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January 15, 1997

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket No. 960833-TP; 960846-TP

Dear Mrs. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration of Order No. PSC-96-1579-FOF-TP. Please file these documents in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White (BW)

Nancy B. White

CMU
LEG 2
LIN 5
SEC 1

Enclosures

cc: All Parties of Record
A. M. Lombardo
R. G. Beatty
W. J. Ellenberg

DOCUMENT NUMBER-DATE
00535 JAN 15 97
FPSC-RECORDS/REPORTING

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation, and MCI Metro Access Transmission Services, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996.	)	DOCKET NO. 960833-TP DOCKET NO. 960846-TP FILED JANUARY 15, 1997

BellSouth Telecommunications, Inc.'s
Motion for Reconsideration

BellSouth Telecommunications, Inc. ("BellSouth"), files pursuant to Rule 25-22.060, Florida Administrative Code, its Motion for Reconsideration of Order No. PSC-96-1579-FOF-TP ("Order"), issued on December 31, 1996, by the Florida Public Service Commission ("Commission") in the above referenced dockets. Reconsideration is required because the Commission overlooked or failed to consider evidence affecting the outcome of this proceeding or misapplied the law as it pertains to this case. In support of its Motion for Reconsideration, BellSouth states the following:

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I. Procedural Background

On February 8, 1996, the Telecommunications Act of 1996 (the "Act") became law. The Act required interconnection negotiations between incumbent local exchange carriers and new entrants. If negotiations were unsuccessful, the parties were entitled to seek arbitration of the unresolved issues from the appropriate state commission. 47 U.S.C. § 252(b)(1). This consolidated arbitration arose after BellSouth and MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. (collectively, "MCI"), and AT&T Communications of the Southern States, Inc. ("AT&T") were unable to reach agreement on all issues despite good faith negotiations.

On December 31, 1996, the Commission issued its Order, holding, among other things, that: (1) AT&T and MCI would be allowed to combine unbundled network elements, priced using unbundled element rates, to recreate existing BellSouth services; (2) with few exceptions, existing tariff terms and conditions would not apply to resellers; (3) contract service arrangements, grandfathered services, and Lifeline/Linkup must be offered by BellSouth at the wholesale discount and short-term promotions should be resold at the promotion rate; (4) certain specified prices would be set for channelization and common and dedicated

transport; (5) BellSouth would be allowed to accept PIC changes only from its end users; (6) BellSouth would be required to provide CABS-formatted billing within 120 days of the issuance of the Order; (7) BellSouth would be required to provide AT&T and MCI access to customer records; and (8) numerous network elements would be priced, either on a permanent or interim basis, at levels set forth in the Order.

The Commission, in reaching a decision on these issues, either overlooked or failed to consider certain evidence or law applicable to these dockets. See Diamond Cab Co. of Miami vs. King, 146 So. 2d 889 (Fla. 1962). The Commission's findings often rely on speculation and conjecture, and, BellSouth believes, resulted from advice that was, albeit unintentionally so, incorrect as to the impact of the August 8, 1996 FCC order addressing the subject of this proceeding. The Commission's decision simply lacks the requisite foundation of competent and substantial evidence.

With regard to the evidence, the Commission must rely upon evidence that is "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1st DCA 1957) See also Agrico Chem. Co. v. State of Fla.

Dep't of Environmental Reg., 365 So. 2d 759, 763, (Fla. 1st DCA 1979); Ammerman v. Fla. Board of Pharmacy, 174 So. 2d 425, 426 (Fla. 3d DCA 1965). The evidence must "establish a substantial basis of fact from which the fact at issue can reasonably be inferred." DeGroot, 95 So. 2d at 916. The Commission should reject evidence that is devoid of elements giving it probative value. Atlantic Coast Line R.R. Co. v. King, 135 So. 2d 201, 202 (1961). "The public service commission's determinative action cannot be based upon speculation or supposition." 1 Fla. Jur. 2d, § 174, citing Tamiami Trail Tours, Inc. v. Bevis, 299 So. 2d 22, 24 (1974). In this case, the Commission's decision is doubly arbitrary because it ignores competent evidence that contradicts the Commission's underlying assumptions in many instances. "Findings wholly inadequate or not supported by the evidence will not be permitted to stand." Caranci v. Miami Glass & Engineering Co., 99 So. 2d 252, 254 (Fla. 3d DCA 1957). 380 So. 2d 1028, 1031 (Fla. 1980).

The sections below examine each of the grounds for reconsideration in turn.

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II. Pricing of the Recombination of Unbundled Network Elements

The issue regarding the recombination of unbundled network elements is the most critical matter to be reconsidered. The Commission's decision to permit MCI and AT&T to obtain services through the use of rebundled elements priced at unbundled element rates will allow MCI and AT&T to manipulate and distort the intent of the Act. As explained herein, reconsideration is needed to correct (1) apparent misunderstandings as to BellSouth's position on recombination as reflected in the Order; (2) the confusion that appears to exist over the terms "rebundling" or "recombination"; (3) the Commission's understanding of its legal authority to deal with this issue; and (4) the erroneous assumptions regarding the levels of risk involved in rebundling versus resale. The Order must also be reconsidered in order to correctly address its impact on the joint marketing restriction. In addition, the Commission may find it beneficial to examine how other states in the region have addressed this issue.

Turning to these matters individually, the Commission's Order appears to misunderstand or misinterpret BellSouth's position on recombination of network elements. MCI and AT&T can combine BellSouth-provided network elements. However, the issue

is not whether AT&T and MCI can combine network elements, but what they should pay for recombined elements when they recombine BellSouth's unbundled network elements in a manner that duplicates or recreates an existing service. In imposing a duty on incumbents to provide access to "elements" of their network, Section 251(c)(3) by its terms contemplates an obligation to provide discrete elements, that is, parts of the network, on an "unbundled basis." The pricing standard for the individual discrete elements is established by Section 252 (d)(1). There is no articulated pricing standard when the unbundled elements are recombined.

What is the basis for BellSouth's position that recombination is a pricing issue? The fundamental basis is that any other conclusion would clearly violate what Congress intended to accomplish when it authorized both resale of existing services and the purchase of individual network elements. The intent of Congress was to promote both facilities-based and resale competition. Importantly, two separate pricing standards were established by the Act: one for the resale of services, and the other for the purchase of unbundled network elements.[1] Any

[1] Section 252(d)(1) of the Act sets the pricing standard for interconnection and network elements while Section 252(d)(3) sets the pricing standard for resale.

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construction of the Act that eviscerates these two distinct modes of competition cannot possibly comport with the intent of Congress. Yet this is precisely what the Commission's Order will do. Such an interpretation would have Congress promoting competition based solely on arbitrage. That is, competitors would choose to resell or, alternatively, to purchase individual elements and recombine them based solely on the determination of which method provides the competitor with an advantage. The difficulty with this result is that any such advantage would result solely from the historical, social pricing goals this and other regulatory bodies have adopted that has caused certain services to be priced below cost. There is no rational basis for such a result.

There can be no serious disagreement that the same service can be provided under these supposed "different" alternatives, "resale" and "recombination." The existing local exchange service provided to a BellSouth customer includes both a loop and a port (which provides the telephone number and dial tone). If MCI or AT&T wins this customer, and chooses to resell the service, then only the billing records are changed so that the service is billed to MCI or AT&T, instead of the end-user customer. No physical work is done to the customer's service.

By way of comparison, without modification, the Commission's Order will allow MCI and AT&T to simply advise BellSouth that it has won the existing customer, and to request that the service be provided and billed to it at the unbundled rates for the loop and port. The same service results, just at different prices.

So, while the terms "rebundling" or "recombination" have been used to suggest that something is taken apart and somehow put back together, this is a fiction. In fact, <u>nothing</u> is done to an existing customer's physical service and <u>nothing</u> is done differently to establish a new customer's physical service. The only thing that changes is who is billed. Yet, under resale, MCI and AT&T are billed the retail rate less the resale discount and the service is subject to the joint marketing restrictions. Under the unbundled scenario, MCI and AT&T are billed for the unbundled loop and port while the joint marketing restrictions are avoided.

The Commission's Order, if left unchanged, allows the price MCI and AT&T pay for the same service to be substantially different, depending on which ordering method is chosen. One price, paid by a reseller, is based on "avoided" costs (a top-down approach) and the other, paid by a competitor recombining costs, is based simply on costs plus a profit (a bottoms-up

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approach). So, when the magic words are spoken, "unbundle me and rebundle me", the effective discount for a business customer can be more than twice (43% vs. 16.81%) the resale discount for the same service, creating an arbitrage opportunity of unprecedented proportions. This simply cannot be what Congress intended.[2]

Why is the differential so great? As noted, the answer, in part, lies in which type of "costs" are analyzed. Further, under the recombination of unbundled elements, MCI and AT&T could avoid the payment of vertical features, e.g. Caller-ID, Call Waiting, and Call Forwarding, that would be charged for under resale and would be essentially "free" under recombination unless the vertical feature charges are applied in addition to the unbundled switching rates as they should be.[3]

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[2] To illustrate this point, BellSouth prepared a chart which makes a comparison of the rates for a typical business customer in Miami (rate group 12) between the resale discount rates established by the Commission's Order, 16.81%, and the unbundled element rates ordered by the Commission. When the elements are "recombined", the effective discount from the retail rates is 43%. This chart is Attached hereto as Attachment "A". Attachment "B" is a comparison of the rates for a typical PBX customer and Attachment "C" is a comparison of the rates for a typical residential customer.

[3] In its Order, the Commission adopted the definition of local switching espoused by the FCC, as including all features that the switch is capable of providing, including but not limited to, vertical services. (Order, pp. 15-16). The Commission apparently intended to price the unbundled switching element to encompass the vertical services. Even if this were the correct approach, no study was offered which identified the cost of vertical services when offered as a part of the switch. BellSouth's position, which this Commission should adopt, is that vertical services are services, not network elements. In fact, the vertical services included in the switch are the same retail services provided via tariff. Therefore, vertical services should be sold at the resale discount, not included in the price of switching.

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It is clear to BellSouth that the Commission ordered what it did because it was led to believe that it had no legal authority under the Act or the FCC's order but to allow such recombination at the unbundled elements price. (Agenda Transcript, pp. 59-60, 73-74, and 91). The Staff specifically agreed that the Commission had "no choice." (Id. at p. 91). This is incorrect.

Under the Eighth Circuit's Stay, this Commission has authority over pricing matters under the Act. Ultimately, the unbundling/rebundling controversy, properly articulated, is a pricing issue. To put a point on the argument, the recombination of a loop and port is indistinguishable from retail local service and, therefore, should be priced under the resale provisions of the Act. To so find is clearly within the Commission's authority and is consistent with the Act.

In addition to the fact that the Commission may have thought it had no choice in the matter, the Order appears to rely on assumptions about the greater risk involved in using unbundled elements versus resold service, perhaps to rationalize the obvious disparity in pricing. AT&T and MCI have somehow created from whole cloth the notion that by buying unbundled elements, they expose themselves to more risk, thus justifying the incredibly lower price they receive when they "recombine" rather

than "resell". Clearly, the leasing and recombination of unbundled elements provided solely by BellSouth imposes no greater risk to the competitor than the resale of existing services. Any distinctions between the price of the unbundled element and the price of resale should exist to compensate facility based providers who assume greater risk by investing their own capital in network facilities to be used in combination with local exchange company provided elements. In such circumstances, the new carrier would be assuming more risk. However, as noted herein, there is absolutely no additional risk involved with recombining unbundled elements the way AT&T and MCI want to do. In fact, if the customer disconnects his service from a new entrant, then that new entrant will cease to purchase elements from BellSouth and thus is not obligated to continue to pay for that customer's unbundled elements. It is BellSouth that is left with the investment risk of the facilities not being used, not the new entrant.

One of the more compelling reasons that this issue should be reconsidered as a pricing issue is its impact on the joint marketing restrictions contained in the Act. Section 271(e)(1) prohibits a telecommunications carrier that serves more than 5% of the nation's access lines, i.e., MCI, AT&T, and Sprint, from

jointly marketing their toll services with services obtained from local exchange carriers pursuant to Section 251(c)(4) (the duty to resell retail services). This prohibition lasts for 36 months or until the entry of the incumbent LEC into the interLATA market, whichever occurs first. Through this provision, Congress clearly recognized that local exchange carriers will be at a distinct marketing disadvantage when their local markets are opened to resale competition, before they can offer interLATA services. However, the Section 271(e)(1) restrictions do not apply to local service provided pursuant to 251(c)(3) (the duty to unbundle network elements). Logically, Congress would not have leveled the marketing playing field in Section 271(e)(1) if it intended to permit carriers to obtain retail services through the fiction of unbundling/rebundling under Section 251(c)(3). This interpretation is consistent with the view of key members of Congress as expressed in an Amicus Curiae Brief filed with the U.S. Court of Appeals for the Eighth Circuit on or about November 16, 1996, pp. 16-17. A copy of the Brief of Amici Curiae filed by the Honorable John D. Dingell, M.C., et al. in Case No. 96-3321 (and consolidated cases) before the U.S. Court of Appeals for the Eighth Circuit is attached hereto as Attachment "D". Even this Commission noted in its Order that "it is inconsistent

to have a service subject to marketing restrictions when resold and not apply the same restrictions to the same service provided through rebundling of network elements." (Order, p. 37).

By ignoring the resale provisions of the Act, including the joint marketing restrictions, the Commission would clearly be acting contrary to the totality of the Act's requirements. On the other hand, recognizing this issue as one affecting the pricing of recombination is clearly appropriate and consistent with the Act and the Eighth Circuit's Stay of the FCC's pricing rules. To hold otherwise would give MCI and AT&T: (1) the ability to resell BellSouth's retail services, but avoid the Act's pricing standard for resale; (2) the ability for MCI and AT&T to avoid the joint marketing restrictions specified in the Act as well as any use and user restrictions contained in BellSouth's tariffs; (3) the ability by MCI and AT&T to maximize their market positions by gaming the system to obtain deeply discounted service; and (4) the ability to foreclose, to a large extent, facilities-based competition and competitors. Moreover, MCI and AT&T would be able to do all this without investing the first dollar in new facilities or new capabilities, thus completely frustrating the Commission's goal of encouraging facilities-based competition.

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The Commission will find support for BellSouth's position in the decisions of some of the other states in the region.[4] For example, the Georgia Commission in its Order in MCI's arbitration with BellSouth, Georgia PSC Docket 6865-U, attached hereto as Attachment "E", expressly concluded that:

> [C]learly, all relevant portions of the FCC rules and the Act provide that MCI may purchase unbundled elements from BellSouth and combine or "rebundle" those elements in any manner that is technically feasible. However, the Commission finds that unrestricted recombination of unbundled elements would allow MCI to purchase unbundled elements from BellSouth, rebundle those elements without adding any additional capability, and "create" or replicate a service that is identical to a BellSouth retail offering. Such replication of a BellSouth retail service goes beyond the scope of combining unbundled elements and instead becomes *de facto* resale. If this result were not treated as *de facto* resale, MCI would avoid not only the Act's resale pricing standard, but also the Act's restrictions regarding joint marketing, and access charge requirements. The Commission further finds that the incentive for CLECs to construct their own facilities could be precluded if CLECs were allowed to avoid the resale pricing standard in such a fashion. <u>The Commission concludes as a matter of law and regulatory policy that the pricing standard of Section 252(d)(3) applies to the *de facto* resale which occurs from rebundling BellSouth network elements to replicate BellSouth retail services, without employing any MCI functionality or capability . . . (other than MCI operator services.)</u>

[4] In the MCI and AT&T Arbitrations in North Carolina, that Commission found merit in BellSouth's position concluding that BellSouth should be allowed to submit additional information describing in full detail workable criteria for identifying the combinations of unbundled network elements that constitute resold services for purposes of pricing, collection of access and subscriber line charges, use and user restrictions in retail tariffs, and joint marketing restrictions. <u>Recommended Arbitration Orders.</u> North Carolina Utilities Commission, Docket No. P-141, Sub 29 (MCI), p. 31, and Docket No. P-140, Sub. 50, (AT&T) p. 32.

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Order, Georgia Public Service Commission, Docket 6865-U, December 23, 1996, pp. 28-29. (emphasis added.)

The Tennessee Regulatory Authority reached a similar conclusion in the MCI and AT&T combined arbitration with BellSouth in Docket Nos. 96-01271 and 96-01152, respectively. Its Order is also instructive on the recombination issue:

> Chairman Greer, in making his motion on Issue 15, expressed concern about allowing AT&T and/or MCI to purchase unbundled elements, rebundle the elements, and offer the same exact service as BellSouth currently offers. In the discussions leading up to the decision in Issue 15, Chairman Greer noted that Section 251(c)(3) of the Act required unbundled access to network elements. Nonetheless, it was his expressed opinion that certain safeguards must be a part of any decision on Issue 15, to prevent the recombining of network elements, capabilities, or functions to recreate an existing BellSouth service. He termed this practice "gaming the system". The Arbitrators answered the question presented, by a unanimous vote, as follows: that AT&T and MCI should be allowed to purchase unbundled elements, but may not combine them in any manner they choose. They must combine the unbundled network elements, capabilities, and/or functions to provide a new or different service from those being provided by BellSouth. This restriction on rebundling is necessary only until Universal Service and Access Charges questions are answered or BellSouth has entered the interLATA market, whichever occurs first.

Order, Tennessee Regulatory Authority, Docket Nos. 96-01271 and 96-01152, November 25, 1996, pp. 26-27.

On January 8, 1997, Arbitrator Brian Eddington issued his report and recommendations to the Louisiana Commission in the

AT&T arbitration with BellSouth. His conclusions and recommendations suggest that recombination be permitted, but priced at resale discounts when such recombination replicates BellSouth's retail services:

> To the extent AT&T purchases unbundled network elements and then recombines them to replicate BellSouth services, it is reselling BellSouth's services. As Shakespeare pointed out, a rose by any other name is still a rose, and so it is with resale, even when AT&T chooses to call it a combination of unbundled elements. Both the FCC and this Commission have issued Orders strongly supporting an aggressive resale market. This commitment to resale would be rendered meaningless if AT&T were allowed bypass resale through the fiction of "rebundling." Unrestricted pricing on the recombination of unbundled elements would allow AT&T to purchase unbundled elements from BellSouth and then rebundle those elements without adding any additional capability, in order to create a service which is identical to a retail offering already being provided by BellSouth and therefore subject to mandatory resale. Such an arrangement would allow AT&T to avoid both the Act's and this Commission's pricing standards for resale, avoid the Act's restrictions regarding joint marketing and avoid access charge requirements. Such an arrangement would also serve as a disincentive to the ILECs to construct their own facilities. [emphasis added.]

Report and Recommendation of Arbitrator, Docket U-22145, Louisiana, January 8, 1997, page 39.

For the foregoing reasons, BellSouth respectfully moves the Commission for rehearing to reconsider its Order allowing MCI and AT&T to combine unbundled network elements at unbundled network

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prices where the resulting service is substantially equivalent to an existing BellSouth service.

III. Tariff Terms and Conditions

In its Order, the Commission held that no existing tariffed terms and conditions would apply except that the resale of grandfathered services, residential services, and Lifeline/Linkup services, would be resold only to end users who were eligible to purchase such services from BellSouth. (Order, p. 60). BellSouth seeks reconsideration of this issue.

The Act specifically permits the Commission to apply reasonable and nondiscriminatory use and user restrictions on the resale of BellSouth's retail services. Section 251 (c)(4)(B) of the Act states that the local exchange company is

> "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunication service, except that a State commission may, consistent with the regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of customers."

The FCC, in its Order issued on August 8, 1996, specifically approved various resale restrictions. Both the Act and the FCC's

Order prohibit only unreasonable or discriminatory conditions or limitations on resale. The terms and conditions currently contained in BellSouth's tariffs were approved by this Commission. Such terms and conditions would not have been approved if this Commission had found them to be unreasonable or discriminatory.

BellSouth requests that this Commission conclude that a reseller must take a service as it finds it, subject to the terms and conditions BellSouth currently imposes on itself. If BellSouth is imposing these terms and conditions on itself, it cannot be discriminatory for AT&T and MCI to be subject to these same terms and conditions. If a reseller determines that a particular term or condition is detrimental, that reseller is free to challenge that term or condition before this Commission. The Commission can then determine whether the term or condition is reasonable and nondiscriminatory.

On the other hand, in its blanket elimination of all terms and conditions, the Commission is essentially throwing the baby out with the bath water. For example, BellSouth has a tariff restriction that its services may not be used for illegal purposes. Under the Order, that restriction is gone. BellSouth also has a tariff restriction that customers cannot place

equipment on the line that may cause injury to a BellSouth employee. Under the Commission's Order, that restriction is gone. Restrictions, terms, and conditions are not dirty words. They are reasonable, nondiscriminatory limitations that this Commission has heretofore approved and that should be recognized and abided by in the resale of services.

In addition, the elimination of these restrictions, terms, and conditions affects two other important considerations. First, the price of the service is clearly impacted, in many cases, by the terms and conditions found in the tariff. BellSouth realizes that cross-class selling is a restriction this Commission retained, but using a cross-class selling example best highlights the problem the Commission has created with regard to the resale of other services. The maximum single line residential rate in Florida is $10.65. A business line in the same area is priced many times higher. The residential price reflects social pricing goals and often is less than the cost of providing the service. If the terms and conditions associated with these rates were not retained, the line could be sold to anyone and these social pricing goals would be thwarted. No doubt this is the basis for the ban on cross-class selling.

This very clear example highlights the point that a service is not just defined by its price, but by all of the terms and conditions that constitute the service, and these other factors influence the price of the service itself. Without restrictions, the price of many tariffed services would be higher. Harkening back to an earlier example, what would be the price of a service to the customer who is allowed to attach equipment to the line that might cause injury to BellSouth's employees?

The second point is that this proceeding is supposed to be about competition. If a reseller can take a service without regard to the restrictions, terms, and conditions that make up the service, how is BellSouth, which is obviously still bound by the tariff's restrictions, terms, and conditions, supposed to compete? Asking the Commission, for example, to remove the restriction that prevents subscribers from placing equipment that may injure BellSouth's employees hardly seems to be an adequate answer. The real answer is that the restrictions, terms, and conditions that presently exist constitute a part of each service, that has been approved by this Commission. They should apply to a reseller's customers and the resellers themselves, just as they apply to BellSouth. By definition, having been

approved by this Commission, the restrictions, terms, and conditions cannot be unreasonable or discriminatory.

IV. Services Excluded from Resale

The Commission held that BellSouth should offer for resale any services that BellSouth provides at retail to end user customers who are not telecommunications carriers. These services include all grandfathered services (both current and future), contract service arrangements (both current and future) and Lifeline and LinkUp services. (Order, pp. 38-45 and 60). The Commission also ordered that short term promotions are not subject to the wholesale discount. This is not correct. For short term promotions, new entrants should be allowed only to purchase the retail service at the appropriate wholesale discount. BellSouth seeks reconsideration of this matter.

Contract Service Arrangements ("CSAs") are designed to respond to specific competitive actions on a customer-by-customer basis. CSAs contain rates established specifically for the competitive situation at hand. A customer-specific proposal is developed containing non-tariffed rates. Under the Commission's Order, AT&T and MCI will be able to purchase this customer-specific proposal from BellSouth at a discount and offer the same

proposal to the same customer at a lower price than BellSouth. This creates an unfair competitive advantage for AT&T and MCI and should not be allowed.

In the January 8, 1997 Arbitrator's Report in the Louisiana AT&T arbitration, the Arbitrator found that "As CSA's are not telecommunication services, but contracts for the providing of telecommunications services, they are not subject to mandatory resale under the Act." Report and Recommendation of Arbitrator, Docket U-22145, Louisiana, January 8, 1997, p. 4. In the Kentucky MCI arbitration order, issued on December 20, 1996, the Commission held that CSAs must be made available for resale, but with no additional discount. Order, Case No. 96-431, Kentucky, December 20, 1996, p. 5. The reasoning in these decisions is sound on these points. BellSouth requests that this Commission either prohibit resale of CSAs or, in the alternative, require BellSouth to resell CSAs with no additional discount.

Grandfathered services are services no longer available for resale to, or transfer between, end users. BellSouth seeks reconsideration of the Commission's finding to the extent the Commission requires resale of services grandfathered prior to the initiation of the arbitration process. As Commissioner Deason noted in his dissent, "if a competitor wants to serve customers

who are currently subscribing to an existing grandfathered service, then that competitor's option is to structure a competitive alternative to the grandfathered services." (Order, p. 111). To the extent that the Commission is concerned that BellSouth will begin grandfathering services to thwart competition, the Commission can either refuse to grandfather the service or require resale of all services grandfathered subsequent to the initiation of the arbitration process.

Lifeline and LinkUp Services are subsidy programs designed to assist low income residential customers by providing a monthly credit on recurring charges and a discount on nonrecurring charges for basic telephone service. BellSouth seeks reconsideration of the Commission's requirement that BellSouth resell these services. As noted by Commissioner Deason in his dissent, "it would be more appropriate to sell the residential service to the ALEC and let the competitor make application on the customers' behalf for these services." AT&T and MCI are perfectly capable of applying to the National Exchange Carrier Association ("NECA"); for the subsidy; BellSouth should not be required to subsidize AT&T and MCI.

BellSouth also requests clarification of the resale of promotional services. The Order states that "short term

promotions, however, those in effect for no more than 90 days, are not subject to the wholesale discount." This may be taken to mean that new entrants can take the promotional offer, but not at a discount. If this were the Commission's intent, this should be reconsidered. The FCC Rules, 51.613(a)(2) state that

> "an incumbent shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if such promotions involve rates that are in effect for no more than 90 days."

BellSouth requests clarification that promotions of less than 90 days may be resold at the wholesale discount applied to the ordinary retail rate for the retail service involved in the promotion, not at the promotional rate.

V. Pricing of Channelization and Common and Dedicated Transport

The Commission in its Order set specific prices for channelization, common transport and dedicated transport. BellSouth seeks reconsideration and/or clarification of the prices set for these elements.

First, the Commission should specify that the prices ordered for the channelization system apply only to the "DS1 level to voice grade" system. BellSouth proposes that the words

"Channelization per system" be revised to "Unbundled loop channelization system (DS1 to VG) - per system."

The TSLRIC cost study which supported BellSouth's proposed rates in this proceeding was only applicable to the "DS1 to voice grade" channelization system. The word "channelization", however is sometimes used in a generic sense in describing other services. For example, the Order uses the subheading of "channelization" when discussing digital cross connect systems. (Order, p. 17). Digital cross-connect systems are not the same service and do not perform the same function as the channelization system used to aggregate or disaggregate DS1 to voice grade levels. Moreover, there are also channelization systems used for other transmission levels, e.g. from DS3 to DS1. This channelization system is distinct and different from that used to connect voice grade loops only.

Since BellSouth provided a cost study and proposed a rate only for the DS1 to voice grade channelization system, it assumes that the Commission approved rates only for that particular system. BellSouth, therefore, requests that the description of the channelization service be clarified to specify it applies to the "DS1 to voice grade" system.

Second, BellSouth seeks reconsideration of the price of certain parts of common and dedicated transport. In the prices set forth for dedicated transport, the Order established a rate of $1.60 per mile. (Order, p. 115). There is no discussion in the Order specifically addressing this $1.60 mileage rate. BellSouth assumes that the mileage rate for dedicated transport is for the DS1 level because the Commission set the facility termination and the non-recurring charge at the rate in the tariff for the DS1 level. BellSouth did not supply a cost study for the mileage element, but instead proposed that the tariff rate of $16.75 per mile be charged. BellSouth, therefore, requests that the Commission reconsider the per mile rate for dedicated transport and establish $16.75 per mile as the appropriate mileage rate for dedicated transport. Further, BellSouth requests that the Order be clarified to note that the rates for dedicated transport are for the DS1 level only.

Third, BellSouth seeks clarification of the $0.0005 per termination rate established under dedicated transport. (Order, p.115). BellSouth's cost and rate per access minute structure for dedicated transport do not include a rate per termination. The cost and rate structure for common transport, however, does support such a rate. However, there is no such rate included in

the Commission's Order for common transport. BellSouth believes that the $0.0005 rate may have been established in error for dedicated transport when it should have been established as a rate under common transport. Therefore, BellSouth requests that the Commission clarify that the ordered $0.0005 is a rate per termination per access minute for common transport and not for dedicated transport.

VI. PIC Changes

In its Order, the Commission prohibited BellSouth from making any PIC change for a customer that receives his local exchange service from a local exchange carrier other than BellSouth. BellSouth was ordered to direct the request of the customer to its local exchange carrier and provide the customer with a contact number for its local carrier (Order, p. 92).

BellSouth requests clarification of this issue. Currently, BellSouth accepts PIC changes electronically via the Carrier Access Record Exchange ("CARE") process from interexchange carriers. The Order would seemingly prohibit BellSouth from processing any PIC requests via the CARE system sent by interexchange carriers, including those from customers of local providers other than AT&T and MCI. Some ALECs who resell

BellSouth's local exchange service may direct interexchange carriers to the mechanized CARE system to process PIC changes.

BellSouth believes the Order should provide that BellSouth will not process PIC changes as contemplated in the Order, unless the customer's local service provider has directed BellSouth to process such changes. This would allow BellSouth to meet the needs of alternative local exchange companies, other than AT&T and MCI, to use the existing mechanized procedures via CARE for processing PIC changes. BellSouth will, of course, implement procedures to reject PIC changes received directly from interexchange carriers via the CARE system for local customers of AT&T and MCI. Moreover, BellSouth would refer local customers of AT&T and MCI who call BellSouth to their local service provider.

Finally, BellSouth seeks reconsideration of the holding that BellSouth provide the non-BellSouth end user customer calling BellSouth's business office to request a PIC change with the contact number of their local carrier. BellSouth should not be required to maintain contact numbers for every local service provider's customer service office. These offices may vary by exchange. Such a requirement is unduly burdensome on BellSouth's customer service representatives and will increase administrative costs for which this Commission has provided no recovery.

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BellSouth should only be required to direct customers who call the business office to contact their local exchange carrier.

VII. CABS-formatted Billing

In its Order, the Commission held that BellSouth provide Carrier Access Billing System ("CABS)-formatted billing for both resale and unbundled elements within 120 days of the issuance of the Order. (Order, p. 96). BellSouth seeks reconsideration on the 120 days requirement. BellSouth requests that if CABS-formatted billing is required by this Commission, it be given 180 days from the issuance of the Order in order to fulfill that requirement.

Currently, BellSouth's CABS system is not capable of billing for local exchange services. While BellSouth's Customer Records Information System ("CRIS") is designed to bill for local exchange services, it is not currently capable of issuing bills in the CABS format. In order to fulfill the Order's requirement, BellSouth must analyze the outputs from the CRIS system, map each data file to the appropriate field in the CABS format, program the system changes, and conduct testing to ensure accurate billing. These activities cannot be completed within 120 days of the issuance of the Order. BellSouth believes that these

activities can be properly and reasonably performed within 180 days from the issuance of the Order and requests that BellSouth be given this additional time.

VIII. Access to Customer Records

In its Order, the Commission held that BellSouth should provide AT&T and MCI access to customer service records under a blanket letter of authorization and that BellSouth should develop a real-time operational interface to deliver customer service records to alternative local exchange companies. (Order, pp. 77-87)

While BellSouth is not opposed to providing appropriate electronic customer service record information to AT&T and MCI as long as customer privacy can be protected, BellSouth seeks reconsideration of the Commission's requirement that BellSouth provide unrestricted, direct, on-line access to the full customer records before protections against "roaming" are implemented. All of BellSouth's customer records, as well as resellers' records, are contained in the same database, and there is no current means of electronically restricting access to individual records in the database. Without knowing in advance which individual customer's record AT&T or MCI would want to view, and more importantly, which customer had given his or her consent,

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there is no way to restrict AT&T and MCI to viewing just that customer's record. If allowed unrestricted access, then AT&T and MCI would be free to look at all customer's records, which would jeopardize the privacy of customers' data.

The FCC recognized the potential for violation of customer privacy in its August 8, 1996 order, and found that the FCC and the states have the authority to protect the confidentiality of proprietary information. BellSouth has investigated and continues to search for ways to provide access to individual records while still securing other records in the database that are confidential and/or not needed for provisioning of local telephone service.

As a solution, until such time as protections can be implemented, and until BellSouth, MCI and AT&T can solve the problem of direct, on-line access, BellSouth has proposed a number of alternatives. For customers who are unable to locate their bills, BellSouth has proposed a three-way call to the BellSouth service center, or a faxed copy of the record, both of which can be accomplished with the verbal authorization of the customer. Also, BellSouth has implemented a "switch as is" process, which means that the customer's existing service can be

switched without the customer's having to specify which services they currently are taking.

The Commission's ruling on the access to customer records issue, if not altered, has the potential to take the slamming or unauthorized PIC change problem the Commission has observed in the interexchange world to even greater heights. The problem is not solved by a blanket letter of authorization, which essentially is a new entrant's global promise not to take an unauthorized look around while it happens to be in the database. This is not a new idea. Letters of authorization currently are used in the interexchange world to say that interexchange carriers will not submit unauthorized PIC changes. Even with these letters of authorization, slamming is still a problem in the interexchange world and this Commission should be hesitant to put faith in blanket letters of authorization for local service.

While AT&T and MCI tend to frame this issue as being between AT&T, MCI and BellSouth, BellSouth believes this is about the customer's need for privacy, and the customer's need for convenience. Therefore, BellSouth respectfully requests a finding that recognizes customer privacy demands and does not allow a blanket letter of authorization to obtain total access to all customer records. BellSouth is willing to provide the

necessary information after customer permission has been granted. Only in this way can the customer's privacy be insured. Alternatively, if a blanket letter of authorization is allowed, this Commission should implement detailed rules governing slamming and unauthorized records access, providing for serious consequences for violators so as to minimize the possibilities of slamming or unauthorized records access before they occur.

IX. Pricing - General

The Commission set both permanent rates and interim rates in this proceeding, based on the available information. The Commission required BellSouth to file TSLRIC cost studies for the elements for which the Commission set interim rates within 60 days of the issuance of the Order. The Commission further required BellSouth to provide TSLRIC cost studies for certain nonrecurring costs within 60 days from the issuance of the Order. BellSouth requests that the provision of cost studies be deferred and that these rates be considered interim in nature and subject to a true-up.

There are serious questions surrounding the validity of the pricing standard espoused by the FCC, which the Eighth Circuit Court of Appeals is currently addressing. Rather than relitigate

the entire matter, BellSouth requests that the Commission defer its decision to set permanent rates and its decision to require BellSouth to file additional studies until this uncertainty has been resolved. The Commission can accomplish this by making all of the rates it established interim in nature until the Eighth Circuit has ruled and the proper pricing standards under the Act are established with certainty. BellSouth is willing and, in fact, requests that the Commission make these interim rates subject to a true-up from the date of the final order in this proceeding so that no party will be subjected to underpaying or overpaying for elements.

X. Conclusion

BellSouth requests that its Motion for Reconsideration be granted and that the Commission adopt BellSouth's positions on the issues discussed herein.

Respectfully submitted this 15th day of January, 1997.

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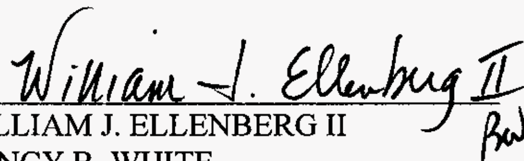

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CERTIFICATE OF SERVICE
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Assumptions and Notes for Attachments "A", "B", and "C"

1. Local usage rate based on $0.0175 for first minute and $0.005 for each additional minute.

2. The duration of a local call was assumed to be 2.0 minutes for business, 2.6 minutes for PBX trunks, and 3.9 minutes for residence, based on August '96 SLUS.

3. Total minute of use for local calls was assumed to be 482 minutes for business, 1164 minutes for PBX trunks, and 583 minutes for residence, based on August '96 SLUS.

4. Local Calling Plus minutes of use was assume to be 37 minutes for business lines and PBX trunks, and 25 minutes for residence lines, based on December '95 data.

5. IntraLATA toll minutes of use was assumed to be 26 minutes for business lines and PBX trunks, and 16 minutes for residence lines, based on December '95 data.

6. Subscriber Line Charge (SLC) collected from resold lines but not from rebundled lines.

7. IntraLATA and InterLATA access charges based on December '95 data. Split between business and residence is from October '95 AMOS data.

Florida Retail, Resale and Rebundling Comparisons

A Typical Business Customer

	Rate Gp 12 Business Line	FL PSC Ordered Resale Discount @ 16.81%	FL PSC Ordered Unbundled Rates
Exchange Line	$29.10	$24.21	$17.00
Port	-	-	$2.00
Hunting	$10.42	$8.67	-
CF Don't Answer	$3.25	$2.70	-
Local Usage	-	-	$5.45
IntraLATA Toll/Local Calling Plus	$7.73	$6.43	$1.92
InterLATA Intrastate Access	$5.15	$5.15	$5.15
InterLATA Interstate Access	$7.87	$7.87	$7.87
SLC	$6.00	$6.00	$0.00
Total	**$69.52**	**$61.03**	**$39.39**
Effective Discount from Retail			**43.3%**

Attachment "A"

Florida Retail, Resale and Rebundling Comparisons

A Typical PBX Customer

	Rate Gp 12 PBX Trunk	FL PSC Ordered Resale Discount @ 16.81%	FL PSC Ordered Unbundled Rates
Exchange Line	$49.47	$41.15	$17.00
Port	-	-	$2.00
Hunting	$10.42	$8.67	-
Local Usage	-	-	$11.41
IntraLATA Toll/Local Calling Plus	$7.73	$6.43	$1.86
InterLATA Intrastate Access	$5.15	$5.15	$5.15
InterLATA Interstate Access	$7.87	$7.87	$7.87
SLC	$6.00	$6.00	$0.00
Total	**$86.64**	**$75.27**	**$45.29**
Effective Discount from Retail			**47.7%**

Attachment "B"

Florida Retail, Resale and Rebundling Comparisons

A Typical Residence Customer

	Rate Gp 12 Residence Line	FL PSC Ordered Resale Discount @ 21.83%	FL PSC Ordered Unbundled Rates
Exchange Line	$10.65	$8.33	$17.00
Port	-	-	$2.00
Call Waiting	$3.00	$2.35	-
Call Forward Variable	$2.00	$1.56	-
Local Usage	-	-	$4.78
IntraLATA Toll/Local Calling Plus	$3.54	$2.77	$1.13
InterLATA Intrastate Access	$3.56	$3.56	$3.56
InterLATA Interstate Access	$7.05	$7.05	$7.05
SLC	$3.50	$3.50	$0.00
Total	**$33.30**	**$29.12**	**$35.52**
Effective Discount from Retail			**-6.7%**

Attachment "C"

ATTACHMENT D

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321
(and consolidated cases)

IOWA UTILITIES BOARD, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petitions for Review of an Order of the
Federal Communications Commission

**MOTION OF THE HONORABLE JOHN D. DINGELL, M.C.,
THE HONORABLE W. J. (BILLY) TAUZIN, M.C., THE HONORABLE RICK
BOUCHER, M.C., AND THE HONORABLE DENNIS HASTERT, M.C.,
FOR LEAVE TO FILE BRIEF AS AMICI CURIAE**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Rule 29A of the Rules of this Court, the Honorable John D. Dingell, the Honorable W. J. (Billy) Tauzin, the Honorable Rick Boucher, and the Honorable Dennis Hastert (collectively, "the Federal Legislators"), hereby move for leave to participate as amici curiae in the above captioned cases.

The Federal Legislators were instrumental in drafting and enacting the Telecommunications Act of 1996. Congressman Dingell has spent many years leading congressional efforts for

telecommunications reform and, during the 104th Congress, was the ranking minority member of the House Committee on Commerce, which had jurisdiction over the Act. Congressmen Tauzin, Boucher, and Hastert also served on that committee, and together they worked, in a bipartisan effort, to draft the bill that ultimately would revise telecommunications law. With this collective experience, the Federal Legislators are able to offer the Court an important perspective on the central issue under review: whether the Federal Communications Commission properly interpreted the local competition provisions of the 1996 Act in its First Report and Order.[1]

The Federal Legislators also have a strong interest in seeing that the Act is administered correctly. As a general matter, Congress always has an institutional interest in ensuring that federal agencies both interpret statutory provisions consistent with the congressional objective and do not exceed the jurisdiction conferred on them. But more particularly, the Federal Legislators have a duty to their constituents to protect the Act's potential to spark technological innovation and development, financial investment, and job creation.

We appreciate that many parties have an interest in these cases and that the Court has attempted to consolidate briefing to the extent possible. But we ask, nonetheless, that the Court

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[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC No. 96-325, CC Docket 96-98 (August 8, 1996).

permit us to file a separate amicus brief of twenty pages in length. Members of Congress can provide an insight into the statute that no other party could have. Moreover, the Federal Legislators do not fall within any of the categories of parties set forth in the Court's order of October 24, 1996. See Supplemental Briefing Order, October 24, 1996; Revised Supplemental Briefing Order, October 30, 1996. Nor would intervention as parties in the case be appropriate for the federal legislators.

Recognizing the unique contribution that persons actually involved in drafting disputed legislation can make to interpreting that legislation, this Court has in the past allowed United States Senators and Representatives to participate as amici.[2] We respectfully ask that it do so again.

For the foregoing reasons, the Court should grant the Federal Legislators leave to file as amici curiae.

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[2] See e.g., In re Young, 82 F.3d 1407 (8th Cir. 1996); State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973); see also INS v. Chada, 462 U.S. 919, 928 (1982) (both Senate and House of Representatives were invited to file briefs as amici curiae).

Respectfully submitted,

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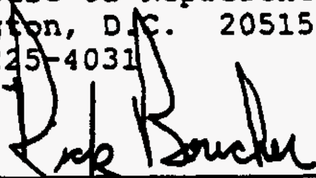
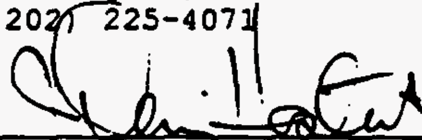

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November 15, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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(and consolidated cases)

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**BRIEF OF AMICI CURIAE
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THE HONORABLE W. J. (BILLY) TAUZIN, M.C.,
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November 15, 1996

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IN THE UNITED STATES COURT OF APPEALS
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THE HONORABLE JOHN D. DINGELL, M.C.,
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THE HONORABLE RICK BOUCHER, M.C., AND
THE HONORABLE DENNIS HASTERT, M.C.

INTEREST OF AMICI CURIAE

Amici are members of Congress who have a strong institutional interest in ensuring that federal agencies correctly interpret statutory provisions and do not exceed the jurisdiction conferred on them. This interest is especially acute with respect to the Federal Communications Commission's implementation of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, in which the Commission has taken a perfectly legible statute and turned it on its head.

Amici include both Republican and Democratic members of the House Committee on Commerce, which had jurisdiction over the 1996 Act. Amici believe that if properly interpreted this legislation will open the door to fuller competition in all telecommunications markets. Because of our involvement in shaping the relevant provisions of the Telecommunications Act, and because our constituents will benefit directly from the healthy competitive environment the Act was designed to foster, amici have a particular interest in seeing that it is implemented in accord with legislative mandates.

SUMMARY OF ARGUMENT

The FCC's First Report and Order[1] is an act of extraordinary arrogance. The Order blatantly disregards congressional intent in two material respects: it asserts federal jurisdiction in areas that Congress intended to reserve for state control, and it establishes rules for the unbundling of network elements that are contrary to congressional intent, and that threaten the viability of established telecommunications networks.

In order to reach the conclusions found in the Order, the Commissioners either had to determine that they had the authority to ignore the plain intent of the peoples' elected representatives, or that Congress doesn't know enough about legislative drafting to explicitly amend sections of the law that it wanted to change.

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[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC No. 96-325, CC Docket 96-98 (August 8, 1996) ("Order").

Apparently unbeknownst to the Commission, however, Congress debated at great length about the proper allocation of state and federal responsibilities. In the end, we decided to leave regulation of most local matters, including especially the pricing of local facilities and services, to the states. To implement that design, the House/Senate conference committee added specific language clearly vesting such authority in the states. See, e.g., 47 U.S.C. § 252(d) (governing local pricing). Just as important, Congress left key provisions of the 1934 Act in place. These include § 2(b), codified at 47 U.S.C. § 152(b), which plainly states that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service . . . ."

The Commission's foray into areas Congress reserved to the states is doubly improper because it establishes rules for the unbundling of network elements that would hamper full competition and reduce investment in local telecommunications networks. Congress deliberately crafted separate pricing methods for competitors to have access to local facilities and services, depending on whether they are facilities-based competitors or resale competitors. The purpose of this distinction was to encourage investment in telecommunications facilities and to create jobs. The Commission's rules eviscerate this important distinction by making the more attractive cost-based pricing method available to other types of competitors. The result of the Commission's failure to respect

Congress' distinction between the two types of competitors is that the pricing benefits Congress intended to inure to those who invested and created jobs will instead be available to pure resellers. The Commission adopts quick fixes that Congress rejected in favor of encouraging long-term investment and employment. The Commission's agenda must, where there is conflict, take a back seat to Congress' own plan for the industry.

ARGUMENT

I. THE TELECOMMUNICATIONS ACT PRESERVES STATE JURISDICTION OVER INTRASTATE PRICING

The Telecommunications Act did not create an entirely new federal regulatory scheme in the telecommunications area. Rather, it amended existing law in response to market developments that have rendered old monopolies obsolete. Congress drew upon more than sixty years of experience under the Communications Act of 1934 and, in particular, decided not to upset the basic jurisdictional balance of the 1934 Act.

A. The 1934 Act Assigned Jurisdiction of Intrastate Services to the States.

The Communications Act of 1934 firmly established a "system of dual state and federal regulation" of the telecommunications industry. Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986). Congress created the Federal Communications Commission and granted it authority to regulate "interstate and foreign commerce" in wire and radio communication, 47 U.S.C. § 151, while leaving intrastate service to state control. To brace this divide, and

ensure that federal regulators would not encroach on a state's jurisdiction, Congress expressly denied the FCC jurisdiction over intrastate matters, except in a few enumerated instances. 47 U.S.C. § 152(b).

The proper division of federal and state power was the "'dominating controversy'" during the drafting of the 1934 Act.[2] The states were particularly concerned by the broad power that the Interstate Commerce Commission, which then regulated both railroads and interstate telecommunications, had claimed over intrastate railroad rates as an incident of regulating interstate rates. See Houston & Texas Ry. v. United States, 234 U.S. 342 (1914); Wisconsin R.R. Comm'n v. Chicago, B & R R.R., 257 U.S. 563 (1922). State authorities feared that if the new federal communications agency were given the same power that the ICC had, they would be displaced from the field of telecommunications.[3]

Congress responded with § 2(b) of the 1934 Act. Section 2(b) provided in 1934, as it does today, that "nothing in this Act shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services,

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[2] Louisiana PSC, 476 U.S. at 372 (quoting Richard McKenna, "Preemption Under the Communications Act," 37 Fed. Comm. L.J. 1, 2 (1985)).

[3] See, e.g., Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 136 (1934) (statement of John E. Benton), reprinted in A Legislative History of the Communications Act of 1934, at 482 (Paglin ed., 1989); id. at 74 (statement of Mr. Clardy); Hearings on S. 6 Before the Senate Interstate Commerce Committee, 71st Cong., 2d Sess. 2179 (1930).

facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b). The provision straightforwardly "reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication." S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934).

Consistent with this legislative intent, the Supreme Court held in Louisiana PSC that § 2(b) "fences off from FCC reach or regulation intrastate matters -- indeed, including matters 'in connection with' intrastate service." 476 U.S. at 370. The Court explained that any attempt by the FCC to regulate intrastate matters, even to effectuate a federal policy, would constitute an agency conferring power on itself. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." Id. at 374-75. This the Court was "both unwilling and unable to do." Id. at 375.

B. The Telecommunications Act Preserves the States' Authority to Regulate Intrastate Communications.

Since 1934, the FCC by and large has respected the limitation that § 2(b) places on its jurisdiction. Even under the 1996 Act, it generally admits that "in the absence of a grant of authority to the Commission, State and local regulators retain jurisdiction over intrastate matters." Memorandum Opinion and Order, In re Classic Telephone, Inc., CCBPol 96-10, ¶ 24 (FCC Oct. 1, 1996). Yet the FCC apparently thought it could get around this basic principle in

its Order. While conceding that the 1996 Act does not explicitly grant it authority over local interconnection and pricing, the FCC contends that Congress implicitly "expand[ed] the applicability of . . . national rules to historically intrastate issues." Order ¶¶ 83-84. Nothing is further from the truth.

There was no general effort to expand federal power through the 1996 Act. Rather, Congress was concerned with limiting federal regulation.[4] Thus, members carefully considered the proper limits of federal and state jurisdiction. Where it wanted to give the FCC authority in areas of traditional state responsibility, Congress said so. For example, §§ 251(b)(2) and (d)(2) give the FCC authority to draw up rules concerning local number portability and network unbundling, respectively. Likewise, as explained below, Congress indicated when regulatory powers should be exercised exclusively by the states. In particular, Congress did not silently transfer the states' traditional responsibility to set prices for local services to federal regulators.

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[4]See 141 Cong. Rec. H4521 (daily ed. May 3, 1995) (statement of Rep. Bliley) (proposed legislation would "substantially reduce Federal regulations of telecommunications" and largely would be "administered locally rather than federally"); 141 Cong. Rec. S8198 (daily ed. June 12, 1995) (statement of Sen. Pressler) ("It is time we reduced the federal bureaucracy. . . . Inside the beltway, these agencies grow and grow and they do not want to give up their turf."); 142 Cong. Rec. H1150 (daily ed. Feb. 1, 1996)(statement of Rep. Goss)(Act will "reduce Federal involvement in decisions that are best made by the free market").

First, Congress determined to keep § 2(b), and hence the Louisiana PSC decision, intact.[5] This determination was deliberate. Congress knows how to amend § 2(b) to carve out specified intrastate services from its broad scope. For example, when Congress drew up provisions relating to telecommunications services for hearing- and speech-impaired individuals under the Americans with Disabilities Act, it amended the first clause of § 2(b) so that those provisions would cover intrastate services. See Pub. L. 101-336, Title IV, § 401(b)(1), 104 Stat. 369 (1990). Congress similarly amended § 2(b) in 1991 and 1993 when imposing federal restrictions on telephone dialing equipment and regulation of mobile services, respectively.[6]

In 1996, the House and Senate conferees decided, after much debate, not to establish a similar carve-out from state jurisdiction in the new telecommunications law. Both the House and Senate bills would have added Part II, Title II of the amended Communications Act (which includes the interconnection, resale, and unbundling requirements) to the list of provisions carved from § 2(b)'s scope.[7] But the conferees deleted that language. This

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[5]See Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of . . . [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

[6]See Pub. L. 102-243, § 3(b), 105 Stat. 2401 (1991) & 47 U.S.C. § 227; Pub. L. 103-66, Title VI, § 6002(b)(2)(B)(I), 107 Stat. 396 (1993) & 47 U.S.C. § 332(c)(3)(A).

[7]See H.R. 1555, 104th Cong., 1st Sess. § 101(e)(1) (1995); S. 652, 104th Cong., 1st Sess. § 101(c)([illegible] (1995).

Court should respect the conferees' decision and reject the FCC's claim that § 2(b) was implicitly amended.[8]

Indeed, the conferees specifically addressed whether federal or state rules would be used to resolve disputes regarding the terms and prices of interconnection, unbundling, and resale. Under the House bill's proposed § 242(a)(2), local carriers were required "to offer unbundled services, elements, features, functions, and capabilities whenever technically feasible, at just, reasonable, and nondiscriminatory prices and in accordance with [proposed] subsection [242](b)(4)." Proposed subsection (b)(4), in turn, authorized the FCC to promulgate regulations implementing section 242's guidelines for interconnection and pricing. H.R. 1555, 104th Cong., 1st Sess. § 101(a) (1995). State commissions would merely "supervis[e]" the private negotiations. Id. (proposed § 242(a)(8)). The Senate bill, by contrast, gave the state commissions responsibility to "resolve" open issues and "impose[e] appropriate conditions upon the parties" in arbitration proceedings, S. 652, 104th Cong., 1st. Sess. § 101(a) (1995) (proposed § 251(d)(5)(C)), subject to FCC regulations.[9]

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[8]See Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-200 (1974) (deletion of a provision by a conference committee "militates against a judgment that Congress intended a result that it expressly declined to enact"); North Haven Board of Educ. v. Bell, 456 U.S. 512, 528 (1982) (deleting a provision of the House and Senate bills was a "conscious choice" by Congress).

[9]See S. Rep. No. 23, 104th Cong., 1st Sess. 21 (1995) ("the solution imposed by a State must be consistent with the FCC's rules"); S. 652, § 101(a) (proposed § 251(i)(1)) (requiring FCC to issue regulations).

Procedurally, the conferees largely followed the Senate approach. Where local competitors can resolve their differences through private negotiations, they are left to do so, subject only to a state determination that the final agreement is nondiscriminatory and consistent with the public interest. 47 U.S.C. § 252(e)(2)(A). But where the terms and prices of interconnection cannot be resolved through private negotiations, either party can ask "a State commission" to mediate differences, id. § 252(a)(2), or to arbitrate any open issues, id. § 252(b). If the parties select arbitration, the Act provides rules, including pricing standards, for the "State commission" to follow. Id. § 252(c),(d).

The final version of the law vests much more substantive authority in the state commissions than either the House or the Senate bill. Consistent with the Senate approach, § 252(c)(1) of the Act requires state commissions, as a general matter, to conduct arbitrations in a manner that "meets the requirements of section 251, including the regulations prescribed [by the FCC] thereunder." But the very next subsection of the Act establishes a special rule for pricing: It instructs state arbitrators "to establish any rates for interconnection, services, or network elements according to subsection (d)," without any reference to Commission regulations. 47 U.S.C. § 252(c)(2).

Section 252(d) confirms the states' responsibility for pricing. Subsection 252(d)(1) provides that "a State commission," in determining "the just and reasonable rate" for interconnection or

network elements, should ensure that the rates are "nondiscriminatory" and "based on the cost . . . of providing the interconnection or network element" and "may include a reasonable profit." Subsection (d)(2) provides guidance regarding so-called "reciprocal compensation," where carriers pass calls back and forth between their networks. Subsection (d)(3) specifies that "a State commission" is to determine wholesale rates for telecommunications services "on the basis of retail rates charged to subscribers . . ., excluding . . . costs that will be avoided by the local exchange carrier."

These provisions, we thought, would make it crystal clear that the states set prices for local interconnection, unbundling, and resale where the parties need outside help. As the Conference Report explained with respect to wholesale rates, the rate "is to be determined by the State Commission." S. Rep. No. 230, 104th Cong., 2d Sess. 126 (1996).

Incredibly, the Commission read these provisions as crying out for federal regulation. It reasoned that regulations are needed to "equaliz[e] bargaining power" between incumbent local carriers and new entrants, and that "[n]ational (as opposed to state) rules more directly address these competitive circumstances." Order ¶ 55. The Commission simply refuses to accept Congress' judgment that state regulators -- who have decades of experience with local pricing issues -- are better positioned than the FCC to know what constitutes an unreasonable demand in particular local negotia-

tions. As long as a state commission complies with the statutory pricing constraints and abides by FCC regulations in those areas (such as number portability and unbundling) where the FCC was given specific authority, the state commission is free to arbitrate pricing disagreements as it sees fit.

II. THE FCC'S RULES WILL REDUCE COMPETITION, JOB CREATION, AND INVESTMENT

The FCC's rules would eliminate virtually all of the flexibility that Congress gave the state commissions. Worse than that, however, they would frustrate the development of genuinely competitive local telecommunications markets.

Congress carefully balanced the interests of incumbent local carriers and new entrants when it drew up the 1996 Act. The conference committee hammered out critical compromises that were designed to give all carriers, old and new, a fair chance to compete. Legislators believed that full and fair competition would "unleash such competitive forces and innovation that our Nation [would] see more technological development and deployment in the next 5 years than we have already seen this century," leading to "hundreds of thousands of new jobs and tens of billions of dollars being invested in infrastructure and technology." 142 Cong. Rec. H1174 (daily ed. Feb. 1, 1996) (statement of Rep. Buyer). Much of the anticipated growth was expected to come from the local exchange market.

The idea was simple. For several decades, competition in local markets has been artificially constrained by authorized monopolies. If those monopolies are eliminated, new businesses will enter the market. They will install their own wires and switches, and they will develop new products and services to attract customers. Today's incumbents will fight back by increasing their own investments in local facilities and services.

But a rational new entrant will not spend the money to install facilities if it has a guaranteed competitive advantage when it uses the incumbent's network. And the incumbent will not invest in upgrading its facilities when its competitors get the greatest benefit from that investment. Neither side would have an incentive to build or invest. Congress' whole plan for job creation and economic growth would be frustrated.

The Commission has arrogantly imposed, through the Order, its own view of what Congress should have done through the Act. The FCC's overreaching is well illustrated by the unbundling provisions of the FCC's rules, under which new entrants have a choice of buying retail services under one pricing formula, or buying all the network capacity needed to provide that same service under a totally different pricing formula. See Order ¶¶ 328-41. These provisions erase carefully drawn statutory distinctions between resale pricing, on one hand, and pricing of network elements, on the other.

Section 252(d) sets out distinct pricing formulas for network unbundling and resale of retail services. 47 U.S.C. § 252(d). As with jurisdiction over local pricing disputes, this distinction was hammered out in the House/Senate conference. The Senate bill contained no specific pricing guidelines relating to resale of incumbent carriers' retail services, but introduced the requirement that local exchange carriers make pieces of their networks separately available for competitors' use at prices "based on the cost . . . of providing the unbundled element" which "may include a reasonable profit." S. 652, § 101(a) (proposed § 251(d)(6)). Conversely, the House bill established only a broad "just, reasonable, and nondiscriminatory prices" standard for unbundling of local network facilities, H.R. 1555, § 101(a) (proposed § 242(a)(2)), but required that local carriers "offer services, elements, features, functions, and capabilities for resale at wholesale rates," id. (proposed § 242(a)(3)(A)).

The conferees realized that the specific pricing rules in the House and Senate bills addressed different situations. The House's formula for resale was designed principally for situations where a non-facilities-based carrier wants to sell the very same service that the incumbent provides its customers. H.R. Rep. No. 204, 104th Cong., 1st Sess. 72 (1995). Local regulators set some retail prices (usually prices for basic residential service) below cost, and make up for these losses by setting other retail prices (like prices for advanced business services) above cost. Id. If the Senate's "cost

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plus profit" approach were used for sales to pure resellers of the incumbent's retail services, those resellers could earn large profits by targeting business customers whom the incumbent must charge above-market prices. This targeted approach, or "cream-skimming," would leave incumbents no way to recover the losses they must incur from serving subsidized customers.[10]

When the conference committee reconciled the two bills it clearly distinguished (as the Senate and House had not done) between (1) a competitor's right of "access to network elements on an unbundled basis" for the provision of its own facilities-based telecommunications services and (2) a competitor's right to purchase the incumbent's retail services at wholesale rates for the purpose of resale. 47 U.S.C. § 251(c)(3), (4). The conferees adopted pricing models that reflected that distinction. The Senate's "cost plus profit" formula was adopted for the purchase of unbundled elements, and the House's "retail price minus avoided costs" formula was adopted for the purchase of retail services to be made available to resellers. 47 U.S.C. § 252(d).

The FCC, however, has allowed competitors who have no local facilities of their own, and thus were expected to be governed by the House's wholesale pricing formula, to obtain all the network

[10]In the Senate, Senators Inouye and Stevens offered an amendment that would have set wholesale prices at the incumbent carrier's "actual cost." 141 Cong. Rec. S8369 (daily ed. June 14, 1995). That amendment was withdrawn, 141 Cong. Rec. S8438 (daily ed. June 15, 1995), indicating the Senate's concurrence that cost-based pricing was not appropriate for resold services.

elements that go into an incumbent's service under the Senate's "cost plus profit" formula. The Commission's rules have the perverse effect of allowing a competitor to chose the more favorable cost-based pricing method, effectively gutting the statutory distinction and guaranteeing that non-facilities-based carriers can make money by undercutting the incumbent's price for any offering that the incumbent must -- under state regulatory policies -- price above cost. As long as they can accumulate risk-free profits with minimal investment, competitors will not build their own networks to provide competing services.

The Commission's establishment of unbundling rules that act as a _substitute_, rather than an _alternative_, for purchasing retail services at wholesale rates slants competition in another way as well. Congress was aware that it would be unfair and anti-competitive to allow the major long distance carriers to market resold local service with their own long distance service where the local telephone company (which provides the local service) cannot sell long distance.[11] Section 271(e)(1) thus provides, in substance, that if AT&T, MCI, and Sprint want to sell packages of local and long distance services before the local exchange carrier

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[11] _See_ 142 Cong. Rec. S713-14 (daily ed. Feb. 1, 1996) (statement of Sen. Harkin) (joint marketing restriction designed "to prevent the big long distance companies from having a competitive advantage"); 142 Cong. Rec. S716-17 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) (preventing competitors from "cherry pick[ing]" profitable business customers while Bell Operating Companies are excluded from interLATA markets is contrary to public interest and interests of other local customers).

can do the same, they must build a local network of some sort. Under the FCC's approach, however, a company like AT&T can obtain all the unbundled network elements it needs to sell local service with its long distance service, without having a single foot of local telephone wire of its own. See Order ¶ 328.

This unfairness is compounded by the specific pricing rules developed by the Commission. As already explained, § 252(d)(1) of the Act instructs state arbitrators to set prices for interconnection and access to network elements based on the incumbent's "cost" plus "a reasonable profit." The Order, however, instructs state commissions to set prices based on a hypothetical "incremental cost" that would be incurred if the incumbent were using an ideally efficient network. 47 C.F.R. § 51.505(b)(1).

Congress meant what we all understand "cost" to mean, i.e., the amount actually paid for something. Furthermore, the Commission's approach of deriving prices from a hypothetical incremental cost would in many cases push prices even below the "actual cost" standard that Congress rejected as too low because it did not include a "reasonable profit." New competitors, who could obtain access to the incumbent's facilities below actual cost, would not build any of their own. And incumbents, lacking any incentive to incur additional construction costs that could not be recovered, would neglect their networks.

The FCC's Order likewise undermines the intent underlying § 252(d)(3), which governs resold local services and instructs the

states to fix wholesale prices at the retail rate less the costs that "will be avoided." Again, the decision to subtract only those costs that actually "will be avoided" was deliberate. Congress wanted to be sure that -- whether local regulators set the retail rate at, above, or below cost -- at least the incumbent will receive the same amount of profit or loss on the wholesale service as it would on the regulated retail service. The conferees thus rejected proposed language that would have set the statutory standard at retail rates minus "avoidable" costs, thereby altering the relationship between price and cost that state regulators built into the retail rate.

Yet the Commission set wholesale prices at the retail rate less any costs that the state determines "can be avoided." 47 C.F.R. § 51.609. It re-opened debate on the rejected "avoidable costs" proposal and then adopted it. See Order ¶¶ 884, 911. The Commission has eviscerated the Act's guarantee that incumbent carriers will receive enough from wholesale transactions so that they are no worse off than they would be under the retail rates, and can fulfill their obligation to provide subsidized services.

Finally, Congress specified that, when drafting rules regarding what network elements must be unbundled, the FCC should consider whether access to a particular proprietary element is "necessary." 47 U.S.C. § 251(d)(2). This provision was designed to reflect the "necessary" standard found in proposed § 251(b)(2) of the Senate bill. S. 652, § 101(a). Yet the Commission has run

around the plain language of the Act, by saying that access to an incumbent's proprietary network elements may be "necessary" even if the competitor can obtain the same elements elsewhere. Order ¶ 283. The Commission reasoned that applying the statute as written might raise competitors' costs somewhat, even if it did not actually prevent competition. Congress, however, wanted to encourage construction of competitive networks, not to set up a system whereby new entrants live indefinitely off of the incumbent's investment.

These examples all reflect the same problem. The Commission has adopted proposals Congress specifically rejected and that will _slow_ the very "private sector deployment of advanced telecommunications and information technologies and services" that Congress meant to "accelerate." S. Rep. No. 230, at 1. We think the Commission is wrong about sound policy, as well as about the law. Its approach will reduce employment and economic growth. But if Congress did make policy mistakes, they are for Congress to fix. The Commission may not override our legislative judgments.

CONCLUSION

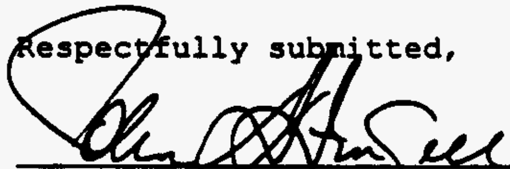
We have tried, through the congressional oversight process, speeches and letters, to encourage the Commission to respect the traditional jurisdictional division of authority that is embodied in the Communications Act. But the Commission is behaving like a renegade agency. It appears to believe that it isn't accountable

to anyone, and should be free to substitute its own judgments for congressional directives.

Apparently the Chairman of the Commission doesn't even believe that Commission decisions should be subject to judicial review. At a press conference in October, he likened this Court's Order Granting Stay Pending Judicial Review to the "imperial sovereignty" exercised by the Chinese emperors.[12]

But under our system, agencies aren't free to substitute their own judgments for those of the Congress. They must obey the law. This Court should strike down the local pricing provisions of the Order as beyond the FCC's jurisdiction and direct the Commission to respect carefully crafted statutory restrictions on resale of incumbents' services and unbundling of local networks.

Respectfully submitted,



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November 15, 1996

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[12]Hundt Calls Court Stay of FCC Rules Example of Extreme Judicial Activism, BNA Analysis and Reports, at C-1 (Oct. 17, 1996).

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DOCKET NO. 6865-U

ORDER RULING ON ARBITRATION

In re: **Petition by MCI for Arbitration of Interconnection Rates, Terms and Conditions with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996**

Record submitted: November 8, 1996 Date decided: December 17, 1996

APPEARANCES

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BY THE COMMISSION:

The Commission issues this Order to announce its ruling on the arbitration between MCI Telecommunications Corporation ("MCI") and BellSouth Telecommunications, Inc. ("BellSouth"). MCI initiated this arbitration by Petition filed on August 19, 1996, seeking rates, terms and conditions for interconnection and related arrangements between it and BellSouth. MCI possesses an Interim Certificate of Authority to provide Local Exchange Service, pursuant to O.C.G.A. § 46-5-163,[1] and sought this arbitration under Section 252(b) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(b). The arbitrated issues presented by MCI had not been resolved by the negotiations which commenced when BellSouth received MCI's formal request on March 26, 1996. Therefore, in accordance with Section 252(b)(4)(C) of the Act, the issues in this arbitration must be resolved by December 26, 1996.

[1] GPSC Docket No. 5944-U, Certificate No. L-003 (interim certificate issued October 17, 1995).

The Commission, serving as the arbitration panel, conducted hearings and took the testimony and evidence presented by MCI and BellSouth and argument presented by the designated Participants.[2] In this Order, the Commission addresses and announces its ruling on the issues contained in MCI's Petition. This Order contains a discussion and findings and conclusions organized as follows: I. Jurisdiction and Proceedings (including a review of the FCC's Rules and the subsequent judicial review of those Rules); II. Issues and Commission Rulings, and III. Ordering Paragraphs.

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[2] The record in this case shows that on October 30, 1996, MCI filed proof of public notice of the arbitration proceeding and hearing schedule, pursuant to the Commission's and the Hearing Officer's directive. (MCI Exhibit 1.)

7. Issue 7: Should, and If So on What Time Frame, BellSouth Provide Real-Time Electronic Interfaces for Pre-Ordering, Order Processing, Provisioning and Installation, Maintenance and Trouble Resolution, Billing (Including Customer Usage Data Transfer), and Local Account Maintenance with Respect to Resold Services and Unbundled Network Elements? 63

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I. JURISDICTION AND PROCEEDINGS

A. Federal Requirements

1. Telecommunications Act of 1996

This proceeding is conducted pursuant to the Telecommunications Act of 1996. Specifically, Sections 251 and 252 of the Act contain pricing and availability standards and other requirements relating to interconnection, access to unbundled elements, and resale of telecommunications services, and other obligations of local exchange carriers. Just as these standards and requirements create a new framework for the telecommunications marketplace, the Act also established arbitration by state regulators as the method for the resolution of disputes that may arise among existing companies and new entrants.

In this Order, which is intended to resolve the open issues and impose conditions upon the parties to the agreement which will result from this proceeding, as required by Section 252(c) of the Act, the Commission has sought to:

(a) ensure that the resolution and conditions meet the requirements of Section 251 of the Act;

(b) establish rates for interconnection, services, or network elements according to Section 252(d); and

(c) provide a schedule for implementation of the terms and conditions by the parties to the agreement which will result from this proceeding.

Toward those objectives, a brief review of five critical provisions contained in the Act is appropriate. Section 251(c)(3) provides, with respect to access to unbundled network elements such as unbundled loops, that each incumbent local exchange carrier ("ILEC") has the duty:

> to provide . . . nondiscriminatory access to network elements on an unbundled basis . . . 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 . . .

Section 252(d)(1) provides the following pricing standard for network elements:

> Determinations by a State commission of . . . the just and reasonable rate for network elements for purposes of subsection (c)(3) [of Section 251] -
> (A) shall be -
> (I) based on the cost (determined without reference to the rate-of-return or other rate-based proceeding) of providing the . . . network element . . ., and
> (ii) nondiscriminatory, and
> (B) may include a reasonable profit.

Section 252(d)(3) provides the following pricing standard for the resale of local exchange telecommunications services:

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

Section 251(c)(6) provides that the duties of each ILEC include:

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

Section 251(g) states, with respect to information services, that the duties of each ILEC include:

> (g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS - On and after the date of enactment of the Telecommunications act of 1996, each local

exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the [FCC], until such restrictions and obligations are explicitly superseded by regulations prescribed by the [FCC] after such date of enactment . . .

2. FCC Rules and Eighth Circuit Stay

The Commission recognizes that the Federal Communications Commission ("FCC") issued its First Report and Order on August 8, 1996 and hereby takes notice of that decision.[3] The First Report and Order was to become effective on September 30, 1996 (30 days after the August 29, 1996 publication of a summary in the Federal Register). However, significant portions of that FCC Order have been stayed by the Eighth Circuit of the U.S. Court of Appeals.[4] A review of the impact of the Eighth Circuit's decision follows.

On October 15, 1996, the Eighth Circuit of the U.S. Court of Appeals issued a limited stay order affecting only the "pricing" regulations and the "pick and choose" rule adopted by the FCC in its First Report and Order. *See* Order Granting Stay Pending Judicial Review, *Iowa Util. Bd. v.*

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[3] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Order FCC No. 96-325) (adopted August 1, 1996; released August 8, 1996), adopting rules to implement Section 251 and certain portions of Section 252 of the Act (hereafter "First Report and Order" or "FCC Order"). A summary of the First Report and Order was published at 61 Fed. Reg. 45,476 (Aug. 29, 1996). This Order cites to the complete First Report and Order as published by the FCC.

[4] Order Granting Stay Pending Judicial Review, *Iowa Util. Bd. v. FCC*, No. 96-3321 (8th Cir. Oct. 15, 1996) (consolidated with other appeals). The Court also stayed a portion of the FCC's Order on Reconsideration of September 27, 1996, dealing with the proxy range for line ports used in the delivery of basic residential and business exchange services.

FCC, No. 96-3321 (8th Cir. Oct. 15, 1996) (the "Stay Order").[5] The Court's Stay Order means that, pending the outcome of the court's full review of the merits of the consolidated challenges to the FCC Order and regulations, all of the provisions of the FCC Order remain in force ***except*** the following sections:

- Total Element Long Run Incremental Cost (TELRIC) pricing methodology and proxy prices for unbundled elements (§§ 51.501 -- 51.513);
- The interim access charge mechanism (§ 51.515);
- Resale methodology and proxies (§§ 51.601 -- 51.611);
- Pricing rules and proxies for reciprocal termination and transport termination (§§ 51.705 -- 51.715);[6] and
- The "pick and choose" rule (§ 51.809).

The court did not stay the FCC Order in its entirety, and those portions of the FCC Order that have not been stayed remain in force pending the appeal. In its Stay Order, the Eighth Circuit did not decide whether the TELRIC methodology, the resale discounts, the proxy rates, or any of the other stayed regulations are inconsistent with the Act. Instead, the Court issued the Stay Order on the ground that a significant question exists about whether the FCC has authority to promulgate the pricing provisions. The Court stated:

> Because we believe that the petitioners have demonstrated that they will likely succeed on the merits of their appeals based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service, we think that it is unnecessary at this time to address the remaining theories which the petitioners use to challenge the legality of the FCC's pricing rules.

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[5] On October 24, the FCC and a coalition of competitive local exchange carriers, including MCI, filed motions with the Supreme Court to vacate the stay. Justice Thomas denied these motions, and application was made to the full Court to review the Stay Order. That application was subsequently denied.

[6] The Eighth Circuit originally stayed §§ 51.701, 703, and 717, but the stay as to those provisions was subsequently lifted on November 1, 1996. *See* Order Lifting Stay in Part. *Iowa Util. Bd. v. FCC*, No. 96-3321 (8th Cir. Nov. 1, 1996).

Stay Order at 16. The stayed regulations reflect the FCC's views for implement the Act's standards, and this Commission may if it chooses adopt the same or similar pricing standards.

B. General Provisions of Georgia Law

In addition to its jurisdiction of this matter pursuant to Section 252 of the Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995, O.C.G.A. §§ 46-5-160 *et seq.*; and generally under O.C.G.A. §§ 46-1-1 *et seq.*; O.C.G.A. § 46-2-20, 46-2-21, and 46-2-23. Further, pursuant to O.C.G.A. § 46-2-20(a), the Commission has general supervisory authority over all telephone companies. *See also* O.C.G.A. § 46-2-21(b)(4); *Camden Tel. & Tel. Co. v. City of St. Marys*, 247 Ga. 687, 279 S.E.2d 200 (1981); *City of Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S.E. 508 (1911). Pursuant to O.C.G.A. § 46-2-20(b), the Commission is also authorized to perform the duties imposed upon it of its own initiative.

The Commission has authority, pursuant to O.C.G.A. § 46-2-20(e), to examine the affairs of all companies under its supervision and to keep informed as to their general condition, their capitalization, and other matters, not only with respect to the adequacy, security, and accommodation afforded by their service to the public and their employees, but also with reference to their compliance with all laws, orders of the Commission, and charter requirements. Pursuant to O.C.G.A. § 46-2-20(f), the Commission has the power and authority to examine all books, contracts, records, papers, and documents of any person subject to its supervision and to compel the production thereof.

C. Procedural Matters

1. Proceedings

The Commission issued a Procedural Order on September 3, 1996. In the Procedural Order, among other things, the Commission appointed Philip J. Smith, Esq. of the Commission Staff as a Hearing Officer to conduct a pre-arbitration conference for the purposes of identifying and, if possible, narrowing the issues, and addressing any other pre-hearing matters. MCI and BellSouth participated in the pre-arbitration conference, held on September 24, 1996. Participants were also recognized at the pre-arbitration conference. The Hearing Officer issued his First Pre-Arbitration Hearing Order on September 26, 1996, establishing the schedule and discussing the disputed issues. MCI and BellSouth also submitted their statement seven days following the pre-arbitration conference summarizing the issues including "core issues" as directed by the Commission and Hearing Officer.

MCI took exception to certain "Directory Issues" rulings made by the Hearing Officer. BellSouth and BellSouth Advertising and Publishing Company responded to MCI's exception. The Commission affirms its October 25, 1996 Order Denying MCI's Exception to the Hearing Officer's First Pre-Arbitration Hearing Order and incorporates that Order herein. As the Commission stated in that Order, this decision does not prevent MCI from raising directory publication issues pursuant to other applicable law in an appropriate proceeding. The Commission also affirms its September 3, 1996 Procedural Order and the Hearing Officer's September 26, 1996 First Pre-Arbitration Hearing Order, and incorporates both by reference as a part of the Commission's decision herein.

At the arbitration hearings which were conducted November 5-8, 1996, MCI presented the direct and rebuttal testimony and exhibits of Don Price, Ronald Martinez, Steven Brenner, Jerry Murphy, Greg Darnell and Don Wood. BellSouth presented the direct and rebuttal testimony and

exhibits of Robert C. Scheye, D. Daonne Caldwell, Walter Reid, Alphonso Varner, Richard Emmerson, Keith Milner, Anthony Pecoraro, and Gloria Calhoun. The Parties were given full opportunity to cross-examine witnesses. The Parties and Participants filed post-hearing pleadings including proposed orders on November 22, 1996, and reply pleadings including reply briefs on November 27, 1996. The arbitration came before the Commission at the regularly scheduled Administrative Session on December 17, 1996, at which time the Commission took action to decide and rule upon the disputed issues.

2. Participants

As the Commission determined in its September 3, 1996 Procedural Order, the Parties to this arbitration are MCI and BellSouth. Other entities have been permitted to participate as "Participants." Participant status was therefore granted to all entities which had sought intervention in the arbitration proceeding but which were not parties to the underlying negotiation (and which would not be signatories to the arbitrated agreement). The Participants have observed the arbitration proceedings and were granted an opportunity to file written comments, but were not granted intervenor status. The Commission will conduct a 30-day review of the agreement submitted by the Parties pursuant to Section 252(e) of the Act. At that time, Participants will be give an opportunity to object to approval of that "arbitrated agreement."

The Participants in this arbitration are the Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs ("CUC"); American Communications Services, Inc. and its subsidiary American Communications Services of Columbus, Inc. ("ACSI"); BellSouth Advertising and Publishing Corporation ("BAPCO"); the Cable Television Association of Georgia ("CTAG"); MFS Intelenet; and Sprint Communications Company, L.P. ("Sprint").

II. ISSUES AND COMMISSION RULINGS

MCI and BellSouth filed a Joint Statement Regarding Pre-Arbitration Conference on October 1, 1996, pursuant to the Commission's September 3, 1996 Procedural Order and the Hearing Officer's September 26, 1996 First Pre-Arbitration Hearing Order. The Parties' Joint Statement identified eleven (11) "core issues" which both Parties agreed must be addressed in this arbitration. The core issues agreed to by the Parties fell into the following six (6) categories:

A - Unbundled Elements
B - Resale
C - Quality of Service Standards
D - Interexchange Carrier Access
E - Interim Local Number Portability
F - Other Technical, Operational and Administrative Issues

The Commission will address the eleven "core issues" in turn, using the Parties' categories. The Commission accepts the statement of issues as framed in the Joint Statement Regarding Pre-Arbitration Conference, but also recognizes that MCI's August 19, 1996 Petition and its exhibits presented many detailed issues for this arbitration. The organization of this Order by "core issues" in no way implies that the issues presented in MCI's Petition are inappropriate or are not intended to be addressed by this Order. Indeed, the Commission recognizes that MCI's Petition presents many issues in great detail; the Commission appreciates the Parties' efforts to address the issues in a condensed, summarized format; and the Commission intends by this Order to resolve and rule upon all issues (other than the aforementioned Directory Issues) contained in the Petition.

For each issue, the positions of the parties are presented first, by summarizing the arguments they presented to the Commission. Next, for each issue, the Commission states its decision and

ruling. Subsequently, the Commission's rulings on these disputed issues are summarized in the concluding ordering paragraphs section of this Order.

A. Unbundled Elements

1. Issue 1: What Unbundled Elements Must BellSouth Make Available to MCI?

a. MCI Position

MCI requested in its Petition access to the following network elements on an unbundled basis:

- Network Interface Device
- Unbundled Loop
- Loop Distribution
- Loop Concentrator/Multiplexer
- Local Switching
- Operator Systems (DA Service/911 Service)
- Multiplexing/Digital Cross-Connect/ Channelization
- Dedicated Transport
- Common Transport
- AIN Capabilities
- Signaling Link Transport
- Signal Transfer Points
- Service Control Points/Databases

(MCI Petition, pp. 21-27.) MCI asked the Commission to rule that each is a network element, capability or function, and asserted that it is technically feasible for BellSouth to unbundle each one. Contrary to BellSouth's arguments, MCI contended, neither the lack of current ordering and tracking systems, nor the fact that some network changes would be required to make these elements available on an unbundled basis, constitutes technical infeasibility under the Act. These elements were discussed in the testimony of MCI witness Murphy (Tr. 391- 434) and other MCI witnesses.

b. BellSouth Position

BellSouth stated that it and MCI have reached agreement on the majority of issues concerning availability of unbundled network elements. According to BellSouth, the only remaining issues for resolution by the Commission are: (1) unbundling of loop distribution and the loop concentrator/multiplexor; (2) selective (or "customized") routing; and (3) access to BellSouth's Advanced Intelligent Network (AIN).

Regarding MCI's request for access to loop distribution and loop concentrator/multiplexor facilities, the FCC Order did not include these as a network element that must be unbundled. BellSouth stated that it cannot unbundle these portions of the loop because the operations and support systems cannot handle the administration of loop without feeder facilities, assignment information cannot be effectively maintained, additional facilities would need to be built to provide access to the distribution facility, ordering, provisioning, maintenance, administration and billing systems would be adversely affected, and establishment of a permanent point of interface could constrain BellSouth from using new technology.

BellSouth stated that when a Competing Local Exchange Carrier ("CLEC") utilizes BellSouth's local switching, it is not technically feasible to selectively route to non-BellSouth transport. Selective routing (or "customized routing") of 0-, 611, and 411 calls utilizing Line Class Codes can be accomplished only with significant, severe limitations on the total number of CLECs that could be accommodated, stated BellSouth, and MCI has requested access to BellSouth's AIN in such a way that both intentional and unintentional disruption of the network are possible. To prevent such disruption BellSouth has asked simply that computer software referred to as mediation devices be put in place.

c. Commission Decision

Section 251(c)(3) of the Act describes BellSouth's duty to provide access to unbundled network elements as follows:

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

The Act inserts the following definition of "network element" at 47 U.S.C. § 153(45):

> (45) 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 Rules at 47 C.F.R. §§ 51.307 to 51.321 provide further detail regarding BellSouth's duty to provide unbundled network elements.[7] These FCC Rules require BellSouth to unbundle seven (7) specifically identified and defined network elements. *See* 61 Fed. Reg. 45, 467 (1996) (to be codified at 47 C.F.R. § 51.319). The FCC Rules also establish the standards that the Commission must apply in determining what additional unbundled elements must be provided. *See* 61 Fed. Reg. 45, 467 (1996) (to be codified at 47 C.F.R. § 51.317). The elements MCI requested in this proceeding will be discussed in two groups: (1) the seven elements the FCC Rules provide must be

[7] These portions of the FCC Rules have not been stayed by the Eighth Circuit pending the appeal.

unbundled, and (2) elements that must be evaluated under the FCC-prescribed standards for additional unbundling.

(1) The Seven Elements Required in FCC Rules

Under the FCC Rules at 47 C.F.R. § 51.319, the seven network elements which BellSouth is required to provided on an unbundled basis are: (1) the local loop, (2) the network interface device ("NID") (on a NID-to-NID basis), (3) local and tandem switching capability (including all features, functions and capabilities of the switch), (4) interoffice transmission facilities, (5) signaling networks (including signaling links and signaling transfer points) and call-related databases, (6) operations support systems functions,[8] and (7) operator services and directory assistance facilities.

It appears from their testimony that BellSouth recognizes that it must unbundle local loops (except that BellSouth claims an exception where the loop is provided over integrated digital loop carrier ("IDLC") facilities), NIDs (on a NID-to-NID basis), tandem switching, interoffice transmission facilities (*i.e.* dedicated and common transport), signaling links and signaling transfer points, and operator services. The only disputed issue for these elements is price, which is addressed under Issue No. 3 later in this Order.

(2) Additional Elements Requested by MCI

If a Petitioner requests access to elements other than the seven discussed above, as MCI has done in this arbitration, section 51.317 of the FCC Rules requires the Commission to determine first whether unbundling is technically feasible. 61 Fed. Reg. 45, 476 (1996) (to be codified at 47 C.F.R. § 51.317(a)). If so, the Commission may decline to require unbundling only in certain limited

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[8] Operations support systems are the subject of a different standard, and will be dealt with below.

circumstances or may accept such requests and direct an ILEC to provide the element to the applicant. 61 Fed. Reg. 45, 476 91996) (to be codified at 47 C.F.R. § 51.317(b)).

In determining technical feasibility, the Commission applies the definition in section 51.5 of the FCC Rules:

> Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access or methods. ***A determination of technical feasibility does not include consideration of economic, accounting, billing, space or site concerns***, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. ***The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible.*** An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access or methods would result in specific and significant network reliability impacts.

(Emphasis added.) This Commission applies these standards in evaluating MCI's request. MCI asked BellSouth to unbundle loop distribution and multiplexing/digital cross-connect. The multiplexing/digital cross-connect element is not in dispute except for price. BellSouth objected, however, to providing loop distribution on an unbundled basis, alleging technical infeasibility. (Tr. 911.) BellSouth witness Milner stated on cross-examination that the only remaining differences between BellSouth and MCI with regard to unbundling were loop distribution and the unbundling of pair gain devices or the digital loop carrier and selective routing (which BellSouth characterized as an unbundled element). (Tr. 893-894.)

The Commission finds that the evidence shows unbundling loop distribution is technically feasible. Loops are commonly divided into two portions: (1) loop distribution from a customer's premises to a cross-connect point, such as a feeder distribution interface ("FDI") or a loop concentrator/multiplexor; and (2) loop feeder from the cross-connect point to BellSouth's central office. (Tr. 428-32.) Unbundled loop distribution is necessary to give MCI the flexibility to use its own loop feeder plant where available. (Tr. 429.) The Commission previously recognized the importance of this element in Docket No. 6537-U. For example, MCI has deployed Synchronous Optical Network (SONET) fiber rings in many metropolitan areas, including Atlanta. Indeed, MCI has deployed several hundred miles of fiber rings in Georgia. (Tr. 457.) By interconnecting its fiber with BellSouth's unbundled loop distribution at existing cross-connect points, MCI can carry traffic from a customer directly to MCI's local switch. (Tr. 432-33.) This enables MCI to make more efficient use of its own facilities, since it avoids the need to use BellSouth's loop feeder, to make a cross-connection at BellSouth's central office, and then to transport the traffic over interoffice transport facilities to MCI's switch. By permitting MCI to maximize the use of its facilities where they are available, unbundling of loop distribution facilities will encourage more rapid development of facilities-based competition in Georgia.

BellSouth asserted that unbundling of loop distribution is not technically feasible for a number of reasons, which fall into two categories: (1) the lack of current record-keeping and billing systems to support subloop unbundling, or (2) the existence of a potential impact on future network rearrangements. These claims, however, rely on a definition of technical feasibility that is not consistent with the controlling definition of technical feasibility set forth in 47 C.F.R. § 51.5 of the FCC Rules. In his direct testimony, BellSouth witness Milner added four criteria to the FCC's

definition of technical feasibility. (Tr. 840.) This Commission does not adopt BellSouth's proposed four additional criteria; additions to the definition of technical feasibility would create a barrier to entry. (Tr. 297-305.)

The FCC has explicitly rejected the lack of ordering and tracking systems as an indication of technical infeasibility. (FCC Order ¶ 390.) In addition, interconnection at an existing cross-connect point such as the FDI is feasible.[9] (Tr. 428-32.) MCI's request for unbundling of loop distribution does not create network security or reliability concerns; MCI stated that it is willing to have all work at the cross-connect point performed for MCI by BellSouth personnel. (Tr. 431.) Unbundling of loop distribution does not require BellSouth to make any modifications to its existing cross-connect facilities, nor does it impact BellSouth's use of integrated digital loop carrier for its own feeder facilities. There no credible basis in this record to conclude that unbundling of loop distribution is technically infeasible. Thus, the Commission directs BellSouth to unbundle this element as MCI requested in its Petition.

The FCC's First Report and Order provides that it is technically feasible to unbundle IDLC-delivered loops (FCC Order, ¶¶ 383-84.) Integrated Digital Loop Carrier ("IDLC") technology allows a carrier to aggregate and multiplex loop traffic at a remote concentration point and to deliver that multiplexed traffic directly into the switch without first demultiplexing the individual loop. BellSouth questioned its obligation to provide an unbundled local loop where the end user is currently served using integrated digital loop carrier (IDLC) technology (Tr. 894), but the FCC Order as cited

[9] MCI is not asking for the Commission to require unbundling of loop distribution in cases where there is no existing cross-connect point, as where BellSouth utilizes a "multiple" or "home run" feeder-distribution design. MCI is willing to use a bona fide request process to obtain unbundled distribution in these unique situations. (Tr. 431.)

makes it clear that BellSouth must unbundle IDLC-delivered loops. Without such an obligation, MCI would be unable to serve all of BellSouth's customers via unbundled loops. In the FCC's words, an exception to the unbundling requirement for these loops would encourage incumbent LECs to "hide" loops from competitors through the use of IDLC technology. (FCC Order ¶ 383.) The record shows that there are a number of technically feasible ways to provide unbundled loops in this situation, including the use of preexisting copper facilities, the use of preexisting universal DLC facilities, the use of next generation digital loop carrier (where available), and, where sufficient demand is available, the purchase by the new entrant of the entire IDLC's complement of contiguous loops. (Tr. 408, 410-11, 915-16.) Therefore, the Commission orders the provisioning of an unbundled loop where the end user is served using an IDLC.

MCI asked the Commission to order BellSouth to provide selective (customized) routing arrangements that will enable an end user (for which MCI acquires service from BellSouth and resells that same service) to reach an MCI operator platform just as a BellSouth customer can reach a BellSouth operator service or repair service platform today (*e.g.*, through dialing 0, 411, 611). The FCC, in its First Report and Order released on August 8, 1996, specifies that customized routing appears to be feasible and is to be provided for the total services resale and unbundled network element environment. This Commission finds that its June 12, 1996 Order issued in Docket No. 6352-U specifies that the ability of a competing carrier to utilize its own operators or custom-branded operator services will enhance the ability of that entity to compete effectively.

MCI proposed two options to BellSouth to accomplish selective routing capability. One of the options is the use of the Advanced Intelligent Network ("AIN"). AIN call routing logic is implemented in a database that is external to the switching center, therefore, it is not dependent upon

the manufacturer or switch version. The Commission finds that at least one incumbent LEC, Bell Atlantic (which also is a Regional Bell Operating Company (RBOC)), has agreed to provide direct routing using AIN and is already working on finalizing technical details. The Commission finds that AIN appears to be a longer-term solution for direct routing capability.

MCI also proposed the use of Line Class Codes to provide customized routing. Line Class Codes (Line Attribute tables) store the data that determine the class of service, screening treatment, recording type and rate center identification for one or more lines that will receive identical treatment. The Commission finds that the Line Class Codes solution to direct routing can be used in most switches as they exist today without updating software or hardware. The Commission finds that there are a finite number of Line Class Codes available in a given type of switch. The Commission further finds, as shown in the record, that manufacturers are expanding the Line Class Code resources of their switching product lines.

The Commission rules that in the interim, it is technically feasible for BellSouth to provide MCI with customized routing utilizing Line Class Codes. The Commission further directs BellSouth and MCI to continue to work with the appropriate industry groups to develop a long-term solution for selective routing.

The Commission concludes that all the capabilities requested by MCI are network elements or functions and directs BellSouth to provide each on an unbundled basis. The Commission rules that when BellSouth determines that a mediation device is necessary on any part of the network, BellSouth shall also route its calls in the same manner.

The Commission must also rule on MCI's request for direct connection to BellSouth network interface devices (NIDs). MCI's Petition had sought interconnection directly to BellSouth's NID, and

it appeared during the hearings that MCI and BellSouth came to agreement at a minimum about NID-to-NID connections, with the exception of who would provide the patch cable between BellSouth's NID and MCI's NID. BellSouth witness Milner testified that the patch cable costs approximately six dollars ($6.00) at retail and that this issue was not a "stumbling block." (Tr. 894-895.) The Commission thus directs BellSouth to provide the patch cord to MCI at a price equal to cost not to exceed $6.00, in those instances in which there will be a NID-to-NID connection.

MCI clarified in its post-hearing pleadings that it still requests direct connection to BellSouth's NID, consistent with its Petition. Although the FCC Order contemplates that a new entrant may install its own NID, it recognizes that another carrier may benefit by connecting its loops to the incumbent LEC's NID. It therefore provides that state commissions may determine whether a direct connection between the new entrant's local loop and the incumbent LEC's NID is technically feasible. 47 C.F.R. § 51.319(a); FCC Order at ¶ 396. Direct connection could occur either where the NID has excess capacity, or if no excess capacity exists, direct connection would involve disconnecting and grounding the BellSouth wire and attaching the MCI wire. The record in this arbitration shows that it is technically feasible for MCI either to use any existing capacity on BellSouth's NID or to ground BellSouth's loop and connect directly to BellSouth's NID. The Commission will allow MCI to connect directly in this fashion, subject to the same conditions adopted in the Docket No. 6801-U arbitration for AT&T's direct connection to the NID. Therefore, MCI must assume responsibility and shall bear the burden of properly grounding the loop after disconnection and maintaining same in proper order and safety. MCI shall assume full liability for its

actions and for any adverse consequences that could result.[10] NIDs used in business settings which are similar to residential service NIDs shall be subject to the same rule.

This Commission is concerned that some CLECs may not have the full technical capability to disconnect and ground the wire safely in all instances. The NID is a single-line termination device or that portion of a multiple-line termination device required to terminate a single line or circuit. The fundamental function of the NID is to establish the official network demarcation point between a company and its end-user customer. The NID, however, also provides a protective ground connection. The National Electrical Code requires that loop distribution plant be grounded and bonded via the NID; if BellSouth's loop is disconnected from the NID, it must be re-grounded in some other fashion. Incorrect disconnection and grounding of BellSouth's wire can create a hazardous condition. While some companies may have technicians capable of performing this work, neither MCI nor this Commission can assure that all CLECs will be as capable as MCI's. The determination of "technical feasibility" in this unique context requires some assessment of the technical capability of the CLEC which requests the direct NID connection. Therefore, this Commission will not allow all CLECs to claim a right of direct connection to BellSouth's NID as a part of their interconnection contracts. If any additional disputes arise regarding this matter, this Commission will make the 47 C.F.R. § 51.319(a) determination of direct NID connection technical feasibility on a case-by-case, CLEC-by-CLEC basis.

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[10] This Commission does not intend to create an underlying liability or cause of action where none may otherwise exist under Georgia or other applicable law. Instead, this ruling speaks to the allocation of legal responsibility.

2. **Issue 2: May MCI Use Unbundled Elements in Any Manner That it Chooses in Order to Provide Service to its Customers, Including Recreating Existing BellSouth Services?**

a. MCI Position

MCI argued that the Act requires BellSouth to offer unbundled elements in a manner that allows MCI to recombine such elements to provide telecommunications services. According to MCI, the Act allows no limitations on the manner in which the elements are combined, or the services which can be provided through the use of unbundled elements. Section 252(c)(3) of the Act obligates BellSouth to provide "network elements in a manner that allows requesting carriers to combine such elements" in order to provide telecommunications services.

MCI stated that the FCC Order also allows requesting carriers to purchase unbundled elements and to combine them in order to provide any telecommunications service, including services provided by the ILEC which are available through resale. (*See* FCC Order ¶ 331.) Rule 51.315, which has not been stayed, states as follows:

> An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.

Although the FCC's Rules regarding the price that must be paid for unbundled elements used to provide local service are currently stayed, the FCC's Rule that requesting carriers must be able to purchase those elements as network elements and combine them to provide any service has not been stayed by the Eighth Circuit.

Thus MCI argued that the Commission must price unbundled elements, regardless of the manner in which they are used by the requesting carrier, in accordance with § 252(d)(1), which

pertains to the pricing of unbundled elements and requires that the price be "based on the cost" of providing the network elements.[11] MCI concluded that pricing of unbundled elements which have been rebundled -- even to the point of replicating BellSouth's retail services -- by using the resale pricing rules would violate the Act and the FCC's regulations.

MCI criticized BellSouth's position that MCI must not be permitted to combine an unbundled loop and an unbundled port (*i.e.* local switching) to provide local exchange service. (Tr. 592.) MCI interpreted BellSouth's position to be that MCI must combine unbundled elements with its own facilities (Tr. 592), and argued that such a requirement is not supported by the Act. MCI noted that FCC Rule § 51.315(b) provides that:

> Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

BellSouth currently combines loops and switching. MCI argued that if BellSouth does not have the right to separate the elements, MCI certainly has the right to combine them.

MCI also alleged that BellSouth's objection to the combination of loops and switching appears to be based on its desire to retain revenues from access charges whenever possible, citing the cross-examination of BellSouth witness Varner (Tr. 658-659). If MCI offers service through the resale of an existing BellSouth service, BellSouth bills and retains any interexchange access charges. If MCI offers service through the use of unbundled elements -- either in combination with each other or in combination with MCI's own facilities -- then MCI bills and retains any interexchange access charges.

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[11] Section 252(d)(1) states that pricing under that provision should be determined "without reference to rate of return or other rate-based proceeding" factors, and there is a separate statutory standard for resale in § 252(d). MCI asserted that these two standards show that Congress intended prices for unbundled elements not be set by a "top down" resale methodology.

The Act establishes two distinctly different pricing mechanisms for resold services and for unbundled network elements. For resold services, prices are set "top-down" on the basis of current retail rates less avoided retail costs. For unbundled network elements, prices are set "bottom-up" on the basis of forward-looking economic costs. In either scenario, MCI argued, BellSouth is fully compensated for the service it provides. In the resale scenario, BellSouth continues to receive all revenues it would have received from offering service at retail, less only a discount equal to the retail costs that BellSouth avoids by offering the service at wholesale. In the unbundling scenario, BellSouth receives a different level of revenues, but one which is designed to fully cover all of its forward-looking economic costs, including a reasonable profit. In the latter case, BellSouth may lose some "contribution" that it would have obtained from access charges had it retained the end-user customer, but MCI contended that BellSouth has no right to expect to remain revenue-neutral when it loses a customer to competition.

b. BellSouth Position

BellSouth stated that a common sense reading of the Act's provisions shows that the different pricing provisions for resale versus unbundled elements must be given effect, and that they are designed for two different purposes. BellSouth argued that MCI should not be allowed to use only BellSouth's unbundled elements to create the same functionalities replicating BellSouth's existing service. By allowing such recombination, BellSouth argued, each competitor could choose the lesser of the resale discount or the presumably lower price of the combined elements. When the combination of unbundled elements reproduces BellSouth's service, then the CLEC should be required to purchase the recombination of elements as if it were purchasing a resold service.

BellSouth contended that to permit otherwise would be to condone tariff arbitrage without any justification.

According to BellSouth, unbundling/rebundling identical network elements would give MCI: (1) the ability to resell BellSouth's retail services, but avoid the Act's pricing standard for resale; (2) the ability for MCI to avoid the joint marketing restriction contained in BellSouth's tariffs; (3) the ability to argue for the retention of access charges by MCI even though the actual service is "disguised resale"; (4) assuming a wholesale discount acceptable to MCI, the ability to maximize its market position by targeting the most profitable form of resale to particular customers; and (5) the ability to foreclose, to a large extent, facilities-based competition and competitors. (Tr. 557-62, 591-94, 629-31, 646-80, 707-11, 768-72.)

BellSouth also asserted that it would suffer untoward financial consequences from MCI's interpretation of the Act and FCC Rules. BellSouth witness Mr. Varner testified that, if MCI and other CLECs gain a 30 percent market share, BellSouth could lose as much as $224 million in contribution if the CLECs bought unbundled residential and business lines and rebundled them to duplicate BellSouth's services. Furthermore, Mr. Varner testified, the contribution would be lost principally in the urban areas, and low-margin, rural customers would bear the brunt of this loss. (Tr. 558-561.)

BellSouth insisted that it does not oppose MCI using any combination of unbundled network elements in any manner it chooses. However, if MCI orders a combination of unbundled elements that replicate a BellSouth retail telecommunications service, BellSouth argued the transaction then should be treated "for what it really is -- the resale of a BellSouth service -- and the resale pricing

rules should apply." (BellSouth Reply Brief at 1.) Thus BellSouth concluded the issue is really not about recombining of network elements, but about the pricing of retail services that are being resold.

c. Commission Decision

The Act provides that each incumbent LEC has the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers (Section 252(c)(4)). It is undisputed that the Act establishes separate and distinct pricing methodologies for resale versus unbundled network elements. The Act mandates that wholesale rates for resale be based on the incumbent LEC's retail rates minus those costs avoided by the incumbent LEC (Section 252(d)(3)) (the "top-down" approach). The Act also restricts the ability of certain telecommunications carriers to jointly market resold local exchange services with interLATA services (Section 271(e)(1)). By contrast, interconnection and network element charges shall be based on cost and may include a reasonable profit (Section 252(d)(1)(A)) (the "bottom-up" approach).

It is also undisputed that the FCC rules provide that an incumbent LEC shall provide network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service (47 C.F.R. § 51.315(a)). These FCC rules state that upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

The Commission concludes that, clearly, all relevant portions of the FCC rules and the Act provide that MCI may purchase unbundled elements from BellSouth and combine or "rebundle" those elements in any manner that is technically feasible. However, the Commission finds that unrestricted

recombination of unbundled elements would allow MCI to purchase unbundled elements from BellSouth, rebundle those elements without adding any additional capability, and "create" or replicate a service that is identical to a BellSouth retail offering. Such replication of a BellSouth retail service goes beyond the scope of combining unbundled elements and instead becomes *de facto* resale. If this result were not treated as *de facto* resale, MCI would avoid not only the Act's resale pricing standard, but also the Act's restrictions regarding joint marketing, and access charge requirements. The Commission further finds that the incentive for CLECs to construct their own facilities could be precluded if CLECs were allowed to avoid the resale pricing standard in such a fashion. The Commission concludes as a matter of law and regulatory policy that the pricing standard of Section 252(d)(3) applies to the *de facto* resale which occurs from rebundling BellSouth network elements to replicate BellSouth retail services, without employing any MCI functionality or capability (other than MCI operator services).

The Commission finds that granting MCI's request for unrestricted buying and combining of unbundled network elements creates the need to develop an appropriate pricing policy regarding rebundled network elements. The Commission rules that in the interim, MCI shall be allowed to combine elements in any manner it chooses. The Commission further rules that when MCI recombines unbundled elements to create services identical to BellSouth's retail offerings, the price MCI pays to BellSouth for those rebundled services shall be identical to the price MCI would pay using the resale discount discussed under Issue No. 5 in this arbitration Order; and these *de facto* resold services shall be provided to MCI under the same terms and conditions applicable to resale, including the same application of access charges and the imposition of joint marketing restrictions. In this situation, "identical" means that MCI is not using its own switching or other functionality or

capability together with the unbundled elements in order to produce its service. MCI operators services shall not be considered a functionality or capability for this purpose. Thus, if MCI purchases elements and only adds its own operator services, then the price MCI pays shall be computed using the resale discount. The Commission further concludes that it shall conduct a generic proceeding to develop appropriate long-term pricing policies regarding recombination of unbundled capabilities.

3. Issue 3: How Should Unbundled Elements Be Priced?

a. MCI Position

The rates that MCI proposed in this arbitration were those shown in Exhibit DJW-3 attached to MCI witness Mr. Wood's testimony, and those contained in MCI's Petition Exhibit 3 (also incorporated in MCI's proposed agreement attached as Exhibit RM-1 to MCI witness Mr. Martinez' testimony and entered into the record as MCI Hearing Exhibit 3). MCI proposed that prices for unbundled elements be based on forward-looking, long-run economic costs, calculated in accordance with Total Element Long Run Incremental Cost ("TELRIC") principles, that a wholesale-only LEC would incur to produce the entire range of unbundled network elements. MCI referred the Commission to its previous decision regarding such an incremental pricing methodology in Docket No. 6537-U. In this arbitration, the TELRIC methodology was utilized in the Hatfield Model, sponsored through MCI witness Mr. Wood. (Tr. 1253-378.)

Section 252(c)(2) of the Act requires the Commission to establish rates for unbundled network elements according to the pricing standards of Section 252(d)(2). That section in turn provides as follows:

> (d) PRICING STANDARDS.--
> (1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.-- Determinations by a State commission of . . . the just and

> reasonable rate for network elements for purposes of subsection (c)(3) of [section 251] -
> (A) shall be -
> (I) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the . . . network element . . ., and
> (ii) nondiscriminatory, and
> (b) may include a reasonable profit.

MCI asserted that to meet these requirements, prices must be set based on forward-looking economic cost. MCI stated that the use of revenue-requirement-based embedded cost standards as used in traditional, rate-of-return and rate-based ratemaking would prevent the market from driving local exchange rates to competitive, economic cost, and would violate the Act.

The FCC coined a new term -- Total Element Long-Run Incremental Cost (TELRIC) -- for its forward-looking costing methodology. Nevertheless, MCI pointed out, the TELRIC methodology is nothing more than the familiar Total Service Long-Run Incremental Cost ("TSLRIC") methodology in which the item to be costed is an "element" rather than a "service." While the Commission is not currently required to apply the FCC's TELRIC methodology due to the stay of the pricing provisions of the FCC Rules, the Commission has previously adopted the similar TSLRIC standard as a basis for setting interim prices under state law (*see* Docket No. 6537-U Order), and MCI contended that the Commission should continue to use a TSLRIC/TELRIC standard for its cost and price determinations under the Act.

The Commission has been provided with competing cost studies which purport to comply with TSLRIC/TELRIC pricing principles. One set of studies, sponsored by BellSouth witness Caldwell, was furnished on a confidential basis not subject to public scrutiny. MCI characterized this as a "black box" approach, under which the relationships used to translate from inputs to outputs are

unavailable for critical review. BellSouth witness Caldwell agreed that BellSouth's alleged forward-looking cost study could not be challenged, criticized or verified based on evidence in the record in this proceeding. (Tr. 1098, 1101, 1102, 1105, 1109.) Accordingly, even if the Commission found that the results of BellSouth's study seemed plausible, MCI argued that BellSouth's study could not form the basis of the Commission's decision.

The other study, the Hatfield Model presented by MCI witness Wood, is an open model which makes use of publicly available data to estimate the forward-looking TELRIC costs that a wholesale-only LEC would incur to produce the entire range of outputs that the FCC Order requires to be unbundled. The Hatfield Model includes cost of capital in its cost calculations, thus satisfying the Act's provision permitting BellSouth a reasonable profit. (Tr. 271, 1275.) The Hatfield Model attributes costs of shared plant to each of the network elements that use that plant, thus appropriately capturing these shared plant costs. It also adds a 10% markup to capital and network operations costs as an estimate of forward-looking overhead costs. *Id.*

MCI stated that setting the prices for network elements equal to the costs that the Hatfield Model reports for each element allows BellSouth to recover all of its economic costs, including a reasonable profit, of doing business as a wholesale-only firm engaged in the business of providing network elements. (Tr. 1279.) MCI argued this approach is reasonable, and fully consistent with the pricing principles of the Act. Thus MCI asked the Commission to adopt the results and methodology of the Hatfield Model in its entirety, and to set permanent rates based on that model.

<u>The Hatfield Model</u>

MCI argued at length what it views as the benefits and strengths of the Hatfield Model. These extensive arguments will not be repeated in detail here; suffice it to say, in summary, MCI stated that

the Hatfield Model uses sound economic costing principles to estimate the relevant costs of a wholesale provider of unbundled network elements using the best publicly available data, and as an open model, its operations can be readily scrutinized and a large number of its key inputs can be set by users. (Tr. 271, 1267, 1270-79.) The model itself, and accompanying documentation, is publicly available through the International Transcription Service of Washington, D.C. (Tr. 1270.) In fact, both the Hatfield Model and its documentation have been entered into the record in this proceeding along with extensive supporting testimony discussing any criticisms and continuing development of the model. (MCI Exhibits 13, 14.) The inputs into the model are available for inspection (MCI Exhibit 14) and, except for Census Block Group (CBG) and U.S. Geological Survey data, the model inputs are user-definable. This degree of openness enables independent scrutiny and evaluation of the assumptions and methodology, and enables a reviewer to test the reliability of the final product. The CBGs, which are so critical to the Hatfield Model, were spot-checked for accuracy including an examination of at least six Georgia CBGs. (*See* MCI Exhibits, 16, 17, 18 and MCI's Response to Hearing Request which was filed on November 12, 1996.) MCI contended that the Hatfield Model represents the most credible forward-looking cost study ever presented to this Commission.[12]

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[12] MCI also responded to various BellSouth criticisms of the Hatfield Model. For example, BellSouth pointed out that previous versions of the model and its inputs have been altered as its developers determined they contained certain flaws. (Tr. 598.) MCI responded that this evolution has enabled the model to take into account new data and to include additional features -- it is thus a strength of the model rather than a weakness. (Tr. 1280-81.) BellSouth criticized the Hatfield Model for using data based on the Benchmark Cost Model (BCM), which it described as "fatally flawed." (Tr. 598.) MCI noted that BellSouth did not describe any of these so-called fatal flaws in any detail, nor did BellSouth acknowledge that US West and Sprint have developed a new version of the BCM (referred to as BCM2), which makes many of the same improvements to the original BCM model that the Hatfield Model has incorporated into its BCM-Plus module. (Tr. 1281.)

BellSouth criticized the Hatfield Model for using unusually low estimates of joint and common costs, an unrealistic cost of money, an overly high plant utilization factor, and overly long depreciation lives. (Tr. 598.) However, BellSouth did not state how these assumptions should be changed. In fact, stated MCI, the Hatfield Model included all the costs described by the FCC as "joint and common" that an efficient carrier would incur on a going-forward basis; the Hatfield Model used a weighted average cost of capital of 10.05%, which is the last weighted cost of capital authorized for BellSouth by this Commission (Tr. 1289); the Hatfield Model used conservative estimates of engineering fill, which are then translated

MCI's Criticisms of BellSouth's TSLRIC/TELRIC Cost Studies

MCI noted that BellSouth submitted sixteen claimed TSLRIC cost studies for various unbundled network elements. BellSouth did not, however, provide any cost studies for a number of the unbundled elements at issue in this case, including local switching, common transport, tandem switching, interconnection, or transport and termination. MCI pointed out that the only evidence in the record on the cost of these elements was that provided by the Hatfield Model. Five days prior to the hearing, BellSouth also provided what it termed a TELRIC cost study for 2-wire and 4-wire analog loops and 2-wire ISDN loops. Except for the studies of 800 Access 10-Digit Screening Service and LIDB Access Service, each of these seventeen studies was provided on a proprietary basis.

MCI argued that BellSouth's single "TELRIC" study represented a significant step backward from forward-looking economic costing principles. Two of the major problems, MCI stated, were the use of embedded ARMIS-type expense data (automated annual report information) as an overlay on the underlying TSLRIC study, and the use of embedded, actual fill factors instead of forward-looking fill rates. Therefore, MCI challenged BellSouth's TELRIC study as being much more like an embedded cost study to safeguard BellSouth's revenue requirement, rather than a forward-looking economic cost study. MCI also charged that by allocating common costs based on investment, rather than total cost, the study disproportionately increased the cost of the unbundled loop, which is both

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by the model into effective fill factors that are even lower than engineering fill levels (Tr. 1318); and the Hatfield Model used the last depreciation lives authorized by the FCC.

BellSouth conducted extensive cross-examination of MCI witness Mr. Wood about the facts that the Hatfield Model assumed CBGs are square, and that (except for the two lowest density sets of CBGs) households are evenly distributed within those groups. (Tr. 1350.) MCI responded that of the 3,770 plus CBGs in BellSouth's Georgia territory, there are at most only 21 CBGs having the underestimation "problem"; and it would be possible to find other CBGs that have the opposite "problem," *i.e.*, the model will tend to overestimate for other CBGs.

one of the more capital-intensive components of the network and one of the most critical to competition. Finally, MCI noted, even BellSouth did not ask this Commission to adopt the results of its own TSLRIC/TELRIC cost studies. (Tr. 1096.)

b. **BellSouth Position**

BellSouth acknowledged that the Act requires that the price of unbundled network elements must be based on cost and may include a reasonable profit (47 U.S.C. 252(d)(1)(A)). In implementing this pricing requirement, stated BellSouth, the Commission's primary goal must be to develop prices that will set the stage for real competition among local telecommunications providers in Georgia. However, BellSouth differed with MCI over whether the basis for any cost study should be forward-looking versus "actual" costs.

BellSouth argued that the TELRIC costing methodology carries compelling substantive and administrative problems that would significantly reduce incentives to invest in telecommunications facilities and the benefits competition can bring. BellSouth contended that the Hatfield Model does not meet the requirements of the Act, because it did not produce results based upon BellSouth's costs. In addition, BellSouth witnesses Mr. Varner and Dr. Emmerson testified that the Hatfield Model contained severe flaws. In short, BellSouth argued that the Hatfield Model is a hodgepodge of methods and inputs from unverified and unverifiable sources, and amounts to nothing more than an attempt by MCI to obtain BellSouth's unbundled network elements at prices that are below BellSouth's costs.

BellSouth argued that the Hatfield Model contained numerous flaws. Among these, BellSouth argued, was the use of approximately 399 default inputs that were not Georgia-specific, including labor rates. (Tr. 1322.) Also, the model assumed a cost of $45 per foot for trenching, but

further assumed that BellSouth would only pay one-third of that cost. (Tr. 1317-18.) BellSouth challenged this assumption that BellSouth would share trenches with other utilities for being unrealistic as to current trenching costs, and speculative as to future trenching costs. (BellSouth Brief at 13.) BellSouth also argued that the model failed to provide a consistent amount of distribution routes for homes in different CBGs which are otherwise identical; failed to adjust to unusually shaped CBGs; and produced an understatement of loop lengths on average, and an understatement of loop costs. (Tr. 1044 & BellSouth Brief at 14-15.)

More fundamentally, BellSouth witness Dr. Emmerson attacked the Hatfield Model's basic approach because it rests on a "completely hypothetical view of the local network." (Tr. 1028.) The model assumed that the local network is built to satisfy a level of demand known with complete certainty, and assumes that the amount of capacity can be installed instantaneously. As Dr. Emmerson put it, the model approximated the costs that would be incurred by an imaginary new entrant who is unconstrained by the technical layout of an existing network. Consequently, he concluded, the Hatfield Model estimated neither the costs that an efficient entrant would actually incur, nor the costs that BellSouth would incur in operating its network efficiently. Dr. Emmerson recommended that any TSLRIC or TELRIC study use a fundamentally different approach, by estimating the forward-looking costs that BellSouth will actually incur in building and operating its network, in a manner consistent with the actual market circumstances BellSouth will encounter. (Tr. 1028-29.)

BellSouth recommended that the Commission adopt BellSouth's existing tariffed rates for existing unbundled network elements, because those existing tariff rates are based upon BellSouth's costs, have been approved by the Commission, include a reasonable profit, and, therefore, meet the

requirements of § 252 of the Act. For unbundled network elements where there are no existing tariff rates, BellSouth proposed that the Commission adopt the results of its cost studies as being "market-based rates," subject to a true-up process within the next six months. BellSouth's proposed rates were contained in Exhibit RCS-3 of its witness Mr. Scheye (revised 10/22/96) (attached to this Order as Appendix B).

c. Commission Decision

The Act provides that the price for unbundled network elements shall be based on cost and may include a reasonable profit. Section 252(d)(1)(I). This is not a light undertaking. It appears that neither Party has been able to conduct a comprehensive review of the inputs and modeling assumptions used by the other. (While BellSouth evidently has had greater access to MCI's Hatfield Model, clearly the limited time in this arbitration has been insufficient to allow a full evaluation.) Some of the arguments on both sides involve broad questions of policy, such as whether to use entirely forward-looking costs or to assume some level of embedded investment in BellSouth's actual network as it exists today. Many of the Parties' other arguments, however, challenge the inputs or methodological assumptions associated with the competing models. The Commission has not had the benefit of a searching evaluation of the cost studies and methodologies to inform its ruling in this arbitration. Nor is the Commission prepared merely to accept BellSouth's tariffs pending such a searching evaluation.

The Commission has established a generic proceeding, Docket No.7061-U, *Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, in order to review fully BellSouth's TELRIC cost studies and any

other relevant cost studies or methodologies. This generic proceeding will result in the setting of permanent rates for interconnection and access to unbundled elements.

In its Order issued in Docket Nos. 6415-U/6537-U pertaining to BellSouth's interconnection rates for MFS and MCI, respectively, this Commission adopted an interim rate for a 2-wire unbundled analog loop at the price of $14.22 per month. Subsequently, in the MFS-BellSouth arbitration (Docket No. 6759-U) and the AT&T-BellSouth arbitration (Docket No. 6801-U), the Commission has affirmed such use of $14.22 as the interim rate for 2-wire loops, and 160% ($22.75) of that amount as the interim rate for 4-wire loops, subject to a true-up mechanism.

The Commission finds it appropriate in this arbitration to affirm and adopt $14.22 as the interim rate for all 2-wire unbundled loops, and 160% ($22.75) of that amount as the interim rate for all 4-wire loops, subject to true-up. The Commission further finds it appropriate to adopt interim rates, subject to a true-up mechanism, for all other unbundled elements, at the rate levels proposed by MCI witness Wood in his testimony and Exhibit DJW-3 (attached as Appendix A to this Order, and incorporated herein by reference). Any other MCI-proposed rates being adopted as interim rates in this arbitration, which may not have been specifically listed in Mr. Wood's exhibit, are contained within MCI's Petition Exhibit 3 (also incorporated by reference), and were also reflected in MCI's Hearing Exhibit 3. The Commission further rules that BellSouth shall provide the patch cord to MCI for NID-to-NID connections at a price not to exceed $6.00. The Commission additionally rules that for any elements as to which MCI did not propose a rate, this Commission adopts the rates proposed

by BellSouth, which were addressed by Mr. Scheye in his Exhibit RCS-3 (attached as Appendix B and incorporated herein by reference).[13]

In adopting the 2-wire and 4-wire loop rates and MCI's proposed rates for the majority of the interim rates, the Commission is aware that they are notably lower than BellSouth's proposed rates, and thus will tend to favor increased CLEC competition. However, it would be premature for the Commission to draw any conclusions about the merits of either Party's cost study models. Neither MCI nor the Commission has been able to evaluate thoroughly the reliability of BellSouth's TELRIC model, or the reasonableness of the input assumptions which BellSouth used in order to derive the model's output results. With respect to a particular scientific procedure or technique, the decision-making body makes a determination whether the procedure or technique in question has reached a scientific stage of verifiable certainty, based upon evidence, expert testimony, treatises, or the rationale of cases in other jurisdictions. *Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 452 S.E.2d 159 (1994).[14] The Commission finds that the TELRIC cost studies BellSouth presented did not meet this standard, and therefore should not be accorded significant weight or relied upon in

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[13] The Commission notes that neither Party vigorously argued the question of geographic deaveraging, although the cost studies entered into evidence showed some results based upon certain deaveraging assumptions. The Commission finds it appropriate to make it clear that it will not order geographic deaveraging of the interim rates adopted herein. The FCC's pricing rules that would require geographic deaveraging have been stayed by the Eight Circuit Court of Appeals. Therefore the Commission is not required as a matter of law to adopt geographically deaveraged rates.

In addition, significant matters of regulatory policy are implicated by the possibility of geographic deaveraging, and that the record in this case does not provide sufficient answers to those questions to warrant imposing geographic deaveraging at this time. These questions of regulatory policy include, but are not limited to, the effects for both competitors and customers of establishing an unbundled pricing scheme that favors entry and investment in high-density urban areas, with relatively higher unbundled prices for low-density rural areas. In addition, BellSouth has asserted elsewhere that its basic local exchange service rates may need to be rebalanced as a result of any geographic deaveraging. Whether or not such rebalancing would indeed prove necessary, such deaveraging may require adjustments for purposes of universal service principles; for example, some adjustments may need to be considered for the newly established Universal Access Fund (Docket No. 5825-U) under Georgia's Telecommunications and Competition Development Act, O.C.G.A. § 46-5-167.

[14] *See also Hubbard v. State*, 207 Ga. App. 703, 429 S.E.2d 123 (1993); and "Exiting the Twilight Zone: Changes in the Standard for Admissibility of Scientific Evidence in Georgia," 10 Ga. St. U. L. Rev. 401 (1994).

reaching a decision in this docket. The Commission is not bound by the strict rules of evidence, and may exercise such discretion as will facilitate its efforts to ascertain the facts bearing upon the right and justice of the matters before it. O.C.G.A. § 46-2-51. While the Commission could admit BellSouth's cost studies into evidence, it is not bound to accord them great weight to it when they have not been verified outside BellSouth. The Commission concludes it would be premature to allow BellSouth's cost studies to serve at this time as the basis for abandoning the interim rate established in the recently conducted Docket No. 6415-U/6537-U proceeding.

For its part, BellSouth asserted weaknesses in the MCI's Hatfield Model used to support MCI's proposed rates in Mr. Wood's Exhibit DJW-3. (BellSouth also criticized the BCM model used in Docket No. 6415-U/6537-U to develop the $14.22 interim 2-wire loop rate.) However, a full examination of the Hatfield Model was not possible in this arbitration. BellSouth will have the opportunity to explore fully such arguments in the generic cost study proceeding. As with BellSouth' cost studies, it would be premature to endorse the Hatfield Model and its results, before there has been an opportunity for all parties and for this Commission to fully investigate the workings of the Hatfield Model and its extensive inputs and assumptions. In the Docket No. 7061-U generic proceeding, BellSouth will have the opportunity, for example, to show what happens if the Hatfield Model is corrected to account for the flaws BellSouth asserted. Thus while the Commission is generally using a forward-looking methodology as the basis for adopting interim rates, as it did previously in Docket Nos. 6415-U/6537-U (MFS/MCI proceeding), Docket No. 6759-U (MFS arbitration), and Docket No. 6801-U (AT&T arbitration), the Commission is not adopting a particular model (such as the Hatfield Model) in this decision. Rather the Commission intends to review the appropriate methodology(ies) and model(s) in the Docket No. 7061-U proceeding.

The Cable Television Association of Georgia, a Participant in this arbitration, commented that the evidence put forward by MCI (in particular the testimony of MCI witnesses Don Wood, Greg Darnell and Dr. Steven R. Brenner) raised significant issues as to whether BellSouth's proposal to employ existing tariffed rates to determine the rates for unbundled elements is overly generous to the incumbent, and would inhibit the establishment of competition. (CTAG Comments at 4.)

At the same time, the Commission declines to adopt interim rates using the $16.09 default proxy rate for Georgia unbundled loops put forward by the FCC in its First Report and Order,[15] pending a review of cost studies for permanent rates, as suggested by the Cable Television Association of Georgia. (CTAG Post-Hearing Comments at 4 & n.10.) Neither Party asked the Commission to use the FCC proxy rate. Moreover, since the Eight Circuit Court of Appeals stayed the pricing provisions of the FCC's First Report and Order and the associated pricing rules, it is clear that this Commission is not bound by and is not required to adopt the FCC's default proxy rate. Moreover, the FCC developed the $16.09 default proxy after discussing several different cost modeling approaches including the Benchmark Cost Model (BCM). In Docket No. 6537-U, this Commission determined that in a dispute between MCI and BellSouth, it was most appropriate to use the BCM and the $14.22 which it was shown to yield in that docket, until such time as the Commission can conduct a full review of TELRIC studies of BellSouth's unbundled network elements (which is the purpose of Docket No. 7061-U).

All of the interim rates adopted in this Order shall be subject to the same type of true-up mechanism that the Commission adopted in the MFS-BellSouth arbitration (Docket No. 6759-U) and

[15] The FCC attempted to set default proxy rates for unbundled local loops at § 51.513(c). This is among the rules stayed by the Eight Circuit Court of Appeals in its October 15, 1996 Order. *See Iowa Util. Bd. v. FCC, supra.*

AT&T-BellSouth arbitration (Docket No. 6801-U). Those true-up provisions were based upon the ACSI-BellSouth Interconnection Agreement addendum.[16] While the Commission might not ordinarily adopt a true-up mechanism in traditional ratemaking, this proceeding is not traditional ratemaking -- it is an arbitration under the federal Act to resolve disputed issues between two players in an evolving telecommunications marketplace and will result in an arbitrated agreement governing the contractual relationship between MCI and BellSouth. Moreover, the true-up provision protects both Parties against differences between the interim rates and permanent rates, and it will be in effect only for a limited time.

B. Resale

4. Issue 4: What Services Must BellSouth Make Available to MCI for Resale?

a. MCI Position

The Act requires BellSouth to offer for resale any telecommunications service that it provides at retail to end user customers who are not telecommunications carriers. MCI argued that this means no retail services should be excluded from resale. Specifically, MCI asked that grandfathered

[16] Some slight modifications were adopted to tailor the true-up mechanism for these arbitrations, as reflected in the ordering paragraphs at the end of this Order. Chief among these are the reference to the Docket No. 7061-U generic cost study proceeding for establishing permanent recurring unbundled local loop rates, and a clarification reflecting this Commission's view of the use of commercial arbitration. The use of commercial arbitration appears appropriate to resolve differences between the Parties regarding the calculation of the true-up; this is similar to a billing dispute. However, any use of commercial arbitration to resolve unfruitful negotiations between the Parties regarding final unbundled loop rates does not substitute for Section 252 arbitration by this Commission. Commercial arbitration may only be undertaken by mutual agreement of the Parties, as a dispute resolution method that is an alternative to the compulsory arbitration of Section 252. As an extension of the negotiation process, therefore, any agreement that results from the use of commercial arbitration must be submitted to this Commission as a "negotiated agreement" for approval under Section 252(e).

The true-up mechanism has also been revised for this arbitration to reflect the policy that the interim rates should not be in place too long pending the true-up. For example, BellSouth recommended that the time period for interim rates should be six or eight months. The Commission is not adopting such an absolute time limit. However, the true-up will be based on permanent rates from a final order that is not stayed pending any appeals; this will help prevent the interim period from extending for an overly long time period.

services, promotions, contract services, volume discounts, and Lifeline and LinkUp services be made available for resale.

Section 251(c)(4) of the Act establishes BellSouth's obligation to offer services for resale. Under that section, BellSouth has the duty:

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

(Emphasis added.) The Act makes no exceptions to this resale obligation, MCI argued, so BellSouth has no basis to refuse to offer any retail service for resale.

BellSouth nevertheless took the position that it will not offer the following services for resale: grandfathered services, contract service arrangements, promotions, LinkUp, Lifeline, 911/E911, and N11 services. BellSouth stated either that these services are not services provided at retail to end user customers who are not telecommunications carriers or that its proposed prohibitions on resale are "narrowly tailored, reasonable and nondiscriminatory" and thus permitted by the Act. (Tr. 721)

MCI argued that the latter claim must be rejected outright as a matter of law, stating that the Act does not permit "prohibitions" on the resale of retail telecommunications services. MCI contended that the "conditions or limitations" that can be imposed on a reasonable and nondiscriminatory basis refer only to limitations that constitute something less than a total prohibition on resale. Following are summaries of MCI's arguments as to each of the services.

1. Grandfathered Services. The unstayed portion of the FCC Rules require that grandfathered services be available for resale to the same customers who have purchased the service in the past. FCC Rules, 47 C.F.R. § 51.615. MCI argued that BellSouth's attempt to ignore this "clear mandate" is merely another effort to prevent effective competition.

MCI stated that it needs the ability to resell grandfathered services to customers who currently purchase such services from BellSouth. Otherwise, BellSouth would be able to offer services to its customers that resale competitors could never match. For example, as noted in Footnote 33 on page 33 of MCI's Petition, BellSouth replaced its ESSX service with a new service called MultiServ last year. BellSouth devoted considerable time to rebut MCI's assertion that the MultiServ episode illustrates an opportunity and incentive for BellSouth to abuse a grandfathering exemption. (Tr. 726-28.) According to MCI, BellSouth's rebuttal misses the point. Many customers prefer to remain on ESSX because it offers them a pricing advantage. Some of these customers can stay on the grandfathered ESSX service for up to six more years. If the grandfathered ESSX service is not available for resale, MCI will have no effective way to compete for these customers. And if grandfathered services generally are not available for resale, BellSouth will have an incentive to engage in "strategic grandfathering" designed to protect groups of customers from the threat of resale competition. MCI objected to BellSouth's proposal regarding MultiServ by letter dated November 22, 1995. MCI asked that the Commission resolve that specific objection, as well as the potential for other problems that could arise by sheltering grandfathered services, by ruling in MCI's favor on this issue.

2. Contract Service Arrangements ("CSAs"). A contract service arrangement is a retail service that has been priced pursuant to a contract with a customer rather than tariff. MCI argued

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that if BellSouth were permitted to preclude the resale of CSAs, it would be able to use such contracts to provide customers with differential pricing that it knows its competitors could not meet. MCI was concerned that this would enable BellSouth to avoid its obligation under the Act to make all retail services available for resale, and constitute an opportunity for anticompetitive practices.

3. Promotions. BellSouth objected to providing promotions for resale on the ground that a promotion is not a separate retail service, but simply a temporary pricing discount for the underlying retail service. The FCC, in an unstayed portion of its Rules, held that all promotions must be available for resale, but that the wholesale discount can be applied to the ordinary retail rate (rather than the promotional rate) if the promotion is for less than 90 days and the LEC does not use successive promotions to avoid the wholesale rate obligation. 61 Fed. Reg. 45, 476 (1996) (to be codified at 47 C.F.R. § 51.613(a)(2)). MCI stated it therefore must be permitted to resell promotions of 90 days or less at the promotional price, although it is not entitled to receive a further discount off the promotional price. MCI acknowledged that allowing such resale would be difficult to enforce, but stated it is the only way effectively to deter abuse of a "promotional restriction."

4. LinkUp and Lifeline. LinkUp and Lifeline are subsidized programs designed to assist low-income residential customers. It is entirely appropriate to place a limitation which restricts the resale of these services to customers who would be eligible to obtain the service directly from BellSouth. However, MCI argued, it would be inappropriate to prohibit their resale. BellSouth will continue to receive any subsidy funds associated with the offering of these services for resale.

5. 911/E911 and N11 Services. BellSouth took the position that 911/E911 and N11 services are not "retail services" because they are offered to a limited class of customers --

governmental bodies and information service providers. According to MCI, BellSouth misinterpreted the Act, which permits resale of any service offered at retail to subscribers who are not telecommunications carriers. N11 and 911/E911 services are offered at retail, and the governmental bodies and information service providers to whom they are offered are not telecommunications carriers. While the Commission may properly restrict the resale of these services to these same categories of customers, there is no basis in the Act to prohibit their resale and the Commission should refuse to do so.

b. <u>BellSouth Position</u>

BellSouth stated that certain options or service offerings which are not retail services, or which have other special characteristics, should be excluded from resale. Contract Service Arrangements ("CSAs") are not tariffed offerings, thus BellSouth argued for that reason and other reasons, CSAs should be excluded from resale. In addition, argued BellSouth, Obsoleted/Grandfathered services are no longer available for sale to, or transfer between, end users, nor should they be transferable between providers.

BellSouth argued that promotions are not retail services and should be restricted from resale. In most instances, they are simply limited-time waivers of nonrecurring charges. BellSouth argued that it would be illogical for BellSouth to run promotions to attract customers, only to be required to give MCI the same limited-time waiver for nonrecurring charges, in addition to the already discounted wholesale monthly recurring rate, so that MCI can attract customers. BellSouth pointed out that the FCC Order agrees with BellSouth's position by allowing promotions used for 90 days or less (not in a continuous manner) to be restricted from resale.

LinkUp and Lifeline are subsidy programs designed to assist low-income residential customers by providing a monthly credit on recurring charges and a discount on nonrecurring charges for basic telephone service. BellSouth asserted that if MCI or any other competitor wishes to provide similar programs through resale, they should be required to purchase BellSouth's standard basic residence service, resell it at an appropriate rate, and apply for and receive certification from the appropriate agency to receive whatever funds may be available to assist in its subsidy program.

BellSouth contended that N11 services, including 911 and E911, are not retail services provided to end users. BellSouth provides N11 services to other companies or government entities who in turn provide the actual service to end user customers. Thus, BellSouth stated that it should not be required to offer these services for resale.

c. Commission Decision

The Act provides that each incumbent LEC has the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers (§ 251(c)(4)(A)). The FCC rules provide that when an incumbent LEC makes a service available only to a limited group of customers that have purchased the service in the past, the incumbent LEC must also make the service available at wholesale rates to requesting carriers to offer on a resale basis to the same limited group of customers that have purchased the service in the past (47 C.F.R. §51.615). The Commission finds and concludes that grandfathered services shall be offered for resale. Since these services are no longer available to all customers, MCI shall only be allowed to resell the grandfathered services to subscribers who have already been grandfathered. These services may not be resold to a different group or a new group of subscribers.

The Commission finds that the benefits of competition should be available to all customers; therefore, Lifeline and LinkUp services shall be made available for resale. MCI may offer LinkUp/Lifeline services only to customers who meet the criteria currently applied to subscribers of these services. MCI shall discount the LinkUp/Lifeline services by at least the same percentage as now provided by BellSouth. MCI shall comply with all aspects of the FCC's and Georgia Public Service Commission's Orders which implement LinkUp/Lifeline programs.

The Commission finds that BellSouth provides 911/E911 and N11 services to customers who are not telecommunications carriers and therefore, according to provisions of the Act, must offer them for resale. Specifically, 911/E911 are valuable services to the public; therefore the Commission encourages both MCI and governmental officials responsible for selecting the providers of such services to maintain the integrity of these services.

In addition, State-specific discount plans shall be made available for resale.

The Commission finds that Contract Service Arrangements (CSAs) by definition are in lieu of existing tariff offerings and in most cases priced below standard tariff rates. Rates, charges, terms and individual regulations, if applicable for CSAs, are developed on an individual case basis and include all relevant cost, and should include at least some margin for contribution. Commonly the CSA is developed for a high-volume customer so the discounts from standard tariff rates are in consideration of the higher volumes. The FCC, in its First Report and Order released August 8, 1996, concluded that if a service is sold to end users it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The FCC further concluded, however, that the avoidable cost for a service with volume discounts may be different from one not subject to volume discounts (FCC Order ¶ 951). This Commission finds that making CSAs available for resale

using the standard wholesale discount (which is discussed under Issue No. 5 in this arbitration) could potentially create an unfair competitive advantage for resellers and force BellSouth to offer services at wholesale prices that may not cover their underlying costs. The Commission finds that as to CSAs, BellSouth has made a showing sufficient to meet the FCC rules (47 C.F.R. § 51.613(2)(b)) that a restriction is reasonable and nondiscriminatory.

MCI has been granted a Certificate of Authority to provide local exchange services through resale and utilizing its own facilities. In addition, MCI may purchase unbundled network elements from BellSouth. MCI may offer service to a prospective customer utilizing resold BellSouth services, unbundled network elements, and its own facilities. The Commission finds that these opportunities will allow MCI to offer competitive alternatives to customers currently served under CSAs. The Commission finds that CSAs shall be made available for resale at the same rates, terms and conditions offered to BellSouth's end users. Given the concerns expressed regarding pricing, the Commission rules that the wholesale discount shall not apply to resold CSAs. The Commission further rules that to discourage BellSouth from engaging in anti-competitive behavior, BellSouth shall file with the Commission all CSAs entered into after the effective date of this Order. The Commission shall review these filings to insure that the rates, terms and conditions are nondiscriminatory, just and reasonable, and in the public interest.

The FCC rules provide that short-term promotions, which are those offered for 90 days or less, should not be offered at a discount to resellers (47 C.F.R. § 51.613(a)(2)). The Commission rules that the FCC rules on this point shall apply to resale of BellSouth's promotions. Thus the Commission also rules that long-term promotions, which are those offered for more than 90 days, shall be made available for resale at the promotional rate minus the wholesale discount. BellSouth

shall not attempt to circumvent this decision by offering a consecutive series of promotions which exceed 90 days, which are more appropriately tariffed items as opposed to promotions. In addition, MCI shall only offer a promotional rate obtained from BellSouth to customers who would qualify for the promotion if they received it directly from BellSouth.

5. Issue 5: What Is the Appropriate Wholesale Price for Services Provided for Resale?

a. MCI Position

(1) Wholesale Discount

MCI witness Darnell presented testimony and a study showing that the appropriate discount should be 23.5% for all services. (MCI Exhibits 8, 9 and 10.) Mr. Darnell also acknowledged that such studies are not exact sciences, and that the Commission's decision on this issue in Docket No. 6352-U is reasonable and consistent with the Act and MCI's position. (Tr. 547.) MCI requested that in this arbitration, the Commission make permanent the discounts it adopted in Docket No. 6352-U (20.3% for residence service and 17.3% for business services.). MCI argued without a permanent rate, a would-be competitor will be unable to plan effectively.

Section 252(d)(3) of the Act requires wholesale rates to be based on the retail rates for the service less costs that are avoided by BellSouth as a result of offering the service on a wholesale basis. MCI asserted that the purpose of calculating the wholesale rates in this manner is to quantify, and deduct, costs of BellSouth that are not incurred in the provision of service at wholesale. In order to determine the appropriate wholesale rates, MCI stated that all -- not just part -- of BellSouth's retailing costs must be deducted from the retail rates. The fundamental feature of the avoided cost calculation is that it determines and excludes the total amount of BellSouth's retailing costs in

calculating the wholesale discount. Thus the wholesale price would reflect only those costs that are incurred in the provision of the service at wholesale.

MCI asked the Commission to affirm its determination of wholesale rates for resold services by calculating the incumbent ILEC's avoided costs, *see* Sections 251(c)(4) and 252(d)(3), by accepting a cost study that complies with the standards adopted by the FCC. MCI stated that doing so would follow the Commission's precedent in Docket No. 6352-U.[17] MCI asked the Commission to repeat its rejection of BellSouth's arguments regarding the wholesale discount level. As the FCC also recognized, avoided costs must be defined as those costs that an incumbent LEC would no longer incur if it were to cease providing retail service and instead provide its service only through resellers. (*See* FCC Order ¶ 911.)

(2) <u>**BellSouth's Tariff Restrictions**</u>

MCI acknowledged that resale is not absolutely unrestricted, and that certain cross-class selling restrictions are appropriate, in particular those which limit resale of grandfathered services, residential services, and Lifeline/LinkUp services to end users who are eligible to purchase such services directly from BellSouth. (Tr. 520.) However, MCI criticized as "extreme" BellSouth's request that any existing tariff limitations also be applied to the resale of services. (Tr. 729-30.) MCI stated that the FCC Order (at ¶ 939) specifically rejected this contention:

> We conclude that resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not

[17] Order, *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms & Conditions and the Initial Unbundling of Services*, Docket No. 6352-U (June 11, 1996). This Order has been upheld following appeal to the Fulton County Superior Court. *BellSouth Telecommunications, Inc. v. Georgia Public Service Commission*, Civil Action No. E-49835 (order issued October 8, 1996).

> limited to those found in the resale agreement. They include limitations contained in the incumbent LEC's underlying tariff.

This places the burden of proof on the incumbent LEC to show any resale restrictions are (1) reasonable and (2) narrowly tailored. MCI asserted that with one exception -- volume discounts for Saver Service -- BellSouth failed even to specifically identify, let alone justify, any tariff limitations which BellSouth believes must be continued. MCI concluded that BellSouth failed to show that its proposed restrictions are "narrowly tailored," and otherwise failed to rebut the FCC's presumption that such restrictions are unreasonable.

With respect to Saver Service, BellSouth contended that the pricing of the service might be affected if the service could be used by multiple end users and the usage aggregated. (Tr. 728.) BellSouth therefore suggested, in effect, that resale of Saver Service should be limited to situations in which a reseller's end user meets the volume requirements in BellSouth's tariff. MCI argued that this position flies in the face of the FCC Order, which held (at ¶ 953) that:

> With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in the aggregate, under the relevant tariff, meets the minimal level of demand.

MCI also argued that BellSouth's position is totally at odds with the practice in the interexchange arena, where many resellers make a business of purchasing a volume-discounted service from AT&T or MCI and reselling it to a collection of end users, none of whom could individually qualify for the volume discount. Thus MCI argued that BellSouth shall not be permitted to apply any tariff limitations beyond appropriate cross-class restrictions specifically justified to and approved by this Commission.

(3) Notice of Retail Service Changes

MCI also requested that BellSouth provide notice of changes to its retail services at least 45 days prior to the effective date of the change, or concurrent with BellSouth's internal notification process for such changes, whichever is earlier. The proposed Interconnection Agreement that is admitted into evidence in this case contains this MCI position (MCI Exhibit 3, Appendix VIII, §1.2.1, page VIII-4).) MCI stated that unless it receives such notification, it will be unable to notify its customers and customer service personnel of such changes in a timely manner.

MCI protested that BellSouth's proposal to give notice of such changes through the tariff filing process, even if such changes are known to BellSouth at an earlier date, will yield BellSouth a competitive advantage with too strong an opportunity to abuse its monopoly position. MCI did agree that the Commission should protect BellSouth from liability for normal changes in business plans which occur after it has provided MCI with notice of an upcoming retail service change, and that the Commission should recognize this potential in considering any disputes it may hear relating to this issue.

b. BellSouth Position

(1) Wholesale Discount

BellSouth recommended that the Commission adopt its calculation of a 13% discount for residential services and 10.6% discount for business services. BellSouth's principal disagreement with MCI (and with the Commission's previous decision in Docket No. 6352-U) centers on its view that the word "avoided" in Section 252(d)(3) should not be read to mean "costs that reasonably can be avoided when an incumbent LEC provides a service for resale," as the FCC held (FCC Rules, § 51.609(b) (emphasis added)). BellSouth believes that FCC's phrase "can be avoided" means merely

"avoidable," and that Congress' decision to use the word "avoided" means the discount may only address costs that are actually avoided.

Although BellSouth has consistently maintained that the FCC turned the wholesale pricing standard on its head, BellSouth submitted through Mr. Reid's testimony both a wholesale discount calculated according to its view of the Act (Exhibit WSR-1) and one following the FCC's methodology (Exhibit WSR-3). BellSouth argued that since the Eighth Circuit stayed the portions of the FCC's Order and Rules concerning the wholesale discount, the Commission can and should adopt an actually-avoided cost standard and endorse Mr. Reid's Exhibit WSR-1 -- which showed discounts of 13% for residential services, and 10.6% for business services. (Tr. 171-172 & BellSouth Brief at 27-29.)

(2) <u>BellSouth's Tariff Restrictions</u>

BellSouth stated that CLECs can use formal complaint proceedings to address and remedy any "abuses" they fear from resale restrictions, and asked the Commission to allow it to apply any use or user restriction or term or condition found in the relevant tariff of a service being resold, when it resells that service to wholesale customers. BellSouth asserted that this is consistent with the Act's prohibition at Section 251(c)(4)(B), which forbids incumbent LECs from imposing unreasonable or discriminatory conditions on the resale of their telecommunications services.

As expressed by BellSouth witness Mr. Scheye, the terms and conditions under which BellSouth provides its retail services are, like the rates for those services, an integral part of those services. (Tr. 728-30.) The conditions BellSouth seeks to impose on MCI are the ones imposed on BellSouth's own retail customers in tariffs that have been approved by this Commission. Consequently, those restrictions have already been determined reasonable, and allowing resellers to

offer the same service capabilities without the terms and conditions inherent thereto would discriminate against BellSouth.

On a specific point regarding resale of residential services (Tr. 781), BellSouth stated that states may prohibit resellers from reselling residential services to customers ineligible to subscribe to such services from the incumbent LEC. (Tr. 763-64, & FCC Order ¶ 962.) Thus, BellSouth argued, this cross-class restriction is not limited only to flat rate services.

BellSouth concluded by asking the Commission to allow it to apply any use or user restriction or term or condition found in the relevant tariff of the service being resold when it resells that service to wholesale customers. BellSouth also asked the Commission to adopt the interLATA joint-marketing restriction contained in the Act (Section 271(e)(1)).

(3) <u>Notice of Retail Service Changes</u>

BellSouth stated that it will provide scheduled notices to MCI and all other carriers concerning network changes that can impact interconnection or network unbundling arrangements. Further, BellSouth stated, regularly scheduled joint engineering meetings coupled with typical tariff notification for retail and resold services should provide adequate time for MCI to make necessary changes.

c. <u>Commission Decision</u>

(1) <u>Wholesale Discount</u>

Section 252(d)(3) of the Act provides:

> (d) PRICING STANDARDS.--
> (3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.-- For purposes of section 251(c)(4), a State commission shall determine the wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion

> thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

In the Commission's Order in Docket No. 6352-U (*Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Conditions and the Initial Unbundling of Services*), the Commission adopted wholesale discounts applicable to BellSouth of 20.3% for residential services and 17.3% for business services. The Commission further ordered that these discount levels shall remain in effect for a 12-month period effective June 15, 1996. At the end of this 12-month period, the Commission shall conduct a review to determine if a need exists to modify these initial discount levels. This arbitration is not the vehicle for such a review.

The Commission finds no factual or legal reason to alter its previous decision in Docket No. 6352-U in this arbitration. The results reached in that docket are appropriate, given the evidence in this record, and this Commission's interpretation of the wholesale pricing standard in Section 252(d)(3). Thus the Commission rules that the wholesale discounts of 20.3% for residential services and 17.3% for business services shall apply for this arbitration proceeding. The Commission further finds that it is appropriate to affirm and adopt the effective period of these discount levels and the review requirement established in Docket No. 6352-U.

(2) <u>BellSouth's Tariff Restrictions</u>

The FCC rules explicitly prohibit cross-class selling (47 C.F.R. § 51-613(a)(1)). They also provide that an incumbent LEC may impose additional restrictions only if it proves to the state commission that the restriction is reasonable and non-discriminatory (47 C.F.R. § 51.613(b)).

This Commission rules that MCI shall resell services in compliance with the applicable terms and conditions of offering a service currently contained within BellSouth's existing retail tariff. Any

terms, conditions and limitations contained within BellSouth's tariff must be reasonable and non-discriminatory. MCI may petition the Commission to review certain restrictions if they find them not to meet the aforementioned standard. Therefore, the Commission will not prejudge any such petition by explicitly giving binding authorization at this time for BellSouth to apply any and all use or user restrictions or terms or conditions found in its tariffs, in the resale environment.

The Commission also adopts the interLATA joint marketing restriction contained in the Act at Section 271(e)(1).

(3) Notice of Retail Service Changes

The Commission finds that the part of MCI's request which sought notification at the same time BellSouth gives internal notification should be adopted. The Commission finds that in the AT&T-BellSouth arbitration (Docket No. 6801-U), BellSouth agreed to provide to AT&T notices of new services and changes to existing services at the same time it notifies its employees internally. AT&T had asked in that arbitration that, in accordance with the parties' agreement, the Commission order that BellSouth provide notice to its wholesale customers of changes to BellSouth's services at the same time it notifies its employees. The Commission finds that it is appropriate to affirm and adopt this same notice requirement in this arbitration proceeding.

MCI did recognize that BellSouth would have an appropriate concern that BellSouth should not be liable to MCI in the event that BellSouth notified MCI in good faith of a change but subsequently abandoned the change. Therefore, MCI agreed that the Commission should protect BellSouth from liability for normal changes in business plans which occur after it has provided MCI with notice of an upcoming retail service change, and that the Commission should recognize this potential in considering any disputes it may hear relating to this issue.

6. Issue 6: To What Extent, If Any, Must BellSouth Provide "Branding" of Services Provided to End Users on Behalf of MCI?

a. MCI Position

MCI stated that branding is technically feasible, and is necessary to enable a reseller to establish its own identity in the market. According to MCI, in a resale environment branding of operator services and directory assistance calls is essential to enable the reseller to establish an identity in the marketplace, to attempt to differentiate its services from those of the incumbent, and to avoid customer confusion. Customer confusion will be significantly diminished if the customer does not perceive that resold services are actually provided by another carrier. (Tr. 521.) FCC Rule § 51.613(c) recognizes the importance of branding in the resale environment, and requires that such branding be provided upon request of the reseller, except in certain limited circumstances:

> (c) Branding. When operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale.
>
> (1) An incumbent LEC may impose such a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests.

MCI's position with regard to branding was straightforward: the brand name is important in a competitive industry. On cross-examination, BellSouth witness Scheye agreed that brand name was important to BellSouth. (Tr. 815-16.) Mr. Scheye agreed that brand would be important to other telecommunications companies as well. (Tr. 815.) MCI asked the Commission to find that branding is important to promote competition.

BellSouth's provision of branding in the resale environment depends on its ability to identify an operator service or directory assistance call as having originated from the customer of a particular reseller. This is another aspect of the "selective call routing" capability discussed under Issue No. 1 that is necessary to route directory assistance, operator services, or repair calls to another carrier's platform in an unbundled element environment. As discussed with respect to Issue No. 1, MCI argued that the record shows such selective call routing to be technically feasible. MCI concluded that BellSouth presented no evidence that branding should be denied for any other reason, and asked that BellSouth be ordered to provide unbranding or rebranding according to MCI's request.

FCC Rule § 51.319(c)(1)(I)(C)(2) requires BellSouth to unbundle "any technically feasible customized routing functions" provided by a local switch. MCI has requested that BellSouth provide customized routing to allow calls by MCI's local customers to directory assistance (411), repair service (611), or operator service (0-) to be routed to an appropriate MCI platform.

MCI argued that as in the case of its other refusals to provide requested network elements on an unbundled basis, BellSouth created its own definition of technical feasibility which does not comport with the definition adopted by the FCC. (Tr. 60-61, 65-66.) For example, BellSouth witnesses Milner and Scheye both argue that the use of line class codes to accomplish selective call routing is not technically feasible because there are a limited number of such codes, which would be exhausted at some point if every reseller wanted to use selective routing and every reseller required the same number of line class codes as BellSouth uses today. (Tr. 66.) Yet the evidence shows that many resellers would not elect to use selective call routing, and that those who do are likely to require many fewer line attribute codes (15 to 75) than the approximately 350 in use by BellSouth today. (Tr. 442-43.) Of course, at any point in time there is a limited number of line attribute codes available

-- although Nortel has announced plans to quadruple the number of such codes in its DMS-100 switch in two phases over the next 18-24 months. (Tr. 439-40.) The limitation of the existing resource, however, can be dealt with by taking steps to conserve line attribute usage; by assigning line attributes on a first-come, first-served basis; and by preventing warehousing of codes by either BellSouth or any new entrants. (Tr. 445-46.) There are models for this type of conservation in both the NXX assignment and physical collocation arenas. (Tr. 446.) Such an approach is certainly more reasonable than denying selective routing to any carrier other than BellSouth on the grounds that BellSouth today could not meet the theoretical demands of all carriers. It is also necessary to avoid violating the Act's requirements for nondiscrimination and for dialing parity, and to avoid creating an unnecessary barrier to entry. (Tr. 63-64.)

Further, line class codes are only one of the available methods to implement selective routing. Bell Atlantic-Pennsylvania has agreed to implement selective routing by June 30, 1997, using AIN capabilities. Southern New England Telephone and Southwestern Bell (SBC) have also represented to MCI that such a solution is feasible. (Tr. 377, 475-78.) The fact that another incumbent LEC can use this technology undercuts BellSouth's claim that use of AIN in this application is not technically feasible. If BellSouth needs to undertake some additional development work to employ AIN for this purpose, it could make use of line class codes to provide this functionality for an interim period while such development work is underway. In short, BellSouth's claim that use of AIN in this application is technically infeasible does not ring true.

Finally, although it certainly is not the preferred solution, parity could be achieved by requiring all customers -- MCI and BellSouth's alike -- to dial a 7-digit or 1-800 number for access to BellSouth's repair service. BellSouth does use 7-digit dialing for repair service in some other states,

and Bell Atlantic has agreed to use 1-800 access for repair calls as a means of achieving local dialing parity. (Tr. 64.)

MCI stated that BellSouth appears to agree that when BellSouth employees interact with an MCI customer with respect to a resold service, (1) it is appropriate for the BellSouth employees to identify themselves as providing service on behalf of MCI, and (2) the BellSouth employees should not be permitted to market BellSouth services to the MCI customer. (Tr. 62.)

MCI also requested that BellSouth use leave-behind cards provided by MCI which are branded to identify MCI as the provider of the service. BellSouth initially refused to use such reseller-provided leave-behind materials, but offered instead to have its field personnel write MCI's name in the blank on a generic, BellSouth-provided leave-behind card. MCI argued that there is no technical or operational reason that BellSouth cannot comply with MCI's request. MCI specifically challenged BellSouth's assertions that the use of multiple leave-behind cards would be an administrative burden and would create the risk that a field technician would leave behind the wrong card.

b. BellSouth Position

BellSouth stated that MCI's request should be denied for two reasons. First, as recognized by the FCC Order, "Section 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services." (FCC Order ¶ 877.) BellSouth's retail local exchange service includes access to BellSouth's operator, repair and directory assistance services through these specific dialing arrangements, e.g. 0, 611, and 411.

Further the FCC Order allows BellSouth to avoid the call branding contemplated by MCI by showing it lacks the capability to comply with a branding or unbranding request. Moreover, it is clear

that MCI could easily provide access and branding for its own operator or repair service to create the discrete recognition of the MCI brand, by providing its customers with another designated number to call (i.e. 00, 1+800-XXX-XXXX).

At the hearing, BellSouth witness Scheye offered an alternative position on the operator service issue, whereby a single set of line class codes can be used as an interim measure for all resellers in which all calls from resold end user lines, to the extent that they go to BellSouth's operator, would be unbranded.

BellSouth stated that another aspect of MCI's branding request -- the issue of the format and distribution of a "leave-behind" card -- should be resolved by the Parties and needs no Commission action.

c. <u>Commission Decision</u>

MCI requested that when BellSouth provide services to MCI customers on behalf of MCI, BellSouth must utilize the MCI brand instead of BellSouth's brand. Specifically, MCI requested that BellSouth: (1) brand operator and directory assistance services with the MCI brand where MCI chooses not to require direct routing; (2) advise MCI customers that they are representing MCI; (3) furnish any customer information materials provided by MCI; and (4) refrain from marketing BellSouth directly or indirectly to MCI customers.

The Commission notes that the FCC concluded that operator, call completion and directory assistance services offered by the incumbent LEC should be branded when provided to a competing LEC as part of a service or service package offering (*see* FCC rules at 47 C.F.R. § 51.613(c)). As to selective routing, the Commission affirms its ruling as expressed under Issue No. 1 in this Order.

The Commission finds and concludes that it is technically feasible and appropriate for BellSouth to brand operator services and directory service calls that are initiated from those services resold by MCI. If for any reason, BellSouth finds that this is not possible to implement for MCI, BellSouth shall revert to generic branding for all local exchange service providers, including itself. The Commission further finds and concludes that it technically feasible and appropriate for BellSouth to provide parity in all respects, including leave-behind cards, and to refrain from marketing BellSouth services to MCI customers.

7. Issue 7: Should, and If So on What Time Frame, BellSouth Provide Real-Time Electronic Interfaces for Pre-Ordering, Order Processing, Provisioning and Installation, Maintenance and Trouble Resolution, Billing (Including Customer Usage Data Transfer), and Local Account Maintenance with Respect to Resold Services and Unbundled Network Elements?

a. MCI Position

MCI asked the Commission to direct BellSouth to provide real-time electronic interfaces to MCI as quickly as possible, but in any event by January 1, 1997, as required by the FCC Competition Order. As noted in footnote 21 on page 17 of MCI's Petition, this requirement is slightly different from that originally ordered by this Commission in Docket No. 6352-U. MCI asserted that such interfaces are necessary to permit MCI to offer customer service at least equal in quality to what BellSouth provides to its customers.

The FCC defines "operations support system functions" as an unbundled network element which must be made available "as expeditiously as possible, but, in any event, no later than January 1, 1997." 61 Fed. Reg. 45, 467 (1996) (to be codified at 47 C.F.R. § 51.319(e)). MCI witness Martinez testified extensively on this requirement. (Tr. 96-154.)

BellSouth does not agree that MCI is entitled to have access to customer records during the pre-ordering phase, before orders are actually placed. MCI contended that such access is critical to fair competition. (Tr. 119.) BellSouth has provided no effective interface for MCI to access this critical information. (Tr. 133.) MCI alleged that the lack of ability to check a customer's account data -- with the customer's permission -- will adversely affect MCI's ability to provide competitive service to its customers. To verify orders and avoid rejection by BellSouth, MCI must have accurate information about the details of the customer's account, and such information must be available in a timely manner. Residential and small business sales generally take place during the course of a single telephone call, in which all sales order and pre-ordering activities occur. (Tr. 117.) Unless MCI's salespeople have on-line, real-time access at that point to the customer's service records, MCI will not be able to quote accurately prices for service comparable to what the customer currently receives, or be able to place accurately an order to replicate the customer's existing service. MCI contended that if a new provider does not have access to the information necessary to take and process the customer's order in an error-free manner, the customer will perceive this as the fault of the new provider.

MCI recognized that there are customer privacy implications relating to access to BellSouth's customer service records in the pre-ordering situation. MCI agreed to provide a blanket letter of authorization to BellSouth which represents that MCI will access such information only with the customer's permission, and MCI would support deployment of a system which prohibits "roaming" through customer records. MCI stated, however, that while Section 222(c)(1) of the Act requires the customer's approval or authorization before customer information is disclosed, there is no requirement that authorization be in writing.

BellSouth proposed to use electronic data interchange (EDI) on an interim basis for pre-ordering and the other interfaces required to support local service, but this method of data interchange is neither real-time nor interactive. These interim measures still involve a manual element -- BellSouth technicians will take information transmitted electronically by MCI and use it to manually input orders into BellSouth's service order system. Thus, they create the opportunity for abuse by BellSouth and hinder the abilities of new entrants. For those reasons, MCI asked the Commission to reject BellSouth's proposal in favor of that espoused by MCI witness Martinez.

In the case of service trouble reporting, the lack of real-time, interactive electronic interfaces would adversely affect the timeliness of repairs. MCI would have to place telephone calls to BellSouth to report customer trouble. In contrast, when electronic bonding for repair was implemented in the long-distance access service arena, MCI saw a dramatic decrease in repair times. The issue of service order processing and provisioning is currently before the industry Order and Billing Forum (OBF), which has published the initial draft of the Local Service Ordering Guideline (LSOG) and the Local Service Request (LSR)/Industry Support Interface (ISI) for ordering all unbundled and resold local services. Many issues remain to be resolved, however, so it is apparent that non-interactive, non-real-time interfaces will continue to be in place for an interim period of time.

MCI pointed out that BellSouth has no incentive to develop these interfaces on its own. MCI stated that only when state commissions require BellSouth to develop a realistic time table for system deployment, as this Commission did in Docket No. 6352-U, will BellSouth begin to take seriously its obligation to provide access to such systems on a nondiscriminatory basis. MCI pointed to BellSouth's statement that it will ignore industry standards for billing CLECs for wholesale services as a prime example of BellSouth's recalcitrance regarding development of appropriate interfaces. (Tr.

1237; MCI Exhibit 11.) MCI asked that BellSouth be ordered to accept the OBF's conclusions on these issues.

The costs of implementing electronic bonding have not been identified. MCI argued that there will be shared benefits to such interfaces, however, since BellSouth will be able to eliminate costly, manual processes that are required in the absence of electronic bonding. Therefore MCI asked that each party bear its own costs of implementing the necessary interfaces. Section 251(c)(3) of the Act requires access to operations support systems to be provided on terms and conditions that are just, reasonable, and nondiscriminatory. MCI argued that all parties have the obligation to develop a competitive local market, and that the statutory standard will not be met if MCI and the other new entrants are required to pay more than their own costs. MCI stated that requiring new entrants to pay all of the costs for BellSouth systems that will make BellSouth a more efficient provider of wholesale services would place a huge financial burden on the new entrants, would unduly favor BellSouth, and would not be competitively neutral. Establishing a system in which each party bears its own costs would not only reflect the sharing of the benefits, MCI argued, but would also provide BellSouth with the incentive to keep the systems development expense reasonable -- an incentive it lacks if it can look to its competitors to underwrite all those costs.

b. BellSouth Position

BellSouth witness Ms. Calhoun testified at length regarding BellSouth's efforts to develop operational interfaces, processes and procedures for both resellers and facilities-based competitors. (Tr. 1120-1245.) BellSouth's efforts include developing extensive electronic interfaces for the functions of pre-ordering, ordering, provisioning, and trouble reporting and billing -- the same function previously addressed by this Commission for resale in Docket No. 6352-U and now required

by the FCC. BellSouth stated that MCI's criticisms are simply unfounded, and thus BellSouth asked the Commission to find that the electronic interfaces and implementation schedule described in Ms. Calhoun's testimony are appropriate for competing LECs' use.

With respect to the pre-ordering phase, BellSouth noted that each customer's monthly bill provides a detailed listing of all the services and features to which the customer subscribes. Therefore, the information MCI seeks is available directly from each customer. BellSouth stated it has made arrangements to accommodate customers who are unable to locate their bill. For example BellSouth will accept three-way calls from the competing LEC, and with the customer's permission will read the list of that customer's services from its records so the competing LEC can conclude its transaction during a single contact with the customer. BellSouth also will fax a printed copy of the customer service record with the customer's permission. In addition, BellSouth has implemented a convenient "switch-as-is" process, so that the customer can switch without being required to remember each and every service. BellSouth asserted that it continues to search for an electronic means of securing customer service records, but has been unable to find a reliable method as yet.

c. Commission Decision

MCI requested that BellSouth provide electronic interfaces that are capable of providing real-time, interactive access to BellSouth's operational support systems in order to perform the following functions: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; and (5) billing. The Commission finds that MCI's request is completely consistent with the FCC regulations, which provide that incumbent LECs must provide nondiscriminatory access to their operations support systems (*see* 47 C.F.R. § 51.319(f)(1)). The FCC rules further provide that an incumbent LEC which

does not currently comply with this requirement must do so as expeditiously as possible, but in any event no later than January 1, 1997 (47 C.F.R. § 51.319(f)(2)).

In the Commission's June 11, 1996 Order issued in Docket No. 6352-U, the Commission ordered BellSouth to provide the electronic interfaces that AT&T had requested in that case. Subsequent Commission action in that docket also prescribed an implementation time frame whereby these interfaces shall be made available. Further, in the Supplemental Order issued in Docket No. 6352-U, the Commission concluded that relevant costs incurred by BellSouth to develop these electronic interfaces shall be recovered from the industry utilizing the operational support systems. The Commission further found that any party which did not agree with its assessment of relevant cost could petition the Commission for relief.

The Commission finds that the interfaces developed to date comply with the Commission's previous Orders and therefore are sufficient to meet MCI's interim requirements. The Commission directs MCI and BellSouth to continue to work jointly with the Ordering and Billing Forum ("OBF") to develop standards for long-term electronic interface solutions. The Commission further directs BellSouth to continue to file monthly surveillance reports to update the Commission on the development and implementation of these electronic interfaces.

The Commission finds that the interim solutions proposed by BellSouth for MCI to obtain customer service records are generally appropriate and will provide the necessary protection of customers' privacy. However, BellSouth's proposals for making available customer service records during the pre-ordering phase will place MCI at a competitive disadvantage. The Commission finds that when a prospective customer contacts the CLEC, there is a need for certain information, including the services to which the customer currently subscribes. The methods BellSouth proposed

for transferring such information would put the competing carrier at a competitive disadvantage, in that it would be required to interact non-electronically with the incumbent to obtain the information. The Commission directs that BellSouth expeditiously develop and deploy an on-line electronic means for MCI to receive customer service records, on a restricted basis that will appropriately safeguard customers' privacy. BellSouth shall file monthly reports with the Commission updating the activities undertaken in the development and deployment of this on-line electronic interface, and shall demonstrate to the Commission that it meets MCI's needs but also contains safety provisions or restrictions to make sure that it safeguards customers' privacy in an appropriate manner.

The Consumers' Utility Counsel ("CUC") filed comments voicing concerns about the privacy of consumers' information. Such information is stored in the customer service records, which are the primary subject of these electronic interface issues. The Commission recognizes the CUC's valid concerns, and further directs BellSouth and MCI to communicate and work with the CUC in order to ensure that the arrangements they develop will meet the CUC's privacy concerns related to these matters. The Parties shall show that they have worked with the CUC, and shall show what arrangements they have developed to protect consumers' privacy, when they demonstrate the electronic interface methodology to this Commission.

C. Quality of Service Standards

8. Issue 8: What Are the Appropriate Quality of Service Standards for BellSouth Services Which Are Provided on an Unbundled Network Element Basis or on a Resale Basis, and What Mechanism Is Appropriate to Enforce These Standards?

a. MCI Position

MCI stated that BellSouth is required to provide service quality that is at least equal to what BellSouth provides to itself or its affiliates. In addition, BellSouth should be required to meet a series of specified technical standards and performance measures tailored to the competitive environment

In order to compete with BellSouth, MCI must be able to offer at least the same level of quality that BellSouth provides to its customers. To monitor that performance, MCI asserted that BellSouth must be required to meet objective measures of service quality and to provide periodic reports to MCI on the level of service provided to MCI and to its other customers, including end users. Examples of measurements of quality, and associated reporting requirements, were contained throughout Appendix VII of MCI Exhibit 3. MCI stated that adherence to these standards should be enforced through a system of credits for failures to meet the applicable performance standards. MCI submitted what it contended are appropriate credit provisions Attachment X, MCI Exhibit 3.

b. BellSouth Position

BellSouth proposed that the Parties agree that within 180 days of the approval of their interconnection agreement, they will develop mutually agreeable specific quality measurements concerning ordering, installation and repair items included in this agreement, including but not limited to interconnection facilities, 911/E911 access, provision of requested unbundled elements, and access

to databases. BellSouth stated that the Parties will also develop mutually agreeable incentives for maintaining compliance with the quality measurements. If the Parties cannot reach agreement on the requirements of this section, BellSouth proposed that either Party may seek mediation or relief from the Commission..

c. Commission Decision

The FCC rules provide that the incumbent LEC shall provide interconnection to a competing LEC that is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party (47 C.F.R. § 51.503 (a)(3)). The Commission finds that BellSouth has committed to comply with this provision of the FCC rules. The Commission currently has service quality rules in place with monitoring and complaint procedures. Principally these existing measures govern the relationship between BellSouth and its end users. In the interim, the Commission shall consider these procedures an appropriate means to address most service quality concerns.

The Commission further finds there is a need to establish additional internal quality measurements to govern the interconnection arrangements between BellSouth and MCI. The Commission directs that within 45 days of this Commission's approval of the interconnection agreement, MCI and BellSouth shall develop mutually agreeable specific quality measurements which shall govern the interconnection arrangements between the carriers, and shall submit these requirements to the Commission for approval and implementation. If by that time the Parties cannot reach agreement on these requirements, either Party may seek mediation or other relief from the Commission.

D. Interexchange Carrier Access

9. **Issue 9: At What Level Must BellSouth Price Interexchange Carrier Access in Order to Comply with the Act?**

a. MCI Position

MCI asked the Commission to deny BellSouth's request to apply access charges to new entrants who purchase unbundled switching and use it to provide access services for interstate or intrastate toll traffic. MCI asserted that the Commission has no authority to impose such charges.

MCI premised its argument on Section 252(d)(1) of the Act, which requires that the rates for unbundled network elements be based on cost. Those rates may include a reasonable profit, but MCI argued they may not include any funding for universal service. MCI argued that when a new entrant purchases unbundled elements to provide exchange access, the new entrant is not required to pay federal or state access charges because those charges are not cost-based.

The Commission is currently examining universal service issues in Docket No. 5825-U, and MCI asserted that the Commission should consider all universal service issues in that docket (and in the federal Universal Service proceeding) -- not in this arbitration.

MCI also asserted that under the Act and the FCC's currently effective regulations, a new entrant who purchases unbundled elements may use those facilities, alone or in combination with its own facilities, to provide any telecommunications service, including exchange access service. *See* 47 C.F.R. § 51.309(b); FCC Order ¶ 356. MCI argued that the new entrant, as the "lessor" of the unbundled elements, should be entitled to all revenues generated through the use of those elements, including any access charges that the entrant chooses to impose on interexchange carriers.

MCI did recognize that the FCC created an interim access charge mechanism to allow incumbent LECs temporarily to continue to collect the Carrier Common Line Charge (CCLC) and

75% of the RIC for interstate access minutes which traverse an unbundled switch purchased by a new entrant. *See* 47 C.F.R. § 51.515(b); FCC Order ¶¶ 716-32. A parallel rule also permitted, but did not require, the states to impose a similar interim intrastate access charge. *See* 47 C.F.R. § 51.515(c). These interim access charge rules, however, have been stayed by the Eighth Circuit. Even if this portion of the FCC Rules had not been stayed, MCI argued that the Commission should decline to impose this non-cost-based charge on new entrants, since it would only serve to artificially raise the cost to new entrants and, ultimately, the price paid by consumers for competitive local exchange service.

While the stay is in effect, MCI argued, there is no authority and no basis in the record in this docket for the Commission to impose any interim interstate or intrastate access charge. With respect to interstate access charges, the Commission has no jurisdiction; interstate access charges have been and remain within the exclusive authority of the FCC. With respect to intrastate matters, MCI contended that the Commission is bound by the pricing provisions of the Act, and that those statutory provisions do not permit incumbent LECs to collect any non-cost-based charge for local switching or for any other unbundled network element.

Therefore MCI stated that the price for unbundled local switching should be based on its forward-looking economic cost in accordance with TELRIC principles. The price should not include any additional charge for intrastate switched access minutes that traverse BellSouth's switch. As MCI argued previously, the Act establishes a fully compensatory cost-based pricing standard for unbundled network elements. Those rates may include a reasonable profit, but may not include any funding for universal service, which must be dealt with through a separate mechanism under Section 254 of the Act and comparable provisions of state law.

b. BellSouth Position

BellSouth noted that the access charge provisions of the FCC's Order and rules have been stayed by the Eighth Circuit. Therefore, BellSouth argued, the Commission should reaffirm that when competing LECs such as MCI purchase unbundled switching and use it for access for intrastate and interstate traffic, normal access charges should apply. BellSouth argued that Sections 251 and 252 of the Act do not apply to the price of exchange access, and in general, the FCC's Order changes nothing with regard to the assessment of access charges.

BellSouth stated further that, even if it were appropriate to deal with access charges in any proceeding, the issue of whether universal service requires the reassessment of access charges can only be dealt with adequately in the context of a generic proceeding.

c. Commission Decision

The Commission finds that the FCC has initiated a proposed rulemaking relative to universal service and access charges. The FCC has recently issued its First Report and Order regarding its findings. This Commission finds that while the issues raised have merit, it is premature for the Commission to be able meaningfully to address them in the context of this arbitration proceeding.

Thus the Commission rules at this time that normal access charges will continue to apply when MCI purchases unbundled switching and uses it for either intrastate or interstate toll traffic.

E. Interim Local Number Portability

10. **Issue 10: What Is the Appropriate Cost Recovery Mechanism for Remote Call Forwarding (RCF) Provided to MCI in Connection with Interim Local Number Portability?**

a. MCI Position

MCI asked the Commission to rule that MCI is not bound by its Partial Interconnection Agreement with BellSouth on this issue, but instead is able to elect under section 1.D of that Agreement the treatment prescribed by the FCC. Section 1.D of the Parties' Partial Interconnection Agreement of May 15, 1996 states:

> In the event that BellSouth is required by an FCC or a State Authority decision or order to provide any one or more terms of interconnection or other matters covered by this Agreement that individually differ from any one or more corresponding terms of this Agreement, MCIm may elect to amend this Agreement to reflect all of such differing terms (but not less than all) contained in such decision or order, with effect from the date MCIm makes such election. The other items covered by this Agreement and not covered by such decision or order shall remain unaffected and as to such terms this Agreement shall remain in effect.

MCI argued that this section permits it to amend its agreement to become consistent with the terms of the FCC's First Report and Order in Docket No. 95-199 ("FCC's ILNP Order"). MCI asserted that the FCC's ILNP requires the cost of providing interim local number portability to be recovered on a competitively neutral basis. MCI asserted that the existing cost recovery mechanism in its Partial Interconnection Agreement (which has been approved by this Commission) -- under which the costs are recovered solely from new entrants -- does not comply with the requirements of the FCC's ILNP Order. Thus MCI asked the Commission to recognize that it elects to take the treatment provided in the FCC's ILNP Order, and that pursuant to its Agreement at section 1, paragraphs B and/or D,

MCI is entitled to pursue treatment articulated in the FCC's ILNP Order regardless of the May 15, 1996 Interim Agreement with BellSouth. (Tr. 20-23.)

This led to MCI's further request that the Commission approve a cost recovery mechanism in which each carrier, MCI and BellSouth, bears its own costs of providing interim local number portability. MCI asserted that this would be a "bill and keep" arrangement, as the simplest method of complying with the FCC's ILNP Order that would avoid the time and expense of implementing more complicated cost recovery mechanisms which would be in place for only a short time.

MCI asserted there should be no explicit monthly recurring charge for Remote Call Forwarding ("RCF") used to provide interim local number portability. MCI argued that Section 251(b)(2) of the Act requires BellSouth to provide number portability in accordance with requirements prescribed by the FCC. Section 251(c)(1) of the Act requires BellSouth to negotiate the terms of an agreement to fulfill the duties imposed by Section 251(b). MCI further argued that Section 252(b) of the Act gives MCI the right to arbitrate this as an open issue which has not been resolved by negotiation.

b. <u>BellSouth Position</u>

BellSouth argued that the issue of cost recovery for interim number portability is included in the Partial Interconnection Agreement and, as such, should not be subject to arbitration. The Partial Agreement contains rates for interim number portability. To the extent the issue has been impacted by the FCC Order. BellSouth contended, arbitration is not the forum for resolution of this issue because its resolution can affect many parties beyond those in this arbitration.

BellSouth argued that MCI's request for arbitration of charges for Remote Call Forwarding (RCF) used for Interim Local Number Portability (ILNP) runs counter to the Parties' Partial

Interconnection Agreement. BellSouth argued that MCI cannot invoke Sections 1.B and 1.D of the Agreement in order to elect to amend the Agreement to include the new terms of the FCC Order, because the FCC's ILNP Order has not become "final and effective." (BellSouth Reply Brief at 2.) Thus BellSouth asked the Commission to find that this issue has been resolved, and is included in a voluntarily negotiated interconnection agreement that has been approved by this Commission under Section 252 of the Act.

c. Commission Decision

The FCC's Rules adopted by the FCC's First Report and Order in Docket No. 95-199 (FCC's ILNP Order) provide that all LECs shall provide transitional measures, which may consist of Remote Call Forwarding, Flexible Direct Inward Dialing, or any other comparable and technically feasible method, as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier, until such time as the LEC implements a long-term method for number portability in that area (47 C.F.R. § 52.7). The FCC's Rules further provide that any cost recovery mechanism for transitional measures for number portability adopted by a state commission must not: (1) give one telecommunications carrier an appreciable, incremental cost advantage over another telecommunications carrier, when competing for a specific subscriber; or (2) have a disparate effect on the ability of competing telecommunications carriers to earn a normal return on their investment (47 C.F.R. § 52.9).

The Commission finds that BellSouth has filed several negotiated interconnection agreements which reflect terms that BellSouth has agreed to with other competing LECs for the provision of interim number portability measures and the associated cost recovery mechanism. The Commission finds that these negotiated interconnection agreements reflect terms that provide for recurring

monthly charges and nonrecurring charges for the establishment of interim number portability measures. The Commission finds that the Partial Interconnection Agreement between BellSouth and MCI filed on May 14, 1996 (and subsequently approved by this Commission) contains similar terms for the provision of interim number portability and an associated cost recovery mechanism. The Commission further finds that this Partial Agreement contains a provision that requires by no later than March 31, 1997, BellSouth will make a revised cost study for remote call forwarding available for review by MCI under an appropriate confidentiality agreement. BellSouth is to negotiate price reductions for remote call forwarding based on the results of such cost study, and if any such reduction is appropriate, it shall be effective 30 days after the date of such cost study.

The Commission also finds that it has issued a Procedural and Scheduling Order in Docket No. 5840-U (Local Telephone Number Portability Under Section 2 of the Telecommunications Competition and Development Act of 1995) which provides for the development of an appropriate cost recovery mechanism, which complies with the FCC's Rules for the implementation of local telephone number portability.

The Commission rules that it would be premature to address this matter in this arbitration, which relates only to MCI and BellSouth, rather than in Docket No. 5840-U. In the interim, MCI and BellSouth shall adhere to the terms agreed to in their Partial Interconnection Agreement which the Commission previously has approved.

F. Other Technical, Operational and Administrative Issues

11. Issue 11: What Other Technical, Operational, and Administrative Provisions Are Required? This Issue Includes Information on Service Charges, PIC Charges for MCI Customers, Rights-Of-Way, Poles, Ducts and Conduits, Bill Format for Unbundled Network Elements, Engineering Records for Unbundled Facilities, Directories, Dialing Parity, Access to Telephone Numbers and General Terms and Conditions of the Agreement.

a. MCI Position

(1) Dark Fiber

From an engineering perspective, MCI stated, dark fiber is simply another level in the transmission hierarchy and is a network element which must be unbundled upon request. (Tr. 417.) Like any other unbundled element, the price for dark fiber should be based on its forward-looking economic cost in accordance with TELRIC principles. Dark fiber refers to fiber optic transmission facilities which have been installed in the BellSouth network, but which have not yet been equipped with the electronic equipment necessary to transmit signals through the fiber. Id. Dark fiber is necessary for MCI to expand the reach of its network using electronics that comport with its network architecture. Id. MCI argued that it does not make sense and would be inefficient to require MCI to purchase transport services (i.e. "lit" fiber) from BellSouth when MCI could purchase the spare, unlit facilities and match them with MCI's own, more efficient electronic technologies. (Tr. 418.)

Section 251(c)(3) of the Act requires BellSouth to provide "nondiscriminatory access to network elements on an unbundled basis." The Act defines network element to mean "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(45). MCI argued that BellSouth's position that since dark fiber has never been activated, it is not "used in the provision of a telecommunications service" and is not subject to the unbundling requirement of the

Act (Tr. 591), rests on an overly narrow reading of the Act. Dark fiber has been deployed by BellSouth to provide future capacity for the provision of telecommunications services. In this regard, MCI stated, it is similar to unused space in a central office (which is available for future growth or for physical collocation by third parties) or to unused line class codes in a switch. Because fiber is deployed with multiple strands within a single cable sheath, dark fiber commonly coexists in the same cable sheath with "lit" fiber. MCI argued that labeling one strand a "network element" and another strand "not a network element" is nothing more than another attempt by BellSouth to create barriers to competitive entry.

(2) Access to Poles, Ducts, Conduits, and Rights-of-Way

All carriers are entitled to nondiscriminatory access to BellSouth's poles, ducts, conduits and rights-of-way. MCI argued that it would be inconsistent with this nondiscrimination provision for BellSouth to be permitted to reserve such capacity for itself for a period of five years, as suggested by BellSouth. (Tr. 750.)

In MCI Exhibit 3, which was sponsored by MCI witness Martinez, MCI proposed the following procedure for its use of BellSouth's poles, ducts, conduits and rights-of-way:

1. Within 20 business days of a request by MCI to use particular facilities (Request), BellSouth should provide information on the availability and condition of such facilities, including a written confirmation of the availability of such facilities (Confirmation).

2. BellSouth should reserve the requested facilities for MCI for a period beginning on the date of the Request and terminating 90 days after the date of the Confirmation.

3. MCI should elect whether or not to use such facilities during that reservation period. If it decides to use such facilities, MCI should send a written notice of acceptance to BellSouth (Acceptance).

4. MCI should have six months after Acceptance to begin attachment and/or installation of its facilities, and one year after Acceptance to complete such activities.

To ensure nondiscriminatory treatment, similar time frames should be applied to requests by other carriers, including BellSouth, to use such facilities. (Tr. 48-51; MCI Exhibit 3, Attachment VI, §§3.9 to 3.11, page VI-3.)

In addition, in order for MCI to make meaningful use of its right to access BellSouth's poles, conduits and rights-of-way, MCI asked that BellSouth be required to provide MCI with access to detailed engineering records and drawings of poles, ducts, conduits and rights-of-way on two days' notice, and with information not reflected in such records on the location and condition of such facilities within twenty business days of a request by MCI. (Tr. 50; MCI Exhibit 3, Appendix VI, §§3.7 and 3.9, pages VI-2 to VI-3.) To the extent that such records contain any customer proprietary information, the Parties should arrange for protection by an appropriate confidentiality agreement.

(3) PIC Change Requests

Today, a monopoly local service provider such as BellSouth accepts Primary Interexchange Carrier ("PIC") changes directly from its local customer or from an IXC. MCI argued that BellSouth's proposal, to continue to accept PIC changes from an IXC for MCI's local customers who are served by the resale of BellSouth's services, would be inappropriate. Just as the IXC's request today must be submitted to the customer's local service provider, the IXC's request tomorrow should likewise be submitted to the customer's local service provider, in this case MCI. BellSouth does not have a direct relationship with MCI's customer, and MCI argued that BellSouth should not undertake

to make PIC changes affecting that customer except when that request is forwarded to it by MCI. MCI contended that this is the only way to protect against abusive practices.

(4) Customer Records

The Parties also addressed this matter under Issue No. 7. MCI argued that it is entitled to have access to customer records during the pre-ordering phase, before orders are actually placed. MCI argued that the lack of ability to check a customer's account data -- with the customer's permission -- would adversely affect MCI's ability to provide competitive service to its customers. (Tr. 117-18.)

MCI recognized the customer privacy implications of access to BellSouth's customer service records in the pre-ordering situation. (Tr. 140.) MCI agreed to provide a blanket letter of authorization to BellSouth which represents that MCI will access such information only with the customer's permission, and MCI would support deployment of a system which prohibits "roaming" through customer records.

MCI stated that electronic bonding should be the interface of choice for all operations systems, but acknowledged that electronic bonding for all systems may not be realistic in the near term. The industry Electronic Communications Implementation Committee has only recently agreed to review electronic bonding interfaces with respect to local operations systems. The issue of service order processing and provisioning is currently before the industry OBF, which has published the initial draft of the Local Service Ordering Guideline ("LSOG") and the Local Service Request ("LSR")/Industry Support Interface ("ISI") for ordering all unbundled and resold local services. Many issues remain to be resolved, however, so MCI conceded that non-interactive, non-real-time interfaces will continue to be in place for an interim period of time.

(5) Bill Format

Bill format issues were the subject of extensive testimony in this case. MCI stated that the industry OBF has established a Carrier Access Billing (CABS) data format which provides a uniform, nationwide format for the provision of billing information for access services. (Tr. 129.) This format provides an appropriate level of detail for carrier-to-carrier billing, allows a carrier to obtain bills in the same format from all LECs, and ensures that the bills can be audited on a mechanized basis. MCI further stated that in August, 1996, the industry OBF approved specifications for CABS-formatted billing for unbundled network elements and resold services. (Tr. 123.) MCI asserted that the use of CABS-formatted billing in the unbundling and resale environment is necessary to provide MCI with billing information in a usable format.

BellSouth proposed to use CABS-formatted billing for unbundled network elements, but not for resold services. For the latter, it proposed to use a CRIS format, similar to that it provides today to end-use customers. Since CRIS-formatted bills vary from state to state and LEC to LEC, MCI would have to develop and maintain multiple operational systems to deal with a wide variety of billing formats. MCI stated that this would create inefficiencies in the billing process and would impede competition. (Tr. 122.)

MCI did state that BellSouth may still be allowed to use its CRIS billing system to collect the relevant billing information. However, MCI asked that BellSouth be required to translate the output from that system into a CABS format before forwarding it to MCI. Such a translation is technically feasible; NYNEX will be using its CRIS system to produce CABS-formatted billing effective October 1, 1996. (Tr. 130.)

(6) Collocation

MCI asked that it be able to collocate subscriber loop electronics, such as digital loop carrier ("DLC"); to interconnect with other collocators; to interconnect to unbundled dedicated transport obtained from BellSouth; and to collocate via either physical or virtual facilities (Tr. 434.) MCI also asked that the rates for collocation be based on forward-looking economic cost in accordance with TELRIC principles. Section 251(c)(6) of the Act places on BellSouth a duty to provide "on rates, terms, and conditions that are non-discriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements," except that virtual collocation can be provided if the Commission finds that physical collocation is not practical for technical reasons or because of space limitations.

MCI stated that the requirements for collocation for interconnection and access to unbundled network elements are different, and broader, than what was needed in the past for competitive access providers. (Tr. 434.) To ensure that collocation is a viable means of providing interconnection and access to unbundled network elements, MCI requested the Commission to order that:

1. MCI has the right to collocate subscriber loop electronics, such as digital loop carrier, in the central office;

2. MCI has the right to purchase unbundled dedicated transport from BellSouth between the collocation facility and MCI's network;

3. MCI has the right to interconnect with other collocators in the same central office; and

4. MCI has the ability to collocate via either physical or virtual facilities.

(Tr. 434.)

(7) Dialing Parity

MCI stated that its customers should be permitted to dial the same number of digits to make a local telephone call as are dialed by a BellSouth customer, and that call processing times for MCI calls within BellSouth's network must be equivalent to those experienced by BellSouth. (Tr. 25.) Any incremental costs directly relating to the provision of dialing parity should be collected on a competitively neutral basis. (Tr. 30.)

Section 251(b)(3) of the Act imposes on BellSouth "the duty to provide dialing parity to competing providers of telephone exchange service" and "the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays." MCI argued that this section is an independent source of authority for the Commission to require BellSouth to route 0-, 411 and 611 calls to MCI's operator, DA and repair platforms on request.

In addition, MCI argued that the Act's requirement of nondiscriminatory access means that BellSouth must provide competing providers with access that is at least equal in quality to what BellSouth provides itself. For example, call set-up and call processing times for MCI customers on BellSouth's network should be equivalent to those for BellSouth itself, and any dialing delays on BellSouth's network should be no longer than those experienced by BellSouth's customers for identical call types.

b. BellSouth Position

(1) Dark Fiber

BellSouth's view is that unused transmission media is neither an unbundled network element, nor a retail telecommunications service to be resold. To be a retail service it must be currently

available as a tariffed (or comparable) service offering; but dark fiber is not. To be an unbundled network element, BellSouth stated that it must contain some functionalities inherent in BellSouth's network. BellSouth quoted Section 3(a)(45) of the Act (47 U.S.C. 153(a)(45)) which defines a "network element" as "a facility or equipment used in the provision of a telecommunications service." (Emphasis added.) BellSouth argued that dark fiber is, by definition, unused, *i.e.*, it is not a functioning part of the network. If it is not a network element and it is not a retail service, BellSouth argued, there is no other standard under the Act for its provision. MCI should not be able to force BellSouth to sell this unused material as if it were a functioning network element.

(2) Access to Poles, Ducts, Conduits, and Rights-of-Way

BellSouth agreed to give MCI equal and nondiscriminatory access to poles, duct, conduit (excluding maintenance spares), entrance facilities, and rights of way under its control which are not currently in use and not required by BellSouth as a maintenance spare. According to BellSouth, the equal and nondiscriminatory must not include maintenance spares; and further, the terms and conditions of such access must not include the mandatory conveyance of BellSouth's interest in real property involving third parties. (Tr. 888-91.)

A maintenance spare is a place reserved on the pole or in the conduit in which BellSouth can place facilities quickly in response to emergency situations such as cut or destroyed cables. BellSouth stated that reserving a maintenance spare is a standard telecommunications industry practice, and that extensive delays in service restoration will be experienced if BellSouth's maintenance spare is forfeited. (*Id.*)

(3) PIC Change Requests

BellSouth argued that MCI's proposal would place BellSouth in a position of refusing properly processed PIC change requests from its other IXC customers and would needlessly increase the volume of local service requests submitted to them by BellSouth. In addition, BellSouth witness Mr. Scheye contended, this proposal would tend to hinder competition by hindering a customer's ability to choose their preferred IXC. (Tr. 748.)

BellSouth proposes to process PIC changes for all customers of local resold services in precisely the same manner, regardless of whether their carrier is AT&T, MCI, or any other CLEC entitled to equal treatment. Thus, it proposes to use its mechanized CARE process to process PIC changes in a local resale environment. (Tr. 747-48.) BellSouth argued that its position is reasonable and nondiscriminatory, and that nothing in Section 251 imposes on the incumbent LEC a duty to limit, at the reseller's request, the ability of a resold customer to change service providers.

(4) Customer Records

BellSouth objects to providing direct on-line access to customer service records in BellSouth's database, when those customers are still customers of BellSouth (or for that matter, any other reseller), because all of BellSouth's records as well as resellers' records would be contained in the same database. (Tr. 1127-30.) Currently under MCI's proposal, when a customer had given consent for MCI to examine their customer service record, there would be no way to restrict MCI to viewing just that customer's account. MCI would be free to look at and examine all customers' records, which would jeopardize the privacy of all customers. (Id.)

BellSouth cited the FCC's First Report and Order (August 8, 1996) which found that the FCC and the states have the authority to protect the confidentiality of proprietary information. Contrary

to MCI's Brief, BellSouth responded that it does not insist upon receiving "written authorization" from the customer. BellSouth asked that MCI's proposal be rejected, and offered three alternatives to protect customer privacy while allowing MCI reasonable means to obtain the customer service records (CSRs) it needs: (1) three-way calls with the CLEC, the customer, and BellSouth; (2) faxing a printed copy of the customer's service record, with the customer's permission; and (3) a "switch as is" process. (*Id.* & BellSouth Brief, & Reply Brief at 4.)

(5) Bill Format

BellSouth uses two billing systems in connection with its services: CABS (Carrier Access Billing System) and CRIS (Customer Records Information System). MCI requests resale bills in CABS format. BellSouth stated that the FCC Order does not specify what billing system must be used, and that the legal standard by which this issue should be judged is whether refusing to use a new billing system at MCI's request is "unreasonable or discriminatory," in violation of 47 U.S.C. § 251(c)(3).

BellSouth witness Ms. Calhoun testified that there currently is no industry standard requiring such billing, nor is one imminent. (Tr. 1125-27.) Contrary to MCI's claims and its Brief, BellSouth argued, the industry's Ordering and Billing Forum (OBF) did not agree on a mechanized CABS format for resale billing. OBF did agree on the minimum items of information that should appear on a resale bill, but the OBF did not specify a billing system, nor a billing format. The OBF documentation specifically states that a CABS preference statement was not included. (*Id.* & BellSouth Brief, & Reply Brief at 4-5.)

BellSouth argued that its CABS system cannot bill for local exchange services, but that its CRIS system is designed to do exactly that. (*Id.*) BellSouth also argued that other CLECs may

prefer their own unique billing systems, and that Section 251 would not allow BellSouth to accommodate MCI's request to the exclusion of others.

(6) <u>Collocation</u>

On the subject of physical collocation, BellSouth proposed that the Commission adopt the rates, terms and conditions presented by BellSouth witness Mr. Scheye. Bellsouth contended that these rates, terms and conditions are just, reasonable and non-discriminatory.

(7) <u>Dialing Parity</u>

c. <u>Commission Decision</u>

(1) <u>Dark Fiber</u>

MCI has requested that BellSouth provide MCI access to BellSouth's unused transmission media, also known as "dark fiber." The Act defines a network element as a facility or equipment used in the provision of a telecommunications service. The FCC rules state that the incumbent LEC shall provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services (47 C.F.R. § 51.319(d)(2)(ii)).

The Commission finds and concludes that dark fiber is a network element and, as such, BellSouth shall be required to provide MCI access to it. The Commission rules that this decision does not require BellSouth to build out or deploy fiber where it has not yet been installed. Instead, BellSouth shall be required to make available "dark fiber" where it exists in BellSouth's network, both today and as a result of future building or deployment; this reflects the Commission's interpretation of "network element" under the Act.

(2) Access to Poles, Ducts, Conduits, and Rights-of-Way

MCI requested access to right-of-ways, conduits, pole attachments, and any other pathways on terms and conditions equal to that provided by BellSouth to itself or any other party. However, BellSouth proposed to reserve in advance five years of capacity in a given facility. The Commission finds that the FCC's First Report and Order, issued on August 8, 1996, addresses reserving capacity (FCC Order ¶ 1170). The Commission concludes that the Act requires nondiscriminatory treatment of all providers of telecommunications or video services as MCI requested, and does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility right-of-way. The Act further requires that permitting an incumbent LEC to reserve space for local exchange service, for example, to the detriment of a would-be new entrant into the local exchange business, would favor the future needs of the incumbent over the current needs of the new entrant. Section § 224(f)(1) prohibits such discrimination among telecommunications carriers.

The Commission rules that BellSouth shall make available access to its right-of-ways, conduits, and pole attachments on terms and conditions equal to that it provides itself, as MCI requested. The Commission finds that BellSouth's attempt to reserve space for itself based upon a five-year forecast is discriminatory and thus is rejected. However, the Commission will allow BellSouth to reserve space for itself for maintenance spares only, based upon a one-year forecast. This shall be applied equally to all LECs, so that BellSouth shall be required to allow space for any LEC seeking such space for maintenance spares based upon a one-year forecast.

MCI also requested copies of pole and conduit engineering records to facilitate planning its access to these facilities. The Commission finds that the FCC Order sets forth an expectation that BellSouth will make its maps, plats and other relevant data available for inspection and copying

(subject to reasonable conditions to protect proprietary information) when BellSouth receives a legitimate request for access to its facilities or property. The Commission rules that BellSouth shall provide access to its engineering records in a manner consistent with the Act and FCC Order.

(3) PIC Change Requests

MCI requested that it be the contact point for PIC change requests for MCI's local service customers. MCI requested that BellSouth reject any PIC change request from another carrier and notify that carrier to submit the request to MCI. The Commission finds that under existing procedures, BellSouth accepts changes from interexchange carriers ("IXCs") on behalf of the customer of record. The Commission finds that when MCI is a reseller of BellSouth local service for the provision of local service to its end user customers, MCI becomes BellSouth's customer of record for that line. The Commission finds that in these situations, BellSouth shall accept PIC changes from MCI as the customer of record or from other IXCs. The Commission finds that MCI is asking for other than normal treatment which would raise the issue of parity among the IXCs. The Commission finds that implementation of MCI's proposal would hinder a customer's ability to choose their preferred interexchange carrier. The Commission rules that the current procedures for handling PIC changes are appropriate.

(4) Customer Records

The Commission's ruling with respect to MCI access to customer records is contained within its discussion and ruling regarding Issue No. 7.

(5) Bill Format

MCI asked that BellSouth should be required to provide all carrier billing, including billing for resold services, via the Carrier Access Billing System ("CABS"), in the Carrier Access Billing

Format. Because BellSouth's CABS bill has not included the detail associated with resold local exchange lines, BellSouth would be required to redesign the CABS billing system to accommodate MCI's request. The Commission finds that such redesign is technically feasible, and that denying MCI's request for the CABS format billing for resold services would be unreasonable and discriminatory under Section 251(c)(3), especially given the evidence that BellSouth has agreed to provide CABS format billing in other jurisdictions. The parties have agreed in North Carolina that, within 180 days from the effective date of their interconnection agreement there, that BellSouth will have modified its CRIS billing system to allow it to bill for resold services in a CABS billing format.[18] Therefore, this Commission will adopt the same terms in its ruling, and direct that BellSouth shall modify its CRIS billing system to allow it to bill for resold services in a CABS billing format, within 180 days from the effective date of its interconnection agreement with MCI.

The Commission rules that BellSouth shall provide MCI with the same internal quality controls and measurements it provides itself. The Commission also directs MCI and BellSouth to continue to work cooperatively with the OBF.

(6) Collocation

The Commission rules that BellSouth shall provide MCI access to collocation in compliance with 47 C.F.R. § 51.323 of the FCC's Rules. The Commission concludes that this means, among other things, that:

1. MCI has the right to collocate subscriber loop electronics, such as digital loop carrier (DLC), in the central office;

[18] *Joint Negotiations Report*, Docket No. P-141 Sub. 29, North Carolina Utility Commission.

2. MCI has the right to purchase and interconnect to unbundled dedicated transport from BellSouth between the collocation facility and MCI's network;

3. MCI has the right to interconnect with other collocators in the same central office; and

4. MCI has the ability to, and may collocate via either physical or virtual facilities.

The Commission finds that the rates for collocation should be set on an interim basis, subject to true-up using the mechanism employed for interim unbundled element rates. Although the Commission has generally adopted MCI's proposed rates for use as interim rates in this arbitration, and MCI proposed generally that collocation rates be set using a TELRIC methodology, MCI did not submit specific proposed rates for collocation. Therefore the Commission directs that the interim rates for collocation shall be those proposed by BellSouth witness Mr. Scheye, subject to the true-up mechanism and the generic cost study review in Docket No. 7061-U.

(7) Dialing Parity

The Commission finds that Section 251(b)(3) of the Act imposes on BellSouth the duty to provide dialing parity to competing providers of telephone exchange service and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays. The Commission rules that BellSouth shall comply with these provisions of the Act.

The Commission directs BellSouth to provide nondiscriminatory NXX code assignments to all competing LECs on the same basis that such assignments are made to incumbent LECs, including BellSouth, until such time as an independent third-party administrator is selected.

B. Implementation

The Commission rules that BellSouth shall communicate knowledge of any engineering changes associated with BellSouth's network elements, deployment of new technologies, or changes to its retail services to MCI at the same time it notifies its employees internally. The Commission finds that directory issues have been resolved in the Partial Interconnection Agreement and the Commission has withdrawn any related issues from this arbitration.

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state commission. Under Section 252(e)(2), different standards govern approval of agreements (or portions thereof) adopted by negotiation versus agreements (or portions thereof) adopted by arbitration. The Commission has set forth its separate procedure for agreements reached through negotiation, and also has stated its procedure for arbitrated agreements in its Procedural Order in this docket.

The Commission anticipates that this Order will result in the submission of an arbitrated agreement, which must then be approved or rejected applying the standards contained in Section 252(e)(2)(B). The Parties are directed to negotiate a comprehensive agreement that incorporates the Commission's decisions on the issues decided in this proceeding, and file it no later than January 10, 1997. While the Parties are strongly encouraged to reduce all the issues to a mutually acceptable agreement,[19] in the event the Parties are unable to conclude an agreement within that time frame, each Party shall file with the Commission its proposed version of agreement on January 10, 1997. Such

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[19] The Commission recognizes that a Party may disagree with one or more of the Commission's arbitration rulings in this Order, but suggests that under Section 252 of the Act, the appropriate remedy is to work out a mutually acceptable agreement that reflects such rulings and sign it under protest if it wishes to preserve its statutory rights to pursue any such disagreement.

filings must clearly delineate the area(s) of dispute between the Parties regarding contract language. The Commission will then adopt the proposal, or the portions of the competing proposals, which the Commission finds appropriate in order to incorporate its arbitration ruling into a comprehensive arbitrated agreement.

Once the Parties have developed the arbitrated agreement by either process, they shall file an original plus 25 paper copies, and one electronic copy on a PC-compatible 3.5" diskette in Word Perfect 6.1 (or lower) format, with the Commission pursuant to Section 252(e)(1) of the Act. The arbitrated agreement shall clearly state which provisions were resolved by the arbitration ruling, and which provisions were negotiated by the Parties. The Parties shall also cause notice to be published as required by the Commission. Copies of the arbitrated agreement shall also be served upon the Consumers' Utility Counsel and all Participants to the arbitration.

The filing of the arbitrated agreement shall initiate the 30-day review process by the Commission pursuant to Section 252(e) of the Act. During this 30-day review, interested parties may participate or intervene, and may ask the Commission to reject the arbitrated agreement on the basis of the standards enumerated in Section 252(e) of the Act, according to guidelines established by the Commission. Following this review, the Commission must either approve or reject the arbitrated agreement. If the Commission has taken no action within 30 days after the filing of the arbitrated agreement, that agreement shall be deemed approved by operation of law to the extent provided by Section 252(e)(4) of the Act.

The 30-day review by the Commission of the arbitrated agreement shall be the formal Commission process which results in a final Commission decision for the agreement between the

parties, and which affords an opportunity for intervention and hearing upon appropriate grounds under federal and state law.

III. ORDERING PARAGRAPHS

Based upon the evidence of record presented in this arbitration proceeding, and for the reasons set forth in the preceding sections of this Order, the Commission concludes that the disputed issues in this arbitration shall be resolved according to the rulings discussed within the preceding sections of this Order and set forth below.

WHEREFORE, IT IS ORDERED that:

A. The Commission resolves Issue No. 1 by ruling that all the capabilities requested by MCI are network elements or functions, and that BellSouth shall provide each on an unbundled basis, as discussed at greater length previously in this Order. The Commission rules that when BellSouth determines that a mediation device is necessary on any part of the network, BellSouth shall also route its calls in the same manner. The network elements to be unbundled include:

Network Interface Device
Unbundled Loop
Loop Distribution
Loop Concentrator/Multiplexor
Local Switching
Operator Systems (DA Service/911 Service)
Multiplexing/Digital Cross-Connecting Channelization
Dedicated Transport
Common Transport
AIN Capabilities
Signaling Link Transport
Signal Transfer Points
Service Control Points/Databases

B. In addition to the network elements required to be unbundled consistent with 47 C.F.R. § 51.319, the Commission rules in favor of MCI's request in its Petition for additional unbundled network elements as discussed under Issue No. 1. The Commission rules that unbundling of loop distribution is technically feasible, and directs BellSouth to unbundle this element as MCI requested in its Petition. The Commission orders the provisioning of an unbundled loop where the end user is served using an IDLC. The Commission rules that for selective (customized) routing during the interim, it is technically feasible for BellSouth to provide MCI with customized routing utilizing Line Class Codes. AIN appears to be a longer-term solution for direct routing capability; the Commission directs BellSouth and MCI to continue to work with the appropriate industry groups to develop a long-term solution for selective routing.

Where MCI will use a NID-to-NID connection, BellSouth shall provide the patch cord to MCI at a price equal to cost not to exceed $6.00. The Commission rules that MCI may either use any existing capacity on BellSouth's NID, or ground BellSouth's loop and connect directly to BellSouth's NID subject to the following conditions: MCI must assume responsibility and shall bear the burden of properly grounding the loop after disconnection and maintaining same in proper order and safety. MCI shall assume full liability for its actions and for any adverse consequences that could result. NIDs used in business settings which are similar to residential service NIDs shall be subject to the same rule. This Commission will not allow all CLECs to claim a right of direct connection to BellSouth's NID, however, and will make the 47 C.F.R. § 51.319(a) determination of direct NID connection technical feasibility on a case-by-case, CLEC-by-CLEC basis.

C. In accordance with its discussion under Issue No. 2 previously in this Order, the Commission concludes as a matter of law and regulatory policy that the pricing standard of Section 252(d)(3) applies to the *de facto* resale which occurs from rebundling BellSouth network elements to replicate BellSouth retail services, without employing any MCI functionality or capability (other than MCI operator services). Therefore, in the interim, MCI shall be allowed to combine elements in any manner it chooses; however, when MCI recombines unbundled elements to create services identical to BellSouth's retail offerings, the price MCI pays to BellSouth for those rebundled services shall be identical to the price MCI would pay using the resale discount discussed under Issue No. 5 in this arbitration Order; and these *de facto* resold services shall be provided to MCI under the same terms and conditions applicable to resale, including the same application of access charges and the imposition of joint marketing restrictions. In this situation, "identical" means that MCI is not using its own switching or other functionality or capability together with the unbundled elements in order to produce its service. MCI operators services shall not be considered a functionality or capability for this purpose. The Commission shall conduct a generic proceeding to develop appropriate long-term pricing policies regarding rebundling or recombination of unbundled elements.

D. The Commission resolves Issue No. 3 by adopting interim rates to apply between BellSouth and MCI, subject to a true-up mechanism. The Commission adopts $14.22 as the interim rate for all 2-wire unbundled loops, and $22.75 as the interim rate for all 4-wire unbundled loops. For all remaining items, the Commission adopts MCI's proposed rates as interim rates. MCI's proposed rates were contained in MCI witness Mr. Wood's testimony, and his Exhibit DJW-3 (attached as Appendix A and incorporated herein by reference), and in MCI's Petition

Exhibit 3 (incorporated herein by reference and reflected in MCI's Hearing Exhibit 3). Finally, for any items as to which MCI did not propose a rate, the Commission adopts as interim rates BellSouth's proposed rates which were contained in Exhibit RCS-3 attached to BellSouth witness Mr. Scheye's testimony (attached as Appendix B and incorporated herein by reference).

Among the rates which MCI proposed and which are adopted herein as interim rates are the following:

ELEMENT	UNIT COST	
Network Interface Device	per line per month	$ 0.53
End Office Switching		
-Port	per line per month	$ 1.13
-Usage	per minute	$ 0.0016
Signaling Links		
-"A" Link	per link-per month	$ 19.97
-"D" Link	per link-per month	$ 25.25
Signal Transfer Point	per message	$ 0.00005
Signal Control Points/Databases	per message	$ 0.00075
Common Transport (orig. or term.)	per minute per leg	$ 0.00067
Dedicated Transport	per DSO equiv. per	$ 4.38
Tandem Switching	per minute	$ 0.0017

E. All interim rates associated with interconnection, unbundled elements, and access to unbundled elements adopted in this Order shall be subject to true-up according to the following provisions:

1. The interim rates shall be trued-up, either up or down, based on rates determined either by an agreement between the Parties, or by a final order of the Commission (including any final order that is not stayed pending appeal). The Parties shall implement the true-up by comparing the actual volumes and demand for each item, together with the interim rates for

each item, with the final rates determined for each item. Each Party shall keep its own records upon which the true-up can be based, and any final payment from one Party to the other shall be in an amount agreed upon by the Parties based on such records. In the event of any disagreement between the records or the Parties regarding the amount of such true-up, the Parties may submit the matter for resolution by an appropriate forum.

2. The Parties may continue to negotiate toward final rates, but in the event that no such agreement is reached within nine (9) months, either Party may petition the Commission for mediation or arbitration to resolve the disputes and to determine final rates. Alternatively, upon mutual agreement, the parties may submit the matter to commercial arbitration, so long as they file the resulting agreement with the Commission as a "negotiated agreement" under Section 252(e) of the Act.

3. A final order of this Commission that forms the basis of a true-up shall be the final order as to rates for unbundled local loops in the Docket No. 7061-U generic cost study proceeding, or potentially may be a final order in any other Commission proceeding which meets the following criteria:

(a) MCI and BellSouth are entitled to be full parties to the proceeding;

(b) The proceeding shall apply the relevant provisions of the federal Telecommunications Act of 1996, including but not limited to Section 252(d)(1) (which contains pricing standards) and any then-effective implementing rules and regulations; and

(c) The proceeding may include as an issue the geographic deaveraging of unbundled element rates, which deaveraged rates, if any are required by said final order, shall form the basis of any true-up.

4. MCI shall retain its ability under Section 252(I) of the federal Act to obtain any interconnection, service, or network element provided under an agreement approved under Section 252 to which BellSouth is a party, upon the same terms and conditions as those provided in the agreement.

F. The Commission resolves Issue No. 4 as follows:

1. Grandfathered services. Grandfathered services shall be offered for resale; the wholesale discount shall apply. AT&T shall only be allowed to resell the grandfathered services to subscribers who have already been grandfathered. These services may not be resold to a different group or a new group of subscribers.

2. Contract Service Arrangements. CSAs shall be made available for resale at the same rates, terms and conditions offered to BellSouth's end users. However, the wholesale discount shall not apply to resold CSAs. BellSouth shall file with the Commission all CSAs entered into after the effective date of this order. The Commission shall review these filings to insure that the rates, terms and conditions are nondiscriminatory, just and reasonable and in the public interest.

3. Promotions. The Commission adopts the methodology specified in the FCC rules with respect to short-term promotions, *i.e.* promotions offered for less than 90 days (47 C.F.R. § 51.613(a)(2)); thus the wholesale discount shall not apply to short-term promotions. BellSouth shall not offer a consecutive series of short-term promotions which exceed 90 days, which are more appropriately tariffed items as opposed to promotions. Long-term promotions, which are those offered for more than 90 days, shall be made available for resale

at the promotional rate minus the wholesale discount. MCI shall only offer a promotional rate obtained from BellSouth to customers who would qualify for the promotion if they received it directly from BellSouth.

4. LinkUp/Lifeline. LinkUp and Lifeline services shall be made available for resale; the wholesale discount shall apply. MCI may offer LinkUp/Lifeline services only to those customers who meet the criteria currently applied to subscribers of these services. MCI shall discount the LinkUp/Lifeline services by at least the same percentage as now provided by BellSouth. MCI shall comply with all aspects of the FCC's and Georgia Public Service Commission's Orders which implement LinkUp/Lifeline programs.

5. N11/911/E911. BellSouth provides 911/E911 and N11 services to customers who are not telecommunications carriers and therefore must offer them for resale; the wholesale discount shall apply.. Specifically, 911/E911 are valuable services to the public; therefore the Commission encourages both MCI and governmental officials responsible for selecting the providers of such services to maintain the integrity of these services. Additionally, State-specific discount plans shall be made available for resale.

G. The Commission resolves Issue No. 5 as follows:

(1) <u>**Wholesale Discount**</u>

The Commission finds no factual or legal reason to alter its previous decision in Docket No. 6352-U in this arbitration. The results reached in that docket are appropriate, given the evidence in this record, and this Commission's interpretation of the wholesale pricing standard in Section 252(d)(3). Thus the Commission rules that the wholesale discounts of 20.3% for BellSouth residential services and 17.3% for BellSouth business services shall apply for this

arbitration. The Commission further affirms the effective period of these discount levels and the review requirement established in Docket No. 6352-U.

(2) BellSouth's Tariff Restrictions

The Commission rules that MCI shall resell services in compliance with the applicable terms and conditions of offering a service currently contained within BellSouth's existing retail tariff. Any terms, conditions and limitations contained within BellSouth's tariff must be reasonable and non-discriminatory. MCI may petition the Commission to review certain restrictions if they find them not to meet the aforementioned standard. Therefore, the Commission will not prejudge any such petition by explicitly giving binding authorization at this time for BellSouth to apply any and all use or user restrictions or terms or conditions found in its tariffs, for resale purposes. The Commission also adopts the interLATA joint marketing restriction contained in the Act at Section 271(e)(1).

(3) Notice of Retail Service Changes

The Commission directs BellSouth to provide notice to MCI of new services and changes to existing services at the same time BellSouth notifies its employees internally. If this Commission hears any disputes regarding BellSouth giving notice of a change but subsequently abandoning the change, the Commission will not impose liability upon BellSouth if it gives the notice in good faith but subsequently alters its plans as a result of normal changes in business plans.

H. The Commission resolves Issue No. 6 by ruling as follows: It is technically feasible and appropriate to, and BellSouth shall brand operator services and directory service calls that are initiated from those services resold by MCI. If for any reason, BellSouth finds that this is not

possible to implement for MCI, BellSouth shall revert to generic branding for all local exchange service providers, including itself. The Commission further rules that BellSouth shall provide parity in all respects as MCI requested, including leave-behind cards, and refrain from marketing BellSouth services to MCI customers. The Commission rules that BellSouth shall comply with the requirements of the FCC rules at 47 C.F.R. § 51.613(c). As to selective routing, the Commission affirms its ruling expressed under Issue No. 1 in this Order.

I. Issue No. 7 is resolved as follows: MCI requested that BellSouth provide electronic interfaces that are capable of providing real-time, interactive access to BellSouth's operational support systems in order to perform the following functions: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; and (5) billing. The Commission rules that MCI's request is completely consistent with the FCC regulations (47 C.F.R. § 51.319(f)(1)). The FCC Rules further provide that an incumbent LEC which does not currently comply with this requirement must do so as expeditiously as possible, but in any event no later than January 1, 1997 (47 C.F.R. § 51.319(f)(2)).

The Commission affirms its previous Orders in Docket No. 6352-U, including its June 11, 1996 Order and Supplemental Order. The Commission finds that the interfaces developed to date comply with the previous Orders in Docket No. 6352-U and therefore are sufficient to meet MCI's interim requirements. The Commission directs MCI and BellSouth to continue to work jointly with the Ordering and Billing Forum ("OBF") to develop standards for long-term electronic interface solutions. The Commission further directs BellSouth to continue to file monthly surveillance reports to update the Commission on the development and implementation of these electronic interfaces.

The interim solutions proposed by BellSouth for MCI to obtain customer service records are generally appropriate and will provide the necessary protection of customers' privacy; but BellSouth's proposals regarding the pre-ordering phase will place MCI at a competitive disadvantage. The Commission directs that BellSouth expeditiously develop and deploy an on-line electronic means for MCI to receive customer service records, with the information restricted to just the information that MCI needs for pre-ordering, to appropriately protect customers' privacy. BellSouth shall file monthly reports with the Commission updating the activities undertaken in the development and deployment of this on-line electronic interface, and shall demonstrate to the Commission that it meets MCI's needs but also contains safety provisions or restrictions to make sure that it safeguards customers' privacy in an appropriate manner. The Commission recognizes the Consumer Utility Counsel's concerns regarding privacy of customer information, and further directs BellSouth and MCI to communicate and work with the CUC in order to ensure that the arrangements they develop will meet these concerns. The Parties shall show their work with the CUC and the resulting arrangements to safeguard customer privacy when they demonstrate the electronic interface methodology to this Commission.

J. Issue No. 8 is resolved as follows: The Commission finds that BellSouth has committed to comply with the FCC rules that provide that the incumbent LEC shall provide interconnection to a competing LEC that is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party (47 C.F.R. § 51.503 (a)(3)). The Commission currently has service quality rules in place with monitoring and complaint procedures, which principally govern the relationship between BellSouth and its end users.

The Commission considers these an appropriate interim means to address most service quality concerns.

The Commission finds there is a need to establish additional internal quality measurements to govern the interconnection arrangements between BellSouth and MCI. The Commission directs that within 45 days of this Commission's approval of the interconnection agreement, MCI and BellSouth shall develop, and submit to the Commission for approval and implementation, mutually agreeable specific quality measurements which shall govern the interconnection arrangements between the carriers. If by that time the Parties cannot reach agreement on these requirements, either Party may seek mediation or other relief from the Commission.

K. The Commission resolves Issue No. 9 by noting that it is premature for the Commission to be able meaningfully to address the issue in the context of this arbitration proceeding. Thus the Commission rules at this time that normal access charges will continue to apply when MCI purchases unbundled switching and uses it for either intrastate or interstate toll traffic.

L. As to the cost recovery question in Issue No. 10 concerning Remote Call Forwarding used for interim local number portability, the Commission rules that it would be premature to address this matter in this arbitration, which relates only to MCI and BellSouth, rather than in Docket No. 5840-U. In the interim, MCI and BellSouth shall adhere to the terms agreed to in their Partial Interconnection Agreement which the Commission has previously approved.

M. The Commission resolves Issue No. 11 as follows:

(1) Dark Fiber

The Commission finds and concludes that dark fiber is a network element under the Act's definition at 47 U.S.C. § 153(45), and rules that BellSouth shall be required to provide MCI with access to it as an unbundled network element. The Commission rules that this decision does not require BellSouth to build out or deploy fiber where it has not yet been installed. Instead, BellSouth shall be required to make available "dark fiber" where it exists in BellSouth's network, both today and as a result of future building or deployment.

(2) Access to Poles, Ducts, Conduits, and Rights-of-Way

The Commission rules that BellSouth shall make available access to its right-of-ways, conduits, and pole attachments on terms and conditions equal to that it provides itself, as MCI requested. The Commission rules that BellSouth's attempt to reserve space for itself based upon a five-year forecast is discriminatory and thus is rejected. However, the Commission will allow BellSouth to reserve space for itself for maintenance spares only, based upon a one-year forecast. This shall be applied equally to all LECs, so that BellSouth shall be required to allow space for any LEC seeking such space for maintenance spares based upon a one-year forecast. The Commission further rules that BellSouth shall provide access to its engineering records in a manner consistent with the Act and FCC Order (subject to reasonable conditions to protect proprietary information).

(3) PIC Change Requests

The Commission finds that when MCI is a reseller of BellSouth local service for the provision of local service to its end user customers, MCI becomes BellSouth's customer of record for

that line. The Commission rules that in these situations, BellSouth shall accept PIC changes from MCI as the customer of record or from other IXCs. The Commission rules that the current procedures for handling PIC changes are appropriate.

(4) Customer Records

The Commission's ruling with respect to MCI access to customer records is contained within its discussion and ruling regarding Issue No. 7.

(5) Bill Format

The Commission rules that BellSouth shall redesign the CABS billing system to accommodate resold services and utilize CABS billing for all unbundled and resold services. BellSouth shall modify its CRIS billing system to allow it to bill for resold services in a CABS billing format, within 180 days from the effective date of its interconnection agreement with MCI. The Commission rules that BellSouth shall provide MCI with the same internal quality controls and measurements it provides itself. The Commission also directs MCI and BellSouth to continue to work cooperatively with the OBF.

(6) Collocation

The Commission rules that BellSouth shall provide MCI access to collocation in compliance with 47 C.F.R. § 51.323 of the FCC's Rules. The Commission concludes that this means, among other things, that:

1. MCI has the right to collocate subscriber loop electronics, such as digital loop carrier (DLC), in the central office;

2. MCI has the right to purchase and interconnect to unbundled dedicated transport from BellSouth between the collocation facility and MCI's network;

3. MCI has the right to interconnect with other collocators in the same central office; and

4. MCI has the ability to, and may collocate via either physical or virtual facilities.

The Commission rules that the rates for collocation shall be set on an interim basis, subject to true-up using the mechanism employed for interim unbundled element rates. The interim rates for collocation shall be those proposed by BellSouth witness Mr. Scheye, subject to the true-up mechanism and the generic cost study review in Docket No. 7061-U.

(7) <u>Dialing Parity</u>

The Commission rules that BellSouth shall comply with Section 251(b)(3) which imposes on BellSouth the duty to provide dialing parity to competing providers of telephone exchange service and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays. The Commission directs BellSouth to provide nondiscriminatory NXX code assignments to all competing LECs on the same basis that such assignments are made to incumbent LECs, including BellSouth, until such time as an independent third-party administrator is selected.

N. The Commission rules that BellSouth shall communicate knowledge of any engineering changes associated with BellSouth's network elements, deployment of new technologies, or changes to its retail services to MCI at the same time it notifies its employees internally. The Commission finds that directory issues have been resolved in the Partial Interconnection Agreement and the Commission has withdrawn any related issues from this arbitration.

O. The Commission directs the Parties to negotiate a comprehensive agreement that incorporates the rulings in this Order, and to file it no later than January 10, 1997. If the Parties cannot reach agreement within that time frame, each Party shall file with the Commission its proposed version of agreement on January 10, 1997. Such filings must clearly delineate the area(s) of dispute between the Parties regarding contract language. The Commission will then adopt the proposal, or the portions of the competing proposals, which the Commission finds appropriate in order to incorporate its arbitration ruling into a comprehensive arbitrated agreement.

Once the Parties have developed the arbitrated agreement by either process, they shall file it with the Commission in the format previously specified in this Order. The arbitrated agreement shall clearly state which provisions were resolved by the arbitration ruling, and which provisions were negotiated by the Parties. The Parties shall also cause notice to be published as required by the Commission. Copies of the arbitrated agreement shall also be served upon the Consumers' Utility Counsel and all Participants to the arbitration.

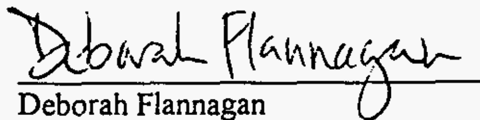
The filing of the arbitrated agreement shall initiate the 30-day review process by the Commission pursuant to Section 252(e)(1) of the Act. This 30-day review shall be the formal Commission process which results in a final Commission decision on the agreement, and which affords an opportunity for intervention and hearing upon appropriate grounds under federal and state law.

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

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

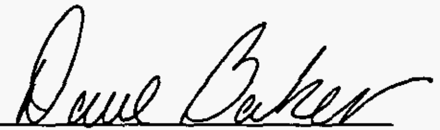
R. Jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 17th day of December, 1996.



Deborah Flannagan
Executive Director
Acting Executive Secretary

12/23/96
Date



Dave Baker
Chairman

12/23/96
Date

APPENDIX A
TO GEORGIA PUBLIC SERVICE COMMISSION'S
ORDER RULING ON ARBITRATION
IN DOCKET NO. 6865-U

(EXHIBIT DJW-3,
SCHEDULE OF MCI'S PROPOSED RATES
FOR UNBUNDLED ELEMENTS)

COST OF NETWORK ELEMENTS

Georgia BELLSOUTH TELECOMM INC - GA

A. Loop elements

		0 - 5 lines/sq mi		5 - 200 lines/sq mi		200 - 650 lines/sq mi		650 - 850 lines/sq mi		850 - 2550 lines/sq mi		> 2550 lines/sq mi		Totals
Loop Distribution (including NID)														
Annual Cost	$	4,988,417	$	180,114,777	$	66,634,780	$	17,299,240	$	79,820,991	$	68,088,671	$	416,946,877
Unit Cost/month	$	44.18	$	20.43	$	9.28	$	6.82	$	5.84	$	4.79	$	8.87
Loop Concentration														
Annual Cost	$	784,834	$	34,377,629	$	25,841,379	$	7,732,692	$	39,171,606	$	26,734,311	$	134,642,351
Unit Cost/month	$	6.95	$	3.90	$	3.60	$	3.05	$	2.77	$	1.88	$	2.86
Loop Feeder														
Annual Cost	$	911,906	$	19,276,244	$	10,365,713	$	4,409,185	$	33,694,865	$	37,225,597	$	105,863,610
Unit Cost/month	$	8.08	$	2.19	$	1.44	$	1.74	$	2.38	$	2.62	$	2.25
Total Loop														
Annual Cost	$	6,685,157	$	233,768,650	$	102,841,873	$	29,441,117	$	152,687,362	$	132,048,580	$	657,472,738
Unit Cost/month	$	59.21	$	26.52	$	14.32	$	11.61	$	10.78	$	9.30	$	13.99
Total lines		9,409		734,643		698,491		211,400		1,179,998		1,183,644		3,917,484
Total lines served by DLC		9,409		669,965		495,698		145,006		721,742		486,053		2,627,872

		Annual Cost	Units			Unit Cost	
End office switching	$	156,707,454					
1. Port	$	47,012,236	3,465,619	switched lines	$	1.13	per line/month
2. Usage	$	109,695,218	68,672,686,366	minutes	$	0.0016	per minute
Signaling network elements	$	5,372,140					
1. Links	$	103,550	432	links	$	19.97	per link per month
2. STP	$	2,593,201	54,733,245,997	TCAP + ISUP messages	$	0.00005	per signaling message
3. SCP	$	2,675,390	3,578,734,400	TCAP messages	$	0.00075	per signaling message
Transport network elements							
1. Dedicated	$	46,960,648	892,651	trunks	$	4.38	per DS-0 equivalent/month
Switched	$	22,662,813	430,788		$	0.00044	per minute
Special	$	24,297,835	461,865				
2. Common	$	2,812,580	4,281,692,089	minutes	$	0.00067	per minute per leg (orig or term)
3. Tandem switch	$	6,289,165	3,616,812,324	minutes	$	0.0017	per minute
Operator systems	$	5,594,922					
Total	$	881,209,648					
Total cost of switched network elements	$	18.80	per line/month				

DJW-3

1971

Intrastate Toll DEMs	5,414,153,894			
Interstate Toll DEMs	12,513,792,328			

10,044 trk-min/mo

InterLATA ded. trunks		127,645
end office trk port inv	$	73,392,683

Common Transport MOU		
Local		
Intrastate Toll	696,102,844	w/o OS usage
Interstate Toll	1,082,830,779	
	2,502,758,466	
	4,281,692,089	

Intrastate IntraLATA Calls	370,300,000	58.70%	SOCCC message counts
Intrastate InterLATA Calls	260,500,000	41.30%	
	630,800,000		

Calculation of EO Usage — trunk port usage 81,885,554,374

Local DEMs, incl OS	85,775,368,771	78.6% of total DEMs
Intraoffice Local DEMs	30,061,257,253	

Intraoffice Local Actual Min	15,030,628,627	
Interoffice Local Actual Min	35,714,111,518	per end
Intrastate Toll Actual Min	5,414,153,894	
Interstate Toll Actual Min	12,513,792,328	
	68,672,686,368	

Dedicated Transport MOU	
Local, w/o OS	17,054,519,690
IntraLATA Toll	1,271,313,372
InterLATA Toll	15,385,319,479
	33,711,152,540

Tandem Switch MOU

Dedicated Trunk-SW 279,685

1972

Cost detail

Loops percent	0.24%	18.77%	15.29%	5.40%	30.13%	30.16%	100.00%
Loops	9,401	732,842	596,760	210,874	1,176,206	1,177,399	3,903,481

	Interconnected at end office	tandem	wtd average
Local interconnection	$ 0.0016	$ 0.0040	n/a
IXC switched access	$ 0.0021	$ 0.0045	$ 0.0026

per 800 attempt (TCAP)	$ 0.0016
	$ 0.0003
ISUP cost/transaction	$ 0.0003
ISUP cost/completion	$ 0.0004
IXC switched access MOU/comp	9.92
ISUP cost/min	$ 0.0000
D link per month	$ 26.25
DS-1 per month	$ 105
DS-3 per month	$ 2,948

	0 - 5 lines/sq mi	5 - 200 lines/sq mi	200 - 650 lines/sq mi	650 - 850 lines/sq mi	850 - 2550 lines/sq mi	> 2550 lines/sq mi	wtd average
NID cost per month	$ 0.66	$ 0.59	$ 0.57	$ 0.61	$ 0.56	$ 0.41	$ 0.53

trunk port costs	
per trunk port (DS-0)	$ 3.37
per trunk port minute	$ 0.00055
total EO usage per minute	$ 0.00160
trk port/min	$ 0.00056
other	$ 0.00104

APPENDIX B
TO GEORGIA PUBLIC SERVICE COMMISSION'S
ORDER RULING ON ARBITRATION
IN DOCKET NO. 6865-U

(EXHIBIT RCS-3 (REVISED 10/22/96),
SCHEDULE OF BELLSOUTH'S PROPOSED RATES
FOR UNBUNDLED ELEMENTS)

Georgia
Rate Proposals
Local Interconnection, Unbundled Services and New Services

SERVICE / RATE ELEMENT	TELRIC	BellSouth Proposed Recurring Prices Existing Tariff	BellSouth Proposed Non-Recurring Prices Existing Tariff	BellSouth Proposed Recurring Prices TRUE - UP	BellSouth Proposed Non-Recurring Prices TRUE - UP
ACCESS TO 800 DATABASE *					
Per 800 Call Utilizing Acc. Ten Digit Screening Svc. w/800 Number Delivery	$0.0010 - Rec.	$0.00365 / query			
Per 800 Call Utilizing 800 Acc. Ten Digit Screening w/800 Number Delivery for 800 Numbers w/Opt. Complex Feature, i.e.,Call Handling and Destination Features	$0.0011 - Rec.	$0.00431 / query			
Per 800 Call Utilizing 800 Acc. Ten Digit Screening w/POTS Number Delivery		$0.00383 / query			
Per 800 Call Utilizing 800 Acc. Ten Digit Screening w/POTS Number Delivery for 800 Numbers w/Opt. Complex Features, i.e.,Call Handling and Destination Features		$0.00431 / query			
Reservation Charge per 800 Number Reserved			$27.50 / 1st $0.50 / Add'l		
Establishment Charge per 800 number estab.w/800 Number Delivery			$63.00 / 1st $2.00 / Add'l		
Establishment Charge per 800 number estab.w/POTS Number Delivery			$63.00 / 1st $2.00 / Add'l		
Customized Ares of Service per 800 Number			$3.00 / 1st $1.50 / Add'l		
Multiple InterLata Carrier Routing per carrier requested, per 800 number			$3.50 / 1st $2.00 / Add'l		
Change Charge per request			$42.00 / 1st $0.50 / Add'l		
Call Handling and Destination Features per 800 number			$3.00		
CHANNELIZATION SYSTEM FOR UNBUNDLED EXCHANGE ACCESS LOOPS					
- Unbundled Loop Channelization System (DS1 to VG)	$401.91 - Rec.			$400.00 / equip.	$525.00 / equip.-1st
- Central Office Channel Interface (circuit specific plug-in equipment), 1 per circuit	$1.21 - Rec.			$1.15 / equip.	$8.00 / 1st $8.00 / Add'l

* Rates revised 10/22/96 to reflect existing tariffed rates in Georgia.

Georgia
Rate Proposals
Local Interconnection, Unbundled Services and New Services

SERVICE / RATE ELEMENT	TELRIC	BellSouth Proposed Recurring Prices Existing Tariff	BellSouth Proposed Non-Recurring Prices Existing Tariff	BellSouth Proposed Recurring Prices TRUE - UP	BellSouth Proposed Non-Recurring Prices TRUE - UP
COLLOCATION *					
Physical					
Application fee					$3,850.00
Space Prep					ICB
Space Construction					$4,500.00
Cable Installation					$2,750.00
Floor Space Zone A				$7.50	
Floor Space Zone B				$6.75	
Power	$4.19 - Rec.			$5.00	
Cable Support Structure	$14.09 - Rec.			$13.35	
POT Bay					
2-wire	$0.10 - Rec.			$0.40	
4-wire	$0.19 - Rec.			$1.20	
DS1	$0.19 - Rec.			$1.20	
DS3	$2.21 - Rec.			$8.00	
Cross-connects-Recurring					
2-wire	$0.30 - Rec.			$0.30	
4-wire	$0.58 - Rec.			$0.50	
DS1	$1.42 - Rec.			$8.00	
DS3	$28.85 - Rec.			$72.00	
Cross-connects-NRC-First					
2-wire					$12.60
4-wire					$12.60
DS1					$155.00
DS3					$155.00
Cross-connects-NRC-Add'l					
2-wire					$12.60
4-wire					$12.60
DS1					$27.00
DS3					$27.00
Security Escort					
Basic - 1st half hour					$41.00
Overtime - 1st half hour					$48.00
Premium - 1st half hour					$55.00
Basic - additional					$25.00
Overtime - additional					$30.00
Premium - additional					$35.00

* Nonrecurring TELRIC costs have been deleted since nonrecurring costs have not been submitted in this docket.

Georgia
Rate Proposals
Local Interconnection, Unbundled Services and New Services

SERVICE / RATE ELEMENT	TELRIC	BellSouth Proposed Recurring Prices Existing Tariff	BellSouth Proposed Non-Recurring Prices Existing Tariff	BellSouth Proposed Recurring Prices TRUE - UP	BellSouth Proposed Non-Recurring Prices TRUE - UP
DIRECTORY ASSISTANCE (DA) ACCESS SERVICE					
DA Call Completion Access Service	$0.0140 - Rec			$0.25 / attempt	
Number Services Intercept Access Service	$0.0040 - Rec			$0.25 / query	
Directory Assistance Service Call	$0.3032 - Rec	$0.25 / call			
Directory Transport					
- Sw. Local Channel-DS1 Level		$133.81 / LC	$866.97 /LC - 1st $486.83 / LC - add'l		
- Sw. Dedicated Transport-DS1 Level		$23.50 / mile $90.00 / fac.term.	$100.49 / fac.term.		
- Sw. Common Tspt. per DA Acc.Svc.Call		$0.00030			
- Sw. Common Tspt. per DA Acc.Svc.Call mile		$0.00004			
- Acc.Tdm.Swg.per DA Acc.Svc.Call		$0.00055			
- DA Interconnection per DA Acc.Svc.Call		$0.00269 *			
- Installation					
- trunk side service, per trunk or signaling connection			$915.00 / first $100.00 / add'l		
DA Database Service					
- Use Fee, per DADS customer's end user request	$0.0192 - Rec	$0.0350			
- Monthly recurring Charge	$120.30 - Rec	$150.00 / month			
Direct Access to DA Service					
- DADAS Service Establishment Charge			$1,000.00		
- DADAS Database Service Charge, per month	$7,207.62 - Rec	$5,000.00			
- DADAS per Query Charge	$0.0052 - Rec	$0.023			
LINE INFORMATION DATABASE ACCESS SERVICE (LIDB) **					
Validation					
- LIDB Common Transport	$0.00006 - Rec	$0.00030 / query			
- LIDB Validation	$0.00935 - Rec	$0.03800 / query			
- Orig. Point Code Establishment or Change			$91.00 /estab.or change		
OPERATOR CALL PROCESSING ACCESS SERVICE					
- Operator Provided Call Handling	$1.3685 / min - Rec. $1.3842 / min - Rec. (using foreign LIDB)			$1.3685 / min. $1.3842 / min. (using foreign LIDB)	
- Fully Automated Call Handling	$0.0052 / attempt-Rec. $0.0766 / attempt-Rec. (using foreign LIDB)			$0.0052 / attempt $0.0766 / attempt (using foreign LIDB)	

* Rates revised 10/22/96 to reflect existing tariffed rate.
** Mirrors LIDB rates set forth in BST's Interstate Access Service Tariff, F.C.C. No. 1.

Georgia
Rate Proposals
Local Interconnection, Unbundled Services and New Services

SERVICE / RATE ELEMENT	TELRIC	BellSouth Proposed Recurring Prices Existing Tariff	BellSouth Proposed Non-Recurring Prices Existing Tariff	BellSouth Proposed Recurring Prices TRUE - UP	BellSouth Proposed Non-Recurring Prices TRUE - UP
UNBUNDLED EXCHANGE ACCESS LOOPS					
- 2-wire analog voice grade loop	$24.91 - Rec	$25.00 **	$140.00 / 1st *** $45.00 / Add'l ***	$17.00	$25.80
- 4-wire analog voice grade loop	$38.78 - Rec	$45.00 **	$140.00 / 1st *** $45.00 / Add'l ***	$27.20	$25.80
- 2-wire ADSL/HDSL		N/A	N/A	$17.00	$25.80
- 4-wire HDSL		N/A	N/A	$27.20	$25.80
- 2-wire ISDN Digital	$37.55 - Rec	N/A	N/A	$27.20 (SEE ALSO RATES	$25.00 PROPOSED IN BST's / ACSI's AGREEMENT)
- 4-wire DS1 Digital Grade Loop	$78.87 - Rec	$117.00 **	$665.00 / 1st ** $315.00 / Add'l **		
Local Interconnection					
End Office Switching	$0.002050 / mou - Rec	$0.00787 / mou			
Tandem Switching	$0.000922 / mou - Rec	$0.00074 / mou			
Common Transport - Per Mile	$0.000003 /mi/mou-Re	$0.00004 / mile/mou			
Common Transport - Facility Termination	$0.000822 / mou - Rec	$0.00036 / mou			
Unbundled Local Switching ****					
End Office Switching				$0.00590 / mou *****	
Tandem Switching				$0.00074 / mou	
Common Transport - Per Mile				$0.00004 / mile/mou	
Common Transport - Facility Termination				$0.00036 / mou *	
Dedicated Transport					
Dedicated Transport-DS1 - Per Mile	$0.3004 - Rec	$23.00 /mile			
Dedicated Transport-DS1 - Facility Termination	$161.97 - Rec	$90.00 /fac.term.	100.49 /fac.term.		

* Rate added 10/22/96 to reflect existing tariffed rate.
** Mirrors Intrastate Special Access rates as set forth in E7.
*** Note added 10/22/96 to indicate that these proposed rates have been adjusted downward from existing tariffed rates and have been included in negotiated agreements.
**** See attached diagram.
***** Plus Unbundled Exchange Access Port rates as displayed following. Plus Vertical Features if applicable.

Georgia
Rate Proposals
Local Interconnection, Unbundled Services and New Services

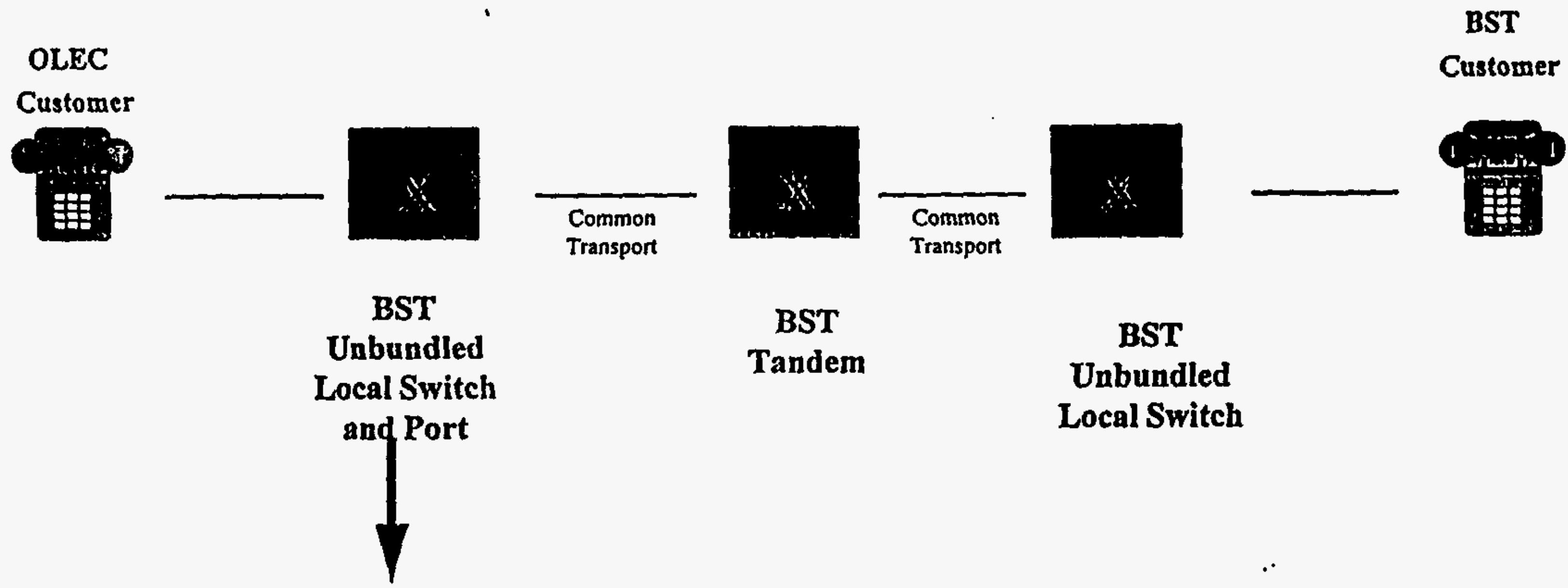
SERVICE / RATE ELEMENT	TELRIC	BellSouth Proposed Recurring Prices Existing Tariff	BellSouth Proposed Non-Recurring Prices Existing Tariff	BellSouth Proposed Recurring Prices TRUE - UP	BellSouth Proposed Non-Recurring Prices TRUE - UP
UNBUNDLED EXCHANGE PORTS					
2-wire Analog Port	$2.07 - Rec.			$2.50	$50.00 / 1st $18.00 / Add'l
4-wire Analog Port (coin)	$2.29 - Rec.			$4.00	$50.00 / 1st $18.00 / Add'l
2-wire ISDN Port	$11.17 - Rec.			$13.50	$150.00 / 1st $120.00 / Add'l
4-wire ISDN Port	$254.68 - Rec.			$308.00	$230.00 / 1st $200.00 / Add'l
Rotary Service (hunting)	$0.19 - Rec.			$0.20	$3.00 / 1st $3.00 / Add'l

BellSouth Telecommunications, Inc.
GPSC Docket No. 6865-U
Exhibit No. RCS-3

GEORGIA

Unbundled Switching and Interconnection

Unbundled Switching - Including Local Network Infrastructure



Line Port - $2.50 per Month

Switching - $0.0059025/mou

Common Transport - $.00004/mou/per mile
plus .00036/mou facilities termination

Tandem - $0.00074/mou

Switching -$0.0059025/mou

Note 1: Charges apply on originating usage only.

Note 2 : No Charge to CTSP for usage originating from BST end user to CTSP end user.