FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

NOVEMBER 20, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI, BARONE)
DIVISION OF COMMUNICATIONS (NORTON, SIRIANNI)

RE: DOCKET NO. 960757-TP - PETITION BY METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC. FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION RATES, TERMS, AND CONDITIONS, PURSUANT TO THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.

DOCKETS NOS. 960833-TP, 960846-TP, 960916-TP - PETITIONS BY AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC., MCI TELECOMMUNICATIONS CORPORATION, MCI METRO ACCESS TRANSMISSION SERVICES, INC., AMERICAN COMMUNICATIONS SERVICES, INC. AND AMERICAN COMMUNICATIONS SERVICES OF JACKSONVILLE, 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. 971140-TP - PETITION BY MCI METRO ACCESS TRANSMISSION SERVICES, INC. TO SET NON-RECURRING CHARGES FOR COMBINATION OF NETWORK ELEMENTS WITH BELLSOUTH TELECOMMUNICATIONS, INC.

AGENDA: DECEMBER 2, 1997 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960833MC.RCM

CASE BACKGROUND

On February 8, 1996, MFS Communications Company, Inc. (MFS) began interconnection negotiations with BellSouth Telecommunications, Inc. (BellSouth) under Section 251 of the Telecommunications Act of 1996 (the Act). On June 28, 1996, MFS filed a petition requesting that the Commission arbitrate various issues in its negotiations with BellSouth, and Docket No. 960757-TP

was opened. In Order No. PSC-96-0817-PCO-TP, issued June 24, 1996, the Prehearing Officer set the matter for hearing on August 27 and 28, 1996. On August 27, 1996, MFS and BellSouth announced that they had reached agreement resolving most of the issues in MFS' arbitration petition. MFS withdrew the resolved issues from the proceeding and from its arbitration petition. The Commission conducted its hearing August 27 on the remaining unresolved issues. Thereafter, on September 6, 1996, the parties submitted a request for approval of their negotiated agreement. The Commission approved the negotiated agreement in Order No. PSC-96-1508-FOF-TP, issued on December 12, 1996, in Docket No. 961053-TP.

On December 16, 1996, the Commission issued Order No. PSC-96-1531-FOF-TP, in Docket No. 960757-TP, resolving the issues in dispute between MFS and BellSouth. On February 27, 1997, the Commission issued Order No. PSC-97-0235-FOF-TP, denying MFS' motion for reconsideration of Order No. PSC-96-1531-FOF-TP.

By letter dated March 4, 1996, AT&T Communications of the Southern States (AT&T), on behalf of its subsidiaries providing telecommunications services in Florida, requested that BellSouth begin good faith negotiations under the Act. On July 17, 1996, AT&T filed a request for arbitration under the Act, and Docket No. 960833-TP was opened.

MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., (MCIm) requested that BellSouth begin good faith negotiations under the Act by letter dated March 26, 1996. Docket No. 960846-TP was established in the event MCIm filed a petition for arbitration of the unresolved issues. On July 30, 1996, AT&T and MCIm filed a joint motion for consolidation of their requests for arbitration with BellSouth. By Order No. PSC-96-1039-TP, issued August 9, 1996, the Prehearing Officer granted the joint motion for consolidation. On August 15, 1996, MCIm filed its request for arbitration with BellSouth under the Act.

The hearing in these consolidated dockets was held October 9 through 11, 1996. AT&T and MCIm sought arbitration of issues in four main subject areas: network elements; resale; transport and termination; and implementation matters.

On December 31, 1996, the Commission issued Order No. PSC-96-1579-FOF-TP, resolving the issues in AT&T's and MCIm's petitions for arbitration with BellSouth.

On March 19, 1997, the Commission issued Order No. PSC-97-0298-FOF-TP, denying BellSouth's motion for reconsideration of

Order No. PSC-96-1579-FOF-TP, but with certain clarifications, and denying in part and granting in part AT&T's cross-motion for reconsideration. On the same date, the Commission issued Order No. PSC-97-0300-FOF-TP, resolving disputed language and approving AT&T's agreement with BellSouth. On March 21, 1997, the Commission issued Order No. PSC-97-0309-FOF-TP resolving disputed language and approving MCIm's agreement with BellSouth. On June 19, 1997, the Commission issued Order No. PSC-97-0723-FOF-TP and Order No. PSC-97-0724-FOF-TP approving, respectively, MCIm's[1] and AT&T's[2] signed agreements with BellSouth.

In Order No. PSC-96-1531-FOF-TP, in Docket No. 960757-TP, the Commission ordered BellSouth to file TSLRIC cost studies for 2-wire ADSL compatible and 2-wire and 4-wire HDSL compatible loops. In Order No. PSC-96-1531-FOF-TP, the Commission had only set interim rates for those and for physical collocation. In Order No. PSC-96-1579-FOF-TP, in Docket Nos. 960833-TP and 960846-TP, the Commission set interim recurring rates for network interface devices, loop distribution, 4-wire analog ports, DA Transport-Switched Local Channel and -Switched Dedicated Transport DS1 per mile and per facility. The Commission also set interim nonrecurring rates for 4-wire analog ports, first and additional, Dedicated Transport per facility termination, DA Transport-Switched Local Channel, first and additional and DA Transport-Switched Dedicated Transport per facility termination. The Commission required BellSouth to file TSLRIC cost studies for these network elements, as well as TSLRIC cost studies for physical and virtual collocation.

BellSouth timely filed the required cost studies on February 14, 1997 in Docket No. 960757-TP. It timely filed the required cost studies in Docket Nos. 960833-TP and 960846-TP on March 3, 1997. In Order No. PSC-97-1303-PCO-TP, the Prehearing Officer consolidated Docket Nos. 960833-TP, 960846-TP, and 960757-TP, together with Docket No. 971140-TP, and set the matters for hearing on January 26 through 28, 1998.

On June 9, 1997, AT&T filed a Motion to Compel Compliance with Order Nos. PSC-96-1579-FOF-TP, PSC-97-0298-FOF-TP, and PSC-97-0600-FOF-TP. On June 23, 1997, BellSouth timely filed a Response and Memorandum in Opposition to AT&T's Motion to Compel Compliance. On October 27, 1997, MCIm filed a similar Motion to Compel Compliance.

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[1]Filed June 4, 1997.

[2]Filed June 10, 1997.

On November 3, 1997, BellSouth timely filed a Response and Memorandum in Opposition to MCIm's Motion to Compel Compliance.

On August 28, 1997, MCIm filed a Petition to Set Non-Recurring Charges for Combinations of Network Elements, with reference to Order No. PSC-96-1579-FOF-TP. That petition was docketed as Docket No. 971140-TP. BellSouth filed a timely response in opposition to MCIm's motion on September 17, 1997.

On July 18, 1997, the U.S. Court of Appeals for the Eighth Circuit filed its opinion in Iowa Utilities Bd. v. FCC, 120 F.3d 753 (Iowa Utilities Bd. I). In the opinion, the court ruled in pertinent part that, in the FCC's First Report and Order,[3] the FCC:

i) exceeded its jurisdiction in promulgating pricing rules and that the Act plainly grants state commissions the authority to determine rates involved in the local competition provisions of the Act;[4]

ii) was not authorized to review agreements approved by state commissions or to enforce such agreements under its complaint authority;[5]

iii) correctly ruled that incumbent LECs are required to provide unbundled access to operational support systems, operator services, directory assistance and vertical switching features;[6]

iv) incorrectly ruled that an element for which unbundling is technically feasible must presumably be unbundled;[7]

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[3]FCC 96-325, Docket Nos. 96-98 & 95-185; released August 8, 1996.

[4]The court vacated 47 C.F.R. §§ 51.501-51.515 except 51.515(b).

[5]See First Report and Order ¶¶121-128.

[6]See 47 C.F.R. §§ 51.319(f), (g).

[7]The court vacated First Report and Order ¶¶278, 281 in part; 47 C.F.R. § 51.317 in part.

v) reasonably interpreted the "necessary" and "impairment" standards with respect to access to proprietary elements;[8]

vi) was not justified in requiring LECs to provide interconnection, unbundled network elements, and access to such elements at superior quality levels;[9]

vii) was not justified in requiring incumbent LECs to recombine network elements purchased on an unbundled basis;[10]

viii) ruled correctly that competing carriers may obtain the ability to provide finished telecommunications services entirely through unbundled access (passim);[11] and

ix) did not promulgate unbundling rules that thwart the Act's purpose to promote facilities-based competition.

On October 14, 1997, the court issued an Order on Petitions for Rehearing, 1997 U.S. App. Lexis 28652, slip opinion, reh'g granted in part, denied in part (Iowa Utilities Bd. II). The court held that § 251(c)(3) does not permit a new entrant to purchase the incumbent LECs' assembled platforms of combined network elements at cost based rates for unbundled access in order to offer competitive telecommunications services. The court vacated 47 C.F.R. §51.315(b).

This recommendation addresses both AT&T's and MCIm's motions to compel compliance.

[8]See First Report and Order ¶¶282-283.

[9]The court vacated 47 C.F.R. §§ 51.305(a)(4), 51.311(c).

[10]The court vacated 47 C.F.R. §§ 51.315(c)-(f).

[11]See passim.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant AT&T's motion to compel BellSouth to provide unbundled elements at the prices established in Order No. PSC-96-1579-FOF-TP, however ordered?

RECOMMENDATION: The Commission should grant AT&T's motion to the extent of compelling BellSouth to provide UNEs singly to AT&T at the prices established in Order No. PSC-96-1579-FOF-TP and to provide AT&T with access to its network for purposes of combining UNEs in order to provide telecommunications services. The Commission should also grant AT&T's motion to the extent of compelling BellSouth to alternatively provide network elements in combination to AT&T at the summation of the prices of the individual elements plus a charge reflecting the cost of assembly. The prices for network element combinations, whichever way established, should be subject to true-up upon the establishment, through negotiation or arbitration, of recurring and non-recurring charges for combinations free of duplicate charges.

STAFF ANALYSIS:

AT&T's Motion

AT&T alleges that BellSouth has declared that it will treat requests for recombined unbundled network elements (UNEs) that substantially replicate existing retail services as requests for resale. AT&T asserts that BellSouth is a de facto monopoly, thereby using its control of the essential elements necessary for local competition in a manner that is anti-competitive, and thus contrary to the intent of the Act. AT&T requests that the Commission determine that BellSouth's refusal to provide unbundled network elements (UNEs) at the prices established in Order No. PSC-96-1579-FOF-TP violates the Commission's order. AT&T further requests that the Commission direct BellSouth to provide UNEs at those prices until negotiations are concluded between the companies regarding duplication of charges when UNEs are purchased in combinations.

AT&T observes that in Order No. PSC-96-1579-FOF-TP the Commission found that AT&T and MCIm are permitted to combine UNEs in any manner they choose, including recreating existing BellSouth services. AT&T also observes that the Commission established permanent rates for certain UNEs based on BellSouth's Total Service Long Run Incremental Cost (TSLRIC) studies, finding that these rates cover BellSouth's TSLRIC costs and provide contribution toward joint and common costs.

AT&T further states that in Order No. PSC-97-0298-FOF-TP the Commission declined to reconsider its decision in Order No. PSC-96-1579-FOF-TP concerning UNE prices and it did not require AT&T to pay the discounted retail price when it purchases multiple UNEs in a way that fully replicates an existing BellSouth service. AT&T states that the Commission, while expressing a concern about duplication of charges when UNEs are purchased combined, nevertheless determined that the prices for UNEs on a stand-alone basis were appropriate.

AT&T also alleges that, in Order No. PSC-97-0600-FOF-TP, issued May 27, 1997, the Commission rejected language proposed by BellSouth based on its contention that UNE combinations replicating an existing BellSouth service ought to be priced as a resold service.

AT&T states that it accepts the Commission-established prices for stand-alone UNEs pending negotiations to establish prices free of duplicated charges when ordering UNEs in combinations.

BellSouth's Response

BellSouth argues that AT&T's motion should be denied because it is based on fundamental mischaracterizations of the Commission's orders and the current status of the rebundling issue. BellSouth requests that the Commission enter an order requiring that AT&T not be permitted to rebundle elements in a manner that replicates existing [BellSouth] services unless and until a price is set for rebundled combinations through negotiation or arbitration.

BellSouth alleges that the Commission has stated that it has not ruled upon the price of a rebundled service, and that AT&T has ignored this. BellSouth cites Order No. PSC-97-0298-FOF-TP, at page 7 and 8, as follows:

> In our original arbitration proceeding in this docket, we were not presented with the specific issue of the pricing of recombined elements when recreating the same service offered for resale.
>
> * * *
>
> Furthermore, we set rates only for specific unbundled elements that the parties requested. Therefore, it is not clear from the record in this proceeding that our

> decision included rates for all elements necessary to recreate a complete retail service. Thus, it is inappropriate for us to make a determination on this issue at this time.
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> * * *
>
> Nevertheless, we note that we would be very concerned if recombining network elements to recreate a service could be used to undercut the resale price of the service.

Additionally, BellSouth alleges that in rejecting BellSouth's proposed language concerning pricing of rebundled elements in Order No. PSC-97-0602-FOF-TP, the Commission declared, in the following words at page 7, that it had not ruled on the issue:

> We expressed concerns with the potential pricing of UNEs to duplicate a resold service at our Agenda Conference, and we expressed our concerns in our Order in dicta; however, we stated that the pricing issue associated with the rebundling of UNEs to duplicate a resold service was not arbitrated ... Accordingly, BellSouth's proposed language shall not be included in the agreement.

On the basis of its position that the Commission has not ruled on the price of elements that are recombined to recreate BellSouth services, BellSouth argues that if AT&T wishes to purchase recombined elements to be used in this manner it should open negotiations with BellSouth. BellSouth claims that it invited AT&T by letter dated June 2, 1997, to negotiate, but that in its response, AT&T asserted that it would only negotiate the elimination of duplicate charges when UNEs are ordered in combination. BellSouth believes, moreover, that AT&T plans to purchase individual UNEs at established prices and then to replicate existing services with these UNEs in a way that undercuts the resale price of these services. This, BellSouth argues, would be a misuse of the Commission's orders. It urges the Commission to deny AT&T's motion and direct AT&T to negotiate with BellSouth the price of the "service."

Staff's Analysis

Section 251(c)(3) of the Act provides in part that "[a]n 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." See also 47 C.F.R. §51.315(a). Telecommunications service is defined in Section 3(a)(51) of the Act as the "offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used." Telecommunications is defined in Section 3(a)(48) as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Network element is defined in Section 3(a)(45) as "a facility or equipment used in the provision of a telecommunications service," including "features, functions, and capabilities that are provided by means of such facility or equipment."

In its First Report and Order, FCC 96-325, the FCC rejected the argument of BellSouth and other local exchange carriers (LECs) that carriers should not be allowed to use unbundled elements exclusively to provide services that are available at resale, because to do so would make Section 251(c)(4), and its associated pricing provision, Section 252(d)(3), meaningless. The FCC, stated at ¶331 that:

> We disagree with the premise that *no* carrier would consider entering local markets under the terms of section 251(c)(4) if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefore find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity as a means to enter local phone markets.

The FCC noted that, while Section 251(c)(3) entrants will have greater opportunities to differentiate their services to the benefit of consumers than Section 251(c)(4) entrants, they will face greater risks. The FCC postulated that this distinction in risk is likely to influence entry strategies.

In Order No. PSC-96-1579-FOF-TP, this Commission noted its concern with the FCC's interpretation of Section 251(c)(3). While tentatively accepting the FCC's interpretation, the Commission stated at pages 37-38 that:

> Specifically, we are concerned that the FCC's interpretation could result in the resale rates we set being circumvented if the price of the same service created by combining unbundled elements is lower ....
>
> Upon consideration, although we are concerned with the FCC's interpretation of Section 251(c)(3) of the Act, we are applying it to this proceeding ... Therefore, since it appears ... that the FCC's Rules and Order permit AT&T and MCI to combine unbundled network elements in any manner they choose, including recreating existing BellSouth services, they may do so for now. However, we will notify the FCC about our concerns and revisit this portion of our order should the FCC's interpretation change.

On reconsideration in Order No. PSC-97-0298-FOF-TP, the Commission at page 7 reiterated its concern with the notion that recombining network elements to recreate a service could be used to undercut the resale price of the service, but it affirmed its decision, nonetheless, that AT&T and MCI could combine network elements in any manner they choose. BellSouth advanced the argument that while AT&T and MCI can combine network elements, when they are combined to replicate an existing BellSouth service, the appropriate pricing standard is found in Section 252(d)(3), and not in Section 252(d)(1). The Commission stated further at pages 7-8 that:

> In our original arbitration proceeding in this docket, we were not presented with the specific issue of the pricing of recombined elements when recreating the same service offered for resale ....

> Furthermore, we set rates only for the specific unbundled elements that the parties requested. Therefore, it is not clear from the record in this proceeding that our decision included rates for all elements necessary to recreate a complete retail service. Thus, it is inappropriate for us to make a determination on this issue at this time.

In Order Nos. PSC-97-0600-FOF-TP and PSC-97-0602-FOF-TP, approving the arbitrated agreements respectively of AT&T and MCI with BellSouth, the Commission refused to allow BellSouth language in the agreements that would have required the parties to negotiate the price of a retail service recreated by combining UNEs, provided that recombining UNEs would not undercut the resale price of the recreated service.[12] The Commission again expressed its concern with pricing of UNE combinations used to replicate a resold service, but stated that the issue of pricing UNE combinations had not been arbitrated.

In Iowa Utilities Bd. I, supra, the court rejected the argument that "by allowing a competing carrier to obtain the ability to provide finished telecommunications services entirely through unbundled access at the less expensive cost-based rate, the FCC enables competing carriers to circumvent the more expensive wholesale rates ... and thereby nullifies the terms of subsection 252(c)(4)." The court ruled that:

> We conclude that the Commission's belief that competing carriers may obtain the ability to provide finished telecommunications services entirely through the unbundled access provisions in subsection 251(c)(3) is consistent with the plain meaning and structure of the Act.

The court approved the rationale that the costs and risks associated with unbundled access as a method of entering the local telecommunications industry make resale a distinctly attractive option.

[12]The language was proposed in Section 36.1 of the AT&T agreement and Section 8, Attachment I, of the MCI agreement.

In Iowa Utilities Bd. II, the court, on rehearing, did not disturb its ruling on obtaining finished services through unbundled access. The court ruled that Section 251(c)(3) unambiguously indicates that the requesting carriers themselves, not the incumbent local exchange carrier, will combine unbundled elements to provide telecommunications services. The court stated that:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, §251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled elements on the one hand and the purchase at wholesale rates of incumbent's telecommunications retail service on the other.

The court, accordingly, vacated 47 C.F.R. §51.315(b), requiring that an ILEC not separate currently combined network elements.

Staff believes that the current state of the law does not require incumbents to provide combined network elements (or assembled platforms) to requesting carriers, whether presently combined or to be combined by incumbents. The court has ruled that, while requesting carriers may combine network elements in any manner of their choosing, including the replication of existing incumbent retail services, Section 251(c)(3) of the Act requires that they purchase, and incumbents provide, network elements on an unbundled basis. The court has furthermore ruled that the requesting carriers must combine network elements themselves and the incumbents must allow them access to their networks for that purpose. The court has reasoned that Sections 251(c)(3) and 251(c)(4) set forth two competitive entry mechanisms with significantly different costs and risks and it has, thereby, rejected the argument that providing finished services through Section 251(c)(3) improperly undermines the viability of entry through Section 251(c)(4).

Nonetheless, under the court's construction of the Act, nothing prevents incumbents from providing network elements in combinations, if they so choose. Indeed, the AT&T/BellSouth interconnection agreement provides in Part II, Unbundled Network Elements, Section 30.5, that

> BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit AT&T to provide Telecommunications Services ....

At Part II, Section 30.4, the agreement also authorizes AT&T to use UNEs to provide any feature, function, or service option within their capability. Thus, it appears clear that BellSouth is obligated under its agreement with AT&T to provide UNEs in combinations if so ordered and that AT&T may combine network elements in any manner of its choosing, including the replication of existing BellSouth retail services. All that is in contention is the price at which BellSouth must provide AT&T with network element combinations.

Part IV, Pricing, Section 34, General Principles, of the agreement provides that network elements and combinations shall be

> priced in accordance with all applicable provisions of the Act and the rules and orders of the Federal Communications Commission and the Florida Public Service Commission.

Part IV, Section 36, Unbundled Network Elements, states that:

> [t]he prices that AT&T shall pay to BellSouth for Unbundled Network Elements are set forth in Table 1.

Table 1 sets forth the recurring and non-recurring rates approved by this Commission in Order No. PSC-96-1579-FOF-TP at Attachment A. Part IV, Section 36.1, Charges for Multiple Network Elements, provides that AT&T and BellSouth shall work together to eliminate "duplicate charges or charges for functions or activities that AT&T does not need" when AT&T orders network elements in combinations. This is pursuant to Order No. PSC-97-0298-FOF-TP, pages 28-32.

The rates (prices) that the Commission approved in Order No. PSC-96-1579-FOF-TP are applicable to UNEs when ordered individually. In Order No. PSC-97-0298-FOF-TP, the Commission

stated at pages 30 and 31 that it was not presented with the specific issue of the pricing of recombined elements when recreating the same service offered for resale, and for that reason it was inappropriate for it to then determine that issue. Even more broadly, staff believes the Commission stated in effect that it had not been presented with the issue of combinations pricing in general. Thus, staff believes that the prices set forth in Part IV of the AT&T/BellSouth agreement are limited in applicability to unbundled network elements when ordered individually. No language in the agreement extends their applicability to unbundled network elements when ordered in combination. Effective combinations prices do not, therefore, exist, since, not only did the Commission not consider combinations pricing in the arbitration proceeding, the parties' interconnection agreement in no way establishes negotiated prices for combinations. It would follow then that BellSouth's obligation to provide network elements in combination under its agreement is effective only upon the parties' now negotiating appropriate prices, or, failing that, presenting their dispute to this Commission for arbitration. Staff does not believe, however, that BellSouth may lawfully hold the position, even under Iowa Utilities Bd. II, supra, that it will only provide elements on a bundled basis that are the equivalent of an existing retail service at wholesale rates, pursuant to Section 251(c)(4) and Section 252(d)(3).

Therefore, staff recommends that the Commission grant AT&T's motion to compel, but only to the extent of compelling BellSouth to provide individual unbundled network elements to AT&T at the prices established by the Commission in Order No. PSC-96-1579-FOF-TP and set forth in the parties' agreement. Further, staff recommends that the Commission find that BellSouth is not required under its interconnection agreement with AT&T to provide AT&T with network elements in combination at the individual element prices set forth in Part IV, Table 1, of the agreement. In addition, staff recommends that, if AT&T desires to purchase network elements in combination, the Commission should direct the parties that they must first attempt to negotiate appropriate prices, which may include assembly or "glue" charges based on cost. Finally, staff recommends that the Commission find that AT&T may alternatively purchase unbundled network elements individually at the prices set forth in the parties' agreement, in which case, BellSouth should be required to provide AT&T with access to its network for purposes of combining elements in order to provide telecommunications services. See Section 3(a)(51). Staff believes that its recommendation in this issue rests on the language in the parties' approved interconnection agreement.

As staff has noted, Part IV, Section 36.1, reflects the Commission's order that network elements purchased in combinations be made available at prices free of duplicate charges or charges for functions or activities that AT&T does not need. Specifically, it provides that:

> Any BellSouth non-recurring and recurring charges shall not include duplicate charges or charges for functions or activities that AT&T does not need when two or more Network Elements are combined in a single order. BellSouth and AT&T shall work together to mutually agree upon the total non-recurring and recurring charge(s) to be paid by AT&T when ordering multiple Network Elements. If the parties cannot agree to the total non-recurring and recurring charge(s) to be paid by AT&T when ordering multiple Network Elements within sixty (60) days of the Effective Date, either party may petition the Florida Public Service Commission to settle the disputed charge or charges.

Thus, staff recommends, whether they are combined by AT&T or BellSouth, that the prices for network element combinations should be subject to true-up to reflect the removal of duplicate charges, upon the establishment, through negotiation or arbitration, of recurring and non-recurring charges for combinations that are free of those charges,

ISSUE 2: Should the Commission grant AT&T's motion to compel BellSouth to complete testing of the purchase, billing and provisioning of unbundled network elements?

RECOMMENDATION: The Commission should grant AT&T's motion to compel BellSouth to complete the testing of ordering, provisioning and billing as appropriate under 47 C.F.R. §51.319(f).

STAFF ANALYSIS: In its motion, AT&T states that it entered into an agreement with BellSouth to purchase four UNEs in Miami to test purchase, billing and provisioning procedures. By letter dated May 29, 1997, BellSouth stated that it would not bill AT&T for the UNEs provided at Commission-established rates; instead it would treat requests for recombined UNEs that substantially replicate existing retail services as requests for a resold retail service. AT&T alleges that BellSouth stated that for both intra-switch and inter-switch local calls it would not send AT&T the records for originating calls. AT&T asserts that BellSouth's refusal to record and provide test call data forecloses any meaningful assessment of the use of UNEs in the provision of local exchange service. AT&T contends that it cannot assess BellSouth's ability to provision UNEs, AT&T's ability to monitor the accuracy of BellSouth's billing of UNEs or its own ability to effectively price its local services using UNEs.

AT&T requests that the Commission direct BellSouth to complete UNE testing, including the recording and provisioning of the appropriate data associated with each UNE utilized in each call made by AT&T customers receiving service through UNEs.

In its response, BellSouth contends that AT&T's request amounts to a trial of the ability to bill services purchased at a sham rebundled price. BellSouth argues that since this Commission has not authorized AT&T to recombine UNEs in a manner that would undercut resale prices, BellSouth should not be required to conduct a trial of its ability to render a bill at the improper price.

If it is AT&T's intention to test the ordering, provisioning, and billing of UNEs used in providing local telecommunications services, then staff believes that AT&T may purchase the necessary network elements from BellSouth on an unbundled basis and, with negotiated access to BellSouth's facilities, assemble them at its own cost in the platforms needed to provide the intended retail services. AT&T may also purchase the equivalent of an existing BellSouth service through the purchase of UNEs if it is able to negotiate with BellSouth appropriate assembly or "glue" charges to be added to the UNE prices that were established in Order No. PSC-

96-1579-FOF-TP and incorporated into the parties' agreement. Although it may agree to do so, BellSouth is under no obligation to provide bundled network elements at the mere summation of the prices for the individual elements. It may not require, however, that AT&T purchase network elements in combinations that replicate existing BellSouth retail services at wholesale discount rates. AT&T may of course provide local services by means of resale.

In any case, whether AT&T purchases unbundled or bundled elements or resold services, in the First Report and Order, supra, the FCC concluded at ¶517 that "operations support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions." In ¶518, the FCC stated further that:

> [I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing. Thus providing nondiscriminatory access to these support systems functions, which would include access to the information such systems contain, is vital to creating opportunities for meaningful competition.

See also 47 C.F.R. §51.319(f).

Staff believes that BellSouth's apparent reluctance to proceed with the testing in Miami of retail services provided through UNEs simply arises from its contention that AT&T is unwilling to pay the appropriate charges. Staff recommends in Issue 1 that the Commission direct BellSouth to provide network elements to AT&T according to one of the permissible Section 251(3) pricing arrangements described therein. Therefore, staff recommends here that the Commission grant AT&T's motion to compel BellSouth to complete the testing of ordering, provisioning and billing as is appropriate under 47 C.F.R. §51.319(f) of the four loops and ports in question in Miami.

ISSUE 3: Should the Commission grant MCIm's motion to compel BellSouth to provide unbundled elements at the prices established in Order No. PSC-96-1579-FOF-TP, however ordered?

RECOMMENDATION: The Commission should compel BellSouth to provide network elements as defined in 47 C.F.R. §51.319 to MCIm individually or combined at the prices for the individual elements established by this Commission in Order No. PSC-96-1579-FOF-TP and set forth in the MCImetro/BellSouth Interconnection Agreement in Attachment I, Table 1. The Commission should require that the prices for combinations of network elements be determined as the sum of the prices of the individual elements comprising the combination without qualification as to use, subject to true-up upon the establishment in Docket No. 971140-TP of recurring and non-recurring charges for combinations free of duplicate charges.

STAFF ANALYSIS:

MCIm' Motion

MCIm alleges that BellSouth has refused to provide UNEs to MCIm at the prices for individual UNEs established by the Commission in Order No. PSC-96-1579-FOF-TP, and sustained in the Commission's subsequent orders on reconsideration, Order No. PSC-97-0298-FOF-TP, and on the MCIm/BellSouth agreement, Order No. PSC-97-0602-FOF-TP, issued May 27, 1997. MCIm requests that the Commission determine that BellSouth's refusal to provide UNEs at existing UNE prices violates the Commission's arbitration decision and the MCIm/BellSouth agreement. MCIm requests that the Commission direct BellSouth to provide UNEs to MCIm at the Commission-established prices, whether ordered singly or in combination.

MCIm states that it has ordered 53 UNE combinations in Florida. MCIm claims that BellSouth has billed the combinations, typically a loop and a port, as resale, claiming that the combinations are the same as the equivalent resale service. MCIm argues that its interconnection agreement with BellSouth does not authorize BellSouth to price UNE combinations at resale rates. As support for its contention, MCIm cites Part A, Section 2; Part A, Section 6; Attachment I, Sections 1 to 8; Attachment III, Section 2; Attachment VIII, Section 2.2.2; and Attachment VIII, Section 2.2.15 of the agreement. MCIm also argues that Attachment VIII, Section 2.2.2 of the agreement distinguishes the migration of existing BellSouth customers by means of resale and by means of UNEs. Further, MCIm argues that Attachment VIII, Section 2.2.15.3 requires that currently interconnected and functional network

elements shall remain connected and functional without any disconnection or disruption of functionality. Finally, MCIm argues that Attachment III, Section 2.6 of the agreement provides that no charges other than those set out in Attachment I, Table 1 (Price Schedule) apply with respect to UNEs. Attachment I, Section 8, requires that duplicate charges be eliminated when two or more UNEs are combined in a single order.

MCIm also argues that the court in Iowa Utilities Bd. I, supra, affirmed that alternative local exchange companies (ALECs) are entitled to provide complete services utilizing UNEs purchased at UNE rates. MCIm contend that although the court ruled in Iowa Utilities Bd. II, supra, that incumbent local exchange companies may not be required to combine UNEs at the request of the ALECs, that ruling does not dislodge the provisions of the MCIm/BellSouth interconnection agreement cited above. In addition, MCIm claims that this Commission is authorized in Sections 252(f)(2) and 253(b) of the Act to require BellSouth to provide UNE combinations on a finding that that is in the best interest of Florida consumers. MCIm contends that this Commission previously recognized[13] the right of ALECs, in furtherance of effective competition, to combine unbundled loops and ports pursuant to Section 364.161, Florida Statutes. MCIm urges the Commission to use its authority under both state and federal law to require BellSouth to provide UNEs on a combined basis, especially when the UNEs are already combined.

MCIm asserts that of the available market entry strategies, entry by use of UNEs offers the greatest potential to bring the benefits of competition to the residential market. MCIm claims that BellSouth, however, thwarts this potential with its proposal to unbundle combined UNEs and deliver them to the ALEC's collocation to be recombined. This will result, MCIm alleges, in unnecessarily and wastefully high nonrecurring charges that will price ALECs out of the residential market. MCIm believes that it is not required by Iowa Utilities Bd. I, supra, to purchase collocations in order to be able to perform combinations.

MCIm concludes that BellSouth's refusal to provide UNEs at UNE prices is contrary to the orders of the Commission, the MCIm/BellSouth interconnection agreement, the Act, and the Florida

[13]Order No. PSC-96-0444-FOF-TP, issued March 29, 1996, in Docket No. 950984-TP. In re: Resolution of petition(s) to establish nondiscriminatory rates, terms and conditions for resale involving local exchange companies and alternative local exchange companies pursuant to Section 364.161, Florida Statutes

Legislature's policy in favor of fair and effective competition. If BellSouth is allowed to continue its refusal to provide UNEs at the individual prices established by the Commission, MCIm asserts that it will hold an unfair advantage over MCIm that impedes MCIm's ability to compete for local customers and stifles competition.

BellSouth's Response

BellSouth argues that MCIm's motion to compel should be denied because it too is based on fundamental mischaracterizations of this Commission's orders and the current status of the "rebundling" issue. BellSouth acknowledges that MCIm has ordered unbundled elements in combinations, but alleges that the combinations replicate existing BellSouth services and are only properly priced when priced at the resale rate. BellSouth further alleges that MCIm, however, seeks to buy retail services at the price of the UNEs that comprise the services, and asserts that it declines to allow MCIm to do this because the Commission has not authorized, and has expressed reservations about, pricing UNE combinations in this fashion.

BellSouth contends that this pricing method would be "far below" resale pricing. BellSouth contends that the Commission's Order Nos. PSC-97-0298-FOF-TP and PSC-97-0602-FOF-TP reflect the Commission's position that the issue of pricing recombined elements was not an issue before it in the arbitration proceeding; that the Commission had not established prices for UNE combinations; and that the Commission held a concern that the price of a UNE combination replicating an existing BellSouth retail service not undercut the resale price of the service. Accordingly, BellSouth argues that MCIm should be directed to negotiate with BellSouth to arrive at appropriate prices. BellSouth notes that Attachment I, Section 8, of its interconnection agreement with MCIm provides that "MCIm and BellSouth shall work together to establish the recurring and non-recurring charges in situations where MCIm is ordering multiple network elements."

BellSouth argues that, while the court affirmed the right of ALECs to use UNEs in any way they choose in Iowa Utilities Bd. II, supra, the court also ruled that ILECs may not be required to recombine UNEs. BellSouth acknowledges that an ILEC is free to recombine UNEs if it chooses. It recognizes its obligation under its interconnection agreement with MCIm to accept and provision UNE combination orders. BellSouth declares that it intends to do so, but its agreement with MCIm does not contain the appropriate prices. It asserts that the pricing issue needs somehow to be resolved. BellSouth contends that for UNE combinations replicating

existing BellSouth services generally, and for "switch-as-is" situations specifically, the proper price is the resale discount rate.

Finally, BellSouth argues that MCIm's contention that this Commission may exercise its authority pursuant to Section 364.161, Florida Statues, to direct BellSouth to provide unbundled loops and ports on a combined basis would lead the Commission to a result that contravenes the Act. See Iowa Utilities Bd. II, supra.

Staff's Analysis

Staff believes that while its previous analysis of AT&T's motion to compel is applicable to MCIm's motion as an explication of the current law, the terms of MCIm's interconnection agreement with BellSouth are different than the terms of AT&T's agreement with BellSouth and therefore require a different result. As noted in that analysis, in Iowa Utilities Bd. I, supra, the court ruled that requesting carriers may combine network elements in any manner they choose.

Attachment III, Network Elements, of the MCIm/BellSouth interconnection agreement provides at Section 2.4 that:

> BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers.

Attachment VIII, Business Process Requirements, Section 2, Ordering and Provisioning, provides at Section 2.2.15.1, Specific Unbundling Requirements, that:

> MCI may order and BellSouth shall provision unbundled Network Elements either individually or in any combination on a single order. Network Elements ordered as combined shall be provisioned as combined by BellSouth unless MCIm specifies that the Network Elements ordered in combination be provisioned separately.

Also, Section 2.2.15.13, id., provides that:

> When MCIm orders Network Elements or Combinations that are currently interconnected

> and functional, Network Elements and Combinations shall remain connected and functional without any disconnection or disruption of functionality.

In Iowa Utilities Bd. II, supra, the court ruled that incumbents are only required to provide network elements on an unbundled basis. BellSouth concurs with this statement of the law and acknowledges that an incumbent is free to recombine network elements if it chooses. BellSouth also acknowledges that, according to the terms of its interconnection agreement with MCIm, it is obligated to accept and provision UNE combination orders. Thus, staff believes, as BellSouth concedes, that BellSouth has clearly undertaken an obligation to provide network elements in combinations to MCIm.

While BellSouth concedes this much, it argues that the agreement does not contain "a price of UNEs that are recombined to replicate an existing BellSouth service." Staff would disagree. First, nothing in the agreement limits the use to which MCIm may put combinations of UNEs or conditions the price of the combinations of UNEs on the way MCIm uses them. Second, Attachment III, Section 2.6, of the agreement provides that "With respect to Network Elements and services in existence as of the Effective Date of this Agreement, charges in Attachment I [,Price Schedule,] are inclusive and no other charges apply, including but not limited to any other consideration for connecting any Network Element(s) with other Network Element(s)." Staff believes that the prices set forth in Table 1 of Attachment I are applicable when individual network elements when they are combined. Staff agrees with MCIm that this language does not permit the addition of "glue charges;" nor does it admit the application of the resale discount when the UNE combination replicates an existing BellSouth retail service.[14]

[14]In contrast, the AT&T/BellSouth interconnection agreement provides, in Part II, Section 29, that "[t]he price for each Network Element is set forth in Part IV of this Agreement." In Part IV, Section 36, the agreement provides that "[t]he prices that AT&T shall pay to BellSouth for Unbundled Network Elements are set forth in Table 1." Table 1 is a mere tabulation of UNEs and associated Commission-established prices (rates). These prices are modified only by Part I, Section 30.8, which permits BellSouth to assess cost-based charges to AT&T to interconnect UNEs or combinations of elements that BellSouth does not interconnect in providing any service to its own customers, and by Part IV, Section 36.1, concerning duplicate charges. Thus, while the MCI/BellSouth agreement explicitly precludes the assessment of UNE assembly charges, that is not the case with the AT&T/BellSouth agreement.

Staff notes that a qualification to pricing UNE combinations as the straightforward summation of the individual element prices is set forth in Section 8 of Attachment I. There, the agreement provides that:

> The recurring and non-recurring prices for Unbundled Network Elements (UNEs) in Table 1 of this Attachment are appropriate for UNEs on an individual, stand-alone basis. When two or more UNEs are combined these prices may lead to duplicate charges. BellSouth shall provide recurring and non-recurring charges that do not duplicate charges for functions or activities that MCIm does not need when two or more network elements are combined in a single order. MCIm and BellSouth shall work together to establish the recurring and non-recurring charges in situations where MCIm is ordering multiple network elements. Where the parties cannot agree to these charges, either party may petition the Florida Public Service Commission to settle the disputed charge or charges.

MCIm and BellSouth have not been able to negotiate recurring and non-recurring charges free of duplicate charges when MCIm orders multiple network elements. Accordingly, and as noted in the Case Background, on August 28, 1997, MCIm filed a petition, which was docketed in Docket No. 971140-TP and consolidated herein, requesting that the Commission set such charges for four specific combinations.[15] This matter is scheduled for hearing on January 26 through 28, 1998.

Therefore, staff recommends that the Commission compel BellSouth to provide network elements as defined in 47 C.F.R. §51.319 to MCIm individually or combined at the prices for the individual elements established by this Commission in Order No. PSC-96-1579-FOF-TP and set forth in the MCImetro/BellSouth Interconnection Agreement in Attachment I, Table 1. The Commission should require that the prices for combinations of network elements be determined as the sum of the prices of the individual elements

[15]These combinations are 2-wire analog loop and port for migration of an existing customer; 2-wire ISDN loop and port for migration of an existing customer; 4-wire analog loop and port for migration of an existing customer; and 4-wire DS1 and port for migration of an existing customer.

comprising the combination without qualification as to use, subject to true-up upon the establishment in Docket No. 971140-TP of recurring and non-recurring charges for combinations free of duplicate charges.

Staff recognizes the Commission's concern that combinations of UNEs to provide service may undercut the prices the Commission has set for resold service. Staff believes, however, that the result in this issue, as the result recommended in Issue 1, is required on the basis of the interconnection agreement of the parties and that it is permissible under the current state of the law. According to the terms of its interconnection agreement with MCIm, BellSouth must provide network elements at individual element prices, whether they are combined or not.

ISSUE 4: Should the Commission grant MCIm's motion to compel BellSouth to provide usage data to MCIm that is necessary to render bills for services provided through UNEs?

RECOMMENDATION: Yes. Pursuant to 47 C.F.R. §51.319(f) and Attachment III, Section 7.2.1.9 of the parties' interconnection agreement, the Commission should compel BellSouth to provide MCIm with the appropriate usage data for all billable calls (including calls involving switched access service) for all types of calls made by MCIm customers through UNEs.

STAFF ANALYSIS: As noted earlier, MCIm alleges that it has purchased 53 UNE combinations from BellSouth in Florida. MCIm further alleges that BellSouth has confirmed these orders as resale and takes the position that it is not obligated to furnish MCIm with the associated usage data necessary for MCIm to bill for services, including switched access, provided by MCIm using UNEs. MCIm observes that pursuant to Section 3(a)(2)(45) of the Act, the term "network element" includes "information sufficient for billing and collection." Further, MCIm notes that Section 7.2.1.9, Attachment III, of the MCIm/BellSouth interconnection agreement provides that "BellSouth shall record all billable events, involving usage of the element, and send the appropriate recording data to MCIm as outlined in Attachment VIII." Section 4.1.1.3 of Attachment VIII of the agreement provides that "BellSouth shall provide MCIm with copies of detail usage on MCIm accounts" for, among other things, completed calls.

Again, MCI charges that BellSouth's refusal to furnish the usage data is a direct impediment to MCI's attempt to enter the local exchange market through the use of UNEs and an improper attempt to thwart competition. MCI alleges that this conduct, too, is contrary to the orders of the Commission, the MCIm/BellSouth interconnection agreement, the Act, and the Florida Legislature's policy in favor of fair and effective competition.

MCI urges that the Commission determine that BellSouth's refusal to provide the data associated with the use of UNEs violates the Commission's arbitration decisions and the MCI/BellSouth interconnection agreement. MCI further urges that the Commission direct BellSouth to provision the appropriate usage data for all billable calls, including calls involving switched access service, for all types of calls made by customers through UNEs.

BellSouth does not address this aspect of MCIm's motion in its response.

BellSouth's apparent unwillingness to provide the usage data MCIm requests seems to be premised on its position that MCI in actuality is improperly purchasing the equivalent of resale services through the recombination of unbundled network elements. Staff believes that is not the case, and that under the state of the law and the terms of the parties' interconnection agreement, MCIm is indeed ordering, and BellSouth is obligated to provide, network element combinations at network element prices. Therefore, staff recommends that, pursuant to 47 C.F.R. §51.319(f) and Attachment III, Section 7.2.1.9 of the parties' interconnection agreement, the Commission compel BellSouth to provide MCIm with the appropriate usage data for all billable calls (including calls involving switched access service) for all types of calls made by MCIm customers through UNEs.

ISSUE 5: Should these dockets be closed?

RECOMMENDATION: No.

STAFF ANALYSIS: These dockets should remain open pending the establishment of permanent prices in Dockets Nos. 960757-TP, 960833-TP, 960846-TP, and 960916-TP and resolution of MCIm's petition in Docket No. 971140-TP.