BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Motions of AT&T Communications of the Southern States, Inc., and MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., to compel BellSouth Telecommunications, Inc. to comply with Order PSC-96-1579-FOF-TP and to set non-recurring charges for combinations of network elements with BellSouth Telecommunications, Inc., pursuant to their agreement.	DOCKET NO. 971140-TP ORDER NO. PSC-98-1271-FOF-TP ISSUED: September 25, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER GRANTING MOTION FOR EXTENSION OF TIME AND DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

CASE BACKGROUND

On June 9, 1997, in Docket No. 960833-TP, AT&T Communications of the Southern States, Inc., (AT&T) filed a Motion to Compel Compliance of BellSouth Telecommunications, Inc., (BellSouth) with reference to certain provisions of Order Nos. PSC-96-1579-FOF-TP, PSC-97-0298-FOF-TP, and PSC-97-0600-FOF-TP and certain provisions of its interconnection agreement with BellSouth regarding the provisioning and pricing of combinations of unbundled network elements (UNEs). On June 23, 1997, BellSouth filed a Response and

Memorandum in Opposition to AT&T's Motion to Compel Compliance. On October 27, 1997, in Docket No. 960846-TP, MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., (MCIm) filed a similar Motion to Compel Compliance. On November 3, 1997, BellSouth 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, for which this docket was opened. BellSouth filed an Answer and Response on September 17, 1997. By Order No. PSC-97-1303-PCO-TP, issued October 21, 1997, this docket was consolidated with Docket Nos. 960757-TP, 960833-TP and 960846-TP for purposes of hearing.

By Order No. PSC-98-0090-FOF-TP, issued January 14, 1998, this docket, now embracing the Motions to Compel Compliance, was severed from Docket Nos. 960757-TP, 960833-TP and 960846-TP. On March 9, 1998, the Commission conducted an evidentiary hearing for the Motions to Compel Compliance and non-recurring charges for certain combinations of network elements. On June 12, 1998, the Commission issued Order No. PSC-98-0810-FOF-TP (Order) in this case. In that Order, the Commission found that BellSouth's requirement that an Alternative Local Exchange Carrier (ALEC) physically collocate in order to receive access to UNEs is in conflict with the Eighth Circuit's decision in Iowa Utilities Board v. F.C.C., 120 F.2d 753, 814 (8th Cir. 1997).

On June 29, 1998, BellSouth filed a Motion for Reconsideration of Order No. PSC-98-0810-FOF-TP. BellSouth seeks reconsideration of the Commission's finding that an ALEC is not required to collocate in order to receive access to UNEs. Additionally, BellSouth seeks clarification of the discussion of issue 5 in the Order and deletion of a statement that is attributed to BellSouth's witness Alphonso Varner in the Order. On July 13 and 14, 1998, AT&T and MCIm filed responses to BellSouth's Motion for Reconsideration. On July 13, 1998, BellSouth filed a Motion for Extension of Time to file Interconnection Agreement.

MOTION FOR EXTENSION OF TIME

Pursuant to Order No. PSC-98-0810-FOF-TP, issued June 12, 1998, the parties were directed to submit written agreements memorializing and implementing the Commission's decisions in the aforementioned Order within 30 days of the issuance of the Order.

In its Motion for Extension of Time, BellSouth seeks additional time so that the Commission can rule on certain issues that it raised in its Motion for Reconsideration.

In support of its Motion, BellSouth states that the parties have reached an impasse regarding the negotiations of the written agreements. BellSouth asserts that the Commission's decision on the Motion for Reconsideration will aid in the negotiations of the issues related to the written agreements. BellSouth also states that it suggested that the parties file a joint request for an extension of time, but MCIm did not agree with BellSouth's suggestion. Therefore, BellSouth requests that the Commission grant an extension of time to file the written interconnection agreement until 14 days after the Order resolving the Motion for Reconsideration is issued.

We find that BellSouth's Motion For Extension of Time is reasonable in light of the pending Motion for Reconsideration. We believe that an Order on the Motion for Reconsideration will aid the completion of the negotiations of the written agreements. While MCIm and AT&T have filed motions in opposition to BellSouth's Motion for Reconsideration, they have not filed motions in opposition to BellSouth's Motion for Extension of Time. An extension of time will allow the parties additional time to file their written agreements, incorporating any changes that may result from our decision on BellSouth's Motion for Reconsideration. Accordingly, we hereby grant BellSouth's Motion for Extension of Time.

MOTION FOR RECONSIDERATION

The purpose of a motion for reconsideration is to bring to the attention of the tribunal some point of fact or law which it overlooked or failed to consider when it rendered its decision. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). It is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). A motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded, 294 So. 2d at 317 (1974).

BellSouth's position:

In its Motion, BellSouth raises three points that it requests the Commission to reconsider or clarify. First, BellSouth states that the Commission should reconsider its holding that BellSouth's requirement that an ALEC must collocate to receive access to UNEs is in conflict with the Eighth Circuit's decision. Second, BellSouth states that the Commission should reconsider or clarify a portion of its discussion on Issue 5. Third, BellSouth requests that the Commission correct a statement that was improperly attributed to BellSouth's witness Alphonso Varner.

In support of its first point, BellSouth argues that the Order's holding that BellSouth's collocation requirement is in conflict with the Eighth Circuit's decision and the Act is in error. BellSouth states that an incumbent LEC may rely on collocation arrangements to satisfy its obligation under Section 251(c)(3) of the Telecommunications Act of 1996 (Act) to provide UNEs in a manner that permits their recombination. BellSouth also argues that the Eighth Circuit did not need to address specifically whether physical collocation was an acceptable method of access under Section 251(c)(3) because the Act itself confirms that it is. BellSouth states that under the Act Congress imposed upon Bell companies a duty to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. Accordingly, BellSouth also states that Congress envisioned that ALECs would obtain access to UNEs under Section 251(c)(3) and the ability to combine those UNEs through collocation.

While BellSouth argues that the Commission erred in holding that BellSouth's collocation requirement is in conflict with the Eighth Circuit's decision and the Act, BellSouth acknowledges that the Eighth Circuit rejected arguments that "a competing carrier should own or control some of its own local exchange facilities before it can purchase and use unbundled elements from an incumbent ILEC to provide a telecommunications service." Iowa Utilities, 150 F.3d at 814.

Regarding the second point in its Motion, BellSouth states that the Commission's discussion on Issue 5 is inconsistent with the Commission's ultimate decision on that issue. Specifically, BellSouth contends that the Order states that in case of a migration of an existing BellSouth customer to AT&T, the price that AT&T shall pay is the sum of the prices for the loop and switch

port. BellSouth claims that this statement is inconsistent with the Commission's finding that the price for combinations of UNEs that recreate an existing BellSouth retail service has not been determined. BellSouth states that the Commission's finding that a loop and switch port does not recreate an existing BellSouth retail service is beneficial to AT&T. BellSouth explains that under this approach when an existing customer migrates from BellSouth to AT&T, AT&T will receive the benefit of more UNEs than just the loop and port, but AT&T will be required to pay only for the loop and port. Additionally, BellSouth claims that the Commission's finding that the AT&T - BellSouth agreement provides a pricing standard for those combinations of UNEs that are not already in existence and those that recreate a BellSouth retail service is inconsistent with the Commission's conclusion on this issue.

Finally, BellSouth requests that the Order be corrected to delete a statement that was improperly attributed to BellSouth's witness Alphonso Varner. Specifically, BellSouth states that there is no support in the record to support the contention that witness Varner stated that BellSouth voluntarily undertook the bundling obligation only because 47 C.F.R. §51.315(a) was then in effect regarding the BellSouth-MCI Interconnection Agreement.

MCIm's response:

MCIm requests that BellSouth's Motion be denied on the first point. MCI states that BellSouth has failed to show that there are any points of law that the Commission overlooked or failed to consider in reaching its conclusion. MCIm argues that the Commission's finding reflects a proper reading of the Eighth Circuit's decision. MCIm explains that under BellSouth's approach, a competing carrier seeking to purchase loop-port combinations would have to control a collocation space and would have to own at least some facilities within that space in order to combine elements for the purpose of providing a telecommunications service. MCIm states that the Eighth Circuit's decision clearly permits new entrants to obtain UNEs from an incumbent LEC and to combine those UNEs to provide a finished telecommunications service even though the new entrant does not own or control any portion of a telecommunications network. Moreover, MCIm asserts that BellSouth's analysis of the Eighth Circuit's decision is based on piecing together out-of-context quotations from the Court's opinion to reach a fundamentally flawed conclusion.

MCIm takes no position on the second point raised in BellSouth's Motion, and MCIm does not object to the deletion of a statement that was attributed to BellSouth's witness Varner because it has not been able to locate any testimony by Mr. Varner which directly supports the challenged statement in the Order.

AT&T's response:

In its Response, AT&T argues that BellSouth's Motion should be denied because it fails to meet the standard for reconsideration. AT&T states that BellSouth simply disagrees with the Commission's finding that BellSouth's requirement that an ALEC must be collocated in order to receive access to UNEs is in conflict with the Eighth Circuit's decision. As to the second point, AT&T states that there is no inconsistency between the Commission's holding and the discussion related to Issue 5. AT&T explains that the Order clearly identifies migration pricing as an exception to its finding. Moreover, AT&T asserts that BellSouth mischaracterizes statements in the Order to argue that it will be forced to provide the entire existing service for the price of a loop and port when it migrates customers from BellSouth to AT&T. Finally, AT&T states that it does not agree with BellSouth's assertion that the statement attributed Mr. Varner needs correction. We note that AT&T did not provide a specific citation to the record to support its position.

Discussion

Collocation and UNE Combinations

BellSouth disagrees with the Commission's finding that BellSouth's requirement that an ALEC must be collocated in order to receive access to UNEs is in conflict with the Eighth Circuit's decision. The Commission made this finding in the course of its discussion of "switch as is", the migration of existing BellSouth customers to AT&T and MCI, and the question of disconnecting elements already functionally combined. See Order No. PSC-98-0810-FOF-TP, pages 51-54. On page 53 of the Order, the Commission stated:

> We find that BellSouth's requirement that an ALEC must be collocated in order to receive access to UNEs is in conflict with the Eighth Circuit. As we have already noted, the court stated held (sic) that a requesting carrier may achieve the capability to provide

> telecommunications services completely through access to the unbundled elements of an incumbent LEC's network and has no obligation to own or control some portion of a telecommunications network before being able to purchase unbundled elements. Iowa Utilities Bd. I, 120 F.3d at 814. BellSouth's collocation proposal would impose on an ALEC seeking unbundled access the very obligation the court held to be inappropriate under the Act, i.e., to own or control some portion of the network.

In addressing the issue of access to UNEs, the Eighth Circuit stated:

> We believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network. Nothing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements. (emphasis added)

Iowa Utilities Board v. F.C.C. 120 F.2d 753, 814 (8th Cir. 1997). A plain reading of the above quotation clearly supports the Commission's finding that BellSouth's collocation requirement is in conflict with the Eighth Circuit's decision and the Act. Therefore, we do not believe that we made a mistake of law or fact in rendering its decision on this point.

Furthermore, BellSouth's interpretation of the Commission's Order is not correct. The Commission does not suggest in its Order that no equipment or materials are required for interconnection and access to UNEs. Collocation is necessary when an ALEC wishes to interconnect its own facilities with UNEs of an ILEC. Here, however, collocation and the associated equipment and materials are not necessary, because, as we explain in our Order at page 52, both AT&T's and MCI's respective agreements prohibit BellSouth from disconnecting UNEs or combinations of UNEs that are currently interconnected and functional. Both agreements provide that those UNEs or combinations of UNEs will remain functional without any disconnection or disruption of service. These contractual provisions eliminate the need for collocation for all elements or combinations of network elements that are currently interconnected and functional when ordered by AT&T or MCI. As the Commission explained; "[t]he apparent purpose of this language in the

agreements is to avoid the disconnection of elements already in place." BellSouth's collocation requirement would require that any element currently interconnected be disconnected and subsequently reconnected via cross connects to a collocated facility. This separation of already connected elements would immediately disrupt service and functionality provided by the use of the network elements. BellSouth's collocation requirement thus conflicts with the provisions of the parties' respective agreements for orders for currently interconnected and functional elements.

For the reasons expressed above, we find it appropriate to deny BellSouth's Motion for Reconsideration regarding the issue of the conflict between the Eighth Circuit's decision and BellSouth's collocation requirement. We considered this issue in the Order, and did not make a mistake of fact or law when we made our decision in the first instance.

Issue 5 Discussion Versus Holding

In its Motion, BellSouth contends that several statements the Commission made in its discussion of Issue 5 are inconsistent with the Commission's finding that the price for combinations of UNEs that recreate an existing BellSouth service has not been determined. Specifically, BellSouth claims the following discussion as being inconsistent with the Commission's finding:

> Therefore, for network element combinations that do not recreate an existing BellSouth retail service and that exist at the time of AT&T's order, we find, as an exception, that the price AT&T shall pay is the sum of the prices for the component elements shown in Table 1 of Part IV. For the specific case of migration of an existing BellSouth customer to AT&T, the price AT&T shall pay is the sum of the prices for the loop and switch port. This exception is sustainable since the elements are already assembled and cannot be disassembled. BellSouth will not incur a cost for assembling or reassembling them, or any other combining related cost.

Order at 44, 45 (emphasis added). We do not believe that reconsideration of this point is warranted, because the discussion in question is not inconsistent with our ultimate decision. For the purposes of aiding the parties in negotiating their interconnection agreements, however, we believe that some clarification is appropriate. The above discussion specifies the

price that AT&T shall pay if it orders only the loop and switch port that serves an existing BellSouth customer. For example, when an existing BellSouth customer migrates to AT&T, and AT&T orders the loop and port that serves the customer, AT&T will receive and pay UNE prices for only those two elements. BellSouth is not required to provide the "entire existing service" for the price of a loop and port.

Furthermore, BellSouth claims that the Commission's finding that a loop and port does not recreate an existing BellSouth retail service would cause AT&T to receive the benefit of more UNEs than just the loop and port when an existing customer migrates from BellSouth to AT&T. BellSouth states that migration of an existing customer from BellSouth to AT&T, with all UNEs and services intact does recreate an existing BellSouth retail service. BellSouth is merely rearguing a point that has already been considered by the Commission. It is inappropriate to reargue matters that have been considered in a motion for reconsideration. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959). Therefore, we believe that BellSouth's argument is an attempt by BellSouth to reargue the finding that a loop and port does not recreate an existing BellSouth retail service.

BellSouth also contends that the Commission's statement on page 46 of the Order that the AT&T - BellSouth Agreement provides a pricing standard for UNE combinations that are not in existence and for those that recreate a BellSouth retail service is inconsistent with the Commission's decision. We do not believe that the aforementioned statement is inconsistent with the decision. Our decision specifically provides that the parties must negotiate prices for those combinations of network elements not already in existence that recreate a BellSouth retail service. The statement asserts that the agreement provides a pricing standard, not prices, for those combinations of network elements that recreate a BellSouth retail service. Accordingly, we find that the statements are consistent with our decision in Order No. 98-0810-FOF-TP.

Statement By BellSouth Witness Varner

In its Motion, BellSouth contends that a statement on page 24 of the Order was improperly attributed to BellSouth's witness Alphonso Varner. Specifically, BellSouth states that there is no support in the record for the statement that BellSouth witness

Varner testified that BellSouth voluntarily undertook the bundling obligation only because 47 C.F.R. §51.319, since vacated, was then in effect regarding the BellSouth - MCI Interconnection Agreement. BellSouth also states that the bundling obligation was not a voluntary and negotiated obligation as stated in the Order.

We did not find any support in the record that BellSouth witness Varner testified that the bundling obligation was a voluntary obligation. The testimony of Mr. Varner, however, does clearly indicate that the bundling obligation was a contractual obligation that was negotiated in the BellSouth - MCI agreement. See Exhibit 24, pp. 23-24. Therefore, the statement that BellSouth voluntarily undertook the bungling obligation should be deleted from the Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion for Extension of Time to file Interconnection Agreement is hereby granted. It is further

ORDERED that the parties shall file their written agreements, incorporating any changes that resulted from this Order, 14 days after issuance of this Order. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Reconsideration of Order No. PSC-98-0810-FOF-TP is hereby denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s request for clarification of Issue 5 and the decision in Order No. PSC-98-0810-FOF-TP is hereby granted. It is further

ORDERED that the statement that was incorrectly attributed to BellSouth Telecommunications, Inc.'s witness Alphonso Varner shall be deleted from Order No. PSC-98-0810-FOF-TP. It is further

ORDERED that this docket shall remain open pending approval of the parties' agreements.

By ORDER of the Florida Public Service Commission this 25th day of September, 1998.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

HO

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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