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April 6, 1998

Ms. Blanca S. Bayó
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 971140-TL

Dear Ms. Bayó:

Enclosed herein for filing on behalf of MCI
Telecommunications Corporation and MCI Metro Access Transmission
Services, Inc. (collectively MCI), are the original and 15 copies
of the MCI's Post Hearing Brief and a Word 7.0 diskette.

By copy of this letter these documents have been provided to
the parties on the attached service list.

Very truly yours,

Richard D. Melson

Richard D. Melson

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Motions of AT&T)	
Communications of the Southern)	
States, Inc. and MCI)	Docket No. 971140-TP
Telecommunications and MCI Metro)	
Access Transmission Services, Inc.)	
to compel BellSouth)	Filed: April 6, 1998
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.)	

BRIEF OF MCI TELECOMMUNICATIONS CORPORATION

Come Now MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. ("MCI") and hereby submit this post-hearing brief to the Florida Public Service Commission ("PSC" or "Commission") requesting that the Commission order the following: that BellSouth comply with its Interconnection Agreement with MCI; that BellSouth provide combinations of unbundled network elements at cost based rates which do not include duplicate charges or charges for services which MCI does not need; and, that BellSouth provide MCI with switched access usage data when MCI serves customers via network elements regardless of how those elements are priced.

This case contains two issues which are critical to the success of widespread telecommunications competition in Florida. The first is whether MCI will be allowed to compete against BellSouth in a fair and nondiscriminatory manner and whether Florida consumers will be allowed to receive the true benefits of competition. MCI has shown that a loop/port combination

can be migrated for less than \$2.00 without loss of service to the customer. In contrast, BellSouth proposes charges of almost \$200.00!¹ BellSouth's proposal is so expensive because it is based on the premise of unnecessarily ripping apart currently combined elements only to require MCI to reconnect them in a collocation facility. As a result, all customers who switch providers would have their service physically disconnected for a period of time. If it was not poised to destroy any chance of widespread local competition in Florida, BellSouth's plan of pulling elements apart just so that it can charge its competitors to put them back together would almost be comical.

The Commission has stated that it would be concerned if the rate for UNE combinations could "undercut" BellSouth's resale rate for retail services. Indeed, it should be concerned. UNE rates are cost based and already include a reasonable profit for BellSouth. If the resale rate is greater than the UNE rate, it means one thing – BellSouth is overcharging its customers. BellSouth's own exhibits filed in this case demonstrate that its rates for residential service are at least \$2.22 per month more than its cost to provide the service, including a reasonable profit. (Ex. 22, AJV-1, Chart C) If UNE competition is allowed, competitive pressures would cause that \$2.22² per month per customer windfall to go back the residential customer. If only resale is allowed, or if the NRCs for UNE combinations are so high that competition is effectively prevented, this residential windfall – which translates to more than \$94 million annually – would

1 For a 2-wire analog loop/port combination, AT&T proposed a nonrecurring charge (NRC) of \$0.21 based on a bottoms-up forward-looking cost analysis (Walsh, Tr. 201). MCI recommended \$1.67 based on adjustments to BellSouth's cost study. (Hyde, Tr. 93) BellSouth recommended \$169.10. (Ex 22, AJV-2) Unlike the MCI and AT&T recommendations, BellSouth's proposal would also require ALECs to purchase collocation facilities. These additional costs are not included in Mr. Varner's proposed rate. (Landry, Tr. 712)

2 As Mr. Gillan testified, BellSouth has actually understated the windfall it receives from residential customers. The actual windfall to BellSouth per customer per month is approximately \$4.36. (Gillan, Tr. 275)

remain embedded in residential rates for the foreseeable future. (Gillan, Tr. 274) In any event, the Eighth Circuit Court of Appeals has fundamentally affirmed the right of ALECs to compete using network element combinations, paying cost-based rates. The Eighth Circuit considered and rejected BellSouth's argument that network element combinations are equivalent to service-resale. Iowa Utilities Board v. Federal Communications Commission, 120 F.3rd 753, 814-15 (1997).

The second issue presented in this case is how will the Commission handle contractual disputes. This is more than merely a procedural question of how Commission hearings on contract disputes will be conducted. It is a fundamental business question: Can MCI rely on the certainty and finality of the plain and unambiguous language of its Interconnection Agreement with BellSouth?

The MCI/BellSouth Interconnection Agreement (“the Agreement”) directly and unambiguously decides the issues in this case. The Agreement specifically gives MCI the right to order UNE combinations and specifically obligates BellSouth to provide such combinations. The Agreement specifies how the prices for combinations of UNEs are determined – the price for UNE combinations is the price of the individual UNEs minus duplicate charges and charges for services not needed. In other words, BellSouth should not charge MCI for work it does not need to perform to provide the elements. When MCI orders migrations of existing BellSouth customers to loop/port combinations, almost all of the charges contained in the nonrecurring charges for the stand-alone UNEs are duplicate charges and charges for services not needed.

Many of the critical provisions in the Agreement were negotiated not arbitrated. Three of those voluntarily negotiated provisions go to the heart of this case – what rate should MCI pay when it migrates an existing BellSouth customer to a loop/port combination. These provisions

provide that MCI can migrate existing BellSouth customers to UNEs, as opposed to resale. Section 2.2.2.3, Attachment VIII. When MCI does so, BellSouth cannot disconnect the currently connected network elements. Section 2.2.15.3, Attachment VIII. Finally, when MCI migrates the customer to UNEs, the charges for the network elements set forth in Attachment 1 apply. Those charges are inclusive and no other charges, including charges for connecting elements together, shall apply. Section 2.6, Attachment III.

Finally, the Agreement specifically requires BellSouth to provide switched access usage data to MCI. This requirement applies to both interstate and intrastate access. Further, it applies even if the Commission determines that recombined elements which allegedly recreate a BellSouth retail service should be priced at the resale rate. The price charged for a network element does not affect the fact that a CLEC serving customers via network elements is the access provider. BellSouth has admitted that the Commission has already ruled that MCI may combine elements in any manner, including recreating an existing service. BellSouth has admitted that when MCI orders a loop/port combination, the loop and the port remain network elements under the Agreement. BellSouth has admitted that when MCI orders a loop/port combination, the loop and the port are still governed by the FCC rules on network elements. In fact, the Agreement specifically states that "When ordering a Combination, MCI shall have the option of ordering all features, functions, and capabilities of each Network Element." Section 2.2.15.6 of Attachment VIII. Pursuant to the FCC rules, one capability of network elements is the ability to provide access services. Accordingly, those rules state that MCI is the access provider when it uses UNEs.

I. **DISCUSSION AND CITATION TO RECORD AND AUTHORITY**

Issue 1(a): Does the BellSouth-MCI Interconnection Agreement specify how prices will be determined for combinations of unbundled network elements that do not recreate an existing BellSouth retail telecommunications service?

****MCI Position:** Yes, the Agreement does specify how the prices for combinations of UNEs will be determined. The price for UNE combinations is the price of the individual UNEs minus duplicate charges and charges for service not needed.**

The MCI/BellSouth Interconnection Agreement (“the Agreement”) directly, expressly, and unambiguously specifies how the prices for combinations of UNEs are determined – the price for UNE combinations is the price of the individual UNEs minus duplicate charges and charges for services not needed. The Agreement gives MCI the right to order UNE combinations and specifically obligates BellSouth to provide such combinations. The Agreement prohibits BellSouth from disconnecting elements ordered in combination and prohibits BellSouth from charging any fee for ripping elements apart or for connecting elements together.

The first step, and the most important one, which should be used in contract interpretation is to look at the language in the contract itself. If that language is clear and unambiguous, there is no reason to look outside the contract.³ See, e.g., Pol v. Pol, 1997 WL 786455 (Fla. 3rd DCA 1997). BellSouth has failed to demonstrate any ambiguity in the Agreement.

3 Indeed, the Agreement itself provides as follows:

Section 31. Entire Agreement. This Agreement, including all Parts and Attachments and subordinate documents attached hereto or referenced herein, all of which are incorporated by reference herein, constitute the entire matter thereof, and supersede all prior oral or written agreements, representations, statements, negotiations, understandings, proposals, and undertakings with respect to the subject matter thereof.

Section 31, Part A, General Terms.

a. Plain Language of the Agreement

The Agreement clearly specifies how the price for UNE combinations will be determined.

Section 8 of Attachment 1 provides:

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 network elements are combined, these prices may lead to duplicate charges. BellSouth shall provide recurring and non-recurring charges that do not include duplicate charges for functions or activities that MCI does not need when two or more network elements are combined in a single order. MCI and BellSouth shall work together to establish recurring and nonrecurring charges in situations where MCI 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.

Table 1 of Attachment 1 sets forth the recurring and non-recurring rates for network elements. If MCI bought a UNE combination today, the rate would be the sum of the rates of the elements which compose that combination. See Section 2.6 of Attachment III.⁴ The contract recognizes, however, that this could cause MCI to pay duplicate charges and charges for services not needed. Therefore, the contract creates a mechanism of negotiation and, if necessary, petition to the Commission for removal of these unnecessary charges. In this case, MCI has petitioned the Commission to set the non-recurring charges (NRCs) for four specific loop-port combinations.⁵

4 While BellSouth claims that nothing in the Agreement provides that UNE combinations be priced at the sum of the individual element prices, that is exactly what Mr. Varner proposes in his testimony for 8 element combinations. (Varner, Tr. 398, 433-34)

5 MCI attempted to negotiate such rates with BellSouth. Such negotiations were unsuccessful. (Parker, Tr. 16) Strangely, Mr. Varner made vague complaints about MCI's failure to request recurring rates at the same time it requested nonrecurring rates. (Varner, Tr. 407-08) MCI has not waived its rights to require BellSouth to remove duplicate charges and charges for services not needed from the recurring rates and specifically reserves its right to do so in a future complaint.

It is undisputed that under the Interconnection Agreement, BellSouth is obligated to provide MCI UNE combinations. (Hendrix, Tr. 621). Section 2.4 of Attachment III of the MCI/BellSouth Interconnection Agreement clearly states that:

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

Section 2.2.15.1 of Attachment VIII provides:

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

When MCI orders currently combined network elements, BellSouth cannot disconnect them before giving them to MCI. Section 2.2.15.3 of Attachment VIII provides:

When MCI 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. This shall be known as Contiguous Network Interconnection of Network Elements.⁶

The Agreement clearly recognizes that MCI may migrate existing BellSouth customers to MCI to be served through unbundled Network Elements reusing existing BellSouth facilities.

Section 2.2.2.3 of Attachment VIII.⁷

⁶ Section 2.2.15.4 goes on to state: "Order combinations of Contiguous Network Elements shall be available to be ordered (i) on a case-by case basis for those Network Elements that are subscriber-specific."

⁷ Section 2.2.2 of Attachment VIII is entitled **Service Migrations and New Subscriber Additions**. Section 2.2.2.1 addresses migration to resale. Section 2.2.2.3 addresses migration to UNEs. "Migration" of an existing customer simply means the situation in which a customer who obtains service from BellSouth today chooses MCI to be his local service provider. In that situation, MCI could elect to serve the customer in a number of ways, including "migrating" the

Under the Agreement, BellSouth is not authorized to charge a “tear-apart-and-reconnect” fee⁸ to MCI when MCI orders elements in combination. First, the Agreement specifically prohibits BellSouth from pulling elements apart when MCI orders them as combined. Section 2.2.15.3 of Attachment VIII. Obviously, there is no need to connect elements that are already connected. In any event, Section 2.6 of Attachment III of the Agreement specifically prohibits such charges:

With respect to Network Elements. . . charges in Attachment I 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).

Section 2.6 of Attachment III also makes clear that the network element charges in Attachment I are the only thing which BellSouth may charge MCI even when those elements are combined with other Network Elements. When read in conjunction with Section 8 of Attachment 1, it is clear the sum of the stand alone UNE rates in Attachment 1 form the ceiling – the maximum rate which BellSouth can charge - when such elements are ordered in combination.

In summary, if MCI orders a loop/port combination (which as explained in detail under Issue No. 7 does not recreate any BellSouth retail service), Section 2.6 of Attachment III tells the parties that the rate for the loop and the rate for the port in Attachment I apply and that there can be no charge for connecting the loop to the port.⁹ Section 8 of Attachment I recognizes,

customer to service through resale of BellSouth’s retail service or “migrating” the customer to service through the use of a UNE combination purchased from BellSouth.

8 Such a charge has sometimes been referred to as a “glue charge.” This term, however, is misleading since it implies that two unassociated elements need to be connected. What BellSouth is really proposing is that MCI pay to have currently connected elements torn apart and then pay to have them reconnected.

9 Actually, this would be true for migration of an existing loop/port combination even if Section 2.6 of

however, that merely summing the stand-alone UNE rates could cause MCI to pay duplicate charges and charges for services not needed. Therefore, BellSouth is required to remove those unnecessary charges.

b. BellSouth's Argument

BellSouth argues that the rates for UNE combinations which do not recreate a BellSouth retail service should be "market based." (Varner, Tr. 388) This position simply ignores the Agreement. In spite of the fact that the Commission ordered "BellSouth to provide NRCs that do not include duplicate charges or charges for functions or activities that MCI does not need when two or more network elements are combined in a single order," Order No. PSC-97-0298-FOF-TP, p. 27, BellSouth claims that the Commission never arbitrated this issue. Under questioning by Commissioner Clark at the hearing, however, Mr. Varner conceded that the only combination rates which the Commission stated that it had not arbitrated were for combinations which duplicated a retail service. (Varner, Tr. 509).¹⁰

The Commission's ruling that BellSouth must provide NRCs that do not include duplicate charges or charges for functions or activities that MCI does not need when MCI orders combinations was incorporated into the Agreement as Section 8 of Attachment I. This Section, therefore, precludes BellSouth's proposal to charge "market rates."

Attachment III did not exist. Section 1 of Attachment III states that "the price for each network element is set forth in Attachment I." If MCI orders a loop and a port, it is obvious that, absent something to the contrary in the Agreement, MCI would pay BellSouth the loop rate for the loop and the port rate for the port. Since under this scenario the loop and the port would already be connected and could not be disconnected (Section 2.2.15.3 of Attachment VIII), there would be no charge for connecting them.

¹⁰ As discussed under Issue 1(b), even though the Commission may not have addressed the issue of pricing of combinations which recreate a retail service, the negotiated provisions in the Agreement do.

As discussed under Issue 8, BellSouth has attempted to interpret the Commission's ruling and Section 8 of Attachment I as merely providing for the price for two or more individual elements ordered at the same time rather than the price for a network element combination. BellSouth bases its position on the words "in a single order." However, Mr. Varner simply ignores the repeated use of the words "combined" and "combination" in the same paragraph. Id. at 27-28. For example, the Commission ordered BellSouth to "specify the elements being combined and the NRC for that combination." Id. at 28 (Emphasis added). Clearly, the Commission was referring to combinations of elements ordered on the same order not merely individual stand-alone elements ordered on the same order. Even Mr. Varner concedes that two stand-alone elements is not a combination - "if we pulled them apart, it would no longer be a combination." (Varner, Tr. 497)

Similarly, Section 2.6 of Attachment III precludes BellSouth's proposal that the price for UNE combinations be "market based." This section provides that the UNE prices in Attachment I "are inclusive and no other charges apply, including . . . consideration for connecting any Network Element(s) with other Network Element(s)."¹¹

As stated above, the Commission's directive that BellSouth provide NRCs for UNE combinations that do not include duplicate charges or charges for functions or activities that MCI

¹¹ As discussed in more detail under Issue 1(b) below, BellSouth has attempted to minimize Section 2.6. It is undisputed that BellSouth voluntarily agreed to this provision; however, BellSouth witnesses have argued that it was only agreed to "in conjunction with" the resale language which the Commission rejected in its May 27, 1997 Order on Agreement, Order No. PSC-97-0602-FOF-TP. (Hendrix, Tr. 638-39) MCI disputes this assertion even as it relates to combinations which allegedly recreate a BellSouth retail service; but, BellSouth's claim that it agreed to this provision "in conjunction with" its resale language is certainly irrelevant to the pricing of combinations which do not recreate a BellSouth retail service. In other word, even if BellSouth's proposed language had been included in the Agreement, that language, by its own terms, would not have affected the pricing of combinations which do not recreate a BellSouth service.

does not need was incorporated into the Agreement as Section 8 of Attachment I. Clearly, therefore, the Agreement specifies how the prices of UNE combinations will be determined.

Issue 1(b): Does the BellSouth-MCI Interconnection Agreement specify how prices will be determined for combinations of unbundled network elements that do recreate an existing BellSouth retail telecommunications service?

****MCI Position:** Yes. The price for UNE combinations is the price of the individual UNEs minus duplicate charges and charges for service not needed. The Agreement makes no distinction between combinations which allegedly “recreate” an existing BellSouth retail telecommunications service and those that do not. **

As explained under Issue 1(a) above, the MCI/BellSouth Interconnection Agreement (“the Agreement”) directly, expressly, and unambiguously specifies how the prices for combinations of UNEs are determined – the price for UNE combinations is the sum of the prices of the individual UNEs minus duplicate charges and charges for services not needed. The Agreement makes no distinction between combinations which allegedly “recreate” an existing BellSouth retail telecommunications service and those that do not. The Agreement gives MCI the right to order UNE combinations and specifically obligates BellSouth to provide such combinations. The Agreement prohibits BellSouth from disconnecting elements ordered in combination and prohibits BellSouth from charging a fee to tear apart and reconnect elements.

As already stated, the first step which should be used in contract interpretation is to look at the language in the contract itself. If that language is clear and unambiguous, there is no reason to look outside the contract. As explained in Issue 1(a), the plain language of the Agreement decides the issues in this case.

a. BellSouth's Argument.

BellSouth argues that the Agreement does not address the issue of pricing of UNE combinations and that combinations which recreate a BellSouth retail service should be priced at the resale rate.¹² However, the Agreement, in Section 2.6 of Attachment III and Section 8 of Attachment I, clearly specifies how UNE combinations shall be priced. Further, the Agreement makes no distinction between UNE combinations which allegedly recreate a BellSouth retail service and those that do not. Thus, there is no basis to treat them differently.

Section 2.6 of Attachment III provides that the UNE prices in Attachment I are "inclusive and no other charges apply," even when those elements are combined with other elements. Section 8 of Attachment 1 states that when UNEs are combined, the stand alone rates may lead to duplicate charges. Therefore, BellSouth is required to provide combinations at rates which do not include the duplicate charges or charges for services not needed. Obviously, this is a fundamentally different methodology than the avoided cost standard for resale. (Ex. 26, Deposition of Jerry Hendrix, p. 47) There is no ambiguity in the Agreement.

Despite the fact that BellSouth has failed to demonstrate any ambiguity in the Agreement, BellSouth urges the Commission to look behind the plain language of the Agreement. BellSouth's argument that the Agreement does not address the issue of pricing for services which recreate a BellSouth retail service seems to be that the Commission has not arbitrated that issue. In particular, BellSouth relies on the Commission's statement in its Order on Reconsideration that it had not arbitrated the "specific issue of pricing of recombined elements when recreating the same

¹² At one point in his deposition, Mr. Hendrix even tries to claim that "nowhere in that attachment [Attachment I] will you find the language 'combinations.'" (Ex. 26, Deposition of Jerry Hendrix, p. 37). That is simply not true. The words "combined" and "combination" appear in Section 8 of Attachment I four times.

service offered for resale.” Order No. PSC-97-0298-FOF-TP, p. 7. BellSouth’s argument that the Commission has not arbitrated this issue overlooks the fact that the Agreement contains many voluntarily negotiated terms which, although never arbitrated by the Commission, are nonetheless binding on BellSouth and MCI.

b. Negotiated Provisions

The Commission’s consideration of the Agreement cannot end with the question of “did we arbitrate this issue.” Only a fraction of the provisions in the Agreement were arbitrated, the rest were negotiated. BellSouth is also bound by the negotiated provisions. To rule otherwise would render the negotiation process meaningless.

First, BellSouth voluntarily agreed to Section 2.2.2 of Attachment VIII. Section 2.2.2.3 authorizes MCI to migrate existing BellSouth customers to MCI to be served through unbundled Network Elements reusing existing BellSouth facilities. Thus, BellSouth’s position that migration equals resale is contrary to the Agreement.¹³ Second, BellSouth also voluntarily consented to Section 2.2.15.3 of Attachment VIII. This section specifically prohibits BellSouth from ripping elements apart when MCI orders them in combination.¹⁴ Third, BellSouth also negotiated Section 2.6 of Attachment III of the Agreement. This section provides that the UNE prices in Attachment I are inclusive and no other charges apply, even when those elements are

13 See discussion of migration under Issue 8.

14 Indeed, during the negotiation process, BellSouth never took the position that they had the right to pull elements apart. (Ex. 39, Deposition of Ron Martinez, p. 49)

combined with other elements. Thus, BellSouth may not charge a “tear-apart-and-reconnect”¹⁵ charge. (Ex. 39, Deposition of Ron Martinez, p. 46-47)¹⁶

Together, these three voluntarily negotiated provisions go to the heart of this case – what rate should MCI pay when it migrates an existing BellSouth customer to a loop/port combination. They provide that MCI can migrate existing BellSouth customers to UNEs, as opposed to resale. (Section 2.2.2, Attachment VIII). When MCI does so, BellSouth cannot disconnect the currently connected network elements. (Section 2.2.15.3, Attachment VIII). Finally, when MCI migrates the customer to UNEs, the charges for the network elements set forth in Attachment I apply. Those charges are inclusive and no other charges, including a charge to connect network elements together, shall apply. (Section 2.6, Attachment III)

BellSouth witnesses have stated that these provisions were only agreed to “in conjunction with” the resale language which the Commission rejected in its May 27, 1997 Order on Agreement, Order No. PSC-97-0602-FOF-TP. (Hendrix, Tr. 638-39) First, this language was not agreed to contingent on approval of any other language.¹⁷ If BellSouth had wanted the Commission to arbitrate these provisions, it could have so requested. It did not. As BellSouth stated in its January 30, 1997 letter to the Commission, this language “is language to which the

15 As discussed in footnote 8, the term “glue charge” is misleading.

16 During the negotiations, BellSouth was “totally aware of the meaning of this paragraph.” (Ex. 39, Deposition of Ron Martinez, p. 47)

17 Mr. Hendrix admitted that nothing in these provisions state that they are contingent on approval of other language. (Ex. 26, Deposition of Jerry Hendrix, p. 50). Instead, he seems say that BellSouth agreed to the language with MCI because it believed the Commission would approve BellSouth’s proposed pricing language because of the concern expressed by the Commission in dicta. *Id.* at 38-39 and 49-50. Even if true, such a reliance on dicta is not reasonable. As discussed below, however, BellSouth agreed to these provisions prior to January 30, 1997. The Commission’s Order on Reconsideration, which Mr. Hendrix allegedly relied on for this belief was not even issued until March 19, 1997.

parties have agreed through the course of negotiations over the past several months.” Ex. 38.

Second, simply reading these provisions reveals that they have nothing to do with resale. They all specifically address UNEs and UNE combinations. None distinguish UNE combinations which allegedly recreate a retail service from those which do not.¹⁸ None even mention resale. The essence of BellSouth’s argument seems to be that Section 2.6 of Attachment III cannot mean what it says because BellSouth has always argued that UNE combinations must be priced at the resale rate.¹⁹ (Hendrix, Tr. 622) BellSouth, however, has not always made this argument. In the initial arbitration hearing, BellSouth did not argue that when MCI combined UNEs to recreate a BellSouth retail service, the UNEs should be priced as resale. Instead, BellSouth was arguing that MCI simply could not recombine the UNEs to recreate a retail service.²⁰ Only after the Commission ruled that MCI could combine UNEs in any manner, did BellSouth start making its pricing argument. Order PSC-97-0298-FOF-TP, p. 7.

Third, the timeline in the Commission’s own records confirms that these provisions were voluntarily agreed to. On December 31, 1996, the Commission issued its Final Order on Arbitration. Order No. PSC-96-1579-FOF-TP. In that order, the Commission rejected

18 Mr. Hendrix attempts to claim that Section 2.6 of Attachment III “simply addresses combinations which recreate existing retail service offerings.” (Hendrix, Tr. 639). However, even Mr. Varner recognizes that not all UNE combinations recreate a BellSouth retail service. (Varner, Tr. 398)

19 That is like MCI arguing that Section 2.6 must mean what it says because MCI has always argued that UNE combinations must be priced at UNE rates. After all, MCI proposed the language.

20 In the arbitration, Mr. Scheye argued that “nowhere in the Act does it anticipate recreation of an existing service by the simple reassembling of the LEC’s unbundled elements.” PSC-96-1579-FOF-TP, p. 34. “BellSouth states that unbundled network elements should only be combined with AT&T’s or MCI’s own capabilities to create a unique service.” *Id.* at 36. BST’s official position in its Prehearing Statement in the initial arbitration was: “AT&T and MCI should be allowed to combine BellSouth provided elements with their own capabilities to create a unique service. They should not be allowed to rebundle these elements to recreate a retail service that is already available to AT&T/MCI via resale.” Prehearing Statement of BellSouth, p. 16.

BellSouth's argument that MCI could not combine network elements to recreate a BellSouth service. Id. at 34-38. On January 30, 1997, BellSouth filed a draft of the MCI/BellSouth Interconnection Agreement with the Commission. In that draft, BellSouth indicated in regular type face the provisions which it had voluntarily negotiated with MCI. BellSouth indicated in bold the provisions which were still in dispute and the provisions which it was including in the draft only because it was ordered to do so by the Commission. The three provisions described above, of course, are in regular type face. Exhibit 38. It would be ridiculous for BellSouth to claim that it was agreeing to these provisions on January 30 "in conjunction with" something the Commission had rejected the month before in its Final Order on Arbitration.

Further, if BellSouth was only agreeing to those voluntarily negotiated provisions shown in the January 30, 1997, Draft Agreement "in conjunction with" some other provision, that other alleged provision would also be in the January 30, 1997 Draft Agreement. It is not there. For example, in the Georgia Interconnection Agreement, Section 2.3 of Attachment III includes BellSouth's proposed language that UNE combinations which recreate a BellSouth retail service should be priced at the resale rate. Exhibit 4. Neither Section 2.3 of Attachment III nor any other provision of the January 30, 1997 Draft Agreement, contains such a limitation. Exhibit 38. BellSouth, therefore, could not have been under the delusion that it was only agreeing to the three provisions in question in conjunction with such a limitation.

On March 19, 1997, the Commission issued its Order on Reconsideration. Order No. PSC-97-0298-FOF-TP. In that order, the Commission issued for the first time its language about removing duplicate charges and charges for services not needed from the rates for combinations. Id. at 27. The Commission's language became Section 8 of Attachment I of the Agreement. On

April 2, 1997, BellSouth filed its proposed language with the Commission that included BellSouth's proposal that recombined UNEs could not undercut the resale price. This proposed language was based solely on the Commission's March 1997 Order on Motion for Reconsideration.²¹ On May 27, 1997, the Commission rejected this proposed language. PSC-97-0602-FOF-TP, p. 5. Both Mr. Hendrix and Mr. Varner have claimed that BellSouth agreed to the negotiated provisions contingent on approval of this rejected language. (Hendrix, Tr. 638-39; Ex. 24, Deposition of Alphonso Varner, p. 54)²² Again, it is ridiculous for BellSouth to claim that the provisions it had voluntarily agreed to prior to January 30, 1997, were somehow "agreed to in conjunction with" a provision that did not even exist prior to March 1997.

Issue 2: If the answer to either part or both parts of Issue 1 is yes, how is the price(s) determined?

****MCI Position:** The price for a UNE combination is the sum of the prices of the individual elements. The Agreement recognizes, however, that this combined price may include duplicate charges and charges for services which are not needed when the elements are combined. Therefore, BellSouth is obligated to remove these unnecessary charges.**

As discussed under Issues 1(a) and 1(b), the price for UNE combinations, whether they allegedly recreate a BellSouth retail service or not, is the sum of the stand-alone prices of the

21 As the Commission noted in its Order: "BellSouth proposes to include the bold language above based solely on our deliberations at our Agenda Conference on BellSouth's Motion for Reconsideration in this proceeding." PSC-97-0602-FOF-TP, p. 5 (Emphasis added).

22 Mr. Varner even tried to claim that "the Commission ordered us to put that [Section 2.6] into the contract." (Ex. 24, Deposition of Alphonso Varner, p. 53) Mr. Varner also claimed that when the Commission ordered BellSouth to sign the Agreement, "it looked at this language specifically." (Varner, Tr. 506) A review of the Commission's orders reveals, however, that the Commission never addressed Section 2.6, or any proposed amendment to it, in any order. Further, BellSouth never asked the Commission to exclude this provision. In fact the opposite is true, BellSouth informed the Commission that it was voluntarily agreeing to this section. Ex. 38.

network elements which make up the combination. Section 2.6 of Attachment III; Section 1 of Attachment III.²³ The Agreement further recognizes, however, that this combined price may include duplicate charges and charges for services which are not needed when the elements are combined. Therefore, MCI is entitled to request, and BellSouth is obligated to provide, prices for combinations which do not include duplicate charges or charges for services not needed when the elements are combined. The appropriate method for determining this combination price would be to remove from the stand-alone UNE prices all duplicate charges and all charges for services which are not need when the elements are combined. Section 8 of Attachment I.

Issue 3: If the answer to either part or both parts of Issue #1 is no, how should the price(s) be determined?

MCI Position: Since the answer to both parts of Issue #1 is yes, this Issue is not applicable. Even if the Agreement did not provide how rates for UNE combinations should be set, the Telecommunications Act requires that they be forward looking and cost based.

As discussed under Issues 1(a), 1(b) and 2, the BellSouth-MCI Interconnection Agreement does specify how of prices will be determined for combinations of unbundled network elements. Under the Agreement, the same method would apply whether the combination allegedly recreates a BellSouth retail service or not. Therefore, this issue is not applicable. If, for some reason, the Commission determines that the Interconnection Agreement does not specify

²³ As discussed in footnote 8 above, this would be true for migration of an existing loop/port combination even if Section 2.6 of Attachment III did not exist. Section 1 of Attachment III states that "the price for each network element is set forth in Attachment I." If MCI orders a loop and a port, it is obvious that, absent something to the contrary in the Agreement, MCI would pay BellSouth the loop rate for the loop and the port rate for the port. Since under this scenario the loop and the port would already be connected and could not be disconnected (Section 2.2.15.3 of Attachment VIII), there would be no charge for connecting them.

how such prices are determined in spite of the plain language of the Agreement, the Commission should still find that the appropriate methodology for determining the pricing of UNE combinations is the forward looking cost based rates.

BellSouth has argued that the Agreement does not address the issue of pricing of UNE combinations and that UNE combinations which “recreate” a BellSouth retail service should be priced as resale. BellSouth also argues that, until it is final and nonappealable, the Commission must ignore the Eighth Circuit’s ruling that UNE combinations must be cost based.²⁴ Instead, BellSouth argues that the Commission should issue an interim solution pending the Supreme Court’s ruling on the appeal of the Eighth Circuit’s decision. During this interim period, MCI should be charged the resale rate for UNE combinations which recreate a BellSouth retail service regardless of whether BellSouth or MCI combines them. (Ex. 24, Deposition of Alphonso Varner, pp. 77-78)²⁵ To justify this absurd result, BellSouth must simultaneously argue that the Agreement is silent on the issue of the pricing of UNE combinations, but that combination pricing is a material term of the Agreement.²⁶ Either the Agreement addresses the issue pricing (and thus

24 As discussed below, the Eighth Circuit Court of Appeals has fundamentally affirmed the right of ALECs to compete using network element combinations, paying cost-based rates. Iowa Utilities Board v. Federal Communications Commission, 120 F.3rd 753, 814-15 (1997).

25 In contrast with Mr. Varner’s opinion, BellSouth’s contract witness, Mr. Hendrix, apparently believed that when MCI combined the elements itself, the individual UNE prices shown in Attachment I would apply. (Ex. 26, Deposition of Jerry Hendrix, pp. 42-43)

26 BellSouth argues that the Agreement does not address the issue of the pricing of UNE combinations. (Ex. 24, Deposition of Alphonso Varner, p. 77-78) BellSouth then argues that the Commission must ignore the Eighth Circuit’s ruling that UNE combinations must be cost based until that decision is final and nonappealable even though the decision has not been stayed. Id. at 78-79. BellSouth basis for asking the Commission to ignore the decision is Section 2.4 of Part A of the Agreement which states that “In the event that any final and nonappealable . . . judicial . . . action materially affects any material terms of this Agreement, . . . the Parties shall renegotiate in good faith.” (Emphasis added) (Varner, Tr. 385) If BellSouth believes that the Agreement is “silent” on the issue of the pricing of combinations, how can it believe that the pricing of combinations is a “material term” of the Agreement?

it is a material term of the Agreement which cannot be altered by a judicial decision until the decision is final and nonappealable) or it does not (in which case the Eighth Circuit's decision that UNE combinations must be priced at UNE rates is immediately binding).²⁷

First, regardless of whether the Agreement addresses the specific issue of pricing of UNE combinations, Section 252(d) of the Act still requires that network element prices be cost-based, not a wholesale discount off a retail price. The Eighth Circuit decision fundamentally affirmed the entrant's right to compete using network element combinations, paying cost-based rates. The Eighth Circuit considered and rejected BellSouth's argument that network element combinations are equivalent to service-resale -- a claim which lies at the heart of its testimony in this docket. Although the Eighth Circuit concluded that BellSouth is not obligated by the federal Act to combine network elements, BellSouth has admitted that under the Agreement it must offer network element combinations without disruption. (Varner, Tr. 385)

Second, there are critical and important differences between network element combinations and service-resale in terms of potential innovation, risk and competitive opportunity. The fact is that network element-based competition has the potential to bring substantial benefits to Florida consumers -- benefits that are not possible with service-resale. Hypocritically, BellSouth wants to have its cake and eat it too. Because market entry via unbundled network elements, unlike resale, offers the possibility of true competition, the FCC concluded that under Section 271 of the Act a provider that totally uses UNEs is facilities based. Mr. Varner stated that

²⁷ Of course, while BellSouth argues that the pricing of UNE combinations is not addressed in the Agreement, BellSouth has conceded that the Agreement requires BellSouth to provide combinations. Thus, it is undisputed that BellSouth's obligation to provide UNE combinations is a material term of the Agreement which cannot be altered until the Supreme Court issues its decision. (Varner, Tr. 385)

he agreed with that definition of “facilities based provider” for purposes of BellSouth getting into long distance. (Varner, Tr. 449) However, Mr. Varner would then treat UNE combinations like resale, thus negating the very reason for considering service via UNEs to be facilities based.

a. The Telecommunications Act And The Eighth Circuit Decision

Based on the plain language of Section 251(c)(3) of the Telecommunications Act of 1996, the Eighth Circuit fundamentally affirmed the entrant's right to provide service using network element combinations obtained from BellSouth at cost-based rates:

The petitioners [such as BellSouth] assert 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 LEC to provide a telecommunications service. The petitioners argue that subsection 251(c)(4) makes resale the exclusive means to offer finished telecommunications services for competing carriers that do not own or control any portion of a telecommunications network. Furthermore, the petitioners point out that under subsection 251(c)(4) a competing carrier may purchase the right to resell a telecommunications service from an incumbent LEC only at wholesale rates.

Initially, we [the Court] 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.

We conclude that the [Federal Communications] 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.

Iowa Utilities Board v. Federal Communications Commission, 120 F.3rd at 814-15.

Although the Court sustained the entrants' right to use network element combinations to provide services, the Court also decided that the entrants should combine the elements themselves. BellSouth has interpreted this provision to permit it to sabotage its network, ripping elements apart so that it can increase its competitor's costs, and forcing these entrants to install collocated facilities to restore the elements to their original configuration.

Fortunately, however, BellSouth acknowledges that the Agreement prohibits this disruptive practice and BellSouth agrees that it must "provide" access to network elements that are currently combined, at least until the Supreme Court issues a final decision on the Eighth Circuit's opinion. (Varner, Tr. 385)²⁸ Unfortunately, BellSouth does not acknowledge its obligation to offer network element combinations at cost-based rates. Instead, BellSouth's position in this proceeding is that the resale price should apply whenever network elements are used to "recreate" a BellSouth service (Varner, Tr. 390). According to BellSouth, under this circumstance, network elements cease existing as network elements and are priced using a wholesale discount.

In other words, entrants are entitled to network element combinations, so long as they are not treated as network elements.²⁹ With this single statement, BellSouth renders meaningless the entire

28 Even assuming the Supreme Court affirms the 8th Circuit's decision, BellSouth may still be required to provide combinations to MCI. First, as already noted, many of the provisions in the Agreement relating to combinations were voluntarily agreed to. Second, this Commission has already ruled that under Florida Statute Sec. 364.161, the ALECs' right to combine unbundled loops and ports is essential to effective competition. Order No. PSC-96-0444-FOF-TP, pp. 14-15. To promote competition, the Commission could exercise its state law authority to require BellSouth to provide such elements on a combined basis, particularly where they are already combined in BellSouth's network.

29 As discussed in more detail under Issue 9 below, the Agreement clearly provides that network elements do

premise of non-discriminatory access: entrants are entitled to use network elements in the same way as BellSouth -- but if they do, BellSouth will no longer consider them network elements in how they are priced or provisioned. There is simply nothing in the Act (or the Eighth Circuit's decision) which suggests that the definition, pricing and provisioning of a network element depends upon the entrant's use or the services that it offers.

b. UNE Combinations Are Fundamentally Different From Resale

There are a number of important differences between the lease of network facilities -- particularly facilities which provide multiple services, including local exchange services, intraLATA toll services, vertical features and access services -- and the resale of a single service as defined by the incumbent LEC. Network elements are an entry strategy that enables the entrant to fully step into the role of a local telephone company, with the same economic constraints and freedoms as any other local carrier. The entrant purchases a set of facilities, compensates the incumbent for the indivisible cost of those facilities (such as the fixed cost of the local loop), and then bears the economic responsibility to price the full range of services which use those facilities (local exchange, intraLATA toll, and exchange access to name a few) to recover its costs and make a profit. (Gillan, Tr. 269-70)

Service-resale, in contrast, establishes the entrant as the incumbent's marketing agent. The incumbent determines what services will be offered and what prices will be charged in its retail tariff; the entrant's role is to market and bill for these services under its own label. Service resale is fundamentally different in virtually every respect from network element combinations: it has a different

not cease being network elements when they are ordered in combination: "When ordering a Combination, MCIIm shall have the option of ordering all features, functions and capabilities of each Network Element." Section 2.2.15.6 of Attachment VIII. Further, Mr. Hendrix conceded on cross-examination that under the Agreement network elements ordered in combination did not cease being network elements. (Hendrix, Tr. 651)

risk/reward profile, it requires a different level of technological proficiency, and it provides a different opportunity to innovate. (Gillan, Tr. 270)

Risk/reward profiles. There is much less risk in a service-resale environment. With service-resale, the entrant essentially re-offers, under its own label, a retail product designed, priced and even administratively organized according to the incumbent's USOC codes. The cost-structure of the entrant exactly parallels the prices of the incumbent and, for all practical purposes, its own revenues as well. Because the entrant's costs and revenues move in lock-step, there is very little risk -- the potential margin is defined by the wholesale discount and it remains fixed as customers purchase more, or less, service. (Gillan, Tr. 270-71)

A network element-based competitor leases the underlying facilities necessary to become a local provider, paying a cost-based rate to obtain the complete functionality of the facilities involved. There are two consequences of this relationship. First, the network element-based competitor becomes the provider of both the retail service to its customers and the exchange-access/interconnection service to other carriers. This form of competition places the entrant squarely in the shoes of the incumbent, compensating the incumbent for the cost of the facilities, yet enabling the entrant to offer same range of services from which to generate offsetting revenues. Second, unlike service-resale, there is no predefined relationship between the entrant's cost structure and its potential revenues. Much of the entrant's cost (for example, the loop and switch port) is incurred as a flat-rate per month -- even though many of its potential revenues (from access, ECS and toll usage, for instance) are a function of usage. Conversely, some network elements impose a usage-cost (such as common transport to terminate local calls), even though the corresponding revenues are fixed (as part of the local bill). (Gillan, Tr. 271)

The result is that the network element option presents a far different risk/reward profile than service-resale -- a fact recognized by the Eighth Circuit when it rejected BellSouth's view that these entry mechanisms were the same:

Carriers entering the local telecommunications markets by purchasing unbundled network elements face greater risks than those carriers that resell an incumbent LEC's services.

Iowa Utilities Board v. Federal Communications Commission, 120 F.3rd at 815.

A carrier purchasing network elements (like the incumbent itself) incurs the substantial fixed cost of local service, with the hope that additional services/features will provide additional revenues. This uncertainty creates the risk -- and its complement, opportunity -- that does not exist under the service-resale. (Gillan, Tr. 272)

Mr. Varner's testimony attempts to characterize the network-element option as providing resale at a greater discount. (Varner, Tr. 391-93) This is not a valid comparison. The network element option is a distinct business opportunity, with a different level of potential revenues, costs and risks than service resale. Certainly, it is mathematically possible to compare the financial performance of each option as a "discount." But, the fact that network elements can be compared to a wholesale discount does not mean that they are equivalent to receiving a discount. (Gillan, Tr. 272)

Mr. Varner's own Exhibit (Ex. 22, AJV-1, Chart C) provides an example of the potential benefit from network element-based competition. Mr. Varner estimates that an entrant's "cost" to serve the typical residential customer is \$30.69 using service-resale and \$28.47 using network elements. Mr. Varner characterizes this difference (\$2.22) as a "windfall" to MCI and AT&T (Varner, Tr. 397). Mr. Varner's characterization is colored from his perspective as a monopolist. Because

BellSouth is a monopolist, this additional \$2.22 does provide a windfall to BellSouth, but only because BellSouth has no competitor seeking to win this customer by offering lower prices. In the absence of competition, BellSouth can charge residential customers the prices which create this windfall and, unless network element-based competition can become a reality, this \$2.22 windfall will continue for many years to come. (Gillan, Tr. 273)

The benefit of network element-based entry, however, is that the \$2.22 is transformed from BellSouth-windfall to potential ratepayer-benefit.³⁰ Neither AT&T, nor MCI (nor BellSouth) will be able to retain the \$2.22 margin because each company will be engaged in a battle to win the customer from the others. Mr. Varner's exhibit illustrates why network element-based competition is so important -- it enables market forces to drive the gap between retail revenues and network cost to its lowest possible level. (Gillan, Tr. 273)

This potential benefit depend upon the Commission correctly establishing a cost-based non-recurring charge in this proceeding. Competitors can only offer lower prices to those customers which they can efficiently serve. The non-recurring charge proposed by BellSouth would effectively prevent competition from bringing lower prices to average consumers. Using BellSouth's proposed NRC of \$169.10, if MCI assumed that it would keep the average residential customer for 2 years, it would need to recover from the end-user an additional \$7.45 per month ($\$169.10 / 24$ months). A non-recurring charge at this level would assure that the Mr. Varner's \$2.22 residential windfall -- a windfall which translates to more than \$94 million in revenue annually -- would remain embedded in residential rates for the foreseeable future. (Gillan, Tr. 274)

³⁰ As Mr. Gillan explains in his testimony, BellSouth underestimates this potential ratepayer benefit. It should be closer to \$4.36 per month. (Ex. 15; Gillan, Tr. 275)

As discussed under Issue 9, another key difference between service resale and UNE combinations is that the network element-based entrant offers both local exchange and exchange access services. This characteristic is important because it provides the entrant with the same economic stature as the incumbent, bringing competitive pressure to both retail local exchange and (through the prism of the exchange access market) long distance prices as well. (Gillan, Tr. 275)

Innovations. Network elements are offered as basic generic functionalities, free of restriction. Services can be designed for new customer classes, basic services can include features and functions that BellSouth only makes available as expensive options, or network elements can be used by the entrant to craft its own promotions and special packages. In addition, by purchasing network elements, entrants can better prepare for a day when alternative networks offer the opportunity to obtain network capacity (i.e., elements) from other vendors. (Gillan, Tr. 275-76)

The ability to innovate using network elements will increase in the future. The introduction of Advanced Intelligent Network (AIN) capability will transform the local switch from a service-definition node to a more generic role. In the future, service-defining capabilities will be housed in remote software databases which provide call processing instructions to the switch. The innovation possible in this environment is limitless, but only if the network facilities which interact with these databases can be efficiently obtained and combined to provide service. (Gillan, Tr. 276; Falcone, Tr. 364-65)

In stark contrast, service-resale, by definition, limits the entrant to reoffering finished services created by the incumbent LEC. Even where the entrant superficially appears to have an ability to modify an incumbent LEC service for instance, by including an optional feature as a standard element, there is little practical flexibility because the entrant's cost structure is defined by the incumbent LEC's retail price. With no economic flexibility, there is little the entrant can do to introduce new pricing

arrangements or feature mixes. (Gillan, 276)

Issue 4(a): Does the BellSouth-AT&T Interconnection Agreement specify how prices will be determined for combinations of unbundled network elements that do not recreate an existing BellSouth retail telecommunications service?

****MCI Position:** No position.**

Issue 4(b): Does the BellSouth-AT&T Interconnection Agreement specify how prices will be determined for combinations of unbundled network elements that do recreate an existing BellSouth retail telecommunications service?

****MCI Position:** No position.**

Issue 5: If the answer to either part or both parts of Issue #4 is yes, how is the price(s) determined?

****MCI Position:** No position.**

Issue 6: If the answer to either part or both parts of Issue #4 is no, how should the price(s) be determined?

****MCI Position:** No position.**

Issue 7: What standards should be used to identify what combinations of unbundled network elements recreate existing BellSouth retail services?

****MCI Position:** There is no need to identify any standards since under the Agreement, the Act, and the Eighth Circuit's decision the issue is irrelevant. Further, UNE combinations are fundamentally different than resale. Finally, the only circumstance that the Commission ever expressed a concern about was using all BellSouth UNEs to recreate a complete BellSouth retail service.**

The issue of what recreates a BellSouth retail service is irrelevant. First, the Agreement specifies how the prices of UNE combinations are determined and makes no distinction between different types of combinations. Second, the Eighth Circuit Court of Appeals, based on the plain language of the Act, has specifically rejected the ILECs' resale argument and has affirmed the right of ALECs to provide complete telecommunications services using all BellSouth UNEs. Third, a UNE combination never recreates a BellSouth retail service – service via UNEs is fundamentally different from resale. Finally, even when the Commission discussed its concern regarding combined elements undercutting resale prices, the Commission was clearly only referring to the situation where the ALEC was using all BellSouth elements and none of its own to create a complete retail service.

a. The Agreement

As discussed in Issues 1(a), 1(b) and 2 above, the Agreement specifies how the prices of UNE combinations should be determined. The Agreement makes no distinction between combinations which allegedly recreate a BellSouth retail service and those that do not. Thus, under the Agreement, the pricing methodology is the same for all types of combinations and there is no reason for the Commission to go through the exercise of attempting to determine what “recreation” means.

b. The Act And The Eighth Circuit

As discussed under Issue 3, the Eighth Circuit has clearly rejected BellSouth position on this issue:

[T]he 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.

Iowa Utilities Board v. Federal Communications Commission, 120 F.3rd at 814.

No matter how much BellSouth protests, entrants have the right to provide service entirely using network elements obtained from BellSouth. Further, under the Act, network element prices are based on cost, whether used alone or in combination. No matter how much BellSouth would like to redefine network element combinations as service-resale, these are distinct entry options that must be respected as such. Even Mr. Varner recognized that under the Eighth Circuit ruling "no distinction needs to be made between whether combinations recreate services or not." (Varner, Tr. 388)

c. UNE Combinations Are Fundamentally Different From Resale

As discussed under Issue 3 above, there are key differences between service-resale and network element-based competition. Thus, network element combinations never "recreate" service resale. Service-resale establishes the entrant as the incumbent LEC's marketing agent, essentially offering identical services, with little to no ability to offer lower prices. If a carrier has no interest in designing unique services, has no reason to offer both local exchange and exchange access service, has no desire to compete aggressively with BellSouth's prices, and has no intention to replace individual network components with the facilities of other carriers (or its own) as they become available, then service-resale is the ideal solution.

While service-resale will provide carriers a simple entry option -- and, for that reason, the

Commission can expect that many carriers will use this approach, particularly at first -- robust local competition depends upon the more challenging opportunities made possible by network element combinations. Network elements permit the entrant to design its own services, they establish the entrant as both local exchange and exchange access provider, they position the entrant for facilities replacement and they present the entrant with the same economic pricing choices as BellSouth.

d. A Loop And A Port Do Not Recreate A Complete Retail Service

Even if the Commission determines that it is necessary to define "recreation," any such definition should include "all elements necessary to recreate a complete retail service." Order No. PSC-97-0298-FOF-TP, at p. 7. A loop and a port alone cannot be used to provide any complete retail service. For example, as Commissioner Clark pointed out, basic service includes three free Directory Assistance calls. (Tr. 443) When that service is resold, the reseller's customer also gets the three free calls. (Varner, Tr. 443-44) In contrast, a loop and a port do not even include the transport to a DA platform, let alone the DA service itself. See Sections 4 and 7 of Attachment III. Whether provided by the ALEC itself or obtained from the ILEC or another ALEC, some other elements, such as operator services, are required to provide a complete service.³¹ To provide basic local service, at least the following elements are needed: loop, port, transport to operator platform, operator platform, transport to DA platform, DA platform, transport to 911 platform, signaling link transport, signaling transfer point, service control point, common transport, tandem switch, and dedicated transport. (Ex. 39, Deposition of Ron Martinez,

³¹ As Mr. Hyde stated in his deposition, if an ALEC bought just a loop and a port but did not purchase operator services from BellSouth, or provide their own, their service would not constitute a complete basic local service. (Exhibit 6, Deposition of Tom Hyde, pp. 93-94)

p 10; Walsh, Tr. 223; Falcone Tr. 362)

The discussion of BellSouth's motion for reconsideration at the February 21, 1997, Special Agenda Conference is illustrative of this point:

MR. GREER: I believe that the service that they [BellSouth] provide and that they are compensated for is more than just a flat rate B1 loop and switching. I think it encompasses operator services. I think it encompasses repairs and all those types of things, and the 911. And so I don't see that they are comparable.

(Special Agenda Conference, Tr. 3027) In response to the BellSouth argument that local switching entitles the ALEC to all the features, functions and capabilities of the ILEC's switch, Mr. Greer pointed out that local switching does not give the ALEC "the actual function that the database provides and those types of things." (Special Agenda Conference, Tr. 3028 (emphasis added)) As Commissioner Garcia discussed in this hearing, BellSouth's argument that the loop and switch, without transport or trunks, can provide basic local service is like giving someone an electric socket in the wall that is not connected to a generator and claiming that you are giving them electricity. (Tr. 482-83)

When it declined to grant BellSouth's motion for reconsideration, the Commission apparently agreed with Mr. Greer's conclusions that basic service includes more than just the loop and the port. In its order denying BellSouth's motion, it stated: "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." Order No. PSC-97-0298-FOF-TP, at p. 7 (emphasis added). This language certainly suggests that the Commission's concern was not ALECs using some or even most of the elements that make up a complete retail service, but all of the elements.

Similarly, when AT&T and MCI asked for wholesale discount rates which excluded charges for operator services, the Commission refused. In refusing to remove operator services expenses from the wholesale rate, the Commission ruled that:

The Act only requires that any retail services offered to customers be made available for resale. If AT&T and MCI want to purchase pieces of services, they must buy unbundled elements and package these elements in a way to meet their needs.

Order No. PSC-97-0298-FOF-TP at p. 23 quoting Order No. PSC-96-1579-FOF-TP at p. 55. In other words, if MCI wants to provide its own operator services and does not want to also contribute to BellSouth's operator services (as it would be required to do if it used resale), then MCI should buy UNEs. Again, the discussion at the February 21, 1997, Special Agenda Conference is illustrative of this point:

MS. SHELFER: [W]henver you order an R1, you don't contact a separate company to get your operator and directory assistance. It comes with your service, just like your access to E-911 is. If operator services, if AT&T wants to provide those services, then it can do it under an unbundled basis and purchase the other pieces as well.

(Special Agenda Conference, Tr. 3108)

When AT&T argued that operator services were not part of basic local service, the Commission dismissed their argument stating that "AT&T simply disagrees with us on what is included in basic local service." Order No. PSC-97-0298-FOF-TP at p. 23. The transcript from the February 21, 1997, Special Agenda Conference makes it clear what definition of basic local service the Commission was accepting:

MR. GREER: Operator service is a piece of local service to me, just as E-911, repair, and all that type of stuff. And so when we develop the resale rates, that's

how we put all the pieces together, because it says retail service. And the retail service is R1 or B1, which includes those types of capabilities.

COMMISSIONER CLARK: Madam Chairman, if there are no other questions, I can move Staff on Issue 2.

(Special Agenda Conference, Tr. 3109-10)

BellSouth apparently wants to have its cake and eat it too. When wholesale discounts were being set, operator services were part of basic service. BellSouth won that argument. Now, when the Commission is considering what recreates basic service, BellSouth wants to argue that operator services are not part of basic service. They cannot have it both ways.

Finally, the Commission specifically used loop/port combinations as its examples when it ruled that BellSouth should be required to remove all duplicate charges and charges for functions and activities not needed from the nonrecurring and recurring charges for UNE combinations. Order No. PSC-97-0298-FOF-TP at pp. 26 and 29. Removing duplicate charges and charges for services not needed is not the resale avoided cost methodology. Thus, even if the Commission has not ruled on the issue of what rate should apply when MCI uses all elements necessary to recreate a complete retail service (for the record, it is MCI's position that the 8th Circuit Order has laid BellSouth's resale argument to rest), it has already ruled how the rates for simple loop/port combinations should be determined.

Issue 8:

What is the appropriate non-recurring charge for each of the following combinations of network elements for migration of an existing BellSouth customer:

- (a) 2-wire analog loop and port;
- (b) 2-wire ISDN loop and port;
- (c) 4-wire analog loop and port; and
- (d) 4-wire DS1 and port?

****MCI Position:** The appropriate non-recurring charges are the rates recommended by MCI Witness Tom Hyde in this matter. These proposed rates remove duplicate charges and charges for services not need when MCI migrates existing loop/port combinations. In the alternative, the Commission should adopt the more efficient NRC study sponsored by ATT in this matter.**

The central pricing issue of this proceeding is the non-recurring charges appropriate to the facilities-migration of certain loop/port combinations of network elements to an entrant. This event must become an efficient, routine and inexpensive process if the benefits of local competition are ever to extend broadly to Florida consumers.³² The Commission should establish cost-based non-recurring charges which only allow BellSouth to charge for work that it actually performs and which is actually necessary. The charges should also reflect the implementation of the automated systems necessary to support this competition.

If costs are not set in this manner, new entrants will not be able to compete against BellSouth in a fair and nondiscriminatory manner and Florida consumers will not receive the true benefits of competition. MCI has shown that a loop/port combination can be migrated for less than \$1.68 without loss of service to the customer. In contrast, BellSouth proposes to charge \$169.10! BellSouth's proposal is so expensive because it is based on the premise of unnecessarily ripping apart currently combined elements only to require MCI to reconnect them in a collocation facility.

³² It is particularly important that the Commission carefully guard against inflated non-recurring charges. The fundamental intent of the Act is to eliminate barriers to entry in the local market. The basic effect of a non-recurring charge, however, is to create a barrier to entry. Because NRCs are imposed whenever change occurs, they fundamentally protect the status quo. The starting point for a competitive local environment, however, is decidedly one-sided. Today, all the local customers are served by the incumbent. Therefore, any charge that is tied to a customer's decision to change carriers constitutes a barrier to the exercise of that choice and provides the incumbent a shield from competitive pressures. (Gillan, Tr. 264)

The Commission has been presented with 3 sets of proposed NRCs in this matter. MCI's proposed NRCs are based on adjustments to BellSouth's own NRC cost study. As required by the Agreement, the purpose of these adjustments was to remove the duplicate charges and charges for services not needed when MCI migrates customers to existing loop/port combinations. Since these loops and ports are already connected and cannot be disconnected, most of the charges in the stand alone UNE rates must be removed. BellSouth's proposal, in contrast, assumes that BellSouth is merely providing MCI with a stand-alone loop and a stand-alone port which MCI must then combine in a collocation space. Unlike the MCI and AT&T recommendations, BellSouth's proposal would also require ALECs to purchase collocation facilities. These additional costs are not included in Mr. Varner's proposed rates. (Landry, Tr. 712) Finally, AT&T has sponsored the AT&T/MCI NRC study which is based on a bottoms-up forward-looking cost analysis (Ex. 12, JPL-5).

The Commission should adopt the non-recurring charges recommended by MCI Witness Tom Hyde in this matter. In the alternative, the Commission should adopt the more efficient NRC study sponsored by ATT in this matter.

a. MCI's Adjustments to the BellSouth Study.

As described under Issue 2, MCI is entitled to request, and BellSouth is obligated to provide, prices for combinations which do not include duplicate charges or charges for services not needed when the elements are combined. The appropriate method for determining this combination price is to remove from the stand-alone UNE prices all duplicate charges and all charges for services which are not need when the elements are combined. Section 8 of

Attachment I.

MCI witness Tom Hyde adjusted BellSouth's non-recurring cost (NRC) to remove the functions that are not needed when a combination of loop and port are provided to migrate an existing BST customer to MCI using unbundled network elements. Since the rates at issue in this case are for migration of existing customers, Mr. Hyde's analysis is based on the assumption that the loop and port are connected today. As discussed above, BellSouth is prohibited under the Agreement from pulling apart elements which are currently connected. See 2.2.15.3 of Attachment VIII. Therefore, the analysis is also based on the assumption that BST will not disconnect the loop from the port before providing them to MCI. Finally, since BellSouth has deployed soft dial tone in Florida, the analysis assumes that soft dial tone is deployed. (Hyde, Tr. 84-86; see Walsh, Tr. 210-11)

Mr. Hyde used the public version of the cost study that BST has provided in Georgia and in other cost cases across the Southeast to develop his adjustments.³³ He assumed that BST would use this same cost study if they filed up-to-date cost studies in Florida. After, reviewing the Florida specific studies filed by Daonne Caldwell in this case, Mr. Hyde determined that, with the exception of the assumptions regarding electronic order processing, there were no significant differences between the Georgia and Florida studies. (Hyde, Tr. 85, 98-99)

As an initial matter, it is important to understand the assumptions in the BST NRC cost study. BST assumes that the loop will be disconnected at the Main Distribution Frame (MDF) and routed to the CLEC's collocation space via a cross-connect. Under BST's assumption, the CLEC

³³ Mr. Hyde used the public version of the Georgia study for two reasons. First, using a public version avoided any problems associated with using proprietary data. Second, Mr. Hyde's direct testimony was due at the same time as BellSouth's, and BellSouth had not previously filed its most recent study in Florida.

would then “combine” the loop and port by obtaining a cross connect that would connect the loop coming out of the CLEC collocation space with the port of the BST switch. This is a very inefficient process and requires work (time and labor) by several BST functional work groups to perform service order processing, engineering, and connect and test functions. Very little of this work is necessary when the loop and port remains intact and the loop is not disconnected by BST. (Hyde, Tr. 85-86)

Mr. Hyde assumed two scenarios regarding the “fall-out” of orders from the mechanized process. In one scenario, he assumed that 80% of the orders are handled electronically and 20% of the orders require manual intervention. This is the assumption that BST utilized in its NRC cost studies in Louisiana, Alabama, Georgia, Tennessee and North Carolina, as opposed to the 100% “fall-out” -- or manual processing of all orders -- that BST’s NRC cost study assumes in Florida. In other words, in Florida, BST developed costs assuming manual order processing. To derive proposed costs for electronic orders in Florida for the elements in the recent Florida cost docket, BST made a subsequent unsupported adjustment to that manual cost. BellSouth has made no such adjustment for the costs for the elements that had permanent rates assigned in the initial arbitration hearing. (Hyde, Tr. 87)

Mr. Hyde also developed a second scenario where 97% of the orders are processed electronically and only 3% of the orders require manual intervention. This level of efficiency is what BST’s witness Stacy indicated in his Georgia testimony that BST is able to achieve for its own orders. (Hyde, Tr. 87; Ex. 6, Late Filed No’s 7 and 8)

Mr. Hyde’s direct testimony explains in detail the adjustments he made to the BellSouth NRC study to eliminate unnecessary work functions from the combinations at issue in this case.

(Hyde, Tr. 87-93) By way of illustration, for the combination of a 2-wire analog loop and port, the loop work functions for engineering, connect and test, and travel are not needed under the assumption of an existing BST customer whose service is migrated to MCI without disconnect. Under the assumption that an existing loop and port are already connected, and that the customer served by that loop and port are to be migrated to MCI, these functions would no longer be necessary. Therefore these worktimes were reduced to zero. Of the five service order functions, only the ICSC function is involved with clearing a "fallout" of an electronic order for migrating an existing BST customer to MCI. All other service order functions were also reduced to zero worktimes because they would not be necessary under the migration scenario. The ICSC worktime was adjusted to reflect an efficient provisioning process whereby 97% of the orders are processed electronically. Therefore, only 3% of the orders will require the work activities of the ICSC to correct the "fallout" condition. Since the assumption is that soft dial tone is deployed in the BST network, there should be no work activity to disconnect an existing loop. Therefore, the work times associated with the loop disconnect function have been eliminated. Mr. Hyde also corrected the error that BST made in implementing their assumption of 15 minutes per "fallout" order to correct the "fallout" condition and applied the worktime only to the first loop element and not to the additional loop element. The 3% ICSC manual correction of "fallout" orders is represented by applying a work time of .0075 hours to all orders at the direct labor rate for the ICSC function. (Hyde, Tr. 87-89)

The only port work function necessary for a migration of an existing BST customer to MCI would be the Connect & Test function for Recent Change Line Translations (RCMAG). The service order functions are already included in the loop "fallout" correction, since the loop

and port would be ordered on the same order. The total combined NRC would be the sum of the adjusted loop and port NRCs. (Hyde, Tr. 89-90)

Similar adjustments were made for the other combinations of unbundled elements. Using this process of removing charges for services not need from the BellSouth cost study, Mr. Hyde recommended the following NRCs for the combinations at issue:

(a) 2-Wire Analog	-First	\$ 1.6755
	-Additional	\$ 1.3598
(b) 4-Wire Analog	-First	\$ 1.6389
	-Additional	\$ 1.3232
(c) 2-Wire ISDN	-First	\$ 3.8319
	-Additional	\$ 3.5162
(d) DS-1	-First	\$ 32.6134
	-Additional	\$ 32.0454

(Hyde, Tr. 93-94)

Significantly, while BellSouth's costing witness Daonne Caldwell obviously disagreed with Mr. Hyde's basic assumption that a loop/port combination would not constitute resale, she otherwise conceded that "the majority of his assumptions would be correct." (Ex. 36, Deposition of Daonne Caldwell, p. 48).

b. BellSouth's Study

BellSouth's analysis assumes that the loop and the port are both cross-connected to an MCI collocation for MCI to combine. It is fundamentally flawed because it is completely inconsistent with the requirements of the Agreement. First, there is nothing in the Agreement that suggests that even when MCI wants to combine elements itself that it must do so at a collocation

facility. Second, as discussed in Issues 1(a) and 1(b), the Agreement requires BellSouth to connect the elements, without charging any tear-apart-and-reconstruct charges. See 2.2.15.1 and 2.6 of Attachment III. Third, and most importantly, the NRCs at issue in this matter are for elements that are currently connected and functional. As explained under Issue 1(b), BellSouth voluntarily agreed in Section 2.2.15.3 of Attachment VIII of the Agreement that it would not pull apart currently combined elements. (Martinez, Tr. 798-99)

BellSouth's study in this case simply does not address the cost of migrating an existing customer to a loop/port combination. (Ex. 36, Deposition of Daonne Caldwell, pp. 31-32; Hyde, Tr. 97; Walsh, Tr. 209) Instead, BellSouth has only addressed the functions of a new connect for a designed service. No provision has been included in BellSouth's study for migration of existing customers to UNE combinations. A large percentage of CLEC orders will be for migrating existing BellSouth customers to CLEC service. When you have an existing service with a loop connected to a port and that combination will be retained by the CLEC, there is no need for any work to be performed by BellSouth on the loop or at the customer premises. Design functions are also unnecessary, as the service is already working and design efforts would be redundant and not cost justified. (Hyde, Tr. 97-98; Landry, Tr. 730-32)

BellSouth witness Mr. Landry assumes that most of the work functions necessary to provide the stand-alone elements will still need to be performed to provide loop/port combinations. As explained above, however, most of the work functions cited by Mr. Landry, and included in BellSouth's cost studies, are not necessary when existing BellSouth customers are migrated to loop/port combinations. (See Landry, Tr. 730-732) When these unnecessary functions are removed, the nonrecurring charges are reduced by approximately two orders of magnitude.

This dramatic reduction in cost is achieved without even questioning the overstated work times for those functions which remain in BellSouth's study when the existing customer is migrated.³⁴ (Hyde, Tr. 98)

Migration. BellSouth argues that "migration" can only take place through resale, not through the purchase of UNEs. (Varner, Tr. 400) That position is contrary to the specific language of the Agreement. Section 2.2.2.3 of Attachment VIII authorizes MCI to migrate existing BellSouth customers to MCI to be served through unbundled Network Elements reusing existing BellSouth facilities. In contrast, Sections 2.2.2.1 and 2.2.2.2 of Attachment VIII refer to migration for resale. In light of these complementary provisions, it is clear that under the Agreement migration to UNEs is not the same as migration to resale, and that MCI can choose which type of migration to use for a particular customer. Even Mr. Varner finally agreed on cross-examination that Section 2.2.2.3 of the Agreement contemplates migration through UNEs. (Varner, Tr. 495-96)

Fallout. BellSouth's assumptions that CLEC fallout will be greater than current access fallout are not appropriate. In a forward looking environment, with most efficient, least cost technology, fallout will be minimal with the CLEC performing corrections, not BellSouth. Fallout for CLECs should be consistent with BellSouth's fallout for its own orders. MCI's Agreement

34 MCI's adjustments to BellSouth's studies do not correct all of the errors and overstatements contained in that study. In an attempt to keep the issues focused, MCI's adjustments correct only the most glaring problems with BST's study - the fact that it ignores the requirement of the Agreement that elements cannot be ripped apart and it assumes 100% manual order processing. If the Commission wants a more accurate assessment of the worktimes for functions which do remain, the Commission should refer to the AT&T/MCI NRC model presented by AT&T in this matter.

with BellSouth requires this parity.³⁵ Fallout of three percent or less is the correct level to use in any UNE cost study since this is BellSouth's own fallout level. (Hyde, Tr. 97; Walsh, Tr. 211, 215) This level of fallout is further supported by the statement made by the President of the United States Telephone Association (USTA), Mr. Roy Neel, in the En Banc on State of Local Competition before the Federal Communications Commission (FCC) on January 29, 1998. In that proceeding Mr. Neel stated:

[b]ut you look in BellSouth alone, there's one C-LEC in BellSouth and we can get you the details about this, that has achieved a flow through rate of 97 percent over the last few months.

(Ex. 6, Late Filed No. 8)

Combinations of Elements Versus Multiple Stand-Alone Elements. BellSouth argues that its proposed NRCs reflect the elimination of duplicate costs when MCI orders two stand-alone elements on a single order. (Varner, Tr. 401) MCI requested NRCs for UNE combinations. MCI did not request NRCs for two stand-alone elements on a single order. See MCI's Petition to Set Non-Recurring Charges For Combinations of Network Elements. BellSouth concedes that the Agreement requires BellSouth to provide combinations. (Ex. 26, Deposition of Jerry Hendrix, p. 43) The Agreement also requires BellSouth to remove charges for functions or activities that MCI does not need when two or more network elements are combined. Section 8 of Attachment I. Issue 8 even asks what is the appropriate NRC for certain "combinations of network elements."

³⁵ See Section 1.0, Attachment VIII (BellSouth shall provide electronic interfaces by January 1, 1997); Section 2.1.1.2, Attachment VIII (BellSouth must provide parity in ordering); Section 2.3.0, Attachment VIII (BellSouth shall provide electronic interfaces by January 1, 1997).

(Landry, Tr. 725) BellSouth's study is simply irrelevant to this issue. (Ex. 36, Deposition of Daonne Caldwell, pp. 31-32)

The Commission's orders and the plain language of Section 8 of Attachment I clearly address NRCs for UNE combinations. In issuing its ruling on this issue in its Final Order on Motions for Reconsideration, the Commission explained that the NRCs it had previously set were for "each element on an individual or stand-alone basis. We did not, however, set NRCs when multiple network elements are combined." Order No. PSC-97-0298-FOF-TP at p. 27. (Emphasis added).

The Commission then stated, "[W]e hereby order BellSouth to provide NRCs that do 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." Order No. PSC-97-0298-FOF-TP at p. 27 (Emphasis added). BellSouth bases its position on the words "in a single order." However, Mr. Varner simply ignores the repeated use of the words "combined" and "combination" in the same paragraph. *Id.* at 27-28. For example, the Commission orders BellSouth to "specify the elements being combined and the NRC for that combination." *Id.* at 28. Clearly, the Commission is referring to combinations of elements ordered on the same order not individual stand-alone elements ordered on the same order. Even Mr. Varner concedes that two stand-alone elements is not a combination - "if we pulled them apart, it would no longer be a combination." (Varner, Tr. 497)

Issue 9: Does the BellSouth-MCIm interconnection agreement require BellSouth to record and provide MCIm with switched access usage data necessary to bill interexchange carriers when MCIm provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or

in combination with other unbundled network elements?

****MCI Position:** Yes. BellSouth is required to record both the interstate and intrastate switched access usage data and send it to MCI in the appropriate format. This requirement applies whether the Commission determines that UNE combinations should be priced at the forward-looking UNE rate or at the resale rate.**

The Agreement specifically requires BellSouth to provide switched access usage data to MCI. This requirement applies to both interstate and intrastate access. Further, it applies even if the Commission determines that combined elements which recreate a BellSouth retail service should be priced at the resale rate. The price charged for a network element does not change the fact that a CLEC serving customers via network elements is the access provider.

Section 7 of Attachment III of the Agreement defines local switching and sets forth the requirements which BellSouth must meet when providing local switching. Section 7.2.1.9 of Attachment III provides as follows: "BellSouth shall record all billable events, involving usage of the element, and send the appropriate recording data to MCI as outlined in Attachment VIII." (Emphasis added) Section 4.1.1.3 of Attachment VIII requires BellSouth to provide recorded usage data on all completed calls. (Ex. 26, Deposition of Jerry Hendrix, p. 53) These sections make no distinction between interstate and intrastate interLATA calls. This requirement to provide usage data is entirely consistent with the Act which defines "network element" to include not just equipment used to provide telecommunications services, but also the "information sufficient for billing and collection" for the service. Section 3(a)(2)(45) of the Act.

The charge for Local Switching which is set forth in Attachment I of the Agreement is inclusive, and no other charges apply. Section 2.6 of Attachment III. Mr. Varner admitted that

this charge already includes the cost of providing access. (Varner, Tr. 450) Further, the Agreement specifically provides that MCI may use Local Switching to provide “any feature, function, capability, or service that such Network Element(s) is capable of providing.” Section 2.3 of Attachment III (Emphasis added). Local Switching includes “all of the features, functions, and capabilities that the underlying BellSouth switch . . . is capable of providing, including but not limited to: . . . Carrier pre-subscription (e.g., long distance carrier, intraLATA toll).” Section 7.1.1, Attachment 3 (Emphasis added). In addition, the Agreement specifically states that Local Switching includes the capability “of routing local, intraLATA, [and] interLATA” calls. Section 7.1.1, Attachment 3. In other words, when MCI purchases Local Switching from BellSouth, it is paying BellSouth for the capability to be the access provider and has the right to use that capability.

Despite the plain language of the Agreement BellSouth makes two arguments in an attempt to deny MCI switched access data. First, BellSouth argues that if UNE combinations are priced at the resale rate, then BellSouth would continue to be the access provider. Second, BellSouth argues that it is entitled to continue to bill for intrastate interLATA switched access whenever MCI uses unbundled elements. BellSouth’s position is contrary to the terms of the Agreement, this Commission’s orders, and the orders of the FCC.

a. Pricing Versus Provisioning

Regardless of what price MCI is charged for combinations of network elements, they do not cease being network elements (Hendrix, Tr. 651) and MCI remains the access provider. See MCI’s Motion to Compel Compliance, p. 8, fn. 5. The Agreement clearly provides that when

MCI orders combinations, it has the right to all the features, functions, and capabilities of each of the component elements. Section 2.2.15.6 of Attachment VIII. The features, functions and capabilities of network elements include the ability to provide access services.

Throughout this case, BellSouth has been attempting to confuse the issue of pricing of UNE combinations with provisioning of UNE combinations and other issues. At times, BellSouth witnesses state that UNE combinations which recreate a BellSouth retail service should be “priced” at the resale rate (Varner, Tr. 390); at times they state that UNE combinations should be “priced and provisioned” as resale (Ex. 26, Deposition of Jerry Hendrix, p. 20); at times they state that a UNE combination “is” resale (Varner, Tr. 391) or will be “treated” as resale (Hendrix, Tr. 633).

The Commission has already ruled in its arbitration order that MCI may combine UNEs “in any manner they choose, including recreating existing BellSouth services.” Order No. PSC-96-1579-FOF-TP, p. 38. In its Order on Reconsideration, the Commission stated a concern about the “specific issue of pricing” of UNE combinations which recreate a BellSouth service. Order No. PSC-97-0298-FOF-TP, p. 7 (Emphasis added). The Commission never suggested that such combinations be provisioned as resale and it never suggested that the network elements would cease being network elements. Indeed, the Commission specifically stated that it was not reconsidering its decision that UNEs could be recombined in any manner. Id.

The Agreement clearly provides that UNE combinations must still be provisioned as UNEs and that BellSouth must still comply with the network element requirements in the Agreement. Section 2.2.15.6 of Attachment VIII specifically provides that “When ordering a Combination, MCI shall have the option of ordering all features, functions and capabilities of

each Network Element.”

On cross-examination at the hearing, BellSouth’s contract witness, Mr. Hendrix admitted that when MCI purchases a loop/port combination under the Agreement, the loop and port remain network elements under the Agreement regardless of how they are priced. (Hendrix, Tr. 651)³⁶ Mr. Hendrix admitted that when MCI purchases a loop/port combination under the Agreement, MCI is still granted exclusive use of the loop under Section 4.1 of Attachment III of the Agreement. (Hendrix, Tr. 652) Obviously, if MCI has exclusive use of the loop, BellSouth cannot also use the loop as the access provider.

Mr. Hendrix admitted that under the Agreement, MCI has the right to route local, intraLATA and interLATA calls via local switching under Section 7.1.1 of Attachment III. (Hendrix, Tr. 656) Mr. Hendrix admitted that when MCI purchases a loop/port combination under the Agreement, MCI is still entitled to receive recording data on all billable events under Section 7.2.1.9 of Attachment III of the Agreement. (Hendrix, Tr. 657-58) Mr. Hendrix admitted that switched access is a billable event. (Hendrix, Tr. 657) Mr. Hendrix admitted that when MCI purchases a loop/port combination under the Agreement, BellSouth is still obligated to provide the network elements in accordance with FCC Rules and Regulations under Section 1 of Attachment III of the Agreement. (Hendrix, Tr. 658) As discussed below, the FCC Rules clearly provide that when an ALEC uses UNEs the ALEC is the access provider to its customers.

b. Interstate and Intrastate

BellSouth also argues that it is entitled to continue to bill for intrastate interLATA switched access whenever MCI uses unbundled elements. Mr. Varner argues that the Agreement

only requires BellSouth to send "appropriate" recording data to MCI. He then goes on to argue that intrastate interLATA usage data is not appropriate. (Varner, Tr. 402) He has taken the word "appropriate" completely out of context. Section 7.2.1.9 of Attachment III, which addresses Local Switching, provides as follows: "BellSouth shall record all billable events, involving usage of the element, and send the appropriate recording data to MCI as outlined in Attachment VIII." The phrase "appropriate recording data" is merely referring to the content requirements which are "outlined in Attachment VIII." (Martinez, Tr. 797) Section 4.1.1.3 of Attachment VIII requires BellSouth to provide recorded usage data on all completed calls. Mr. Hendrix, BellSouth's contract witness, admitted that the Agreement requires BellSouth to provide interstate access records. (Ex. 26, Deposition of Jerry Hendrix, p. 52) Mr. Hendrix also admitted that there was nothing in the Agreement which stated that intrastate switched access should be treated differently from interstate. Id.

Mr. Varner attempts to frame the question of who is the intrastate access provider as a "pricing decision" for this Commission. (Varner, Tr. 402) This is not a pricing question. It is a question of what is a network element. The FCC is responsible for defining the minimum set of network elements that BellSouth must offer. The Florida Commission is responsible for determining the prices that BellSouth will charge for these elements, subject to the requirement that the prices must be cost-based. As discussed in more detail below, the FCC has defined network elements in a manner which establishes the entrant as access provider. In any event, the Florida Commission has already established cost-based prices that fully compensate BellSouth for the cost of these facilities. (Gillan, Tr. 284-85) There is no room to entertain, much less accommodate, BellSouth's request to retain an intrastate

36 "They do not cease being network elements even if I bill those as resale." (Hendrix, Tr. 651)

access monopoly.

Local Switching includes "all of the features, functions, and capabilities that the underlying BellSouth switch . . . is capable of providing, including but not limited to: . . . Carrier pre-subscription (e.g., long distance carrier, intraLATA toll." Section 7.1.1, Attachment 3. In addition, "Local Switching shall also be capable of routing local, intraLATA, [and] interLATA" calls. Section 7.1.1, Attachment 3. Clearly, local switching includes the ability to provide access. Amazingly, Mr. Varner even admitted that the rate BellSouth charges for local switching already includes the cost of providing switched access. (Varner, Tr. 450) In other words, when MCI purchases Local Switching from BellSouth, it is already paying BellSouth for this capability.

c. The Telecommunications Act of 1996 and FCC Rules

A central premise of the federal Act is that a new entrant may obtain network elements to provide whatever array of services it desires. Section 251(c)(3) describes BellSouth's obligation to provide network elements as:

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements ...

The FCC rules which implement Section 251 reaffirm this central principle. For instance, CFR §51.307(c) states (emphasis added):

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

The following FCC rules, undisturbed by the Eighth Circuit's decision, clearly establish that the entrant may use network elements for this (or any) purpose:

47 C. F. R. § 51.309. Use of Unbundled Network Elements

- (a) An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.
- (b) A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.

These FCC rules do not apply only to the interstate services that will be offered using network elements. The Act's provisions defining network elements -- as well as the FCC rules implementing that authority -- are non-jurisdictional. That is, the entrant's right to use network elements to provide any service includes intrastate services (such as local service and intrastate access). After all, the Act adopted a national blueprint for local competition -- a framework that would have been meaningless if its provisions applied only to the use of network elements to provide interstate services. FCC orders and effective federal rules clearly establish the entrant as the provider of access services with respect to its end-users -- and this conclusion would apply equally to both interstate and intrastate access. (Gillan, Tr. 280-81)

The FCC has clearly addressed the entrant's ability to become the access-provider to its own customers. The FCC has reiterated through a series of orders that the roles of local provider (to the end-user) and access-provider (to other carriers) go hand-in-hand. In its initial decision defining network elements issued August 8, 1996 in Docket 96-98 (paragraph 356), the FCC concluded:

We confirm our tentative conclusion in the NPRM that section 251(c)(3) permits interexchange carriers and all other requesting carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers.

Furthermore, in this same order, the FCC explicitly defined the loop network element to establish the entrant as the exclusive provider of all services using the loop (paragraph 385):

Giving competing carriers exclusive control over network facilities dedicated to particular end users provides such carriers the maximum flexibility to offer new service to such end-users. In contrast, a definition of a loop element that allows simultaneous access to the loop facility would preclude the provision of certain services in favor of others.

Finally, on September 27, 1996, the FCC issued an Order on Reconsideration in Docket 96-98 (paragraph 11), that extended this principle to the local switching network element in recognition of its indivisible nature:

... when a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single [network] element on a per-line basis ... Thus, a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user.

Consequently, the FCC rules defining the loop and switch network elements establish the purchasing carrier as a complete provider of local exchange and access services.

BellSouth's proposal to retain intrastate access cannot be squared with its obligations under the Act, its compliance with FCC rules, its obligations under the Agreement, or even the cost methodology underlying the prices charged for these network elements. BellSouth's position effectively redefines the loop/switch network elements to only provide the entrant with the functionality to provide some

services (presumably local services and interstate access), but that BellSouth somehow retains the functionality to offer others (intrastate access). This perspective, however, violates that basic definition of these elements as the lease of all functionality to the entrant.

Furthermore, at the urging of the ILECs, the FCC specifically rejected defining these elements in a manner which would have allowed the functionality to provide exchange access to exist independently of local service:

We decline to define a loop element in functional terms, rather than in terms of the facility itself ... this definition would enable an IXC to purchase a loop element solely for purposes of providing interexchange service. While such a definition, based on the types of traffic provided over a facility, may allow for the separation of the costs for a facility dedicated to one end user, we conclude that such treatment is inappropriate. (Order, Docket 96-98, paragraph 385.)

We thus make clear, as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier. (Order on Reconsideration, paragraph 13.)

BellSouth cannot have it both ways -- if BellSouth could retain the functionality to provide only exchange access, then it should also offer this same functionality as a network element to others. The fact is that the loop/switch network elements embrace all the functionality of these facilities and BellSouth's request to retain an intrastate access monopoly must be rejected.

Issue 10: Does the AT&T-BellSouth interconnection agreement require BellSouth to record and provide AT&T with detail usage data for switched access service, local exchange service and long distance service necessary for AT&T to bill customers when AT&T provides service using unbundled network elements either alone or in combination?

****MCI Position: No position.****

II. CONCLUSION

For the foregoing reasons, the Commission should hold that the price for combinations of UNEs is governed by the Agreement and equals the sum of the prices for the stand-alone elements, less any duplicate charges or charges for services not needed. The Commission should also adopt the NRCs for loop/port combinations for migration of existing customers proposed by MCI witness Tom Hyde. These recommended rates are based on adjustments and correction to BellSouth's own studies. Mr. Hyde strictly followed the methodology of removing duplicate charges and charges for services not needed which was mandated by the Commission. In the alternative, the Commission should adopt the rates recommended by AT&T witness Richard Walsh which are based on the AT&T/MCI Non-Recurring Cost Model. These proposed rate are based on the cost of forward-looking, efficient procedures and technologies.

RESPECTFULLY SUBMITTED this 6th day of April, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by hand delivery this 6th day of April, 1998.

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