

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

MAY 1, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI) *G mcs*
DIVISION OF COMMUNICATIONS (STAVANJA, CORDIANO) *W*

RE: DOCKET NO. 971140-TP - MOTIONS OF AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC., AND MCI TELECOMMUNICATIONS CORPORATION AND MCIMETRO ACCESS TRANSMISSION SERVICES, INC., TO COMPEL BELLSOUTH TELECOMMUNICATIONS, INC., TO COMPLY WITH ORDER NO. PSC-96-1579-FOF-TP AND TO SET NON-RECURRING CHARGES FOR COMBINATIONS OF NETWORK ELEMENTS WITH BELLSOUTH TELECOMMUNICATIONS, INC., PURSUANT TO THEIR AGREEMENT

AGENDA: MAY 14, 1998 - SPECIAL AGENDA - POST-HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\971140ri.cjp

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FPSC-RECORDS/REPORTING

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LIST OF ACRONYMS USED IN RECOMMENDATION

ACAC	Account Customer Advocate Center
Act	Communications Act of 1934 as Amended by The Telecommunications Act 1996
AIN	Advanced Intelligence Network
AT&T	AT&T Communications of the Southern States, Inc.
BR	Brief of Evidence
BellSouth	BellSouth Telecommunications, Inc
CABS	Carrier Access Billing System
CGI	Common Gateway Interface
CLEC	Competitive Local Exchange Carrier
CO	Central Office
CPG	Circuit Provisioning Group
CRIS	Customer Record Information System
DA	Directory Assistance
DS1	Digital Signal @ 1.544 Mbps
Eighth Circuit	U.S. Court of Appeals for the Eighth Circuit
EXH	Exhibit
FCC	Federal Communications Commission
FPSC	Florida Public Service Commission
ILEC	Incumbent Local Exchange Carrier

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ISDN	Integrated Services Digital Network
IXC	Interexchange Carrier
JFC	Job Function Code
LCSC	Local Carrier Service Center
MCIm	MCI Metro Access Transmission Services, Inc. & MCI Telecommunications Corporation
NRC	Non-Recurring charge
NRCM	Non-Recurring Cost Model
OSS	Operational Support System
POTS	Plain Old Telephone System
RBOC	Regional Bell Operating Company
RCMAG	Recent Charge Line Translation Group
SCP	Signaling Control Point
SS7	Signaling System 7
SSIM	Special Services Installation Maintenance
STP	Signaling Transfer Point
TA96/ACT	Telecommunications Act of 1996
TELRIC	Total Element Long Run Incremental Cost
TR	Transcript
TSLRIC	Total Service Long Run Incremental Cost
UNE	Unbundled Network Element

EXECUTIVE SUMMARY

Issue 1 addresses whether or not the BellSouth-MCIIm interconnection agreement specifies how prices will be determined for combinations of unbundled network elements that a) recreate and b) do not recreate an existing BellSouth retail telecommunications service. Staff is recommending that the Commission should find that the MCIIm/BellSouth interconnection agreement specifies how prices will be determined for combinations of unbundled network elements that recreate an existing BellSouth retail service. Staff is recommending that the Commission should also find that the MCIIm/BellSouth interconnection agreement specifies how prices will be determined for combinations of unbundled network elements that do not recreate an existing BellSouth retail service.

Further, staff is recommending that the Commission should require BellSouth, under the agreement, to provide network elements as defined in 47 C.F.R. §51.319 to MCIIm individually or combined, whether already combined or not, at the prices for the individual elements established by the Commission in Order No. PSC-96-1579-FOF-TP and set forth in the agreement in Table 1 of Attachment I. In addition, staff is recommending that the Commission should find that, under the agreement, the prices for combinations of network elements should be determined as the sum of the prices of the individual elements comprising the combination, without qualification as to use and subject to the elimination of duplicate charges or charges for unneeded functions or activities.

Issue 2 addresses how will the price(s) be determined if the answer to both parts of Issue 1 are yes. Whether MCIIm recreates an existing BellSouth retail service or not through the combination of unbundled network elements, staff is recommending that the prices MCIIm should pay BellSouth for network element combinations or for the network elements if ordered individually are based on the rates established in Order No. PSC-96-1579-FOF-TP and set forth particularly in the parties agreement in Table 1 of Attachment 1, Section 2.6 of Attachment III, and Section 8 of Attachment I. The prices for combinations of network elements should be determined as the sum of the prices of the individual elements comprising the combination, less duplicate and unnecessary charges.

Issue 3 addresses how the price(s) will be determined if the answer to both parts of Issue 1 are no. Staff is recommending that since staff recommends in Issues 1(a) and (b) that the Commission find that the MCIIm/BellSouth interconnection agreement contains a pricing standard for network element combinations and recommends in

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Issue 2 what that standard should be, the Commission should find Issue 3 moot. If, however, the Commission denies staff's recommendations in Issues 1(a) and 1(b) and in Issue 2, then staff is recommending that the Commission direct the parties to resume negotiations in order to establish prices for UNE combinations that comport with the requirements of the Act and with the Commission's decision in Issue 7.

Issue 4 addresses whether or not the BellSouth-AT&T interconnection agreement specifies how prices will be determined for combinations of unbundled network elements that a) recreate and b) do not recreate an existing BellSouth retail telecommunications service. Staff is recommending that the Commission should find that AT&T's interconnection agreement with BellSouth sets forth a pricing standard expressed particularly in Section 36.1 for network elements ordered as combinations on a single order that do not recreate an existing BellSouth retail service. Staff is recommending that the Commission should also find that AT&T's interconnection agreement with BellSouth sets forth a pricing standard expressed particularly in Section 36.1 for network elements ordered as combinations on a single order that do recreate an existing BellSouth retail service.

Further, staff is recommending that the Commission should find that the pricing standard in the parties' agreement requires them, in either case, to first attempt to negotiate appropriate prices for combinations of elements based on the Commission's decisions in Issues 5 and 6 below. Failing that, the parties may submit their dispute to the Commission for resolution through arbitration. Also, staff is recommending that the Commission should further find that BellSouth is not required under its agreement with AT&T to provide AT&T with network elements in combination at the sum of the individual element prices set forth in Table 1 of Part IV, except in the case where the elements exist in combination at the time of AT&T's order. Finally, staff is recommending that the Commission should find that AT&T may alternatively purchase unbundled network elements individually at the prices set forth in the parties' agreement, in which case, BellSouth should be required to provide AT&T with access to its network for purposes of combining elements in order to provide telecommunications services.

Issue 5 addresses how the price(s) will be determined if the answer to both parts of Issue 4 are yes. Staff is recommending that, under the pricing standard in the AT&T-BellSouth agreement that the Commission should find in Issue 4, for network elements not already combined at the time of AT&T's order, the Commission should find that, if AT&T requests that BellSouth provision them in

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combination, AT&T and BellSouth should negotiate the price AT&T should pay, as required by Section 36.1 of Part IV of their agreement. Staff is also recommending that the Commission should also find that the prices negotiated for these combinations should be compliant with Section 252(d)(1) of the Act and the Commission's decisions below in Issue 6, and be free of duplicate and unnecessary nonrecurring charges. Further, in the specific case of network elements existing as combinations at the time of AT&T's order, staff is recommending that the Commission should find, as an exception, that the price AT&T should pay is the sum of the prices for the component elements in Table 1 of Part IV of its agreement with BellSouth. Finally, if the Commission should deny staff's recommendation in Issues 4(a) and 4(b) and in Issue 5, finding that the parties' agreement does not require them to negotiate appropriate prices for unassembled UNE combinations or that the prices for already assembled combinations are not specified by the agreement or that the parties' agreement contains no pricing standard for UNE combinations of any kind, staff is recommending that the Commission nevertheless should require the parties to negotiate UNE combination prices in all events that comport with Section 252(d)(1) of the Act and that are free of duplicate and unnecessary charges.

Issue 6 addresses how the price(s) will be determined if the answer to both parts of Issue 5 are no. If the Commission should deny staff's recommendation in Issues 4(a) and 4(b) and in Issue 5, finding that the parties' agreement does not require them to negotiate appropriate prices for unassembled UNE combinations or that the prices for already assembled combinations are not specified by the agreement or that the parties' agreement contains no pricing standard for UNE combinations of any kind, staff recommends that the Commission nevertheless should require the parties to negotiate UNE combination prices in all events that comport with Section 252(d)(1) of the Act and that are free of duplicate and unnecessary charges. If the Commission should deny staff's recommendation in Issues 4(a) and 4(b) and in Issue 5, finding that the parties' agreement does not require them to negotiate appropriate prices for unassembled UNE combinations or that the prices for already assembled combinations are not specified by the agreement or that the parties' agreement contains no pricing standard for UNE combinations of any kind, staff recommends that the Commission nevertheless should require the parties to negotiate UNE combination prices in all events that comport with Section 252(d)(1) of the Act and that are free of duplicate and unnecessary charges. If the Commission should deny staff's recommendation in Issue 5, finding that the parties' agreement does not require them to negotiate appropriate prices for

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unassembled UNE combinations or that the prices for already assembled combinations are not specified by the agreement, staff recommends that the Commission require the parties to negotiate UNE combination prices in all events that comport with the Act and its decision below in Issue 8 concerning duplicate and unnecessary charges.

Issue 7 addresses what standard should be used to identify what combinations of unbundled network elements recreate existing BellSouth retail telecommunications services. Staff is recommending that the Commission find that such standard is irrelevant because of the 8th Circuit Court's Order which states that the capability to provide services through access to the unbundled network elements of an incumbent local exchange carrier is permissible under the Act.

Issue 8 addresses the appropriate nonrecurring charge for each of the following combinations of network elements for the 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 loop and port?

Staff is recommending that the Commission approve the nonrecurring charges found on page 68 in the staff recommendation.

Issue 9 addresses whether or not the BellSouth-MCIm interconnection agreement requires BellSouth to record and provide MCIm with the 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. Staff is recommending that the Commission find that BellSouth is required under the terms of the agreement with MCIm with switched access usage data necessary for MCIm to bill IXCs 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.

Issue 10 addresses whether or not the BellSouth-AT&T interconnection agreement requires 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. Staff is recommending

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that the Commission find that BellSouth is required under the terms of its agreement with AT&T to record and provide AT&T with switched access usage data necessary for AT&T to bill IXCs when AT&T provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements.

Issue 11 addresses whether or not this docket should be closed. Staff is recommending that the Commission keep the docket open and require the parties to submit a final arbitration agreement conforming with the Commission's ultimate determination in this docket for approval within 30 days of issuance of the Commission's order.

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CASE BACKGROUND

On June 9, 1997, in Docket No. 960833-TP, AT&T Communications of the Southern States, Inc., (AT&T) filed a Motion to Compel Compliance of BellSouth Telecommunications, Inc., (BellSouth), with reference to certain provisions of Order Nos. PSC-96-1579-FOF-TP, PSC-97-0298-FOF-TP, and PSC-97-0600-FOF-TP and certain provisions of its interconnection agreement with BellSouth having to do with the provisioning and pricing of combinations of unbundled network elements (UNEs). On June 23, 1997, BellSouth timely filed a Response and Memorandum in Opposition to AT&T's Motion to Compel Compliance. On October 27, 1997, in Docket No. 960846-TP, MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., (MCI) filed a similar Motion to Compel Compliance. On November 3, 1997, BellSouth timely filed a Response and Memorandum in Opposition to MCI's Motion to Compel Compliance.

On August 28, 1997, MCI filed a Petition to Set Non-Recurring Charges for Combinations of Network Elements, for which this docket was opened. BellSouth filed a timely response in opposition on September 17, 1997. By Order No. PSC-97-1303-PCO-TP, issued October 21, 1997, the Prehearing Officer consolidated Docket No. 971140-TP with Docket Nos. 960757-TP, 960833-TP and 960846-TP for purposes of hearing.

At its Agenda Conference on December 2, 1997, the Commission directed that the Motions to Compel Compliance be set for hearing. In Order No. PSC-98-0090-PCO-TP, issued January 14, 1998, the Prehearing Officer severed Docket No. 971140-TP from Docket Nos. 960757-TP, 960833-TP and 960846-TP and directed that the Motions to Compel Compliance be addressed in this docket.

On March 9, 1998, the Commission held a hearing in which it received testimony concerning the Motions to Compel Compliance and non-recurring charges for certain combinations of network elements. This is staff's recommendation construing the parties' interconnection agreements with respect to the provisioning and pricing of network element combinations, the standard to be applied to determine whether a combination of network elements constitutes a recreation of an existing BellSouth retail service, and the non-recurring charges for certain loop-port combinations.

DISCUSSION OF ISSUES

ISSUE 1: Does the BellSouth-MCIIm interconnection agreement specify how prices will be determined for combinations of unbundled network elements

- a) that do not recreate an existing BellSouth retail telecommunications service?
- b) that do create an existing BellSouth retail telecommunications service?

RECOMMENDATION: Yes. The Commission should find that the MCIIm/BellSouth interconnection agreement specifies how prices will be determined for combinations of unbundled network elements that do not recreate an existing BellSouth retail service. The Commission should also find that the MCIIm/BellSouth interconnection agreement specifies how prices will be determined for combinations of unbundled network elements that do recreate an existing BellSouth retail service. The Commission should require BellSouth, under the agreement, to provide network elements as defined in 47 C.F.R. §51.319 to MCIIm individually or combined, whether already combined or not, at the prices for the individual elements established by the Commission in Order No. PSC-96-1579-FOF-TP and set forth in the agreement in Table 1 of Attachment I. The Commission should find that, under the agreement, the prices for combinations of network elements should be determined as the sum of the prices of the individual elements comprising the combination, without qualification as to use and subject to the elimination of duplicate charges or charges for unneeded functions or activities.

POSITIONS OF PARTIES

BellSouth:

No. The BellSouth-MCIIm Interconnection Agreement specifies prices for individual network elements. The Agreement does not specify how combinations of unbundled network elements should be priced.

AT&T:

- a) No position.
- b) No position.

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MCIIm:

a) Yes, the Agreement does specify how the prices for combinations of UNEs will be determined. The Agreement makes no distinction between combinations which allegedly recreate an existing BellSouth retail telecommunications service and those that do not.

b) Yes, the Agreement does specify how the prices for combinations of UNEs will be determined. The Agreement makes no distinction between combinations which allegedly recreate an existing BellSouth retail telecommunications service and those that do not.

STAFF ANALYSIS:

MCIIm

MCIIm argues that its agreement with BellSouth "directly, expressly, and unambiguously" specifies how the prices for combinations of UNEs are determined. (MCIIm BR 5) The price for UNE combinations is the price of the individual UNEs minus duplicate charges and charges for services not needed. Id. The agreement gives MCIIm the right to order UNE combinations and specifically obligates BellSouth to provide such combinations. Id. 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. Id.

MCIIm witness Parker testifies that the MCIIm agreement sets forth an "explicit" pricing standard for UNEs. (TR 67, EXH 2 p13) He testifies further that Section 2.6 of Attachment III of MCIIm's agreement is a key provision. (TR 29, 68-69) Section 2.6 provides that:

With respect to network elements, charges in Attachment 1 are inclusive and no other charges apply, including but not limited to any other consideration for connecting any network elements with other network elements.

He states that this provision means that "when MCI orders from BellSouth a connected loop and port, BellSouth can charge only for the individual UNE prices set forth in Attachment 1." Id. He states further that this provision was negotiated. (TR 29-30)

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Witness Parker observes that this section is immediately preceded by Section 2.4 of Attachment III, which provides 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.

(TR 69-70)

Witness Parker further testifies that another key provision in its agreement is Section 8 of Attachment I. (TR 30) That section provides that:

The recurring and non-recurring prices for Unbundled Network Elements ("UNEs") in Table 1 of this Attachment are appropriate for UNEs on an individual, stand-alone basis. When two or more UNEs are combined, these prices may lead to duplicate charges. BellSouth shall provide recurring and non-recurring charges that do not duplicate charges for functions or activities that MCI does not need when two or more Network Elements are combined in a single order

Witness Parker also testifies that Section 2.2.15.3 of Attachment VIII of the agreement is pertinent to this issue. (TR 30, 70) That section provides that:

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.

He states that this provision means that "when MCI orders combinations of elements that are currently connected to each [other] and serving a customer, BellSouth cannot rip those elements apart." Id. He states further that this section also was negotiated. (TR 30-31)

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Witness Parker concludes that the provisions of MCI's agreement having to do with pricing UNEs is not ambiguous. (TR 31, 74) Rather, they specifically recognize MCI's right "to migrate existing BellSouth customers to MCI to be served by UNEs." Id. They further prohibit "BellSouth from ripping apart elements that are currently connected when ordered in combination, and ... specif[y] how the prices for those combinations are determined." Id. He points out that Attachment 3 determines the provisioning of UNEs and Attachment 1 determines how they are to be priced. (TR 68)

MCI witness Martinez was a principal negotiator. (TR 787) He also testifies that the MCI agreement provides prices for UNE combinations as the sum of the rates for the stand-alone elements. (TR 791) He further testifies that the agreement provides "a mechanism for removing from that sum duplicate charges and charges for services not needed when the elements are ordered in combination." Id.

Witness Martinez also testifies that the phrase "charges in Attachment I are inclusive and no other charges apply" in Section 2.6 of Attachment I means that:

In essence, again going back to ordering that which already exists to be in place, and that is the combination loop and port. There are no charges to take them apart or put them together because they already exist; that the charges are themselves the charges as reflected in Attachment I.

(EXH 39, p38)

Witness Martinez testifies that BellSouth voluntarily agreed to Section 2.2.2 of Attachment VIII, Section 2.2.15.3 of Attachment VIII, and Section 2.6 of Attachment III. (TR 792) He contends that these provisions "go to the heart of this case." (TR 793) They establish:

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 ... When MCI does so, BellSouth cannot disconnect the currently connected network elements ... Finally, when MCI migrates the customer to UNEs, the

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charges for the network elements set forth in Attachment I apply. Those charges are inclusive and no other charges, including a glue charge, shall apply

Id. He states that "BellSouth voluntarily agreed that we could migrate customers to UNEs, they agreed that they would not disconnect the currently connected elements, and they agreed not to charge a glue charge." (TR 794) He maintains that this provision existed from the very beginning of the negotiations and that BellSouth's negotiators were "totally aware of what the meaning was of that paragraph." (EXH 39, pp40,47)

MCI argues that BellSouth did not agree to these provisions subject to the adoption of other language that it proposed be included in Section 8 of Attachment I, language that the Commission disallowed in Order No. PSC-97-0602-FOF-TP, issued May 27, 1997. (MCI BR 16) That language would have required the parties to negotiate the price of a retail service that is recreated by combining UNEs. MCI argues that:

[T]he 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 BellSouth's argument that MCI could not combine network elements to recreate a BellSouth service. (citation omitted) 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. (citation omitted) 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.

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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.

* * *

On March 19, 1997, the Commission issued its Order on Reconsideration ... 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. (citation omitted) 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 ... Order on Motion for Reconsideration. On May 27, 1997, the Commission rejected this proposed language. (citation omitted) ... 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.

(MCIm BR 15-17)

BellSouth

BellSouth argues that its interconnection agreement with MCIm specifies prices only for individual network elements; it does not specify how combinations of network elements should be priced. (BellSouth BR 8)

BellSouth maintains that in order to conclude that its agreement specifies the prices for combinations of network elements, the Commission must find either that it (the Commission) decided the prices in the arbitration or that BellSouth voluntarily

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agreed to such prices. BellSouth asserts that neither finding makes any sense nor is supported by the evidence. Id.

BellSouth witness Hendrix was the company's lead negotiator. (TR 646, EXH 26 p28) He testifies that, while, in Order No. PSC-96-1579-FOF-TP, the Commission's Final Order on Arbitration, the Commission allowed MCI to combine UNEs in any manner of their choosing, the Commission, at pages 37-38, declined to rule on the pricing of recombined elements. (TR 622) He further testifies that, in its Order No. PSC-97-0298-FOF-TP on reconsideration, the Commission stated that it was not presented with the specific issue of the pricing of recombined elements recreating service resale and that it was not clear that its decision included rates for all the elements necessary to recreate a complete retail service. (TR 623)

Witness Hendrix testifies further that, because there was no direction from the Commission on UNE combinations pricing, BellSouth proposed language for inclusion in its agreement with MCI in Section 8 of Attachment I that addressed that question. Id. The language BellSouth proposed was as follows:

Negotiations between the parties should address the price of a retail service that is recreated by combining UNEs. Recombining UNEs shall not be used to undercut the resale price of the service recreated.

Id. He notes that the Commission, in Order No. PSC-97-0602-FOF-TP, at page 5, rejected the language BellSouth proposed, and stated again that, while it was concerned about the pricing for UNEs duplicating service resale, that issue was not presented for arbitration. (TR 624)

Witness Hendrix testifies that BellSouth's agreement with MCI specifies only prices for individual network elements. (TR 625) He maintains that it does not specify how UNE combinations should be priced. Id. He further testifies that, contrary to MCI's view, Section 2.6 of Attachment III does not set prices for combinations. (TR 625-26) He explains that:

This language was agreed to in conjunction with the pricing language BellSouth tried to incorporate into the agreement, but which was rejected by the Commission. BellSouth has consistently maintained its position that unbundled network elements combined to

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recreate an existing retail service offering is considered resale. BellSouth would never have voluntarily agreed to a provision in the agreement that would undercut its position on combinations.

(TR 626) He rejects MCI's contention that Section 8 of Attachment I provides the pricing standard for UNE combinations. (TR 640) He observes that this section requires BellSouth and MCI to work together to develop recurring and non-recurring charges that do not duplicate charges for functions or activities that MCI does not need when two or more UNEs are combined in a single order. Id.

Witness Hendrix in addition testifies that when MCI purchases a loop and port combination from BellSouth it is replicating a BellSouth retail offering. (EXH 26 p34) He maintains that the appropriate price in this case is not provided in the agreement as the sum of the prices for the loop and for the port; rather, it is the retail rate less the Commission-approved wholesale discount. Id.

In rejecting the interpretation of Section 2.6 of Attachment I that would specify the pricing standard for UNE combinations, (EXH 26 p37, TR 693), witness Hendrix explains that:

The first answer being, Attachment I ... will address individual UNE elements. Nowhere in that attachment will you find the language "combinations."

The reason the language is worded as is, and I remember this language being included, we at one point had tried to make references to the tariffs just to ensure we had all bases covered. MCI did not want references to the tariff. They said Attachment I is an all inclusive attachment and anything that we're wanting to add later we would be able to come in and amend the agreement and amend Attachment I to actually include those rates.

* * *

So when it says "all inclusive," it does not mean ... that these are the only rates that you would charge for putting UNEs

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together in the way the carriers would want to actually do that.

(EXH 26 pp37,38) Further, he testifies that Section 2.6 is very clear when read with knowledge of the language that BellSouth proposed to be included in Section 8 of Attachment I, which the Commission disallowed. (EXH 26 p40) BellSouth considered the disallowed language to be consistent with the Commission's orders and it was left with a problem when the Commission disallowed it. (EXH 26 pp40-41) Nevertheless, BellSouth decided to await a favorable ruling from the Eighth Circuit that once final and nonappealable would enable it to negotiate revised language. (EXH 26 p40) According to witness Hendrix, the Commission was "sick of hearing from [BellSouth]," and for that reason, threatened a penalty if a signed agreement were not timely submitted for approval. (EXH 26 p41)

Witness Hendrix testifies that the phrase "no other charges apply" in Section 2.6 means that the rates contained in Attachment I are the rates that would apply for each individual UNE. (EXH 26 p42) He summarizes his testimony on this issue by agreeing with the suggestion that if an ALEC orders an unbundled loop and an unbundled port and combines them itself, the prices in Attachment I apply, but that if the ALEC orders a loop and port already combined, while BellSouth must, under the agreement, provide the combination, it would do so at the resale price. (EXH 26 p43)

BellSouth argues that MCIm's contention that BellSouth agreed to a combinations pricing standard blatantly ignores BellSouth's consistent position on the pricing of recombined elements, the circumstances surrounding execution of the interconnection agreement, and the language of the agreement itself. (BellSouth BR 10) BellSouth witness Varner testifies that BellSouth has fought ALEC proposals to purchase UNE combinations that replicate retail services at cost-based rates in every state arbitration proceeding, in Section 271 proceedings, and at the FCC. (TR 425)

Finally, BellSouth argues that language identical to the language in Section 2.6 of Attachment III is in its interconnection agreements with MCIm in every other state in its region, and yet, with the exception of Kentucky, MCIm must pay the resale price when it purchases UNEs that when combined recreate an existing BellSouth service. (BellSouth BR 11-12, 21-25)

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Conclusion

This issue requires the Commission to determine whether the MCI-BellSouth interconnection agreement establishes a pricing standard for UNEs ordered by MCI in combinations, a matter in dispute between the parties. Accordingly, staff's analysis of the agreement's pertinent provisions rests on the application of principles of contract construction and the requirements of Section 251(c) of the Act.

Principles of Contract Construction

In *James v. Gulf Insur. Co.*, 66 So.2d 62, 63 (FLA. 1953), the Florida Supreme Court cited with favor Contracts, 12 Am.Jur §250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language.

See also, Triple E Development Co. v. Florida Gold Citrus Corp., 51 So.2d 435, 438-39, rhq. den. (Fla. 1951).

Before extrinsic matters may be considered by a court in interpreting a contract, the words used on the face of the contract must be ambiguous or unclear. (citations omitted) In the absence of an ambiguity on the face of a contract, it is well settled that the actual language used in the contract is the best evidence of the intent of the parties and the plain language controls. (citations omitted) Acceleration Nat'l Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So.2d 738 (Fla. 3d DCA 1989), rev. den., 548 So.2d 662 (Fla.1989). A court may not give contract terms a meaning other than that expressed in it or rewrite the contract. De Slatopolsky v. Balmoral Condominium Ass'n, 427 So.2d 781 (Fla. 3d DCA 1983). The cardinal rule of construction is to ascertain the intention of the contracting parties and to give effect to that intention if it can be done consistently with legal principles. (citations omitted) Where the language chosen by the parties, given its ordinary and natural meaning, unambiguously manifests that intention, the judicial task is at an end. (citations omitted) Jacksonville Terminal Co. v. Railway Express Agency, Inc., 296 F.2d 256 (Th Cir. 1961), cert. den., 369 U.S. 860 (1962). A contract must be construed within its context according to its own clear and unambiguous terms. Avis Rent a Car Says. v.

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Monroe County, 660 So.2d 413 (Fla. 3d DCA 1995). Plain and unambiguous language in a contract must be construed to mean just what the language used implies and nothing more. Williams Island Associates, Ltd. v. Cohen, 547 So.2d 954 (Fla. 3d DCA 1989), rev. den., 558 So.2d 17 (Fla. 1990). If a contract read in its entirety contains no ambiguity, the court must not make, remake, or alter it, but must give effect to the terms as stated therein. Jacksonville v. W.R. Fairchild Const. Co., 547 So.2d 1010 (Fla. St. DCA 1989); Cloughton Hotels, Inc. v. Miami, 140 So.2d 608 (Fla. 3d DCA 1962, cert. den., 146 So.2d 750 (Fla. 1962)).

Section 251(c)

The FCC

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

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

We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections

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251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefore find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity as a means to enter local phone markets.

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

This Commission

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

Specifically, we are concerned that the FCC's interpretation could result in the resale rates we set being circumvented if the price of the same service created by combining unbundled elements is lower

Upon consideration, although we are concerned with the FCC's interpretation of Section 251(c)(3) of the Act, we are applying it to this proceeding ... Therefore, since it appears ... that the FCC's Rules and Order permit AT&T and MCI to combine unbundled network elements in any manner they choose, including recreating existing BellSouth services, they may do so for now. However, we will notify the FCC about our concerns and revisit this portion of our order should the FCC's interpretation change.

On reconsideration in Order No. PSC-97-0298-FOF-TP, the Commission, at page 7, reiterated its concern with the notion that recombining network elements to recreate a service could be used to

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undercut the resale price of the service, but it affirmed its decision, nonetheless, that AT&T and MCI could combine network elements in any manner they choose. BellSouth advanced the argument that while AT&T and MCI can combine network elements, when they are combined to replicate an existing BellSouth service, the appropriate pricing standard is found in Section 252(d)(3), and not in Section 252(d)(1). The Commission stated further at pages 7-8 that:

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

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

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

The Eighth Circuit

In Iowa Utilities Bd. v. FCC, 120 F.3d 753 (Iowa Utilities Bd. I), the court rejected the argument that "by allowing a competing carrier to obtain the ability to provide finished telecommunications services entirely through unbundled access at the less expensive cost-based rate, the FCC enables competing carriers to circumvent the more expensive wholesale rates ... and thereby nullifies the terms of subsection 252(c)(4)." The court ruled that:

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

120 F.3d at 815. The court approved the rationale that the costs and risks associated with unbundled access as a method of entering the local telecommunications industry make resale a distinctly attractive option.

In Order on Petitions for Rehearing, 1997 U.S. App. Lexis 28652, slip opinion, reh'g granted in part, denied in part (Iowa Utilities Bd. II), the court, on rehearing, did not disturb its ruling on obtaining finished services through unbundled access. The court ruled that Section 251(c)(3) unambiguously indicates that the requesting carriers themselves, not the incumbent local exchange carrier, will combine unbundled elements to provide telecommunications services. The court stated at ¶2 that:

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

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

The Applicable Legal Framework

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

The Provisioning and Pricing Requirements of the MCI-BellSouth Agreement

Provisioning

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

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

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

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

Also, Section 2.2.15.13 of Attachment VIII provides that:

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.

In Iowa Utilities Bd. II, supra, the court ruled that incumbents are only required to provide network elements on an unbundled basis. BellSouth witness Varner acknowledges that an incumbent is free to combine network elements in any manner of its choosing. (EXH 24 p23) Nevertheless, MCI witness Parker testifies that BellSouth is required to provide UNE combinations to MCI pursuant to Section 2.4 of Attachment III and Sections 2.2.15.1 and 2.2.15.3 of Attachment VIII of the agreement. (TR 19) Moreover, BellSouth witnesses Varner and Hendrix freely acknowledge that, according to the terms of BellSouth's agreement with MCI, it is obligated to accept and provision UNE combination orders. (EXH 24 pp23,24, TR 621-22) Thus, staff believes that there can be no question that BellSouth has undertaken a contractual obligation to provide network elements in combinations to MCI. That obligation is not affected by the Eighth Circuit's nonfinal ruling on reconsideration, as witness Varner recognizes. Id.

Pricing

BellSouth witness Hendrix testifies, however, that BellSouth's agreement with MCI does not specify how prices will be determined for UNE combinations that recreate an existing BellSouth retail service. (TR 625) Staff must disagree. First, nothing in the agreement limits the use to which MCI may put combinations of UNEs or conditions the price of the combinations of UNEs on the way MCI uses them. Second, Section 2.6 of Attachment III, of the agreement provides that "[w]ith respect to Network Elements and services in existence as of the Effective Date of this Agreement, charges in Attachment I [,Price Schedule,] are inclusive and no other charges apply, including but not limited to any other consideration for connecting any Network Element(s) with other Network Element(s)." (emphasis added) Staff believes that the absence of use-limiting language in the agreement and the emphasized language in Section 2.6 admit no other interpretation than that the network element prices set forth in Table 1 of Attachment I are applicable when elements are ordered in combination.

Witness Hendrix testifies that Section 2.6 cannot be fairly interpreted without considering the language that BellSouth would

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have included in Section 8 of Attachment I, the language that the Commission rejected. (EXH 26 p40-41) That language, which BellSouth thought to be consistent with the Commission's orders, would have required BellSouth and MCI to negotiate UNE combination prices that would not undercut the price of service resale. (TR 623-24).

While staff understands the problem that BellSouth considered it faced with the Commission's rejection of its proposed Section 8 Attachment I language, staff does not believe that BellSouth was left without a recourse but to accept language with which it disagreed and await an eventual favorable ruling from the Eighth Circuit. Witness Hendrix agrees that the business implications of a UNE combinations pricing standard are "huge." (EXH 26 p39) Staff cannot imagine any subject matter considered in the agreement between these parties that might have required more scrutiny, and, hence, the most careful of language. Nevertheless, staff believes that the signed agreement contains no language that can be fairly construed to preserve BellSouth's concern about the pricing of replicative services. Thus, the language in Section 2.6, plain and unambiguous as it is, and read in conjunction with all the other provisions in the agreement relating to pricing, should be construed as the expression of the parties' intent at the time of forming the agreement. Because this language is plain and unambiguous, it is the Commission's task only to determine what intent the language expresses, not to divine another intent that might have been in the minds of BellSouth's negotiators.

Staff agrees with MCI that this language does not permit the addition of charges to those specified in Table 1 of Attachment I, including "glue charges," for the purchase of UNE combinations. Neither does it permit the application of the resale discount when the UNE combination replicates an existing BellSouth retail service. This is so because no language in the agreement limits or conditions the manner in which MCI may use UNE combinations, whether purchased from and supplied by BellSouth or combined by MCI.

Staff notes that a qualification to pricing UNE combinations as the straightforward summation of the individual element prices is set forth in Section 8 of Attachment I. There, the agreement provides that BellSouth shall provide recurring and non-recurring charges that do not duplicate charges for functions or activities that MCI does not need when two or more network elements are combined in a single order. The parties have not been able to agree to what charges, if any, are duplicated in these circumstances. Pursuant to the agreement, MCI has petitioned the

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Commission to settle this dispute with respect only to four specific loop-port combinations. Staff addresses this dispute in Issue 8 below.

Therefore, staff recommends that the Commission require BellSouth to provide network elements as defined in 47 C.F.R. §51.319 to MCIm individually or combined, whether already combined or not, at the prices for the individual elements established by this Commission in Order No. PSC-96-1579-FOF-TP and set forth in the MCImetro/BellSouth interconnection agreement in Attachment I, Table 1. The Commission should require that, under the agreement, the prices for combinations of network elements should be determined as the sum of the prices of the individual elements comprising the combination without qualification as to use, subject to the elimination of duplicate charges or charges for unneeded functions or activities.

Staff recognizes the Commission's concern that combinations of UNEs to provide service purchased at cost-based prices may undercut the prices the Commission has set for resold service. Staff believes, however, that the result it recommends here is required on the basis of the interconnection agreement of the parties and that it is consistent with the current state of the law. Staff is mindful of BellSouth's service resale replication stance. Nevertheless, according to the terms of its interconnection agreement with MCIm, BellSouth must provide network elements in combination, whether they are already combined or not, and, applying well-established principles of contract construction, provide them at the summation of individual UNE prices. Staff notes, moreover, that the relationship of cost-based UNE prices to service resale prices for the "same" service will not always be in favor of the service provided by means of UNEs.¹ (TR 291)

Staff recognizes that the Eighth Circuit's holding on the obligation of ILECs to provide bundled network elements is before the Supreme Court on certiorari. BellSouth witness Varner testifies that if the Supreme Court affirms the Eighth Circuit's holding, the [MCIM and AT&T] interconnection agreements require the parties to renegotiate mutually acceptable terms concerning the provisioning of UNEs, since an affirmation would materially affect a material term of the agreements. (TR 385) That provision is found in the AT&T agreement at Section 9.3 of the General Terms and

¹In Issue 7, staff presents a comparative analysis of the facilities necessary to provision a telecommunications service by means of UNEs and by means of service resale.

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Conditions; it does not, however, appear in the MCI agreement. Instead, the MCI agreement, in Section 6 of the General Terms and Conditions, provides that if the Court's affirmation would render the UNE provisioning provisions of the agreement "insufficiently clear to be effectuated," the parties shall promptly negotiate them. While the Eighth Circuit's holding if affirmed would remove a bundling obligation from BellSouth, it does not in the first place disallow voluntary bundling agreements. Witness Varner agrees. (TR 387) BellSouth's bundling obligation in its agreement with MCI is a negotiated one. Witness Varner testifies, however, that BellSouth voluntarily undertook the bundling obligation only because 47 C.F.R. §51.315(a), since vacated, was then in effect. (TR 426) Nevertheless, staff believes that if the Supreme Court does affirm the Eighth Circuit in this respect, the bundling provisions in the MCI agreement would not become "insufficiently clear to be effectuated." Therefore, staff believes the parties would not then be under a duty to renegotiate them.

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

RECOMMENDATION: Whether MCI_m recreates an existing BellSouth retail service or not through the combination of unbundled network elements, the prices MCI_m should pay BellSouth for network element combinations or for the network elements if ordered individually are based on the rates established in Order No. PSC-96-1579-FOF-TP and set forth particularly in the parties agreement in Table 1 of Attachment 1, Section 2.6 of Attachment III, and Section 8 of Attachment I. The prices for combinations of network elements should be determined as the sum of the prices of the individual elements comprising the combination, less duplicate and unnecessary charges.

POSITIONS OF PARTIES

BellSouth:

The prices for combinations of unbundled network elements are not contained in the BellSouth-MCI_m Interconnection Agreement.

AT&T:

No position.

MCI_m:

The price for a UNE combination is the sum of the stand-alone prices of the network elements which make up the combination. 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, MCI_m 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 needed when the elements are combined.

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STAFF ANALYSIS:

MCIm

MCIm argues that 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 network elements which make up the combination. It relies on Section 2.6 of Attachment IIIa and Section 1 of Attachment III for this assertion. (MCIm BR 17-18) MCIm argues further that its agreement further recognizes that a UNE combination price may include duplicate charges and charges for services which are not needed when the elements are combined. It concludes, therefore, that it 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. Id. at 18. It asserts that the appropriate method for determining prices for UNE combinations is to remove from the stand-alone UNE prices in Table 1 of Attachment I all duplicate charges and all charges for services which are not needed when the elements are combined. Id.

BellSouth

BellSouth argues that prices for combinations of network elements are not contained in its agreement with MCIm. (BellSouth BR 14)

Conclusion

The evidence and argument of the parties relative to Issue 2 is set forth in detail in staff's analysis in Issues 1(a) and 1(b). In Issues 1(a) and 1(b), staff recommends that the Commission find that the MCIm/BellSouth interconnection agreement specifies the pricing standard for network element combinations. Staff necessarily includes in that recommendation what it believes that standard should be and its reasons for its belief. Hence, on the basis of the evidence and argument discussed in Issues 1(a) and 1(b), here, in Issue 2, staff recommends that the Commission find that, whether MCIm recreates an existing BellSouth retail service or not through the combination of unbundled network elements, the prices MCIm should pay BellSouth for network element combinations or for the network elements if ordered individually are based on the rates established in Order No. PSC-96-1579-FOF-TP and set forth in the agreement in Table 1 of Attachment 1. The prices for combinations of network elements should be determined as the sum of the prices of the individual elements comprising the combination, less duplicate and unnecessary charges.

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

RECOMMENDATION: Staff recommends in Issues 1(a) and (b) that the Commission find that the MCI/BellSouth interconnection agreement contains a pricing standard for network element combinations and recommends in Issue 2 what that standard should be. Hence, staff recommends that the Commission find Issue 3 moot. If, however, the Commission denies staff's recommendations in Issues 1(a) and 1(b) and in Issue 2, then staff recommends that the Commission direct the parties to resume negotiations in order to establish prices for UNE combinations that comport with the requirements of the Act and with the Commission's decision in Issue 7.

POSITIONS OF PARTIES

BellSouth:

Prices for unbundled network element combinations that do not recreate an existing BellSouth retail service should be negotiated between the parties. Unbundled network element combinations that recreate an existing BellSouth retail service should be priced at the retail price of that service minus the applicable wholesale discount.

AT&T:

No position

MCI:

Since the answer to both parts of Issue #1 is yes, this Issue is not applicable.

STAFF ANALYSIS:

MCI

MCI argues that although the plain language of its agreement with BellSouth specifies how prices will be determined for network element combinations, if the Commission determines otherwise, then the Commission should find that pricing for network element combinations should be based on forward-looking costs, as required by Section 252(d) of the Act. (MCI BR 18-19) MCI also argues that service through network elements and service through resale are different in terms of potential innovation, risk and competitive opportunity. Id. at 20.

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MCIm asserts that, interpreting Section 251(c)(3) of the Act, the Eighth Circuit, in Iowa Utilities Board I, 120 F.3d at 814-15, affirmed MCIm's right to provide service using network element combinations obtained from BellSouth at cost-based rates, as follows:

The petitioners 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 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.

(MCIm BR 21)

MCIm rejects BellSouth witness Varner's contention that, while under the agreement BellSouth will provision UNE combinations that recreate existing BellSouth retail services, the price to MCIm will be the retail price of the service less the applicable wholesale discount. Id. at 21. MCIm asserts that the pricing standard in the Act is not conditioned on the use it makes of UNEs. Id. at 23.

MCIm/AT&T witness Gillan testifies that there are a number of important differences between the lease of network facilities,

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particularly those that provide multiple services, and the resale of a single service defined by the ILEC. (TR 268) He explains:

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.

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 risk/reward profile, it requires a different level of technological proficiency, and it provides a different opportunity to innovate.

(TR 269)

Witness Gillan also testifies that there is much less risk in a service resale environment. Id. He explains:

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

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potential margin is defined by the wholesale discount and it remains fixed as customers purchase more, or less, service.

Id.

He contrasts the risks attending a network element-based competitor as follows:

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 [the] 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).

(TR 270) He testifies further that:

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:

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

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.

(TR 270-71)

Witness Gillan testifies further that a network element-based carrier's capacity to innovate exceeds that of a service reseller. (TR 275) He argues that service-resale limits the entrant to reoffering finished services created by the incumbent LEC. Id. He argues further that 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. Id. He concludes that with no economic flexibility, there is little the entrant can do to introduce new pricing arrangements or feature mixes. Id.

He argues, in contrast, that with network elements, 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. (TR 274) In addition, he argues that 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. (TR 275)

He observes that the ability to innovate using network elements will increase in the future. Id. He explains that the introduction of Advanced Intelligent Network (AIN) capability will transform the local switch from a service-definition node to a more generic role. Id. He further explains that in the future,

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service-defining capabilities will be housed in remote software databases which provide call processing instructions to the switch. Id. He ventures that 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. Id.

Witness Gillan concludes that:

There should be no issue that the entrant will use network elements to provide services and use those network elements in the same way that BellSouth or any other local telephone company would use them. They only go together one way. What makes these plans different is that one establishes the entrant as the complete and legitimate phone company in every dimension, and the other establishes the entrant simply as a marketer for BellSouth services.

(TR 292)

BellSouth

BellSouth argues that while existing contractual provisions remain in effect obligating BellSouth to provide MCI with combinations of elements, combinations that recreate an existing BellSouth retail service should be priced at the retail price of that service minus the wholesale discount. Any other result would undercut the resale provisions and the joint marketing restrictions in the Act. (BellSouth BR 15, TR 389) Witness Varner testifies that the agreement with MCI does not contain a pricing standard for UNE combinations; rather prices for UNE combinations that do not recreate an existing BellSouth retail service should be negotiated by the parties and should be market-based to reflect the increased risk associated with the use of UNES. (TR 388)

BellSouth argues that Congress, recognizing that the emergence of facilities-based competition in local markets would take some time, provided in the Act two other means by which ALECs could enter local markets more quickly. (BellSouth BR at 16) Under service resale, ALECs are allowed to purchase existing retail services, including basic telephone service that serves most customers, from the incumbent telephone company at what is commonly described as a wholesale rate. Under unbundled network elements, ILECs are required to sell ALECs access to discrete pieces of the ILECs' existing networks, with ALECs' gaining the ability to create

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new telephone services that would be competitive with the ILECs' services. Id.

BellSouth argues further that Congress created two, totally different pricing theories for these two types of market entry. For service resale, Section 252(d)(3) of the Act requires that existing retail services be priced to resellers at "retail rates charged to subscribers" less those "costs that will be avoided" by the ILEC as a result of selling to the reseller. 47 U.S.C. § 252(d)(3). Id. at 16-17. BellSouth explains that this is what is often called a "top down" pricing structure, which begins with the retail price of a good or service and subtracts cost components to arrive at a wholesale price. Id. at 17. For unbundled network elements, Section 252(d)(1) of the Act requires ILECs to sell elements to ALECs at prices based on the cost of the individual element, plus a reasonable profit. Id. BellSouth explains that this is known as a "bottom up" pricing structure, which begins with incremental cost and then fixes the final price by building up the incremental or direct cost by shared and common costs and reasonable profit. Id.

BellSouth contends that the careful distinction Congress crafted between resale and unbundled network elements would be completely obliterated if MCI and AT&T were permitted to purchase at cost-based rates combinations of network elements that replicate an existing retail service. Id.

Witness Varner testifies that:

It is expected that the typical request by MCI or AT&T would be for BellSouth to provide a combination of UNES (as a preassembled combination, or on a switch as is basis) without the physical work of combining the elements. This exemplifies the situation over which the Commission has expressed concern. In essence, MCI or AT&T would order a BellSouth retail service simply by placing the order as a series of UNES. This situation is, quite frankly, the one most likely to exist and is the one MCI and AT&T have actually demanded. This migration of a customer's service or switch "as is" is simply resale, since MCI and AT&T are not purchasing UNES, but are, in fact, purchasing a finished retail service. In such cases, BellSouth will bill

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the retail service rate minus the applicable
wholesale discount.

(TR 390-91) BellSouth argues that the activity that witness Varner describes here amounts to "gaming the system." (BellSouth BR 19)

Witness Varner also argues that what MCIm propose is "sham unbundling" and he illustrates the effect that would have on BellSouth's revenues. He discusses a business customer with two lines and hunting and a single vertical feature on each. The customer's monthly charge is \$70.68. If MCIm wins that customer on the basis of service resale, it would pay BellSouth a monthly charge of \$62.36, after applying the wholesale discount rate of 16.81%. BellSouth would continue to receive access charges. If MCIm were to provide service to that same customer by means of combined UNES purchased at cost-based prices, it would pay BellSouth a monthly charge of \$32.77, an effective retail discount of 53.66%. BellSouth no longer would receive access charges. The service would be no different and involve the same capabilities and functions, he contends. This, he asserts, would render Section 252(d)(3) of the Act meaningless. (TR 391-93)

Witness Varner also argues that "switch as is" permits MCIm to wrongly bypass the joint marketing restriction of Section 271(e)(1) of the Act. This restriction would prohibit MCIm from jointly marketing telephone exchange service provisioned pursuant to Section 251(c)(4) of the Act (service resale) with its interLATA services until certain conditions obtain, but not services provisioned pursuant to Section 251(c)(3) (unbundled access). (TR 394)

Witness Varner observes that the Commission expressed concerns in Order No. PSC-96-1579-FOF-TP both with "sham unbundling" and circumvention of the joint marketing restriction. (TR 395, 396)

BellSouth points out that state commissions in Georgia, Mississippi, Alabama, Louisiana, North Carolina, South Carolina and Tennessee all have held that the pricing standard of Section 252(d)(3) applies when unbundled network elements are combined in a way so as to recreate an existing BellSouth retail service. (BellSouth BR 21-25) BellSouth acknowledges that each of these decisions was reached before the Eighth Circuit upheld the FCC's determination that services provided by means of unbundled access and by means of resale were not the same. (BellSouth BR at 25)

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Conclusion

Staff recommends in Issues 1(a) and 1(b) and Issue 2 that the Commission find that the MCIm agreement with BellSouth provides a pricing standard for UNE combinations and that the pricing standard is derived from Order No. PSC-96-1579-FOF-TP and reflected particularly in Table 1 of Attachment I, Section 2.6 of Attachment III, and Section 8 of Attachment I of the agreement. If the Commission approves these recommendations, then Issue 3 is rendered moot. If, however, the Commission denies these recommendations, then staff recommends that the Commission require MCIm and BellSouth to resume negotiations in an effort to establish prices for UNE combinations that are consistent with the Act and comport with the Commission's decisions in Issues 7 and 8 below.

In rebuttal testimony, witness Varner argues that under MCIm's view of the agreement, MCIm would order the "functional equivalent of a BellSouth retail service simply by changing the words [] use[d] when the service is ordered." (TR 408) He observes that the Nonrecurring Cost Model sponsored by AT&T yields the same nonrecurring costs for service resale as it does for unbundled or platform access. (TR 409)

Moreover, he contends that it should surprise no one that substantial margins exist in business vertical services and access charges. (TR 410) These margins exist as a matter of public policy, he argues, in order to support affordable residential rates. Id. If ALECs skim the business customers under these circumstances, he asserts that residential customers will be harmed, especially high cost customers. Id.

He rejects witness Gillan's assertions that unbundled access and service resale represent different business opportunities. Id. In either, he asserts, what the ALEC can add to the service, what the ALEC can do with the service, the ALEC's ability to innovate and to serve the customer are the same. Id. He argues that the only difference in business opportunity is that the ALEC pays less for the resold service, avoids the payment of access charges and gets around the joint marketing restriction. Id.

Witness Gillan criticizes the conclusion witness Varner draws from his hypothetical comparisons of the costs under service resale and unbundled access. Witness Varner's comparisons for business, PBX and residential customers all show significantly lower costs for unbundled access, which he describes as "windfalls" for the ALECs. (EXH 22, TR 397) Witness Gillan testifies that these

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differences are unsustainable in competitive markets and they will in due time inure to the benefit of customers. (TR 272)

Witness Gillan observes that the retail service replication argument that BellSouth advances here and that was accepted in a number of states in BellSouth's region was rejected in Texas, Illinois, Wisconsin, Michigan, Iowa, Oregon and California. (TR 301) He acknowledges that the Georgia commission affirmed its decision after the Eighth Circuit ruled, while noting that all the decisions in BellSouth's region came down before the Eighth Circuit ruled. Id.

The evidence and arguments of the parties notwithstanding, staff recommends that the Commission need not directly address the issue raised here even if the Commission disapproves staff's recommendations in the foregoing issues. The parties include Issue 7 in this proceeding in order to obtain the Commission's ruling on the appropriate standard by which to identify combinations of network elements, if any, that recreate an existing BellSouth retail service. The Commission's decision in Issue 7 will have no effect with respect to Issues 1(a) and 1(b), and Issue 2, if the Commission approves staff's recommendations on the requirements of the parties' present interconnection agreement in those issues.² Conversely, if the Commission denies staff's recommendations in those issues, then its decision in Issue 7, with its decision in Issue 8, will become relevant to the appropriate disposition of the issues raised here.

This Commission has, from the very first of the arbitration proceedings that have come before it under the Act, encouraged interconnecting companies and incumbents to reach interconnection agreements through negotiation. This policy reflects the intent of Congress as expressed in Sections 251(c)(1) and 252(a)(1) of the Act. Therefore, staff recommends in the event the Commission denies its recommendations in Issues 1(a) and (b) and Issue 2 that the Commission require MCI and BellSouth to establish through resumed negotiations a pricing standard for network element combinations that is consistent with the Act and comports with the Commission's decision in Issue 7.

²With this turn of events, the Commission's decision in Issue 7 will become significant for these parties only on the expiration of their present agreement.

ISSUE 4: Does the BellSouth-AT&T interconnection agreement specify how prices will be determined for combinations of unbundled network elements

- a) that do not recreate an existing BellSouth retail telecommunications service?
- b) that do create an existing BellSouth retail telecommunications service?

RECOMMENDATION: Yes. The Commission should find that AT&T's interconnection agreement with BellSouth sets forth a pricing standard expressed particularly in Section 36.1 for network elements ordered as combinations on a single order that do not recreate an existing BellSouth retail service. The Commission should also find that AT&T's interconnection agreement with BellSouth sets forth a pricing standard expressed particularly in Section 36.1 for network elements ordered as combinations on a single order that do recreate an existing BellSouth retail service. Further, the Commission should find that the pricing standard in the parties' agreement requires them, in either case, to first attempt to negotiate appropriate prices for combinations of elements based on the Commission's decisions in Issues 5 and 6 below. Failing that, the parties may submit their dispute to the Commission for resolution through arbitration. The Commission should further find that BellSouth is not required under its agreement with AT&T to provide AT&T with network elements in combination at the sum of the individual element prices set forth in Table 1 of Part IV, except in the case where the elements exist in combination at the time of AT&T's order. Finally, the Commission should find that AT&T may alternatively purchase unbundled network elements individually at the prices set forth in the parties' agreement, in which case, BellSouth should be required to provide AT&T with access to its network for purposes of combining elements in order to provide telecommunications services.

POSITIONS OF PARTIES

BellSouth:

No. The BellSouth-AT&T Interconnection Agreement does not specify how combinations of unbundled network elements should be priced. The Agreement only specifies prices for individual network elements.

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AT&T:

a) The clear and unambiguous language of the Interconnection Agreement between AT&T and BellSouth as approved by the Commission indicates that BellSouth must provide UNEs on a stand-alone basis or in combination at the rates set forth in the Agreement, regardless of whether any combinations of elements recreate or duplicate a BellSouth service.

b) The clear and unambiguous language of the Interconnection Agreement between AT&T and BellSouth as approved by the Commission indicates that BellSouth must provide UNEs on a stand-alone basis or in combination at the rates set forth in the Agreement, regardless of whether any combinations of elements recreate or duplicate a BellSouth service.

MCI:

- a) No position.
- b) No position.

STAFF ANALYSIS:

AT&T

AT&T argues that the interconnection agreement between it and BellSouth expressly and unequivocally requires BellSouth to provide AT&T with combinations of UNEs at cost, even if those combinations could duplicate BellSouth's existing retail service, less duplicative or unnecessary costs. It asserts that nothing in the agreement, this Commission's orders, the opinions of the Eighth Circuit, or the Act is to the contrary. It asserts further that the agreement as originally negotiated by AT&T and BellSouth required BellSouth to provide AT&T with combinations of UNEs at the agreement's cost-based UNE prices, and drew no distinction between combinations that would permit AT&T to recreate existing services and those that would not. Moreover, AT&T contends that this issue was revisited during the arbitration proceedings, and the agreement was revised expressly to confirm AT&T's right under the agreement to purchase combinations of UNEs that would recreate existing BellSouth retail services. (AT&T BR 1-2, 4)

AT&T argues further that this Commission has indicated a concern if the price for a UNE combination, which would permit AT&T to recreate a BellSouth service, would "undercut" BellSouth's resale rate for that service. It asserts that this Commission is right to be concerned, but its concern should be directed at

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BellSouth's retail rate for that service, not at the prices established by the agreement for the UNE combination. Since UNE prices are based on the Commission's determination of BellSouth's forward looking costs and a reasonable profit, the economically correct prices that should be found in an efficiently competitive market, AT&T contends that if BellSouth's resale price for a UNE combination exceeds the UNE prices for that combination, the inference to be drawn is that BellSouth is "gouging" its retail customers. AT&T maintains that if competition based on UNE combination prices is permitted, those retail prices will be driven down, to the benefit of Florida's consumers. Id. at 2.

AT&T witness Eppsteiner participated in the interconnection agreement negotiations. (TR 143) He testifies that AT&T's agreement with BellSouth requires BellSouth to furnish AT&T with combinations of network elements. (TR 144) He relies on Sections 1 and 1A of the agreement's General Terms and Conditions for this conclusion. (TR 144-45) Section 1 provides that:

This Agreement sets forth the terms, conditions and prices under which BellSouth agrees to provide ... (b) certain Unbundled Network Elements, or combinations of such Network Elements ("Combinations")

Section 1A provides that:

AT&T may purchase unbundled Network Elements for the purpose of combining Network Elements in any manner that is technically feasible, including recreating existing BellSouth services.

Witness Eppsteiner also relies on Section 30.5 of Part II of the agreement, Unbundled Network Elements. Id. That section provides that:

BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit AT&T to provide Telecommunications Services to its Customers subject to the provisions of Section 1A of the General Terms and Conditions of this Agreement.

Witness Eppsteiner testifies that BellSouth and AT&T agreed that Section 1A would be added to their agreement, and referenced in

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Section 30.5, to express this Commission's arbitration of AT&T's complaint that BellSouth was refusing to provide combinations of UNEs that replicated existing BellSouth retail services. (TR 145) He testifies that the Commission ruled that AT&T could combine UNEs in any manner it might choose, including recreating existing BellSouth retail services. (TR 146) He testifies further that the Commission's ruling is reflected by the language in Section 1A. Id.

Witness Eppsteiner points to other provisions in the agreement that also address BellSouth's obligation to provide AT&T with UNE combinations. (TR 146) First, Section 2.2 of Attachment 4, Provisioning and Ordering, provides that:

Combinations, consistent with Section 1.A of the General Terms and Conditions of this Agreement, shall be identified and described by AT&T so that they can be ordered and provisioned together and shall not require enumeration of each Element within that Combination on each provisioning order.

Next, Section 3.9 of Attachment 4, provides that:

BellSouth will perform testing with AT&T to test Elements and Combinations purchased by AT&T.

Finally, Section 4.5 provides that:

When AT&T orders Elements or Combinations that are currently interconnected and functional, such Elements and Combinations will remain interconnected and functional without any disconnection or disruption of functionality. This shall be known as Contiguous Network Interconnection of network elements.

He testifies that these provisions were negotiated. (TR 147)

With respect to prices for UNE combinations, witness Eppsteiner testifies that those prices, recurring and nonrecurring, are set forth in Table 1, Unbundled Network Elements, of Part IV, Pricing, as the sum of the individual element prices, except that they reflect duplicate and unnecessary charges that must be removed. (TR 149) As support for this conclusion, he relies on Section 36 of Part IV, which provides that:

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The prices that AT&T shall pay to BellSouth for Unbundled Network Elements are set forth in Table 1.

(TR 147) He relies further on Section 36.1, Charges for Multiple Network Elements, which provides that:

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

(TR 147-48) He maintains that Section 36.1 reflects the Commission's ruling in Order No. PSC-97-0298-FOF-TP.

Witness Eppsteiner testifies further that the prices for UNE combinations are established in the agreement by the foregoing provisions, whether or not the combination replicates an existing BellSouth retail service. (TR 150) He observes that the Commission rejected language proposed by BellSouth for inclusion in Section 36.1 that would have required the parties to address the price of a retail service recreated by UNE combinations through further negotiations. Id. Noting the Commission's concern with the pricing of services replicated by UNE combinations, he, nonetheless, concludes that the Commission's rejection of this language provides for no exception to the manner in which UNE combinations are to be priced under the agreement. Id. He testifies that the agreement contains no language that would ever allow BellSouth to treat UNE combinations as service resale. (TR 150-51)

Witness Eppsteiner, moreover, testifies that BellSouth acknowledged that prices of all UNE combinations are established by Part IV. (TR 151) He states that, because the parties could not agree on language with respect to additional charges, BellSouth

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proposed the following language (which the Commission rejected in Order No. PSC-97-0300-FOF-TP):

BellSouth shall charge AT&T the rates set forth in Part IV when directly interconnecting any Network Element or Combination to any other Network Element or Combination

AT&T concludes that Sections 1 and 1A of the agreement require BellSouth to provide AT&T with combinations of UNEs to be priced, without exception, according to Table 1 of Part IV. (AT&T BR 5)

Finally, AT&T argues that as a logical extension of BellSouth's position concerning replicated retail services, BellSouth could effectively block AT&T, or any ALEC, from purchasing any UNE combination at cost-based rates by simply filing a tariff, thereby invoking the service resale price standard. (AT&T BR 5-6)

BellSouth

BellSouth witness Hendrix testifies that BellSouth intends to abide by its contractual obligation to provide AT&T with UNEs in combinations. (TR 641) He notes that BellSouth took on this obligation only because it believed that the law applicable at the time required it to do so. Id. He noted further that BellSouth believes the Eighth Circuit's ruling on rehearing [Iowa Utilities Board II] will remove this obligation from BellSouth if affirmed by the Supreme Court and require the parties to renegotiate the affected provisions of their agreement. Id.

Witness Hendrix testifies that BellSouth's interconnection agreement with AT&T specifies prices only for individual network elements and does not specify prices for combinations of network elements, including combinations that replicate an existing BellSouth retail service. (TR 627, BellSouth BR 27) BellSouth argues that, as evidenced by Order Nos. PSC-96-1579-FOF-TP, PSC-97-0298-FOF-TP, and PSC-97-0600-FOF-TP, this Commission did not arbitrate the price AT&T would pay for element combinations. Id. BellSouth argues further that AT&T witness Eppsteiner acknowledges this to be true. (TR 174)

Moreover, BellSouth argues that there is no evidence to suggest that it voluntarily relinquished its long held position that UNE combinations replicating BellSouth retail services should be priced as service resale. (BellSouth BR 28) BellSouth witness Varner testifies that BellSouth has contested the ALECs' position

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on the pricing standard for replicative combinations in arbitration proceedings in every state in its region, in every Section 271 proceeding, before the FCC and before the Eighth Circuit. (TR 425) BellSouth argues that AT&T witness Eppsteiner's testimony that BellSouth refused to provide AT&T with combinations that replicated existing BellSouth retail services at cost-based prices is additional evidence of BellSouth's steadfastness. (BellSouth Br 29)

Witness Hendrix testifies that Table 1 of Part IV of the agreement does not contain specific prices for UNE combinations; rather, the prices it contains are for individual UNES. (TR 642-43) He rejects witness Eppsteiner's assertion that the prices for UNE combinations are the sums of the prices in Table 1 for the component elements. Id. BellSouth argues that AT&T witness Eppsteiner in fact agreed that Table 1 is a list of the prices for individual unbundled network elements. (BellSouth BR 28)

He testifies that Section 36.1 of Part IV only obligates the parties to work together to establish total recurring and non-recurring charges for orders for multiple network elements; it does not specify prices for combinations. Id. He acknowledges, however, that Section 36.1 is pertinent only when multiple elements are ordered as combinations, and is not pertinent in a service resale context. (TR 669) He testifies further that Section 4.5 of Attachment 4 merely prohibits BellSouth from separating already combined elements; it does not address pricing. Id. BellSouth argues that witness Eppsteiner agreed that no language in the agreement states the price for UNE combinations as the sum of element prices. (BellSouth BR 28)

Witness Hendrix also acknowledges that the state commission in Kentucky ruled that AT&T can combine UNES even to recreate a BellSouth retail service and that AT&T would pay the sum of the element prices for combinations. (TR 669) While he also acknowledges that the language related to pricing in BellSouth's Florida agreement with AT&T was in most respects like the same language in its Kentucky agreement, Section 36.1, which is not in the Kentucky agreement, and whose full significance is often missed, is a key difference and sustains BellSouth's contention that its Florida agreement with AT&T does not specify the pricing standard for UNE combinations. (TR 669-671)

He maintains that Section 36.1 requires two things of the parties. First, it requires the parties to eliminate duplicate and unnecessary charges when UNES are ordered in combination. Second, it requires the parties to establish total recurring and non-

recurring charges when UNEs are ordered in combination. (TR 673-74) He argues that it is the second requirement, the one often missed, that does the most to sustain BellSouth's contention. (TR 671, 673, 674-76) He suggests that the second requirement is one by which the risk that BellSouth incurs in organizing to provide UNE combinations to AT&T can be reflected in the price. (TR 676) He maintains also that BellSouth's contention is bolstered by the language it attempted to include in Section 36.1. Id.

Conclusion

The discussions in Issues 1(a) and 1(b) above concerning contract construction and Section 251(c) of the Act are meant to apply in this issue. As noted in those issues, staff believes that the record shows that ILECs are not required to, but may, provide combined network elements (or assembled platforms) to requesting carriers, whether presently combined or to be combined by the ILEC. ALECs may combine network elements in any manner of their choosing, including the replication of existing incumbent retail services, but Section 251(c)(3) of the Act requires, absent an agreement of the parties otherwise, that ALECs purchase, and ILECs provide, network elements on an unbundled basis. ILECs must allow ALECs access to their networks for the purpose of combining the unbundled elements.

The Provisioning and Pricing Requirements of the AT&T-BellSouth Agreement

Provisioning

Under the Eighth Circuit's construction of the Act, nothing prevents ILECs from providing network elements in combinations, if they so choose. Indeed, as AT&T witness Eppsteiner testifies, the AT&T interconnection agreement with BellSouth provides in Section 30.5 of Part II, that BellSouth shall offer UNEs in combination with any other UNE or UNEs in order to permit AT&T to provide telecommunications services. (TR 144-45) At Section 30.4 of Part II, the agreement authorizes AT&T to use UNEs to provide any feature, function, or service option within the capacity of the UNE. Thus, it appears clear that BellSouth is obligated under its agreement with AT&T to provide UNEs in combinations if so ordered and that AT&T may combine network elements in any manner of its choosing, including the replication of existing BellSouth retail services. BellSouth witness Hendrix testifies that BellSouth does not dispute that it has an obligation under the agreement to provide UNE combinations to AT&T, even combinations not yet in

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existence. (EXH 26 p32) BellSouth witness Varner is in accord. (EXH 24 pp17,24) What is generally in contention is what is the price at which BellSouth must provide AT&T with network element combinations, and particularly, what is the applicable pricing standard when AT&T combines UNES in a manner that replicates an existing BellSouth retail service.

Pricing

Section 34 of Part IV of the agreement provides that network elements and combinations shall be:

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

Section 36 of Part IV, states that:

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

Table 1 sets forth the recurring and non-recurring rates approved by this Commission in Order No. PSC-96-1579-FOF-TP at Attachment A. Section 36.1 of Part IV, provides, as both witness Eppsteiner and witness Hendrix testify, that AT&T and BellSouth shall work together to eliminate "duplicate charges or charges for functions or activities that AT&T does not need" when AT&T orders network elements in combinations. This language appears in the agreement to reflect Order No. PSC-97-0298-FOF-TP.

The rates (prices) that the Commission approved in Order No. PSC-96-1579-FOF-TP are applicable to UNES when ordered individually. Neither party disputes this. In Order No. PSC-97-0298-FOF-TP, the Commission stated at pages 30 and 31 that it was not presented with the specific issue of the pricing of recombined elements when recreating the same service offered for resale, and for that reason it was inappropriate for it to then decide that issue. Even more broadly, staff believes the Commission stated in effect that it had not been presented with the issue of combinations pricing in general. Thus, staff believes that the prices set forth in Part IV of AT&T's agreement with BellSouth are limited in applicability to unbundled network elements when ordered individually. No language in the agreement extends their applicability to unbundled network elements when ordered in combination. Of pivotal importance, no limiting language such as

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the language in Section 2.6 of Attachment III in MCI's agreement with BellSouth, appears in AT&T's agreement. Effective UNE combination prices do not, therefore, exist in the agreement, since, not only did the Commission not consider combinations pricing in the arbitration proceeding, the parties' interconnection agreement neither expressly nor inferentially establishes negotiated prices for combinations.

The provisions on which AT&T relies for its contention that BellSouth is obligated to provide element combinations without limitation as to the use to which AT&T may put them, have that effect clearly enough. The provisions of its agreement on which AT&T relies for its contention that the pricing standard for UNE combinations is the sum of the prices for the component elements in Table 1 of Attachment I, however, do not appear to have that effect. Section 1 of General Terms and Conditions provides that the agreement sets forth the prices for network elements individually and for network element combinations. Sections 36 and 36.1 of Part IV accordingly establish those prices, Section 36 for UNEs ordered individually and Section 36.1 for UNEs ordered in combinations (or multiple network elements). Separate pricing provisions for UNEs ordered individually and for UNEs ordered in combination are reasonable since AT&T could be expected to adopt both facilities-based and unbundled access entry strategies.

BellSouth witness Hendrix testifies persuasively that Section 36.1, which is applicable only in the case of provisioning UNE combinations and not in the case of service resale, consists of two separate requirements. The first requirement is expressed in the first sentence:

Any BellSouth non-recurring and recurring charges shall not include duplicate charges or charges for functions or activities that AT&T does not need when two or more Network Elements are combined in a single order.

That requirement simply recognizes that some economies are likely to prevail when AT&T orders network elements in combination on the same order as compared with a series of orders for either individual or combined elements. (TR 668)

The second requirement is expressed in the second sentence:

BellSouth and AT&T shall work together to mutually agree upon the total non-recurring and recurring charge(s) to be paid by AT&T

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when ordering multiple network elements.
(emphasis supplied)

This requirement quite clearly sets what amounts to a "pricing standard" for UNE combinations. Under this requirement, AT&T and BellSouth are to negotiate total charges for UNE combinations. There is no reference to other provisions in the agreement that would elucidate the pricing parameters. Thus, the parties are to negotiate UNE combination prices that are consistent with Section 252(c)(1) of the Act, i.e., based on cost, nondiscriminatory, and inclusive of a reasonable profit.

Both of these requirements appear in the agreement because of the Commission's rulings in Order Nos. PSC-97-0298-FOF-TP and PSC-97-0600-FOF-TP. In Order No. PSC-97-0298-FOF-TP, the Commission ruled that:

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

* * *

Furthermore, we set rates only for the specific unbundled elements that the parties requested.

Order at 8-9. There, the Commission also ruled that:

[W]e hereby order BellSouth to provide [non-recurring charges] 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 at 30.

In Order No. PSC-97-0602-TP, the Commission, considering BellSouth's duplicative service resale language, stated that:

[W]e stated that the pricing issue associated with the rebundling of UNEs to duplicate a resold service was not arbitrated. Accordingly, we declined to make a

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determination on this matter, and did not approve any language to be included in the arbitrated Agreement.

Order at 7.

AT&T witness Eppsteiner testifies that Section 36.1 is a "special" provision relating to charges for multiple network elements, which reflects the Commission's ruling in Order No. PSC-97-0298-FOF-TP. (TR 147, 148) In further testimony, however, he only addresses the requirement of the first sentence of Section 36.1, concluding that "the parties are to work together to establish prices [for UNE combinations] that do not include [duplicate or unnecessary charges]". (emphasis supplied) (TR 148)

BellSouth witness Hendrix acknowledges that under the requirement of the first sentence of Section 36.1, the parties are to negotiate the removal of duplicate and unnecessary charges when AT&T orders two or more elements in a single order. (TR 642) He goes on, however, to assert that Section 36.1 also requires the parties to negotiate non-recurring charges and recurring charges when AT&T orders multiple elements, as required by Order Nos. PSC-97-0298-FOF-TP and PSC-97-0600-FOF-TP. Id. Asked if Section 36.1 means that AT&T pays the sum of the network elements comprising a combination less any duplicate or unnecessary charges, witness Hendrix disagrees, stating:

[T]hat flies in the face of the Act ... I think one part of it is to eliminate duplicate charges on a single order, but the other part is to reflect a market based price wherein you do not assume the risk of having to staff; you do not assume the risk of having to buy trucks; you do not assume the risk of anything else that you would have to do to put those UNES together to actually offer a retail service. We actually assume that risk. And that price should reflect market pricing as well as the risk associated with doing such.

(TR 675-76) He testifies that stranded plant (idle loops in the hands of ALECs) with exhaust imminent also represents a risk because it would jeopardize BellSouth's ability to meet customer demand, whether from ALECs or end users. (EXH 26 p59) He testifies also that another risk BellSouth would incur is a negative effect on revenues resulting from BellSouth's inability to use facilities in the hands of ALECs to market its own products. (TR 688)

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Thus, staff believes that the AT&T agreement with BellSouth does provide a pricing standard for UNE combinations, which is expressed in Section 36.1 and not modified in any way elsewhere in the agreement. That standard is that the parties must negotiate total recurring and non-recurring charges for UNE combinations that at least reflect the elimination of duplicate and unnecessary charges and that are consistent with the Act, as discussed further in Issues 5 and 6 below. Staff does not believe, however, that BellSouth may lawfully hold the position, even under Iowa Utilities Bd. II, supra, that it will only provide elements on a bundled basis that are the equivalent of an existing retail service at wholesale rates, pursuant to Sections 251(c)(4) and 252(d)(3) of the Act. Staff notes that Section 36.1 provides both in the case of the first and the second requirement that if the parties are unable to reach agreement through negotiation they may petition the Commission for an arbitrated resolution.

Staff believes that Section 36.1, read in conjunction with other provisions in the agreement related to pricing and BellSouth's obligation to provide AT&T with UNE combinations, is plain and unambiguous. While this same language appears in MCIm's interconnection agreement with BellSouth, its effect in that case is substantially modified by other language. No such modifying language appears in the AT&T agreement. As staff has noted, this omission is of pivotal importance. Thus, the language in Section 36.1, plain and unambiguous as it is, should be construed as the expression of the parties' intent at the time of forming the agreement. Because this language is plain and unambiguous, it is again the Commission's task only to determine what intent the language expresses, not to divine another intent that might have been in the minds, in this case, of AT&T's negotiators.

Therefore, staff recommends that the Commission find that AT&T's interconnection agreement with BellSouth sets forth a single pricing standard expressed particularly in Section 36.1 for network elements ordered as combinations, whether the combination would recreate an existing BellSouth retail service or not. Staff recommends that the pricing standard in the parties' agreement requires them, in either case, to first attempt to negotiate appropriate prices for combinations of elements based on the Commission's decisions in Issues 5 and 6 below. Failing that, the parties may submit their dispute to the Commission for resolution through arbitration. Further, BellSouth should not be required under its interconnection agreement with AT&T to provide AT&T with network elements in combination at the individual element prices set forth in Table 1 of Part IV, except in the case where the UNES exist in combination at the time of AT&T's order. This exception

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is sustainable, staff believes, because BellSouth will incur no additional costs related to combining functions.³ Finally, staff recommends that the Commission find that AT&T may alternatively purchase unbundled network elements individually at the prices set forth in the parties' agreement, in which case, BellSouth should be required to provide AT&T with access to its network for purposes of combining elements in order to provide telecommunications services. See Section 3(a)(51).

Here, staff again notes BellSouth witness Varner's testimony that BellSouth will negotiate with AT&T the portion of their agreement relating to the provisioning of UNE combinations if the Supreme Court affirms the Eighth Circuit. (TR 385) Section 9.3 of the General Terms and Conditions of the AT&T-BellSouth agreement requires the parties to renegotiate in good faith mutually acceptable new terms if a final and nonappealable judicial act "materially affects any material terms" of the agreement. Thus, staff believes that in this case, unlike in the case of the MCI-BellSouth agreement, the parties are required to renegotiate the provisions of the agreement relating to the provisioning of UNE combinations in the event the Supreme Court affirms the Eighth Circuit's bundling holding.

³See staff's analysis in Issue 8 for further details.

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

RECOMMENDATION: Under the pricing standard in the AT&T-BellSouth agreement that the Commission should find in Issue 4, for network elements not already combined at the time of AT&T's order, the Commission should find that, if AT&T requests that BellSouth provision them in combination, AT&T and BellSouth should negotiate the price AT&T should pay, as required by Section 36.1 of Part IV of their agreement. The Commission should also find that the prices negotiated for these combinations should be compliant with Section 252(d)(1) of the Act and the Commission's decisions below in Issue 6, and be free of duplicate and unnecessary nonrecurring charges. In the specific case of network elements existing as combinations at the time of AT&T's order, the Commission should find, as an exception, that the price AT&T should pay is the sum of the prices for the component elements in Table 1 of Part IV of its agreement with BellSouth. Further, the Commission should find that the prices AT&T should pay BellSouth for UNE combinations allegedly replicating an existing BellSouth retail service, e.g., in the case of a BellSouth customer migrating to AT&T, should not be determined differently than for UNE combinations that do not allegedly replicate an existing BellSouth retail service.

POSITIONS OF PARTIES

BellSouth:

The prices for combinations of unbundled network elements are not contained in the BellSouth-AT&T Interconnection Agreement.

AT&T:

The prices for UNE combinations are the cost-based UNE rates established by the Commission and as set forth in the AT&T/BellSouth Interconnection Agreement regardless of whether such combinations recreated a BellSouth service. There is no basis in the Interconnection Agreement, the Commission's orders, the 8th Circuit's decisions, or the Telecom Act of 1996 to suggest that the prices of combinations of UNEs could be priced at anything other than the cost-based UNE rates established by the Commission. See Issue 6.

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MCI:

No position.

STAFF ANALYSIS:

AT&T

AT&T argues that its agreement with BellSouth specifies that the price of a combination of UNEs is the total of the cost-based UNE prices, less any duplicative or unnecessary charges. (AT&T BR 9) AT&T argues further that the agreement makes no distinction between the pricing of combined UNEs and uncombined UNEs, except to provide that the prices of combined UNEs shall not include duplicate charges or charges for functions or activities that AT&T does not need when the UNEs are combined. Id. Moreover, AT&T argues that the agreement makes no distinction between the pricing of UNE combinations that would permit AT&T to recreate an existing service and those that would not. Id. AT&T contends that under the agreement, the appropriate charge for any combination of UNEs is the aggregate charge for the individual elements, less any duplicative or unnecessary charges.

AT&T witness Eppsteiner testifies that Section 36 of Part IV of the agreement addresses the pricing of UNEs. (TR 147-48) Section 36 provides that the "[t]he prices that AT&T shall pay to BellSouth for Unbundled Network Elements are set forth in Table 1." (EXH 9 p53) He testifies that Table 1 of Part IV sets forth the applicable recurring and non-recurring charges for each individual UNE. (TR 147) He concludes that for combinations of network elements, the price is the sum of the individual element prices less any duplicative or unnecessary charges. (TR 149, AT&T BR 10)

AT&T argues that there is no indication in Section 36 of Part IV of the Agreement, or in Table 1, that the UNE prices set forth in Table 1 are not to be used in determining the proper charge for UNEs that are included in a UNE combination. (AT&T BR 10) Witness Eppsteiner testifies that Section 36.1 provides that the charge set forth in Table 1 must be reduced to eliminate any duplicative or unnecessary charges. (TR 147,148) See Issue 4.

Witness Eppsteiner testifies that under Sections 36 and 36.1 of the agreement the appropriate charge for a combination of UNEs is the aggregate cost of the individual elements, less any duplicative or unnecessary costs, without regard to whether that combination would permit AT&T to recreate an existing BellSouth retail service. (TR 149,150-51, AT&T BR 10) In support of this contention, AT&T argues that if UNE combinations were to be priced

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at resale prices, as BellSouth contends, there would be no need for the Section 36.1 provision eliminating duplicative or unnecessary charges when combined elements are provided. (AT&T BR 11) Also, AT&T argues that the Commission three times rejected BellSouth's replicative service resale argument in Order Nos. PSC-96-1579-FOF-TP, PSC-97-0298-FOF-TP, and PSC-97-0600-FOF-TP.

BellSouth

BellSouth argues that prices for combinations of network elements are not contained in its agreement with AT&T. (BellSouth BR 30) BellSouth relies here on the same evidence and argument described in Issues 4(a) and 4(b).

Conclusion

The evidence and argument of the parties relative to Issue 5 is set forth in detail in staff's analysis in Issues 4(a) and 4(b). In Issues 4(a) and 4(b), staff recommends that the Commission find that the AT&T/BellSouth interconnection agreement specifies a pricing standard for UNE combinations in Section 36.1. That standard requires the parties to negotiate total recurring and non-recurring charges for UNE combinations from which duplicative and unnecessary charges have been eliminated. It also requires that the parties conduct negotiations consistent with the Commission's decisions in Issue 8 herein. In Issue 8, staff recommends what nonrecurring charges are appropriate with the elimination of duplicative and unnecessary charges for four specific loop-port combinations.

Section 4.5 of Attachment 4 of the agreement provides that BellSouth may not disconnect assembled network elements, but shall provide them to AT&T "interconnected and functional without any disconnection or disruption of functionality." AT&T witness Falcone testifies that it is unnecessary and unreasonable, indeed anti-competitive, to physically separate existing loop and switch port combinations, requiring ALECs to recombine them by means of collocated facilities. (TR 330) He asserts that BellSouth can separate a migrating customer's loop and switch port electronically and, then, AT&T, using the features, functions and capabilities of the unbundled switch it purchased, would also electronically recombine them. (TR 333) He describes this process as one that is similar to the "recent change" process BellSouth uses when deactivating service to a customer. (TR 332,333) He testifies that AT&T has learned that at least two vendors are capable of supplying technology that would effectively adapt the "recent

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change" process for the purposes of interconnecting ALECs. (TR 336-37)

BellSouth witness Landry testifies that the "recent change" process, also known as Dedicated Inside Plant and Dedicated Outside Plant (DIP/DOP), is applicable to retail and resale services, but not to unbundled network elements. (TR 716) He asserts that provisioning a functional loop and switch port to a ALEC requires that they be physically separated and interconnected to the ALEC. (TR 717) He testifies that once a ALEC is interconnected, it can activate the service electronically through the switch. (TR 716)

Staff is persuaded by witness Falcone's testimony that an existing customer, for which an assembled loop and switch port is in place, can be migrated from BellSouth to AT&T electronically. Moreover, the parties' agreement does not permit BellSouth to disconnect currently functional combinations. Witness Landry's testimony appears to be at variance with BellSouth witness Varner's designation of eight network element combinations, not including loop and switch port, that, because they can only be provisioned as combinations, are offered at a price that is the sum of the prices for the component elements. (TR 398-99) Therefore, in the specific case of a migration of an existing BellSouth customer to AT&T, staff recommends that the price AT&T should pay is the sum of the prices for the loop and switch port in Table 1 of Part IV. Since the elements are already assembled and cannot be disassembled, BellSouth will not incur a cost for assembling or reassembling them, or any other combining-related cost.

BellSouth witness Hendrix testifies that the price of any element combination, save those that replicate an existing BellSouth retail service, should be negotiated by AT&T and BellSouth, and that those prices should be market based in order to reflect the risks BellSouth assumes in providing network elements. (TR 675-76) No AT&T witness directly addresses witness Hendrix's contention regarding risks assumed by BellSouth. These risks do not appear to be something that can be readily quantified and, even if they can, witness Hendrix does not offer guidance to the Commission useful for reflecting them in negotiated prices.

For network elements not already combined at the time of AT&T's order, however, staff recommends that if AT&T requests that BellSouth provision them in combination, AT&T and BellSouth should negotiate the price AT&T should pay, as required by Section 36.1 of Part IV of their agreement. Staff also recommends that the prices for these combinations should be compliant with Section 252(d)(1) of the Act and the Commission's decisions here and in Issue 6 and

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in Issue 8 concerning duplicate and unnecessary nonrecurring charges.

Staff also recommends that the prices AT&T should pay BellSouth for UNE combinations allegedly replicating an existing BellSouth retail service should not be determined differently than for UNE combinations that do not replicate an existing BellSouth retail service. The Commission ruled in Order No. PSC-96-1579-FOF-TP at page 38 that ALECs may combine network elements in any manner of their choosing, including in a manner replicating an existing BellSouth retail service. The Eighth Circuit has addressed the pricing standard applicable to UNE combinations without exception as to the service provided, as follows:

Although a competing carrier may obtain the capability of providing local telephone service at cost-based rates under unbundled access as opposed to wholesale rates under resale, unbundled access has several disadvantages that preserve resale as a meaningful alternative. Carriers entering the local telecommunications markets by purchasing unbundled network elements face greater risks than those carriers that resell an incumbent LEC's services.

* * *

The increased risk and the additional cost of recombining the unbundled elements will hinder the ability of competing carriers to undercut [Section 251(c)(4)] prices and lure these customers away from the incumbent LECs. Nor do we believe that subsection 271(e)(1)'s limitation on the joint marketing of local services with long-distance services will be meaningless.

120 F.3d at 815. Furthermore, in Issue 7 below, staff recommends that the record shows that the purchase of a BellSouth loop and switch port combination does not, without more, constitute a replication of an existing BellSouth retail service, nor does it constitute, without more, a retail service of any kind.

According to AT&T witness Gillan, what divides BellSouth and AT&T is not price. (TR 291) He offers an illustration of revenues from a typical Florida residential customer whose service might be

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provided by service resale or network elements, which shows the cost of providing service by network elements to be almost \$10.00 more than by service resale. (EXH 15 EXH JPG-1) He argues that:

If BellSouth was actually willing to sell us these network elements for the service resale price, we'd take it. But what they're not willing to do is recognize that a network element purchaser steps into the market as a complete local telephone company, fully competing against BellSouth like any other local telephone company, with the ability to offer any set of services on these network elements, including exchange access services, and bring the full brunt of competition to this entire range of activities.

(TR 292) What witness Gillan's argument suggests is that the real stake for BellSouth is the retention of access charges. BellSouth witness Varner testifies that the provision of basic residential telephone service only begins to become economically attractive with consideration of access charges. (TR 543) He provides an illustration showing that the cost of typically providing Rate Group 12 residential service without features is \$24.90 compared with the retail price of \$10.65. (EXH 24 Rev.Dep.EXH 2 Chart C) With access charges of \$14.11 in total, however, the retail price increases to \$24.76. Id.

Conversely, BellSouth witness Varner insists that this case is about price and that it is not about provisioning terms and conditions. (TR 405) Staff, however, is persuaded by witness Gillan's contention that underlying the present dispute about UNE combinations prices is the right of ALECs to operate freely in the marketplace as full-service local telecommunications carriers. (TR 257)

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

RECOMMENDATION: If the Commission should deny staff's recommendation in Issues 4(a) and 4(b) and in Issue 5, finding that the parties' agreement does not require them to negotiate appropriate prices for unassembled UNE combinations or that the prices for already assembled combinations are not specified by the agreement or that the parties' agreement contains no pricing standard for UNE combinations of any kind, staff recommends that the Commission nevertheless should require the parties to negotiate UNE combination prices in any circumstance that comport with Section 252(d)(1) of the Act and that are free of duplicate and unnecessary charges.

POSITION OF PARTIES

BellSouth:

Prices for unbundled network element combinations that do not recreate an existing BellSouth retail service should be negotiated between the parties. Unbundled network element combinations that recreate an existing BellSouth retail service should be priced at the retail price of that service minus the applicable wholesale discount.

AT&T:

The prices for UNE combinations are the cost-based rates established by the Commission and as set forth in the AT&T/BellSouth Interconnection Agreement regardless of whether such combinations recreate a BellSouth service. There is no basis in the Interconnection Agreement, the Commission's orders, the 8th Circuit's decisions, or the Telecom Act of 1996 to suggest that the prices of combinations of UNEs could be priced at anything other than the cost-based UNE rates established by the Commission.

MCI:

No position.

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STAFF ANALYSIS:

AT&T

AT&T argues that the prices that BellSouth proposes to charge AT&T for combinations of network elements to provide service to a customer are overstated, inefficient, and reflective of BellSouth's desire to impede competition and protect its monopoly revenues. They bear no relation to the existing recurring prices for network elements that are combined to provide service to existing BellSouth customers who want to migrate to service provided by AT&T. (AT&T BR 2)

Noting the concern the Commission has expressed with respect to prices for UNE combinations permitting AT&T to recreate a BellSouth service that would "undercut" BellSouth's resale rate for that service, AT&T argues further that the Commission is right to be so concerned, but its concern should be directed at BellSouth's retail rate for that service, not at the prices established by the agreement for the UNE combination. Id. It asserts that the UNE prices it advances as being appropriate are based on the Commission's determination of BellSouth's forward looking costs, and include a reasonable profit. Prices based on forward looking costs are the economically correct prices that should be found in an efficiently competitive market. If BellSouth's resale price for a UNE combination exceeds the UNE prices for that combination, the inference to be drawn, AT&T contends, is clear. BellSouth is "gouging" its retail customers. Id. AT&T ventures that if competition based on UNE combination prices is permitted, those retail prices will be driven down, to the benefit of Florida's consumers. Id. In any event, AT&T asserts, the Eighth Circuit has made it clear that UNE combinations duplicating a retail service are not equivalent to resale and need not be priced at the resale discount. Id.

AT&T argues that inasmuch as its interconnection agreement with BellSouth provides prices for UNE combinations, this issue should not have to be addressed. In the event the Commission were to find otherwise, however, AT&T argues further that appropriate prices for UNE combinations must be cost-based and forward looking pursuant to Section 252(d)(1) of the Act, not discounted from service resale prices. (AT&T BR 14) AT&T notes that the Eighth Circuit found that competing carriers may obtain the ability to provide finished telecommunications services entirely through the use of UNEs purchased at cost-based prices, and suggests that that finding "forecloses any possible argument that combinations of network elements used to provide services to customers can be

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priced as though they were resale." Id. AT&T asserts that using combined network elements is not the functional equivalent of providing telecommunications service through resale. (AT&T BR 15) AT&T further asserts that if it can purchase loop-switch port combinations only through service resale, it is effectively precluded from joint marketing local services with its long-distance services pursuant to Section 271(e) of the Act. Id. AT&T notes that BellSouth witness Varner acknowledges that to be the necessary outcome of BellSouth's replicative service resale theory. (TR 541-42)

AT&T witness Gillan argues that what BellSouth proposes is a third pricing standard, one that is in addition to the standards set forth in Sections 252(d)(1) and (3) of the Act, and one not contemplated in the Act. (TR 264) BellSouth witness Hendrix testifies that "in Florida, when a [ALEC] orders a combination of network elements or orders individual network elements that, when combined, duplicate a retail service provided by BellSouth, for purposes of billing and provisioning, such orders should be treated as resale." (TR 622) Witness Gillan rejects that, arguing that that statement "renders meaningless the entire premise of non-discriminatory access." (TR 265) He maintains that the Act as interpreted by the Eighth Circuit provides no support for the theory that pricing and provisioning of a network element depends upon the entrant's use of the services it offers. Id.

AT&T witness Falcone argues that BellSouth should not be permitted to physically disconnect already assembled network elements, thereby requiring AT&T to reassemble them by means of costly physically collocated facilities. Such a practice, he argues, serves no valid commercial purpose, is needlessly disruptive to service, is unnecessary, and creates an insurmountable entry barrier. (TR 309, 314-15, 318) AT&T argues that BellSouth's "recent change" process is a reasonable and available alternative to physical collocation, and states that:

If BellSouth has an inexpensive, efficient, and nondisruptive mechanism for changing its customers' local and long distance service, the nondiscrimination provisions of the Act mandate that competing carriers not be burdened by a more expensive, less efficient, disruptive, and anticompetitive procedure for proving service using combined UNES.

(AT&T BR 18)

BellSouth

BellSouth witness Hendrix argues that BellSouth's agreement with AT&T does not specifically provide prices for UNE combinations. (TR 627) BellSouth witness Varner argues that under the agreement, when BellSouth provisions combinations of UNES that recreate existing BellSouth retail services, the price to the ALEC should be the retail price of that service less the applicable wholesale discount. (TR390) BellSouth notes that it makes the same case here with respect to its agreement with AT&T as it does in Issue 3 with respect to its agreement with MCI. (BellSouth BR 30)

Conclusion

In Issue 5, staff recommends that the Commission find that the AT&T/BellSouth agreement provides a pricing standard for UNE combinations in Section 36.1 of Part IV and related provisions of the agreement. Staff further recommends in Issue 5 that the Commission find that that standard, with one exception, should be that the parties will negotiate prices that AT&T should pay for UNE combinations that comport with Section 252(d)(1) and the Commission's decision in Issue 8 below. That exception is for the case where network elements are already combined in BellSouth's network. In that case, staff recommends that the Commission find that the prices for such combinations are the sums of the prices for the component elements found in Table 1 of Part IV.

Even if the Commission should deny staff's recommendation in Issue 5, finding that the parties' agreement does not require them to negotiate appropriate prices for UNE combinations or that it contains no pricing standard at all for UNE combinations, staff recommends here that the Commission nevertheless should require the parties to negotiate UNE combination prices in all circumstances that comport with Section 252(d)(1) of the Act and its decision below concerning duplicate and unnecessary charges. Except for the case where elements are already assembled on BellSouth's network, staff does not believe that AT&T's position that prices for UNE combinations are found expressly in the agreement is sustainable in the agreement's pricing provisions. The pricing language in the agreement can be fairly construed only as applicable to UNES ordered individually. Neither does staff believe that BellSouth's position that prices for UNE combinations replicating retail services should be set at service resale is sustainable. The pricing standard for UNE combinations is not affected by the manner in which an ALEC deploys them.

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As staff observes in Issue 3, it is this Commission's enduring policy to encourage incumbents and competing entrants to negotiate interconnection agreements. Of course, if the parties are unable to reach agreements on disputed issues, they may, pursuant to Section 252(b) of the Act, request that the Commission arbitrate a resolution of their dispute.

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

RECOMMENDATION: Staff recommends the Commission find that a standard for identifying which combinations of unbundled network elements recreate an existing BellSouth retail telecommunications service is irrelevant. The 8th Circuit Court's Order states 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. (STAVANJA)

POSITION OF PARTIES:

BELLSOUTH: The Commission must analyze the core functions, features, and attributes of the requested combination to determine if those functions, features and attributes mirror the functions of an existing retail offering.

AT&T: It is not practically possible for an entrant to fully recreate a BellSouth Service. Moreover, any such distinction is irrelevant to the question of the appropriate prices to be charged for UNE combinations.

MCI: There is no need to identify any standards since the Agreement makes no distinction between combinations which allegedly recreate a BellSouth retail service and those that do not. Further, an ALEC service using UNE combinations never recreates a BellSouth retail service. Finally, the only circumstance that the Commission ever expressed a concern about was using all BellSouth UNEs to recreate a complete BellSouth retail service. Clearly, no complete BellSouth retail service can be created using just a loop/port combination. In any event, the Eighth Circuit Court of Appeals has specifically rejected the ILECs' resale argument and has affirmed the right of ALECs to provide complete telecommunications services using all BellSouth UNEs.

STAFF ANALYSIS:

The parties differ in their view on which network elements, when combined, recreate a BellSouth retail service. Based on the evidence in the record, staff believes that BellSouth's concern is over the recreation of its basic local service. BellSouth's position is that a loop and port combination recreates basic local

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service. Therefore, staff will address what combination of network elements are necessary to provide basic local service. Specifically, staff addresses basic local telecommunications service per the definition in Section 364.02(2), Florida Statutes, which is for flat-rate residential and single-line, flat-rate, business service.

I. Definition of Basic Local Service

Section 364.02(2), Florida Statutes, defines Basic Local Telecommunications Service as:

voice-grade, flat-rate residential and flat-rate single-line business local exchange services which provide dial tone, local usage necessary to place unlimited calls within a local exchange area, dual tone multi-frequency dialing, and access to the following: emergency services such as "911," all locally available interexchange companies, directory assistance, operator services, relay services, and an alphabetical directory listing...

Staff would note that the above definition lists what constitutes basic service for the end user. This definition does not include an exhaustive list of the network elements or functions necessary to provide basic local service.

BellSouth witness Hendrix states that with basic local service, an end user gets the capability to complete local calls, and access to operator services, 911, and other carriers. (EXH 26, p.7) BellSouth witness Varner echoes the same capabilities and also included a White Pages listing. AT&T witness Walsh also agrees, stating that with basic local service, an end user would receive the same capabilities whether or not he or she were an AT&T customer or a BellSouth customer. (EXH 11 p10)

II. Customer Migration and Switch "As Is" for Combinations of UNES

Issue 8 addresses the non-recurring charges for several loop and port combinations when such combinations are currently in use to provide service to a BellSouth customer. Staff would note that a key term used in Issue 8 is "migration," that is, migration of the loop and port serving an existing customer. However, staff will address the meaning of customer migration in this issue.

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BellSouth's position is that when the loop and port elements are combined, basic local service is recreated and should be priced at the resale rate. (Varner TR 429, 435) BellSouth witness Varner states that use of the word "migration" in this proceeding could lead to confusion, since the term typically applies to a switch "as-is" situation. (TR 400) BellSouth witness Varner states that the term switch "as is" applies only to the retail service environment and this, he states, is not a resale proceeding. (TR 400, 413) AT&T witness Walsh states that "migration occurs when a customer with existing service requests a change in its local service provider (i.e., moving an existing BellSouth customer to AT&T)." (TR 195) Witness Walsh contrasts this definition with service installation, which he defines as "the establishment of any new (or additional) service for a CLEC customer." (TR 195) MCI witness Hyde provides a similar definition, stating that migration occurs when an existing customer moves from one local exchange provider to another. Witness Hyde used an example, stating that migration could occur when a customer moves from BellSouth to MCI. In addition that same customer could migrate from MCI to AT&T, and then from AT&T back to BellSouth. Witness Hyde states that all of these cases represent migration. (EXH 6, p.15)

Staff notes that the term "migration" is used for a specific reason. AT&T and MCI requested that Issue 8 address the non-recurring charge for migrating the loop and port that serve an existing BellSouth customer. This is because AT&T's and MCI's respective agreements with BellSouth state that network elements currently in use may not be broken apart when ordered in combination. (Parker TR 20; Eppsteiner TR 146) Specifically, the MCI/BellSouth agreement states in Section 2.2.15.3 of Attachment VIII:

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. (TR 20)

The AT&T/BellSouth agreement states in Section 4.5 of Attachment 4:

When AT&T orders Elements or Combinations that are currently interconnected and functional, such Elements and Combinations will remain interconnected and functional without any disconnection or disruption of service. (TR 156)

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It appears to staff that the only party confused with migration in this proceeding is BellSouth. Due to the agreement provisions shown above, staff believes it is clear why the language in Issue 8 pertains to a migration situation. Staff further believes that due to this agreement language, BellSouth is obligated to provide AT&T and MCIM any combination of network elements that are currently serving a BellSouth customer on an "as is" basis. Staff would note that both the MCIM/BellSouth and AT&T/BellSouth agreements define the term "combination." The MCIM/BellSouth agreement states in Part B, p.3, that:

"Combinations" means provision by ILEC of two or more connected Network Elements ordered by MCIM to provide its telecommunications services in a geographic area or to a specific customer and that are placed on the same order by MCIM.

The definition in the AT&T/BellSouth agreement in Attachment 11, p.3, states:

"Combinations" consist of multiple Network Elements that are logically related to enable AT&T to provide service in a geographic area or to a specific customer and that are placed on the same order by AT&T.

Staff believes that the purpose of including such language in the agreement was to avoid disconnecting network elements that are already in place. Under BellSouth's collocation proposal, when a loop and port are ordered, each element must be physically disconnected from BellSouth's network and reconnected at the ALEC's collocation facility. (Landry TR 705) BellSouth witness Landry states that when an ALEC orders a loop and port combination, BellSouth will separate the request into two separate service orders and process the request as if each element was received as an individual order. (TR 704-705)

Staff believes that BellSouth's requirement that an ALEC must be collocated in order to receive access to UNES is in violation of the 8th Circuit Order. The Court stated that the Act permits an ALEC to obtain the ability to provide telecommunications services entirely through the unbundled access provisions in subsection 251(c)(3). The 8th Circuit Court's Order specifically states that:

Initially, we believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier

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may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent ILEC'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 I 120 F.3d 753 at 814, TR 258)

Therefore, staff believes that BellSouth's collocation proposal is not only unnecessary under the terms of AT&T's and MCIm's contracts, but is inconsistent with the Act as well. The obligation imposed on an ALEC by an ILEC, that the ALEC must provide one of its own network elements in order to be granted access to the ILEC's network, is in direct violation of the 8th Circuit Court's Order.

Nowhere in the Act, the 8th Circuit's Orders, or the FCC's rules and Interconnection Orders, is there support for BellSouth's position that each network element ordered in sequence (in combination or for combining) by an ALEC must be physically disconnected from an ILEC's network, be connected to an ALEC's collocation facility, and then *be re-connected back* to the ILEC's network. (Falcone TR 333 Staff believes that the 8th Circuit Court's order stating that an ALEC does not have to own or control some portion of a telecommunications network supports this notion, because staff believes that the use of a collocation facility is a choice, not a mandate. (Gillan TR 258) While staff recognizes that under certain circumstances access to UNEs requires collocation, staff believes that collocation need only be used for the purpose of establishing interconnection of ALEC facilities with those of the ILEC. (Falcone TR 329-330) Section 251 (c)(3) of the Telecommunications Act of 1996, states that an incumbent local exchange carrier has the following duty:

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to unbundled network elements on an unbundled basis at any technically feasible point...An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

In conclusion, staff believes that the record shows that migration of an existing BellSouth end user means that the same network elements serving that customer must be provided "as-is" without physical disconnection. However, this does not prohibit

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AT&T or MCI from substituting one of its own UNEs in conjunction with the UNEs that currently serve the end user. Staff believes that if the respective agreements between the parties did not prohibit BellSouth from disconnecting already combined network elements, then migration of network elements would not occur, because of the 8th Circuit Court's ruling that ILECs are not required to provide them as such. Therefore, the record shows that when AT&T or MCI place an order for network elements, and those elements are currently combined, BellSouth is obligated to migrate those elements on an "as-is" basis.

III. Standard for Network Elements Necessary to Recreate a BellSouth Retail Service

The parties differ in their view on which network elements, when combined, recreate a BellSouth retail service. BellSouth witness Hendrix states that there are several factors that the Commission should consider in determining whether or not a combination of UNEs requested by an ALEC recreates an existing retail telecommunications service offering. Witness Hendrix states that the Commission should "look at the core functions of the requested combination to see if those functions mirror the functions of an existing retail service offering." (TR 628-629) AT&T witness Gillan states that regardless of what combination of network elements are used, "it simply is not possible for an entrant to recreate a BellSouth service." Witness Gillan asserts that it takes more than the interplay of network elements to define a service. Witness Gillan states that how a service is priced, how the service is supported, and what need the service satisfies defines a service. (TR 250)

Based on the evidence in the record, staff believes that BellSouth's only concern is the recreation of its local service. BellSouth's position is that a loop and port combination recreates local service. BellSouth witness Varner states that basic exchange service is replicated with the purchase (combination) of the loop and port. (TR 435) Witness Varner asserts that other functions such as operator services and the signaling systems are not part of basic local service, because an additional charge is incurred when they are used. Witness Varner states that the loop and port provide access to the same capabilities as are accessible through resale of basic local service. (TR 436)

Staff would note that witness Varner's testimony regarding access is confusing. Witness Varner described access to operator services, for example, as a function of the switch--that is, the

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switch provides access to the operator services platform. (TR 437) However, staff believes that access to operator services and Directory Assistance (DA) via resale is different from access via a loop and port. Under cross-examination at the hearing, witness Varner stated that if an ALEC ordered a loop and port, it would still need an operator services trunk to get an operator services call to the operator. (TR 470) The same is true for DA and for 911. (TR 480-481, 483) These trunks are additional elements for which additional charges are imposed on the ALEC when the ALEC orders them. Therefore, staff concludes that a loop, port (local switching element), and trunk are necessary to access the operator services platform. Under resale, basic local service includes the operator services trunk for access to an operator, because an end user can literally talk to an operator, without charge, by simply dialing zero. In addition, under resale DA can also be utilized by the end user. In fact, BellSouth offers three free DA calls. (TR 443) Therefore, no additional charges are incurred by an ALEC for the use of operator services trunks and DA trunks under resale. The only additional charges incurred for use of an operator or for DA under resale, are the charges when an end user actually uses the operator. In this case, the ALEC pays the retail rate, less the wholesale discount. (TR 444-445)

Witness Varner asserts that operator services and DA are not part of basic local service, because a separate charge applies for the use of each. Witness Varner states that only access to these services are provided with basic local service. (TR 437-444) Staff believes that witness Varner is, in essence, treating operator services and DA similarly to vertical services (i.e., as additional services separate from local service). Staff believes that access, including the trunk, to the operator and to DA are part of basic local service because, when a new customer calls to have service installed, BellSouth does not ask if the customer wants to be hooked up to the operator. Operator service is a UNE; therefore, access to operator services cannot be provided if no operator exists. Staff would also note that a customer does not incur a charge to access an operator; a charge is only assessed based on the type of service actually provided by the operator. Moreover, this Commission has already stated that when an ALEC orders basic local service for resale, the ALEC receives that service exactly like BellSouth provides it for its customers. (Order No. PSC-96-1579-FOF-TP, p.49) The Commission stated that if an ALEC wants to change a service offering provided by BellSouth, then the ALEC must purchase UNES to provide such service. This decision was the result of a dispute between AT&T and BellSouth in their arbitration proceeding. AT&T's position was that it wanted to provide its own operator services in conjunction with reselling BellSouth's local

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service. AT&T argued that such costs would be avoided by BellSouth and should be removed in determining the wholesale discount. The Commission's Order specifically states:

We find that costs associated with operator and directory assistance services will not be 100% avoided, because AT&T will be providing its own customers these services. We do not believe the intent of the Act was to impose on an ILEC the obligation to disaggregate a retail service into more discrete retail services. The Act merely requires that any retail services offered to customers shall be made available for resale. If AT&T wants to purchase pieces of services, it must instead, buy unbundled elements and package these elements in a way that meets its needs. (Order No. PSC-96-1579-FOF-TP, p.49)

Staff believes the Commission's decision is clear that access to operator services and DA services are inherent with basic local service. Staff also believes that a deviation by the Commission from its decision would require revisiting the arbitration issue on the determination of the wholesale discount.

Staff believes the discussion above on access is important in the determination of which elements are necessary to provide basic local service. Staff believes that it is clear that when an ALEC purchases a loop and port combination, those are the only elements it receives. As discussed above, not only are operator services, DA, 911 and signaling system databases separate network elements, but the trunks to access each of them are also separate elements. Staff believes a loop and port combination serving an end user is insufficient to meet the definition of basic local service. In addition to the reasons cited previously, a loop and port serving an end user will not provide the capability of reaching all other end users in the local calling area. (TR 471-472) BellSouth witness Varner states that a loop and port combination provides the ability of an end user to call every other end user that is served by that wire center. (TR 473) Staff would note that a wire center is essentially the local switch that serves a particular area; therefore, a loop and port combination would only allow an end user the ability to call other end users that are also served by the same switch. Staff would also add that the area served by one switch is not usually the entire local calling area.

Witness Varner admits that BellSouth's basic local service includes calling capability to customers that are served by another local switch. (TR 472) Witness Varner states that about 35% of

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local calls on average are handled by the same switch that serves a particular end user and that the other 65% are transported to another switch. (TR 472) Therefore, when more than one switch serves a local calling area, each switch must be connected in some manner in order to transfer the call from one switch to the other. The network element which carries the call between switches is transport. (TR 472) There are two types of transport: common transport and dedicated transport. (TR 473) Common transport is transport that is utilized by multiple carriers, whereas dedicated transport is utilized by only one carrier. Transport is a separate network element, and use of transport in combination with a loop and port requires an additional charge. No additional charge for transport is assessed under resale (TR 474)

Not all switches are directly connected to each other with the transport element. (EXH 9, p.2) Although these switches are not directly connected with each other, they have a common connection to another switch, usually a tandem switch. Therefore, when a local call originating on one switch must be directed to another switch to which it is not directly connected, the originating switch will route the call to either another central office switch or to the tandem switch, which in turn, will route the call to the terminating switch. (Falcone TR 365-366) AT&T witness Falcone states that typically each switch in the network will be directly connected to another switch. Switches which are not directly connected, but require a local call to be ported via the tandem, are not the norm. However, witness Falcone states that these scenarios can be found in BellSouth's network. (TR 367-368)

Under cross examination, AT&T witness Falcone states that all the elements depicted on the UNE diagram (EXH 19) are necessary to provide basic local service, plus the operations support systems (OSS), which witness Falcone points out as not being shown on the diagram. (TR 362) The network elements depicted on the diagram (EXH 19) include the loop, local switching, operator services (including DA), signaling system network, transport, tandem switching, and lines representing trunks connecting operator services, DA, and the signaling system to the switch. (EXH 19)

Staff would note that the functions of OSS are pre-ordering, ordering, provisioning, billing, maintenance and repair. Staff believes that OSS must be utilized in providing basic local service. For example, it is intuitive that billing is a function that is performed every month. Without OSS, an ALEC cannot provide billing statements to its customers. Staff believes, therefore, that OSS functions are also a necessary element in the provision of local service.

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CONCLUSION

Staff believes the record shows that in order to actually duplicate local service, AT&T/MCI would have to own or control all of the network elements described above as needed for each end user. Specifically those elements are the loop, local switching, operator services (including DA), signaling system network, transport, tandem switching, and the trunks connecting operator services, DA, and the signaling system to the switch. In addition, staff believes that AT&T/MCI would also need to interconnect these elements with BellSouth's network, if AT&T/MCI provides any of these elements themselves. If AT&T/MCI ordered only a loop and port combination from BellSouth, then in order to replicate basic local service, staff believes that AT&T/MCI may have to pay either transport or additional switching charges, or both, when a call terminates to a BellSouth customer. This will occur when more than one switch is utilized to process a call. For example, when a customer of AT&T or MCI calls a BellSouth customer, the call would pass from facilities owned or controlled by AT&T or MCI, to BellSouth's network. If, after receiving the call, BellSouth transports the call, then transport charges would be assessed to AT&T or MCI. The call must then pass through the switch serving BellSouth's end user. BellSouth would also assess termination switching charges to AT&T/MCI.

If AT&T or MCI utilized its own loop and local switch, for example, then reciprocal compensation charges would apply to traffic that is passed back and forth between each Company's network. Reciprocal compensation is compensation for the exchange of traffic between the networks of two individual carriers. (See Order PSC-96-1579-FOF-TP, pp64-68) Even if AT&T or MCI own their own loop and switch, they would still need to use BellSouth's network to terminate a local call if one of the end users was not an AT&T or MCI customer. Therefore staff believes that a loop and port (local switching element) are insufficient to recreate or duplicate basic local service.

Staff believes that another option available to provide basic local service, absent the use of BellSouth's network, is for AT&T or MCI to duplicate BellSouth's entire network. This could be achieved by providing all of the elements themselves or via a combination of their own elements and the use of another carrier's network. (Gillan TR 303) Again, if AT&T or MCI do not own or control the facilities that serve both the end user originating the call and the end user where the call is terminated, then AT&T or

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MCI must either pay to use BellSouth's network, another carrier's network, or provide all of the network elements themselves.

Staff believes that BellSouth's network was designed using the network elements necessary to provide various services, not only for the local calling area of its end users, but also to provide access to its entire service territory as well as access outside of its service territory. Staff believes that a new entrant in the market would need more than a loop and the local switching element to provide local service to an end user. Without access to or control of facilities between other end users, or access to the networks of other carriers, the new entrant would not be able to complete or pass calls made by its end user customers.

Based on record evidence, staff believes that combinations of network elements alone serving an end user will not constitute the replication of a BellSouth retail service. Staff believes that physical network elements are only a part of what is necessary to provide local telecommunications services. Staff believes that management competency and skills, quality of service, customer support, and marketing are what distinguishes one carrier from another. However, staff realizes that the issue before the Commission is not what, in total, is required to replicate an existing service, but what network elements when combined will recreate an existing BellSouth retail telecommunications service. The Act clearly set out separate requirements and pricing standards for resale and access to UNEs. As stated above, the 8th Circuit Order states 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. Staff concludes that BellSouth's position that a loop and port recreates local service cannot be substantiated. Therefore, staff recommends that the Commission find that a standard for identifying which combinations of unbundled network elements recreate an existing BellSouth retail telecommunications service is irrelevant for any purpose in this proceeding.

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ISSUE 8: What is the appropriate nonrecurring charge for each of the following combinations of network elements for the 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 loop and port?

RECOMMENDATION: Staff recommends that the Commission approve the nonrecurring charges shown in Table I, for these loop/port combinations for the migration of an existing BellSouth customer.
(CORDIANO)

TABLE I: Staff's Recommended Nonrecurring Charge For Each Loop/Port Combination Based On The Migration Of An Existing BellSouth Customer

Network Elements	Staff's Recommended Non-Recurring Rates	
	First	Additional
2-wire analog loop/port	\$1.4596	\$0.9335
2-wire ISDN loop/port	\$3.0167	\$2.4906
4-wire analog loop/port	\$1.4596	\$0.9335
4-wire DS1 loop/port	\$1.9995	\$1.2210

POSITION OF PARTIES:

BELLSOUTH: When BellSouth combines unbundled network elements (UNEs) for an Alternative Local Exchange Carrier (ALEC) that recreate existing BellSouth services, those combinations should be priced at the retail service rate minus the applicable wholesale discount.

AT&T: There is no basis in the Agreement, the Commission's orders, the Eighth Circuit's decisions, or the Telecommunications Act of 1996 (Act) to suggest that the prices of combinations of UNEs could be priced at anything other than the cost-based UNE rates established by the Commission.

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MCIm: MCIm's position is that the price for UNE combinations is the price of the individual UNEs minus the duplicate charges and charges for services not needed. The Agreement makes no distinction between different types of combinations for purposes of this pricing. When MCIm orders migrations of existing BellSouth customers to loop/port combinations, almost all of the charges contained in the nonrecurring charges (NRCs) for the stand-alone UNEs are duplicate charges and charges for services not needed.

STAFF ANALYSIS:

I. Introduction

Section II provides the basis for staff's recommendation that the Commission reject BellSouth's cost proposal which involves: 1) breaking apart the loop/port combination currently serving an existing BellSouth customer; 2) requiring AT&T and MCIm to put the loop and port back together; and 3) forcing AT&T or MCIm to set up a collocation space in order to provide service via UNEs.

Section III provides the parties' development of their NRCs for the loop/port combinations for the migration of an existing BellSouth customer without loop/port separation.

Section IV provides staff's recommended NRCs for the loop/port combinations for the migration of an existing BellSouth customer without loop/port separation.

II. Staff's Analysis Of BellSouth's Cost Proposal

BellSouth witness Caldwell's nonrecurring cost development is premised on the loop and port being disconnected from BellSouth's network as separate elements, and the ALEC recombining them at its collocation space. (EXH 36, p.32) AT&T/MCIm's cost study, on the other hand, is based on a "switch as is," where an existing customer that is connected would be switched "as is" (i.e., the loop/port remain connected), which BellSouth believes constitutes resale. (EXH 36, p.31)

AT&T/MCIm argue that their Agreements with BellSouth allow them to order existing physically combined UNEs and obligate

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BellSouth to provide such combinations. Section 2.2.15.3, Attachment VIII, of the MCI/BellSouth Agreement specifically states that:

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.

Similarly, Section 4.5, Attachment 4, of the AT&T/BellSouth Agreement specifically states that:

When AT&T orders Elements or Combinations that are currently interconnected and functional, such Elements and Combinations will remain interconnected and functional without any disconnection or disruption of functionality. This shall be known as Contiguous Network Interconnection of network elements.

As discussed in Issues 1 and 3 respectively, staff believes that the purpose of including such language in the contract is to avoid breaking apart network elements that are currently in place.

Under BellSouth's collocation proposal, witness Landry states that loop/port orders would be submitted to BellSouth on one service request. (TR 704) However, BellSouth witness Landry states that when an ALEC orders a loop and port combination, BellSouth will separate the request into two separate service orders and process the request as if each element was received as an individual order. Witness Landry argues that the loop and port must be separated into two service orders, because the unbundled loop offerings are currently processed by access billing systems, whereas the port offerings are processed by nonaccess billing systems. (TR 704-705)

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AT&T witness Walsh states that BellSouth's proposal assumes a disconnect and a new connect. Witness Walsh states that for the new connect, BellSouth requires a separate order for the loop and a separate order for the port. Under this scenario, witness Walsh explains that there is a charge to disconnect the loop and a charge to disconnect the port, and a charge to reconnect the loop and reconnect the port. BellSouth also proposes to collect, up front, charges for future disconnection of these elements. (EXH 11, p.17) He further states that BellSouth's operational support systems (OSSs) are set up so that if a request involving a loop and port comes through, the OSSs would assign the closest loop and port. He argues that there is no reason why this cannot be done on one service order within BellSouth's provisioning system. (EXH 11, p.32)

As stated earlier, BellSouth argues that when an ALEC orders a loop/port combination, BellSouth must separate the request into two separate service orders and process the request as separate elements for billing purposes. However, MCIm witness Hyde states that there is no technical reason why BellSouth cannot use the existing telephone number identifier for the loop so that it can be processed by nonaccess billing systems on the same service order with the port. (EXH 6, pp.25, 34-35) As recommended in Issue 5, staff agrees with MCIm that BellSouth can use the same telephone number assigned to the loop and not have to break apart the loop and port combinations for processing purposes. Furthermore, staff would point out that language in both the AT&T/BellSouth and MCIm/BellSouth Agreements specifically states that currently combined elements will remain connected. Therefore, staff believes BellSouth should be required to process each loop/port combination under one service order without breaking apart the loop/port combination into individual UNEs and having AT&T or MCIm recombine them at the collocation facility.

AT&T witness Falcone states that BellSouth's collocation proposal is illegal. (EXH 17, pp.37-38) He notes that AT&T's recent-change process for the loop and port combination would only involve notifying the switch that an ALEC is now the carrier for billing purposes. The switch records the customer's local and access usage data for billing purposes. (EXH 17, pp.93-94) Therefore, the cost associated with the migration of an existing BellSouth customer should only involve "processor time to reflect

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the change in who is serving the customer, and to activate different billing systems to reflect the use of unbundled network elements by the CLEC." (TR 211) AT&T witness Falcone further states that:

...requiring physical separation of the loop and switch is not necessary and would tremendously increase the nonrecurring costs...For example, in Georgia, one new entrant estimating \$300,000 in construction costs, taking several months to establish three collocation facilities. (TR 309; TR 323)

Even with the collocation facility in place, witness Falcone states that AT&T is not going to win too many customers if customers have to be told that they may be out of service for four hours. (EXH 17, p.47)

Staff's review of the audit of BellSouth's nonrecurring cost study reveals, in part, the opinion that:

The DDC-1 schedules filed by BellSouth do not represent the migration of an existing BellSouth customer for scenarios in Issue 8. BellSouth's definition of migration is resale. It appears that the DDC-1 schedules assume that the loop and port have to be separated to be provided to the Alternative Local Exchange Company. (EXH 20, p.3)

In regard to the above-cited opinion, staff witness Young states that:

...that's my judgement of their information that they gave me...their answer is the cost study did not address migration. That's for almost every single subject matter expert we interviewed. (EXH 21, pp.42-43), (EXH 20, pp.17-48)

Staff believes that BellSouth's collocation proposal would be costly, disruptive, and unnecessary for the migration of an

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existing BellSouth customer, as AT&T witness Falcone testifies. (TR 309) Staff believes that BellSouth's proposals to break apart loop/port combinations that are currently connected and to force AT&T or MCI to have a collocation facility where the unbundled loop and the unbundled port can be recombined, is in direct conflict with the terms of the Agreements and the Eighth Circuit Court's decision. The Eighth Circuit Court's decision states:

Initially, we believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network. Nothing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements. (US 96-3321, p.38 of 47)

As discussed in Issue 7, staff believes that BellSouth's requirement that an ALEC must be collocated in order to purchase UNEs is in violation of the Court's decision regarding subsection 251(c)(3) of the Act. The Court further states that the Act permits an ALEC to obtain the ability to provide telecommunications services entirely through the unbundled access provisions in subsection 251(c)(3). (TR 258-259)

Staff recommends that the Commission reject BellSouth's cost proposal which involves: 1) breaking apart the loop/port combination currently serving an existing BellSouth customer; 2) requiring AT&T or MCI to put the loop and port back together; and 3) forcing AT&T or MCI to set up a collocation space in order to provide service via UNEs. Staff's rationale is threefold. First, BellSouth's proposal appears to be a breach of the Agreements; second, BellSouth's proposal appears to be inconsistent with the Eighth Circuit Court's interpretation of subsection 251(c)(3) of the Act; and third, staff does not believe that BellSouth's collocation proposal addresses the issue at hand which is specifically the migration of an existing BellSouth customer.

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III. Development Of Nonrecurring Charges For The Migration Of An Existing BellSouth Customer Without Loop/Port Separation

MCIm's and AT&T's proposed cost components for each of the loop/port combinations at issue in this proceeding are shown in Tables A8-1, A8-2, A8-3, and B8-1. Staff would note that the proposed NRCs shown below each of these tables have been calculated using the same formula as proposed by MCIm and AT&T. (EXH 5, TAH-1,-2,-3, pp.1-3 and EXH 6, pp.104-106 (TAH-4a); EXH 12, RJW-1, pp.1-4). Specifically, the NRCs have been calculated by adding 1) the installation worktime multiplied by the labor rate and 2) the disconnect worktime multiplied by the labor rate, multiplied by the disconnect discount factor.

A. MCIm's Proposal: Until the Commission determines the appropriate NRCs for the loop/port combinations for the migration of an existing BellSouth customer, MCIm asserts in its Petition that:

the nonrecurring charges will be determined by merely adding together these two stand alone rates...the nonrecurring charges for performing this function should certainly be no more than \$1.49, and MCIm contends that it should be less.⁴ (Document No. 08754, pp.7-9)

Actually, witness Hyde has filed cost studies for MCIm based on the assumption that "soft dial tone using dedicated inside plant and dedicated outside plant (DIP/DOP) was deployed in the BellSouth network and that BellSouth would not disconnect the loop and port before furnishing the UNEs to MCIm." (TR 87)

With respect to MCIm's proposed NRCs for all the loop/port combinations, MCIm's witness Hyde states that page 1 of his Exhibits TAH-1, 2, 3, and 4a mirror what BellSouth filed in Georgia, except that he removed the unnecessary functions and

⁴BellSouth currently charges \$1.49 to perform a PIC (Presubscribed Interexchange Carrier) change. A PIC change is the process by which telecommunications end users switch long distance providers. MCIm believes the functions necessary to migrate a loop and port combination are essentially the same as performing a PIC change.

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reduced BellSouth's proposed fallout rate from 20 percent to 3 percent. (EXH 6, pp.69-73)

Fallout Resolution (LCSC JFC 2300)

MCI witness Hyde assumes there will be fallout resolution costs associated with the local carrier service center (LCSC), job function code (JFC) 2300. This center serves as the customer point of contact where orders containing errors are resolved. (EXH 6, p.31) MCI proposes a LCSC installation worktime of 0.0075 hours based on 3 percent of the orders falling out during the provisioning process. MCI further assumes that each fallout condition takes 15 minutes on average to resolve. MCI only assigns LCSC installation worktimes to the initial combined loop/port. (EXH 5, p.1 of TAH-1, 2, 3, and EXH 6, p.104 (TAH-4a)) Witness Hyde states that fallout resolution worktime should be only applied to the first, not additional, loop/port combinations, because BellSouth assumes fallout resolution on a per order, not per loop/port combination basis. (EXH 6, pp.76-77) He further states that he proposes a 3 percent fallout rate because BellSouth witness Stacy indicated, in the Georgia proceeding, that this is what BellSouth currently experiences. (EXH 6, pp.82-83; TR 87) However, while witness Stacy indicates that "BellSouth has achieved a flow-through rate of approximately 97%," (EXH 6, p.194) witness Stacy continues with:

...in certain exchanges for retail residential services, although many other exchanges are significantly lower. This rate has been achieved after approximately 15 years of effort in designing, and re-designing the network and OSS supporting provisioning. ...BellSouth's experience with UNEs is less than 2 years old to date, despite significant investments in OSS, man-years of effort by subject matter experts, and several trials with facility based CLECs, the current flow-through rate for UNEs is still 0%! ...There is simply no reason to anticipate that flow through will exceed 80% in the foreseeable future. (EXH 6, pp.194-195)

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In another example, Witness Hyde notes that Southwestern Bell currently experiences a flow-through rate of 99 percent via its EASE provisioning system. When asked if this rate corresponds to resale or UNEs, his understanding is that it relates to resale and that Southwestern Bell has indicated that it expects to achieve this rate for UNE provisioning as well. (EXH 6, pp.83-93) In addition, witness Hyde points out that the President of the United States Telephone Association, Mr. Roy Neel, in the En Banc on State of Local Competition before the Federal Communications Commission on January 29, 1998, stated:

[b]ut you look in BellSouth alone, there is 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. (TR 97)

However, the record does not reflect whether or not this flow-through rate applies to resale or UNEs.

Recent Change Line Translations (RCMAG JFC 4N1X)

MCIm also assumes recent-change translation. A recent-change translation process for a loop and port combination simply involves notifying the switch that an ALEC is now the carrier for billing purposes. (EXH 17, pp.92-94) The costs for this activity are booked to JFC 4N1X. (EXH 5, p.1 of TAH-1, 2, 3 and EXH 6, p.104 (TAH-4a)) Witness Hyde states that the recent-change translation job function would have to be manually performed today. (EXH 6, pp.29-30) However, he further states that:

...there's no reason to believe that could not be mechanically handled as well. In a going-forward environment, it should be. As a matter of fact, within ESSX and certain other functions, BellSouth gives that capability to ESSX customers to allow direct interface to recent-change translations in order to change features. (EXH 6, p.30)

Staff would point out that in cases not involving designed services (e.g., Integrated Services Digital Network (ISDN) and Digital Signal 1.544 Mbps (DS1) applications), where fallout does

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not occur, and when electronic recent-change translation is available, the time to migrate an existing BellSouth customer to an ALEC, i.e., changing the presubscribed local carrier (PLC) code, should be equal to the time it takes BellSouth to migrate a customer to an IXC, i.e., changing the PIC code.

Designed Services

MCIm's witness Hyde states that charges for ISDN and DS1 loop/port combinations are higher than 2-wire and 4-wire analog loop/port combinations because these applications involve designed services (i.e., Circuit Provisioning Group (CPG), Account Customer Advocate Center (ACAC), and Special Services Installation and Maintenance (SSIM)), where BellSouth provides not only dialtone as in plain old telephone service (POTS), but also data transmission capability. (EXH 6, p.32)

Table A8-1: MCIm's Proposed Worktimes For 2-Wire and 4-Wire Analog Loop/Port

FUNCTION	JFC	Installation First/Add'l (Hours)		Disconnect First/Add'l (Hours)		Direct Labor Rate	Disconnect Discount Factor
LCSC	2300	0.0075	0.0000	0.0000	0.0000	\$42.09	N/A
RCMAG	4N1X	0.0250	0.0250	0.0125	0.0125	\$37.34	0.9133(2-W) 0.8350(4-W)

Source: Witness Hyde's Exhibit TAH-1, p.1 (Issue 8a); Witness Hyde's Exhibit TAH-2, p.1 (Issue 8c)

MCIm's proposed NRCs for the first/additional 2-wire analog loop/port combination are \$1.6755 and \$1.3598, respectively. (EXH 5, p.1 of TAH-1) MCIm's proposed NRCs for the first/additional 4-wire analog loop/port combination are \$1.6389 and \$1.3232, respectively. (EXH 5, p.1 of TAH-2)

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Table A8-2: MCI's Proposed Worktimes For 2-Wire ISDN Loop/Port Combination

FUNCTION	JFC	Installation First/Add'l (Hours)		Disconnect First/Add'l (Hours)		Direct Labor Rate	Disconnect Discount Factor
LCSC	2300	0.0075	0.0000	0.0000	0.0000	\$42.09	N/A
RCMAG	4N1X	0.0667	0.0667	0.0333	0.0333	\$37.34	0.8248

Source: Witness Hyde's Exhibit TAH-3, p.1 (Issue 8b)

MCI's proposed NRCs for the 2-wire ISDN first/additional loop/port combination are \$3.8319 and \$3.5162, respectively. (EXH 5, p.1 of TAH-3)

Table A8-3: MCI's Proposed Worktimes For 4-Wire DS1 Loop/Port Combination

FUNCTION	JFC	Installation First/Add'l (Hours)		Disconnect First/Add'l (Hours)		Direct Labor Rate	Disconnect Discount Factor
LCSC	2300	0.0075	0.0000	0.0000	0.0000	\$42.09	N/A
CPG	470X	0.0040	0.0000	0.0000	0.0000	\$36.25	N/A
ACAC	471X	0.0019	0.0019	0.0000	0.0000	\$38.26	N/A
SSIM	411X	0.0075	0.0050	0.0000	0.0000	\$42.96	N/A
RCMAG	4N1X	0.0250	0.0250	0.0250	0.0250	\$37.34	0.7675

Source: Witness Hyde's EXH TAH-4a, p.1 (EXH 6, p.104) (Issue 8d)

MCI's proposed NRCs for the first/additional 4-wire DS1 loop/port combination are \$2.5054 and \$1.9374, respectively. (EXH 5, p.104)

B. AT&T's Proposal: AT&T has filed its cost studies based on the recent-change process. (TR 212) According to AT&T witness Falcone, the recent-change process for a loop and port combination simply involves notifying the switch that an ALEC is now the carrier for billing purposes. The switch records the customer's local and access usage data for billing purposes. (EXH 17, pp.92-94) Specifically, AT&T's recent-change process assumes only fallout resolution costs associated with RCMAG job functions

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and assumes that the switch translations are electronically performed. (EXH 17, pp.90-93)

Fallout Resolution (LCSC JFC 2300) and Recent Change Line Translations (RCMAG JFC 4N1X)

The LCSC, JFC 2300, is the customer point of contact where manual exchange of information would take place. The RCMAG, on the other hand, is a separate group that is in charge of the information that is required to provision a service in a switch. (EXH 11, p.49) AT&T witness Walsh proposes zero LCSC installation worktime because a recent-change switch translation is all that is required which he believes would be handled by RCMAG. (EXH 12, pp.1-4) AT&T witness Walsh states that AT&T's Non-Recurring Cost Model (NRCM) assumes an efficient OSS with 98 percent of the fallout being electronically handled by the Provisioning Analyst Work Station ("PAWS"), or a similar OSS, involving only processing time. The remaining 2 percent would require manual assistance by BST's RCMAG to deliver recent change translation information to the switch. (TR 196-211) The LCSC (JFC 2300) and the Connect & Test (JFC 2730) functions are not required with electronic ordering, and witness Walsh estimates no more than seventeen and a half minutes on average are required for the RCMAG to resolve fallout conditions. (EXH 11, pp.39-40) Witness Walsh further states that cross-audits performed as a "regular general maintenance routine" can totally avoid synchronization problems that lead to fallout. The costs of such audits would be captured in recurring rates. (EXH 11, pp.44-46) Witness Walsh believes that fallout in the LCSC can be automatically returned to the CLEC. (EXH 11, p.74) Although he states the LCSC is not required, he mentions that BST's LCSC group might occasionally call the ALEC in an effort to manually resolve a problem. (EXH 11, p.50) In this case, AT&T would assign fallout resolution cost only to the initial combined loop/port because AT&T views the entire ordering process as one order. (EXH 11, p.78) For example, while an order might consist of six lines which would involve six internal processes, AT&T would assign the worktime only to the initial line. (EXH 11, pp.78-79)

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Table B8-1: AT&T's Proposed Worktimes For All Of The Loop/Port Combinations At Issue In This Proceeding

FUNCTION	JFC	Installation First/Add'l (Hours)		Disconnect First/Add'l (Hours)		Direct Labor Rate	Disconnect Discount Factor
RCMAG	4N1X	0.0057	0.0000	0.0000	0.0000	\$33.27	N/A

Source: Witness Walsh's Rebuttal Exhibit RJW-1 (Issues 8a through 8d)

Based on a 2 percent fallout rate, a fallout resolution time of 17 minutes, and a 10.4 percent overhead, AT&T's proposed NRCs for all the first/additional loop/port combinations are \$0.2081 and \$0.0000, respectively. (EXH 12, p.1 of RJW-1) However, witness Walsh proposes a fallout resolution time of 17.5 minutes, not 17 minutes. (EXH 11, pp.40-41) Therefore, staff has made the correction and the resulting NRC for the first loop/port combination, with overhead, should be \$0.2143, not \$0.2081.

C. BellSouth's Proposal:

With respect to the issue at hand, staff repeatedly tried to obtain the necessary information from BellSouth in order to determine the appropriate NRCs for the migration of an existing BellSouth customer. Finally, BellSouth witness Caldwell identified which work center activities (i.e., LCSC/ACAC for the port and LCSC, Network Services, and RCMAG for the loop) would be necessary under the assumption that the migration of an existing BellSouth customer to either MCIm or AT&T can be accomplished without separating the loop/port combinations at issue in this proceeding. (EXH 37, pp. 6-7) While BellSouth witness Caldwell did provide estimated values for these cost components (EXH 37, pp.6-19), staff would note that BellSouth did not actually develop nonrecurring costs from a migration standpoint for each of the loop/port combinations at issue in this proceeding. As discussed in Section II, BellSouth's nonrecurring cost development involves breaking apart the loop/port combination, requiring recombination and collocation. When asked to make a cost comparison of the loop/port ordered individually versus in combination, witness Caldwell responded the only cost savings is a reduction in the ACAC worktime. (EXH 36, pp.12-13)

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Turn-up (ACAC JFC 471X)/Fallout Resolution (LCSC JFC 2300)

The work activities associated with the ACAC are the coordination of the service turn-up and the turn-up testing. (EXH 36, p.11) According to witness Caldwell's Exhibit DDC-1, BellSouth's proposed fallout resolution costs are based on a fallout rate of 20 percent, with a fallout resolution time of 15 minutes. (EXH 35, pp.1-31)

IV. Staff's Recommended Nonrecurring Charges For The Migration Of An Existing BellSouth Customer Without Loop/Port Separation.

Based on the record evidence, staff believes that the loop/port combinations at issue in this proceeding should be priced at UNE rates by identifying the duplicate and unnecessary charges to be eliminated when applying the pricing standards recommended in Issues 2 and 4. Staff would note that all parties agreed to the wording of Issue 8, which specifically addresses the question--What is the appropriate nonrecurring charge for each of the loop/port combinations for the migration of an existing BellSouth customer?

Staff believes that MCIm and AT&T are requesting the migration of the loop and port that are serving an existing BellSouth customer. When AT&T or MCIm wins the customer, it wants the loop and port that is currently serving the BellSouth customer "as is." AT&T (TR 195) and MCIm (EXH 6, p.15) state that migration involves migrating a customer from one local provider to another, and they believe the NRC for each loop/port combination should be priced at the cost-based UNE rate that will be determined by this Commission. (Order No. PSC-98-0368-PHO-TP, p.9) However, BellSouth's witness Varner states that "there really is no such thing as migration of a loop and port..." (EXH 24, p.14) Typically, migration is moving the customer from one carrier to another carrier. It is synonymous with switch "as is," and, therefore, the NRCs for the loop/port combination should be priced at the resale rate. (EXH 24, pp.14-18) A switch "as is" pertains only to a resale environment. (Varner TR 400) Nonetheless, when BellSouth's subject matter experts (SMEs) were questioned concerning whether or not BellSouth's cost study addresses the issue of migration in the context of this

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proceeding, all 13 SMEs said that the "BellSouth cost study did not address migration." (EXH 20, pp.17-47)

BellSouth had the opportunity to refute AT&T/MCIm's cost components based on the migration of an existing BellSouth customer. Staff believes BellSouth has not done so. Witness Caldwell provided worktime estimations under the assumption that:

the Commission decides that the migration of an existing BellSouth customer to either MCIm or AT&T can be accomplished by means of network elements already combined in the BellSouth network--that is to say the loop and port combinations at issue in this proceeding--and at element prices without physical separation. (EXH 37, pp.6-19)

MCIm's NRCs are based on today's environment, whereas AT&T's are based on a totally forward-looking approach. (EXH 6, p.86) All of AT&T's proposed NRCs are the same. However, MCIm's witness Hyde states that the NRCs for ISDN loop/port combinations should be higher than the analog loop/port combinations because ISDN applications involve added costs associated with designed services. (EXH 6, p.32) Staff agrees with MCIm that charges for the ISDN and DS1 loop/port combinations should be higher than the analog loop/port combinations.

Staff has based its recommended NRCs on today's environment. (EXH 6, p.86) Upon review of the evidence in this case, staff's adjustments to the parties' cost components are based on the following discussion.

Fallout Resolution (LCSC JFC 2300)

Staff believes that BellSouth's and the Petitioners' fallout rates represent the high/low of what is achievable during the life of these agreements. To complicate matters, the majority of the evidence upon which the petitioners rely pertains to resale-based fallout. On the other hand, BellSouth's proposed fallout rate (20%) appears to be based on ordering individual UNEs, rather than combinations. Staff would note that this proceeding is specific to the migration of loop/port combinations in which the elements are already connected. While it is reasonable to

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assume that fallout rates will not improve markedly over the life of these agreements, the crux of the problem is estimating how the fallout rate for the combination orders at issue in this proceeding will compare to the fallout rates for resale and individual UNE orders. Staff believes that the fallout rate for these combination orders will be greater than the fallout rate for resale, but significantly less than the fallout rate for individual UNE orders. This assessment is based on the nature of the provisioning process for resale, individual UNE, and existing combination orders. MCIIm proposed a 3% fallout rate based on BellSouth specific evidence cited earlier in this recommendation which indicates that 3% is the best fallout rate that can be obtained under a resale scenario. BellSouth's proposed fallout rate of 20% appears to be based on an individual UNE scenario. Given the 3-20% range, staff believes a fallout rate of 5% is reasonable for the migration of loop/port combination orders in which the elements are already connected.

The second piece of the fallout issue is how long it takes to clear each downstream fallout condition. There is significant agreement among the parties in that BellSouth and MCIIm both estimate 15 minutes, and AT&T estimates 17 or 17.5 minutes. Consequently, staff believes it is reasonable to assume a fallout resolution time of 15 minutes.

To summarize, staff recommends a 5% fallout rate and a fallout resolution time of 15 minutes, per order. These assumptions are reflected in staff's recommended nonrecurring rates for the loop/port combinations which are shown in Table III-2.

Recent Change Line Translations (RCMAG JFC 4N1X)

The RCMAG is a separate group that is in charge of the information that is required to provision a service in a switch. (EXH 11, p.49) BellSouth (EXH 35, DDC-1, pp.11,13,17,27,29, and 33) and MCIIm (EXH 5, p.1 of TAH-1 and -2, and EXH 6, p.104 (TAH-4a)) propose the same worktimes of 0.0250 for manually performing the switch translations for each loop/port combination. AT&T, on the other hand, does not propose a worktime for performing the actual switch translations because AT&T believes this should be handled electronically. Staff agrees with MCIIm and BellSouth. Therefore, staff recommends that the proposed worktime of 0.0250

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hours for manually performing switch translations is appropriate for all the loop/port combinations, except the 2-wire ISDN loop/port combination. Staff recommends that BellSouth's (EXH 35, DDC-1, pp.15 and 31) and MCIm's (EXH 5, p.1 of TAH-3) proposed worktimes of 0.0667 hours for the 2-wire ISDN loop/port combination are appropriate.

Labor Rates

AT&T proposes the use of fully loaded labor rates which are based on an efficient provider's rates. (EXH 11, p.70) MCIm proposes the use of direct labor rates which are equal to BellSouth's direct labor rates. (EXH 5, p.1 of TAH-1 and -2, and EXH 6, p.104 (TAH-4a); EXH 35, DDC-1) Staff recommends that the Commission approve the use of the direct labor rates in the development of the NRCs for each of the loop/port combinations in this proceeding.

Disconnect Worktimes

AT&T and MCIm both agree that the disconnect should not be charged up front, but should be charged at the actual time of disconnect. (EXH 11, p.17; EXH 6, p.54) Staff recommends that disconnect costs not be included in the development of the NRCs. Eliminating disconnect costs from up-front NRCs is a logical way to relieve some of the burden associated with high start-up costs. ALECs understand and accept that disconnect costs exist, and we believe it is more appropriate to assess those charges at the time the costs are incurred.

Designed Services

MCIm's witness Hyde states that the proposed NRCs for ISDN and DS1 loop/port combinations are higher than 2- and 4-wire analog loop/port combinations because these applications involve designed services, i.e., CPG, ACAC, and SSIM, where BellSouth provides not only dialtone as in POTS, but also data transmission capability. (EXH 6, p.32) Similarly, witness Caldwell states that without switch compatibility, BellSouth would incur additional costs. (EXH 37, p.16-18) Staff agrees with BellSouth and MCIm that there are designed service costs associated with the ISDN/DS1 loop and port combinations. However, as discussed earlier, BellSouth only provided estimated worktimes assuming the

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migration of an existing BellSouth customer can be accomplished by means of the loop and port combinations at issue in this proceeding. Staff would note that AT&T has not proposed designed service costs. (EXH 11, pp.80-82) Therefore, staff believes MCI's proposed designed service worktimes are reasonable and recommends that the Commission approve the use of such worktimes.

Conclusion:

Upon review of the record evidence, staff recommends that the Commission approve the following NRCs for each loop/port combination for the migration of an existing BellSouth customer. Staff believes the following recommended cost components and resulting NRCs are appropriate. Staff would note that the NRCs shown in Table III-2 have been calculated using the same formula proposed by BellSouth, AT&T, and MCI. (EXH 35, DDC-1, pp. 1-33; EXH 12, RJW-1, pp.1-4; EXH 5, TAH-1,-2,-3, pp.1-3 and EXH 6, pp.104-106 (TAH-4a)) Specifically, the NRCs have been calculated by adding 1) the installation worktime multiplied by the labor rate and 2) the disconnect worktime multiplied by the labor rate, multiplied by the disconnect discount factor. Please note that staff's recommended NRCs exclude disconnect costs as discussed earlier in this issue.

Table III-1: Staff's Recommended Cost Components For All Loop/Port Combinations (Note: The highlighted Job Functions only apply to 4-Wire DS1 Loop/Port Combinations)

FUNCTION	JFC	Installation First/Add'l (Hours)		Disconnect First/Add'l (Hours)		Direct Labor Rate	Disconnect Discount Factor
LCSC	2300	0.0125	0.0000	0.0000	0.0000	\$42.09	N/A
RCMAG ¹	4N1X	0.0250	0.0250	0.0000	0.0000	\$37.34	N/A
ACAC	471X	0.0019	0.0019	0.0000	0.0000	\$38.26	N/A
CPG	470X	0.0040	0.0000	0.0000	0.0000	\$36.25	N/A
SSIM	411X	0.0075	0.0050	0.0000	0.0000	\$42.96	N/A

¹Staff's recommended worktime for the 2-wire ISDN loop/port combination is 0.0667, as proposed by both BellSouth (EXH 35, DDC-1, pp.15 and 31) and MCI. (Witness Hyde's EXH 5, Exhibit TAH-3)

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TABLE III-2: MCI's, AT&T's, And Staff's Recommended Nonrecurring Charge For Each Loop/Port Combination Based On The Migration Of An Existing BellSouth Customer

Network Elements	First			Additional		
	MCI	AT&T	STAFF	MCI	AT&T	STAFF
2-wire analog loop/port	\$1.6755	\$0.2143	\$1.4596	\$1.3598	\$0.0000	\$0.9335
2-wire ISDN loop/port	\$3.8319	\$0.2143	\$3.0167	\$3.5162	\$0.0000	\$2.4906
4-wire analog loop/port	\$1.6389	\$0.2143	\$1.4596	\$1.3232	\$0.0000	\$0.9335
4-wire DS1 loop/port	\$2.5054	\$0.2143	\$1.9995	\$1.9374	\$0.0000	\$1.2210

Staff would note that BellSouth's proposed NRCs for loop/port combinations are based on the disconnection and subsequent reconnection of the elements through use of the collocation space. As discussed earlier in this issue, staff believes BellSouth's approach is in direct conflict with the terms of the Agreements and the Eighth Circuit Court's decision. Hence, staff has not included BellSouth's proposed NRCs in the above rate comparisons.

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ISSUE 9: Does the BellSouth-MCIIm interconnection agreement require BellSouth to record and provide MCIIm with the switched access usage data necessary to bill interexchange carriers when MCIIm provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements?

RECOMMENDATION: Staff recommends that the Commission find that BellSouth is required under the terms of its interconnection agreement with MCIIm to record and provide MCIIm with switched access usage data necessary for MCIIm to bill IXCs when MCIIm provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements.

POSITIONS OF PARTIES:

BellSouth:

The BellSouth-MCIIm Interconnection Agreement requires BellSouth to record all billable usage events and send the appropriate recording data to MCIIm. This does not include intrastate interLATA data.

AT&T:

No position.

MCIIm:

Yes. BellSouth is required to record the usage data and send it to MCIIm in the appropriate format.

STAFF ANALYSIS:

MCIIm

MCIIm argues that the agreement in plain language specifically requires BellSouth to provide switched access usage data to MCI. (MCIIm BR 45) MCIIm witness Parker testifies that Section 4.1.1.3 of Attachment VIII requires BellSouth to provide

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recorded usage data on all completed calls. (TR 25) Section 4 of attachment VIII is entitled Provision of Subscriber Usage Data. Section 4.1.1.3 provides that:

BellSouth shall provide MCIIm with copies of detail usage on MCIIm accounts. However, following execution of this Agreement, MCIIm, may submit and BellSouth will accept a PON for a time and cost estimate for development by BellSouth of the capability to provide copies of other detail usage records for completed calls originating from lines purchased by MCIIm for resale. Recorded usage data includes, but is not limited to, the following categories of information:

Completed Calls

Use of CLASS/LASS/Custom Features (under circumstances where BellSouth records activations for its own end user billing)
Calls to Information Providers Reached Via BellSouth Facilities and Contracted by BellSouth
Calls to Directory Assistance Where BellSouth Provides Such Service to an MCIIm Subscriber
Calls Completed Via BellSouth-Provided Operator Services Where BellSouth Provides Such Service to MCIIm's Local Service Subscriber and Usage is Billed to an MCIIm Account.

For BellSouth-Provided MULTISERV Service, Station Level Detail Records Shall Include Completed Call Detail and Complete Timing Information Where Technically Feasible.

Witness Parker also testifies that Section 7.2.1.9 provides that the usage data required includes all data, and, particularly, switched access usage information, which MCIIm needs to bill interexchange carriers (IXCs) for originating and terminating switched access charges. Id. MCIIm argues that BellSouth witness Hendrix acknowledges that the agreement requires BellSouth to provide MCIIm data on all completed calls (EXH 26 p53, MCIIm BR 45)

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Section 7 is entitled Local Switching. Section 7.2.1.9 provides that:

BellSouth shall record all billable events, involving usage of the element, and send the appropriate recording data to MCI as outlined in Attachment VIII.

MCI argues that the requirement to provide usage data is derived from the Act's definition of network element at Section 3(a)(2)(45) to include "information sufficient for billing and collection." (MCI BR 45)

MCI witness Martinez notes that Section 7.1.1 of Attachment III provides that local switching:

shall include all 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) [and] routing local, intraLATA, interLATA, calls to international subscriber's preferred carrier, call features (e.g., call forwarding) and Centrex capabilities.

(TR 798) He also notes that Section 2.6 of Attachment III provides that MCI may use the local switch to provide any feature, function or capability, or service within the capacity of a network element or network elements. Id. MCI argues that when it 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. (MCI BR 46)

MCI argues that the provisioning of a combination of UNEs is a separate consideration from the pricing standard for the combination. It maintains that when it orders combinations of network elements, BellSouth must provision the combinations ordered regardless of the pricing standard applied. (MCI BR 46-47) MCI argues that BellSouth witness Hendrix acknowledges that, pursuant to Section 7.1.1, with local switching MCI may route local, intraLATA and interLATA calls. (MCI BR 48, TR 656)

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MCIm also argues that BellSouth wrongfully maintains that it is entitled to continue billing intrastate interLATA switched access charges when MCIm provides service through UNE combinations that replicates retail service. (MCIm BR 48-49) MCIm argues that with local switching it acquires the capability to provide switched access service for the price for local switching set forth in Part IV of the agreement. (MCIm BR 50) For that reason, witness Martinez argues that it is wrong for BellSouth to retain switched access for itself, requiring MCIm to effectively pay twice for the same switching capability. (TR 798) He rejects BellSouth witness Varner's contention that to supply intrastate interLATA usage data is inappropriate as a distortion of the language in Section 7.2.1.9. (TR 797)

MCIm argues further that Section 1 of Attachment III requires BellSouth to provide MCIm with UNEs in accordance with FCC rules and regulations. (MCIm BR 48) Witness Gillan testifies that the FCC considers that the roles of local service provider and access provider "go hand-in-hand." (TR 280) He notes that in FCC 96-325, CC Docket No. 96-98, at ¶356, the FCC concluded 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.

He also points to 47 C.F.R. §51.307(c) and §51.309(a) and (b) in support of his contention that unbundled access provides AT&T, not BellSouth, with the right to offer switched access. (TR 278-279) He further notes that in its September 27, 1996, Order on Reconsideration in that docket, FCC 96-394, the FCC determined at ¶11 that:

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

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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.

(TR 281) He argues that BellSouth's position that it may retain intrastate interLATA access would wrongly define the switch element as providing an entrant with only the functionality to provide some, not all, services to end users. That position, he maintains, is indefensible. (TR 281-82)

BellSouth

BellSouth witness Hendrix testifies that under Section 7.2.1.9 of Attachment III of the agreement, BellSouth is required to "record all billable events involving usage of the element, and send the appropriate recording data to MCIm as outlined in Attachment VIII." He states that interstate access records will be transmitted to MCIm via the Access Daily Usage File (ADUF). (TR 632)

Witness Hendrix testifies, further that, pursuant to Section 7.2.1.15 of Attachment III, MCIm may only offer features within the capability of the switch that BellSouth offers to itself or to another party. (TR 655) He agrees, however, that MCIm has the ability with local switching to route local intraLATA and interLATA calls. (TR 656)

He also testifies that, pursuant to Section 7.2.1.9, BellSouth will provide usage data to MCIm that will enable MCIm to bill its end users. (TR 658) Since BellSouth claims it retains intrastate interLATA access, however, such calls, he asserts, are not "billable events" for MCIm with respect to its end users, and therefore it is not appropriate for BellSouth to supply usage data for them. (TR 656-57) Witness Hendrix agrees that no language in the agreement requires that the parties treat interstate access and intrastate interLATA access differently, but he argues there is no language that would preclude different treatment either. (EXH 26 p52-53) BellSouth argues that Section 7.2.1.9, which requires BellSouth to record all billable events and send the appropriate data to MCIm, does not obligate it to provide intrastate interLATA usage data.

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Concerning switched access, BellSouth witness Varner testifies that:

Whereas the FCC has determined that interstate access is to be billed by the ALEC when the ALEC provides service to its customers using BellSouth's unbundled elements, this Commission has not made a similar determination on intrastate, interLATA access ... Since the FCC has chosen to eliminate access charges for these services, a source of contribution to support intrastate rates has been removed. Consequently, this Commission should consider what action should be taken to offset any loss of contribution previously provided by interstate access charges.

(TR 402-03). He acknowledges, however, that he cannot be certain that this has happened and he is merely suggesting to the Commission that it ought to inquire into whether the FCC's decision has caused such a problem for the states. (EXH 24 p117) BellSouth states that access charges are a significant source of Universal Service Support and the question, therefore, of whether ALECs purchasing unbundled local switching may bill for intrastate interLATA access is not one to be properly decided in this proceeding. (BellSouth BR 40)

Witness Varner asserts, moreover, that, when MCI orders local service through "switch as is," it is offering service resale and BellSouth will, accordingly, continue to bill the applicable access charges. In that case, he maintains, it is not necessary to provide usage data to MCI. (TR 403)

Finally, BellSouth observes that Section 4.1.1.2 of Attachment VIII of the agreement requires it to "provide MCI with Recorded Usage Data in accordance with provisions of Section 4." (BellSouth BR 41) Section 4 is entitled Provision of Subscriber Usage Data. BellSouth argues that Section 4 obligates it only to provide "billable" usage data and that, only in the context of resale. (BellSouth BR 42) For support, it cites Section 4.2.1.1, which provides that:

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BellSouth shall provide MCIIm with unrated [Exchange Message Record System] records associated with all billable intraLATA toll and local usage which they record on lines purchased by MCIIm for resale.

(BellSouth BR 42)

Conclusion

BellSouth's position that it is not obligated to provide MCIIm with usage data for intrastate interLATA calls rests on its contention that the service MCIIm provides when provisioned with a BellSouth loop-port combination replicates an existing BellSouth retail service. Under service resale, BellSouth is entitled to bill access charges; MCIIm does not acquire the functionality of BellSouth's switch. Hence, in that context, a case can be made that BellSouth need not supply MCIIm with usage data for intrastate interLATA calls pursuant to Section 7.2.1.9 of Attachment III. Such calls would not be "billable events" to its end users for MCIIm.

Staff disagrees, however, with BellSouth that in providing service by means of unbundled loops and switch ports, MCIIm replicates an existing BellSouth service. (See analysis in Issue 7.) Here, staff notes that with the acquisition of local switching through the purchase of an unbundled switch port, the record supports that MCIIm gains the right to provide all features, functions, and capabilities technically feasible within the switch, including exchange access service. 47 C.F.R. §51.319(c); Act, §3(a)(2)(45). In addition, staff notes that BellSouth must provide MCIIm, as a requesting carrier, with access to any unbundled network element in a manner that allows MCIIm to provide any telecommunications service that can be offered by means of that network element, 47 C.F.R. §51.307(c), and that BellSouth may not impose limitations, restrictions, or requirements on requests for, or for the use of, unbundled network elements that would impair the ability of MCIIm to offer a telecommunications service in the manner that MCIIm intends, 47 C.F.R. §51.309(a); Act, §251(c)(3). Accordingly, staff recommends that the Commission find that BellSouth is required under the terms of its interconnection agreement with MCIIm to record and provide MCIIm with switched access usage data necessary

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for MCIIm to bill IXCs when MCIIm provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements.

Section 7.2.1.9 of Attachment III quite plainly provides that:

BellSouth shall record all billable events, involving the usage of the element, and send the appropriate recording data to MCIIm as outlined in Attachment VIII.

Section 4.1.1.3 of Attachment VIII provides that BellSouth shall supply MCIIm with recorded usage data for "completed calls." No language in the agreement sets apart intrastate interLATA calls from "completed calls." Staff believes that BellSouth's argument that it is required by Section 4 of Attachment VIII only to supply MCIIm with billable usage data in a resale context is unsustainable. Section 4 sets forth requirements generally for the provision of subscriber usage data. Section 4.2.1.1, on which BellSouth relies, speaks only of billable intraLATA toll and local usage in the context of resale.

With respect to BellSouth's obligation to provide usage data for all billable events, staff believes that the pertinent language of the agreement is plain and unambiguous. Again, because it is so, it is the Commission's task merely to determine what intent the language expresses.

Staff recommends, therefore, that the Commission should find that BellSouth is required under the terms of its interconnection agreement with MCIIm to record and provide MCIIm with switched access usage data necessary for MCIIm to bill IXCs when MCIIm provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements.

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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?

RECOMMENDATION: Staff recommends that the Commission find that BellSouth is required under the terms of its interconnection agreement with AT&T to record and provide AT&T with switched access usage data necessary for AT&T to bill IXCs when AT&T provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements.

POSITIONS OF PARTIES

BellSouth:

The BellSouth-AT&T Interconnection Agreement requires that BellSouth record all billable usage events and send the appropriate recording data to AT&T. This does not include intrastate interLATA data.

AT&T:

The Interconnection Agreement clearly requires BellSouth to provide the data needed by AT&T to appropriately bill its customers.

MCI:

No position.

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STAFF ANALYSIS:

AT&T

AT&T witness Eppsteiner testifies that Attachment 7 of AT&T's agreement with BellSouth sets forth BellSouth's obligation to provide usage data for switched access service. (TR 159) He testifies that Section 2.1 provides that:

BellSouth shall provide AT&T with Recorded Usage Data in accordance with this Attachment 7.

Id. He testifies further that Section 3.1 provides that:

BellSouth will record all usage originating from AT&T customers using BellSouth-provided Elements or Local services. Recorded Usage Data includes, but is not limited to, the following categories of information:

Completed Calls
Use of Feature Activations for Call Return, Repeat Dialing, and Usage Sensitive Three Way
Rated Calls to Information Providers Reached Via BellSouth Facilities
Calls to Directory Assistance Where BellSouth Provides Such Service to an AT&T Subscriber
Calls Completed Via BellSouth-Provided Operator Services Where BellSouth Provides Such Service to AT&T's Local Service Customer originating from AT&T's customer or billed to AT&T
For BellSouth-Provided Centrex Service, Station Level Detail Records Shall Include Completed Call Detail and Complete Timing Information

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Id. Witness Eppsteiner testifies that the language of the agreement was crafted broadly enough to include interstate and intrastate access service, local exchange service and long-distance service. Id.

Witness Eppsteiner testifies that BellSouth has not provided correct usage data for test calls made by AT&T customers. He testifies that BellSouth has neither provided usage data for interstate access services, nor for switching minutes of use. (TR 160, EXH 8 p37)

AT&T relies also on the testimony of witness Gillan, which is discussed above in detail in Issue 9.

BellSouth

BellSouth argues that AT&T witness Eppsteiner does not identify any language in the AT&T-BellSouth interconnection agreement that would obligate BellSouth to provide intrastate interLATA usage data when AT&T is purchasing unbundled local switching from BellSouth. (EXH 26 p52; BellSouth BR 42) BellSouth argues further, as discussed in more detail in Issue 9, that, because the Commission has not ruled that a ALEC purchasing unbundled local switching is entitled to bill for intrastate interLATA access, BellSouth will continue to bill the applicable charges on intrastate interLATA calls. (BellSouth BR 43) It argues also that there is no need for it to furnish intrastate interLATA usage data to AT&T. Id.

Conclusion

As in Issue 9, BellSouth's position that it is not obligated to provide AT&T with usage data for intrastate interLATA calls rests on its contention that the service AT&T provides when provisioned with a BellSouth loop-port combination replicates an existing BellSouth retail service. Under service resale, BellSouth is entitled to bill access charges; AT&T does not acquire the functionality of BellSouth's switch. Hence, in that context, a case can be made that, BellSouth need not supply AT&T with usage data for intrastate interLATA calls pursuant to Sections 2.1 and 3.1 of Attachment 7. Such calls would not be "billable events" to its end users for AT&T.

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Staff disagrees, however, with BellSouth that in providing service by means of unbundled loops and switch ports, AT&T replicates an existing BellSouth service. (See analysis in Issue 7.) Here, staff notes, as for MCIm, that the record shows that, with the acquisition of local switching through the purchase of an unbundled switch port, AT&T gains the right to provide all features, functions, and capabilities technically feasible within the switch, including exchange access service. 47 C.F.R. §51.319(c); Act, §3(a)(2)(45). In addition, staff notes that BellSouth must provide AT&T, as a requesting carrier, with access to any unbundled network element in a manner that allows AT&T to provide any telecommunications service that can be offered by means of that network element, 47 C.F.R. §51.307(c), and that BellSouth may not impose limitations, restrictions, or requirements on requests for, or for the use of, unbundled network elements that would impair the ability of AT&T to offer a telecommunications service in the manner that AT&T intends, 47 C.F.R. §51.309(a); Act, §251(c)(3). Accordingly, staff recommends that the Commission find that BellSouth is required under the terms of its interconnection agreement with AT&T to record and provide AT&T with switched access usage data necessary for AT&T to bill IXCs when AT&T provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements.

Section 2.1 of Attachment 7 quite plainly provides that:

BellSouth shall provide AT&T with Recorded Usage Data in accordance with this Attachment 7.

Section 3.1 of Attachment 7 provides that BellSouth shall supply AT&T with recorded usage data for "completed calls." No language in the agreement sets apart intrastate interLATA calls from "completed calls."

With respect to BellSouth's obligation to provide usage data for switched access service, staff believes that the pertinent language of the agreement is plain and unambiguous. Again, because it is so, it is the Commission's task merely to determine what intent the language expresses.

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Staff recommends, therefore, that the Commission find that BellSouth is required under the terms of its interconnection agreement with AT&T to record and provide AT&T with switched access usage data necessary for AT&T to bill IXCs when AT&T provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements.

ISSUE 11: Should these dockets be closed?

RECOMMENDATION: No, the parties should be required to submit a final arbitration agreement conforming with the Commission's ultimate determination in this docket for approval within 30 days of issuance of the Commission's order. This docket should remain open pending Commission approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

STAFF ANALYSIS: The parties should be required to submit a final arbitration agreement conforming with the Commission's ultimate determination in this docket for approval within 30 days of issuance of the Commission's order. This docket should remain open pending Commission approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.