



# Public Service Commission

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RECORDS AND REPORTING

**DATE:** AUGUST 19, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF COMMUNICATIONS (KING) ✓  
DIVISION OF LEGAL SERVICES (BEDELL, WATTS) *BCW*

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

**AGENDA:** 08/31/99 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\CMU\WP\971140.RCM

### 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 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 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 MCI metro Access Transmission Services, Inc., (MCI) filed a similar Motion to Compel Compliance. On November 3, 1997,

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BellSouth 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 an Answer and Response on September 17, 1997. By Order No. PSC-97-1303-PCO-TP, issued October 21, 1997, this docket was consolidated with Dockets Nos. 960757-TP, 960833-TP and 960846-TP for purposes of hearing.

At the December 2, 1997, Agenda Conference, the Commission directed that the Motions to Compel Compliance be set for hearing. Accordingly, in Order No. PSC-98-0090-PCO-TP, issued January 14, 1998, Docket No. 971140-TP, now embracing the Motions to Compel Compliance, was severed from Dockets Nos. 960757-TP, 960833-TP and 960846-TP.

On March 9, 1998, an evidentiary hearing was conducted. On June 12, 1998, Order No. PSC-98-0810-FOF-TP was issued that memorialized the Commission's decisions in this docket 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, the non-recurring charges for certain loop and port combinations, and the furnishing of switched access usage data. The parties were required to submit written agreements memorializing and implementing the Commission's decisions within thirty days of the issuance of Order No. PSC-98-0810-FOF-TP.

On June 29, 1998, BellSouth filed its Motion for Reconsideration of Order No. PSC-98-0810-FOF-TP. On September 25, 1998, Order No. PSC-98-1271-FOF-TP was issued granting BST's motion for extension of time to file its interconnection agreement; denying its motion for reconsideration; granting clarification on how prices for combinations is determined; and deleting a statement incorrectly attributed to BST witness Alphonso Varner from Order No. PSC-98-0810-FOF-TP.

In October 1998 the parties stated that they were unable to reach agreement on the content of the amendments to be incorporated in their interconnection agreements. Accordingly, AT&T, MCI, and BST each submitted individual amendments which they believed captured the Commission's decisions.

In January 1999, the United States Supreme Court issued its decision in AT&T Corp. v. Iowa Utilities Bd., 119 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999) [hereinafter AT&T v. Iowa Utilities], which reinstated the FCC's rules on combinations. On

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March 2, 1999, staff met with the parties to discuss what impact, if any, the Supreme Court's ruling may have on the pending amendments to the interconnection agreement. At the conclusion of the March 2, 1999 meeting, staff asked the parties to once again try and reach agreement on language that could be incorporated into the existing interconnection agreements, taking into consideration the Commission's decisions as well as the Supreme Court's opinion. The parties proposed and discussed language in an effort to reach a mutual agreement as to the amendments on combinations of network elements. Unfortunately, the parties were unable to reach agreement, and once again each party submitted separate amendments to be incorporated into the agreements. Since the parties cannot agree on language that incorporates the Commission's decisions into their existing interconnection agreements, these issues are again before this Commission.

Based on Order No. PSC-98-0810-FOF-TP and the current state of the law, staff believes there are only three issues which must be addressed in this recommendation. These issues are:

- what amendments, if any, are necessary to address combinations that recreate a BST retail service;
- what amendments, if any, are necessary to incorporate the non-recurring charges for certain loop and port combinations; and
- what amendments, if any, are necessary to incorporate the Commission's other decisions in Order No. PSC-98-0810-FOF-TP.

Finally, staff would note that the contracts between AT&T-BellSouth and MCI-BellSouth are currently scheduled to expire in less than one year (June 2000). It is possible that the parties will be negotiating (or perhaps arbitrating) a new contract before the Commission's decisions in this docket are resolved. In addition, there is a docketed proceeding (Docket 990649-TP Investigation into Pricing of Unbundled Network Elements) that will address generically some of the issues relating to combinations with a post-hearing order tentatively scheduled to be issued in March 2000.

**DISCUSSION OF ISSUES**

**ISSUE 1:** What amendments, if any, are necessary to address combinations that recreate a BST retail service?

**RECOMMENDATION:** On a going-forward basis, as it relates to the interconnection agreements of AT&T-BST and MCIIm-BST, the prices for UNE combinations, whether or not they are in existence, or whether or not they recreate an existing retail service, should be determined based on the same pricing standard for UNE combinations that do not recreate a retail service. Therefore, staff recommends that the Commission order the parties to incorporate the language proposed by staff in Attachments A and B to this recommendation.  
(KING)

**STAFF ANALYSIS:**

As stated in the Case Background, Docket No. 971140-TP was opened to address a number of issues, primarily concerning the treatment of UNE combinations in AT&T and MCIIm's interconnection agreements with BST. Order No. PSC-98-0810-FOF-TP directed the parties to submit written agreements memorializing and implementing the Commission's decisions. With regard to the MCIIm-BellSouth interconnection agreement, the Commission concluded, among other things, that:

- 1) The prices for combinations of network elements in existence or not shall be determined as the sum of the prices of the individual elements comprising the combination as set forth in the agreement in Table 1 of Attachment I, except when the network elements are combined in a way to recreate an existing BellSouth retail service.
- 2) MCIIm and BellSouth shall negotiate the price for those network element combinations that recreate an existing BellSouth retail service, whether or not in existence at the time of MCIIm's order.
- 3) BST is obligated under the terms of the agreement to furnish switched access usage data to MCIIm when MCIIm provides services using unbundled local switching.
- 4) Non-recurring charges for 2-wire analog loop and port combinations; 2-wire ISDN loop and port combinations; 4-wire analog loop and port combinations; and 4-wire DS1 loop and port

combinations are approved as set forth on pages 67 and 68 of the Order.

- 5) BST and MCI shall negotiate on their initiative what competitive local telecommunications services provisioned by means of unbundled access, if any, constitute the recreation of the incumbent local exchange carrier's retail service.

(PSC-98-0810-FOF-TP, pages 25, 27, 68, and 69)

With regard to the AT&T-BellSouth interconnection agreement, the Commission concluded, among other things, that:

- 1) The agreement provides a pricing standard for combinations of network elements in existence that do not recreate a BellSouth retail service, but requires the parties to negotiate prices for those combinations of network elements not already in existence and for those that recreate a BellSouth retail service, whether in existence or not.
- 2) BST is obligated under the terms of the agreement to furnish switched access usage data to AT&T when AT&T provides services using unbundled local switching.
- 3) Non-recurring charges for 2-wire analog loop and port combinations; 2-wire ISDN loop and port combinations; 4-wire analog loop and port combinations; and 4-wire DS1 loop and port combinations are approved as set forth on pages 67 and 68 of the Order.
- 4) BST and AT&T shall negotiate on their initiative what competitive local telecommunications services provisioned by means of unbundled access, if any, constitute the recreation of the incumbent local exchange carrier's retail service.

(PSC-98-0810-FOF-TP, pages 33, 47, 68, and 69)

To date the parties have not been able to agree on language to be incorporated into their respective interconnection agreements and each party has submitted its own amendments.

**The Commission's Decision**

In Order No. PSC-98-0810-FOF-TP, the Commission determined that the MCI-BST agreement provided a pricing standard for combinations of UNEs that do not recreate an existing BST retail service, and the Commission directed the parties to negotiate prices for those that do recreate an existing BST retail service.

The Commission drew a similar conclusion with regard to the AT&T-BST agreement, that in addition to negotiating prices for those combinations that recreate a BST service, AT&T and BST must also negotiate prices for those combinations of network elements not already in existence.

**Current State of the Law**

Since the Commission's decisions in this docket, the United States Supreme Court issued its opinion in AT&T V. Iowa Utilities. Among other things, the Court reinstated the FCC's rules on combinations and affirmed its rationale. Specifically, the Court stated:

Rule 315(b) forbids an incumbent to separate already-combined network elements before leasing them to a competitor. As they did in the Court of Appeals, the incumbents object to the effect of this rule when it is combined with others before us today. TELRIC allows an entrant to lease network elements based on forward-looking costs, Rule 319 subjects virtually all network elements to the unbundling requirement, and the all-elements rule allows requesting carriers to rely only on the incumbent's network in providing service. When Rule 315 (b) is added to these, a competitor can lease a complete, preassembled network at (allegedly very low) cost-based rates.

The incumbents argue that this result is totally inconsistent with the 1996 Act. They say that it not only eviscerates the distinction between resale and unbundled access, but that it also amounts to Government-sanctioned regulatory arbitrage . . . .

As was the case for the all-elements rule, our remand of 319 may render the incumbents' concern on this score academic. Moreover, section 254 requires that universal service subsidies be phased out, so whatever

possibility of arbitrage remains will be only temporary. In any event, we cannot say that Rule 315(b) unreasonably interprets the statute. . . .

It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the [FCC] to opt in favor of ensuring against an anticompetitive practice.

AT&T Corp. v. Iowa Utilities Bd., 119 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999) (Slip Opinion pages 25-28.)

In summary, while the Court did not use the specific term "recreate," it is staff's belief that the Court's opinion allows an entrant to purchase UNE combinations that recreate retail services at prices based on forward-looking costs.

**PARTIES' PROPOSED AMENDMENTS and STAFF'S ANALYSIS OF THOSE PROPOSALS**

**BST'S PROPOSED AMENDMENTS FOR MCIIm**

On March 22, 1999, BellSouth re-filed its amendments to be included in its current agreement with MCIIm. The amendments proposed by BellSouth are meant to replace existing sections of the interconnection agreement. The proposed amendments follow.

**Attachment 1, Section 8**

Any BellSouth non-recurring and recurring charges shall not include duplicate charges or charges for functions or activities that MCIIm does not need when two or more Network Elements are combined in a single order. BellSouth and MCIIm shall work together to mutually agree upon the total non-recurring and recurring charges(s) to be paid by MCIIm when ordering multiple Network Elements.

**Attachment III, Section 2.4**

The Network elements provided pursuant to this Agreement may be connected to other Network Elements provided by BellSouth or to any Network Element provided by MCI itself or by any other vendor. MCI may purchase unbundled Network Elements at the rates set forth in Attachment I of this Agreement for the purpose of MCI combining such Network Elements, whether those elements are its own or are purchased from BellSouth, in any manner that it chooses to provide service.

**Attachment III, Section 2.6**

BellSouth shall provide the following combined Network Elements for purchase by MCI. The rate of the following combined Network Elements is the sum of the individual element prices as set forth in Attachment I of this Agreement. Order Coordinating is available for each of these combinations at an additional charge.

- SL2 loop and cross connect
- Port and cross connect
- Port and cross connect and common transport
- Port and vertical features
- SL2 loop and loop concentration
- Port and common transport
- SL2 loop and LNP

Staff has evaluated the language proposed by BST based on Order No. PSC-98-0810-FOF-TP and the current state of the law, and believes that BST has gone beyond what is necessary to capture the Commission's decisions in its agreement.

BST proposes deleting Attachment I, Section 8 of the existing agreement, and replacing it with the language shown above. In its order the Commission stated:

We find further that the qualification to pricing UNE combinations that do not recreate an existing BellSouth retail service as the straightforward summation of the individual element prices is set forth in Section 8 of Attachment I of the agreement. 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.



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This language reflects our decision in Order No. PSC-97-0298-FOF-TP at pages 30 through 32 that the parties work together to establish recurring and non-recurring charges free of duplicate charges or charges for unneeded functions or activities when UNEs are combined in a single order. [emphasis added] (PSC-98-0810-FOF-TP, page 26)

Based on the above statements made by this Commission regarding Attachment I, Section 8, staff does not believe BST's proposal to delete the existing language is necessary or appropriate.

With regard to Attachment III, Section 2.4, the Commission stated at page 24 of Order No. PSC-98-0810-FOF-TP that:

. . . BellSouth is required to provide UNE combinations to MCIm 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. . . . Thus, we find upon consideration that BellSouth has undertaken a contractual obligation to provide network elements in combinations to MCIm. BellSouth is required under the agreement to provide MCIm network elements as defined in 47 C.F.R. §51.319 to MCIm individually or combined, whether already combined at the time ordered or not. That obligation is not affected by the Eighth Circuit's nonfinal ruling on rehearing, as witness Varner recognizes.

Again staff does not believe the Order directed any party to draft new language for Section 2.4. Therefore, absent MCIm's explicitly agreeing to it, staff believes BST's proposed language for Section 2.4 is inappropriate.

With regard to Section 2.6 of Attachment III, the Commission noted, on page 24 of PSC-98-0810-FOF-TP:

...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 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)," we find that this language extends only to elements purchased singly or to combinations of network elements that do not recreate an

existing BellSouth retail service. We believe this language is clear and unambiguous but only to this extent. Thus, we construe it as a limited expression of the parties' intent at the time of forming the agreement that prices for network element combinations that do not recreate existing BellSouth retail services shall be determined as the sum of the prices of the component elements. Because this language is plain and unambiguous, it is our task only to determine what intent the language expresses, not to divine another intent that might have been in the minds of MCI's negotiators.

Again, in its Order, the Commission specifically examined this portion of BST-MCI's interconnection agreement and did not require the parties to amend this language in any way. Staff believes the language BST proposes goes beyond anything this Commission has ordered. For example, BST proposes including language regarding the availability of order coordinating at an additional charge; staff cannot find any language in PSC-98-0810-FOF-TP which directed any party to include such language. Accordingly, staff does not believe it is appropriate to delete this section and replace it with the language proposed by BST.

Finally, BST proposed that Section 2.8 of its interconnection agreement, which currently reads "MCI and BellSouth agree that the Network Elements identified in this Attachment are not all possible Network Elements," be deleted in its entirety and replaced with the following language:

BellSouth will abide by any effective final and non-appealable rule of the FCC or state commission that prohibits BellSouth, except upon request, from separating requested Network Elements that are currently combined; provided, however, that the operation of this subsection shall be construed in accordance with decisions of the FCC and any reviewing court in light of the U.S. Supreme Court's decision in AT&T Corp. v. Iowa Utilities Bd., and provided further that this subsection shall apply only to Network Elements that BellSouth is compelled to unbundle by regulatory agencies with jurisdiction, and that any voluntary agreement by BellSouth to make network facilities available shall not expand its obligations to provide MCI Network Elements that currently are combined in BellSouth's network. Any reference to combinations or obligation regarding combinations, within this Agreement shall be governed by this paragraph. The rates, terms

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and conditions regarding the Network Elements provided by BellSouth, including but not limited to the rates for such elements, what combinations of Network Elements are to remain combined and what Network Elements BellSouth is unconditionally required to provide shall be governed by the decisions of the FCC and the 8th Circuit Court of Appeal, upon remand of the AT&T Corp. v. Iowa Utilities Bd. Proceeding ("96-98 Remand Proceeding"). The Parties agree to modify the Agreement to implement any 96-98 Remand Proceeding decision or rules upon receipt of a final and nonappealable decision or rule. Neither Party waives its right to participate in, seek reconsideration of or appeal any such decision rendered as a result of the remand. Further, if as a result of any reconsideration or appeal of any decision, said decisions or rules are modified, vacated or changed, the Parties shall modify the Agreement to comply with such final decision within ninety (90) days of the effective date of such decision or order.

In its Order the Commission did not order the parties to amend or negotiate new language for this section. Staff believes that BST has proposed amendments to Section 2.8 because of the Supreme Court's remand of FCC rule 319. BST states in the cover letter to its March 1999 proposed amendments "BellSouth has agreed with the FCC to continue to make available to CLECs network elements in accordance with existing interconnection agreements pending the FCC's reexamination of Rule 319 in light of the necessary and impair standard." Staff believes based on this statement, the current state of the law, and Order No. PSC-98-0810-FOF-TP, that BST's proposed amendment to Section 2.8 of Attachment III is not necessary and goes beyond what was required by the parties in this docket. Furthermore, Part A, Section 2 of the existing agreement incorporates the specific actions that must be taken by the parties in the event the FCC or a state regulatory body promulgates rules or regulations, or issues orders, which make unlawful any provision in the agreement. In addition, the agreement incorporates provisions in the event that any final and nonappealable legislative, regulatory, judicial or other legal action materially affects any material terms of the agreement. Therefore, it remains unclear to staff what purpose or need is served by BellSouth's proposed amendment.

### **MCIm'S PROPOSED AMENDMENTS**

On March 19, 1999, MCIm filed its amendments to be included in its agreement with BST. The amendments proposed by MCIm are meant to accompany the current provisions in its agreement with BST, not to replace sections of its existing interconnection agreement. The proposed amendment regarding pricing standards for combinations is:

The prices for any combination of Network Elements shall be determined as the sum of the individual elements comprising the combination as set forth in the Agreement in Table 1 of attachment 1. Whether or not a combination of Network Elements is currently offered shall not affect the pricing of the combination. Any BellSouth non-recurring and recurring charges shall not include duplicate charges for functions or activities that MCIm does not need when two or more Network Elements are combined in a single order. Such non-recurring and recurring charges shall be inclusive and no other charges shall apply, including but not limited to any other consideration for connecting any Network Elements with other Network Elements.

MCIm's proposed language appears also to go beyond what is required. Specifically, the inclusion of the sentence that reads "Such non-recurring and recurring charges shall be inclusive and no other charges shall apply, including but not limited to any other consideration for connecting any Network Elements with other Network Elements" goes beyond what the Commission determined in its order. The Commission specifically stated with regard to Section 8 of Attachment I of the agreement that ". . . the parties work together to establish recurring and non-recurring charges free of duplicate charges or charges for unneeded functions or activities when UNEs are combined in a single order." (PSC-98-0810-FOF-TP, page 26)

### **AT&T-BST Agreement**

With regard to the AT&T-BST agreement the Commission concluded that the agreement provides a pricing standard for combinations of network elements in existence that do not recreate a BellSouth retail service, but required the parties to negotiate prices for those combinations of network elements not already in existence and for those that recreate a BellSouth retail service, whether in existence or not. (PSC-98-0810-FOF-TP, p.33) Furthermore, in Order No. PSC-98-1271-FOF-TP the Commission stated:

Our decision specifically provides that the parties must negotiate prices for those combinations of network elements not already in existence that recreate a BellSouth retail service. The statement asserts that the agreement provides a pricing standard, not prices, for those combinations of network elements that recreate a BellSouth retail service. Accordingly, we find that the statements are consistent with our decision in Order No. 98-0810-FOF-TP.

Staff has evaluated the language proposed by BST and AT&T based on the same criteria noted above. While BST and AT&T appear to have some common language, staff believes these amendments go beyond current law and the Commission decisions in Order No. PSC-98-0810-FOF-TP.

#### **BST'S PROPOSED AMENDMENTS<sup>1</sup> FOR AT&T**

On March 22, 1999, BellSouth filed its amendments to be included in its current agreement with AT&T. The amendments proposed by BellSouth are meant to replace existing sections of the interconnection agreement, and BST also has proposed some new sections.

##### **Section IA**

The Services and Elements provided pursuant to this Agreement may be connected to other Services and Elements provided by BellSouth or to any Services and Elements provided by AT&T itself or by any other vendor.

##### **Section IB**

AT&T may purchase unbundled Network Elements for the purpose of combining such Network Elements, whether those elements are its own or are purchased from BellSouth, in any manner that it chooses to provide service. In accordance with Section 9.3 of this Agreement, BellSouth, except upon request, BellSouth shall not separate network elements that BellSouth currently combines. Provided

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<sup>1</sup> Apparently at some time during the negotiation process BST and AT&T discussed AT&T adopting portions of the MCIm agreement (specifically, Attachments I and III). This appears in the language proposed by BST but not that proposed by AT&T. Because it does not appear in both parties' proposed amendments, staff does not believe it should be addressed in this recommendation.

that, the operation of this subsection shall be construed in accordance with decisions of the FCC and any reviewing court in light of the US Supreme Court's decision in AT&T Corp. v. Iowa Utilities Bd., and provided further that this subsection shall apply only to Network Elements that BellSouth is compelled to unbundle by regulatory agencies with jurisdiction, and that any voluntary agreement by BellSouth to make network facilities available shall not expand its obligations to provide AT&T Network Elements that currently are combined in BellSouth's network. Any reference, to combinations or obligation regarding combinations, within this Agreement shall be governed by this paragraph.

The rates, terms and conditions regarding the Network Elements provided by BellSouth, including but not limited to the rates for such elements, what combinations of Network Elements are to remain combined and what Network Elements BellSouth is unconditionally required to provide shall be governed by the decisions of the FCC and the 8th Circuit Court upon remand of the AT&T Corp. v. Iowa Utilities Bd. Proceeding ("96-98 Remand Proceeding"). The Parties agree to modify the Agreement to implement any 96-98 Remand Proceeding decision or rules upon receipt of a final and non-appealable decision or rule. Neither party waives its right to participate in, seek reconsideration of or appeal or any such decision rendered as a result of the remand. Further, if, as a result of any reconsideration or appeal of any decision, said decisions or rules are modified, vacated or changed, the Parties shall modify the Agreement to comply with such final decisions within ninety (90) days of the effective date of such final and nonappealable decision or order.

**Section 30.7 (New)**

It accordance with Section IB of this Agreement, BellSouth shall charge AT&T the rates set forth in Exhibit A when directly interconnecting any Network Element or Combination to any other Network Element or Combination. If BellSouth provides such service to an affiliate of BellSouth, that affiliate shall pay the same charges.

Once again, staff believes BST goes beyond what is needed to be included in its agreement with AT&T. Staff does not believe that the Commission intended that the parties re-write portions of their

existing agreements. It appears that the suggested language in the proposed 1A is part of the existing 1A. Section 1B, an entirely new section, encompasses part of the existing 1A. In addition, 1B goes beyond what was ordered by this Commission to be included in any memorializing language. Staff believes Section 9.3 of the existing AT&T-MCI agreement should take care of any concern BST may have regarding changes in existing law. Furthermore, since Section 30.7 refers to Section 1B and the parties cannot agree on language to be included in 1B, staff believes the Commission should reject this language also.

#### **AT&T's PROPOSED AMENDMENTS**

##### **SECTION 1A**

The Services and Elements provided pursuant to this Agreement may be connected to other Services and Elements provided by BellSouth or to any Services and Elements provided by AT&T itself or by any other vendor.

##### **SECTION 1B**

AT&T may purchase unbundled Network Elements for the purpose of combining such Network Elements, whether those elements are its own or are purchased from BellSouth, in any manner that it chooses to provide service. In accordance with Section 9.3 of this Agreement except upon request, BellSouth shall not separate requested network elements that BellSouth currently combines.

##### **PROPOSED NEW LANGUAGE - NEW SECTION 30.7**

In accordance with Section I B., 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. If BellSouth provides such service to an affiliate of BellSouth, that affiliate shall pay the same charges. When AT&T purchases multiple network elements or combinations of elements, the price AT&T shall pay is the sum of the prices for the network elements included. For the Network Elements and services set forth below, the charges are inclusive and no other charges apply, including but not limited to any other consideration for connecting any Network Elements with other Network Elements.

As is the case with the language proposed by BST, staff believes AT&T goes beyond what the Commission directed it to include in its amended agreement with BST. Furthermore, staff would note that while it appears that the parties have reached agreement on the language to be included in 1A, they actually have not because the proposed Section 1A is meant to replace the current 1A. The language currently in Section 1A has been incorporated in part of the suggested amendment to 1A and 1B. Accordingly, since the parties cannot agree on replacement language for 1B, staff does not believe replacing Section 1A is appropriate. Staff believes that language that goes beyond the Commission's decision is permissible only when both **parties agree** to such language.

#### **STAFF'S CONCLUSION AND RECOMMENDATION**

The Commission determined that the agreements between MCIIm-BST and AT&T-BST did not address the specific issue of when UNEs are recombined to duplicate a retail service. Therefore, the Commission directed the parties to negotiate what the prices for combinations of network elements should be in the case where the combination would recreate an existing retail service<sup>2</sup>. It is staff's belief, that upon mutual agreement and within the scope of the law, the parties could have included any language they believed appropriate regarding the price for UNE combinations that recreate. However, since the parties are at an impasse, staff believes that the language it recommends must comport with the Commission's decisions, as well as the current state of the law.

Staff believes that since the Supreme Court has reinstated the FCC's rules, under those rules and section 251 of the Act, combinations that recreate a retail service should be priced under the same pricing standard as those combinations which do not recreate a retail service.<sup>3</sup> FCC rule 51.315 does not distinguish between combinations that do or do not recreate an existing service. This Commission concluded that the interconnection agreements between AT&T-BST and MCIIm-BST did provide a pricing standard (adding up the individual prices for the network element and then subtracting any duplicate or unnecessary charges) for UNE

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<sup>2</sup>AT&T and BST were also directed to negotiate the prices for those combinations that do not presently exist.

<sup>3</sup> Staff notes that in Order No. PSC-98-0810-FOF-TP the Commission expressed concern that recombining network elements at the simple sum of the UNE prices to recreate a service could undercut the resale provision of the service. However, the Commission has never ruled on that issue, but only expressed its concern.



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combinations that did not recreate an existing BST service. (Order at pages 10 and 33). Therefore, staff believes that on a going-forward basis, as it relates to the interconnection agreements of AT&T-BST and MCI-BST, the prices for UNE combinations, whether or not they are in existence, or whether or not they recreate an existing retail service, should be determined based on the same pricing standard for UNE combinations that do not recreate a retail service. Therefore, staff recommends that the Commission order the parties to incorporate the language proposed by staff in Attachments A and B to this recommendation.

Staff's recommendations take into account the fact that the parties were not able to successfully negotiate this issue. If the parties had been successful in their negotiations or submitted mutually agreed upon language that comported with the Commission's decisions, staff would have recommended approval of such language. However, since the parties could not agree, staff believes it must make its recommendation taking into consideration the current state of the law.

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**ISSUE 2:** What amendments, if any, are necessary to incorporate the non-recurring charges for certain loop and port combinations?

**RECOMMENDATION:** The non-recurring charges approved by the Commission and shown in Table II on page 68 of Order PSC-98-0810-FOF-TP should be incorporated in the MCIIm-BST and AT&T-BST agreements. Accordingly, staff recommends that the Commission order the parties to incorporate the language proposed by staff in Attachments A and B to this recommendation. (KING)

**STAFF ANALYSIS:**

In Order No. PSC-98-0810-FOF-TP, at page 67, the Commission concluded:

Upon review of the evidence in this record, we approve the non-recurring work times and direct labor rates shown in Table I for each loop and port combination in issue in this proceeding for the migration of an existing BellSouth customer to AT&T or MCIIm without unbundling. We furthermore approve the resultant NRCs shown in Table II.

MCI proposed the following language be inserted into their agreement:

Based on the Order issued by the Florida Public Service Commission on June 12, 1998 in Docket No. 971140-TP, the rates for non-recurring charges for the migration of a loop and port combination as ordered are set forth below.

Network Element Combinations	First Installation	Additional Installations
2-wire analog loop and port	\$1.4596	\$0.9335
2-wire ISDN loop and port	\$3.0167	\$2.4906
4-wire analog loop and port	\$1.4596	\$0.9335
4-wire DS1 loop and port	\$1.9995	\$1.2210

The rates in the above table are those rates approved by the Commission and shown in Table II on page 68 of Order PSC-98-0810-FOF-TP. Staff recommends that the Commission approve the language proposed by staff in Attachments A and B for inclusion into the

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MCIm-BST and AT&T-BST agreements<sup>4</sup>. The language proposed by staff in these Attachments is identical to the language proposed by MCIm on this matter.

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<sup>4</sup> The language AT&T proposed in March did not address this issue. After discussion with AT&T, staff has learned that the omission of language regarding this issue was an oversight on the part of AT&T.

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**ISSUE 3:** What further actions are necessary to incorporate the Commission's other decisions in Order PSC-98-0810-FOF-TP?

**RECOMMENDATION:** No further actions are needed. (KING)

**STAFF ANALYSIS:** In addition, to those specific actions discussed in Issues 1 and 2, the Commission also concluded in its order that BST is obligated under the terms of its agreements with MCI and AT&T to furnish switched access usage data when MCI and AT&T provide services using unbundled local switching. To date staff is not aware of any complaints by AT&T or MCI regarding their receiving this information; therefore, staff believes that this matter is no longer at issue.

Further, the Commission ordered the parties to negotiate on their own initiative what competitive local telecommunications services provisioned by means of unbundled access, if any, constitute the recreation of the incumbent local exchange carrier's retail service. In the proposed amendments submitted in October 1998, the parties attempted to capture this provision in their respective proposals; however, the proposed amendments in March did not. Since staff believes, based on the current state of the law, that it does not matter whether or not combining network elements recreates a retail service, we believe it is unnecessary for the parties to fulfill this requirement. Therefore, staff believes that no further action beyond that discussed in Issues 1 and 2 are needed.

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**ISSUE 4:** Should this docket be closed?

**RECOMMENDATION:** No, the parties should be required to submit a final arbitration agreement consistent with the Commission's decisions herein 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.  
(WATTS, BEDELL)

**STAFF ANALYSIS:** The parties should be required to submit a final arbitration agreement consistent with the Commission's decisions herein and Order Nos. PSC-98-0810-FOF-TP and PSC-98-1271-FOF-TP 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.

**ATTACHMENT A**

**STAFF'S PROPOSED AMENDMENTS TO THE MCI<sub>m</sub>-BST AGREEMENT**

- 1) Based on the Order issued by the Florida Public Service Commission on June 12, 1998, in Docket No. 971140-TP, the rates for non-recurring charges for the migration of a loop and port combination as ordered are set forth below. These rates shall be incorporated in Attachment 1, Table 1, of the existing agreement.

Network Element Combinations	First Installation	Additional Installations
2-wire analog loop and port	\$1.4596	\$0.9335
2-wire ISDN loop and port	\$3.0167	\$2.4906
4-wire analog loop and port	\$1.4596	\$0.9335
4-wire DS1 loop and port	\$1.9995	\$1.2210

- 2) Attachment 1, Section 8, of the existing agreement, shall be amended as follows:

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. The prices for combinations of network elements shall be the sum of the individual element prices as set forth in Table 1. 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 include duplicate charges for function or activities that MCI<sub>m</sub> does not need when two or more network elements are combined in a single order. MCI<sub>m</sub> and BellSouth shall work together to establish the recurring and non-recurring charges in situation where MCI<sub>m</sub> is ordering multiple network elements. Where the parties cannot agree to these charges, either party may petition the Florida Public Service Commission to settle the disputed charge or charges. BellSouth must notify the Commission when a rate is set that excludes duplicate charges by filing a report within 30 days of the rate being established. This report must specify the elements being combined and the charges for that particular combination.

**ATTACHMENT B**

**STAFF'S PROPOSED AMENDMENTS TO THE AT&T-BST AGREEMENT**

- 1) Based on the Order issued by the Florida Public Service Commission on June 12, 1998 in Docket No. 971140-TP, the rates for non-recurring charges for the migration of a loop and port combination as ordered are set forth below. These rates shall be incorporated in Part IV, Table 1, of the existing agreement.

Network Element Combinations	First Installation	Additional Installations
2-wire analog loop and port	\$1.4596	\$0.9335
2-wire ISDN loop and port	\$3.0167	\$2.4906
4-wire analog loop and port	\$1.4596	\$0.9335
4-wire DS1 loop and port	\$1.9995	\$1.2210

- 2) Part IV, Section 36.1, of the existing agreement, shall be amended as follows:

The prices for combinations of network elements shall be the sum of the individual element prices as set forth in Part IV, Table 1. 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.