State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: AUGUST 26, 1999

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

FROM: DIVISION OF COMMUNICATIONS (FAVORS, KENNEDY, KING, OLLILA) SAS for CRF RK WL JMO RNT
DIVISION OF LEGAL SERVICES (FORDHAM) c.f. CB

RE: DOCKET NO. 990149-TP - PETITION BY MEDIAONE FLORIDA TELECOMMUNICATIONS, INC. FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: 09/07/99 - 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\990149.RCM

CASE BACKGROUND

On December 1, 1995, the Florida Public Service Commission (FPSC) approved a stipulated agreement between MediaOne Florida Telecommunications, Inc., and BellSouth Telecommunications, Inc., providing for interconnection services between the two companies. That agreement expired on January 1, 1998, but the parties mutually agreed to extend the contract pending finalization of a successor agreement. Negotiations for a successor agreement failed, and on February 9, 1999, MediaOne filed a Petition for Arbitration, seeking the assistance of the FPSC in resolving the remaining issues.

Initially, this docket had thirteen issues to be arbitrated. However at the June 22, 1999 Prehearing Conference, both parties stipulated that issues 1, 6, 8, 9, 10, 11 and 12 had been resolved. Issue 13, filed by MediaOne, raised the following issue: Should the

Florida Public Service Commission arbitrate performance incentive payments and/or liquidated damages for purposes of the MediaOne/BellSouth Interconnection Agreement? If so, what performance incentive payments and/or liquidated damage amounts are appropriate, and in what circumstances? The issue regarding the award of liquidated damages has been raised and denied in other dockets which have been arbitrated by this Commission. Petition of DIECA Communications, Inc. D/b/a Covad Communications Company, Order No. PSC-99-01715-PHO-TP. Based upon prior rulings, the pre-hearing officer found that the FPSC is without jurisdiction to arbitrate issues on damages. Thus, Issue 13 was not arbitrated in this proceeding. Therefore the issues which remain are 2, 3, 4, 5, and 7.

Issues 2 and 3 both concern originating and terminating traffic from internet service providers (ISPs). Specifically, Issue 2 asks if calls that originate from or terminate to ISPs should be defined as "local traffic" for purposes of the MediaOne/BellSouth Interconnection Agreement. Issue 3 deals with the issue of reciprocal compensation arrangements. Because Issues 2 and 3 required similar analysis, these issues are discussed together under Issue 2. This case represents the first time the FPSC is ruling on these types of ISP issues outside the four corners of an existing interconnection agreement[1].

For Issues 2 and 3 there is a primary and alternative recommendation. Staff's primary recommendation is that ISP-bound calls should be defined as local traffic for purposes of the MediaOne/BellSouth interconnection agreement, and that reciprocal compensation should apply for this traffic. Staff alternatively recommends that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on this matter. Staff's analysis on these issues begins on page 5 of this recommendation.

Issue 4 pertains to the appropriate price MediaOne should pay BellSouth for Calling Name ("CNAM") data base queries. Staff recommends that the appropriate price for CNAM is BellSouth's proposed one cent per data base query because staff believes that there is insufficient evidence in the record to conclude that CNAM is a UNE. Thus, CNAM's price is not required to be priced according to the FCC's TELRIC standards. BellSouth is free to propose what it considers to be a market-based price.

[1] The Commission's previous decisions on these ISP matters were limited to interpreting specific language contained in existing agreements.

Issues 5 and 7 each deal with network terminating wire (NTW) in multiple dwelling units (MDU). Issue 5 addresses the appropriate manner for MediaOne to have access to BellSouth's NTW in MDUs. Staff recommends that the appropriate manner for MediaOne to have access to network terminating wire (NTW) in multiple dwelling units is as described in BellSouth's position, modified to provide MediaOne access to the first pair of NTW (unless BellSouth is using the first NTW pair to concurrently service the same MDU), and modified to designate that BellSouth will not permit other ALECs access to the access terminal installed by BellSouth for MediaOne, without MediaOne's approval. The recommendation is discussed in greater detail beginning on page 23.

Finally, Issue 7 concerns what BellSouth should be permitted to charge MediaOne for access to NTW. Staff recommends that the appropriate charges are those shown in Table 7-2, on page 37 of this recommendation.

ISSUE 2: Should calls originated from or terminated to Internet Service Providers ("ISPs") be defined as "local traffic" for purposes of the MediaOne/BellSouth Interconnection Agreement?

PRIMARY RECOMMENDATION: Yes. Calls originated from or terminated to Internet Service Providers ("ISPs") should be defined as "local traffic" for purposes of the MediaOne/BellSouth Interconnection Agreement. Further, staff recommends that these calls be included in the reciprocal compensation arrangements of this Interconnection Agreement unless or until the FCC adopts a final rule which concludes that reciprocal compensation should not apply to this traffic. **(FAVORS)**

ALTERNATIVE RECOMMENDATION: Staff recommends that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is due for this traffic because the FCC has retained jurisdiction over this traffic. It has also issued a Notice of Proposed Rulemaking seeking comments on two alternative proposals to implement a final rule regarding inter-carrier compensation for ISP-bound traffic. The FCC will issue a final ruling on whether inter-carrier compensation is due for ISP-bound traffic. **(FAVORS)**

STAFF ANALYSIS: See Issue 3 for Primary and Alternative analyses since Issues 2 and 3 are related.

POSITION OF THE PARTIES:

BELLSOUTH: No. ISP traffic represents the continuous transmission from the end-user to a distant Internet site. The FCC has ruled that this traffic is jurisdictionally mixed and largely interstate in nature. Therefore, the FCC has also ruled that this traffic is subject to interstate jurisdiction.

MEDIAONE: Dial-up calls to ISPs should be treated as local traffic, for purposes of reciprocal compensation. A call to an ISP uses local network facilities just as any local call and it imposes the same costs on the terminating carrier.

ISSUE 3: Should calls that originate from or terminate to ISPs be included in the reciprocal compensation arrangements of the Interconnection Agreement?

RECOMMENDATION: See recommendations for Issue 2. **(FAVORS)**

POSITION OF THE PARTIES

BELLSOUTH: No. As set forth in response to Issue 2, ISP traffic is interstate in nature. The ISPs are only intermediaries that handle a portion of the call. Therefore, these calls should not be compensable under the provision in an interconnection agreement for the reciprocal compensation of local traffic.

MEDIAONE: Dial-up calls to ISPs should be included in the reciprocal compensation arrangement. A call to an ISP uses local network facilities just as any local call and it imposes the same costs on the terminating carrier.

PRIMARY STAFF ANALYSIS:

Issues 2 and 3 both address traffic to Internet Service Providers. Issue 2 seeks to determine whether this traffic should be defined as "local" for purposes of the parties' Interconnection Agreement, and Issue 3 seeks to determine whether reciprocal compensation should apply for this traffic. These issues are related, and staff believes it appropriate to address both issues in one recommendation. This case represents the first time that the Commission is not interpreting an existing Interconnection Agreement in determining whether reciprocal compensation should be due for ISP-bound traffic. These parties are seeking to enter into a new agreement and wish the Commission to make a decision on this matter that will apply on a going-forward basis.

These issues focus on whether Internet Service Provider (ISP) traffic should be defined as "local" for purposes of the parties' Interconnection Agreement. More specifically, these issues seek to determine whether or not, when an end user of one party calls an ISP that is an end user of the other party, the party that serves the customer originating the call should pay reciprocal compensation to the other party which serves the ISP. Section 251 (b)(5) of the Telecommunications Act of 1996 obligates all local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of

telecommunications." The FCC further clarified in its Local Competition Order "that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area." (FCC 96-325, ¶1034) Therefore, if ISP-bound traffic is defined as "local traffic" for purposes of the parties' Interconnection Agreement, reciprocal compensation would necessarily apply.

MediaOne witness Lane states that for purposes of MediaOne's network and services, ISP traffic is no different from any other call to a local number. (TR 38) Witness Lane explains that a customer's computer dials a local number and then is connected to the ISP's equipment, and at that point a local call has been completed, just as any other local call. (TR 39) He states that "what the ISP does after that should have no impact on that basic fact." (TR 39) Witness Lane further states that since the FCC does not allow local exchange companies to impose access charges on ISPs, if MediaOne does not receive reciprocal compensation from BellSouth, it will not be compensated for terminating ISP traffic. (TR 40) Witness Lane states that the 1996 Act obligates interconnected carriers to compensate one another for terminating traffic. (TR 38)

BellSouth witness Varner counters that the pertinent part of this obligation is that reciprocal compensation applies only to the termination of local traffic, and that ISP traffic is not local traffic. (TR 261) Witness Varner contends that the call does not terminate at the ISP. He states that the ISP point of presence (POP) represents the edge of the Internet and usually consists of a bank of modems, and that ISPs can use the public switched network to collect their subscribers' calls to the Internet. (TR 243) Witness Varner states that the FCC, in its Declaratory Ruling, declared that Internet traffic is jurisdictionally mixed and appears to be largely interstate. He also states that the FCC concluded that ISP calls do not terminate at the ISP's location, but rather continue on to their ultimate destination, specifically at websites in other states or countries. (TR 245)

The FCC Declaratory Ruling to which witness Varner refers is Order FCC 99-38 issued in CC Docket No. 96-98, released on February 26, 1999. In that Order the FCC did conclude "that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." (FCC 99-38, ¶1) However, the FCC did not make a determination as to whether reciprocal compensation is due for ISP-bound traffic. Instead, it acknowledged that it currently does not have a rule governing inter-carrier compensation for ISP-bound traffic, and until it adopts a final rule, state commissions may

continue to determine whether reciprocal compensation is due for this traffic. (FCC 99-38, ¶22, ¶28)

BellSouth witness Varner points out that in paragraph 12 of this Declaratory Ruling, the FCC, referring to its BellSouth Memory Call Order, concluded that it has jurisdiction over and can regulate charges for the local network when it is used in conjunction with the origination and termination of interstate calls. (TR 245) Witness Varner states that consistent with the FCC's Declaratory Ruling, it has been BellSouth's position that reciprocal compensation only applies when local traffic is terminated on either party's network; since ISP traffic is not local traffic, it is not subject to reciprocal compensation obligations. (TR 248)

Witness Varner also disagrees that state commissions have the authority to arbitrate compensation for ISP traffic:

> A state commission's arbitration authority under Section 252 extends only to agreements negotiated pursuant to the requirements of Section 251. Because inter-carrier compensation for interstate services is not governed by Section 251, state commissions are without the statutory authority to arbitrate disputes over such matters. (TR 262)

Witness Varner also does not believe that "the FCC has the authority to rewrite the Communications Act and vest the state commissions with the power to regulate matters relating to interstate communications, that, under the Act, are specifically reserved to the FCC." (TR 263)

Witness Varner believes that any arbitration of ISP compensation would be separate from a Section 252 arbitration because it is not appropriate to pay local reciprocal compensation for ISP traffic. Further, he states:

> Although the FCC's Order authorized states to arbitrate the issue of inter-carrier compensation for ISP traffic, the FCC cannot simply expand the scope of Section 252 to cover such arbitrations. (TR 263)

Witness Varner states that reciprocal compensation for ISP traffic both subsidizes the ISPs and burdens end users. He explains that allowing the ISPs to buy local business lines and not

requiring them to pay access charges subsidizes ISPs, and he asserts that if reciprocal compensation is required, the level of subsidy is increased even more. (TR 274)

Staff disagrees with MediaOne witness Lane's characterization that a local call is completed when a customer's computer connects with the ISP's equipment, and his assertion that what the ISP does after that has no impact on that basic premise. Witness Lane's characterization has often been referred to as the "two call" theory. The first call, from the end user to the ISP, is an intrastate telecommunications service; the second call, from the ISP local point of presence to the Internet backbone, is an interstate information service. The FCC specifically repudiated this theory in its Declaratory Ruling by stating:

> We disagree with those commenters that argue that, for jurisdictional purposes, ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP. As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication. (FCC 99-38, ¶13)

Therefore, this argument presented by witness Lane is not valid.

BellSouth witness Varner goes to great lengths to argue that ISP traffic is interstate, not local, and should not be subject to reciprocal compensation obligations. Staff agrees with witness Varner that ISP traffic is primarily interstate traffic. The FCC, in its recent Declaratory Ruling, concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." (FCC 99-38, ¶1) It does not appear to be technically feasible at this time to distinguish between the interstate and intrastate components of ISP traffic. (Varner TR 266) However, the FCC made no determination as to whether reciprocal compensation is due for ISP-bound traffic.

The FCC acknowledged that it currently has no rule governing inter-carrier compensation for ISP-bound traffic. (FCC 99-38, ¶9) It further explained:

> Generally speaking, when a call is completed by two (or more) interconnecting carriers, the

> carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (e.g., by delivering a call to an interexchange carrier (IXC)), the carriers share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act. Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. (FCC 99-38, ¶9)

As explained, carriers share access revenues received from IXCs for delivering interstate traffic. In the case of ISP traffic, the FCC has given enhanced service providers (ESPs), of which ISPs are a subset, an exemption from paying interstate access charges even though it recognized that ESPs use interstate access services. The FCC explains that this exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESPs, that had been paying the generally much lower business service rates from the rate shock that would result from immediate imposition of carrier access charges. (FCC 99-38, ¶5, footnote 10) In 1997, the FCC decided that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." (FCC 99-38, ¶6) Thus the FCC, as recently as 1997, decided to continue the access charge exemption for ESPs.

Further, the FCC directed the states to treat ISP traffic as if it were local, by permitting ISPs to purchase their public switched telephone network (PSTN) links through local business tariffs. (FCC 99-38, ¶9) Therefore, an ISP need only subscribe to services from a LEC's local business tariffs to receive incoming calls from its customers. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.

This treatment of ISP traffic as "local" seems to be the point of contention between ILECs and ALECs. The FCC readily admits in

its recent Declaratory Ruling that it has treated ISP-bound traffic as local traffic even though it was aware that ISPs used interstate access services. The FCC even states that it "continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local." (FCC 99-38, ¶5) In recognizing the confusion that its treatment of ISP-bound traffic has caused, the FCC has stated that it believes that adopting a rule governing prospective inter-carrier compensation for ISP-bound traffic would serve the public interest. (FCC 99-38, ¶28)

Until such a rule has been adopted, however, the FCC has stated that state commissions will continue to determine whether reciprocal compensation is due for this traffic. BellSouth witness Varner states that the FCC does not have the authority to rewrite the Communications Act and vest the state commissions with the power to regulate matters relating to interstate communications that, under the Act, are specifically reserved to the FCC. (TR 263) However, the FCC stated:

> As we observed in the *Local Competition Order,* state commission authority over interconnection agreements pursuant to section 252 "extends to both interstate and intrastate matters." Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process. (FCC 99-38, ¶25)

Staff will not attempt to address here the merits of the arguments that witness Varner raises; we believe these arguments are more appropriate in the context of an appeal of FCC Order 99-38. Nonetheless, staff wishes to make it perfectly clear that the FCC has authorized state commissions to determine whether reciprocal compensation is due for this traffic until such time as it adopts a final rule on this matter.

Staff believes that the Commission should order that reciprocal compensation is due for ISP-bound traffic, in part because either LEC, MediaOne or BellSouth, will incur a cost for delivering a call to an ISP that is originated by an end user on the other LEC's network. The FCC also agrees that LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network. (FCC 99-38, ¶29) Therefore, staff believes that because of the way ISP-bound traffic is treated, there is very little difference between ISP-bound traffic and any other local call that is delivered to a LEC's network. The delivering LEC's

network is utilized in the same fashion, and it incurs the same types of cost that are incurred for any other local call. The FCC affirms that it has treated ISP-bound traffic as though it were local. (FCC 99-38, ¶5) It even went so far as to state:

> While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the context of reciprocal compensation, suggest that such compensation is due for that traffic. (FCC 99-38, ¶25)

However, staff is very concerned that a per-minute charge for reciprocal compensation is likely not the appropriate means for a LEC to efficiently recover its costs. The FCC also noted its concerns on the pricing methodology for ISP-bound traffic:

> We believe that efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic. For example, flat-rated pricing based on capacity may be more cost-based. Parties also might reasonably agree to rates that include a separate call set-up charge, coupled with very low per-minute rates. (FCC 99-38, ¶29)

Staff observes that the rate for reciprocal compensation is not an issue in this case. The parties have agreed to a price for reciprocal compensation. (TR 279) The only issues before the Commission are whether ISP-bound traffic should be defined as local for purposes of the MediaOne/BellSouth interconnection agreement, and whether reciprocal compensation should apply for this traffic. Nevertheless, staff simply notes that if the Commission approves staff's recommendation to include ISP-bound traffic in reciprocal compensation obligations, perhaps the parties should reevaluate the agreed-upon rate and pricing structure to ensure that it is economically sound for both parties in regards to this traffic.

Conclusion

Staff recommends that ISP-bound calls should be defined as local traffic for purposes of the MediaOne/BellSouth interconnection agreement, and that reciprocal compensation should apply for this traffic. The FCC, although recognizing that ISPs

use interstate access service, has always treated ISP-bound traffic as though it were local traffic. Thus, it appears no different from any other local call originated on one LEC's network and delivered to another LEC's network. The FCC has recognized that a rule regarding inter-carrier compensation for ISP-bound traffic is in the public interest and has issued a Notice of Proposed Rulemaking in FCC Order 99-38, released on February 26, 1999, to achieve such end. However, this rule will apply on a prospective basis, and until a final rule is adopted, the FCC has stated that state commissions will continue to determine whether reciprocal compensation is due for this traffic.

ALTERNATIVE STAFF ANALYSIS:

Staff recommends that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is due for this traffic. The root of the problem in determining whether ISP-bound traffic is local and whether reciprocal compensation is due, stems from the FCC's treatment of this traffic. The FCC admittedly has treated ISP-bound traffic as though it were local traffic. The FCC has exempted ISPs from paying access charges. In its Declaratory Ruling it stated:

> Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. (FCC 99-38, ¶5)

The FCC explains that the exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESPs, that had been paying the generally much lower business service rates from the rate shock that would result from immediate imposition of carrier access charges. (FCC 99-38, ¶5 footnote 10) The FCC continues to allow ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.

The FCC has realized the problems that its treatment of this traffic has caused throughout the country. It stated:

> Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. . . . As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute. (FCC 99-38, ¶9)

Presumably due to the many disputes that have arisen concerning ISP-bound traffic, the FCC issued a Declaratory Ruling concluding that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. (FCC 99-38, ¶1) However, the FCC stated that it currently has no rule governing inter-carrier compensation for ISP-bound traffic, but believes that adopting such a rule to govern prospective compensation would serve the public interest. (FCC 99-38, ¶28) To this end, the FCC has issued a Notice of Proposed Rulemaking seeking comments on two proposals for a rule.

In the meantime, the FCC has left it to state commissions to determine whether reciprocal compensation is due for this traffic. BellSouth witness Varner does not believe that state commissions have the statutory authority under section 252 of the 1996 Act to arbitrate this issue because inter-carrier compensation for interstate access is not governed by section 251 of the Act. (TR 262) Witness Varner also does not believe that the FCC has the authority to "rewrite the Communications Act and vest the state commissions with the power to regulate matters relating to interstate communications that, under the Act, are specifically reserved to the FCC." (TR 263) Witness Varner sums it up by stating:

> The FCC clearly asserted that they have jurisdiction over this traffic and they've exercised that jurisdiction. This is really an FCC issue. And as a result of that, any ruling that this Commission does make on this

> issue is really going to be temporary until the FCC issues their rules. The FCC was very clear about that in their order. That in saying at this point state commissions may apply or deal with this in 252-type arbitrations. However, at some point the FCC will issue their rules and whatever comes out of the rules is what will have to apply. (TR 275-276)

Staff agrees that the FCC has claimed jurisdiction over this traffic and will ultimately adopt a final rule on this matter. The FCC stated:

> We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic. (FCC 99-38, ¶16)

Further, as mentioned earlier, the FCC does intend to adopt a final rule to govern inter-carrier compensation for ISP-bound traffic. Therefore, any decision the Commission makes will only be an interim decision. As such, staff recommends that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is due for this traffic. Staff also notes that MediaOne appears to agree with this decision. MediaOne stated in its brief:

> Because, however, the FCC has under consideration proposals for the resolution of this issue, MediaOne would not object to the Commission's choosing to defer the issue pending the outcome of the FCC proceeding. (BR 3)

Conclusion

Staff recommends that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is due for this traffic. The root of the problem stems from the FCC's treatment of this

traffic. On the one hand, the FCC has recently ruled that ISP-bound traffic is jurisdictionally mixed and largely interstate. On the other hand, it has recognized that it has treated this traffic as local, but retains jurisdiction over this traffic. The FCC has also determined that a rule concerning prospective inter-carrier compensation for this traffic would be in the public interest. To this end, it has issued a Notice of Proposed Rulemaking seeking comments on two proposals for such a rule. Therefore, any decision this Commission makes presumably will be preempted if it is not consistent with the FCC's final rule. Further, the petitioner, MediaOne apparently does not object to the Commission choosing to defer this issue pending resolution by the FCC.

ISSUE 4: What is the appropriate price for Calling Name ("CNAM") data base queries?

RECOMMENDATION: The appropriate price for CNAM is BellSouth's proposed one cent per data base query because staff believes that there is insufficient evidence in the record to conclude that CNAM is a UNE. Thus, CNAM's price is not required to be priced according to the FCC's TELRIC standards. BellSouth is free to propose what it considers to be a market-based price. **(OLLILA)**

POSITION OF THE PARTIES

BELLSOUTH: The appropriate price for CNAM is one cent per query. This is the rate charged to any company that shows their end user names in BellSouth's calling name database. Because the CNAM agreement is not governed by the requirements of Section 251 or Section 252 of the Act, the rates BellSouth charges for its CNAM database service is not an issue appropriate for arbitration. In addition, MediaOne already has an agreement with BellSouth for this service and is inappropriately seeking to be relieved of its contractual obligations.

MEDIAONE: The Commission should determine that CNAM database queries are an unbundled network element. By law, pricing for unbundled network elements must be based on cost, be non-discriminatory, and may include a reasonable profit. MediaOne does not believe that the $.016/query pricing being proposed by BellSouth is cost based and further believes that the Commission should require BellSouth to prove how this price was determined and that it is cost based.

STAFF ANALYSIS: At the outset, staff notes that MediaOne's position statement is incorrect when it says that BellSouth is proposing a query price of $0.016. In testimony filed on April 1, 1999, BellSouth witness Varner states that the per query rate is $0.01. (TR 254)

A Calling Name (CNAM) database provides the name of the calling party to a customer with caller ID number and name service. (TR 252) BellSouth witness Varner describes BellSouth's CNAM database service, how it works, and how it handles calls placed from outside the BellSouth region:

> BellSouth's CNAM Database Storage service allows ALECs, independent companies, wireless providers and paging

> companies to store and access name and number information in the BellSouth Calling Name Database. With BellSouth's CNAM service, customers have access to a large volume of names -from the extensive BellSouth customer database plus sharing agreements with other large database owners. When an end user initiates a call to another end user subscribed to Calling Name Service (e.g., Caller ID Deluxe), call setup information is passed to the called party's switch. The called party's switch then queries the BellSouth Signal Transfer Point ("STP") for Calling Name Information. If necessary, this connectivity can be accomplished through a third party STP. The BellSouth STP then passes the query to the BellSouth CNAM Service Control Point ("SCP") for resolution. Calling Name Information is then passed back through the BellSouth STP to the called party's switch and the subscriber's Caller ID display unit. For out-of-region callers, the BellSouth STP passes the query to an out-of-region CNAM SCP for resolution. Calling Name Information is returned through the BellSouth STP to the called party's switch and display unit. (TR 252)

On March 4, 1997, BellSouth and MediaOne signed an agreement, which they call an "Annex." This agreement provides the terms and conditions under which BellSouth is to provide MediaOne with CNAM. (EXH 15, AJV-1) Both parties agree that this agreement is not part of BellSouth's and MediaOne's interconnection agreement. (TR 251, 359) Exhibit A to the Annex states that $50.00 per 1,000 access lines per month is the recurring flat rate charge for access to BellSouth's CNAM Service Control Point (SCP). Exhibit A further states that "The recurring flat rate will convert to a per query usage rate once query usage measurement capability becomes available." (EXH 15, AJV-1, Exhibit A) What the "per query usage rate" will be, and how it will be determined, however, is left unsaid.

According to BellSouth witness Varner's direct testimony, filed on April 1, 1999, the rate BellSouth "intends to charge MediaOne" is $0.01 per query. (TR 254) However, there seems to be some confusion within MediaOne as to what BellSouth's proposed price is. MediaOne referred to $0.016 in its position; however, during the hearing MediaOne witness Maher asserted that a price of $0.01 is a "40 fold increase over the existing price." (TR 353) Since MediaOne witness Lane stated during the hearing that witness Maher "will discuss this issue [the CNAM price] in greater detail," staff believes that the appropriate person at MediaOne, witness Maher, is aware that BellSouth's price is $0.01 per query. (TR 26)

BellSouth witness Varner asserts that "the CNAM agreement is not governed by the requirements of Section 251 or Section 252 of the Act, the rates BellSouth charges for its CNAM database service is [sic] not an issue appropriate for arbitration." (TR 251) This is because:

> The FCC's Rule 51.319 defines call-related databases "as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of a telecommunications service." (§51.319(e)(2)(i)) Access to BellSouth's CNAM database is not a necessary component for billing and collection, transmission, or routing of an end user's call. An end user's call will complete whether or not a query is made to a CNAM database. (TR 253-254)

MediaOne witness Maher asserts that for "this proceeding, the Commission should determine [that] the CNAM database is an unbundled network element. . . ." (TR 353-354) He states that, "I am not aware that any regulatory commission (including the FCC) has ruled one way or the other on this issue." (TR 357) Citing the FCC's rule 319 definition, he argues that:

> Mr. Varner contends that CNAM cannot be a network element because it plays no role in the completion of a call. His argument overlooks the fact that the FCC has ruled that Calling Name Delivery is "adjunct-to-basic" (CC Docket No. 91-281, 10 FCC Rcd. 11700, para. 131) and thus itself a telecommunications service (see, CC Docket No. 96-149, 11 FCC Rcd 21905, para. 107). Because BST's CNAM service is essential to MediaOne's delivery of calling name to its Caller ID customers, the Public Service Commission can and should determine that it is an unbundled network element. (TR 357)

Witness Maher testified at the hearing that he did not know whether CNAM is available as a UNE in other jurisdictions. He did state that, "I would say that the pricing that we've seen would suggest that it's not -- if a UNE dictates a pricing level, it's definitely not an [sic] UNE based on the pricing that's out there in the market today." (TR 370)

BellSouth witness Varner states that "Access to BellSouth's CNAM database is not a necessary component for billing and collection, transmission, or routing of an end user's call." (TR 254) However, witness Varner leaves out an important part of Rule

51.319's definition -- namely, what follows the word "routing": "or other provision of a telecommunications service." MediaOne witness Maher does not address witness Varner's omission of "other"; instead, he refers to other FCC orders that deal with calling name.

Whether or not CNAM is a UNE determines the pricing of CNAM. If CNAM is a UNE as MediaOne asserts, then its rate must be based on a TELRIC cost standard. If it is not a UNE, as BellSouth asserts, then its pricing is BellSouth's prerogative.

On January 25, 1999, the United States Supreme Court vacated the FCC's rule 51.319, which listed the UNEs that an incumbent local exchange carrier must provide. The Supreme Court vacated Rule 51.319, "[B]ecause the Commission [FCC] has not interpreted the terms of the statute in a reasonable fashion. . . ." (AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999, slip opinion at 25) As of this writing, the FCC has not issued a new list of UNEs.

The Supreme Court opinion also stated in part:

> The Commission [FCC] cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. That failing alone would require the Commission's rule to be set aside. In addition, however, the Commission's assumption that *any* [emphasis in original] increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms. (AT&T Corp v. Iowa Utilities Bd., 119 S. Ct. 721 (1999), slip opinion at 22)

With Rule 51.319 vacated, staff must turn to the Supreme Court's decision for guidance. Are there alternative providers of CNAM? When asked by staff and MediaOne whether BellSouth was aware of other CNAM database providers, BellSouth responded to MediaOne's May 10, 1999 interrogatory, and to staff's May 20, 1999 interrogatory, that BellSouth was aware of "comparable" service offered by Illuminet, Sprint United, US West, Bell Atlantic, and GTE. (EXH 2, pp. 16-17, 69)

In his rebuttal testimony, MediaOne witness Maher asserts that no other supplier can "provide MediaOne with access to BST's CNAM data." (TR 356) Witness Maher also states that, "Each ILEC's CNAM database includes only its subscribers and the subscribers of other

LECs who store their subscribers' names and telephone numbers there. We can get CNAM access from, say, Bell Atlantic in Massachusetts and Virginia, but not in Florida or Georgia. BST is our only option here." (TR 356) During the hearing, however, witness Maher stated that MediaOne uses Illuminet for its Massachusetts and Virginia operations because it does not have a contract with Bell Atlantic, since Bell Atlantic "does not have the capacity at this point to store our data [in Massachusetts]. (TR 361, 368) In his deposition, witness Maher stated that MediaOne had not "pursued" other options for CNAM in Florida, even though MediaOne uses Illuminet in other states. (EXH 11, pp. 4, 14) Witness Maher stated that MediaOne did not pursue using alternative providers because "our assumption is that if we go through another provider to get to BellSouth data, it will just be that much more expensive than getting the data or having the query made directly to BellSouth." (EXH 11, p. 14) MediaOne's assumption is "based on us thinking that BellSouth would charge the same per query rate to anyone retrieving that data," according to witness Maher. (EXH 11, pp. 14-15)

Witness Maher testified at the hearing that it was not until after his deposition that MediaOne attempted to obtain prices from alternative providers. (TR 363-364) MediaOne obtained a price per query of $0.018 from Illuminet, the same price that MediaOne pays Illuminet to query the PacTel and Bell Atlantic databases. (TR 364-365) Witness Maher stated that Illuminet's "language is that basically they will charge the query rate plus a transport charge." (TR 363) He also stated that another source has proposed to provide MediaOne with CNAM data, but that the price is "much more expensive because they charge a higher price than BellSouth, plus a transport charge." (TR 363)

Witness Maher further testified that this proceeding is MediaOne's "first real opportunity to arbitrate the CNAM rate." (TR 369) As for seeking arbitration of the CNAM rate in the Bell Atlantic territories, witness Maher first stated that "Bell Atlantic does not have the capacity at this point to store our data. And that's why in both Richmond and in Boston we have chosen to store our data, or have had to store our data with Illuminet. . . ." (TR 368) Later on, though, witness Maher states "It just wasn't part of our Interconnection Agreement so we didn't arbitrate it at that point." (TR 368)

Without the certainty of an FCC rule on UNEs, staff has relied on the Supreme Court decision for guidance during this analysis. It is clear from the record in this proceeding that there <u>are</u> alternative providers to BellSouth; in fact, MediaOne is using one

of the alternative providers. Not until three days before the hearing, only after a deposition, did MediaOne even try to obtain price quotes from other vendors. However, BellSouth provided MediaOne with the names of several alternative vendors prior to the deposition. MediaOne received price quotes from only two of the vendors, both of which had higher prices than proposed by BellSouth.

Staff has found MediaOne's overall testimony on this issue to be inconsistent and insufficient. For example, according to MediaOne, BellSouth is MediaOne's only option in Florida. (TR 356) After questioning by BellSouth, MediaOne explains that it can use Illuminet in Florida, as it does in California and in Bell Atlantic's territory, albeit at a higher price. (TR 364-365) MediaOne states that CNAM was not part of its interconnection agreement in Massachusetts, so MediaOne did not arbitrate it. (TR 368) However, MediaOne's agreement with BellSouth for CNAM in Florida is also outside of the interconnection agreement. (TR 251, 359) With regards to alternative providers, it is clear that MediaOne has made little or no effort to ascertain if there are better prices than BellSouth's price. There is no record evidence that MediaOne made any serious attempt to obtain the best price possible for CNAM.

Based on the record evidence, staff does not believe that CNAM comes even close to passing the "necessary" and "impair" test as described by the Supreme Court. Staff believes that the most that *may* be garnered from MediaOne's argument is that CNAM *might possibly* be a UNE, but without substantive evidence it is simply impossible to conclude that CNAM must be a UNE.

In its position, BellSouth states that "MediaOne already has an agreement with BellSouth for this service and is inappropriately seeking to be relieved of its contractual obligations." It appears as if BellSouth bases its "inappropriately seeking" claim on its belief that since CNAM is not a UNE, MediaOne's efforts to arbitrate the rate for CNAM mean that MediaOne is "inappropriately seeking to be relieved of its contractual obligations."

Witness Varner agreed that it is not "reasonable" for MediaOne to agree to "any price that BellSouth came up with" after BellSouth had the measurement capability. (TR 306) MediaOne witness Maher stated that MediaOne "intends to honor its existing calling name delivery contract with BellSouth and migrate to a per query usage rate." (TR 352) However, according to witness Maher, "MediaOne has not agreed to pay whatever rate BST might wish to charge." (TR 357)

Although staff questions the practice of signing any contract which states that the price will change, but does not specify the new price or how it will be determined, staff believes that BellSouth's alleging that MediaOne is "inappropriately seeking to be relieved of its contractual obligations" does not speak to the issue of what the CNAM price should be. The real issue is what the price should be for CNAM; it so happens that the price is a function of whether or not CNAM is a UNE. Staff believes that there is insufficient evidence in the record to conclude that CNAM is a UNE. Thus, CNAM's price is not required to be priced according to the FCC's TELRIC standards. BellSouth is free to propose what it considers to be a market-based price. In addition, BellSouth's price for a CNAM query is the lowest in the record; therefore, there is no basis for concluding that it is unreasonable.

Therefore, staff recommends that the appropriate price for CNAM is BellSouth's proposed $0.01 per data base query because staff believes that there is insufficient evidence in the record to conclude that CNAM is a UNE. Thus, CNAM's price is not required to be priced according to the FCC's TELRIC standards. BellSouth is free to propose what it considers to be a market-based price.

ISSUE 5: What is the appropriate manner for MediaOne to have access to network terminating wire ("NTW") in multiple dwelling units ("MDU")?

RECOMMENDATION: Staff recommends that the appropriate manner for MediaOne to have access to network terminating wire (NTW) in multiple dwelling units is as described in BellSouth's position below, modified to provide MediaOne access to the first pair of NTW (unless BellSouth is using the first NTW pair to concurrently service the same MDU), and modified to designate that BellSouth will not permit other ALECs access to the access terminal installed by BellSouth for MediaOne, without MediaOne's approval. (KENNEDY)

POSITION OF THE PARTIES

BELLSOUTH: BellSouth offers a reasonable method of access to the NTW in BellSouth's garden terminal. Using BellSouth's proposed method, the ALEC installs its own terminal in proximity to the BellSouth garden terminal. BellSouth installs an access terminal that contains a cross-connect panel on which BellSouth will extend the ALEC requested NTW pairs from the garden terminal. The ALEC will then extend a tie cable from their terminal and connect to the pairs they have requested. The ALEC would then install its own Network Interface Device ("NID") within the end-user apartment and connect the ALEC requested pair(s) to this NID. At MediaOne's request, BellSouth will pre-wire NTW pairs, which would obviate the need to have a BellSouth technician dispatched each time MediaOne wants access to a given end user customer.

MEDIAONE: The Commission should determine that, to the extent BellSouth retains ownership and control of NTW, it will be treated as an unbundled network element, which BellSouth must provide on a nondiscriminatory basis. To accomplish this, BellSouth should terminate its Network Distribution Facilities into a MDU on one cross-connect facility and its NTW on a separate cross-connect facility that would be accessible to all LECs serving the MDU. Each LEC, including BellSouth, would provision service to a specific unit by connecting its cross-connect to the NTW cross connect. This would enable all LECs to have identical access to NTW in accordance with state and federal law.

STAFF ANALYSIS: MediaOne Florida Telecommunications, Inc. (MediaOne) is a facilities-based, alternative local exchange company (ALEC) operating within the state of Florida. To market and provide its local exchange services to residents in multi-

dwelling units (MDUs), MediaOne is seeking access to network terminating wire (NTW) owned and controlled by BellSouth Telecommunications, Inc. (BellSouth). BellSouth believes it has offered MediaOne a reasonable method of access to its NTW. MediaOne claims that BellSouth's proposal would effectively preclude it from serving MDU residents and proposes a different access method, to which BellSouth objects.

BellSouth's Proposal to Provide MediaOne Access to NTW

BellSouth witness Milner describes NTW as another part of BellSouth's loop facilities, referred to as the sub-loop element loop distribution. In multi-story buildings, NTW is connected to the riser cable and fans-out the cable pairs to individual customer suites or rooms on a given floor within the building. Where riser cable is not used, NTW is attached directly to BellSouth's loop distribution cables. (TR 160) BellSouth witness Milner states that riser cable is a part of that sub-loop element referred to as loop distribution and is located on the network side of the demarcation point. (TR 159-160) Witness Milner provides that NTW is the last part of the loop on the network side of the demarcation point. A network interface device (NID) establishes the demarcation point between BellSouth's network and the inside wire at the customer's premises. (TR 160)

Witness Milner states that each ALEC will provide its own terminal in proximity to the BellSouth garden terminal or connector block within the wiring closet. (TR 153, 189; EXH 14, p.1) Witness Milner provides that BellSouth will install an access terminal that contains a cross-connect panel on which BellSouth will extend the ALEC-requested NTW pairs for the ALEC's use. (TR 153, 189; EXH 14, p.1) According to BellSouth witness Milner, the ALEC would then extend a tie cable from its own terminal to the access terminal, which BellSouth provides, to access the NTW pairs that were requested by the ALEC. (TR 153, 189; EXH 14, p.1)

MediaOne's Proposal to Access BellSouth's NTW

In summarizing his pre-filed testimony, MediaOne witness Lane provides that there is no practical solution for MediaOne to deliver telephone service to MDU residents utilizing its cable facilities. For that reason, MediaOne requires reasonable access to BellSouth's NTW. (TR 24-25)

Staff provides two attachments, Attachments 5-1 and Attachment 5-2, to aid in demonstrating MediaOne's proposal to access

BellSouth's NTW. Attachments 5-1 and 5-2 were entered into the official record by MediaOne as elements of Exhibit No. 13. To avoid confusion, staff notes that these same attachments were originally referred to as Attachments 3 and 4 in MediaOne witness Beveridge's direct testimony. (TR 83).

Referring to Attachment 5-1 to staff's recommendation, witness Beveridge explains that the box, BST CSX, represents two cross-connect blocks in close proximity, one for the distribution facilities, and one for the NTW. (TR 83) Witness Beveridge explains that BellSouth provisions service by connecting the cross-connects with short jumper wires. (TR 83)

On a plywood-base model, Exhibit 13, witness Beveridge introduced at the hearing, witness Beveridge testified that the two terminal blocks, one labeled MDU Riser Cable or NTW, and the other labeled ILEC Outside Plant Termination, represent existing facilities owned by BellSouth. (TR 55) Witness Beveridge also acknowledged that the terminal blocks labeled MDU Riser Cable or NTW and ILEC Outside Plant Termination would be located inside a wiring closet. (TR 57) Staff believes this testimony demonstrates that the term BST CSX, discussed in the preceding paragraph, represents BellSouth's wiring closet.

Again referring to Attachment 5-1 to staff's recommendation, MediaOne witness Beveridge testifies that MediaOne would separate the cross-connects that constitute BST CSX, or BellSouth's wiring closet, in BellSouth's proposal. (TR 83) Witness Beveridge further testifies that depending on the physical configuration of the cross-connects, rearrangement may not be required in some cases. (TR 83) Referring to Attachment 5-2 to staff's recommendation, witness Beveridge testifies that because the cross-connect on which BellSouth's NTW terminates is now physically separate, it functionally becomes the ACCESS CSX. (TR 83) Staff notes that on Attachment 5-2 to staff's recommendation, BST CSX will no longer represent BellSouth's wiring closet as it is traditionally configured. Witness Beveridge provides that because all local exchange companies have equal access to the ACCESS CSX shown on Attachment 5-2 to staff's recommendation, all of the companies can provision service quickly, easily, and on equal footing. (TR 83)

MediaOne witness Beveridge's testimony provides an illustration of how MediaOne's proposal will work. Referring to Attachment 5-2 to staff's recommendation, MediaOne witness Beveridge testifies that if CLEC-1 wins a customer from BellSouth, CLEC-1's technician would simply disconnect BellSouth's jumper from BellSouth's BST CSX and ACCESS CSX. CLEC-1's technician will then

connect CLEC-1's jumper between CLEC-1's CSX and ACCESS CSX, thereby connecting its distribution facilities to the first NTW pair. (TR 83-84) In its effort to identify ownership of ACCESS CSX, staff refers to MediaOne witness Beveridge's testimony offered at the hearing. Mediaone witness Beveridge testifies that the terminal block, labeled MDU Riser Cable or NTW, on Exhibit 13, is BellSouth's facility. (TR 55) Staff believes that this testimony intuitively demonstrates that ACCESS CSX is BellSouth's property.

Key Issues

In the following paragraphs, staff identifies and provides discussion on the key issues that BellSouth identifies regarding MediaOne's proposal to access BellSouth's NTW. Likewise, staff identifies and provides discussion on the key issues that MediaOne identifies regarding BellSouth's proposal for providing MediaOne access to BellSouth's NTW. For each issue identified, staff offers its conclusion based on the testimony provided by the witnesses for each party.

Classification of NTW as an UNE

BellSouth witness Milner testifies that neither the 1996 Act nor the FCC specified that NTW is an unbundled network element, but as a minimum, a technically feasible form of access must be identified. (TR 150) Expanding on this point, BellSouth witness Varner testifies that the specific list of network elements that BellSouth must provide will not be known until the FCC completes its proceeding on remand of Rule 51.319. Witness Varner provides that BellSouth will provide MediaOne NTW capability before the FCC completes its proceedings. Witness Varner provides that BellSouth reserves the right to reconsider whether it will continue to offer NTW upon completion of the FCC's proceedings. (TR 255)

MediaOne witness Beveridge testifies that as long as BellSouth claims NTW as part of its network, the Commission should categorize NTW as an UNE. (TR 92) Witness Beveridge asserts that BellSouth will likely refuse to provide NTW to its competitors unless it is required to do so. He testifies that if MediaOne is required to purchase an entire unbundled loop from BellSouth, MediaOne's service will be uneconomic. (TR 92)

Staff notes that in the Unbundled Network Terminating Wire MediaOne Information Package, provided by BellSouth to MediaOne, it is indicated that BellSouth will provide access to NTW in states where BellSouth is required to offer "sub-loop unbundling." These states are Florida, Georgia, Kentucky and Tennessee. (EXH 12, p.4)

Staff believes that the Commission need not make a ruling regarding whether or not BellSouth's NTW is an UNE.

Appropriate Method for Connecting to BellSouth's Terminal Blocks

BellSouth's witness Milner testifies:

> In its First Report and Order (CC Docket No. 96-98, released August 8, 1996) at paragraph 198, the FCC included the following statement:
>
> "Specific, significant, and demonstrable network reliability concerns associated with providing interconnection or access at particular point, however, will be regarded as relevant evidence that interconnection or access at that point is technically infeasible." (TR 150-151)

BellSouth witness Milner further states:

> The FCC elaborated further on this point at paragraph 203 of that same order by stating:
>
> "We also conclude, however, that legitimate threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to incumbent LEC networks. Negative network reliability effects are necessarily contrary to a finding of technical feasibility. *Each carrier must be able to retain responsibility for the management, control, and performance of its own network.*" *(emphasis added)* (TR 151)

BellSouth witness Milner asserts that the access to NTW sought by MediaOne is not technically feasible. (TR 151) Witness Milner testifies that MediaOne's proposal would render BellSouth incapable of managing and controlling its network in the provision of service to its end users, or in providing portions of its network to other ALECs for their use in providing services to their end users. (TR 188) Witness Milner emphasizes that MediaOne's proposal raises the question of how BellSouth would know if an ALEC had used BellSouth's NTW, thus effectively denying BellSouth control of its own property. (TR 179)

BellSouth witness Milner testifies that closer examination of MediaOne's proposal immediately reveals that MediaOne's technicians

could, either intentionally or unintentionally, disrupt the services provided by BellSouth to its end user customers. (TR 152) Witness Milner provides that BellSouth's garden terminal is a relatively small device and it has no means of protecting against the intentional or unintentional disruption once access to the interior of the garden terminal has been made. (TR 188-189) Witness Milner asserts that BellSouth's proposal to provide MediaOne access to NTW retains network reliability, integrity, and security for both BellSouth's network and the ALEC's network. (TR 189) Witness Milner states that under BellSouth's proposal, MediaOne could put some sort of cover over its terminal block and its network terminating wire pairs and thereby protect them from being tampered with by a third party. (TR 235)

BellSouth witness Milner states that BellSouth makes NTW available to any ALEC through BellSouth's established process. BellSouth witness Milner provides that other local service providers are using BellSouth's NTW to compete with BellSouth. (TR 166) BellSouth witness Milner testified that there was only one ALEC in Florida that obtained access to BellSouth's NTW in the manner that BellSouth offers MediaOne access to BellSouth's NTW; however, ALECs in other states use BellSouth's NTW in the same manner. (TR 226)

MediaOne's witness Lane claims that 40% of the homes MediaOne's network passes are MDUs and that BellSouth's proposal to provide NTW effectively precludes MediaOne's ability to provide service to MDU residents. (TR 24-25, 30)

MediaOne witness Beveridge testifies that MediaOne's proposal requires the separation of BellSouth's cross-connect for NTW from BellSouth's cross-connect for BellSouth's distribution facilities. MediaOne witness Beveridge states that depending on the physical configuration, in some instances actual rearrangement of BellSouth's cross-connects may not be necessary. (TR 83) MediaOne witness Beveridge provides that in the majority of cases, no new hardware or rearrangement would be necessary because BellSouth's existing hardware could be used. Witness Beveridge states that if new hardware were required, it could be provided by BellSouth, interested ALECs, or an agreed-upon third party on a cost sharing basis since both BellSouth and other ALECs benefit. (EXH 6, pp. 1-2) For MDUs that BellSouth currently has NTW installed, staff cannot understand why BellSouth would bear any responsibility for cost if MediaOne's approach prevails.

MediaOne witness Beveridge states:

> Mr. Milner quotes a portion of paragraph 203 of the FCC's First Report and Order in CC Docket No. 96-98 (August 8, 1996) for the proposition that network reliability and security are legitimate factors in assessing technical feasibility. He omitted the following that appears in the same paragraph.
>
> "Thus with regard to network reliability and security, to justify a refusal to provide interconnection or access at a point requested by another carrier, incumbent LECs must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impact *would* result from the requested interconnection or access." (emphasis added) (TR 89)

MediaOne witness Beveridge testifies that witness Milner has not claimed that providing MediaOne access to NTW at BellSouth's terminals would produce specific and significant adverse impacts to BellSouth's service. He asserts that Milner has provided no evidence to support claims of network reliability, integrity, and security problems. (TR 89) While staff agrees that BellSouth did not provide specific evidence on this point, staff believes BellSouth's argument that network reliability, integrity, and security could be impaired is logical and persuasive.

MediaOne witnesses Lane and Beveridge also take issue with BellSouth's proposed method of access to NTW because it requires the presence of a BellSouth technician. A BellSouth technician must be present during the initial installation of BellSouth's proposed access terminal and during the follow-on provisioning of the NTW pairs requested by MediaOne, unless MediaOne requests provisioning of NTW pairs during the initial site set-up. In addition to coordination problems, MediaOne claims that the price it must pay for a BellSouth technician to perform work serving no useful purpose, creates a competitive disadvantage for MediaOne by substantially increasing the cost of provisioning service. MediaOne points out that this negatively impacts other competing alternative local exchange companies (ALECs) as well. (TR 30, 53, 75-76)

MediaOne witnesses Lane and Beveridge testify that the coordination of an installation between itself, a customer, and BellSouth will create an unnecessary inconvenience for the customer, cause MediaOne's product to be less desirable, and

virtually preclude MediaOne from serving MDU residents, denying consumers an alternative to BellSouth. (TR 25, 30-31, 54, 74, 76-77, 82)

Staff has not been able to find precedent that addresses the situation where one party is seeking to use its own personnel to, in effect, modify the configuration of another party's network without the owning party being present. Staff finds that MediaOne's proposal to physically separate BellSouth's NTW cross-connect facility from BellSouth's outside distribution cross-connect facilities is an unrealistic approach for meeting its objectives. In fact, it appears that MediaOne and BellSouth have not even addressed this element of MediaOne's proposal. In the entire testimony, the only response that addresses this issue was initiated by a staff interrogatory. Therefore, staff contends that BellSouth is perfectly within its rights to not allow MediaOne technicians to modify BellSouth's network.

Even though Issue 6, regarding the reclassification of Florida's demarcation point for MDUs to the minimum point of entry (MPOE), has been stipulated by both parties as not at issue, it appears to staff that MediaOne's proposal effectively attempts to achieve that objective. Staff believes that it is in the best interests of the parties that the physical interconnection of MediaOne's network be achieved as proposed by BellSouth. At the direction of the Commission, staff is currently in the process of analyzing the merits of changing the demarcation point from the customer's premise to the MPOE.

Staff concludes from the record that at least one other ALEC in Florida and an unknown number of ALECs in other states have been able to provide service based on BellSouth's NTW proposal. Thus, staff believes that MediaOne should be able to provide service using BellSouth's NTW proposal. Staff believes that MediaOne's key issue is price, which is addressed in Issue 7. Staff also concludes that the BellSouth installed access terminal should be reserved for exclusive use by MediaOne. If other ALECs are permitted access to the terminal installed for MediaOne, MediaOne would be subject to the same network security and control problems that BellSouth uses in its arguments. In addition, because MediaOne is required to pay BellSouth for the access terminal and the labor to install it, staff believes it would be inappropriate for BellSouth to offer other ALECs a sharing arrangement on this terminal, without MediaOne's approval.

First Pair of NTW and NID

MediaOne witness Beveridge testifies that MediaOne does not have access to all of BellSouth's NTW pairs because BellSouth reserves the first pair for its own use. (TR 74) As a result, witness Beveridge notes that MediaOne's technician could be subjected to a time consuming task of locating the first jack within a customer premises to connect inside wiring to the NTW pair provided by BellSouth. (TR 77) Witness Beveridge offers that MediaOne should be given access to BellSouth's first NTW pair any time it is available. (TR 80) MediaOne witness Beveridge provides that BellSouth does not offer a NID in its proposal to furnish MediaOne NTW, thus MediaOne's technician would be required to locate the first jack within the residential unit being served. Because BellSouth requires MediaOne to install a NID, MediaOne would be subjected to additional costs which could be avoided in many instances if BellSouth would allow MediaOne access to the first pair of NTW. (TR 76-78) MediaOne witness Beveridge testifies that the requirement to install a NID is unnecessary, placing MediaOne at a competitive disadvantage through increased costs. Witness Beveridge testifies that requiring the installation of a NID would also inconvenience the customer. (TR 52-54, 76-78, 81-82, 85)

BellSouth witness Milner states that MediaOne would not necessarily have to rewire the NID and alternatives such as a simple splitter jack could be used by MediaOne to gain access to the second pair of NTW that is installed in most existing MDUs. (TR 169-170) Witness Milner also testifies that BellSouth will relinquish the first pair in certain cases, typically when no other spare pairs are available other than the first NTW pair. (TR 167) BellSouth witness Milner testifies that BellSouth retains the first NTW pair for operational efficiency. (TR 219-220)

Based on the testimony, staff believes that BellSouth's retention policy regarding the first pair of NTW is unreasonable for servicing facilities-based ALECs. Staff believes that customers would ultimately suffer the burden of inconvenience at the hands of BellSouth's policy. Therefore, staff believes that BellSouth should be required to relinquish the first NTW pair and make it available to MediaOne, unless BellSouth is using the first pair of NTW to concurrently service the same MDU. Staff also believes that most, if not all, of MediaOne's issues related to the NID will then be resolved.

Conclusion

Staff recommends that the appropriate manner for MediaOne to have access to network terminating wire (NTW) in multiple dwelling

units is BellSouth's proposal, modified to provide MediaOne access to the first pair of NTW, and modified to designate that BellSouth will not permit other ALECs access to the special access terminal installed by BellSouth for MediaOne, without MediaOne's approval.

ISSUE 7: What, if anything, should BellSouth be permitted to charge MediaOne for access to NTW?

RECOMMENDATION: Staff recommends that the appropriate charges are those shown in Table 7-2. **(Kennedy)**

POSITION OF THE PARTIES

BELLSOUTH: BellSouth should be permitted to charge MediaOne for access to Network Terminating Line at the rates set forth in Exhibit AJV-3 to the testimony of Alphonso J. Varner.

MEDIAONE: So long as BellSouth retains ownership and control of NTW, MediaOne believes it should be priced as an unbundled network element; that is, it should be priced at cost, as prescribed by the rules of the Commission and the FCC. If the Commission were to order BellSouth to move the demarcation point to the MPOE, NTW would become inside wire. At that point, MediaOne believes it would no longer be obligated to pay BellSouth anything for access to NTW. Telephone companies are precluded from imposing a charge for the use of inside wiring. Moving the demarcation point does not transfer ownership of inside wiring. There are already procedures in place under which carriers recover the costs of inside wiring. Carriers are not entitled to additional compensation for such wiring.

STAFF ANALYSIS: MediaOne asserts that if the Commission orders BellSouth to move the demarcation point to the minimum point of entry (MPOE), network terminating wire (NTW) would become inside wire, and MediaOne believes it would no longer be obligated to pay BellSouth anything for access to NTW. While MediaOne's petition for arbitration had included an Issue 6, which asked the Commission to determine the appropriate demarcation point for BellSouth's network facilities serving multiple dwelling units (MDUs), the parties stipulated that, for purposes of this proceeding, the appropriate demarcation point is set forth in Rule 25-4.0345(1)(b), Florida Administrative Code[2].

[2] Rule 25-4.0345(1)(b), Florida Administrative Code, states in pertinent part, that the demarcation point is "the point of physical interconnection (connecting block, terminal strip, jack, protector, optical network interface, or remote isolation device) between the telephone network and the customer's premisses wiring.

Because BellSouth and MediaOne stipulate that Issue 6 has been resolved, MediaOne's apparent position on the price it pays BellSouth for NTW is more accurately represented by MediaOne witness Beveridge's statement that the Commission should require BellSouth to provide network terminating wire as an unbundled network element, priced at TELRIC. (EXH 6, p.4)

During the hearing, MediaOne witness Beveridge notes that BellSouth proposes a charge of $171 for first-time site preparation and connection of up to 25 NTW pairs, $40.47 for every subsequent site visit, and $0.60 per month for each NTW pair provided. (TR 52) When questioned, witness Beveridge agreed that under MediaOne's proposal, MediaOne would connect at BellSouth's access terminal and use BellSouth's network to connect to the customer's premises. (TR 124) When asked if MediaOne had an objection to the recurring charge of $0.60 per pair per month, MediaOne witness Beveridge stated "No." (TR 124) When asked if he was aware of a cost study for NTW filed by BellSouth witness Caldwell on April 1, 1999, MediaOne witness Beveridge stated "No, sir, I'm not." (TR 131)

BellSouth witness Caldwell testifies that the purpose of her testimony is to present the cost study results for NTW. (TR 338) In her testimony, witness Caldwell states:

> The cost study is based on the cost study methodology accepted by this Commission in Order No. PSC-98-0604-FOF-TP in Docket Nos. 96057-TP, 960833-TP and 960846-TP dated April 29, 1998. This Order established rates for numerous network capabilities, ranging from 2-Wire Analog Loop Distribution to Physical Collocation. On page 12 of the Order, the Commission ordered rates that "cover BellSouth's Total System (Service) Long-run Incremental Costs (TSLRIC) and provide some contribution toward joint and common costs." (TR 339)

Referring to Order No. PSC-98-0604-FOF-TP, issued April 29, 1998, BellSouth witness Caldwell testifies that the Commission recognized that consideration must be given to an appropriate level of shared and common cost, and that the order identifies the appropriate modeling technique and set of basic inputs that should be used. (TR 343) Witness Caldwell further testifies that BellSouth has incorporated the Commission's recommendations into the NTW cost study that was submitted. (TR 343) In describing these major categories, BellSouth witness Caldwell states:

> First of all, for the cost of capital we used a 9.9%. For taxes we used Florida-specific. For the shared cost, we excluded them from the TELRIC labor rate as had been ordered, and we also reduced the network operating expense by the amount ordered. The common cost equaled [sic] 5.12% and, in fact, what we did was used the shared and common model that the Florida Staff made changes to and submitted back to BellSouth as a result of the docket on unbundled network elements. So it is the exact same model.
>
> The Commission also determined that ordering costs should be established in a separate and future docket. Thus it was recommended that the local carrier service center, or the LCSC, cost should be eliminated from the cost study. This is one area where BellSouth has deviated slightly from the Commission's order and it's based on our interpretation of that order. (TR 344)

During cross-examination, BellSouth witness Caldwell was asked to turn to page 32 of Exhibit 17 and asked if the Service Inquiry category includes the account team, installation and maintenance, and the LCSC. Witness Caldwell testifies "That is correct." (TR 345-346) Witness Caldwell was also asked to turn to page 33 of the same exhibit and questioned if the Service Inquiry category LCSC was the only function listed. Witness Caldwell testifies "Yes, for this one." (TR 346) Then witness Caldwell was asked to turn to page 37 of that same exhibit, and was asked if the service order category was included in the activities for the service visit charge, and was asked if service order includes the work management center and the installation and maintenance. BellSouth witness Caldwell testifies "Yes it does." (TR 346-347)

In response to a question about why BellSouth's cost study included charges for Service Inquiry and Service Order, an apparent contradiction to the Order on which BellSouth's cost study was based, BellSouth witness Caldwell explains that BellSouth's interpretation "is in terms of firm order...." (TR 348) She explains that for the first item on page 32, which was the site survey per MDU/MTU, BellSouth was just surveying the particular site where the NTW would be ordered but, at the time, BellSouth does not have an order. (TR 348) Witness Caldwell further explains that BellSouth's interpretation was that this was a specific type

activity that would be handled by the LCSC but was not the result of an order. (TR 348) In response to a statement that the Order required the elimination of that category, BellSouth witness Caldwell testifies "I guess it's in terms of just how we interpreted it. It is identified in the study separately, so it could be handled in any way the Commission sees fit. We can do that." (TR 348)

Conclusion

For ease of rate comparison, staff has included Table 7-1, BellSouth Proposed Prices for NTW, which duplicates BellSouth pricing data provided in Exhibit 15, AJV-3, dated April 1, 1999. Table 7-2 contains staff's recommended prices for NTW. Staff's recommended rates exclude all charges for Service Inquiry and Service Order activities, in accord with the requirements in Commission Order No. PSC-98-0604-FOF-TP. BellSouth witness Caldwell provides testimony that the services BellSouth's workers perform under the Service Inquiry and Service Order functions were not related to a firm order. (TR 348) However, staff notes that BellSouth witness Caldwell's cost study shows under the Service Inquiry activity that the Account Team takes the CLEC request for site visit, records information on Service Inquiry (SI) form, and passes firm order SI to Installation and Maintenance (I&M), among other tasks. (EXH 17, p.32) Based on BellSouth's cost study's identification that a firm order is passed from SI to I&M, staff concludes that guidance provided in Commission Order No. PSC-98-0604-FOF-TP, issued April 29, 1998, should prevail. Therefore, staff recommends that the Commission allow BellSouth to charge MediaOne the prices for access to network terminating wire shown in Table 7-2, Staff Recommended Prices for NTW.

Staff recommends the changes shown in Cost Reference Numbers A.15.2, A.15.3, and A.15.7. Staff's recommended prices were determined by eliminating the non-recurring direct costs for all functions identified as either Service Inquiry or Service Order on pages 19, 21, and 29 of Exhibit 17. Staff applied the Gross Receipts Tax Factor and the Common Cost Factor to the revised direct costs in the same fashion as defined on pages 18, 20, and 28 of Exhibit 17.

Table 7-1
BellSouth Proposed Prices For NTW

			Nonrecurring	
Cost Ref. #	**Rate Element**	**Recur.**	**First**	**Add.**
A.15	***Unbundled Network Terminating Wire***			
A.15.1	Unbundled NTW	.6011		
A.15.2	NTW Site Visit - Survey, per MDU/MTU Complex		**171.16**	
A.15.3	NTW Site Visit - Setup, per terminal		**75.28**	**48.37**
A.15.4	NTW Access Terminal Provisioning including first 25 pair panel, per terminal		101.09	100.25
A.15.5	NTW Existing Access Terminal Provisioning, second 25 pair panel, per terminal		29.75	28.90
A.15.6	NTW Pair Provisioning, per pair		4.48	3.64
A.15.7	NTW Service Visit, Per Request, per MDU/MTU Complex		**40.47**	

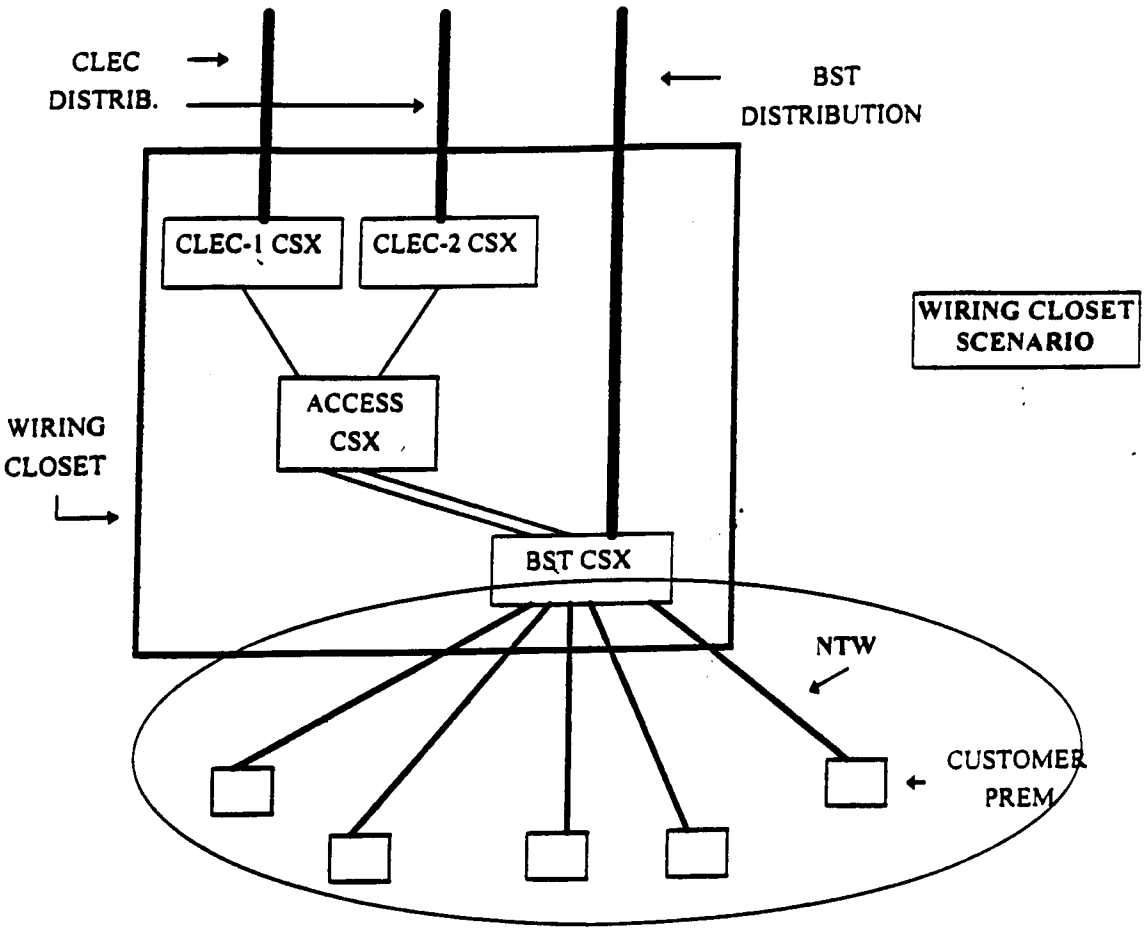
Table 7-2
Staff Recommended Prices For NTW

			Nonrecurring	
Cost Ref. #	**Rate Element**	**Recur.**	**First**	**Add.**
A.15	***Unbundled Network Terminating Wire***			
A.15.1	Unbundled NTW	.6011		
A.15.2	NTW Site Visit - Survey, per MDU/MTU Complex		**120.10**	
A.15.3	NTW Site Visit - Setup, per terminal		**39.43**	**36.42**
A.15.4	NTW Access Terminal Provisioning including first 25 pair panel, per terminal		101.09	100.25
A.15.5	NTW Existing Access Terminal Provisioning, second 25 pair panel, per terminal		29.75	28.90
A.15.6	NTW Pair Provisioning, per pair		4.48	3.64
A.15.7	NTW Service Visit, Per Request, per MDU/MTU Complex		**21.18**	

ISSUE 14: Should this docket be closed?

RECOMMENDATION: No, the parties should be required to submit a signed agreement that complies with the Commission's decisions 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. (FORDHAM)

STAFF ANALYSIS: The parties should be required to submit a final arbitration agreement conforming with the Commission's decisions 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.


CLEC
DISTRIB.
BST
DISTRIBUTION
CLEC-1 CSX
CLEC-2 CSX
WIRING CLOSET
SCENARIO
ACCESS
CSX
WIRING
CLOSET
BST CSX
NTW
CUSTOMER
PREM

ATTACHMENT 5-2