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October 26, 2009

Ms. Ann Cole, Commission Clerk
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket No.: 000121A: Saturn Telecommunication Services, Inc., Motion to Intervene and Request to Have the Florida Public Service Commission Hold In Abeyance BellSouth Telecommunications, Inc. d/b/a/ AT&T Florida's ("AT&T Florida") Motion for Expedited Approval of Funding for Lifeline Outreach and for Modification of the Self-Effectuating Enforcement Mechanism ("Motion"), or Alternatively Deny the Request.

Dear Ms. Cole:

Pursuant to an email received from Ruth Nettles, Office of Commission Clerk on October 26, 2009, (copy attached) enclosed please find a total of eight copies of Saturn Telecommunication Services, Inc., Motion to Intervene and Request to Have the Florida Public Service Commission Hold In Abeyance BellSouth Telecommunications, Inc. d/b/a/ AT&T Florida's ("AT&T Florida") Motion for Expedited Approval of Funding for Lifeline Outreach and for Modification of the Self-Effectuating Enforcement Mechanism ("Motion"), or Alternatively Deny the Request, which was electronically e-filed on Friday, October 23, 2009; however, the same was too large to be accepted for e-filing.

Copies of the attached were served to the parties on the Certificate of Service on October 23, 2009.

We thank you for your kind attention to the filing of this Motion.

Very truly yours,

ALAN C. GOLD

COM
CR
CL
EC
GCP
SSC
SGA
ADM
CLK

Charles S. Coffey

From: Nmsamry@aol.com
Sent: Monday, October 26, 2009 10:44 AM
To: ccoffey@acgoldlaw.com
Subject: Fwd: FW: Docket #000121A
Attachments: dMotiontoInterveneandRequestToHoldAT&TInAbeyance10-20-09.pdf

From: Filings@PSC.STATE.FL.US
To: agold@acgoldlaw.com
CC: DMenasco@PSC.STATE.FL.US, RNettles@PSC.STATE.FL.US
Sent: 10/26/2009 7:46:11 A.M. Central Daylight Time
Subj: FW: Docket #000121A

Dear Mr. Gold:

We are in receipt of your attached document. Please note that per the Commission's e-filing requirements, documents are not to exceed 100 pages.

A link to the Commission's e-filing requirements is included for your convenience: http://www.psc.state.fl.us/dockets/e-filings/

Your filing must be filed in hard copy with our office in order to be accepted for filing. Please call our office if you have any questions.

Sincerely,

Ruth Nettles
Office of Commission Clerk
850-413-6770

From: Alan C. Gold [mailto:agold@acgoldlaw.com]
Sent: Friday, October 23, 2009 4:07 PM
To: 'Alan C. Gold '; Filings@psc.state.fl.us; Beth Keating; gene.watkins@cbeyond.net; tony.mastando@deltacom.com; matt.feil@akerman.com; kmudge@covad.com; carolyn.ridley@twtelecom.com; 'Keith Kramer'
Cc: 'Edenfield, Kip'; 'Gurdian, Manuel'; Adam Teitzman; Lisa Harvey; vkaufman@kagmlaw.com; gene@penningtonlawfirm.com; De.ORoark@verizon.com; dkonuch@fcta.com; sberlin@nuvox.com
Subject: Docket #000121A

Enclosed find filing please find Saturn Telecommunication Services, Inc. Motion To Intervene and Request to Have the Florida Public Service Commission to Hold in Abeyance AT&T's Motion for Expedited Approval of Funding for Lifeline Outreach and for Modification of the Self-Effectuating Enforcement Mechanism, or Alternatively Deny the Request.

Alan C. Gold, Esquire

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October 23, 2009

Ms. Ann Cole, Commission Clerk
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Via E-Mail Only: filings@psc.state.fl.us

Re: Docket No. 000121A: Saturn Telecommunication Services, Inc. Motion To Intervene and Request to Have the Florida Public Service Commission to Hold in Abeyance AT&T's Motion for Expedited Approval of Funding for Lifeline Outreach and for Modification of the Self-Effectuating Enforcement Mechanism, or Alternatively Deny the Request

Dear Ms. Cole:

Enclosed for filing is Saturn Telecommunication Services, Inc. Motion To Intervene and Request to Have the Florida Public Service Commission to Hold in Abeyance AT&T's Motion for Expedited Approval of Funding for Lifeline Outreach and for Modification of the Self-Effectuating Enforcement Mechanism, or Alternatively Deny the Request.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

/s ALAN C. GOLD

CC: All Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation in the establishment Of operations support systems Permanent performance measures for Incumbent local exchange Telecommunications companies	)))))	Docket No: 000121A Filed: October 23, 2009

SATURN TELECOMMUNICATIONS SERVICES INC. MOTION TO INTERVENE AND REQUEST TO HAVE THE FLORIDA PUBLIC SERVICE COMMISSION TO HOLD IN ABEYANCE AT&T'S MOTION FOR EXPEDITED APPPROVAL OF FUNDING FOR LIFELINE OUTREACH AND FOR MODIFICATION OF THE SELF-EFFECTUATING ENFORCEMENT MECHANISM, OR ALTERNATIVELY DENY THE REQUEST

Saturn Telecommunication Services Inc d/b/a/ STS Telecom (STS Telecom) a Florida corporation, pursuant to Rules 28-106.201, 28-106.204 and 28-106.205, of the *Florida Administrative Code,* files this Motion to Intervene and Request to Have the Florida Public Service Commission Hold In Abeyance BellSouth Telecommunications, Inc. d/b/a/ AT&T Florida's ("AT&T Florida") Motion for Expedited Approval of Funding for Lifeline Outreach and for Modification of the Self-Effectuating Enforcement Mechanism ("Motion"), or alternatively deny the request.

1. The basis of AT&T's argument supporting its request to eliminate Tier 2 remedy payments is as follows:

> Tier 2 remedies provide additional financial incentives to focus on the overall competitive process to maintain an open market and prevent backsliding. This "safeguard" is no longer necessary....Since Section 271 approval in 2002, AT&T Florida has unquestionably maintained its ordering, provisioning, maintenance & repair, and billing systems and associated processes at levels that support the CLEC industry and provides an efficient CLEC with a meaningful opportunity to compete.

2. AT&T's argument is disingenuous, because if AT&T was properly maintaining its systems and properly and timely meeting the CLECs' orders and other requests, it would have no remedy payments to make. AT&T has the ability to eliminate all remedy payments both to the state and to the CLECs; all AT&T needs to do is to comply with the performance measurements. STS suggests that AT&T will continue to miss the performance measurements consistent with its past performance, and to eliminate the remedy payments to the State would only serve to encourage backsliding. The remedy payments should not be eliminated, but instead this Commission should investigate how AT&T measures it performance, and insure that these measurements accurately reflect performance.

3. Currently STS Telecom has two active complaints against AT&T for discrimination for the "access" of UNE and UNE Combinations in two different venues

4. STS' position in both complaints is that AT&T has not maintained an open market, and that they have not complied with the market opening requirements of Section 271 of the Act.[1]

5. In the current complaint with the FEDERAL COMMUNICATION COMMISSION, of SATURN TELECOMMUNICATION SERVICES, INC. a Florida corporation [Complainant] v. BELLSOUTH TELECOMMUNICATIONS, INC., Florida corporation, d/b/a/ AT&T FLORIDA, [Respondents], **File No. EB-09-MD-008 [see**

[1] The Telecommunications Act 1934 as amended in 1996, Section 271 (2) SPECIFIC INTERCONNECTION REQUIREMENTS—(B) COMPETITIVE CHECKLIST.—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following: (i) Interconnection in accordance with 251 (c)(2) and 252 (d) (1). (ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251 (c) (3) and 252 (d) (1).

attached exhibit "A" without exhibits which are not being filed herein, but will be supplied upon request to the FPSC or any interested party], STS Telecom has alleged that AT&T Florida has violated numerous conditions of interLATA relief as provided by Section 271 of the Act with regards to the "competitive checklist" (B)(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251 (c)(3) and 252 (d)(1). This action should be resolved either by the end of the year or in the early part of next year.

6. Further STS Telecom has before this Honorable Commission a complaint against AT&T seeking that the Commission prohibit AT&T from the retiring of LENS (Local Exchange Navigation Systems) used in the AT&T Southeast Region which is set to be replaced by LEX and VERIGATE as used in the AT&T Southwest Region.[2] STS alleges in its complaint that AT&T Florida's LEX ordering system violates an order of this Commission since it does not have the same pre-order edits as LENS, which was ordered to have the equivalent in quality of pre-order edits as AT&T's RNS (Retail Navigation System) that it provides to its retail services.[3] [See Docket No. 090430-TP]. **[see attached exhibit "B" which are not being filed herein, but will be supplied upon request to the FPSC or any interested party]**

7. In both venues STS Telecom argues that AT&T Florida engages in discriminatory practices as to the access of UNE and UNE Combinations, and that the replacing of LENS with LEX and VERIGATE violates this State Commission's Order

[2] The retirement of LENS and replacing the ordering system by LEX and VERIGATE is part of the AT&T 22 State OSS alignment.
[3] The Florida Public Service Commission's Order No. PSC-98-1001-FOF-TP in Docket No. 98119-T) ("Supra Order")

and further discriminates against pre-ordering and ordering as compared to parity to AT&T's own retail ordering systems.

8. STS expects that the FPSC staff will render a recommendation to the State Commission in early November 2009 with regard to STS' claims in Docket No. 090430-TP. STS expects that both the State Commission and the FCC will render their Orders within a relatively short time, which will reflect the accuracy or inaccuracy of the claims made by AT&T in its "Motion for the Approval of Lifeline Outreach Funding and for the Modification of SEEM Penalty Payments." Further, orders by the State Commission and FCC will have a direct impact in showing whether or not AT&T has "backslid," and whether "safeguards" are no longer necessary. In the event that either the State Commission or FCC rules in favor of STS and against AT&T, then the arguments by AT&T that "safeguards" are no longer necessary would be rendered moot. Such a ruling or rulings would demonstrate that SQM/SEEM Tier 2 payments are still required as a monitoring mechanism to verify that AT&T Florida is providing its wholesale customers with nondiscriminatory access to AT&T Florida's OSS.

9. With regards to AT&T Florida's responsibility to the Community Service Fund ("CSF") as agreed to between Florida's Office of Public Counsel ("OPC"), this funding is a separate and distinct requirement of AT&T Florida. Whether said Fund has been exhausted is not an issue in the instant Docket. The remedy payments, a completely separate matter from the CSF, were voluntarily agreed to by AT&T in order to ensure that AT&T Florida could enter into interLATA services in Florida, and do so in a more prompt manner. This interLATA relief has been of a great benefit to AT&T Florida financially. AT&T received what it bargained for when it agreed to remedy payments.

AT&T should not be allowed to escape such agreed-upon obligations. The enforcement mechanism is designed to maintain open markets in Florida; it is not meant to provide funds to the CSF. AT&T Florida bringing up its responsibility to the CSF is simply a veiled and disingenuous attempt to side step their responsibility to adhere to the principles of the Telecommunications Act of 1996, specifically with the market opening requirements of section 271; such funding should not be made a basis of removing a vital enforcement mechanism.

10. Since the inception of this docket through October 15, 2009, AT&T has made $11,321, 609.80 in Tier 2 payments to the state. A contribution of $250,000.00 is a drop in the bucket in comparison to the future payments that AT&T will be required to make, if past performance is indicative of future performance.[4] While contributions to the CSF are admirable, it is abhorrent to utilize the CMF as a tactic to escape its monetary obligations to the state. The state would be far better served to let AT&T's contribution to the CMF of $250,000.00 be a credit against its tier 2 remedy payment obligation, if this Commission is so inclined

11. Since the Florida Public Service Commission will be in a far better position to evaluate the positions of AT&T in their motion, once there is a final determination in the FCC [File No. EB-09-MD-008] hearing and at the FPSC [Docket No. 090430-TP] hearing, AT&T's motion in this instance should be held in "*abeyance*" until then.

12. The elimination of the tier 2 payment substantially affects STS' interest as such remedy payments help insure proper performance by AT&T and prevents

[4] STS believes that if AT&T accurately measured it performance that the payments would have been substantially higher than payments AT&T actually made.

backsliding. STS believes that if such remedy payments were abolished, that AT&T would be more inclined to poorly and untimely service STS' needs.

13. STS first learned of AT&T's Motion for Expedited Approval of Funding for Lifeline Outreach and for Modification of the Self-Effectuating Enforcement Mechanism on approximately October 16, 2009, in the ordinary course of its business.

WHEREFORE, Intervenor, SATURN TELECOMMUNICATION SERVICES, INC. respectfully requests that this Honorable Commission enter an order allowing it to intervene, hold AT&T's Florida's Motion for Expedited Approval of Funding for Lifeline Outreach and for Modification of the Self-Effectuating Enforcement Mechanism in abeyance until final determinations have been made before the FCC [File No. EB-09-MD-008] and the FPSC [Docket No. 090430-TP], or alternatively deny the request and for any other relief deemed appropriate.

s/ Alan C. Gold
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CERTIFICATE OF SERVICE
Docket No. 090430-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail only this 23 day of October, 2009 to the following:

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s/ Alan C. Gold
Alan C. Gold (Florida Bar No. 304875)

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
SATURN TELECOMMUNICATION SERVICES, INC., a Florida corporation,	)	
	)	
Complainant,	)	
	)	**File No. EB-09-MD-008**
v.	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC., a Florida corporation, d/b/a AT&T FLORIDA,	)	
	)	
Respondent.	)	
	)	

FORMAL COMPLAINT

Mark Amarant, President and CEO
Keith Kramer, Executive Vice President
SATURN TELECOMMUNICATION SERVICES, INC.
FCC Registration Number: 0018687350
12399 SW 53 Street
Cooper City, FL 33330
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Complainant

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Florida Bar Number 580910
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Counsel for Complainant

Dated: July 20, 2009

TABLE OF CONTENTS

FORMAL COMPLAINT

Complainant, SATURN TELECOMMUNICATION SERVICES, INC. ("STS" or "Complainant"), by and through their undersigned Counsel, pursuant to Sections 201, 202, 208, 251, 271 and 272 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (hereinafter, "the Act"), 47, C.F.R. Sections 1.720, *et seq.* of the Federal Communications Commission's ("FCC" or "Commission") Rules and Regulations, and 47 C.F.R. Sections 51.5; 51.307; 51.309; 51.311; 51.313; 51.315; 51.316; 51.319; 51.321; and 51.503; hereby brings this Formal Complaint against BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a AT&T FLORIDA ("AT&T" or "BELLSOUTH" or "Respondent").

I. PARTIES AND STS's COUNSEL

1. STS is a Competitive Local Exchange Carrier ("CLEC") and Interexchange Carrier ("IXC") certified by the Florida Public Service Commission ("FPSC"), to provide telecommunication services in Florida. STS is also a telecommunications carrier and local exchange carrier under the Act.[1]

2. STS is a regional telecommunications company offering local and long distance services to businesses and residential consumers throughout Local Access and Transport Area 460 ("LATA 460"), which includes South Florida.[2]

3. STS has its office at 12399 SW 53rd Street, Cooper City, Florida 33330, and its telephone number is 954-252-1000.[3]

[1] See Affidavit of Keith Kramer, ¶2.
[2] See Affidavit of Keith Kramer, ¶2.
[3] See Affidavit of Keith Kramer, ¶2.

4. AT&T is an incumbent local exchange carrier ("ILEC") certified by the FPSC to provide local exchange services in Florida. AT&T is an ILEC as defined in section 251(h)(1) of the Act and is a local exchange telecommunication company as defined by §364.02 (6), Florida Statutes. AT&T is also a Bell Operating Company ("BOC") and an Interexchange Carrier certified by the FPSC to provide long distance services based upon its compliance with section 271 of the Act.

5. According to the official records of the Florida Secretary of State, AT&T has its principal office at 675 W. Peachtree Street, NE, Suite 4500, Atlanta, Georgia 30375; and its Registered Agent for Florida, CT Corporation System, is at 1200 Pine Island Road, Plantation, Florida 33324[4]; AT&T's in-house Counsel representing AT&T in this matter is Terri Hoskins, Esquire, AT&T Services, Inc., 1120 20th Street, NW, Suite 1000, Washington, D.C. 20036, telephone number: (202) 457-3047. AT&T is also being represented by Geoffrey M. Klineberg, Esq., Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington D.C. 20036, telephone number: 202-326-7928.

6. STS is represented in this action by Alan C. Gold Esq., James L. Parado, Esq., and Charles S. Coffey, Esq. of Alan C. Gold P.A., 1501 Sunset Drive, Second Floor, Coral Gables, Florida 33143, FCC Registration Number 0018661306, telephone number: 305-667-0475, facsimile number: 305-663-0799, e-mail: agold@acgoldlaw.com.

[4] AT&T acquired BellSouth Telecommunications, Inc. pursuant to a merger. Hence, Respondent may be referred to in the instant complaint as "AT&T" or "BELLSOUTH".

II. CITATION TO COMMUNICATIONS ACT AND REGULATIONS VIOLATED

7. Pursuant to 47 C.F.R. §1.721(4), STS alleges that AT&T violated the following sections of the Communications Act and regulations of the Commission with respect to AT&T's failure to honor its commingling obligations (See Point I, *supra*):

   a. AT&T violated the following sections of the Act: 47 U.S.C.A. §§ 271(c)(2)(i) and (ii); 47 U.S.C.A. §§ 201(a) and (b); 47 U.S.C.A. § 202(a); 47 U.S.C.A. §§ 251(c)(2)(B), (C) and (D); and 47 U.S.C.A. § 251(c)(3);

   b. AT&T violated the following sections of the Commission's regulations: 47 C.F.R. §§ 51.309(e), (f) and (g); 47 C.F.R §§ 51.311(a) and (b); 47 C.F.R § 51.315(e); 47 C.F.R § 51.316(b); 47 C.F.R § 51.319(a); and 47 C.F.R 51.321 §§ (a) and (c).

   c. AT&T violated the following Order of the Commission: *Triennial Review Order* ("TRO")[5], ¶581.

8. Pursuant to 47 C.F.R. §1.721(4), STS alleges that AT&T violated the following sections of the Communications Act and regulations of the Commission with respect to AT&T's failure to honor its commingling obligations (See Point II, *supra*):

   a. AT&T violated the following sections of the Act: 47 U.S.C.A. §§ 201(b); 47 U.S.C.A. §202(c)(1); 47 U.S.C.A. §251(c)(2)(D); 47 U.S.C.A. §§ 271(c)(2)(B)(i) and (ii) and 47 U.S.C.A. § 272 (c)(1).

[5] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98), and Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147), Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 16978 (rel. Aug. 21, 2003) (Triennial Review Order) ("TRO").

b. AT&T violated the following sections of the Commission's regulations: 47 C.F.R. § 51.5; 47 C.F.R. §§ 51.307(a) and (c); 47 C.F.R. §§51.309(a), (c) and (f); 47 C.F.R. § 51.316(a); 47 C.F.R. §§ 51.319(a)(c) and (d); and 47 C.F.R. § 51.321(a).

c. AT&T violated the following Order of the Commission: *Non-Accounting Safeguards Order*[6], Section V. Nondiscrimination Safeguards, ¶¶ 194, *et seq.*

9. Pursuant to 47 C.F.R. §1.721(4), STS alleges that AT&T violated the following sections of the Communications Act and regulations of the Commission with respect to AT&T's failure to perform seamless conversions (See Point III, *supra*):

a. AT&T violated the following sections of the Act: 47 U.S.C.A. §§ 202(a) and 47 U.S.C.A. § 251(c)(2)(C).

b. AT&T violated the following sections of the Commission's regulations: 47 C.F.R. § 51.311(a); 47 C.F.R. § 51.316(b)

10. Pursuant to 47 C.F.R. §1.721(4), STS alleges that AT&T violated the following section of the Communications Act with respect to AT&T's failure to negotiate in good faith (See Point IV, *supra*):

a. AT&T violated the following sections of the Act: 47 U.S.C.A. § 202(a) and 47 U.S.C.A. § 251(c)(2)(C).

b. AT&T violated the following sections of the Commission's regulations: 47 C.F.R. § 51.311(a) and 47 C.F.R. § 51.316(b).

[6] See In The Matter Of Implementation Of The Non-Accounting Safeguards Of Sections 271 And 272 Of The Communications Act Of 1934, As Amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 11230 (December 24, 1996).

III. SUMMARY

11. On December 3, 2003, Commissioners Michael J. Copps and Jonathan S. Adelstein commented on the FCC's final decision granting Qwest, permission to enter the long distance market, stating:

> Today's decision is one for the history books....But this is no way the end of the process, because the real challenge is just beginning. We must put in place a rigorous and sustained *monitoring* process to ensure continued compliance with the market-opening requirements of Section 271. We are mistaken if we think that competition is guaranteed forever by our decisions-at best it is only enabled.... After all, without effective monitoring, we may find the old monopoly forces that led to the breakup of MaBell will be able to just piece themselves back together again". [7]

12. As evidenced by STS's instant complaint, this warning has unfortunately come true

13. In 2003, STS entered the "local competitive" market in South Florida. By March 2005, STS had grown to over 18,200 UNE-P lines, adding nearly 700 UNE-P lines per month.[8] According to AT&T's Executive Director of Wholesale Sales,[9] Marcus Cathey ("Cathey"), by 2005 "STS had a very large base of UNE-P provided customers."[10] Cathey believed STS to be "large" and "significant" for the South Florida area.[11] STS was a facilities-based carrier with plans to move its embedded base of UNE-P customers, primarily residential and small business customers, to its

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[7] *See FCC Commissioners Michael J. Copps and Jonathan S. Adelstein Call for Section 271 Enforcement Follow-Through,* FCC, Unofficial Announcement of Commission Action (December 3, 2003).

[8] See Affidavit of Keith Kramer, ¶4 and documents KK00025-KK00027.

[9] See Marcus Cathey' s Deposition page 8 line 13, taken in *Saturn Telecommunications Inc. v. BellSouth Telecommunications Inc.* in the United States District Court for the Northern District of Florida, Case Number 4:08-CV-00271-SPM-WCS on May 21 2009. (Marcus Cathey's Deposition")

[10] See Marcus Cathey's Deposition page 63 lines 21 and 22.

[11] See Marcus Cathey's Deposition page 66 lines 13 and 14.

CLASS five switch within the TRRO's transition period.[12]

14. In mid-2004, anticipating the TRRO, BellSouth solicited STS to buy a commingled network using its "Special Access SMARTring" connected to UNE-Ls.[13] BellSouth's design was attractive as it would allow STS in a short time and with a modest capital investment, to transition its embedded base of UNE-P customers to its facilities. [14]

15. During the transition period of 2005, STS also launched its new Voice over Internet Protocol ("VoIP") services targeted to larger business customers using larger bandwidth services, i.e., DS1s (local loops combined with transport). The BellSouth designed commingled network also accommodated these combined voice and data services. VoIP services with the combination of advanced hardware offerings allowed STS to expand its market to medium and enterprise business customers, something that it hadn't done prior to 2005.[15] This would complete STS's product offering allowing it to be a reasonably efficient CLEC, envisioned by the TRO and TRRO[16].

16. During the investigation and negotiation phase for the commingled network, BellSouth provided STS with information identifying the types of UNE-L loops it would use, recommending two of the more cost effective UNE-Ls: (a) Unbundled Copper Loops Non-Designed (UCL-ND) or (b) Service Level 1 (SL1) loops.

[12] The FCC Triennial Review and Remand Order (TRRO) allowed CLEC's providing services through UNE-P to have a twelve month transition period starting March 11, 2005, to move their embedded base to alternate arrangements. See TRRO, ¶¶ 235, 236 and 239. See Affidavit of Keith Kramer, ¶ 12.

[13] See Affidavit of Keith Kramer, ¶ 12. See also Marcus Cathey's Deposition, pages 67, 68, 80, 81 and 142.

[14] See Affidavit of Keith Kramer, ¶ 12.

[15] See Affidavit of Keith Kramer, ¶ 24

[16] *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338; FCC 04-290, released February 4, 2005 ("Triennial Review Remand Order" or "TRRO")., ¶¶ 24-28. See also Affidavit of Keith Kramer, ¶5.

BellSouth indicated that STS would use the "batch hot cut"[17] process to migrate its embedded base of UNE-P customers.[18] By December 2005 STS was ready to start migrating its embedded base of UNE-P customers to comply with the transition period envisioned by the TRRO—all lines should be converted by March 11, 2006. [19]

17. BellSouth persuaded STS to spend millions of dollars and enter into an agreement for a Special Access network, in part by assuring STS that it could use an Unbundled Copper Loop Non-Designed ("UCL ND") in its commingled network to support its residential and small business customers.[20] In early 2006, after STS committed to going forward with BellSouth's commingled network, BellSouth advised STS that it could not use the UCL-ND; instead, it must use the more costly Service Level 1, ("SL1") loops.[21] In late March 2006, after the expiration of the transition period for converting UNE-P to alternative arrangements, BellSouth informed STS that even the SL1 loop would not work, but instead, STS must use the far more costly Service Level 2 ("SL2") loop.[22] Though this change in network design dramatically increased the costs of STS's business plan, STS was already committed to the network so it decided to move ahead. Nonetheless, AT&T still refused to do the conversions of the embedded base of UNE-P lines in a timely and seamless manner and refused to convert new customers to the commingled network using DS0s.[23]

[17] The "batch hot cut process" that BellSouth uses is called the "Bulk Migration Process" in early 2004 this was a manual process, by the 2005 this process had become mechanized.
[18] See Affidavit of Keith Kramer, ¶¶ 22, 26--documents KK00093-95.
[19] See Affidavit of Keith Kramer, ¶ 30.
[20] See Affidavit of Keith Kramer, ¶ 26.
[21] See Affidavit of Keith Kramer, ¶32.
[22] See Affidavit of Keith Kramer, ¶34.
[23] See Affidavit of Keith Kramer, ¶ 34.

18. As a result of AT&T's actions, since March 11, 2005 STS has been effectively precluded from selling services to the small business and residential customers of South Florida. Realistically, the only market that STS can sell in South Florida is businesses large enough to use STS'S DS 1-based VoIP services.[24] Utilizing unlawful, deceptive and anti-competitive practices, AT&T has stripped away and continues to prevent STS from conducting its core business of serving the telecommunication needs of small business and residential customers.

19. Admittedly, since 2005 AT&T has been able to convert a handful of STS's customers to its commingled network. But those conversions were far from seamless. The conversion process was lengthy, at times taking days to convert just a few lines. Business customers lost dial tone for extended periods of time. After conversion, AT&T refused to properly service the customers, and did not properly perform repairs.[25] Moreover, these customers were then targeted by AT&T in its win back campaigns, reducing STS's Wholesale UNE-P lines from 18,200 to just over 4,500 lines today.[26] Even worse, STS cannot lure those customers back, because AT&T will not allow STS to convert existing AT&T customers to its commingled network.[27]

20. Notably, the actions of BellSouth appear to stand in stark contrast to the commingling efforts of its AT&T brethren in other regions.[28] In the thirteen (13) former Southwestern Bell states, commingling can be accomplished utilizing the equivalent

[24] See Affidavit of Keith Kramer, ¶ 79.
[25] See Affidavit of Keith Kramer, ¶ 79; Affidavit of Andrew Silber ¶ 16.
[26] See Affidavit of Keith Kramer, ¶ 79; Affidavit of Andrew Silber ¶ 20.
[27] See Affidavit of Keith Kramer, ¶ 79.
[28] See Declaration of Michael Starkey ¶ 53.

of an SL1 in the former nine (9) BellSouth states.[29] Yet, in the nine (9) former BellSouth states, AT&T requires that the costly SL2 be utilized for commingling in order to drive up the price and eliminate competition. If that weren't enough, AT&T in the former BellSouth region has no process to perform batch hot cuts, and not even a manual process for the conversion of a single customer to a commingled arrangement using DS0.[30]

21. Unlike Humpty Dumpty, "Ma Bell" is being put back together, and the new AT&T is as monopolistic and anti-competitive as ever. AT&T is committed to protecting its large number of small business and residential customers from fair competition.[31] As gigantic a company as AT&T is, it refuses to allow a small regional CLEC like STS compete for the small business and residential customers on a level playing field.

22. Since 2005, it has been STS'S intention to become a reasonably efficient CLEC competing with AT&T and other CLECs in South Florida for the lucrative small businesses and residential market.[32] AT&T has deliberately deprived STS of that opportunity by "baiting and switching" STS into entering into a long term and very expensive agreement related to AT&T's Special Access SMARTRing, by refusing to convert existing or new customers onto the SMARTring, by forcing STS to move its embedded UNE-P base to AT&T's very costly Wholesale UNE-P service, by eroding STS'S one time substantial base of customers, and by making it impossible to convert new residential and small businesses to the commingled network.

[29] Declaration of Michael Starkey ¶¶ 53, 54 and 55.
[30] See Affidavit of Keith Kramer, ¶79, document KK000674, Affidavit of Caryn Diaz, ¶10, and Affidavit of Ron Curry, ¶21.
[31] See Declaration of Michael Starkey, ¶¶ 7, 8 and 9.
[32] See Affidavit of Keith Kramer, ¶ 5.

IV. STATEMENT OF FACTS

A. Bellsouth Solicits STS

23. After executing an Interconnection Agreement ("ICA") in 2003 with BellSouth, STS commenced providing local telephone service in addition to the long distance service it had been previously providing.[33]

24. From 2003 through 2005, STS grew its business to approximately 18,200 UNE-P lines provisioned predominantly to small business and residential customers in LATA 460 in South Florida.[34]

25. Shortly after publication of the decision of the District of Columbia Court of Appeals on the impairment standard for unbundled local switching in *United States Telecom Assn. v. FCC,* 359 F3d. 554 (DC Cir. 2004) in April 2004, Keith Kramer ("Kramer"), STS'S Executive Vice President in charge of legal and regulatory, realized that there was a distinct probability that UNE-P would no longer be available and STS would need to find alternative arrangements in order to continue in the telecommunications business.[35]

26. In the summer of 2004, STS was solicited by a sales representative of BellSouth, Michael J. Lepkowski ("Lepkowski") and a BellSouth network sales engineer, Daryl Ducote ("Ducote") to sell STS a "SMARTring" which was a SONET-based network designed to transport special access services.[36]

27. At that time STS'S switched facilities were located in Miami, Florida and consisted of a Telica (now Alcatel) Plexus 9000 packet switch connected to BellSouth via an

[33] See Affidavit of Keith Kramer, ¶ 3.
[34] See Affidavit of Keith Kramer, ¶ 4--documents KK00025-KK00027.
[35] See Affidavit of Keith Kramer, ¶ 12.
[36] See Affidavit of Keith Kramer, ¶ 13.

OC-12 that STS was utilizing to provide bundled services to business customers over DS1 local loops and interoffice transport. This business supplemented STS'S core business of UNE-P lines.[37]

28. During the summer of 2004, Lepowski and Ducote proposed that Bellsouth could develop a commingled network for STS utilizing a Special Access SMARTring to which STS'S switch could be connected. STS would then use UNE combinations (i.e. Enhanced Extended Links ("EELs")) or a combination of unbundled loops and transport to connect STS'S customer loops to the fiber ring node and onto STS'S switch. Multiplexing would be purchased from BellSouth to multiplex DS0s to higher capacity transport facilities.[38]

29. During 2004, it was not decided what equipment was needed at the collocation facility, however it was understood by both Lepowski and Ducote that STS intended to utilize this commingled network to (i) migrate its entire embedded base of UNE-P customers (ii) migrate the business customers to which STS provided DS 1 services and (iii) serve new customers with DS0, DS1 and VoIP services[39].

30. In December 2004 Kramer received a call from both Lepkowski and Ducote, again suggesting that Bellsouth could develop a commingled network for STS[40].

[37] See Affidavit of Keith Kramer, footnote 8--documents KK00023-K00033, KK00075-KK00088, and K00153.
[38] See Affidavit of Keith Kramer, ¶15--documents KK00153-KK00155.
[39] See Affidavit of Keith Kramer, ¶15--documents KK00153-KK00155.
[40] See Affidavit of Keith Kramer, ¶ 14 The FCC defines "commingling as "the connecting, attaching or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of unbundled network elements, with one or more such facilities or services. See 47 CFR § 51.5.

31. In January 2005 Kramer had discussions with Lepkowski and Ducote concerning the development of the commingled network. Kramer specifically inquired of both BellSouth employees about the process that would be used to cutover STS'S embedded base of UNE-P lines to its own switch. Specifically, Kramer questioned and requested information about the sufficiency of BellSouth's Bulk migration process to convert STS'S embedded base of UNE-P customers to STS'S Class 5 switch once the commingled network was installed.[41]

32. On January 18, 2005, Ducote e-mailed Kramer in response to Kramer's inquiries, with copies to Lepkowski and Mark Amarant (Amarant"), the Chief Executive Officer of STS, the "information on the UNE-P to UNE-L bulk migration" which consisted of links to BellSouth's website and two documents, the first entitled "Manual Migration to Channelized Transport" and the second "UNE-P to UNE-L Bulk Migration, CLEC Information Package."[42]

33. Keith Kramer carefully reviewed the documents on BellSouth's website, which had *no restriction or exception for commingled circuits.*[43]

34. It must be noted that from 2004 through the conclusion of the construction of the network, BellSouth suggested nothing other than commingling to convert STS'S embedded UNE-P base and to convert new UNE-L customers.[44]

35. Also in January 2005, Lepkowski and Ducote were in the process of determining the actual number of STS lines that could be converted from UNE-P to DS0 and migrated to the commingled network[45]

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[41] See Affidavit of Keith Kramer, ¶17.
[42] See Affidavit of Keith Kramer, ¶17--document KK00019 and KK000182.
[43] See Affidavit of Keith Kramer, ¶17--document KK00182.
[44] See Affidavit of Keith Kramer, ¶79.

36. On February 4, 2005, the FCC released its TRRO[46], which, in part, established the permanent rule related to unbundled local circuit switching, and in turn eliminated UNE-P. In the TRRO, the FCC issued a national finding of "no impairment" for unbundled local circuit switching and established a transition period whereby CLECs were required to migrate from UNE-P to other service-delivery methods.[47]

37. On February 11, 2005, BellSouth released its carrier notification letter SN91085039, outlining the requirements related to the elimination of UNE-P and the conditions of the transition period.[48]

38. During February 2005 Kramer questioned Lepkowski and Ducote regarding their training and expertise on unbundled local elements due to the fact that in prior discussions with these two BellSouth employees (i) the primary focus was on Special Access products, and (ii) they have been unable to answer questions regarding UNEs.[49]

39. Lepkowski and Ducote both assured Kramer that they had already commenced training on UNEs and would have both the knowledge and available resources to assist STS in the development of the commingled network. STS was never advised otherwise.[50]

B. Bellsouth Designs A Commingled Network Utilizing Unbundled Copper Loops Non Designed

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[45] See Affidavit of Keith Kramer, ¶17-- KK00036-KK00049.
[46] *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, Order on Remand,* WC Docket No. 04-313, CC Docket No. 01-338; FCC 04-290.
[47] TRRO ¶ 199.
[48] See Affidavit of Keith Kramer, ¶18--documents RC00001-RC00005.
[49] See Affidavit of Keith Kramer, ¶19.
[50] See Affidavit of Keith Kramer, ¶19--document KK00052.

40. The focus during February 2005 then switched to the particular BellSouth Serving Wire Centers ("SWCs") in which STS would place its collocation equipment in the commingled network. The SWCs in which STS placed its collocation equipment would serve as nodes. These nodes would allow STS to reach other SWCs where STS had UNE-P customers by using EELs and Interoffice Transport.[51]

41. Selection of the SWCs for the nodes was a crucial decision for STS because it determined the cost of interoffice transport that STS would incur for its commingled network. Since customers connected directly to the nodes would not require interoffice transport and the associated costs, STS had to choose the SWCs where it had the highest concentration of UNE-P customers to be migrated to the commingled network to serve as nodes.[52]

42. Lepkowski volunteered to take the information on STS'S nodes, begin a service inquiry which was required to see if BellSouth could engineer the SMARTring with 8 nodes, and contact a BellSouth commingling manager and other BellSouth product managers to confirm that Ducote and his network design was functional.[53]

43. Also in February 2005, Amarant was investigating the conversion costs for converting the UNE-P lines to this commingled network.[54]

44. On February 25, 2005, Ducote sent Amarant an e-mail containing schedules setting forth the number of lines to be converted at the various SWCs. The totals were 18,296 DS0 lines, 890 DS 1 lines, and 28 DS 3 lines.[55]

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[51] See Affidavit of Keith Kramer, ¶19.
[52] See Affidavit of Keith Kramer, ¶19.
[53] See Affidavit of Keith Kramer, ¶19.
[54] See Affidavit of Keith Kramer, ¶19.

45. Based on conversations with both Lepkowski and Ducote, STS was assured that (i) the commingled network could be built, (ii) STS'S embedded base of UNE-P customers could be migrated to the commingled network prior to the termination of the transition period set forth in the TRRO, and (iii), the network could be built and operated profitably.[56]

46. In April 2005 Kramer traveled to BellSouth's office in Atlanta to meet with Ducote and Lepkowski to discuss the commingled network that BellSouth was designing for STS. During the Atlanta meeting both Lepkowski and Ducote drew out the network design on a white board. This meeting included but was not limited to detailed discussions on the following topics: (i) costs of the network, including, without limitation, the initial (non-recurring) and operating (recurring) costs, (ii) numbers of lines at the SWCs and (iii) diagrams of the commingled network architecture. At this meeting both STS and AT&T agreed that STS would require an OC-48 SMARTring with OC-12 overlays for additional nodes. STS agreed with BellSouth's proposal that the network would be comprised of local loops from the customer's premise (either a DS1 or a DS0 Loop[57]) to either a 1/0 [58] or 3/1 mux[59] either directly connected to STS'S collocation or indirectly connected to STS'S collocation through the interoffice transport hub and spoke design at either a DS1 or DS3 level.[60]

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[55] See Affidavit of Keith Kramer, ¶19, documents KK00023-KK00033.
[56] See Affidavit of Keith Kramer, ¶16, documents KK0004-KK00056.
[57] A Digital Signal (DS) 0 is a 64 kbps voice grade channel and Digital Signal (DS) 1 is a 1,544 mbps channel equivalent to 24 DS0s.
[58] This refers to a multiplexer that combines multiple DS0s onto a DS1.
[59] This refers to a multiplexer that combines numerous DS1s onto a DS3.
[60] See Affidavit of Keith Kramer, ¶20--document KK00063- KK00064.

47. Prior to the Atlanta meeting, on April 19 and 20, 2005 Kramer wrote Bellsouth's Contract Negotiator, Kyle Todtschinder ("Todtschinder") explaining that "Daryl (Ducote) was coming up with a network design, based on the new rules (TRRO)" and wanted to discuss how the BellSouth designed network would comply with the rules[61]

48. On April 28, 2005, Ducote sent Kramer and STS'S Chief Technical Officer, Gil Cohen, ("Cohen") an e-mail with copies to Lepkowski and Amarant confirming the "main topic discussed, Commingling" at the Atlanta meeting, and the tremendous cost savings to STS of this BellSouth designed commingled network. Attached to the e-mail were various schedules including one which showed the lines to be converted on each SWC, which included 18,296 DS0 lines, and diagrams showing the proposed commingled network with the local loop from the end user to the SWC being a DS0 in most cases and a DS1 in the remaining situations.[62]

49. On May 2, 2005 Ducote wrote Kramer to discuss the ordering process for the commingled network including the "ordering of a DS0 to the end user.[63]

50. Also in May 2005, Kramer reviewed the Triennial Review Order (TRO)[64], particularly with regards to commingling as well as the related FCC rules and regulations. After his review, Kramer contacted BellSouth's local contract manager ("LCM") who serviced STS, Ann Foster ("Foster"), and requested a copy of BellSouth's commingling guidelines. Foster replied that there were currently no commingling guidelines available, however they were being finalized.[65]

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[61] See Affidavit of Keith Kramer, ¶20--document KK00063-KK00069.
[62] See Affidavit of Keith Kramer, ¶20. See documents KK00036-KK00049
[63] See Affidavit of Keith Kramer ¶21, See documents KK00053-KK00056
[64] See TRO.
[65] See Affidavit of Keith Kramer, ¶21--documents KK00060.

51. During May 2005, Kramer began focusing on what was the most effective and least costly DS0 that STS could utilize as the local loop in the commingled network. In response to Kramer's inquiry, Ducote sent Kramer technical information from BellSouth's document TR-73600, describing only the following loops: (i) Unbundled Copper loops Non-Designed ("UCL-ND"), and (ii) Service Level 1 ("SL1"). No mention was made of utilizing Service Level 2 ("SL2") or Unbundled Copper Loops Designed ("UCL-D").[66]

52. On or about May 28, 2005 Kramer, Amarant, Cohen, and Kevin Collins ("Collins"), a STS engineer, flew to Birmingham, Alabama to meet with Lepkowski, Ducote, and Michael Hurst ("Hurst"), the BellSouth Commingling Manager.[67]

53. During the May meeting in Birmingham, Lepkowski discussed the Commingled Network with STS, drew diagrams of BellSouth's proposed network design and discussed implementation of the commingled network.[68]

54. Lepkowski expressed to Kramer and Amarant how excited he was about this commingled network and the opportunities to market it to all other CLECs and that it could start a new wave of special access sales.[69]

55. AT the meeting STS questioned what would be the most efficient equipment to collocate in BellSouth's SWCs that would accommodate the commingled network arrangement as well as comply with the necessary requirements of section 251(c)(6)

[66] See Affidavit of Keith Kramer, ¶22--documents. KK00093 and KK00094.
[67] See Affidavit of Keith Kramer, ¶22--documents KK00098-KK00101; See Affidavit of Gil Cohen, ¶3.
[68] See Affidavit of Keith Kramer, ¶23; See Affidavit of Gil Cohen, ¶4.
[69] See Affidavit of Keith Kramer, ¶67--document KK00451; See Affidavit of Mark Amarant ¶ 3.

of the Act.[70] Cohen inquired as to whether a patch panel[71] would meet both criteria. Hurst left the room to confer with other BellSouth personnel and after a substantial period of time, Hurst returned to the meeting and stated that the patch panel would be compliant with section 251(c) (6) of the Act and would work in a commingled network utilizing DS0s and DS 1s.[72]

56. On May 31, 2005, Hurst confirmed his understanding of this commingled network in writing stating; "From the proposed configurations that were reviewed with me today for STS Telecom, it is my understanding that they will have voice grade/DS0 and DS1 UNE loops connected to and riding Special Access channelized interoffice facilities connected to a ring. In my opinion STS Telecom would be in full compliance with their Triennial Review Order based interconnection agreement that stipulates that high capacity loop transport must terminate into a collocation that meets 51.318(c) if it terminates the channelized DS3 facilities into a virtual collocation and further cross-connects to the ring."[73]

57. On June 2, 2005, Ducote writes STS that they "are also still investigating the migration/conversion process discussed in our (Birmingham) meeting and hope to

[70] Section 251(c)(6) of the Act imposes on incumbent local exchange carriers (ILECS) the "duty to provide, on rates terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier....".

[71] See: Affidavit of Gil Cohen ¶ 4; alsot Generally speaking a patch panel is a mounted hardware unit containing an assembly of port locations in a communications.....system. In a network, a patch panel serves as a sort of static switchboard, using cables-or patch panel cords or cables-to interconnect equipment with the network. http//searchnetworking.techtatget.com/sDefinition/0,,sid7_gci3433942,00.html

[72] See Affidavit of Keith Kramer, ¶23; See Affidavit of Gil Cohen, ¶¶ 4 and 5.

[73] See Affidavit of Keith Kramer, ¶23--document KK00153.

have a conference call early next week to discuss this."[74] In the e-mail Ducote also discussed the use of Unbundled Copper Loops Non-Designed and SL1s, and referred STS to Tech Ref TR-73600. No mention was made of SL2s.

58. In June 2005, after several requests for the information to Foster at BellSouth were ignored, Ducote sent STS a Copy of BellSouth's UNE-P to UNE-L Bulk Migration Process. In the accompanying e-mail, Ducote explained the relevancy of document, stating; "To me it indicates that you can use the lower rated loop out of your agreement. That is you can use a 2 wire Unbundled VoiceLoop-SL1 or a 2-wire Unbundled Copper Loop Non Design." Ducote ended the e-mail stating "I am currently waiting for more information on a migration process."[75] It is clear that in order to sell STS this expensive Special Access SMARTring, BellSouth was representing to STS that more expensive UNE loops such as SL2s were not required in this BellSouth designed commingled network.

C. The Parties Begin To Implement the Commingled Network

59. In July 2005, Mr. Ducote sent STS a letter from his superior, Assistant Vice President Marcus Cathey ("Cathey") at BellSouth, demanding that STS abide by the TRRO and transition UNE-P arrangements from UNEs to special access, including a remittance to BellSouth of the 15% rate increase retroactive to March 11, 2005. STS was shocked at the tone of the letter since the FCC's TRRO provided for a twelve (12) month transition period beginning on the effective date of the TRRO (March 12, 2005)[76] and Cathey was apparently demanding that STS immediately transition to

[74] See Affidavit of Keith Kramer, ¶23--documents KK00154-KK00155.
[75] See Affidavit of Keith Kramer ¶24--documents KK00156--KK00159.
[76] TRRO, ¶ 235.

"these new arrangements" despite only being about four (4) months into the twelve (12) month transition period. This letter was particularly surprising given that STS was in the process of signing an OC-48 SMARTring Agreement to accomplish the transitions within the twelve (12) month transition window.[77]

60. By August 2005 STS and BellSouth had signed the SMARTRing Agreement which provided for STS to pay BellSouth about $40,000 per month for the OC-48 SMARTring service. Further, Ann Parkin (f/k/a Ann Foster) (BellSouth) advised STS that the Commingling Package had been posted to the BellSouth Interconnection Website under Unbundled Network Elements. Kramer reviewed the information on BellSouth's website and contacted several BellSouth-approved companies that could install STS'S collocation equipment in the SWCs and the cable runs. STS ultimately selected and finalized an agreement with AFL Networks to perform the collocation installations.[78]

61. AFL Networks began the review of the installation process in September 2005. At that point, AFL Networks informed STS that it had never installed the type of collocation equipment (i.e., "patch panels") that STS wanted to install, and thus they had questions that they required to be answered prior to the installation. STS forwarded these questions to Ducote.[79]

62. Ducote sent an e-mail to STS which answered AFL Networks' questions and contained a network diagram for STS to forward to AFL Networks. [80] Ducote then

[77] See Affidavit of Keith Kramer, ¶25--documents KK00160-KK00164.
[78] See Affidavit of Keith Kramer, ¶26.
[79] See Affidavit of Keith Kramer, ¶27--document KK00167.
[80] See Affidavit of Keith Kramer, ¶28--documents KK00169-KK00171.

began working with Kathy Cicero ("Cicero") of STS on the ordering process for a commingled Network.[81]

63. By October-November 2005, Kramer had contacted Barbara Hunter ("Hunter") of BellSouth concerning the applications for collocation that had to be filled out before AFL Networks could begin the installation work. Hunter expressed concerns about the collocation equipment being installed (the patch panels) as she claimed that she knew of no other instance in which a similar arrangement had been previously installed. The conversation ended with Hunter stating that she would have to get back to Kramer before processing the order. Within a week, Hunter confirmed that she had received authorization that the patch panel collocation equipment was acceptable and compliant and she would assist STS with the application requirements.[82]

64. Once the application and engineering forms were completed and accepted by both companies, AFL Networks proceeded with the collocation installation, which began in November of 2005.[83]

D. The Trouble Begins Bellsouth Has No Conversion Process for Commingling

65. By December 2005, the collocation installations were complete, and the network was installed and ready for testing and to begin migrating lines. At this point, STS personnel were having difficulty reconfirming with BellSouth that STS had the ability to convert its embedded base of UNE-P customers to the commingled network. [84]

[81] See Affidavit of Kathy Cicero, ¶¶ 10 through 13.
[82] See Affidavit of Keith Kramer, ¶29.
[83] See Affidavit of Keith Kramer, ¶29--documents KK00499- KK00673.
[84] See Affidavit of Keith Kramer, ¶30--document KK0017; See Affidavit of Gil Cohen, ¶ 7. See Also Affidavit of Kathy Cicero, ¶¶14 through 16.

66. By January 2006, STS could not find anyone at BellSouth that understood how to convert STS'S embedded base of UNE-P customers to the commingled network. Discussions were ongoing between STS personnel and BellSouth representative Robby Pannell about the conversion process. However, it became increasingly clear to STS that no one within BellSouth's local ordering center had procedures for or understood the process for conversion of UNE-P lines to a commingled network[85].

67. From January 2006 through March 2006, STS unsuccessfully attempted to have BellSouth convert its existing UNE-P lines to STS'S commingled network. Numerous e-mails were exchanged between the parties, but BellSouth was unwilling or unable to convert the lines. Instead, BellSouth gave STS conflicting and misleading information. It appeared that no one in BellSouth had the slightest idea how to accomplish putting customers on the commingled network that BellSouth had designed for STS.[86]

68. In early 2006, STS was told by BellSouth that only SL1s can be utilized as the loop component of its commingled network and that unbundled cooper loops non-designed would not work. This resulted in a major price difference as all prior projections and discussions between STS and BellSouth were based upon the local loop being an Unbundled Copper Loop Non- Designed (UCL-ND).[87]

69. On March 27, 2006 Kramer e-mailed James Tamplin ("Tamplin") at BellSouth, and summarized what had transpired since January as STS had attempted to convert its

[85] See Affidavit of Keith Kramer, ¶31--documents KK00409, KK00410, KK00413, and KK00416- KK00425; See also Affidavit of Kathy Cicero, ¶ 16.
[86] See Affidavit of Keith Kramer, ¶¶32 through 37--documents KK00184-KK00245; See also Affidavit of Kathy Cicero, ¶¶17 through 18.
[87] See Affidavit of Keith Kramer ¶34, documents KK00210--KK00215.

UNE-P lines to its commingled network. Kramer points out that there simply are no processes in place to do the conversion. Kramer also states; "James, it seems perplexing to me that after a year of designing and building the network with the help of some very good people at BellSouth to comply with the FCC TRRO through commingling, now that it comes time to convert our UNE-P base, BellSouth has no way of doing the Bulk migration process to convert our lines."[88]

70. On March 27, 2006, STS'S Ron Curry ("Curry") e-mails BellSouth in frustration complaining of a manual process proposed by BellSouth in which STS would order a new line and disconnect the UNE-P, which would not only result in increased costs, but also result in unacceptable service outages for STS'S end user customers.[89] In other words, STS was being told it could not convert its UNE-P lines but would need to order all new services instead, complete with service outages that result from the provisioning of new facilities.

71. On March 28 Kramer e-mailed BellSouth complaining of the manual process and the prohibitive costs of the same and requested resolution.[90]

72. By the end of March the situation had degraded further as BellSouth informed STS that even the SL1 loop recently suggested would not work, and instead only the much more expensive SL2 would work. On March 29 Kramer e-mails BellSouth complaining that the costs of utilizing the SL2s in the commingled network would be more than the "retail price that BellSouth sell to its end users in Florida."[91]

[88] See Affidavit of Keith Kramer, ¶35, documents KK00216 and KK00217.
[89] See Docs KK00220-KK00224. See also Affidavit of Kathy Cicero, ¶19; Affidavit of Ron Curry, ¶¶ 32, 34-35.
[90] See Affidavit of Keith Kramer, ¶35, document KK00259.
[91] See Affidavit of Keith Kramer, ¶32.

73. An SL2 loop requires STS to pay approximately 15% more per month for each customer loop over the monthly charges for a SL1 loop. It more than doubles the initial investment in non-recurring charges that STS must pay to convert an existing or new customer to its commingled network above a SL1 loop. In fact, due to STS'S customer make-up the initial investment in SL2 loops could be up to four (4) times the cost of using SL1s.[92] On average STS' installation costs of an SL2 is approximately 3.6 times greater than the installation costs of an SL1.[93]

74. Based on the 18,200 subscriber lines using UNE-P, AT&T's insistence on an SL2 loop would have resulted in STS paying approximately $30,000.00 additional per month (over the SL1) in monthly recurring charges and nearly $2,300,000.00 in non-recurring charges.[94]

75. Also disturbing to STS was that the FCC's transition period for migrating UNE-Ps to alternative arrangements had expired and STS was paying much higher commercial rates for UNE-P instead of the rates provided for in the Company's ICA. Based on previous discussions between the companies, STS was prepared in December 2005 to start the bulk migration process. In March 2006, over three (3) months after STS was ready to convert its embedded base, BellSouth informed STS that no such conversion process existed.[95]

E. STS Attempts to Compromise With AT&T

76. By the end of March 2006 Kramer requested a conference call with the BellSouth Local Carrier Service Center ("LCSC") to discuss the problems STS was

[92] See Declaration of Michael Starkey ¶ 48 and footnote 92.
[93] See Affidavit of Mark Amarant footnote 4.
[94] See Declaration of Michael Starkey ¶ 49.
[95] See Affidavit of Keith Kramer, ¶33--documents KK00221- KK00222.

experiencing due to BellSouth's recent change in position. On this conference call a number of items were discussed, including BellSouth's new requirement that only Service Level 2 DS0 local loops ("SL2") could be used in a commingled network. Since STS was only just informed by BellSouth of this new costly requirement, Kramer inquired of BellSouth as to when BellSouth imposed this requirement. BellSouth responded that this requirement was placed on the BellSouth Interconnection Website in November 2005. During the conference call Kramer visited to the website and noted that the requirement was not currently on BellSouth's website and asked everyone on the call to check the website for themselves. No one else was able to find this onerous requirement of SL2s. That aside, this new piece of information from BellSouth about a SL2 loop requirement only increased STS'S concerns given that all previous indications from BellSouth indicated that first, lower-priced Unbundled Copper Loops Non-Designed, and then the more costly SL1 DS0 loops, could be used in a commingled environment.[96] Because SL2 loops were significantly more expensive, this new revelation dramatically changed the economics of the commingled network.

77. In a desperate attempt to get further clarification from BellSouth, Kramer e-mailed Tamplin about the conversion process. Kramer explained to him that STS had expended considerable time, effort and money over the past year building out the commingled network in reliance on the proposals given to STS by BellSouth.[97]

[96] See Affidavit of Keith Kramer, ¶¶22, 26.
[97] See Affidavit of Keith Kramer, ¶ 35--document KK-00259.

78. Kramer also contacted Donna Hartley ("Hartley") of BellSouth outlining the same issues he explained to Tamplin.[98] On March 28, 2005 Tamplin sent Kramer an e-mail stating that BellSouth had no ordering process for the conversion of UNE-P to a UNE-L terminating into a multiplexer other than the manual Local Service Request ("LSR"). Further, Tamplin stated that BellSouth could not guarantee that every UNE-L connected to the multiplexer in a commingled environment would be a UCL. This correspondence raised grave concerns for STS because the only manual conversion process that STS personnel was aware of involved disconnecting the existing loop and establishing an entirely new loop (with a Disconnect (D) and a New Connect (N)) – something entirely different and far more expensive than a conversion of an existing loop[99]. In other words, not only was the process being suggested by Tamplin manual in nature, it was not a conversion process at all, but instead a much more expensive disconnect of existing service and provision of new service that would undoubtedly, in addition to the greater expense, leave STS customers out of service for a significant period of time.

79. Following Tamplin's March 28, 2006 e-mail Kramer placed a call to Ducote because he was instrumental in assisting STS in the development of the commingled network that BellSouth was now claiming could not be used. Ducote suggested that STS should have been able to implement the network he assisted STS in developing and which STS actually built. He also expressed his belief that BellSouth would work something out with STS.[100]

[98] See Affidavit of Keith Kramer, ¶ 35--documents KK00236, KK00241, KK00246, KK00247.
[99] See Affidavit of Keith Kramer, ¶35--documents KK00241 and KK00260.
[100] See Affidavit of Keith Kramer, ¶36--document KK00257.

80. By this time, STS was in a desperate situation. STS had based its future plans on not only converting its embedded base of UNE-P to the commingled network but also on continuing to sell to small business and residential customers while adding advanced services to its product line. With the new BellSouth positions, it appeared that STS would be struggling to survive. As a result, STS was negotiating with a gun to its head and had no viable option except to work something out with BellSouth.[101]

81. In early April 2006, STS had settlement discussions with BellSouth; however BellSouth insisted that before settlement discussion occurred, that a non-disclosure agreement ("NDA") be signed. BellSouth also insisted that STS reduce the number of lines being that would be converted.[102] As a compromise and in order to avoid a costly and lengthy legal battle, Kramer suggested to BellSouth that STS could keep residential lines on the commercial agreement, that perhaps 8,500 lines could be converted to T1s (as opposed to DS0s), and that about 3,500 lines would need to be converted to DS0s in the commingled environment. During this call Kramer did not have the exact data in front of him to support these numbers, but based on the position that BellSouth had placed STS in, STS felt that reaching a compromise of some sort, at the time was critical to its very survival.[103]

82. Once Kramer received the NDA it was apparent that it was not an "off the shelf" NDA. It required that all STS personnel connected to the project be told in writing that there is a binding NDA. This was disturbing to STS while at the same time interesting that BellSouth would take this position and course of action. Once the

[101] See Affidavit of Keith Kramer, ¶37--document KK00280.
[102] See Affidavit of Keith Kramer, ¶38
[103] See Affidavit of Keith Kramer, ¶38--documents KK00272-KK00275.

NDA was signed, Kramer informed Lepkowski that the line count was an approximation, meaning that at the time of the conference call Kramer did not have the exact count of customers to be converted, including the number of customers that could be transitioned to DS1s profitably.[104] STS cannot presently locate this NDA, and believes after STS executed the same and returned it to BellSouth; it never retained a copy nor received a fully executed copy back from BellSouth.[105]

83. Following this conversation STS' upper management discussed the profitability of converting customers to DS1s, including the required line count per customer and the required amount of revenue that would make such a conversion to DS1 profitable. Given that STS originally intended to convert to DS0s in a commingled network, this profitability analysis was not based on the original business plan. Instead, STS compared the cost and profit to STS from purchasing loops from BellSouth at the rates in the Market Based UNE-P Agreement to the cost and profit to STS by converting their customers to STS'S network via DS1s. It became clear to STS'S management that the embedded base of UNE-P customers could not be converted, that BellSouth had no intention of converting STS'S entire embedded base of UNE-P, and that the cost to STS from purchasing its embedded base of UNE-P from BellSouth's Market Based UNE-P Agreement would critically and detrimentally affect STS'S long-term profitability, and indeed its future as a growing, viable business.[106]

[104] See Affidavit of Keith Kramer, ¶40.
[105] See Affidavit of Keith Kramer ¶39--documents KK00272- KK00285.
[106] See Affidavit of Keith Kramer, ¶41.

84. On April 13, 2006, Kramer had a phone conversation with Donna Hartley ("Hartley") of BellSouth during which she provided some hope that STS would be able to convert its entire embedded base. During the phone conversation, Hartley said that STS was going to be able to use "Bulk Migration Version 5" to covert its embedded base.[107]

85. From May 10, 2006 through May 26, 2006, STS continued to work with BellSouth to allow ordering Single Bandwidth Commingling ("SWBC") without success.[108]

86. STS'S concerns and problems with BellSouth led to a request that the companies meet in person to attempt to find a resolution. This meeting occurred in Atlanta, Georgia at BellSouth's offices in May 2006. The STS personnel present at this meeting were Mark Amarant and Keith Kramer, and the BellSouth personnel present at this meeting were Gary Patterson, Regina Guillet, Michael Lepkowski, Paul Wilbanks, Donna Hartley, Robby Pannell, and Valerie Cottingham. Several topics were discussed at this meeting, including STS'S financial position, BellSouth's recent SL2 loop requirement, and cutover volumes. Regarding STS'S financial position, Ms. Guillet (BellSouth) expressed concerns about STS on a going forward basis given that she had reason to believe that hundreds of CLECs were going out of business. Regarding BellSouth's requirement to use SL2 loops in a commingled arrangement, Ms. Hartley (BellSouth) explained that using SL1 loops in a commingled arrangement was technically infeasible. Regarding cutover volumes,

[107] See Affidavit of Keith Kramer, ¶41-documents KK00225- KK00226.
[108] See Affidavit of Kathy Cicero, ¶¶19(a) through (x).

STS indicated that it may have as many as 12,000 UNE-P customers to be converted, which was very disconcerting to the BellSouth representatives.[109]

87. Several Settlement proposals were exchanged over the following weeks which never came to fruition[110]. It resulted in a document being exchanged between the parties with questions from STS and BellSouth's responses. In BellSouth's responses they stated that Unbundled Copper Loops are not technically feasible, that only SL2s would work as the local loop in STS'S commingled network, that STS must augment its existing collocation points at the eight (8) nodes (which was never previously discussed), and that the number of conversions would be limited to 2,100 lines.[111] STS then replied to BellSouth's responses in an attempt to continue the dialogue.[112]

F. STS Forced To Take Legal Action and Reach a Settlement

88. In June 2006, STS'S Counsel filed an emergency petition with the FPSC and a comment letter to the FCC opposing the merger of AT&T and BellSouth. Both filings complained of the failure of BellSouth to timely convert STS'S embedded base of business as required by the FCC's TRRO, including but not limited to:

a. That BellSouth's representatives mislead STS with regards to the use of SL1, UVL Local Loops in its Commingled Network; and

b. That BellSouth misrepresented the Bulk Ordering Migration process.[113]

89. In July 2006 BellSouth representatives Jim Mesa (Attorney), Parkey Haggman (Attorney), Jerri Hendrix (AVP) Mr. Cathy (AVP) and Mike Lepkowski met with

[109] See Affidavit of Keith Kramer, ¶42, document KK00302.
[110] See Affidavit of Keith Kramer, ¶43 through 45.
[111] See Affidavit of Keith Kramer, ¶48, documents KK00355-KK00366.
[112] See Affidavit of Keith Kramer, ¶ 45, documents KK 00367 through KK00383
[113] See Affidavit of Keith Kramer ¶48 and Exhibit 2 of the Affidavit of Nancy M. Samry ¶7.

STS' representatives, Alan Gold (Attorney), Mark Amarant (CEO) and Keith Kramer (EVP) for mediation in Tallahassee Florida.[114]

90. During the mediation both Parties reached resolution on the following terms:

a. STS would receive $2.4 million in credits against existing bills.

b. Both Parties would enter into a new ICA and Wholesale Agreement.

c. BellSouth would provide for a bulk ordering process for 2,500 UNE-P lines by March 31, 2007, giving BellSouth time to implement a permanent solution for the rest of STS'S embedded base and conversion of new customers.

d. Final documents were to be signed by November 2006[115]

G. STS Attempts to Convert To Commingled Network by Bulk Migration Work Around Process Pursuant To Settlement Agreement

91. In June 2006, Kathy Cicero ordered STS'S first SPA 1/0 muxed T1. STS then submitted an order on June 21, 2006 to convert two (2) UNE-P lines to SL2 loop commingling on STS'S dedicated service to test the conversion process.[116]

92. The above request was rejected and STS was told that there was no conversion process.[117] This is corroborated by e-mails from BellSouth to STS employees.[118]

93. In October 2006 Ms. Parkey Haggman conferences Kramer, Amarant and STS'S Counsel to discuss the timeline for conversion and terms and conditions for the ICA.

a. Haggman states again that for the ICA SL1s are not feasible, only SL2s.

b. Haggman states during this call that it will take BellSouth approximately one year to convert the 2,500 lines.

[114] See Affidavit of Keith Kramer, ¶ 49.
[115] See Affidavit of Keith Kramer, ¶ 49.
[116] See Affidavit of Kathy Cicero, ¶ 20.
[117] See Affidavit of Kathy Cicero, ¶ 20.
[118] See Affidavit of Kathy Cicero, ¶ 24 and Affidavit of Andrew Silber, ¶ 7.

c. STS states its position that this is unacceptable.

d. Haggman later commits to a March 31, 2007 time frame to finish the conversion of the 2,500 lines.[119]

e. The rest of the STS embedded base will be converted subsequent to March 31, 2007.[120]

94. During the first week in December 2006 STS and BellSouth sign the Interconnect Agreement and the Confidential Settlement Agreement.[121]

95. Since the date of the two Agreements BellSouth has merged with AT&T.

96. The Confidential Settlement Agreement required STS to submit "a list of the number of circuits to be migrated by CLLI no later than November 13, 2006."[122] On October 27, 2006, more than two weeks prior to the required submission date, STS submitted a list of the circuits in compliance with the Confidential Settlement Agreement[123]

97. On November 13, 2006, AT&T acknowledged receipt of the list.[124]

98. The Confidential Settlement Agreement required that after the list of number of circuits was submitted, AT&T was obligated to establish due dates for the migration orders.[125]

99. AT&T never gave STS the due dates in breach of the Confidential Settlement Agreement.[126]

[119] See Affidavit of Keith Kramer, ¶ 50.
[120] See Affidavit of Keith Kramer ¶ 49.
[121] See Exhibit 1 to Affidavit of Nancy M. Samry, ¶6.
[122] See Exhibit 1 to Affidavit of Nancy M. Samry, ¶6
[123] See Affidavit of Keith Kramer, ¶50--documents CD000006-CD000007.
[124] See Affidavit of Keith Kramer, ¶ 50--documents CD000008-CD000009.
[125] See Exhibit 1 to Affidavit of Nancy M. Samry, ¶ 6.
[126] See Affidavit of Keith Kramer, ¶ 51; Affidavit of Ron Curry, ¶ 23.

100. STS fully complied with all of its obligations under the Confidential Settlement Agreement.[127]

101. Subsequent to entering into the Settlement Agreement, STS attempted in good faith to fulfill its obligations under the Agreements. The Affidavit of Caryn Diaz (f/k/a "Caryn Roldan") is attached hereto, which is a timeline of the events transpiring from November 1, 2006 through Mach 2009, evidencing STS'S good faith efforts under the Agreements.[128]

102. STS first received the ordering document for UNE-P to Commingled SL2 UNE Loop Bulk Migration on November 1, 2006, in which BellSouth requested information to begin the conversion of customers.[129]

103. From November 1, 2006 through November 28, 2006, STS continued to exchange and provide documentation and information requested by BellSouth in good faith in connection with the conversion of customers.[130]

H. AT&T Still Refuses or Fails to Convert Lines to STS'S Commingled Network

104. On November 28, 2006, BellSouth sent a revised document for the ordering process. STS attended a conference call with BellSouth and walked through a test order in the LENS system following the revised process provided to STS by BellSouth; the goal was to see how the order flowed through the system. The test order was unsuccessful and STS showed BellSouth the numerous deficiencies and problems with BellSouth's

[127] See Affidavit of Keith Kramer, ¶ 51.
[128] See Affidavit of Caryn Diaz.
[129] See Affidavit of Caryn Diaz, ¶ 11 and Affidavit of Andrew Silber, ¶13.
[130] See Affidavit of Caryn Diaz, ¶¶ 11 through 23.

revised ordering process. Until the deficiencies and problems with the ordering process were corrected, STS could not process any orders. [131]

105. STS was not the only CLEC that encountered operational barriers through BellSouth/AT&T's OSS. On or about September 14, 2006, XO Communication sent an e-mail to the BellSouth/AT&T CLEC Facilitator advising them of a number of problems with the commingling process, and copied STS and several other CLECs on said e-mail.[132] XO went on to advise that it has had to discourage commingling in the BellSouth Region due to all the problems with the BellSouth/AT&T systems.[133]

106. From November 29, 2006 through December 12, 2006, STS continued its attempts to work in good faith with BellSouth to provide all necessary documentation and information needed to fix the ordering process.[134]

107. On December 12, 2006, BellSouth made some suggestions to test the ordering and conversion process again and requested additional information. However, AT&T was not able to answer all questions and resolve the issues that arose from the November 28th test; STS was still unable to submit orders for conversion.[135]

108. By December 18, 2006, STS had provided all requested information to BellSouth, and awaited further instructions on how to process test orders and answers from BellSouth concerning all issues raised from the November 28th test.[136]

109. STS followed up with BellSouth on January 8, 2007 through January 12, 2007. but still did not receive any resolution from BellSouth.[137]

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[131] See Affidavit of Caryn Diaz, ¶¶23 through 26.
[132] See Affidavit of Ron Curry, ¶ 27.
[133] See Affidavit of Ron Curry, ¶ 28.
[134] See Affidavit of Caryn Diaz, ¶¶ 27 through 36.
[135] See Affidavit of Caryn Diaz, ¶ 34.
[136] See Affidavit of Caryn Diaz, ¶ 36.

110. On January 15, 2007, AT&T sent a third revised document for the work around process that was significantly different from previous documents. AT&T only answered some of the questions STS sent after the November 28, 2006 call, and STS still had many issues and concerns regarding the viability of the work around process.[138]

111. From January 16, 2007 through January 19, 2007, STS continued working in good faith with BellSouth to correct and resolve issues with the third revised work around process.[139]

112. On January 18, 2007, Stacy Rockett ("Rockett") of AT&T requested that STS submit two (2) test orders, one with the Connected Facility Assignment ("CFA") information in the remarks (as instructed in AT&T's process) and one with the CFA info in the Circuit Reference ("CKR") field (requested by STS). AT&T clarified and cancelled both orders for "Invalid Cable and Pair," which were the fields STS populated as directed to by AT&T. Rockett indicated that these orders were clarified due to an internal training issue on AT&T's part.[140]

113. On January 19, 2007, AT&T's Robby Pannell advised STS that he believed he addressed all of STS' concerns and that STS should be able to process test orders. STS'S Caryn Diaz ("Diaz" f/k/a "Roldan") disagreed and advised Rockett that the

[137] See Affidavit of Caryn Diaz, ¶¶ 37 through 39.
[138] See Affidavit of Caryn Diaz, ¶¶ 40 through 42.
[139] See Affidavit of Caryn Diaz, ¶¶ 44 through 46. See also Affidavit of Kathy Cicero, ¶¶28 through 31.
[140] See Affidavit of Caryn Diaz, ¶45.

order STS submitted a day prior was clarified and cancelled evidencing AT&T's most recent process was defective.[141]

114. On January 19, 2007, AT&T unilaterally cancelled a conference call between the STS'S and AT&T's legal teams. AT&T advised STS that it believed all concerns had been addressed and that STS should be able to process test orders. STS advised AT&T that an order submitted the previous day was defective.[142]

115. On January 22, 2007, Diaz received a call from AT&T's Rockett to discuss populating the CFA in the CKR field of the order in LENS. Rockett requested that STS submit another test order using a "live customer" and asked that STS once again populate the CFA info in the CKR field. Diaz advised Rockett that the test lines STS had been using in its office are no different from a live customer. Rockett advised Diaz that STS could not submit another order under that ATN[143] because STS has already used it on three (3) prior orders and that the orders were caught up in the system. Rockett requested that STS submit an order using one of its live customers outside of STS'S office. Diaz advised Stacy that she would need to get authorization from Keith Kramer prior to submitting a test order using one of STS'S live customers, as the orders that STS had submitted prior to this date were for live customer lines but in STS'S own office.[144]

116. Kramer then spoke to AT&T's Rockett and Hartley, and they both requested that STS submit a test order on one of its live customers. Kramer requested that they provide to

[141] See Affidavit of Caryn Diaz, ¶46.
[142] See Affidavit of Caryn Diaz, ¶ 46.
[143] "ATN" stands for Account Telephone Number. See Exhibit 45--documents CD001678-CD001683.
[144] See Affidavit of Caryn Diaz, ¶ 47.

STS a written guarantee that if STS used an outside live customer that the service would not go down.[145]

117. On January 23, 2007, Diaz received a call from Rockett and Hartley. They called to discuss the issue STS had with the ACTL pre-populating the orders in LENS. They advised STS to send another test order using a live customer and to leave the ACTL to auto populate. They advised STS that the LCSC rep would change the ACTL for STS to the correct one. Diaz asked Rockett and Hartley to send an e-mail detailing what they wanted STS to do on the orders and it would be discussed with Kramer for approval before sending over any orders. Diaz also advised Rockett and Hartley that Kramer would need to authorize a test order on a outside live customer. BellSouth agreed to send Diaz an e-mail detailing their work around for the ACTL field. STS received Rockett's e-mail regarding the ACTL work around.[146]

118. On February 7, 2007, AT&T sent STS a fourth revised document for the work around process, and from February 7, 2007 through February 23, 2007, STS continued providing AT&T information needed to attempt to perfect the process.[147]

119. Meanwhile, STS continued to work on transferring its embedded base onto the commingled network using UNE DS0s. It took well over a year to reach the point where BellSouth was able to finally try a test run of Wholesale UNE-P to UNE DS0 conversion, which began on February 19, 2007. The testing was a complete disaster due to BellSouth's incompetence.[148]

[145] See Affidavit of Caryn Diaz, ¶ 48.
[146] See Affidavit of Caryn Diaz, ¶ 49--documents CD000230-CD000232.
[147] See Affidavit of Caryn Diaz, ¶¶ 52 through 61.
[148] See Affidavit of Gil Cohen, ¶8.

120. During the February 19th DS0 test, BellSouth's technician was not hearing ringing when STS signaled ringing, but was just hearing clicks. BellSouth's technicians verified that the ring generator was functioning properly and claimed the issue looked like a signaling issue.[149] It became clear from the February 19th testing process that AT&T's technicians did not possess the experience and capability to perform a successful test conversion.[150]

121. On February 20th and 21st, 2007, STS continued working on the test run, and after examining the problems, STS'S Gil Cohen explained that the card at the pair gain was a basic POTS plug, and in order for STS to get the type of loop-start that was required AT&T need to swap it to 2- FXS cards/AUIA41, special service cards for SLIC 5. Ordinarily, the POTS plug would work, but because this was an "integrated" circuit (passing through Bellsouth Switch), there is no COT (central office terminal) to talk to the pair gain POTS plug. Cohen further explained the problems to AT&T.[151] At first, AT&T's technicians did not understand Cohen's explanations. AT&T's technicians initially attempted to not take responsibility for its failures by concluding that it had delivered what was ordered, however after explaining several times, using multiple analogies, AT&T's technicians finally understood Cohen's explanations.[152]

122. On February 21, 2007, STS'S Cohen continued to work with AT&T's technicians to implement the test.[153]

[149] See Affidavit of Gil Cohen, ¶8b.
[150] See Affidavit of Gil Cohen, ¶¶8c. through e.; Affidavit of Andrew Silber ¶19
[151] See Affidavit of Gil Cohen, ¶ 8.g.
[152] See Affidavit of Gil Cohen, ¶¶ 8g. through l.
[153] See Affidavit of Gil Cohen, ¶ 8.

123. On March 2, 2007 at 10:46 AM, AT&T's technicians stated that after further research they concluded that AT&T is not providing a standard loop start signal, that AT&T will have to change the way that they engineer the circuits, and that should be accomplished "soon"... AT&T's technicians also stated that they will most likely have to use a different piece of equipment at the RT, and if, they re-engineer they will have to dispatch to the CO.[154]

124. On March 5, 2007 at 4 PM, the SL2 loop at the office was functional and was sending STS' proper ANSI loop-start signaling. AT&T advised STS that it replaced the card at the Remote Terminal with the FXS card. STS was concerned that this was not a viable solution as AT&T will (most likely) have to dispatch to every Remote Terminal or Central Office that STS place orders for to install FXS cards in the Remote Terminal or Central Office, which would not work in a "bulk migration" environment because it's not possible to hot cut large amounts of customers with little or no downtime if AT&T had to dispatch to the remote terminal or central office.[155]

125. On March 8, 2007, four (4) lines were tested at STS'S location and the actual conversion time was 12 hours, which was unacceptable and unreasonable. The process was not ready for testing.[156]

126. From March 8, 2007 through May 1, 2007, STS continues to work with AT&T in good faith in order to perform live test orders, none of which were successful.[157]

127. On May 2, 2007, AT&T sent STS its fifth revised document on the ordering process, and the parties continue working on the process. On May 9, 2007, a live customer

[154] See Affidavit of Gil Cohen, ¶8.m.
[155] See Affidavit of Gil Cohen, ¶8.m.
[156] See Affidavit of Caryn Diaz, ¶ 62.
[157] See Affidavit of Caryn Diaz, ¶¶ 62 through 71.

was tested and said customer was left out of service for thirty (30) minutes. Another live customer tested loses service for one hour, and a third customer was left without service for 2 hours. All outages were caused by AT&T.[158]

128. From May 11, 2007 through June 7, 2007, the parties continue attempts to make the process work. On June 7, 2007, the parties perform a second round of live tests, which were again a failure.[159]

129. On July 3, 2007, STS submits eight (8) live test orders at the Oakland Park Spoke. On July 17, 2007, the live test conversions at a spoke were completed and the testing phase was completed.[160]

130. Despite the completion of the testing phase, there were still problems with conversion. On August 8, 2007, STS converted live customers at the nodes and a spoke, but STS still had several issues concerning the conversion of their embedded base from UNEP to commingled SL2s, none of which were resolved.[161]

A. BellSouth/AT&T had still not published a process for CLECs to convert to commingled SL2s outside of the defective work around process provided to STS.

B. Since STS'S last test order was converted there has been a CR (change requests) that was put into effect that contradicts the Bulk ordering work around process that STS is to follow on their orders. The CR is as follows

[158] See Affidavit of Caryn Diaz ¶¶ 72 through 76.
[159] See Affidavit of Caryn Diaz, ¶¶ 77 through 85.
[160] See Affidavit of Caryn Diaz, ¶¶ 87 though 88.
[161] See Affidavit of Caryn Diaz, ¶ 89.

1. CR2468 – Instructs CLEC to omit leading zeros on channel pair one and channel pair two for REQTYP B/Bulk Migration. Per the Bulk Ordering Work Around Process STS is required to populate the channel pair with "00." STS would need to test this field to be certain it will work following the instructions provided in the Bulk Ordering Work Around Process.

C. STS has observed that with each conversion test order that there is an ongoing need for AT&T internal training on this new commingled conversion process. STS is not in a position to submit orders and trust that they are handled and provisioned correctly without taking the time to project manage each and every step made by AT&T due to training matters.

D. Since STS has started the test order conversion process, the support team assigned to STS by AT&T has changed and continues to change. STS finds itself conditioning these new individuals to bring them up to speed on the processes so that they can pick up where the last person left off and support STS when necessary.

131. STS continues to try and salvage the conversion process by working with AT&T to convert customers, however attempts to convert live customers continue to fail.[162]

132. As of November 6, 2007 STS had observed the following.[163]

a. AT&T's systems are still issuing internal orders inconsistently. STS has implemented as part of their provisioning process the monitoring of AT&T's

[162] See Affidavit of Caryn Diaz, ¶¶ 90 through 99.
[163] See Affidavit of Caryn Diaz, ¶100.

internal orders that should be triggered by AT&T's systems. In the event that an AT&T internal order is not generated, generated incorrectly, or generated in error, STS was proactively contacting AT&T to have these orders corrected. If STS did not take this step, the result was service problems that affected STS'S customers.

b. With each conversion test order that there is an ongoing need for AT&T internal training on this new commingled conversion process. STS was not in a position to submit orders and trust that they are handled and provisioned correctly without taking the time to project manage each and every step made by AT&T due to AT&T's internal training matters.

c. Since STS had started the test order conversion process the support team assigned to STS by AT&T changed and continued to change. STS found itself training these new individuals to bring them up to speed on its processes so that these new members of the support team could pick up where the last person left off and support STS when necessary.

d. STS still had not received due dates from AT&T to populate the required field on the orders.

e. AT&T had limited STS to converting an average of only four (4) lines per wire center per day and limited the number of SWCs for conversions, which made the seamless conversion of STS'S embedded base impossible. Therefore, STS was unable to move forward with the migration to SL2's[164]

[164] See Declaration of Michael Starkey ¶18, 19, See Affidavit of Caryn Diaz ¶46, 100 and Affidavit of Keith Kramer, ¶ 55, See documents CD000218-CD000219, CD000224-CD000229, and CD000915-CD000916.

133. As an example of the bulk migration work around process failure, STS attempted to convert lines through the bulk migration work around process of its customer, Fox's All Pro Car Wash. Service interruption for the customer began on December 5, 2007, and was not resolved until nine days later on December 14, 2007. Throughout the attempts to repair the lines, AT&T continuously blamed STS, alleging that STS had a faulty switch. However, ultimately it was discovered that the problem was with AT&T's equipment—specifically a D4 card in BellSouth's central office. As a result, STS lost the customer, who STS later discovered went to AT&T.[165]

134. As of May 2008 AT&T had yet to convert STS'S embedded base of UNE-P customers, and the bulk migration work around process still suffered from serious errors and defects.[166]

135. While STS was eventually able to covert approximately eighty (80) lines, this was not able to be done without numerous errors being made due to AT&T's actions or inactions. STS was not able to convert these lines without service to customers being interrupted, often for lengthy periods of time during working hours, which is not acceptable to STS or its customers and makes the conversion process impossible for STS to use.[167]

136. Additionally, STS was not able to submit the orders it was entitled to submit by January 31, 2007 under a Settlement Agreement entered into by the parties. In fact, by January 31, 2007 STS had already received three (3) different versions of the Bulk Migration Work Around Process (hereafter "Work Around Process") due to the fact

[165] See Affidavit of Gil Cohen, ¶10.
[166] See Affidavit of Caryn Diaz, ¶¶ 101 through 103.
[167] See Affidavit of Caryn Diaz, ¶ 9; Affidavit of Ron Curry, ¶¶ 55-56.

that no version existed as of January 31, 2007 that would even allow a conversion order to be generated in the system.[168] It was not until May 31, 2007 that order generation was even possible, and then the Work Around Process was still riddled with defects that render it completely unusable to this day.[169]

I. STS Files Suit

137. Due to AT&T's failure to convert the 2,500 lines pursuant to the Settlement Agreement and the failure to convert STS'S embedded base of UNE-P customers, STS had no other choice except to file an informal complaint with the FCC on May 30, 2008. Nearly two weeks later, on June 12, 2008, STS filed a complaint against AT&T before the Northern District of Florida.[170]

138. The Complaint contained three counts: (1) Count I for breach of the Settlement Agreement based upon BellSouth's failure to convert the 2500 lines; (2) Count II for fraud in the inducement with respect to the entering the Settlement Agreement, alleging that BellSouth knew it would not be able to convert the 2500 lines, but represented otherwise to STS in order to persuade STS to enter into the Settlement Agreement; and (3) Count III for Breach of the Interconnect Agreement based upon BellSouth's disastrous implementation of its new Operating Support System ("OSS") by failing to properly test the same despite being warned by STS that the OSS would

[168] See Affidavit of Caryn Diaz, ¶10.
[169] See Affidavit of Caryn Diaz, ¶10.
[170] STS originally sued "AT&T Corp. as Successor to BellSouth Telecommunications, Inc." The Parties agreed to amend the complaint to substitute the name of defendant, "BellSouth Telecommunications, Inc., d/b/a AT&T Florida". The First Amended Complaint was accepted by Court Order on July 7, 2008.See Affidavit of Nancy M. Samry¶ 9.

fail and failing to convert the embedded base and new customers to its network utilizing SL2s.[171]

139. Upon a Motion to Dismiss filed by AT&T, the District Court dismissed Counts II and III on November 28, 2008. The Court dismissed Count II for fraudulent inducement, ruling that under Florida law, since the parties were adverse STS could not reasonably rely on AT&T's representations even if they were false. The Court dismissed Count III for breach of the Interconnect Agreement, ruling that the Florida PSC would be the appropriate forum to address the breaches of the ICA. The Court denied AT&T's Motion to Dismiss Count I of the Complaint for breach of the Confidential Settlement Agreement because the parties had explicitly chosen the Northern District of Florida as the appropriate forum for any dispute regarding the Settlement Agreement, and ruled that STS'S prior filing of an informal complaint with the FCC did not preclude STS from filing suit for breach of the Settlement Agreement.

J. AT&T Refuses To Convert To Commingled Network in April 2009

140. During the pendancy of the litigation, toward the end of March 2009, STS submitted another batch of orders to AT&T following precisely the steps included within the latest work around process developed by AT&T. Again, these orders were invalidly clarified and cancelled. It appeared that the AT&T representatives at the LCSC had no clue about this process and did not know how to work the orders. STS placed numerous calls to the LCSC and spoke with many representatives and managers to work through the clarifications. STS again dealt with error after error and wasted substantial time and effort in an attempt to work through these errors. Some of the

[171] See Affidavit of Nancy M. Samry¶ 9.

errors encountered were already worked through on past orders and were coming up again. The process proved again to be inconsistent, full of defects and unworkable.[172]

141. Still STS was determined to work through the issues and get its lines converted until a few of STS'S end users who were scheduled to be converted lost service prior to the conversion.[173]

142. One of the customers lost service because AT&T worked the conversion order too early. This customer had never had a service affecting trouble ticket in the two (2) years prior to this event.[174]

143. In addition, STS noticed that AT&T was designing the circuits as ground start rather than loop start as requested on the orders. If STS allowed the orders to complete, its end users would be out of service. Even when STS brought this issue to AT&T's attention, AT&T would correct some but not all of the circuits. The entire process became too cumbersome for STS and dangerous to its business customers who were facing a nearly certain loss of service when AT&T bungled the conversions. Therefore, management eventually gave the directive to cancel all orders and stop the project.[175]

K. Federal Action Voluntarily Dismissed

144. On June 22, 2009, STS filed a Motion to Amend and to file its Second Amended Complaint, adding an alternative count for rescission of the Settlement Agreement.[176]

[172] See Affidavit of Caryn Diaz, ¶105.
[173] See Affidavit of Caryn Diaz, ¶106; See Affidavit of Andrew Silber ¶ 16.
[174] See Affidavit of Caryn Diaz, ¶107; See Affidavit of Andrew Silber ¶ 16.
[175] See Affidavit of Caryn Diaz, ¶108.
[176] See Affidavit of Nancy M. Samry, ¶11.

145. The alternative count for rescission was due to the fact that since BellSouth could not perform its obligations in the Settlement Agreement to convert the 2500 lines, (the main consideration of the agreement), STS was entitled to rescind the agreement and was excused from any and all of its obligations under the Settlement Agreement. [177]

146. On June 23, 2009 STS and AT&T entered a Stipulation agreeing to dismiss the Federal litigation without prejudice[178]

147. On June 30, 2009 pursuant to the Stipulation, the United States District Court entered its order, dismissing the case without prejudice.[179]

L. Relation Back to Informal Complaint

148. STS filed its Informal Complaint on or about May 30, 2008 before the FCC, which was based in large part on the same set of facts as the instant formal complaint, Docket No.: EB-08-MDIC-0034, entitled Saturn Telecommunication Services, Inc. v. AT&T.

149. On January 15, 2009, the FCC approved the Parties' first joint request to extend the original deadline of January 21, 2009 to convert STS Informal Complaint to a Formal Complaint to March 7, 2009.

150. On February 10, 2009, the FCC approved the Parties' second joint request to extend the conversion deadline of March 7, 2009 to March 26, 2009.

151. On March 16, 2009, the FCC approved the Parties' third joint request to extend the conversion deadline of March 26, 2009 to April 15, 2009.

[177] See Affidavit of Nancy M. Samry ¶11.
[178] See Affidavit of Nancy M. Samry ¶13.
[179] See Affidavit of Nancy M. Samry ¶10.

152. On April 10, 2009, the FCC approved STS'S fourth request to extend the conversion deadline of April 15, 2009 to June 30, 2009, which was also agreed to by AT&T.

153. On June 17, 2009, the FCC approved STS'S motion to extend the conversion deadline of June 30, 2009 to July 21, 2009, which was also agreed to by AT&T.

154. Therefore, all claims stated in STS'S Formal Complaint that were also stated in its Informal Complaint shall relate back to the date of original filing of May 30, 2008.

V. LEGAL ARGUMENT & ANALYSIS

A. POINT I: AT&T HAS FAILED TO HONOR ITS COMMINGLING OBLIGATION

155. Since the end of 2004, STS has made substantial investments in its facilities and paid BellSouth/AT&T nearly twenty six million dollars ($26,000,000).[180]

156. If BellSouth had honored its commitments to STS regarding the BellSouth-designed commingled network, STS would have converted its UNE-P embedded base of over 18,200 DS0 lines to its commingled network by March 2006 and continued selling new DS0 services to small business and residential customers.[181]

157. Prior to 2005, STS'S primary business model was selling telecommunication services to residential and small business customers averaging less than four (4) lines per customer.[182]

158. BellSouth considered STS a strong competitor in the South Florida market. According to the deposition of Marcus Cathey, Executive Director of Wholesale

[180] See Affidavit of Keith Kramer, ¶2; Affidavit of Mark Amarant ¶ 2
[181] See Affidavit of Keith Kramer, ¶ 56.
[182] See Affidavit of Keith Kramer, ¶ 5.

Sales for AT&T,[183] taken May 21, 2009, "STS had a very large base of UNE-P provided customers"[184] and "probably large for that area, significant in that area."[185]

159. BellSouth solicited STS'S business in 2004 knowing that UNE-P was approaching its last days and that STS was going to need to find an alternative arrangement for its large UNE-P base.[186]

160. STS did not seek BellSouth out; rather, AT&T solicited STS to sell a special access product, a SMARTring.[187]

161. At that point in time, STS was already in the process of becoming a facilities based telecommunications carrier, and had purchased and was utilizing its own Class five switch.[188]

162. BellSouth's proposal to STS was for STS'S embedded UNE-P base and new customers be converted to STS'S network using commingled arrangements involving

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[183] See deposition transcript of Marcus Cathey taken in the case of *Saturn Telecommunications Company Inc. vs. BellSouth Telecommunications Company* in the United States District Court for the Northern District of Florida, Case Number 4:08-cv-00271-SPM-WCS, taken May 21 2009 page 8 line 13, Mr. Cathey testified that he held that position for the last eleven years but prior to the merger between AT&T and BellSouth he had a different title which was sales assistant vice president (deposition pages 8 and 9). Mr. Cathey also testified that both Michael Lepkowski and Daryl Ducote were members of the sales team that Cathey managed (see deposition page 12 line 22 through page 13 line 15.

[184] See Marcus Cathey deposition, page 63, lines 21 through 24

[185] See Marcus Cathey deposition, page 66, line s 13 and 14.

[186] See Affidavit of Keith Kramer, ¶12.

[187] See Marcus Cathey deposition commencing on page 68 line 12:

Q. Did somebody approach STS regarding the use of a SMARTring?
A. I'm sure my account team did.
Q. Why are you sure of that?
A. Because they were incented to.
Q. When you say they were incented, they received commissions for the sale?
A. That's correct.
Q. And as part of your compensation, does it depend upon the sales of your sales team?
A. Yes.

[188] See Affidavit of Keith Kramer, ¶ 12.

DS0 and DS1 UNE Loops, multiplexing, and an expensive Special Access SMARTRING.[189]

163. Initially, AT&T stated that STS could use the least expensive local loop for this commingled network, unbundled copper loop non–designed ("UCL-ND").[190] After hooking STS on acquiring the network by the low costs of the UCL-ND, BellSouth advised STS, that UCL-ND's could not be used in a commingled arrangement.[191] Then AT&T instructed STS to utilize a more expensive DS0 loop – a Service Level 1 (" SL1").[192] When AT&T failed or refused to migrate lines or add new customers to the commingled network utilizing SL1s, AT&T mandated an even more expensive DS0 loop – the SL2 loop.[193] AT&T's sales tactics are commonly referred to as a "bait and switch."[194]

164. As AT&T was not satisfied with forcing STS to utilize the costly SL2 loop, AT&T refused to perform the functions necessary to allow commingling in a proper, efficient and seamless manner when any DS0 was utilized as the local loop including without limitation, a SL2.[195]

165. More than four (4) years have passed since the conversion of STS'S embedded base should have been completed, and AT&T has only been able to convert approximately eighty (80) lines to STS'S commingled network utilizing the costly SL2, and nearly all of those conversions have experienced problems. Very few, if any, of these

[189] See Affidavit of Keith Kramer, ¶ 12; Affidavit of Gil Cohen, ¶¶ 3-5.
[190] See Affidavit of Keith Kramer, ¶¶ 22, 26.
[191] See Affidavit of Keith Kramer, ¶ 32.
[192] See Affidavit of Keith Kramer, ¶¶ 32-33.
[193] See Affidavit of Keith Kramer, ¶ 34.
[194] See Affidavit of Keith Kramer, ¶ 45.
[195] See Affidavit of Caryn Diaz, ¶¶ 99, 100.

conversions were seamless.[196] To date, STS has been unable to convert a single new customer to its commingled network utilizing any type of DSO UNE loop.[197]

166. Moreover, even though the conversion process was to involve no effort or manpower of behalf of STS other than properly ordering the conversions pursuant to AT&T guidelines, STS had to spend countless hours and micromanage each of those eighty (80) lines that were eventually converted by AT&T.[198] Had it not been for STS'S involvement, in all probability, the lines would not have been converted, or if converted the end-user would have experience longer outages and greater problems than experienced.[199]

167. According to AT&T's commingling expert, Frederick C. Christensen, Senior Manager, Methods & Procedures, in a hypothetical situation in which the order for a conversion pursuant to the bulk migration work around process went through smoothly without rejection or clarification, the end-user should receive dial tone with the only effort from STS being the submission of the order; stating; "In the other instance, where the order is submitted successfully by STS and its falls out for manual intervention, the service rep creates a service order, sends it downstream to network organization, they do their magic, the customer's got dial tone and everybody is happy".[200]

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[196] See Affidavit of Caryn Diaz, ¶ 9; See Affidavit of Keith Kramer, ¶ 59.
[197] See Affidavit of Keith Kramer, ¶ 59.
[198] See Affidavit of Andrew Silber, ¶ 15.
[199] See Affidavit of Andrew Silber ¶¶ 15 and 16; Affidavit of Ron Curry, ¶¶ 55-60; Affidavit of Caryn Diaz, ¶ 9.
[200] See Deposition of Frederick C. Christensen taken in the case of Saturn Telecommunications Services Inc. v. BellSouth Telecommunication, Inc. In the United States District Court for the Northern District of Florida, Case number 4:08-CV-271-SPM-WCS, taken May 28, 2009, page 89 lines 18 through 23.

168. AT&T's actions in making STS spend excessive manpower and resources in converting its embedded base are aimed at driving the costs of commingling even higher. It is just another anticompetitive and monopolistic method AT&T employs to discourage commingling and eliminate competition.[201]

169. Additionally, once the few lines were converted to STS'S network, the problems did not end. The percentage of the converted lines that had issues which required repair by AT&T occurred at three to four (3 to 4) times greater frequency than that experienced when the lines were wholesale UNE-P.[202] Then to pour salt on the wound, once repair issues arose AT&T could not adequately and in a sufficient time period repair the problems. This was apparently, at least in part, due to a lack of adequate training for AT&T repair personnel on the commingled network design.[203]

170. The failure to adequately repair the lines caused customers to loose confidence in STS and at times resulted in a loss of the account.[204] This is further evidence how AT&T discourages commingling, and in fact punishes a CLEC from taking advantage of certain available methods of interconnection.

171. AT&T also limited the number of UNE –P lines to be converted to STS'S commingled network pursuant to the Bulk Migration Work Around Process at certain Serving Wire Centers. In some cases AT&T limited the conversions to an average of four (4) lines per day.[205] Not only is this contrary to numerous representations that

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[201] See Affidavit of Andrew Silber, ¶¶ 15, 16; Affidavit of Keith Kramer, ¶ 15.
[202] See Affidavit of Andrew Silber, ¶¶ 17.
[203] See Affidavit of Andrew Silber ¶¶ 18 and 19; Affidavit of Caryn Diaz ¶¶ 9, 46, 100; Affidavit of Ron Curry, ¶¶ 57, 58.
[204] See Affidavit of Andrew Silber ¶ 19.
[205] See Declaration of Michael Starkey ¶¶ 18 and 19. See Affidavit of Caryn Diaz, ¶¶ 46, 100; Affidavit of Keith Kramer, ¶ 55.

BellSouth made to the FCC and State Commissions when it was urging the FCC to get rid of UNE-P, it is just another method that AT&T utilizes to discourage commingling and eliminate competition.[206]

172. During the Florida Public Service Commission's investigation of BellSouth's batch hot cut process in 2003, BellSouth discussed the benefits – operational efficiencies and rate advantages[207] – of its batch hot cut process and assured the FPSC that BellSouth was capable of converting the embedded base of UNE-P to UNE-L arrangements. BellSouth described its batch hot cut process as follows: "BellSouth took a proven, tested and approved process and overlaid a bulk ordering mechanism and project management to create a seamless, end-to-end process that will allow BellSouth to efficiently migrate thousands of UNE-P customers to UNE-L. These additions create efficiencies in the batch process and thereby it complies with the TRO."[208]

173. BellSouth explained to the Florida Public Service Commission that its batch hot cut process would work even if "CLECs decide to convert the totality of their UNE-P base to unbundled loops attached to the CLECs' switches rather than BellSouth's switches"[209] and claimed that it could hire "687 central office employees and 394

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[206] See Affidavit of Keith Kramer, ¶ 60.

[207] Direct Testimony of Kenneth Ainsworth on behalf of BellSouth Corp., Florida PSC Docket No. 030851-TP, December 4, 2003, p. 25. ("Q. IN ADDITION TO OPERATIONAL EFFICIENCIES, ARE THERE RATE ADVANTAGES TO THE BATCH PROCESS? Yes. The rate for the batch hot cut is discussed in the testimony of BellSouth witness John Ruscilli.") MS000094.

[208] Surrebuttal Testimony of Kenneth Ainsworth on behalf of BellSouth Corp., Florida PSC Docket No. 030851-TP, January 26, 2004, p. 5. MS000101

[209] Direct Testimony of Kenneth Ainsworth on behalf of BellSouth Corp., Florida PSC Docket No. 030851-TP, December 4, 2003, p. 33. (emphasis in original) MS000097

installation and maintenance employees" in "4 to 5 months" to address the UNE-P cutover volumes.[210]

174. In its Comments to the FCC in the TRRO proceeding, BellSouth represented: "BellSouth's hot cut processes, including its batch hot cut process, allows for UNE loops to be provided at a high level of efficiency and quality and for large quantities of UNE-P arrangements to be converted to UNE loops in a short time frame."[211]

175. If one believes AT&T's representations to the FCC and the Florida PSC to be true, then the only plausible explanation for the failure of AT&T to convert STS'S embedded UNE-P base to its commingled network in over four (4) years and prohibit STS from converting new customers to its network is that AT&T acted in the manner it did in order to eliminate competition and protect its "sacred and valuable" base of small business and residential customers[212]. AT&T made a conscious decision to break the law and either not commingle DS0s, or make it as expensive and as burdensome as possible to discourage CLECS from commingling DS0s.

176. Over those same four (4) years that AT&T was able to convert only 80 lines, AT&T has been able to charge STS the much higher rate for the commercial "UNE-P replacement" offering contained in its wholesale agreement and win back most of STS'S customers as evidenced by the 75% reduction in STS'S embedded UNE-P base.[213]

[210] Direct Testimony of Alfred A. Heartley on behalf of BellSouth Corp., Florida PSC Docket No. 030851-TP, December 4, 2003, p. 10. MS000107
[211] Initial Comments of BellSouth Corp., WC Docket No. 04-313, CC Docket No. 01-338, October 4, 2004 ("BellSouth TRRO Comments"), p. 26.
[212] See Declaration of Michael Starkey, ¶¶7, 8, and 9.
[213] See Affidavit of Keith Kramer, ¶ 7, 52, 59, and 79.

177. The simple fact is that AT&T has refused to permit commingling utilizing DS0 loops. Apparently AT&T made a decision that it was simply not good business for AT&T to permit DS0 UNE Loops in a commingled network. AT&T realized that by utilizing commingling, small CLECs who were willing to invest reasonably in their own facilities could compete with AT&T in the small business and residential market.

178. AT&T refuses to perform bulk migrations (or individual migrations), develop an electronic or manual bulk migration process, or even develop a single manual or mechanized conversion process for DS0 UNE-Ls in a commingled arrangement in order to migrate STS'S embedded base of UNE-P lines to its commingled network, or to convert new DS0 lines to this commingled network.[214]

179. Prior to 2004, BellSouth/AT&T promised the FCC an efficient hot cut procedure to convert its entire embedded base of UNE-P to UNE-L in exchange for the elimination of UNE-P.[215] For example, in October 2004 BellSouth filed the Affidavit of Kenneth Ainsworth, Keith Milner, and Alphonso J. Varner in WC Docket No 04-313, CC Docket No 01-338.[216] Beginning at paragraph 52 of BellSouth's Affidavit, the affiants discuss the creation of a "pseudo CLEC" by establishing 750 UNE-P accounts in three (3) SWCs in Florida for the purposes of demonstrating the proficiency of its batch hot cuts processes. In paragraph 55 of the affidavit, BellSouth discussed the current makeup of its existing base of UNE-L accounts in Florida, and determined that 87% were SL1s and only 7% were SL2s. BellSouth testified that it was able to do 125 batch hot cuts on day one at the West Hollywood Central Office,

[214] See Affidavit of Keith Kramer, ¶¶, 79--document KK00674.
[215] See Affidavit of Keith Kramer, ¶¶ 70, 76.
[216] Direct Testimony of Kenneth Ainsworth on behalf of BellSouth Corp., Florida PSC Docket No. 030851-TP, December 4, 2003.

which is close to the same SWC in which STS has a significant number of lines. BellSouth claimed that in the first three (3) days of this "test" it did 125 batch hot cuts a day in a particular SWC. On Day 4, BellSouth claimed it performed 375 batch hot cuts in three SWCs. This is in addition to BellSouth's claims that it could efficiently and seamlessly migrate the embedded base of UNE-P to alternative arrangements if the FCC eliminated UNE-P.

180. Contrary to BellSouth's claims in the affidavit, AT&T cannot presently convert STS'S embedded base of customers to the commingled network or convert new customers to the commingled network, and still has no workable process for batch hot cuts to a commingled network.[217] In fact, in March 2007 STS attempted to convert four wholesale UNE-P lines to its commingled network from its corporate office as a test over a two (2) day period.[218] This test was performed at the Pembroke Pines Central Office which is very close to the SWC (West Hollywood Central Office) in which BellSouth claimed it had converted over 125 UNE-P lines in a day.[219] This attempt was a complete disaster, all due the failures or refusals of AT&T to perform bulk migrations for UNE-L involving commingled arrangements.[220]

181. AT&T refuses to honor its commingling obligations as it relates to DS0 UNE loops.[221] AT&T reasonably permits commingling when utilizing DS1s serving large business customers, but constructs additional barriers for commingled arrangements and

[217] See Affidavit of Keith Kramer, ¶ 7.
[218] See Affidavit of Keith Kramer, ¶ 50.
[219] See Affidavit of Keith Kramer, ¶ 50.
[220] See Affidavit of Keith Kramer, ¶ 50.
[221] See Affidavit of Keith Kramer, ¶¶ 31-37.

stonewalls STS when attempting to convert a small business and residential customer utilizing DS0 loops.[222]

182. AT& T discourages commingling.[223]

183. It is undisputable that AT&T offers and performs bulk migrations as well as single LSR conversions for STS'S competitors who do not utilize a commingled network.[224] STS simply wants what the law requires: AT&T to provide STS nondiscriminatory access to UNEs and UNE Combinations, including UNEs and UNE Combinations in a commingled arrangement.[225] AT&T is not allowed to discriminate against STS because STS uses commingling, particularly because the FCC's commingling rules are clear that AT&T must permit STS to commingle and because AT&T developed the commingled network it now claims is technically infeasible.[226]

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[222] See Affidavit of Keith Kramer, ¶¶ 31-37.

[223] At Marcus Cathey's deposition commencing at page 61 line 4 he testified:

Q. Now, when you sell a special access product, I assume you intend that it works.
A. I do, but my team will not sell a special access product that was commingled. We would not proactively sell that.
Q. When you said you would not proactively sell it, what do you mean?
A. In other words, I wouldn't proactively engage our customers to do commingling.
Q. You would not go out to a customer and recommend commingling?
A. Absolutely not.

At Marcus Cathey's deposition commencing at page 53 line 16 he testified: .

Q. Now back in 2004, did you believe commingling could be used to increase the sales of special access?
A. No. I didn't really believe it would. If anything, I felt like it hurt the sales of special access.

At Marcus Cathey's deposition commencing at page 34 line 23 he testified:

"...there was no directive incentive to sell UNEs or commingling."

[224] See Affidavit of Keith Kramer, ¶ 54.

[225] See Affidavit of Keith Kramer, ¶ 54.

[226] See Affidavit of Keith Kramer, ¶¶ 21, 31-37.

184. In fact, STS has received proposals from another CLEC, Nuvox Communications ("Nuvox") to convert STS'S embedded base of wholesale UNE-P customers.[227] If STS went with Nuvox, the local loop would be a DS0, UNE-L, SL1 voice grade loop, which Nuvox acquires from AT&T. The UNE-L would be connected to Nuvox's network at the collocation point in the Service Wire Center.[228] The resulting price to STS would be far less than STS is paying AT&T on its wholesale UNE-P agreement.[229] If Nuvox can utilize DS0 loops – and more specifically DS0 loops of the SL1 variety – in its network, AT&T should be able to allow STS to commingle the same DS0 loops in STS'S commingled network. [230]

185. AT&T makes available commingled arrangements involving voice grade DS0 UNE-L muxed to DS1 throughout it local service territory except for in the former BellSouth states.[231]

186. AT&T's CLEC Online website indicates that the following commingled arrangement is available in AT&T's thirteen (13) state non-BellSouth region: "UNE DS0 Loop connected to a channelized Special Access DS1 Interoffice Facility, via a special access 1/0 mux."[232]

187. In this same thirteen (13) state non-BellSouth region, AT&T offers only a single type of analog DS0 loop and does not distinguish on the basis of SL1 versus SL2.[233] AT&T's requirement for STS to use a higher-priced, "designed" SL2 loop in

[227] See Affidavit of Keith Kramer, ¶ 54.
[228] See Affidavit of Keith Kramer, ¶ 54.
[229] See Affidavit of Keith Kramer, ¶ 54.
[230] See Affidavit of Keith Kramer, ¶¶ 54, 55.
[231] See Declaration of Michael Starkey, ¶ 53.
[232] See Declaration of Michael Starkey, ¶ 54.
[233] See Declaration of Michael Starkey, ¶ 53.

commingled arrangements has the effect of increasing STS'S costs and discouraging commingling.

Legal Analysis

188. As demonstrated by the approximately eighty (80) wholesale UNE-P lines that AT&T was eventually able to convert to STS'S commingled network, the fact that AT&T can successfully convert lines utilizing DS1 loops in a commingled arrangement, the fact that this commingled arrangement is offered by AT&T in all non-BellSouth states, and the fact that other CLECs utilize DS0 loops and SL1 loops in non-commingled arrangements all demonstrate that STS'S commingled network – a network that BellSouth itself developed – is technically feasible.[234]

189. Pursuant to 47 CFR §51.311 (c) "Previous successful access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities."

190. Pursuant to 47 CFR §51.321 (c), "a previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on any incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points."

191. Moreover pursuant to 47 C.F.R. 51.315 (e) "An incumbent LEC that denies a request to combine unbundled network elements pursuant to paragraph (c)(1) or paragraph

[234] See Affidavit of Keith Kramer, ¶¶ 45, 59; Declaration of Michael Starkey, ¶¶ 53, 54.

(d) of this of this section must prove to the state commission that the requested combination is not technically feasible."

192. It is undeniable that BellSouth designed commingled network utilizing SL1s as the local loop is technically feasible and BellSouth's refusal to convert is nothing more than anticompetitive and monopolistic behavior.[235]

193. AT&T failed to abide by its commingling obligations as set forth in 47 C.F.R. § 51.309(e), (f) and (g) as follows:

> (e) "Except as provided in §51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.
>
> (f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.
>
> (g) An incumbent LEC shall not deny access to an unbundled network element or a combination of unbundled network elements on the grounds that one or more of the elements:
>
> (1) Is connected to, attached to, linked to, or combined with, a facility or service obtained from an incumbent LEC; or
>
> (2) Shares part of the incumbent LEC's network with access services or inputs for mobile wireless services and/or interexchange services".

194. The FCC further found in the TRO that a restriction on commingling would violate Sections 201 and 202 of the Act as well as section 251(c)(3) of the Act:[236]

> We conclude that the Act does not prohibit the commingling of UNEs and wholesale services and that section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate

[235] See Affidavit of Keith Kramer, ¶¶ 45, 59; Declaration of Michael Starkey, ¶¶ 53, 54.
[236] *TRO*, ¶ 581.

> access services. An incumbent LEC's wholesale services constitute one technically feasible method to provide nondiscriminatory access to UNEs and UNE combinations. We agree with the Illinois Commission, the New York Department, and others that the commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers. Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c) (3) Incumbent LECs place no such restrictions on themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer or intermediate connections to network equipment in a collocation space. For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations."[237]

195. AT&T prohibits STS from commingling a SL1 DS0 UNE loop or a UNE combination, including a SL1 DS0 UNE loop with wholesale special access transport obtained from AT&T[238], in violation of 47 CFR §51.309(e).

196. Despite a request by STS, AT&T has refused to develop a conversion process whether batch migration (batch hot cut) or other type of process, for migrating UNE-P lines to commingled arrangements[239], in violation of 47 CFR §51.309(f) which requires AT&T to "perform the functions necessary to commingle" a UNE with a wholesale service.

197. AT&T has denied STS access to a SL1 loop and any other DS0 UNE loop and UNE combinations involving a SL1 and any other DS0 UNE loop on the grounds that the

[237] TRO, ¶ 581.
[238] See Affidavit of Keith Kramer, ¶ 45.
[239] See Affidavit of Keith Kramer, ¶¶ 45, 51.

UNE loop would be "connected to, attached to, linked to, or combined with" special access service obtained from AT&T[240] in violation of 47 CFR §51.309(g) (1).

198. It is very clear that any one of the above restrictions on commingling would be a violation of Sections 201, 202 and 251(c) (3) of the Act.

199. 47 USCA § 271 (c) (2) (B) "Competitive checklist" states:

> Access or interconnection provided or generally offered by a Bell operating company or other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> (i) Interconnection in accordance with the requirements of *sections 251(c) (2)* and *252(d) (1)* of this title.
>
> (ii) Nondiscriminatory access to network elements in accordance with the requirements of *sections 251(c) (3)* and 252 *(d) (1)* of this title.

200. Moreover pursuant to 47 USCA § 271 (d) (6), it is this Commissions' responsibility to enforce the checklist and review and act on complaints such as the instant complaint.

201. In section 581 of the TRO, the FCC has already determined that a restriction on commingling is a violation of section 251(c) (3) of the Act. STS has demonstrated in Point I of this complaint that AT&T has also violated section 251(c) (2) (B), (C) and (D) of the Act in that AT&T refuses or fails upon request to furnish interconnection "at any technically feasible point within the carrier's network", AT&T refuses or fails to provide interconnection "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection" and AT&T refuses or fails to provide interconnection on terms that are just reasonable and nondiscriminatory." Therefore

[240] See *Affidavit of Keith Kramer*, ¶ 45.

AT&T has violated its obligations under section 271 of the Act. AT&T's refusal to permit commingling involving DS0 loops in general and SL1 loops in particular violates 47 CFR § 51.319(a) which requires an incumbent LEC to "provide a requested telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis" and in subsection (a)(1) "nondiscriminatory access to the copper loop on an unbundled basis."

202. AT&T's refusal to connect DS0 loops[241], including without limitation SL1 loops, to STS'S commingled network violates 47 CFR § 51.321 (a) which requires an ILEC to provide "on terms that are just, reasonable and nondiscriminatory" "any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier."[242]

203. AT&T's failure to convert STS'S lines in a seamless manner[243] violates 47 CFR § 316 (b) which requires such conversions to occur "without adversely affecting the service quality perceived by the requesting carrier's end-user customer."

204. AT&T's failure to convert seamlessly and failure to properly and efficiently repair problems in STS'S commingled network[244] violates 47 CFR § 311 (a) and (b) which requires the quality of, and the access to, the unbundled network be the same for all telecommunications companies and for itself.

[241] See Affidavit of Keith Kramer, ¶ 45.
[242] The fact that AT&T successfully converted 80 lines, although with problems, "is substantial evidence that such method is technically feasible." 47 CFR § 51.321 (c). Moreover if it were not technically feasible AT&T had an obligation to prove the same to state commissions, pursuant to 47 CFR § 51.321 (c), which it failed to do. See Declaration of Michael Starkey, ¶51, and Affidavit of Keith Kramer, ¶45.
[243] See Affidavit of Keith Kramer, ¶ 54.
[244] See Affidavit of Keith Kramer, ¶¶ 54; Affidavit of Caryn Diaz, ¶¶ 99, 100.

COUNT I
Violation of 47 USCA § §271(c) (2)(i) and (ii) Regarding Commingling

205. STS realleges and reavers paragraphs 25 through 143 and paragraphs 155 through 204 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

206. AT&T's refusal to allow commingling utilizing DS0 loops in Florida as well as the other BellSouth states violates 47 USCA §271(c) (2) (i) and (ii) as AT&T failed "to provide interconnection in accordance with sections 251(c) (2)" of the Act, as well as "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c) (3) of the Act."

207. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE, STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T

immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

COUNT II
Violation of 47 USCA §201(a) Regarding Commingling

208. STS realleges and reavers paragraphs 25 through 143 and paragraphs 155 through 204 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

209. AT&T's refusal to allow commingling utilizing DS0 loops in Florida as well as the other BellSouth states violates 47 USCA §201(a) which requires "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore."

210. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged

WHEREFORE, STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations

under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

COUNT III
Violation of 47 USCA §201(b) Regarding Commingling

211. STS realleges and reavers paragraphs 25 through 143 and paragraphs 155 through 204 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

212. AT&T's refusal to allow commingling utilizing DS0 loops in Florida as well as the other BellSouth states constitutes a practice which is unjust and unreasonable in violation of 47 USCA § 201 (b).

213. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

COUNT IV
Violation of 47 USCA §202(a) Regarding Commingling

214. STS realleges and reavers paragraph 25 through 143 and paragraphs 155 through 204 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

215. AT&T's refusal to allow DS0 loops and/or SL1 loops as the local loop in commingled arrangements in Florida as well as the other BellSouth states while allowing other CLECs and itself to utilize DS0 loops and/or SL1 loops as the local loop in non-commingled network constitutes "unjust or unreasonable discrimination in charges practices, classifications regulations, or services" and gives "undue or unreasonable preference or advantage" to AT&T itself and other CLECs who utilize DS0 loops as the local loop in their networks in violation of 47 USCA §202 (a).

216. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled

network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE, STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

COUNT V
Violation of 47 USCA § 251(c) (2) (B), (C) and (D) Regarding Commingling

217. STS realleges and reavers paragraphs 25 through 143 and paragraphs 155 through 204 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

218. AT&T's actions in refusing and failing to allow commingling of DS0 loops in Florida and the other BellSouth states constitutes a violation of 47 USCA § 251(c) (2) (B), (C) and (D) in that AT&T refuses or fails upon request to furnish interconnection "at any technically feasible point within the carrier's network", AT&T refuses or fails to

provide interconnection "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection" and AT&T refuses or fails to provide interconnection on terms that are "just, reasonable and nondiscriminatory."

219. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

COUNT VI
Violation of 47 USCA §251(c) (3) Regarding Commingling

220. STS realleges and reavers paragraphs 25 through 143 and paragraphs 155 through 204 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

221. AT&T's refusal to allow commingling utilizing DS0 loops in Florida as well as the other BellSouth states violates AT&T's obligation to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) of the Act."

222. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start converting existing customers to STS'S commingled network utilizing DS0

loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

B. POINT II: SL1s ARE THE APPROPRIATE UNE-L IN STS's COMMINGLED NETWORK

223. In 2005, when AT&T solicited STS to sell it a commingled network to move STS'S embedded base of customers, AT&T assured STS that unbundled copper loops non-designed ("UCL-ND") could serve as the local loop.[245]

224. UCL-ND is the least expensive local loop, with nonrecurring charges ("NRC") of $44.98 (connect) and $24.88 (disconnect) per line and a monthly recurring charge ("MRC") of $10.92 per line.[246]

225. In March 2006, after STS was committed to going forward with its commingled network, AT&T told STS that UCL-ND would not work in this commingled network, but rather a more expensive loop, service level ("SL1") one was needed.[247]

226. The SL1 loop is more expensive than the UCL-ND loop, with non-recurring charges ("NRC) of $49.57 (connect) and $25.62 (disconnect) per line and a monthly recurring charge ("MRC") of $15.20 per line.[248]

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[245] See Affidavit of Keith Kramer, ¶¶ 20, 22, 26--documents KK00023-00033, KK00063-KK00069.

[246] This monthly recurring rate applies zone 2. The UCL-ND monthly recurring rates for zones 1and 3 are $7.69 and $19.38 per month, respectively. See Affidavit of Raquel Rencher Exhibit "2"

[247] See Affidavit of Keith Kramer, ¶¶ 32, 33.

[248] This monthly recurring rate applies zone 2. The SL1 loop monthly recurring rates for zones 1and 3 are $10.69 and $26.97 per month, respectively. See Affidavit of Raquel Rencher Exhibit "2"

227. In late March 2006 after STS had spent additional time and the transition period for converting UNE-P to alternative arrangements had expired, AT&T told STS that SL1 loops would not work in this commingled arrangement and that an even more expensive loop, a service level two or SL2 loop, was required.[249]

228. The SL2 loop is more expensive than the SL1 and UCL-ND loops, with NRCs of $135.75 (connect) and $63.53 (disconnect) per line and a MRC of $17.40 per line.[250]

229. AT&T's insistence on an SL2 loop instead of a SL1 requires STS to pay approximately 15% more per month for each customer loop. And, perhaps more importantly, it more than doubles the initial investment in non-recurring charges STS must make when initially converting or winning a customer.[251]

230. AT&T's conduct of persuading STS to commit to a commingled network based on certain key representations and afterwards change those key representations is a classic "bait and switch."[252]

231. Had STS been able to convert its existing UNE-P base and new customers utilizing UCL-ND loops or SL1 loops, as BellSouth initially represented, STS would have been able to convert its embedded base to its own network within the transition period set forth in the FCC's TRRO, and would have been able to offer a product that allowed STS to reasonably and efficiently compete with AT&T for residential and small business customers.[253]

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[249] See Affidavit of Keith Kramer, ¶ 34.
[250] This monthly recurring rate applies zone 2. The SL2 loop monthly recurring rates for zones 1 and 3 are $12.24 and $30.87 per month, respectively. See Affidavit of Raquel Rencher Exhibit "2".
[251] See Michael Starkey Declaration ¶ 48
[252] See Affidavit of Keith Kramer, ¶ 45.
[253] See Affidavit of Keith Kramer, ¶ 17.

232. Requiring STS to use higher priced SL2 loops in commingled arrangements is discriminatory and fails to comply with the FCC's commingling requirements.[254]

233. STS'S commingled network was designed by BellSouth utilizing UCL-ND and/or SL1 loops, and was sold to and approved by STS based on this key representation.[255]

234. In all states in which AT&T is the ILEC except for the nine (9) BellSouth states, AT&T makes available commingled arrangements consisting of an "UNE DS0 Loop connected to a channelized Special Access DS1 Interoffice Facility, via a special access 1/0 mux." In these states, AT&T makes this commingled arrangement available as a generic interconnection agreement offering. Further, unlike in the nine (9) BellSouth states, in no other state does AT&T distinguish SL1 loops from SL2 loops, which means that AT&T has no restriction on commingling SL1 loops in its territory outside the BellSouth region.[256]

235. In 2005 and 2006 STS requested a combination of UNEs and commingled arrangement as a particular method of obtaining interconnection or access to unbundled network elements that AT&T refused to provide.[257]

Legal Analysis

236. Once an ILEC refuses to provide a request for interconnection, it is the ILEC's obligation to prove to the state commission that such request is not technically feasible pursuant to 47 CFR §51.321(d), which states:

> An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the

[254] See 47. U.S.C. 272(c)(2).
[255] See Affidavit of Keith Kramer, ¶¶ 22, 23.
[256] See Declaration of Michael Starkey ¶¶53, 54 and 55.
[257] See Affidavit of Keith Kramer, ¶¶ 21, 24, and 45.

requested method of obtaining interconnection or access to network elements at that point is not technically feasible.

237. AT&T's reasons for not permitting STS to commingle UCL-ND and SL1 loops have nothing to do with technical infeasibility, but instead appear to be geared towards raising STS'S barriers to entry as they relate to commingling and prevent STS from effectively competing with AT&T for residential and small business customers.[258]

238. AT&T's claim that it is technically infeasible to commingle SL1 DS0 UNE loops is based solely on its contention that SL1 loops and special access facilities are inventoried in two different databases, with DS0 loops in the LFACs database and special access in the TIRKs database.[259]

239. AT&T has not demonstrated that commingling a SL1 loop is technically infeasible for this or any other reason.[260] The term "Technically Feasible" is a defined term in the FCC's rules:[261]

> *Technically feasible.* Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. ***A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns,*** except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. ***The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine***

[258] See Affidavit of Keith Kramer, ¶ 45.

[259] See Exhibit 10 to Affidavit of Nancy M. Samry which is a true and correct copy of Deposition of Frederick C. Christensen Exhibit taken on May 28, 2009, pgs. 248-255, *Saturn Telecommunication Services, Inc. vs. BellSouth Telecommunication, Inc.*, Before the United States District Court for the Northern District of Florida, Tallahassee Division, Docket No. 4:08-CV-271-SPM-WCS.

[260] See Declaration of Michael Starkey ¶51; Keith Kramer's documents KK00675-KK00677; See Affidavit of Keith Kramer, ¶ 45

[261] 47 C.F.R. §51.5.

> ***whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.*** (emphasis added)

240. The above definition shows that AT&T's reason for technical infeasibility – i.e., SL1 loops and SL2 loops are inventoried in different databases – is not justification for establishing technical infeasibility. Whether or not an ILEC must "modify its facilities or equipment to respond to such a request" does not render a request technically infeasible, and AT&T has provided no reason why its OSS systems could not be modified to fulfill STS'S request to commingle an SL1 loop. This definition also states that whether STS'S request is "technically feasible" does not turn on economic considerations. Therefore, AT&T cannot refuse to commingle a SL1 loop because it may have to spend money to overcome the LFACs/TIRKs issue.

241. Furthermore, AT&T has not demonstrated any network reliability impacts from commingling a SL1 loop. AT&T's claim that connecting a SL1 loop to a special access circuit would result in reliability concerns is based solely on the alleged incompatibility between its two inventory systems (TIRKs and LFACS) – not upon issues related to actual harm that might result on the network from commingling a SL1 loop.

242. Additionally, to STS'S knowledge AT&T did not prove to the Florida Commission, or to any other state commission as required by §§ 47 C.F.R. 51.5, that using a SL1 UNE loop in a commingled arrangement is not technically feasible.[262]

[262] See Declaration of Michael Starkey ¶51; Keith Kramer's documents KK00675-KK00677; See Affidavit of Keith Kramer, ¶ 45.

243. AT&T's actions in prohibiting the commingling[263] of SL1 loops violates 47 CFR § 51.307 (a) and (c) in that AT&T is not providing nondiscriminatory access to network elements (UNE-L) on terms that are "just, reasonable and nondiscriminatory," and is not providing STS access to SL1 UNE-L "in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element."

244. AT&T's conduct in prohibiting the commingling of SL1 UNE loops violates 47 CFR § 51.309 (a) in that AT&T is imposing "limitations, restrictions, or requirements on requests for, or use of unbundled network elements"; 47 CFR § 51.309 (c) in that AT&T is failing to allow STS to commingle unbundled network elements (SL1 UNE loops) with wholesale services obtained from AT&T; and 47 CFR § 51.309 (f) as AT&T refuses or fails "to perform the functions necessary to commingle an unbundled network element (SL1 UNE loops) or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from a requesting LEC."

245. AT&T's conduct in prohibiting the commingling of SL1 UNE loops violates 47 CFR § 51.319 (a), (c) and (d) in that AT&T refuses to combine network elements (SL1 UNE loops) in a technically feasible manner.

246. AT&T's conduct in prohibiting the commingling of SL1 UNE loops violates 47 CFR § 51.316 (a) in that AT&T is refusing to convert STS wholesale UNE embedded base to commingling UNE-Ls.

[263] See Affidavit of Keith Kramer, ¶¶ 45, 53-79.

247. AT&T's conduct in prohibiting the commingling of SL1 UNE loops violates 47 CFR § 51.321 (a) as it does not permit interconnection of a technically feasible method on terms that are "just, reasonable and nondiscriminatory."

248. AT&T's conduct in making available as a generic interconnection agreement offering commingled arrangements consisting of an "UNE DS0 Loop connected to a channelized Special Access DS 1 Interoffice Facility, via a special access 1/0 mux" in all states in which AT&T is the ILEC except for the nine (9) BellSouth states, and AT&T's distinguishing of SL1 loops from SL2 loops in the BellSouth states but not outside the BellSouth region, violates 47 U.S.C. § 272(c)(1), which states that a BOC may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; the conduct also violates the Commission's Non-Accounting Safeguards Order.[264]

COUNT VII Violation of 47 USCA § 271(c) (2) (B) (i) and (ii) Regarding SL1s

249. STS realleges and reavers paragraphs 25 through 143 and 223 through 248 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

250. AT&T's conduct in requiring higher priced SL2 loops be used in commingled arrangements violates 47 USCA 271(c)(2)(B)(i) and (ii) as the interconnection

[264] See In The Matter Of Implementation Of The Non-Accounting Safeguards Of Sections 271 And 272 Of The Communications Act Of 1934, As Amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 11230 (December 24, 1996)(Specifically, see Section V. Nondiscrimination Safeguards, ¶¶ 194, 195, 198, 202, 203, 206, 212, and 227.)

services are not "in accordance with the requirements of Sections 251(c)(2)" of the Act, AT&T fails to provide "nondiscriminatory access to network elements."

251. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law. .

COUNT VIII
Violation of 47 USCA § 201(b) Regarding SL1s

252. STS realleges and reavers paragraphs 25 through 143 and 223 through 248 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

253. AT&T's conduct in requiring higher-priced SL2 loops be used in commingled arrangements violates 47 USCA 201(b) as its "charges, practices, classifications, and regulations" are unjust and unreasonable.

254. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems

appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

COUNT IX
Violation of 47 USCA § 251 (c) (2) (D) Regarding SL1s

255. STS realleges and reavers paragraphs 25 through 143 and 223 through 248 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

256. AT&T's conduct in requiring higher-priced SL2 loops be used in commingled arrangements violates 47 USCA 251(c) (2) (D) as it is not providing interconnection "on rates, terms and conditions that are just, reasonable, and nondiscriminatory."

257. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T

immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

COUNT X
Violation of 47 USCA § 272 (c) (1) Regarding SL1s

258. STS realleges and reavers paragraphs 25 through 143 and 223 through 248 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

259. AT&T's conduct in making available as a generic interconnection agreement offering commingled arrangements consisting of an "UNE DS0 Loop connected to a channelized Special Access DS 1 Interoffice Facility, via a special access 1/0 mux" in all states in which AT&T is the ILEC except for the nine (9) BellSouth states, and AT&T's distinguishing of SL1 loops from SL2 loops in the BellSouth states but not outside the BellSouth region, violates 47 U.S.C. § 272(c)(1), because AT&T is discriminating between AT&T, its affiliates and CLECs in the BellSouth states in the provision or procurement of goods, services, facilities, and information, and in the establishment of standards.

260. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost

profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

C. POINT III: AT&T MUST DO CONVERSIONS SEAMLESSLY

261. AT&T attempts to make commingling utilizing DS0s so difficult that CLECS are discouraged from doing commingling. AT&T's failure to perform the functions necessary to permit STS to commingle UNEs with wholesale services and its failure to provide seamless conversions raises STS'S barriers to entry and makes commingling uneconomic for CLECs.[265]

262. After STS places a proper order with AT&T to convert its UNE-P arrangements to commingled UNE-L arrangements, STS must expend substantial money and manpower micromanaging and overseeing AT&T's attempts to perform the

[265] See Affidavit of Keith Kramer, ¶¶ 31-37.

conversion.[266] In the few cases where AT&T was able to perform the conversion, had it not been for STS'S continuous involvement, in all probability, the lines would not have been converted, or end users would have experienced longer outages and greater problems during the conversion than they actually experienced.[267]

263. Even with STS'S help, AT&T failed or refused to do the conversions in a timely and seamless manner. Conversion attempts were riddled with customer-impacting problems, including lengthy service outages, some outages lasting days. These conversions are of existing STS customers who are not changing their phone services and do not expect outages, especially of significant duration.[268] Moreover, due to arbitrary limitations on the amount of lines converted, these end-users are nearly all small business customers who need a dependable phone service without outages.[269]

264. To make matters worse, when these customers experienced outages, AT&T refused or failed to repair the problems in a prompt and efficient manner.[270]

265. The money, time and resources STS must expend to navigate AT&T's error-prone work around bulk migration process (a by-product of AT&T's larger failure to abide by its commingling obligations) significantly raises STS'S barriers to entry and has,

[266] See Affidavit of Andrew Silber ¶ 14 15 and 16, Affidavit of Ron Curry, ¶¶ 55-60; Caryn Diaz, ¶ 9.
[267] See Affidavit of Andrew Silber ¶ 14 15 and 16, Affidavit of Ron Curry, ¶¶ 55-60; Caryn Diaz, ¶ 9.
[268] See Affidavit of Andrew Silber ¶ 14, 15 and 16; Affidavit of Ron Curry, ¶¶ 55-60; Caryn Diaz, ¶ 9.
[269] See Affidavit of Andrew Silber, ¶ 18.
[270] See Affidavit of Andrew Silber ¶ 17, 18 and 19. Affidavit of Ron Curry, ¶¶ 55-60; Caryn Diaz, ¶ 9.

to date, prevented STS from fully maximizing the efficiency of its commingled network.[271]

266. The customer-impacting problems that have been pervasive in AT&T's bulk migration work around process harms STS'S reputation and STS'S competitive position vis-à-vis AT&T.[272]

267. Given that commingling somewhat levels the competitive playing field for small carriers like STS by allowing them to take advantage of economies of scale it is no surprise that AT&T would discourage commingling – and AT&T was abundantly clear during the deposition of Marcus Cathey (the AT&T employee who managed the sales of Special Access for BellSouth and AT&T) that AT&T does not like commingling and thinks that it is bad business for AT&T.[273]

268. Unfortunately for STS, AT&T's disdain for commingling and its failure to live up to its obligations in this regard has had detrimental impacts for STS. Since 2004 when STS first began attempting to get AT&T to convert STS'S UNE-P lines to its commingled network, AT&T has performed approximately eighty (80) conversions (with STS'S continued oversight and involvement), while STS'S lines have decreased by about 75%.[274]

269. STS'S customer base will continue to erode as long as STS is forced to pay the higher AT&T wholesale UNE-P rates, instead of the lower loop rates which STS would have paid if AT&T had lived up to its obligations under the law and pursuant to agreement

[271] Affidavit of Keith Kramer, ¶¶ 31-37.
[272] See Affidavit of Andrew Silber ¶¶ 16-19.
[273] See Deposition of Marcus Cathey, page 61, line 4.
[274] See Affidavit of Keith Kramer, ¶7.

with STS, and allowed STS to use the commingled network AT&T assisted STS in developing.

270. Out of these business customers who were converted to STS'S commingled network, approximately 18% experienced problems in their service after conversion. None of these customers had experienced service problems in their telephone service with STS prior to the conversion to the commingled network.[275] This rate of service interruption is three to four times the normal rate of service interruptions for customers on UNE-P.[276]

271. Many of the converted customers have since left STS, presumably because of the problems they experienced during the conversion process, or problems they experienced during attempts to repair problems brought about by the conversion.[277]

272. These difficulties are not experienced by other CLECs using non-commingled networks and are not experienced by AT&T's customers. STS wants the same quality for its customers as AT&T provides itself and other CLECs.

Legal Analysis

273. In other AT&T states outside the BellSouth territory, such as Texas, AT&T agrees that a conversion should be seamless. [278]

274. In prior testimony before the FCC and state commissions, BellSouth claimed it could do batch hot cuts in a seamless manner in its campaigns to have the FCC terminate UNE-P.[279]

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[275] See Affidavit of Ron Curry, ¶ 57. See Affidavit Caryn Diaz ¶107.
[276] See Affidavit of Andrew Silber ¶ 17.
[277] See Affidavit of Andrew Silber, ¶ 58.
[278] See generic interconnection agreement for AT&T Texas sections 2.13, 2.185, See Declaration of Michael Starkey¶ 55, Documents MS000259-MS000261.

275. The generic interconnection agreement for AT&T Texas provides in section 2.18.5:

> "This Section 2.18 only applies to situations where the wholesale service, or group of wholesale services, is comprised of UNEs offered or otherwise provided for in this Attachment, including commingled arrangements with wholesale services. The Parties agree that converting between wholesale services, such as special access services, and UNEs or UNE combinations should be a seamless process that would not create any unavoidable disruption to CLECs customer's service or degradation in service quality. Since such conversions will only constitute a record and billing change and in no way impact the physical circuits involved the interval for completing conversions shall be mutually negotiated between the parties. In no event will the conversion interval exceed the standard interval applicable to the UNE(s) or UNE combination to which the wholesale service is being converted. Pricing changes begin the next billing cycle following the conversion request."

276. The generic interconnection agreement for AT&T Texas also provides in section 2.13:

> "When CLEC orders Unbundled Network Elements in combination, and identifies to SBC TEXAS the type of telecommunications service it intends to deliver to its end user customer through that combination (e.g., POTS, ISDN), SBC TEXAS will provide the requested elements with all the functionality, and with at least the same quality of performance and operations systems support (ordering, provisioning, maintenance, billing and recording), that SBC TEXAS provides through its own network to its local exchange service customers receiving equivalent service, unless CLEC requests a lesser or greater quality of performance through the Bona Fide Request (BFR) process. 251(c) (3) Unbundled Network Element combinations provided to CLEC by SBC TEXAS will meet all performance criteria and measurements that SBC TEXAS achieves when providing equivalent end user service to its local exchange service customers."

277. AT&T's conduct constitutes a violation of 47 CFR § 51.311(a), as the quality of the unbundled network element is not the same for those in commingled arrangements when compared to those in non-commingled arrangements. AT&T's conduct also

[279] See Declaration of Michael Starkey ¶¶ 17 and 18.

violates 47 CFR § 51.311(a), as the quality of the unbundled network element is not the same as what AT&T provides itself.

278. AT&T's conduct constitutes a violation of 47 CFR § 51.316(b) which states: "An incumbent LEC shall perform any conversion from a wholesale service or a group of wholesale services to an unbundled network element or a combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer".

COUNT XI
Violation of 47 USCA § 251 (c) (2) (C), Regarding Non Seamless Conversions

279. STS realleges and reavers paragraphs 25 through 143 and 261 through 278 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

280. AT&T's conduct constitutes a violation of 47 USCA § 251 (c)(2)(C), as AT&T fails to provide for commingled arrangements involving DS0 loops "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."

281. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher

costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start seamlessly converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

COUNT XII
Violation of 47 USCA § 202 (a) Regarding Non Seamless Conversions

282. STS realleges and reavers paragraphs 25 through 143 and 261 through 278 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

283. AT&T's conduct constitutes discrimination in violation of 47 USCA 202 (a) which declares unlawful "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."

284. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other

CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start seamlessly converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

D. POINT IV: AT&T FAILED TO NEGOTIATE IN GOOD FAITH

285. In March 2006, prior to and during the negotiations of the present Interconnection Agreement between STS and Bellsouth (n/k/a AT&T), AT&T represented to STS that the only DS0 UNE loop available in a commingled arrangement was a Service Level 2, or SL2, and that it was technically infeasible to provide a SL1 loop in a commingled arrangement.[280]

[280] See Affidavit of Keith Kramer ¶¶ 34 and 42.

286. Based upon AT&T's representations, STS entered into an interconnection agreement with AT&T that included a restriction of using SL2 loops in commingled arrangements. [281]

287. However, STS did not know at that time that AT&T's claim that it was technically infeasible to use a SL1 loop in a commingled arrangement was false, and STS would not have entered into the Interconnection Agreement limiting commingling to SL2 loops absent AT&T's inaccurate representation.[282]

288. BellSouth/ ATT knew at the time the representation was made that the representations were false.

Legal Analysis

289. AT&T knew at the time the representations were made that SL1s were technically feasible in a commingled network due to the fact that the utilization of SL1s in a commingled environment was common in all AT&T states except the former BellSouth states, and in fact the SL1/ SL2 distinction is not used in the non-BellSouth states.[283]

290. Further, despite BellSouth's representations to STS, neither BellSouth nor AT&T proved to any state commission that it was technically infeasible to use SL1 loops in a commingled arrangement. There is a specific standard for demonstrating technical infeasibility that calls for an incumbent LEC to "prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would

[281] See Affidavit of Keith Kramer ¶ 49, 50, Exhibit 3 to Keith Kramer's Affidavit
[282] See Affidavit of Keith Kramer ¶ 45, 49, 50.
[283] See Affidavit Michael Starkey ¶¶ 53 through 55.

result in specific and significant adverse network reliability impacts."[284] There has been no such showing made by AT&T.[285]

291. The above misrepresentations by AT&T were done in bad faith, for the purpose of discouraging commingling and raising barriers to entry for its competitors.[286]

292. AT&T's conduct as explained in this count constitutes a violation of 51 C.F.R. § 301 which imposes on ILECs a duty to negotiate in good faith and prohibits "intentionally misleading or coercing another party into reaching an agreement that it would not have otherwise made."

COUNT XIII
Violation of 47 USCA § 251 (c) (1) Regarding Duty To Negotiate In Good Faith

293. STS realleges and reavers paragraphs 25 through 143 and 285 through 292 herein and said paragraphs are hereby incorporated herein as if the same were set forth fully herein.

294. AT&T's conduct as explained in this count constitutes a violation of its obligation as an ILEC to negotiate interconnection agreements in good faith pursuant to 47 USCA § 251 (c)(1).

295. As a result of AT&T's actions, STS suffered damages, including but not limited to having to pay much higher rates for services on a wholesale agreement compared to what STS would have paid if AT&T had converted its lines to the commingled network, being forced to expend many man-hours trying to get the process to work, having its customers subject to win back campaigns by AT&T as well as other

[284] 47 C.F.R. § 51.5, definition of Technically feasible See also 47 C.F.R. 321(d) See also Declaration of Michael Starkey ¶ 50
[285] See Declaration of Michael Starkey ¶51; See Affidavit of Keith Kramer ¶ 45; Keith Kramer document KK000675 – KK000677.
[286] See Affidavit of Keith Kramer, ¶¶ 31-37.

CLECs, lost customers to win back campaigns by AT&T as well as other CLECs, lost profits associated with the small business and residential customer markets, higher costs by being forced to underutilize the SMARTring, lost goodwill, and losses to STS'S valuation as an ongoing concern and was otherwise damaged.

WHEREFORE STS requests that the FCC accept jurisdiction over the parties and subject matter of this complaint, determine that AT&T has violated its commingling obligations under the statutes and FCC Rules, Regulations and Orders cited herein, issue its determination of liability against AT&T, defer awarding damages until further proceedings, enter its order requiring AT&T to immediately comply with its commingling obligation and require that AT&T immediately start seamlessly converting existing customers to STS'S commingled network utilizing DS0 loops of the SL1 variety as the local loop, and for such other relief as the Commission deems appropriate including imposing sanctions, fines and/or penalties against AT&T for its willful and flagrant violations of law.

E. POINT V: STS'S COMPLAINT INVOLVES AT&T'S FAILURE TO ABIDE BY FEDERAL STATUTES, RULES AND ORDERS OVER WHICH ONLY THE FCC HAS JURISDICTION; THE FORUM SELECTION CLAUSE OF THE PARTIES' FLORIDA INTERCONNECTION AGREEMENT DOES NOT APPLY

296. On May 30, 2008, STS filed an informal complaint against AT&T alleging much of the same violations as in STS' formal complaint. In its response to STS'S informal complaint, AT&T, in a desperate attempt to avoid liability for its numerous violations of the market-opening provisions of the Telecommunications Act of 1996 ("Act") and Federal Communications Commission's ("FCC's") implementing rules and orders, argued that the dispute between the parties amounts to a disagreement about the

interpretation or implementation of the parties' Interconnection Agreement ("ICA") in Florida.

297. Therefore, according to AT&T, the forum selection clause of the ICA should apply and STS should be required to take its dispute to the Florida Public Service Commission instead of the FCC. AT&T will almost certainly make similar "forum selection clause" arguments in its response to STS'S formal complaint. When it does, the Commission should be aware that AT&T is wrong on the law and that STS'S complaint involves disputes about AT&T's compliance with federal requirements over which only the FCC – not state commissions – has authority.

298. The forum selection clause on its face is narrow as it does not cover all disputes between the parties, but only those disputes concerning "the interpretation or implementation of any provision of the ICA."[287] The Instant complaint is not concerning the interpretation or implementation of the ICA. STS explains in its formal Complaint and supporting affidavits and documentation that AT&T, in its dealings with STS, has placed restrictions on commingling in violation of Sections 201/202 of the Act, has failed to negotiate in good faith, and failed to abide by its obligations under Sections 271 and 272 of the Act.

299. The legal precedent is clear: only the FCC has jurisdiction over violations of Sections 201, 202, 271 and 272 of the Act, and as such, STS'S complaint is properly before the FCC.

[287] See Affidavit of Keith Kramer, ¶ 49.

1. AT&T's Violations of Sections 201 and 202 of the Act are properly before the FCC

300. AT&T has placed restrictions on commingling in a number of ways. First, AT&T has refused to commingle a DS0 loop (i.e., unbundled copper loop-non designed and Service Level 1 loops) with wholesale transport.[288]

301. Second, AT&T has failed to develop a batch hot cut process (or individual hot cut process) that would allow STS to covert its embedded base of lines from AT&T's switch to STS'S switch as well as allow STS to convert lines for existing AT&T customers to STS'S switch.[289]

302. The FCC stated as follows at paragraph 581 of the TRO[290]:

> We agree with the Illinois Commission, the New York Department, and others that the commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers. **Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act**. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c) (3). Incumbent LECs place no such restrictions on themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer or intermediate connections to network equipment in a collocation space. For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations. (footnotes omitted) (emphasis added)

303. Most relevant to this discussion, the FCC concludes in paragraph 581 of the TRO that a restriction on commingling constitutes "an 'unjust and unreasonable practice' under

[288] See Affidavit of Keith Kramer, ¶45.
[289] See Affidavit of Keith Kramer, ¶¶45 and 51.
[290] See TRO ¶581.

201 of the Act, as well as an 'undue and unreasonable prejudice or advantage' under section 202 of the Act."[291] (emphasis added)

304. The unjust and unreasonable practice language under Section 201 states:

> (b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is **unjust** or unreasonable is hereby declared to be unlawful…

305. The undue and unreasonable prejudice or advantage under Section 202 states:

> (a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

306. The proper venue for disputes brought under Sections 201[292] and 202[293] of the Act is the FCC.

307. In addition, as the FCC noted in paragraph 581 of the TRO, a restriction on commingling puts competitive LECs like STS at an unreasonable competitive disadvantage because it forces them to operate two functionally equivalent networks

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[291] See TRO ¶581

[292] See Peter W. Huber, Michael K. Kellogg, et al., FEDERAL TELECOMMUNICATIONS LAW (2nd Ed. 1999), p. 286, footnote 355 (47 U.S.C. 201(b). The FCC has primary jurisdiction over claims that rates are not just or reasonable. See Ambassador, Inc. v. United States, 325 U.S. 317, 324 (1945)).

[293] See *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier In the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221 (rel. Aug. 27, 1999), ¶ 41. (Stating that with respect to section 202 of the Act, complaints under section 208 of the Act may be filed should the complainant believe that such unreasonable discrimination has occurred.

or forces them to choose between UNEs and more expensive special access to serve customers.

308. AT&T's restrictions on commingling have subjected STS (and other CLECs who may be interested in commingling) to an unreasonable competitive disadvantage.[294] Because AT&T has refused to commingle DS0 loops of the UCL-ND and SL1 variety[295], STS has been forced to choose between leaving its residential and small business customers connected to AT&T's switch at commercial rates or pay recurring and non-recurring charges associated with higher-priced SL2 loops to commingle, thereby spoiling the economic validity of the entire arrangement.

309. Further, AT&T's commingling restrictions have forced STS to operate two functionally equivalent networks – one "commercial platform" network to serve those customers that AT&T has failed to convert to commingling arrangements and one network using STS'S own switch and the wholesale transport it is purchasing from AT&T.[296]

310. Finally, paragraph 581 of the TRO requires ILECs to modify their *interstate* access tariffs to effectuate commingling, and there is no question that the FCC has sole jurisdiction over interstate access tariffs. For example, BellSouth FCC Tariff No. 1 Section 2.2.3 contains commingling terms and the rates for special access facilities used in commingling arrangements, and one only need to peruse BellSouth's

[294] See Affidavit of Keith Kramer, ¶ 17.
[295] See Affidavit of Keith Kramer, ¶ 45.
[296] See Affidavit of Keith Kramer, ¶¶ 7, 52, 59, 79.

interstate tariff to clearly understand that the FCC has jurisdiction over BellSouth's interstate tariffs.[297]

2. AT&T failed to negotiate in good faith

311. AT&T has an obligation under section 251(c) (1) of the Act and 47 C.F.R § 51.301(a) to "negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements..."

312. AT&T failed to negotiate in good faith when it engaged in negotiations with STS about the parties' current ICA. Specifically, AT&T made false representations to STS during negotiations for the ICA that Service Level 2 (SL2) loops must be used in commingling arrangements and that it was technically infeasible to use SL1 or UCL-ND loops.[298]

313. As a result of these false representations, the interconnection agreement limited commingling of loops to SL2 loops.[299] This has the impact of dramatically increasing STS'S costs and subjecting STS to an unreasonable competitive disadvantage vis-à-vis AT&T and other CLECs.[300]

314. Moreover, based on the evidence provided in support of STS'S Complaint, AT&T has not even attempted to demonstrate technical infeasibility for commingling SL1 or UCL-ND loops to any State Commission, and AT&T's commingling offerings in all

[297] See, e.g., footnote (x) in BellSouth's interstate tariff which states: "Previous material in this section has been de-tariffed as required by the Commission [FCC] upon the use of the forbearance relief pursuant to FCC Memorandum Opinion and Order No. FCC 07-180 released October 12, 2007..."
[298] See Affidavit of Keith Kramer ¶50.
[299] See Affidavit of Keith Kramer ¶50.
[300] See, Declaration of Michael Starkey¶34, 66.

AT&T states outside the BellSouth region conclusively proves that AT&T's technical infeasibility claims are false, designed to mislead and hinder competition.[301]

315. The proper jurisdiction for disputes related to negotiating in good faith is the FCC. The FCC said in paragraph 143 of its Local Competition Order:[302] "...we believe that the Commission has authority to review complaints alleging violations of good faith negotiations pursuant to section 208." The FCC has held in *CoreComm v SBC*[303] that:

> there may be circumstances in which a carrier could file (and prevail on) a section 208 complaint, even where the defendant is in compliance with its interconnection agreement. For instance, a carrier could allege a violation of the duty to negotiate in good faith under section 251(c) (1), "even if the [defendant] carrier is in compliance with an agreement approved by the state commission."

316. Hence, not only can STS bring a dispute about good faith negotiations before the FCC, but AT&T does not even have to be violating the ICA to be held accountable for its prior failures in this regard. The situation that exists here, i.e., where an ICA was entered into as a result of AT&T violating its good faith negotiating obligations, is the perfect example of the scenario the FCC envisioned.

317. While AT&T may not be violating the letter of its Florida ICA with STS (and hence the Florida Commission may have no legitimate concern), the premise of the ICA

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[301] See Declaration of Michael Starkey, ¶¶ 46-61.

[302] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket No. 96-98, CC Docket No. 95-185, FCC 96-325, First Report and Order, 11 FCC Rcd 15499, ¶ 143 (Rel. Aug. 8, 1996) ("Local Competition Order"). See also footnote 257 of the Local Competition Order which states: "We previously have held that parties may raise allegations regarding good faith negotiation pursuant to section 208. *Cellular Interconnection Proceeding* 4 FCC Rcd 2369, 2371 (1989). The Commission also held in that case that 'the conduct of good faith negotiations is not jurisdictionally severable. *Id.* at 2371."

[303] 18 FCC Rcd 7568, ¶ 32.

itself (i.e., the ability of the two parties to truly have arrived at a meeting of the minds), requires scrutiny – scrutiny only the FCC can provide.

318. The FCC has addressed other complaints alleging a failure to negotiate in good faith under section 251(c) (1). For example, just recently in March 2009 in *North County Communications Corp. v Metro PCS California, LLC, Defendant*[304], the FCC addressed a complaint filed by North County Communications against MetroPCS, alleging, in part, that MetroPCS violated the "good faith negotiations" requirement under 251(c) (1) and FCC Rule 51.301 by failing to negotiate and execute a written interconnection agreement with North County in good faith. Though the FCC denied North County's complaint on this count because MetroPCS – unlike AT&T – is not an ILEC, the fact that the FCC took jurisdiction over the dispute shows that disputes under 251(c)(1) and 51.301 are properly filed at the FCC.[305]

3. AT&T's Violations of Sections 271 and 272 of the Act are properly before the FCC

319. Sections 271 of the Act prohibits a Bell Operating Company, ("BOC") like AT&T in Florida, from providing in-region interLATA services unless it meets the requirements of the "competitive checklist" under section 271(c)(2)(B) of the Act.

320. Two of these checklist items are found under sections 271(c)(2)(B)(i) and (ii), which require a BOC to provide "Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" and "Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."

[304] File No. EB-06-MD-007, DA 09-719, 24 FCC Rcd 3807; 2009 FCC LEXIS 1346; March 30, 2009.

[305] The FCC further signaled its willingness to address complaints about whether ILECs are negotiating in good faith under section 251(c)(1) and FCC Rule 51.301 as follows: "For purposes of this Order only, we assume, without deciding, that a violation of either rule 51.301 or rule 51.715 would be a violation of the Act cognizable under section 208 of the Act."

321. AT&T has an obligation, as a BOC, to satisfy the checklist items under section 271 of the Act in order to provide in-region interLATA services, as well as independent obligation, as an ILEC, to satisfy the obligations of section 251 of the Act. For example, when AT&T (Legacy SBC and BellSouth) was recently granted forbearance of the cost assignment rules, the FCC relied on the independent safeguards of sections 251 and 271 of the Act (and others):

> Following forbearance, AT&T will remain subject to a number of statutory safeguards that are important components of the regulatory framework that ensure that AT&T's rates and practices are just, reasonable and not unjustly or unreasonably discriminatory, as required by section 10. In particular, AT&T will remain subject to section 251 obligations; section 271 obligations, including the obligation to continue to comply with the market-opening requirements that AT&T had to meet in order to receive authority to provide in-region, interLATA services; and the continuing general obligation to provide service on just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions pursuant to sections 201 and 202 of the Act. Most significantly, AT&T will remain subject to dominant carrier regulation of its interstate exchange access services, including price cap regulation of most exchange access services.[306]

322. As this excerpt demonstrates, there are a number of different tools in the FCC's toolkit for ensuring that AT&T does not discriminate against competitors: (i) Section 251, (ii) Section 271, (iii) Section 201, (iv) Section 202, and (v) price cap regulation for access services.

323. It also demonstrates that section 271 includes the obligation for AT&T to continue to comply with the market-opening requirements it had to meet for 271 approvals, including the two (2) checklist items referenced above.

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[306] *In the Matter of Petition of AT&T Inc. for Forbearance Under 47 USC § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules; Petition of BellSouth Telecommunications, Inc. for Forbearance under 47 USC § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules,* WC Docket No. 07-21; WC Docket No. 05-342, FCC 08-120, 23 FCC Rcd 7302; April 24, 2008, ¶ 14.

324. Moreover, section 271 (d) (6)(A) of the Act expressly provides for the enforcement of the checklist items by the FCC and in 271(d) (6) (B) requires the FCC to establish procedures for the review of complaints "concerning failures by Bell operating companies to meet conditions required for approval." It is undisputable that the Commission has authority to determine STS' complaints regarding 271 violations.

325. AT&T has violated section 271 in its dealings with STS by failing to provide interconnection and access to unbundled network elements as required by sections 251 and 252 of the Act. For example, AT&T has failed to provide nondiscriminatory access to DS0 loops by failing to provide DS0 loops of the SL1 and UCL-ND variety to STS in commingled arrangements despite (*i*) AT&T providing these DS0 loop types to other CLECs[307] and (*ii*) AT&T imposing no such limitation on DS0 loop types on itself when combining the loops that serve its end users with transport.[308]

326. This AT&T-imposed restriction does not only apply to STS, however, but apparently to any CLEC who may want to use DS0 loop commingling to serve residential and small business customers, and as such, this issue raises AT&T's compliance with the market-opening requirements it had to meet to receive 271 approval.

327. Now that AT&T has received 271 approval to provide long distance services throughout its local territories in 22 states (and become a vertically integrated telecommunications company) – ironically, in part due to the competitive benefits of UNE-P – AT&T has refused to provide interconnection and access to network elements on a nondiscriminatory basis to STS.

[307] See Declaration of Michael Starkey, ¶¶ 62-67.
[308] See Declaration of Michael Starkey, ¶¶ 62-67.

328. In its complaint to the FCC, STS alleges that AT&T has violated its obligations as a BOC under section 271 of the Act and asks the FCC to take corrective action, and that AT&T's authority to provide in-region interLATA authority be suspended.

329. The FCC has expressly concluded that claims of discrimination arising from section 271 can be brought before the FCC in section 208 complaints.[309]

330. In determining whether Qwest's past conduct with respect to unfiled interconnection agreements warranted denial of section 271 authority, the FCC said: "In the future, parties remain free to present other evidence of ongoing discrimination, for example, through state commission enforcement processes to this Commission in the context of a section 208 complaint proceeding. Further, to the extent past discrimination existed, we anticipate any violations of the statute or our rules will be addressed expeditiously through federal and state complaint and investigation proceedings."[310]

331. Though the FCC references state processes as a potential avenue for discrimination complaints, it makes very clear that "parties remain free" to file complaints regarding ongoing section 271 compliance with the FCC in section 208 complaints.

332. Further, the FCC has found that nothing in Section 251 of the Act disturbs a party's ability to file a complaint with the FCC under section 208 of the Act.

333. The FCC addressed this very issue in the Local Competition Order. The FCC said: "In the NPRM, we sought comment on the relationship between sections 251 and 252 and the Commission's existing authority under section 208(a), which allows any person to file a complaint with the Commission regarding 'anything done or omitted

[309] *In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona,* WC Docket No. 03-194, FCC 03-309, 18 FCC Rcd 25504, December 3, 2003 ("Qwest Arizona 271 Order").
[310] Qwest Arizona 271 Order, 18 FCC Rcd. 25504, ¶ 57.

to be done by any common carrier subject to this Act, in contravention of the provisions thereof..."[311]

334. We asked whether section 208 gives the Commission authority over complaints alleging violations of requirements set forth in sections 251 or 252."[312] On this issue, the FCC found that:

> "Federal district courts may...refer issues of compliance with the substantive requirements of sections 251 and 252 to the Commission [FCC] under the primary jurisdiction doctrine. We find, however, that federal court review is not the exclusive remedy...The 1996 Act is clear when it intends for a remedy to be exclusive...We further conclude that section 252(e)(6) does not divest the Commission of jurisdiction, in whole or in part, over complaints that a common carrier violated section 251 or 252 of the Act. Section 601(c)(1) of the 1996 Act provides that the 1996 Act "shall not be construed to modify, impair or supersede" existing federal law -- which includes the section 208 complaint process - "unless expressly so provided." Sections 251 and 252 do not divest the Commission of its section 208 complaint authority. An aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission. Alternatively, a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement. We plan to initiate a proceeding to adopt expedited procedures for resolving complaints filed pursuant to section 208. We note that, in acting on a section 208 complaint, we would not be directly reviewing the state commission's decision, but rather, our review would be strictly limited to determining whether the common carrier's actions or omissions were in contravention of the Communications Act. Thus, consistent with our past decisions in analogous contexts, we conclude that a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review or a section 208 complaint to the Commission against a common carrier. Such a person could, as a further alternative, pursuant to section 207, file a complaint against a common carrier with the Commission or in federal district court for the recovery of damages. We are unlikely, in adjudicating a complaint, to

[311] See Local Competition Order, 11 FCC Rcd. 115499, ¶ 122.
[312] FCC Local Competition Order, ¶ 122.

> examine the consistency of a state decision with sections 251 and 252 if a judicial determination has already been made on the issues before us.[313]

335. It is therefore undisputable, in a section 208 complaint, like then instant complaint against AT&T, a party can raise before the FCC both a 271 violation as well as a violation of section 251 of the Act.

336. Section 272 of the Act requires a BOC (AT&T/BellSouth) to provide certain interLATA telecommunications services through a separate affiliate, and establishes structural and nondiscrimination safeguards that are designed to prevent anticompetitive discrimination and cost-shifting.[314]

337. "BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3)."[315]

338. The FCC further noted that:

> "a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its positions in locals markets by making these rivals' offerings less attractive."[316]

339. For the reasons above, Congress required the Commission to find whether a 271 applicant has demonstrated its compliance with section 272 of the Act. This

[313] FCC Local Competition Order, ¶¶ 124-128.
[314] See 47 U.S.C. § 272; *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd. 20543 (Rel. Aug. 19, 1997), ¶ 344 (citing to Non-Accounting Safeguards Order, 11 FCC Rcd. at 21913-14.)
[315] Id., 12 FCC Rcd. 20543, ¶ 345 (citing to Non-Accounting Safeguards Order, 11 FCC Rcd. at 21911-12.)
[316] Id., 12 FCC Rcd. 20543, ¶ 345 (citing to Non-Accounting Safeguards Order, 11 FCC Rcd. at 21912.)

requirement is of crucial importance because the structural and nondiscrimination safeguards of section 272 ensure competitors have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate, thereby fulfilling the fundamental objectives in the 1996 Act.[317] Furthermore, since SBC/AT&T acquired BellSouth, BellSouth therefore becomes the affiliate. Whereas SBC/AT&T in allowing BellSouth/AT&T to discriminate against the commingling of DS0s in the nine former BellSouth states, is equivalent to SBC/AT&T allowing its affiliate to discriminate against non-affiliated entities, which discrimination it does not do itself against these non-affiliated entities in the non-former Bellsouth states. Such allowed discrimination that SBC/AT&T allows its affiliate BellSouth/AT&T goes against the fundamental objectives of the 1996 Act.[318]

340. Section 271(d) (3) (B) requires the Commission to make a finding that the BOC applicant will comply with that section, in essence a predictive judgment regarding the future behavior of the BOC.[319] In making this determination, the Commission will look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272.[320] Moreover, section 272 gives the Commission the ***specific authority*** to enforce the requirements of section 272 after in-region interLATA authorization is granted.[321] (emphasis added)

[317] See Id., 12 FCC Rcd. 20543, ¶ 346.
[318] See 47 U.S.C. § 272 (c)(1)
[319] Id., 12 FCC Rcd. 20543, ¶ 347.
[320] See Id., 12 FCC Rcd. 20543, ¶ 347.
[321] See Id., 12 FCC Rcd. 20543, ¶347.

341. It should also be clear that the Commission has the enforcement authority to address allegations or complaints involving section 272 violations.[322]

342. In the instant case, the facts and evidence presented prove that AT&T's/BellSouth's actions violated §272(c)(1) by discriminating against STS in relation to access to UNEs and UNE combinations, and restricting STS'S access to commingled arrangements.[323]

4. The Forum Selection Clause in the Parties' ICA does not prohibit the FCC from asserting jurisdiction over STS'S Complaint

343. The forum selection clause in the parties' Florida ICA is found in paragraph 8 *Resolution of Disputes* of the "General Terms and Conditions" and states:

> Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation or implementation of any provision of this Agreement, or as to the proper implementation of this Agreement, the aggrieved party, if he elects to pursue resolution of the dispute shall petition the Commission[324] for a resolution of the dispute....

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[322] See *In the Matters of Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates; Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Section 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation, and Maintenance Conditions Contained in the SBC/Ameritech Merger Order; Petition of the BellSouth Corporation for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2)-(3) of the Commission's Rules; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Report and Order in WC Docket No. 03-228 Memorandum Opinion and Order in CC Docket Nos. 96-149, 98-141, 01-337, 19 FCC Rcd. 5102 (rel. Mar. 17, 2004), ¶ 24. (Citing 47 U.S.C. §§ 208, 271(d)(6)). See also, *In the Matter of Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, Memorandum Opinion and Order, 18 FCC Rcd. 23525, ¶ 6, footnote 23 (rel. Nov. 4, 2003.); and, e.g. *In the Matters of Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities*, Memorandum Opinion and Order, 13 FCC Rcd 2627 (rel. Feb. 6, 1998) (further evidencing the Commission's authority to grant forbearances of section 272 as it relates to specific BOC services.)

[323] See Affidavit of Keith Kramer, ¶¶ 53-79. See Declaration of Michael Starkey, ¶¶ 53-55.

[324] "Commission" is a defined term in the ICA referring to the Florida Public Service Commission, found on page 1 of "General Terms and Conditions" See STS-000005.

344. The forum selection clause is clear: it applies only to disputes related to interpretation and implementation of the parties' ICA. It does not cover all disputes between the parties and does not address disputes about subject matter over which the FCC has jurisdiction – such as the 201/202 violations described above.

345. Furthermore, STS brings a separate complaint in this proceeding that it would not have entered into the existing ICA in its current form had AT&T acted in good faith during the negotiations – an issue that clearly falls outside of the "interpretation and implementation" of the existing ICA.

346. An examination of prior decisions on "forum selection clause" issues shows that the disputes subject to STS'S complaint are materially different from the contractual disagreements that would be properly before the state commissions.

347. In Broadview Networks, Inc. v. Verizon Telephone Cos., 19 FCC Rcd 22216, ¶ 15 (Chief, Enf. Bur. 2004) ("Broadview Networks Order"), the FCC discussed the applicability of a forum selection clause in a complaint before the FCC, stating at ¶ 15 of the Commission's order:

> Finally, the questions whether the parties' Interconnection Agreement applies and requires arbitration of this dispute do not involve such preeminent federal concerns that we should disregard the *New York Order*'s holdings. Instead, those questions raise garden variety matters of contract interpretation that state tribunals have ample ability and authority to resolve. Indeed, the Act expressly contemplates that state tribunals will play a central role in arbitrating, approving, and interpreting interconnection agreements. Moreover, the Commission has emphasized the importance of abiding by the terms of interconnection agreements, including valid forum-selection clauses. (footnotes omitted)

348. Applying the holding of the Broadview Networks Order, STS'S claims involve "preeminent federal concerns" and do not raise "garden variety matters of contract interpretation."

349. STS certainly raises issues that should be of "preeminent Federal concern" outside the scope of the parties' existing ICA. For example, STS is alleging that AT&T in its BellSouth region prohibits DS0-level commingling for all carriers. Putting the existing Florida ICA aside, STS intended to replicate its business plan in Georgia (and has entered into an ICA to provide service there) had it been successful in implementing the commingling network arrangement AT&T initially designed for its use in Florida. [325]

350. Yet, after years of attempting to arrange with AT&T a workable conversion process or overcome the economic difficulties that arise from AT&T's unreasonable requirement to use LS2 loops, those plans have fallen through. STS's only recourse for this type of obstruction lies with the FCC.[326]

351. The preamble to the Telecommunications Act of 1996 (see, Public Law No. 104-104, 110 Stat. 56 (1996)) states that Congress' objective in enacting it was

> [t]o promote competition and reduce regulation in order to secure lower prices and higher quality of services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

352. AT&T's failures, as described in STS'S complaint has undermined, rather than promoted, local competition – particularly for residential and small business customers – by rendering an expressly permitted means of competing in the local market (commingling) ineffective for a majority of local lines.

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[325] See Affidavit of Keith Kramer, ¶ 2, footnote 1.
[326] See Affidavit of Keith Kramer, ¶¶ 1-10.

353. AT&T's failures have also had detrimental impacts on the quality of services for consumers who have been put out of service for extended periods of time during AT&T's failed attempts to convert these customers to its competitor.

354. Absent AT&T rectifying this situation, problems raised in STS'S complaint will undermine the attempts of any competitor to serve customers via commingling arrangements.

355. AT&T's conduct has also undermined Congress' objective for the rapid deployment of new telecommunications technologies.

356. While STS did rapidly deploy new technologies for the purpose of responding to the FCC's elimination of the UNE-P (based on a network designed by AT&T), which was consistent with Congress' goal, the roadblocks AT&T quickly erected after the network was built and technologies deployed rendered the network and technologies inefficient and ineffective.[327]

357. As such, it has discouraged STS[328] (as well any other CLECs considering a commingled network) from investing in technologies, and actually encourages CLECs to continue to use AT&T's switch under commercial platform arrangements instead of utilizing their own switch (creating the same chilling effect on network investment AT&T complained about during the TRO/TRRO proceedings as it pushed for UNE-P elimination).

358. Obviously, when one of the largest ILECs in the nation fails utterly to effectuate one of the FCC's approved methods of market-entry (commingling) for an entire class of customers (residential and small business), such a failure should raise "preeminent

[327] See Affidavit of Keith Kramer, ¶¶ 44-52.
[328] See Affidavit of Keith Kramer, ¶ 45.

federal concerns" and should be addressed by the agency charged with implementing these objectives, i.e., the FCC.

359. Putting the parties' ICA in context, in relation to the larger view of AT&T's actions, requires only examination of the following scenario. Assume that AT&T did not restrict STS from using its commingled network effectively, and that STS was able to grow its DS0-commingled network such that it served only 18,200 residential and small business subscribers it had on UNE-P services. A success story of that type would have certainly encouraged further entry by other providers relying upon the same strategy, potentially providing robust competition for residential and small business customers in South Florida (and elsewhere).[329]

360. Yet, AT&T's restrictions "nipped" this potential groundswell of competition "in the bud." That, in STS'S opinion, should be an issue of "preeminent federal concern."

361. Based on STS'S experiences and AT&T's own statements to the FCC, it is clear AT&T (formerly BellSouth) did not live up to the promises it made to the FCC regarding seamless, timely conversions to get UNE-P eliminated. STS believes that an ILEC making hollow promises in order to lessen regulation in its favor is a matter of preeminent federal concern.

362. If AT&T is allowed to be rewarded for its conduct in this instance, what other monopolistic and anticompetitive conduct will it engage in to frustrate facilities-based competition for residential and small business customers, particularly now that AT&T is horizontally and vertically larger than it was in 2005?

[329] See Declaration of Michael Starkey, ¶ 58, footnote 108.

363. That the disputes raised by STS'S complaint is a matter of preeminent federal concern is further evidenced by the FCC's discussion of commingling obligations under paragraph 581 of the TRO, in which the FCC found commingling so important to ILEC obligations under the Act that it concluded that a restriction on commingling was a violation of Sections 201, 202 and 251 and subjected competitors to unreasonable competitive disadvantages.

364. The Broadview Networks Order provides further guidance on this issue at ¶ 18 which states:

> Broadview and Verizon agree, correctly, that three appellate cases – *Duke Power*, *Ivarans I*, and *Ivarans II* – establish principles that should guide the Commission in determining the enforceability of an arbitration clause contained in an interconnection agreement. Distilled to their essence, these cases stand for the following propositions: **The parties' agreement to arbitrate disputes cannot divest a federal agency of jurisdiction to decide a case.** Nonetheless, a federal agency should honor agreements to arbitrate absent a compelling reason not to do so. Such compelling circumstances may exist when (1) the complaint concerns a dispute that lies at the core of an agency's enforcement mission; (2) the dispute "inevitably touches commercial relationships" among many participants in the relevant industry; (3) the dispute involves interpretation of facially clear contract language (as opposed to the interpretation of ambiguous contract language or the application of contract language to particular facts); or (4) arbitration would be a waste of time...(footnotes omitted, emphasis added)

365. As shown in the bold language, parties' agreement to arbitrate disputes cannot divest the FCC of its jurisdiction to decide a case. Therefore, even if the forum selection clause applied to the disputes raised in STS'S complaint – which it does not – the FCC would maintain its jurisdiction to address the disputes due to the FCC's jurisdiction over disputes related to, for example, Sections 201 and 202. The excerpt goes on to say that the FCC "should" honor agreements absent a "compelling reason" not to do so. Thus, if the forum selection clause was meant to apply to the disputes

raised by STS (which it is not), then the FCC should honor that agreement unless one of four (4) different compelling reasons exist.

366. While STS disagrees with AT&T's suggestion that the forum selection clause is indicative of some agreement on STS'S part to address the disputes in its Complaint before the Florida Public Service Commission, even if it was, a number of "compelling circumstances" listed above apply to STS'S complaint.

367. First, as discussed above regarding Congress' objectives and the importance placed on commingling by the FCC, STS'S complaint "lies at the core of [the FCC's] enforcement mission."

368. Second, STS'S complaint touches on commercial relationships among AT&T and any CLEC attempting to commingle DS0 loops. Currently, STS (and potentially other CLECs who may be interested in DS0 commingling throughout BellSouth's 9-state region) have commercial arrangements with AT&T so that they can continue to use AT&T's switch in the absence of UNE-P. If it was not for AT&T's failure to abide by the FCC's commingling requirements, STS would have already replaced the commercial arrangements with UNE-L served via STS'S switch.

369. Regarding the third compelling circumstance, this dispute is not about the interpretation of ICA language (the dispute is not about "ambiguous contract language or the application of contract language to particular facts"). Fourth, taking the dispute to the Florida Public Service Commission would be a waste of time because the Florida Commission does not have jurisdiction to address issues raised in STS'S complaint.

370. The FCC's Core Communications Order (Memorandum Opinion and Order, Core Communications, Inc. v. Verizon Maryland, Inc., 18 FCC Rcd 7962 (2003)) is also helpful in demonstrating that STS'S complaint is properly before the FCC. Paragraph 27 of the Core Communications Order states:

> Verizon further argues that allowing Core's Complaint to proceed would "make nonsense of the entire remedial scheme under section 252 and would deprive interconnection agreements of any binding effect - indeed it would deprive interconnection agreements of virtually all practical significance." Verizon's argument is incorrect. As Verizon acknowledges, Core's claim does not seek to hold the Maryland SGAT unlawful or to rewrite its terms. Instead, Core's Complaint essentially seeks to *enforce* the SGAT's terms (and, by definition, the Act's terms). Thus, far from vitiating the significance of interconnection agreements in the statutory scheme, allowing Core's Complaint to proceed actually emphasizes and reinforces the crucial status of interconnection agreements in implementing the statutory requirements, as well as incumbent LECs' statutory obligation to comply with their agreements. (footnotes omitted)

371. At paragraph 22, the FCC rejected Verizon's claim that the FCC lacked jurisdiction over Core's complaint stating:

> Verizon asserts that the Commission lacks jurisdiction under section 208 of the Act to adjudicate Core's claims alleging a violation of section 251(c) (2) of the Act. The Commission recently addressed and rejected all of the same jurisdictional arguments that Verizon raises here. Therefore, for the reasons stated in *CoreComm v. SBC* we deny Verizon's jurisdictional defense, and hold that we have jurisdiction under section 208 to adjudicate Core's claims alleging a violation of section 251(c) (2). (footnotes omitted)

372. Moreover, the FCC rejected an argument raised by Verizon – very much like the argument raised by AT&T about STS'S complaint – that proceeding with Core's complaint would ignore a forum selection clause of the Verizon/Core ICA. Footnote 81 of the Core Communications Order states: Contrary to Verizon's suggestion otherwise, Verizon's Reply Br. at 8, nothing in this order indicates that the

Commission would ignore a valid forum-selection clause in an interconnection agreement."

373. By rejecting Verizon's position, the FCC rejected the notion that a forum selection clause in an ICA should trump the FCC's jurisdiction – regardless of the facts. Further, given that Core's complaint involved violations of section 251(c) (2) of the Act, it shows that the FCC can even adjudicate a complaint regarding violations of section 251(c) (2) of the Act without ignoring a forum selection clause.

374. When asked to enforce not only Section 251, but 201, 202, 271 and 272 as well, the FCC's jurisdictional imperative is even stronger.

375. What's more, the FCC has held that "there may be circumstances in which a carrier could file (and prevail on) a section 208 complaint, *even where the defendant* is in compliance with its interconnection agreement." CoreComm v. SBC, 18 FCC Rcd. 7568, ¶ 32. "For instance, a carrier could allege a violation of the duty to negotiate in good faith under section 251(c) (1), 'even if the [defendant] carrier is in compliance with an agreement approved by the state commission.'" Id. Therefore, not only is the FCC free to address in complaints disagreements stemming from an ILEC's obligations under section 251 of the Act, 251 violations can be alleged in complaints before the FCC even when the ILEC may be complying with the parties' ICA.

376. In summation, the position AT&T took in its response to STS'S informal complaint (and which it will undoubtedly make in response to STS'S formal complaint) – i.e., that the FCC cannot exert jurisdiction over STS'S claims due to the forum selection clause – is not grounded in law. The FCC can and should assume jurisdiction over

STS'S dispute, as it has done in the past under similar circumstances,[330] and grant STS'S relief so that AT&T is not allowed to continue its unlawful and discriminatory practices.

F. POINT VI: THE CONFIDENTIAL SETTLEMENT AGREEMENT AND THE RELEASE INCORPORATED THEREIN DOES NOT BAR THIS COMPLAINT

377. On November 8 2006, STS and BellSouth executed a Confidential Settlement Agreement in which BellSouth agreed to "migrate 2,500 DS0 Wholesale Platform Lines ("Platform Lines") to SL2 Loops commingled with Special Access Transport using a bulk migration work-around process."[331]

378. The Confidential Settlement Agreement required that BellSouth use "reasonable efforts" to migrate these 2,500 lines, and that they be migrated no later than March 31, 2007, provided that STS satisfied certain conditions such as providing a list of the circuits to be converted by a certain date.[332]

379. The Confidential Settlement Agreement required BellSouth to establish due dates, which it never did.[333]

380. The Confidential Settlement Agreement required STS to withdraw "without prejudice" the Complaint STS filed before the Florida Public Service Commission against BellSouth and its Comments opposing the merger between AT&T and BellSouth filed before the FCC.[334]

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[330] See, e.g., Core Communications Order and CoreComm v. SBC, 18 FCC Rcd 7568, ¶¶ 13-19.
[331] See Affidavit of Nancy M. Samry, Exhibit 1, ¶13.
[332] See Affidavit of Nancy M. Samry, Exhibit 1, ¶13. The affidavits of Keith Kramer, Ron Curry, and Caryn Diaz demonstrate that STS complied with its obligations.
[333] See Affidavit of Nancy M. Samry, Exhibit 1, ¶13; See Affidavit of Caryn Diaz ¶ 10.
[334] See Affidavit of Nancy M. Samry Exhibit 1, ¶ 4, 5. Both of these filings involved the failure of AT&T to Convert STS's embedded base to its network utilizing SL1s prior to the date of the complaint See Exhibits 4 and 6.

381. The Confidential Settlement Agreement expressly did not "in any way, modify, amend or abrogate the current Interconnection Agreement" between the parties.[335]

382. The Confidential Settlement Agreement released Bellsouth "from all Demands, Actions and Claims, whether known or unknown, asserted or which could have been asserted against BST (BellSouth) related to" the FPSC Complaint or the FCC Comments.[336]

383. BellSouth/AT&T never migrated the lines and breached the Confidential Settlement Agreement.

384. As result of the breach STS filed suit against AT&T in United States District Court alleging breach of the Confidential Settlement Agreement, Breach of the ICA, and Fraud in the Inducement regarding the Confidential Settlement Agreement.

385. The United States District Court refused to dismiss the count of the complaint regarding breach of the Confidential Settlement Agreement but dismissed the claim for breach of the ICA ruling that it should be brought before the Florida Public Service Commission. It also dismissed the fraud claim.

386. On June 22, 2009, STS filed a motion to amend with a proposed amended complaint containing a count for recession of the Confidential Settlement Agreement based on the breach by AT&T.[337]

387. On June 23, 2009, STS and AT&T filed a stipulation dismissing the complaint without prejudice and on June 30, 2009, based on the stipulation the Court dismissed the complaint without prejudice.[338]

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[335] See Affidavit of Nancy M. Samry Exhibit 1.
[336] See Affidavit of Nancy M. Samry Exhibit 1, ¶5, 6.
[337] See Affidavit of Nancy M. Samry, Exhibit 6, ¶11.

388. The instant complaint before the FCC and the complaint before the district court are completely separate. The district court only concerns the 2,500 lines that were not converted to the commingled network pursuant to the Bulk Migration Work Around Process. The instant complaint concerns the other 16,000 wholesale UNE-P lines that STS should have been able to convert to the commingled network subsequent to the execution of the Confidential Settlement Agreement, the 100,000 new lines that STS should have been convert subsequent to the execution of the Confidential Settlement Agreement, the discriminatory and predatory practices committed by AT&T subsequent to the execution of the Confidential Settlement Agreement, and the numerous violations of law committed by AT&T after the execution of the Confidential Settlement Agreement. On its face the release does not preclude any of these claims, which are based upon actions occurring subsequent to the release.

389. However, if the FCC disagrees and determines that the release is broad enough to cover the allegations in the complaint, then STS will elect to rescind the Confidential Settlement Agreement.

390. The breach of a dependent covenant gives the injured party the right to rescind the contract, or to treat it as broken and to recover damages for a total breach. *Steak House, Inc. v. Barnett*, supra; *Mabry Corporation v. Dobry*, 141 So.2d 335 (2nd DCA Fla.1962); 17A C.J.S. Contracts s 425 (1963). The injured party must, however, elect between these two remedies as they are mutually exclusive. *Weeke v. Reeve*, 65 Fla. 374, 61 So. 749 (1913); *Deemer v. Hallett Pontiac, Inc.*, 288 So.2d 526 (3rd DCA Fla.1974); *Owens v. Smith*, 154 So.2d 878 (1st DCA Fla.1963). If the contract is

[338] See Affidavit of Nancy M. Samry, Exhibit 5, ¶10.

rescinded, it is as though it had never existed. See *Hustad v. Edwin K. Williams & Co.--East*, 321 So. 2d 601, 603 (Fla.App.1975).

391. Election between legally inconsistent remedies need only occur before judgment is entered. *Williams v. Robineau*, 124 Fla. 422, 168 So. 644 (1936); *see also Owens v. Smith*, 154 So.2d 878 (Fla. 1st DCA 1963). *See Erwin v. Scholfield,* 416 So.2d 478, 479 (Fla.App. 5 Dist., 1982). Election of remedies has been heavily litigated and considered by the Courts in Florida. The more liberal rule, and the one adopted by most jurisdictions, is in effect that the mere bringing of an action or *427 suit which is dismissed before judgment, no election can be said to have been made. 9 R.C.L. 961; *Register v. Carmichael*, 169 Ala. 588, 53 So. 799, 34 L.R.A. (N.S.) 309; *Cohoon v. Fisher*, 146 Ind. 583, 44 N.E. 664, 45 N.E. 787, 36 L.R.A. 193; *Gridley v. Ross*, 37 Idaho, 693, 217 P. 989; *McClure Estate, Inc. v. Fidelity Trust Co.*, 243 Mass. 408, 137 N.E. 701; *Humiston Keeling & Co. v. Bridgman*, 195 Mich. 82, 161 N.W. 852, 853; *Hartford Life Ins. Co. v. Patterson* (Tex.Civ.App.) 231 S.W. 814; *Kehoe v. Patton*, 21 R.I. 223, 42 A. 868; *McIntosh v. Lynch*, 78 Okl. 85, 188 P. 1079. In 1936 the Florida Supreme Court in 1936 adopted this same position. *See Williams v. Robineau,* 124 Fla. 422, 426-427, 168 So. 644, 646 (Fla.1936)168 So. 644.

392. Additionally, the Florida Supreme Court in 1987 further ratified and expanded on this concept in *Barbe v. Villeneuve,* 505 So.2d 1331 (Fla. 1987). There the Court said "Barbe voluntarily and intentionally sought and obtained the default judgment against Atlas and Tashea. When a party elects between two or more inconsistent courses and has knowledge of all the pertinent facts, he binds himself to the course he adopts first

and cannot later withdraw from this knowing election." *Myers v. Ross,* 10 F.Supp. 409, 411 (S.D.Fla.1935); *Gralynn Laundry v. Virginia Bond & Mortgage Corp.*, 121 Fla. 312, 319, 163 So. 706, 708 (1935). *See Barbe v. Villeneuve*, 505 So.2d 1331, 1334 (Fla.1987). Note that the *Barbe* Court, as in the other cases, only talked about an election of remedies being final after a judgment was entered. The *Barbe* Court also affirmed the ruling in *Erwin v. Scholfield* (that legally inconsistent remedies need only be elected before judgment is entered).

393. STS has the option of suing on the settlement agreement or considering it rescinded due to AT&T's breach. Were it be considered rescinded, all releases included in the settlement agreement would be void.

394. It is a clear that the Confidential Settlement and the accompanying releases do no bar the instant claim

VI. REQUIRED CERTIFICATIONS

A. 47 CFR §1.721(a) (8) Certification: Attempts at Pre-Suit Settlement

395. STS hereby certifies that it has, in good faith, discussed or attempted to discuss the possibility of settlement with AT&T prior to the filing of the formal complaint.

396. The parties have held numerous informal settlement discussions since the filing of the Informal Complaint.

397. STS has sent numerous documents evidencing its claims and damages to AT&T within a reasonable period of time prior to a voluntarily scheduled private mediation on March 30, 2009.

398. The March 30th mediation was unsuccessful, therefore prior to filing the formal complaint STS mailed a certified letter on April 2, 2009 outlining the allegations that

form the basis of the complaint it anticipated filing with the FCC, allowing for a reasonable period to respond prior to filing the Complaint.

399. On April 7, 2009, the Parties attended a pre-complaint teleconference with the FCC. At the teleconference, AT&T requested and STS agreed, that STS would send a revised certified letter clarifying AT&T's violations of FCC rules and regulations, along with explanations of how AT&T violated each rule or regulation.

400. At the direction of the FCC as discussed at the teleconference, STS sent a Mediation Brief to outline the dispute in detail to AT&T and the FCC by e-mail on April 14, 2009. AT&T served its Mediation Brief by e-mail on STS on May 8, 2009. In response, STS served its Reply Mediation Brief on May 15, 2009, by e-mail and certified mail. AT&T served on STS a Supplemental Mediation Brief on May 29, 2009 as directed by the FCC.

401. On June 9th and 10th, 2009, the Parties attended mediation at the FCC, and have held informal talks since mediation. However, the Parties have not been able to reach an agreement to resolve their disputes.

B. 47 CFR §1.721(a)(9) Certification: List of Separate Actions Filed

402. On or about June 5, 2006, STS filed a petition before the Florida Public Service Commission, which was based on BellSouth's conduct prior to the date of the complaint in failing to convert STS'S embedded base of UNE-P customers to its commingled network utilizing SL1s.[339] STS also filed Comments[340] before the FCC opposing BellSouth's merger with AT&T on or about July 13, 2006.

[339] In re: Dispute To Require BellSouth to Honor Commitments and to Prevent Anticompetitive and Monopolistic Behavior Between Saturn Telecommunication Services, Inc. d/b/a STS and

403. The FPSC Petition and Comments before the FCC concerned, *inter alia*, the failure of AT&T to convert STS'S embedded base prior to June 2006 and had been resolved by the Mediated Settlement Agreement, however the breach of said Agreement forms one of the bases of the instant formal complaint.

404. STS filed its Informal Complaint on or about May 30, 2008 before the FCC, which was based in part on the same set of facts as the instant formal complaint, Docket No.: EB-08-MDIC-0034, entitled Saturn Telecommunication Services, Inc. v. AT&T.

405. The Informal Complaint evidences that AT&T is in violation the Act by not converting STS'S wholesale embedded base of UNE-P customers.

406. STS also filed a complaint in the U.S. District Court, Northern District Court of Florida, Case No.: 4:08-cv-00271-SPM-WCS, entitled Saturn Telecommunication Services, Inc. v. BellSouth Telecommunications, Inc., d/b/a AT&T Florida, on June 12, 2008, which was voluntarily dismissed on June 30, 2009.[341]

407. The District Court Complaint was also based in part the allegations that AT&T breached the Confidential Settlement Agreement by failing to convert 2,500 lines. Before the Complaint was voluntarily dismissed by stipulation and without prejudice. STS sought to add a count for rescission of the Settlement Agreement.[342]

BellSouth Telecommunications, Inc., Docket Number 06-0435-TP. See Affidavit of Nancy M. Samry, Exhibit 2.

[340] In the Matter of: BellSouth Corporation and AT&T, Inc., STS's Comments on Application for Consent to Transfer of Control Filed by AT&T, Inc. and BellSouth Corporation, Docket No.: WC DOCKET NO 06-74 (July 13, 2006) See Affidavit of Nancy M. Samry, Exhibit 3

[341] See Affidavit of Nancy M. Samry Exhibits 4 and 5, ¶¶10 and 11.

[342] See Affidavit of Nancy M. Samry, Exhibit 4, 5, 8, ¶10, 11, and 13.

408. With the exception of the informal complaint which is being converted to the instant formal complaint, none of the actions above are pending before the respective court or agencies stated therein.

409. To the best of STS and its attorney's knowledge, this Complaint does not seek prospective relief proposed or at issue in a notice-and-comment proceeding that is currently before the Commission.

C. 47 CFR §§ 1.721(a)(15) and 1.1106(1)[343] Certification of Filing Fee

410. The undersigned Counsel certifies under penalty of perjury in accordance with the Formal Complaint Intake Form (Form FCC 485) and 47 CFR §§1.721(a)(15) and 1.1106(1), that Complainant STS (Registration No. 0018687350) has paid the required filing fee of $200.00 by check dated July 20th, 2009, indicating payment type code "CIZ", which was sent to the FCC along with the original informal complaint, appropriate correspondence and FCC Form 159 to:

Federal Communications Commission
c/o U.S. Bank
Government Lockbox # 979094
SL-MO-C2-GL
1005 Convention Plaza
St. Louis, MO 63101

Attn: Government Lockbox

1-888-225-5322

[343] The FCC Formal Complaint Intake Form incorrectly cites to "47 C.F.R. Section 1.1105(1)(c)", which does not exist. Counsel confirmed with the FCC via e-mail that the correct citation on the Intake Form should be 47 C.F.R. 1.1106(1).

D. 47 CFR §§ 1.721(c) and 1.736: Certification of Waiver of 90-Day Resolution

411. Pursuant to 47 CFR 1.736, STS and AT&T previously agreed, and the FCC approved the waiver the of the 90-Day Resolution Requirement by Letter Ruling dated April 10, 2009, File No. EB-00-MDIC-0034.

E. 47 CFR §§ 1.721(a)(10): Information Designation

412. Pursuant to 47 CFR 1.721(a)(10), the Information Designation containing lists of witnesses, documents, and descriptions of the same is attached.

F. 47 CFR §§ 1.52 and 1.734(c): Signature and Verification

413. Pursuant to 47 CFR §§ 1.52 and 1.734(c), Counsel for STS certifies that he has read the formal complaint, that to the best of his knowledge, information, and belief formed after reasonable inquire, it is well grounded in fact and is warranted by existing law, and that it is not interposed for purposes of delay or for any other improper purpose.

VII. DAMAGES REQUEST PURSUANT TO 47 CFR § 1.722

414. Pursuant to 47 CFR § 1.722(a), STS hereby requests the recovery of damages against AT&T.

415. Pursuant to 47 CFR § 1.722(d), STS hereby requests that a determination of damages be made in a proceeding separate from and subsequent to the proceeding on the instant formal complaint determining liability and prospective relief.

416. Pursuant to 47 CFR 1.722(e)(1), STS hereby attaches the Affidavit of Mark Amarant and Declaration of James Webber containing STS'S initial computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials and evidence used to determine the amount of

damages, which may be amended and/or supplemented upon the filing of a supplemental complaint for damages.[344]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed on this 20th day of July 2009, to:

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[344] See Affidavit of Mark Amarant.

EXHIBIT B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

SATURN TELECOMMUNICATION SERVICES INC., a Florida corporation, Petitioner, v. BELLSOUTH TELECOMMUNICATIONS, INC., a Florida corporation, d/b/a AT&T Respondent.	Docket No._____ Filed: September_____, 2009

VERIFIED EMERGENCY PETITION FOR INJUNCTIVE RELIEF AND REQUEST FOR STAY OF AT&T's CLEC OSS-RELATED RELEASES

Petition, SATURN TELECOMMUNICATION SERVICES, INC. ("STS"), by and through its undersigned Counsel, pursuant to Rule 25-22.030, Florida Administrative Code, hereby files this Verified Emergency Petition for Injunctive Relief and Request For Stay of AT&T's CLEC OSS-Related Releases until such time as AT&T's OSS-Related releases complies with the prior orders of this Honorable Commission, and in support thereof states as follows.

I. PARTIES AND STS' COUNSEL

1. STS is a Competitive Local Exchange Carrier ("CLEC") and Interexchange Carrier ("IXC") certified by the Florida Public Service Commission ("FPSC"), to provide telecommunications services in Florida.
2. STS has its office at 12399 SW 53rd Street, Cooper City, Florida 33330, and its telephone number is 954-252-1000.

3. AT&T is an incumbent local exchange carrier ("ILEC") certified by the FPSC to provide local exchange services in Florida. AT&T is an ILEC defined in §251(h)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (hereinafter, "the Act"), and is a local exchange telecommunications company defined by §364.02(6), Florida Statutes. AT&T is also a Bell Operating Company ("BOC") and an interexchange carrier certified by the FPSC to provide long distance services based upon §271 of the Act.

4. According to the official records of the Florida Secretary of State, AT&T has its principle office at 675 Peachtree Street, NE, Suite 4500, Atlanta, Georgia 30375; and its Registered Agent for Florida, CT Corporation System, is at 1200 Pine Island Road, Plantation, Florida.

II. JURISDICTION

5. The Commission has jurisdiction with respect to the claims asserted in this Petition under Chapter 120 and 364, Florida Statutes, and Chapters 25-22 and 28-106, Florida Administrative Code.

6. The Commission also has jurisdiction under the Federal Act under 47 U.S.C. § 251(d)(3) (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) with respect to matters raised in this Petition.

III. VIOLATION OF AN ORDER OF THE FLORIDA PUBLIC SERVICE COMMISSION.

7. On July 22, 1998, the Florida Public Service Commission ("FPSC") issued Order No. PSC-98-1001-FOF-TP in Docket No. 980119-TP, "Final Order on Complaint", In re: *Complaint of Supra Telecommunications & Information Systems against BellSouth*

Telecommunications, Inc. for violation of the Telecommunications Act of 1996; petition for resolution of disputes as to implementation and interpretation of interconnection, resale and collocation agreements; and petition for emergency relief. ("Final Order")

8. The Final Order provided the following:

> **VII. RELIEF**
>
> ....
>
> 5. BellSouth shall modify the ALEC ordering systems so that the systems provide the same online edit checking capability to Supra that BellSouth's retail ordering systems provide.
>
> ....

9. The online edit checking capabilities were necessary in order to bring the CLEC's ordering procedures in parity with BellSouth's retail ordering procedures, and to eliminate an unfair competitive advantage employed by BellSouth in the ordering process. The edit checking capabilities inform a CLEC of errors in the order while the order is being processed, and allows a CLEC to have a customer on the telephone line while placing and completing an order. Thus this edit checking capability allows the CLEC to immediately give the customer the date for the new service, and avoid delays and other errors. For example under the edit checking capabilities of the current LENS system, if a field was filled in incorrectly or a required field left blank, the system will not allow the CLEC to process the order, but rather inform the CLEC of the error, allow the CLEC to properly fill in the order and continue processing the order. In LEX, the system does not advise the CLEC of the error during the ordering phase, but the order will be rejected or clarified after the order is completed, thus causing delays, eroding

consumer confidence in the CLEC, and unfairly giving BellSouth (AT&T) an unfair competitive advantage.

10. Pursuant to the FPSC's Final Order in the Supra case, BellSouth was compelled to modify LENS to incorporate certain "pre-order edits" so that orders could flow through the system without errors (error free), in a similar manner to what BellSouth provided for itself, in its Retail Navigation System (RNS)[1].

11. The Final Order of this Commission requiring BellSouth to provide the "online edit checking capability" was affirmed by this Commission in Order No. PSC-03-1178-PAA-TP issued October 21, 2003 and in Order No. PSC-04-1146-FOF-TP issued November 18 2004, in the same docket as the Final Order. These two orders found that BellSouth had complied with this Commission's 1998 order on the "online edit checking capability" in LENS.

12. Recently, Respondent AT&T notified the CLEC community through their "Accessible Letter SN91087078 and CHANGE MANAGEMENT CR 2493"[2] (Attached as Composite Exhibit "A") that it intended to change its Operation Support Systems (OSS) from the current systems as were provided for by BellSouth[3] to those Operational Support Systems used by the 13 AT&T state region. This change is referred to by AT&T as the 22 State

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[1] In DOCKET NO. 980119 – TP; ORDER NO. PSC – 98 – 1001 – FOF – TP; Witness Hamilton asserted that LENS does not provide prompts for USOC codes, features details, or service and customer information requirements, not does it have the capability to allow Supra to supplement an order once it has been submitted via LENS...He stated that BellSouth's customer service representatives with access to all customer information and its order systems provide prompts for all "critical information" such as USOC codes.

[2] Accessible Letter stated: On June 22, 2008, AT&T Southeast Region will retire the Local Exchange Navigation System (LENS) Graphical User Interface (GUI). The ordering functionality currently provided for by LENS will be replaced by the Local Service Request Exchange (LEX) GUI, and the pre-ordering functionality will be replaced by the Verigate GUI, which are systems currently used by the AT&T 13-state region.

[3] Currently referred to as the AT&T Southeastern region.

OSS Alignment. Part of this Alignment is the retirement of the Local Exchange Navigation System ("LENS") to Local Service Request Exchange (LEX) and Verigate GUI.

13. The AT&T 22-State OSS Alignment LENS will be retired and replaced by LEX for pre-ordering and ordering of §251(c)(3) elements starting in November 2009. LEX and Verigate do not have the same pre-order edits as LENS. According to the affidavits of Mr. Ron Curry and Ms. Caryn Diaz,[4] on August 5, 2009 during the CMP (Change Management Process) meeting, AT&T presented to the CLEC community a LEX overview for the Southeast Region November 2009 Release.

14. At the August 5th 2009 meeting, STS asked the following question: "Does LEX allow for the same pre-order edits as LENS?" AT&T answered "No", and explained; "LEX provides for the initial edits that required fields and forms are populated and basic field edits checks." Further according to AT&T, "No additional field level edits and/or validations will be done prior to issuance."—meaning that if an error occurs, then the order will flow through and then be rejected and electronically sent back to the CLEC. [5]

15. As in the Supra case in 1998, this was the same position of BellSouth through its witness: "Witness Stacy further asserted that if an order containing an error is submitted through LENS or EDI, an error code is attached to the order and electronically sent back to the ALEC"[6].

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[4] See attached affidavits of Curry and Diaz.
[5] See Exhibit "1" attached to affidavit of Curry
[6] ODER NO. PSC – 98 – 1001 – FOF –TP, pg. 21 3. Insufficient Ordering Capabilities response of BellSouth witness Stacey.

16. According to the affidavit of Mr. Cesar Lugo[7] AT&T's RNS does not allow an error on an order to flow through its system and then be electronically rejected. The RNS prompts corrections thereby saving time during the conversion and ordering process.

17. According to Curry and Diaz there are as many as 25 edits within LENS that will no longer be provided for in LEX[8]. These pre-order errors in LENS will not allow the CLEC to move to the next page/screen until the pre-order error is corrected.

18. As a result, Petitioner will be irreparably harmed by erosion of customer confidence, inability to efficiently add, convert and service its customers on Petitioner's network, and loss of customers to Respondent. Because of the lack of edits in LEX, it is highly unlikely for a CLEC to process an order through the system in a timely manner without errors. If Petitioner wanted to take an order from an end user over the phone in LEX as Petitioner does today in LENS, it would be impossible to do so timely and efficiently and expect the customer to wait while the order taker works through the errors back and forth in LEX. Also, if an order is submitted with errors the system rejects the order back so the order does not reach a representative from AT&T. During this time, the person ordering cannot cancel an order and start over. This could cause internal provisioning problems. The only option of removing the order from the pending queue is to delete it at which time you will lose the entire order history. Given the history of AT&T's inability to correctly invoice services without error, it would not be in a CLEC's best interest to delete the history of any order that may be subject to billable charges. Processing orders in LEX will increase order errors, increase charges to the CLEC for supplemental orders as well as delay service to the end user. The use of LEX OSS will affect the CLEC's

[7] *See* affidavit of Lugo.
[8] *See* affidavit of Curry and Diaz.

ability to satisfy and thus retain an end user's telecommunication's services after conversion to a CLEC from AT&T or another CLEC. The implementation of LEX as proposed by AT&T is a giant step backwards for CLECs and their customers, and designed by AT&T to give its retail division an unfair competitive advantage over the CLECs.

19. The FPSC determined in July 22, 1998, the following:[9]

> "We believe the same interaction and edit checking capability must take place when an ALEC is working an order as when BellSouth's retail ordering systems interact with BellSouth's FUEL and Solar databases to check the accuracy of BellSouth orders. Based upon the evidence, it does not appear that this interaction currently takes place in a manner that gives Supra adequate online edit checking ability".

20. The Final Order is not just relevant with regards to Supra but is an Order that BellSouth had to comply with for all CLECs[10], since the relief granted compels Respondent to modify its ordering systems that effect all CLECs, not just Supra.

21. AT&T in their 22 State OSS Alignment seeks to disregard the mandate of the FPSC and "backslide" into the performance structure to which this Commission found to be unacceptable over ten years ago in July 1998. Given all the advancements in technology over the last decade, it is unbelievable that in 2009, AT&T intends to revert to an ordering process for CLECs that was not in parity with the BOC's own retail ordering system in 1998.

22. The fact that AT&T still utilizes the edit checking capabilities in the ordering system for its own retail customers demonstrates the desirability as well as the viability of having the same capabilities in the ordering systems utilized by CLECs.

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[9] *See* ORDER NO. PSC – 98 -1001 –FOF – TP, at pg. 22.
[10] CLECs and ALECS are the same, in 1998 the FPSC referred to CLECs and Alternative Local Exchange Carriers.

IV. REQUEST FOR EMERGENCY INJUNCTIVE RELIEF

23. The FPSC requires that all contracts and services shall be fair, just, reasonable, and sufficient, and the service rendered to any person by any telecommunications company shall be rendered and performed in a prompt, expeditious, and efficient manner. See §364.03(1). The telecommunications facilities furnished by a telecommunications company shall be kept in good condition and repair; and its service shall be adequate, sufficient, and efficient. See id. Every telecommunications company shall, upon reasonable notice, furnish to all persons who may apply therefore and be reasonably entitled thereto suitable and proper telecommunications facilities and connections for telecommunications services and furnish telecommunications services as demanded upon terms to be approved by the commission.

24. Respondent has announced the implementation of an OSS system which clearly violates the FPSC's Final Order, and will continue to violate said Order for as long as LEX continues to lack adequate edit checking capabilities. The OSS Release currently scheduled for November 2009, will cause substantial and irreparable damage to Petitioner, all other CLECs operating in Florida and the consumer. The only entity which will profit from this release and its devastating effect on the CLEC ordering process, is AT&T retail.

25. The FPSC has the power to seek relief in the circuit court in the form of temporary or permanent injunctions, restraining orders or other appropriate orders where the FPSC finds that an entity within its jurisdiction has violated or is in violation of a Commission Order and the FPSC finds that said violation impairs the operations or service of any

entity over which it has jurisdiction. See Rule 25-22.030 Injunctions, Florida Administrative Code. See also §§ 364.015 and 364.285(2), Florida Statutes.

26. Furthermore, whenever the FPSC finds, on its own motion or upon complaint, that repairs or improvements to, or changes in, any telecommunications facility ought reasonably to be made, in order to promote the convenience of the public or in order to secure adequate service or facilities for basic local telecommunications services consistent with the requirements set by the FPSC, the FPSC must make and serve an order directing that such repairs, improvements, changes, additions, or extensions be made in the manner specified in the order. See §364.15, Florida Statutes.

27. The FPSC is also empowered to impose penalties on Respondent for violation of its orders. See §364.285(1), Florida Statutes.

WHERFORE, based on the stated intentions of AT&T in their 22 State OSS Alignment not to incorporate pre-ordering edits, in violation of the Final Order On Complaint, Petitioner requests:

a. An order that this Commission restrain AT&T from implementing the AT&T 22-State OSS Alignment in November 2009, and/or file an action in circuit court for an injunction, until such time as AT&T can demonstrate through an independent third party testing that they have provided pre-order edits substantially equal to what they provide to themselves in their retail order system "RNS";

b. An order that this Commission issue a stay of the implementation of the AT&T 22-State OSS Alignment in November 2009 with respect to release in Florida, and/or file an action in circuit court for a stay;

c. An order assessing penalties against Respondent pursuant to §364.03, Florida Statutes;

d. An order requiring that AT&T make its LENS OSS with its edit checking capabilities available to STS and other CLECS until any new OSS replacement system contains the came capabilities..

e. An order for attorney's fees if applicable, costs and for such further relief as the Commission deems just and appropriate.

s/ Alan C. Gold
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VERIFICATION TO EMERGENCY PETITION FOR INJUNCTIVE RELIEF AND REQUEST FOR STAY OF CLEC OSS-RELATED RELEASES

I have read the foregoing Verified Emergency Petition For Injunctive Relief and Request For Stay of CLEC OSS-Related Releases and the facts contained herein are true and correct based upon my personal knowledge. Moreover due to the scheduled release of LEX in November 2009, it is necessary the Petition be considered by this Commission on an emergency basis.

KEITH KRAMER as Vice President, Legal & Regulatory, Saturn Telecommunication Services, Inc.

State of Florida }
} § §
County of Broward }

BEFORE ME the undersigned authority personally appeared on this 2ND day of September 2009, Keith Kramer as Vice President, Legal& Regulatory, Saturn Telecommunication Services, Inc., who is personally known to me or has produced _____ as identification, and who after being duly sworn, deposes and states that he has read the foregoing Verified Emergency Petition For Injunctive Relief and Request For Stay of CLEC OSS-Related Releases, and states that the facts contained therein are true and correct and based upon his personal knowledge.

NOTARY PUBLIC - STATE OF FLORIDA
Print Name:
Commission No.:
Expiration:

ANDREW T. SILBER
MY COMMISSION # DD 557657
EXPIRES: May 30, 2010
Bonded Thru Notary Public Underwriters

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 2, 2009, I electronically filed the foregoing document with the Florida Public Service Commission. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via email transmission or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Alan C. Gold
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