State of Florida

Public Service Commission

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

DATE: June 9, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Susac)
Division of Competitive Markets & Enforcement (Wright)

RE: Docket No. 040028-TP – Complaint and request for summary disposition to enforce contract audit provisions in interconnection agreement with NewSouth Communications Corp., by BellSouth Telecommunications, Inc.

AGENDA: 06/21/05 – Regular Agenda – Interested Parties May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Request that this recommendation immediately precede the recommendation in Docket No. 040527-TP

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040028.RCM.DOC

Case Background

On April 26, 2002, BellSouth Telecommunications, Inc. (BellSouth) transmitted a letter to NewSouth Communications, Corp. (NewSouth), notifying NewSouth of its intent to audit NewSouth's Enhanced Extended Links (EELs). NewSouth refused to comply with the audit, and to date, BellSouth has not conducted an audit of NewSouth's EELs.

On January 12, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed a Complaint and Request for Summary Disposition against NewSouth Communications, Corp. (NewSouth) to

enforce an audit provision in their interconnection agreement.[1] On February 2, 2004, NewSouth filed its Answer and Response in Opposition to BellSouth's Complaint. On February 23, 2004, Order No. PSC-04-0186-PCO-TP was issued, which required the parties to file additional briefs regarding the issue of the correct law to be applied in determining the audit rights of BellSouth in regard to the referenced circuits. In accordance with the aforementioned order, both parties filed timely briefs on March 23, 2004.

Subsequent to this filing, the parties engaged in settlement negotiations and sought mediation with the Commission in attempt to resolve the dispute. No resolution was reached and on February 2, 2005, staff held a conference call with the parties to discuss the procedural handling of the docket. NewSouth contends that BellSouth was supposed to respond to outstanding discovery by March 11, 2005; however, BellSouth did not respond. NewSouth filed a Motion to Compel (Motion) on March 17, 2005, and BellSouth responded on March 24, 2005.[2] Recently, on May 6, 2005, BellSouth filed a supplement to its Motion for Summary Disposition. NewSouth responded on May 13, 2005, arguing that the filing was inappropriate.

BellSouth's supplemental filing asserts that NewSouth challenged BellSouth's EELs audit procedures before the FCC in the context of BellSouth's Five State 271 Application. BellSouth indicates that the FCC rejected that challenge. NewSouth argues that the Commission's rules and Orders in this proceeding do not contemplate receipt of supplemental filings; thus, consideration of this material is inappropriate. Staff believes it is in the Commission's discretion as to whether to consider or disregard the supplemental material. Staff notes that it has not specifically addressed the supplemental material in its analysis, but its consideration would in no way alter staff's recommendation.

This recommendation addresses BellSouth's Motion for Summary Disposition. It is undisputed that the parties' ICA is governed by, construed and enforced in accordance with the laws of the State of Georgia. Staff believes that the dispute hinges solely upon the interpretation of the following language of the parties interconnection agreement (ICA):

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements.

Attachment 2, Section 4.5.1.5 of the parties' ICA

[1] The audit provision of the parties' ICA is attached hereto as Exhibit A.
[2] No ruling has been made regarding the Motion to Compel and the parties represented to staff that they do no object to a ruling subsequent to the resolution of BellSouth's Motion for Summary Disposition.

Summary of Staff's Recommendation

Staff recommends granting BellSouth's Motion for Summary Disposition and allow BellSouth to audit NewSouth's records regarding the use of Enhanced Extended Links (EELs). Staff believes the parties' interconnection agreement (ICA) governs this dispute and not the FCC's Supplemental Order Clarification (SOC) and the Triennial Review Order (TRO). The language in Attachment 2, Section 4.5.1.5 of the parties' ICA is clear and unambiguous as to BellSouth's right to audit NewSouth's records.

Discussion of Issues

Issue 1: Should the Commission grant BellSouth Telecommunications, Inc.'s Motion For Summary Disposition?

Recommendation: Yes. Staff recommends granting BellSouth's Motion for Summary Disposition and allowing BellSouth, at its sole expense, and upon thirty (30) days notice to NewSouth, to audit NewSouth's records to verify the type of traffic being transmitted over loop and transport combinations, also known as Enhanced Extended Link (EELs). Staff recommends requiring BellSouth to serve NewSouth with notice of its intent to conduct the audit, thirty (30) days in advance of the audit. (Susac)

Staff Analysis:

It should be noted at the outset that the Parties' arguments also include supplemental briefs filed on March 23, 2004. Also, it is undisputed that BellSouth has given NewSouth thirty (30) days notice of its intent to conduct the audit.

Parties Arguments

BellSouth

In its Complaint, BellSouth argues that its right to audit NewSouth is governed solely by the parties' voluntarily negotiated Agreement. BellSouth argues that it is not necessary to look beyond the four corners of the Agreement. BellSouth claims that neither the SOC[3] nor the TRO is applicable to this dispute. BellSouth does not dispute the fact that the FCC issued its SOC in connection with adoption of rules establishing network elements pursuant to unbundling requirements under Section 251(c). However, BellSouth contends that the duties of each party in this case are defined by their Agreement and not Section 251(c).[4]

As a general matter, BellSouth claims that when parties negotiate and enter into an interconnection agreement voluntarily, they may do so "without regard to the standards set forth in subsections (b) and (c) of Section 251." 47 U.S.C. §252(a). BellSouth argues that this means parties can bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Section 251(b) and (c) of the Act.[5] BellSouth

[3] In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000).

[4] 47 U.S.C. § 252(a); AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties would other have under Section 251(b) or Section 251(c)"); Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp., 294 F.3d 307, 322 (2d Cir. 2002), cert. granted, 123 S.Ct. 1480 (2003) (refusing to allow a requesting carrier to "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of Section 251"); Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc., 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (holding that upon approval of a negotiated interconnection agreement, "the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)" and that a party "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts . . . .")

[5] See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 373 (1999) ("an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"; MCI

claims that the parties were free to negotiate different terms from the audit requirements in the SOC, and that is precisely what resulted from the parties' negotiations.

BellSouth argues that, "where contract language is unambiguous, construction is unnecessary and the court simply enforces the contract according to its clear terms."[6] BellSouth argues that the language of the agreement provides it with an unqualified right to audit NewSouth's circuits provided BellSouth gives 30 days notice and assumes the cost of the audit. In sum, BellSouth claims that the ICA "trumps" the FCC's SOC, and adopting NewSouth's position would undermine the entire negotiation and arbitration scheme set forth in the Act.

BellSouth claims that, to the extent NewSouth was interested in adding audit conditions from the SOC, NewSouth could have requested such language be incorporated into the parties' ICA during negotiations. For example, Attachment 2 § 4.5.2.2, incorporated specific language from the FCC's SOC regarding Option 4 conversions. However, BellSouth argues that its current request to audit loops and transports does not contain the same language that falls under Option 4. BellSouth asserts that the omission was intentional and Attachment 2, § 4.5.1.5, of the parties' ICA is clear as to the parties' rights in this regard.

Furthermore, even though it does not believe the Order is relevant to this dispute, BellSouth asserts that it has met the auditing criteria contained in the SOC. BellSouth cites paragraphs 1, 29 and 32 in support of its position, and asserts that these three paragraphs stand for the notion that an ILEC may audit a CLEC to confirm that it is providing significant amounts of local exchange service over EEL combinations. Further, BellSouth recognizes that audits should not be routine, and notes that it has not audited in NewSouth in approximately three years. Last, BellSouth asserts that it has cause to conduct the audit and has hired an independent third party to conduct the audit.[7]

BellSouth also argues that the TRO does not apply to this dispute. The TRO was adopted well after the execution of the parties ICA and therefore has no relevance to the interpretation of the ICA, unless and until the Order is incorporated into the Agreement via the change of law provision. BellSouth claims that the TRO has not been incorporated into the ICA, and therefore, is not relevant to this dispute.

As stated above, BellSouth seeks to audit NewSouth's records pursuant to the terms and conditions in the parties' ICA. BellSouth claims the Agreement alone sets forth the terms of the parties' rights with respect to EEL audits and FCC Orders, such as the TRO and the SOC, cannot be read to vary the terms of the Agreement. BellSouth also argues that under Georgia law, a merger or integration clause in a contract provides the parties with a substantive, contractual right against a tribunal's use of extraneous material to "construe" the contract in contradiction

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Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262, 1266 (9th Cir. 2000) ("[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)"; Iowa Utilities Board v. Commission, 120 F.3d 753, n. 9 (8th Cir. 1997) aff'd in part, rev'd in part on other grounds, See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 ("[t]"he FCC's rules and regulations have direct effect only in the context of state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations.")

[6] Moore & Moore Plumbing, Inc. v TriSouth Contractors, Inc., 256 Ga. App. 58, 567 S.E.2d 697 (2002)

[7] BellSouth Mr. Hendrix Affidavit, ¶5, 12 and 16.

terms. GE Life and Annuity Assurance Co. v. Donaldson, 189 F.Supp. 2d 1348, 1357 (M.D. Ga 2002) ("a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material.") Last, BellSouth contends that this auditing issue is purely contractual and the Commission need not conduct a hearing.

NewSouth

NewSouth argues that BellSouth's request to audit is unreasonable and fails to meet the criteria set forth in the FCC's SOC and TRO. NewSouth asserts that the express terms of Att. 2 § 1.5 of the parties' Agreement require compliance with Section 251(c)(3), FCC's Rules and Orders, such as the SOC when provisioning EELs. In addition, NewSouth claims that BellSouth selected an auditor that is neither independent of BellSouth nor an auditor.

NewSouth argues that the ICA, by its express terms, incorporates the SOC.[8] Section 1.1 of the Attachment 2 of the ICA provides that it "sets forth the unbundled network elements and combinations of unbundled network elements that BellSouth agrees to offer to NewSouth in accordance with the obligations under section 251(c)(3) of the Act. In addition, Section 1.5 of Attachment 2 more specifically provides that, "[s]ubject to applicable and effective FCC Rules and Orders … BellSouth will offer combinations of network elements pursuant to such orders." Further, similar language is found in Section 4 of Attachment 2, which addresses EELs. Section 4.2 of Attachment 2, states that "[w]here necessary to comply with an effective FCC/and/or State Commission Order, or as other wise agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also know as the Enhanced Extended Link ("EEL"). In light of the above, NewSouth argues that the ICA expressly subjects BellSouth to the SOC .

NewSouth also argues that the ICA incorporates the SOC and the TRO as a matter of law. Under Georgia law,[9] the parties are presumed to have incorporated existing law into their contracts, and to have negotiated with regard to existing law, unless the Parties explicitly state otherwise. Further, NewSouth argues that there is a "strong presumption" that negotiated provisions that plainly track controlling law were negotiated "with regard to the 1996 Act and controlling law." AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 229 F.3d 457, 465 (4th Cir. 2000). NewSouth claims that these decisions incorporate the SOC into the parties ICA, and that the TRO should also be incorporated because it is merely a continuation of the SOC.

For example, NewSouth cites a quote from Section 4.5, Attachment 2 of the ICA to illustrate the incorporation of the SOC; this section provides that NewSouth may not convert special access unless it use the combination to provide a "significant amount of local exchange service." Next, the ICA defines "significant amount of local exchange service" with reference to the SOC , and thereby incorporating the Order.

[8] NewSouth also attaches letters from BellSouth that state BellSouth has complied with the SOC. It is staff's understanding that these letter were attached to illustrate BellSouth's understanding of the parties' ICA that BellSouth must satisfy the SOC prior to auditing NewSouth.
[9] There is no dispute between the parties that Georgia law governs the parties' ICA.

NewSouth also cites BellSouth's letter regarding conducting the audit as evidence that the SOC controls. In a letter dated April 26, 2002, BellSouth cited the SOC as authority for conducting and payment of the audit, and not the parties' ICA. NewSouth argues that the reimbursement language in the letter does not appear in the parties' ICA, and therefore, is evidence of BellSouth's understanding that the SOC applies. In sum, NewSouth asserts that BellSouth cannot claim exemption from the SOC by pointing to the parties' ICA, while on the other hand imposing requirements on NewSouth that are only found in the SOC.

As for the TRO applicability, NewSouth argues that the Order carried over the requirement that an ILEC cannot audit without concern, and must conduct the audit in accordance with the American Institute of Certified Public Accountants (AICPA) standards. In addition, the TRO retained the SOC's requirements as to payment for the audit. In this dispute, NewSouth claims that BellSouth did not select an independent auditor that is AICPA compliant.

In addition, NewSouth argues that a Motion for Summary Disposition should not be granted in light of outstanding discovery. As stated in the case background, BellSouth has not responded to NewSouth's discovery requests. Therefore, NewSouth argues that Summary Disposition is not appropriate in light of outstanding discovery which could reveal an issue of fact.

In conclusion, NewSouth argues that the SOC and the TRO should be read in conjunction with the parties' ICA, and when read in conjunction with the ICA, BellSouth's request to audit NewSouth is unreasonable and fails to meet the criteria set forth in the aforementioned Orders.

Standard

Section 120.57(1)(h), Florida Statutes, provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits."

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought.[10] The burden is on the movant to demonstrate that the opposing party cannot prevail.[11] "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."[12]

[10] Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993).

[11] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

[12] Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). See also McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).

"Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[13] If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.[14] However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.[15]

Moreover, staff notes that this Commission has recognized that policy considerations should be taken into account in ruling on a motion for summary final order. By Order No. PSC-98-1538-PCO-WS,[16] the Commission found that

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
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> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

Analysis

Staff recommends granting BellSouth's Motion for Summary Disposition because the clear, unambiguous, and voluntarily-negotiated language of the ICA allows BellSouth to audit

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[13] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

[14] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

[15] Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

[16] Issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

NewSouth upon thirty (30) days notice. Staff recommends that the Commission first determine whether the parties' ICA is a fully integrated contract, and if so, then the Commission's review should be confined to the plain language of the parties ICA. In the event the Commission finds the language of the agreement clear and unambiguous, then the language should not be contradicted or supplemented.[17]

Staff believes the parties' ICA fully integrated contract because the Agreement contains a merger clause. A merger clause is "a provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document." Henry Cambell Black, Black's Law Dictionary (5th ed. 1979); See also, UCC §2-202; (e.g., the Eleventh Circuit relied on Georgia law holding that a merger clause prevented recovery by estopping the claimant from asserting reliance on any misrepresentations or omissions made outside of the four corners of the contract. Hall v. Coram Healthcare Corp., 157 F.3d 1286, 1287 (11th Cir., 1998))

Next, staff recommends that the Commission determine whether the language of the parties' ICA is clear and unambiguous. Under Georgia law,[18] "the standard of review applicable to the question of whether a contract is ambiguous is de novo. . . In reviewing the trial court's construction, the appellate court is 'guided first by the language of the contract itself and where the contract is clear and unambiguous there is no reason to go further. In such a situation, the intent of the parties must be determined from only the four corners of the document, and not parol evidence." Garcia v. Tarmac Am., Inc., 880 So.2d 807, 809 (Fla. Dist Ct. App., 2004) In addition, under Georgia law "where the language of a contract is clear, unambiguous, and capable of only one reasonable interpretation, no construction is necessary or even permissible." Stern's Gallery of Gifts, Inc. v. Corporate Property Investors, Inc., 176 Ga.App. 586, 337 S.E.2d 29, 35 (Ct.App.1985). "[A] word or phrase is ambiguous only when it is of uncertain meaning, and may be fairly understood in more ways than one." Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783, 787 (1947) (emphasis added); see United States Fidelity & Guar. Co. v. Gillis, 164 Ga.App. 278, 296 S.E.2d 253, 255 (Ct.App.1982)[19]

[17] John D. Calamari and Joseph M. Perillo, Contracts, Hornbook Series §3-4 (3d ed. 1992)

[18] It is undisputed that the parties' ICA is governed by, constured and enforced in accordance with the laws of the State of Georgia.

[19] (Contract language that is capable of only one logical interpretation is accorded its literal meaning, but terms that are susceptible of more than one reasonable interpretation are "uncertain of meaning or expression and, thus, ambiguous."). "The existence or non-existence of ambiguity is always a question of law for the court." Stern's Gallery, 337 S.E.2d at 35. Since interpretation of unambiguous contract terms is for the court solely, the former Fifth Circuit, deciding a contract case under Georgia law, concluded that "merely because the parties disagree upon the meaning of contract terms will not transform the issue of law into an issue of fact." General Wholesale Beer Co. v. Theodore Hamm Co., 567 F.2d 311, 313 (5th Cir.1978) (per curiam) (emphasis added)

As stated in the case background, staff believes the language in the parties' ICA is clear and unambiguous. The language in Attachment 2, Section 4.5.1.5 of the parties interconnection agreement (ICA) states,

> **BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records** not more than once in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements.

Attachment 2, Section 4.5.1.5 (emphasis added)

Staff believes the language at issue is capable of only one logical interpretation and should be accorded its literal meaning that, "BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records . . . ."

Staff believes that neither the SOC nor the TRO should apply to the set of facts in this dispute, and that the plain, unambiguous language of the agreement should prevail. Staff recognizes that neither the SOC nor the TRO appear in the disputed language of Attachment 2, Section 4.5.1.5. The parties' entered into a voluntary agreement whereby they incorporated specific language of the SOC in certain sections of the ICA, and omitted specific language from that Order in other sections of the ICA. Staff believes that this omission was intentional and that the plain language of the parties' ICA governs the dispute. If the SOC, in its entirety, was incorporated into the parties' ICA as a matter of law as NewSouth argues, then the specific references to the SOC would be unnecessary and redundant. Further, staff also believes that the TRO does not apply because the Order was issued after the execution of the ICA, and neither party has amended the ICA to reflect the holdings of the TRO. Staff believes these views are also consistent with the FCC. The FCC, for example, stated that its rules do not supersede any audit rights included in any interconnection agreements or other commercial arrangements. 2005 FCC LEXIS 912 (FCC, 2005), citing, Supplemental Order Clarification, 15 FCC Rcd at 9604, para. 32 (noting that some interconnection agreements contain audit rights).

Alternatively, if the Commission finds that the SOC is incorporated into the parties' ICA, staff believes that BellSouth has complied with the SOC with regard to an ILEC's right to audit a CLEC's use of EELs. BellSouth asserts that it has cause to conduct the audit, and by way of affidavit, BellSouth asserts that it has chosen an independent auditor to "verify NewSouth's local usage certification and compliance of the FCC Supplemental Order." Affidavit of Jerry Hendrix, p. 2.

Staff recognizes NewSouth's argument that Att. 2, §1.5 of the ICA requires BellSouth to comply with the SOC when provisioning EELs. However, staff believes this section of the ICA is relevant only to BellSouth's obligation to *provision* EELs and is not relevant to BellSouth's right to *audit* EELs.

In addition, staff is aware of NewSouth's argument that Summary Disposition is not appropriate in light of its Motion to Compel outstanding discovery. However, staff still believes granting the Motion for Summary Disposition is appropriate in this particular matter. As a general rule, courts do not condone the granting of summary judgment while a motion to compel discovery is pending, unless it can be determined that "the disallowed discovery would add nothing of substance to the party's claim." McCall v. Henry Medical Center, 250 Ga. App. 679, 685 (2) (551 S.E.2d 739) (2001). In the case at hand, it is staff's belief that discovery would not add substance to a party's position, because contract construction is a question of law and there is no issue of material fact to discover.

In conclusion, staff recommends granting BellSouth's Motion for Summary Disposition and allow it to audit NewSouth's records regarding the use of Enhanced Extended Links (EELs) upon thirty (30) days notice of its intent to conduct the audit. Staff believes the language in Attachment 2, Section 4.5.1.5 of the parties' ICA is clear and unambiguous as to BellSouth's right to audit NewSouth's records. Staff also believes that the FCC's SOC and the TRO do not apply to this dispute. Last, if BellSouth concludes that that NewSouth is not providing a significant amount of local exchange traffic over the EELs, then BellSouth can file a complaint with the Florida Public Commission, pursuant to the dispute resolution process set forth in the parties' ICA. NewSouth would then have the opportunity to challenge the results of the audit, if necessary.

Issue 2: Should this Docket be closed?

Recommendation: Yes. In the event BellSouth's Motion for Summary Disposition is granted, staff recommends closing the docket because no further action is needed by the Commission. (Susac)

Staff Analysis: In the event BellSouth's Motion for Summary Disposition is granted, staff believes that no further action is needed by the Commission.