ORIGINAL

Legal Department 45

NANCY B. WHITE
Assistant General Counsel-Florida

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5558

April 6, 1998

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 971140-TP (Recombination Docket)

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunication's Inc.'s Brief of the Evidence, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White (BW)

Nancy B. White

ACK ✓
AFA 1
APP
CAF
CMU Stevanya
CTR
EAG
LEG 1
LIN 5
OPC
RCH
SEC 1
WAS
OTH

Enclosures

cc: All parties of record
A. M. Lombardo
R. G. Beatty
William J. Ellenberg II

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
03965 APR-6 98
FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
DOCKET NO. 971140-TP (Recombination Issues)

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express this 6th day of April, 1998 to the following:

Charles J. Pelligrini
Staff Counsel
Division of Legal Services
Florida Public Service Comm.
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(850) 413-6232

C. Everett Boyd, Jr.
Ervin, Varn, Jacobs,
Odom & Ervin
305 South Gadsden Street
Post Office Drawer 1170
Tallahassee, FL 32302
(850) 224-9135

Richard Melson
Hopping Green Sams & Smith
123 South Calhoun Street
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500

Mr. Thomas K. Bond
MCI Metro Access Transmission
Services, Inc.
780 Johnson Ferry Road
Suite 700
Atlanta, GA 30342

Tracy Hatch, Esq.
Michael W. Tye, Esq.
101 N. Monroe Street
Suite 700
Tallahassee, Florida 32301
Attys. for AT&T
Tel. (850) 425-6364

Mark A. Logan, Esq.
Brian D. Ballard, Esq.
Bryant, Miller & Olive, P.A.
201 S. Monroe Street
Tallahassee, Florida 32301
Attys. for AT&T
Tel. (850) 222-8611

Nancy B. White
Nancy B. White (/bw)

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Motions of AT&T Communications of the Southern States, Inc. and MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. to Compel BellSouth Telecommunications, Inc. to comply with Order PSC-96-1579-FOF-TP and to set non-recurring charges for combinations of network elements with BellSouth Telecommunications, Inc. pursuant to their agreement	)	**Docket No. 971140-TP**
	)	**Filed: April 6, 1998**

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF OF THE EVIDENCE

ROBERT G. BEATTY
NANCY B. WHITE
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5555

WILLIAM J. ELLENBERG II
BENNETT L. ROSS
675 West Peachtree Street,
Suite 4300
Atlanta, Georgia 30375
(404) 335-0711

DOCUMENT NUMBER-DATE
03965 APR-6 98
FPSC-RECORDS/REPORTING

STATEMENT OF THE CASE

Following the passage of the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 251, *et seq.*, BellSouth negotiated in good faith with a number of potential alternative local exchange carriers ("ALECs"). Many of those negotiations were successfully concluded with the signing of interconnection agreements between the parties. For AT&T Communications of the Southern States, Inc. ("AT&T") and MCI Telecommunications Corporation ("MCI"), the negotiations resulted in petitions for arbitration.

In the arbitration proceedings, the Commission ordered that prices for unbundled network elements and interconnection be based on BellSouth's Total Service Long Run Incremental Cost ("TSLRIC") studies. Order No. PSC-96-1579-FOF-TP, Docket Nos. 960833-TP, 960846-TP & 960916-TP, at 32-33 (Dec. 31, 1996). The Commission set permanent rates, with the exception of those functions for which BellSouth did not provide a TSLRIC study. In those instances, the Commission set interim rates based on either the Hatfield study results with modifications or BellSouth's tariffs. At the time of its decision, the pricing provisions of the FCC's First Report and Order in CC Docket No. 96-98 had been stayed by the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), although the FCC's rules that required BellSouth to provide combinations of unbundled network elements to ALECs remained in effect.

One of the issues in the arbitrations concerned the extent to which AT&T and MCI could rebundle network elements in any manner of their choosing, including recreating an existing BellSouth retail service. Order No. PSC-96-1579-FOF-TP,

Docket Nos. 960833-TP, 960846-TP & 960916-TP, at 34 (Dec. 31, 1996). After considering Section 251(c)(3) of the 1996 Act and applicable provisions of the FCC's August 8, 1996 First Report and Order in CC Docket No. 96-98, this Commission concluded:

> Based on the foregoing, it appears to us that AT&T and MCI should be able to combine network elements in any manner they choose. *We note that we are concerned with the FCC's interpretation of Section 251(c)(3) of the Act. Specifically, we are concerned that the FCC's interpretation could result in the resale rates we set being circumvented if the price of the same service created by combining unbundled elements is lower.* Our responsibility to set rates is underscored by the fact that the portion of the FCC's order on pricing has been stayed. *We are also concerned about the possibility that the joint marketing prohibitions in section 271(e)(1) could be circumvented.* The FCC has interpreted Section 271(e)(1) as only prohibiting the joint marketing of resold services and not services created by combining unbundled network elements. We believe it is inconsistent to have a service subject to marketing restrictions when resold and not apply the same restrictions to the same service provided through rebundling of network elements.
>
> Upon consideration, although we are concerned with the FCC's interpretation of Section 251(c)(3) of the Act, we are applying it to this proceeding. We do this based on the arbitration standards we are to follow as set forth in Section 251 of the Act and because the portion of the FCC's Order interpreting this section has not been stayed by the 8th Circuit Court of Appeals. *Therefore, since it appears based on the above, that the FCC's Rules and Order permit AT&T and MCI to recombine unbundled network elements in any manner they choose, including recreating existing BellSouth services, that they may do so for now. However, we will notify the FCC about our concerns and revisit this portion of our Order should the FCC's interpretation change.*

Order No. PSC-96--1579-FOF-TP, at 37-38 (emphasis added).

On January 15, 1997, BellSouth filed a motion seeking reconsideration of the pricing of unbundled elements when they are recombined to reproduce or duplicate an existing BellSouth retail service. BellSouth argued that the pricing standard for

individual elements set forth in Section 252(d)(1) of the 1996 Act is not the appropriate standard to apply to recombined elements and that rebundled elements should be priced under the resale provisions of the 1996 Act. The Commission denied BellSouth's motion for reconsideration, holding that:

> In our original arbitration proceeding, *we were not presented with the specific issue of the pricing of recombined elements when recreating the same service offered for resale. ...*
>
> *Furthermore, we set rates only for the specific unbundled elements that the parties requested.* Therefore, it is not clear from the record in this proceeding that our decision included rates for all elements necessary to recreate a complete retail service. Thus, it is inappropriate for us to make a determination on this issue at this time. ...

Order No. PSC-97-0298-FOF-TP, Docket Nos. 960833-TP, 960846-TP & 960916-TP, at 7-8 (March 19, 1997) (emphasis added). However, the Commission reiterated its concern if "recombining network elements to recreate a service could be used to undercut the resale price of the service." *Id.* at 8.

In an effort to avoid any confusion on this point, BellSouth submitted for the Commission's approval final arbitrated agreements with both AT&T and MCI that included language to reflect both the Commission's pronouncement that it had not ruled upon the price of recombined elements and the Commission's stated concern about undercutting resale. Specifically, BellSouth proposed language stating that "[f]urther negotiations between the parties should address the price of a retail service that is recreated by combining UNEs," and that this price should not undercut the resale price of any retail service.

On May 27, 1997, the Commission entered orders rejecting BellSouth's proposed language. According to the Commission:

> We expressed concerns with the potential pricing of UNEs to duplicate a resold service at our Agenda Conference, and we expressed our concerns in our Order in dicta; however, we *stated that the pricing issue associated with the rebundling of UNEs to duplicate a resold service was not arbitrated. Accordingly, we declined to make a determination on this matter, and did not approve any language to be included in the arbitrated agreement.* We find BellSouth's proposal to include this language and refusal to sign the Agreement without such language completely unacceptable. Accordingly, BellSouth's proposed language shall not be included in the arbitrated Agreement.

Order No. PSC-97-0600-FOF-TP, Docket Nos. 960833-TP, 960846-TP & 960916-TP, at 7 (May 27, 1997) (emphasis added); *see also* Order No. PSC-97-0602-FOF-TP, at 5 (May 27, 1997). The Commission directed the parties to submit a signed agreement consistent with its arbitration orders and threatened to issue a show cause order against the non-signing party seeking fines of $25,000 per day.

On June 9, 1997 and October 27, 1997, AT&T and MCI filed Motions to Compel Compliance with the Arbitration orders. In addition, MCI filed a Petition to Set Non-Recurring charges for Combinations of Network Elements. By Order No. PSC-98-0090-PCO-TP, the Commission severed these proceedings from the original arbitration dockets.

On July 18, 1997, the Eighth Circuit vacated the FCC's pricing rules and affirmed that state commissions have exclusive jurisdiction over the pricing of unbundled network elements and interconnection. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). In addition, the Eighth Circuit ruled that incumbent local exchange companies ("ILECs"), such as BellSouth, did not have to combine network elements for ALECs,

ruling that it is the ALEC's responsibility to perform the combination function. According to the Eighth Circuit, "while the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining." *Id.* at 813.

On October 14, 1997, in its decision on rehearing, the Eighth Circuit reiterated in its decision that the 1996 Act only requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. The Eighth Circuit vacated the FCC's rules that prohibited the incumbent from separating "requested network elements that the incumbent LEC currently combines" because, according to the Eighth Circuit, the 1996 Act "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services." *Id.* The Eighth Circuit reasoned that permitting the "acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." *Id.*

On January 16, 1998 the United States Supreme Court granted certiorari to review the Eighth Circuit's decision regarding pricing as well as the recombination of network elements. Nevertheless, with respect to the interconnection agreements

BellSouth signed with AT&T and MCI, language requiring BellSouth to combine unbundled elements will remain in effect until such time as the Supreme Court has completed its review, assuming the Supreme Court upholds the Eighth Circuit's decision. The interconnection agreements today contain language requiring that, should "... any *final* and *nonappealable* legislative, regulatory, judicial or other legal action materially affects any material terms of the Agreements, the parties will renegotiate mutually acceptable terms as may be required." (emphasis added) Therefore, assuming the issues now before the Supreme Court become final, BellSouth will, at that time, renegotiate the portion of the AT&T and MCI agreements relating to combinations of network elements. (Parker, Tr. at 35-37).

The Commission conducted formal hearings in this matter on March 9 and 11, 1998. BellSouth presented the testimony of Alphonso Varner, Jerry Hendrix, Daonne Caldwell, and Eno Landry. The hearing produced a transcript of 801 pages and 39 exhibits.

This Brief of the Evidence is submitted in accordance with the post-hearing procedures of Rule 25-22.056, Florida Administrative Code. A summary of BellSouth's position on this issues to be resolved in this docket is set forth in the following pages and is marked with an asterisk.

STATEMENT OF BASIC POSITION

While language in the interconnection agreements currently obligates BellSouth to provide combined network elements to AT&T and MCI, the interconnection agreements do not contain the price for such combinations. Throughout the numerous

arbitration proceedings in the BellSouth region, including in its Petition for Reconsideration in the AT&T and MCI arbitration proceedings in Florida, BellSouth's position has been that when BellSouth combines network elements for an ALEC that recreate an existing BellSouth services, those combinations should be priced at the retail service rate minus the applicable wholesale discount. Accordingly, until the Eighth Circuit's decision becomes final and nonappealable, the Commission should order that recombined elements which replicate an existing BellSouth retail service should be priced at the resale discount rate.

STATEMENT OF POSITION ON THE ISSUES

Issue No. 1: Does the BellSouth-MCIm interconnection agreement specify how prices will be determined for combinations of unbundled network elements

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

b) that do create an existing BellSouth retail telecommunications service?

**Position: No. The BellSouth-MCIm Interconnection Agreement specifies prices for individual network elements. The Agreement does not specify how combinations of network elements should be priced.

In order to conclude that the BellSouth-MCIm Interconnection Agreement specifies the prices for combinations of network elements, this Commission must find either that it decided the prices in the arbitration or that BellSouth voluntarily agreed to such prices. Neither finding makes any sense nor is supported by the evidence.

That the Commission did not arbitrate the price of combinations of network elements is clear from the Commission's own rulings. In its Final Order on Motions for Reconsideration, the Commission noted that in the arbitration "we were not presented with the specific issue of the pricing of recombined elements when recreating the same service offered for resale." Order No. PSC-97-0298-FOF-TP, at 7 (March 19, 1997). The Commission reiterated this position two months later, stating that "the pricing issue associated with the rebundling of UNEs to duplicate a resold service was not arbitrated." Order No. PSC-97-0602-FOF-TP, at 5 (May 27, 1997). It is inconceivable that the Commission decided an issue that was not even the subject of arbitration.

While begrudgingly acknowledging that the price of recombined elements was not arbitrated, MCI nevertheless contends that BellSouth voluntarily agreed that MCI could purchase combinations at cost-based rates. As MCI witness Parker testified:

> Q. . . . is it your position or your understanding that this Commission decided in the arbitrations what price should apply to recombined elements that recreate a service BellSouth offers for resale.
>
> A. No, I don't believe they issued a price for specific combination of elements.
>
> Q. And, in fact, didn't this Commission on at least two occasions indicate specifically that the Commission was not deciding that issue.
>
> A. To the best of my recollection, yes.
>
> Q. And just so I'm clear, even though the issue was not decided by this Commission in arbitrations, you believe that BellSouth agreed that individual unbundled element prices should apply when MCI purchases recombined elements that recreate a service that BellSouth offers for resale; is that correct?
>
> A. Yes.

(Parker, Tr. at 40-41). MCI's contention blatantly ignores BellSouth's consistent position on the pricing of recombined elements, the circumstances surrounding execution of the interconnection agreement, and the language of the agreement itself.

There can be no serious dispute that BellSouth consistently has opposed proposals by ALECs to purchase combinations of network elements at cost-based rates. BellSouth has fought this proposal in every state arbitration proceeding, the Section 271 proceedings, as well as at the FCC. (Varner, Tr. at 425). Even AT&T and MCI witness Gillan acknowledged as much:

> Q. Well, in all of the 271 proceedings and all the arbitration proceedings you were involved in with BellSouth, to your knowledge has BellSouth ever agreed that AT&T or MCI should be able to purchase combined network elements at cost-based rates?
>
> A. No, not to my knowledge.

(Gillan, Tr. at 297-298). Indeed, consistent with arbitration decisions in BellSouth's other states, MCI cannot purchase network elements at cost-based rates in Georgia, Mississippi, Louisiana, Alabama, North Carolina, or South Carolina when the elements are combined to recreate an existing BellSouth service. (Parker, Tr. at 46-47).

MCI's position that BellSouth suffered a momentary spell of institutional amnesia and voluntarily agreed to MCI's purchase of recombined elements at cost-based rates solely in Florida is absurd. (Parker, Tr. at 47-48). As BellSouth witness Varner explained, "It's absolutely inconceivable that BellSouth would have voluntarily agreed to offer combinations of unbundled elements at unbundled element prices while consistently and vehemently opposing this same proposal in every possible venue." (Varner, Tr. at 425).

MCI's reliance upon Section 2.6 of Attachment III is seriously misplaced. That provision states that "[w]ith respect to Network Elements ... charges in Attachment I are inclusive and no other charges apply, including but not limited to any other consideration for connecting any Network Element(s) with other Network Element(s)." (Parker, Tr. at 16). Although Mr. Parker claims that this provision makes clear that the sum of the stand alone element rates in Attachment I form the "maximum rate" that can be charged when network elements are ordered in combination," (Parker, Tr. at 17), it does no such thing.

First, as BellSouth witness Hendrix explained, when the parties negotiated the agreement, MCI "wanted all rates [in Attachment I] and if we needed other rate elements, then we would actually amend the agreement to include new rates elements." (Hendrix, Tr. at 693). Accordingly, Section 2.6 was added to make clear that the rates could be determined from the Agreement and that there was no need "to reference any tariffs." According to Mr. Hendrix, who, unlike Mr. Parker, was involved in negotiating the agreement, Section 2.6 was not meant to enable MCI "to order UNEs, combine those UNEs and the sum of the UNEs in Attachment I would actually apply." (Hendrix, Tr. at 693).

Second, the language in Section 2.6 of Attachment III is identical to that contained in BellSouth's interconnection agreements with MCI in every other state in BellSouth's region. (Hendrix, Tr. at 693). For example, this language is contained in MCI's agreements in Georgia, Louisiana, and Mississippi, even though in those states, as Mr. Parker admitted, MCI must pay the resale rate when it purchases network

elements that when combined recreate an existing BellSouth service. (Parker, Tr. at 50). Because the language in Section 2.6 does not permit MCI to purchase combinations of network elements at cost-based rates in these other states, it is unreasonable to construe this same language to allow MCI to do so in Florida.

In urging the Commission to adopt its twisted contractual interpretation, MCI wants the Commission to disregard clear evidence that the parties had not agreed on the price of recombined network elements in Florida. For example, BellSouth proposed inserting language in the MCI interconnection agreement underscoring the need for further negotiations between the parties to "address the price of retail service that is recreated by combining UNEs." *See* Order No. PSC-97-0602-FOF-TP, at 5 (May 27, 1997). Although not accepted by the Commission, BellSouth's proposed language belies MCI's contention that BellSouth had voluntarily agreed to the price of recombined elements; if that were the case, there would have been no need for further negotiations.

That the parties had not reached agreement on the price of recombined elements is underscored by the language in Section 8 of Attachment I, which provides:

> *The recurring and non-recurring prices for Unbundled Network Elements (UNEs) in Table 1 of this Attachment are appropriate for UNEs on an individual, stand-alone basis.* When two or more network elements are combined, these prices may lead to duplicate charges. BellSouth shall provide recurring and non-recurring charges that do not include duplicate charges for functions or activities that MCIm does not need when two or more network elements are combined in a single order. *MCIm and BellSouth shall work together to establish recurring and nonrecurring charges in situations where MCIm is ordering multiple network elements. Where the parties cannot agree to these charges, either party may petition the Florida Public Service Commission to settle the disputed charge or charges.*

(Parker, Tr. at 21) (emphasis added). This provision makes clear that: (1) the prices in the agreement are appropriate only for network elements "on an individual, stand-alone basis;" and (2) further discussions between the parties were required to establish the prices for combinations of network elements ordered by MCI. This language would be rendered superfluous if, as MCI contends, the parties had agreed to the price of recombined network elements.

The strongest evidence that BellSouth did not agree to the price of recombined elements came from MCI's own witness, Mr. Parker. According to Mr. Parker, MCI initiated this proceeding because of MCI and BellSouth's failure to reach agreement on the recurring and nonrecurring charges for combinations of network elements:

> Q. Now, MCI and BellSouth cannot agree or has not agreed to the nonrecurring charges for certain specified combinations; isn't that correct?
>
> A. Yes.
>
> Q. And MCI has petitioned the Commission to set those nonrecurring charges; isn't that right?
>
> A. Yes.
>
> Q. Now, MCI and BellSouth also have not agreed on the recurring price that should apply when MCI purchases certain combinations; isn't that correct?
>
> A. Yes.
>
> Q. Has MCI petitioned the Commission to set that price in this proceeding?
>
> A. Yes, I believe so.

(Parker, Tr. at 56).

Mr. Parker's testimony is dispositive of Issue No. 1. His testimony confirmed what BellSouth has been saying since the inception of this proceeding; namely that BellSouth and MCI did not agree on the price of combinations of network elements. No amount of creative lawyering by MCI or its insistence on reading contractual provisions in a vacuum can create agreement where none exists.

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

**Position: The prices for combinations of network elements are not contained in the BellSouth-MCIm Interconnection Agreement.

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

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

Assuming the Supreme Court upholds the Eighth Circuit's decision in *Iowa Utilities Bd. v. FCC*, no distinction needs to be made between combination of elements that do or do not recreate existing retail services. Because BellSouth is not required to provide combinations of network elements to ALECs under the Eighth Circuit's ruling, ALECs would only be entitled to purchase unbundled network elements that they can

combine themselves in order to provide service; the price of these elements should be the individual element prices regardless of how they are combined by the ALEC. (Varner, Tr. at 388-389).

However, in the interim, while the existing contractual provisions remain in effect obligating BellSouth to provide AT&T and MCI with combinations of elements, combinations that recreate an existing BellSouth retail service should be priced at the retail price of that service minus the wholesale discount. Any other result would undercut the resale provisions and the joint marketing restrictions in the 1996 Act.

Designed to create a "pro-competitive, de-regulatory" framework for the provision of telecommunications services, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) ("Conference Report"), the 1996 Act was intended to promote facilities-based competition. That is, Congress clearly contemplated that new competitors would build their own networks, just as BellSouth has done. The competing networks would then interconnect so that a customer on one network could call a customer on another network served by a competing local exchange company.

However, Congress understood that this would take time. The complex, far-reaching telephone infrastructure currently in place has taken decades to develop and cannot be duplicated overnight. Congress recognized that some new competitors would not be able to deploy their own local service networks immediately, making it "unlikely that competitors will have a fully redundant network in place when they initially offer local service." Conference Report at 148.

Accordingly, Congress created two separate and distinct means of allowing new competitors to get into business quickly, without having to build complete telephone networks. First, Congress required incumbent providers like BellSouth to "offer for resale any telecommunications service that [it] provides at retail." 47 U.S.C. § 251(c)(4). The new competitors are allowed to purchase existing retail services, including basic telephone service that serves most customers, from the incumbent telephone company at what is commonly described as a wholesale rate.

Second, Congress required the incumbent local exchange companies to sell competitors access to discrete pieces of the incumbent's existing network, called "unbundled network elements." 47 U.S.C. § 251(c)(3). An example of such an "element" would be the loop connecting a customer's house to the network. A competitor might provide its own switch for telecommunications among its local customers and buy access to the loop from the incumbent. By allowing competitors to buy such "unbundled network elements," the 1996 Act allows new entrants to create new telephone services that would be competitive with the incumbent's services.[1]

At the same time, Congress created two, totally different pricing theories for these two types of market entry. On the one hand, Congress directed that existing

[1] Congress recognized that new local competitors, such as MCI, may be able to buy a telephone switch and place the switch in Miami, but that it would be difficult, if not impossible to duplicate quickly every copper pair of telephone lines running to every home and business in Miami. Congress clearly contemplated that new local competitors could enter existing markets by buying and installing those portions of the new telephone network that could be accomplished swiftly, and supplement those facilities with "unbundled network elements" belonging to the incumbent local telephone company. As time passed, the new entrant could expand its own system, replacing the "unbundled network elements" purchased from the incumbent with the new entrant's own facilities.

retail services be priced to resellers at "retail rates charged to subscribers" less those "costs that will be avoided" by the incumbent local telephone company as a result of selling to the reseller. 47 U.S.C. § 252(d)(3). Congress required that the "avoided" cost of billing be subtracted from the retail rate of the resold service in determining the price the new entrant would pay to the incumbent. This is what is often called a "top down" pricing structure, which begins with the retail price of a good or service and *subtracts* cost components to arrive at a wholesale price.

Congress adopted an entirely different pricing scheme for unbundled network elements. In this situation, Congress required the incumbent to sell unbundled network elements to the new competitor at a price based on the cost of the individual element, to which a reasonable profit could be added. 47 U.S.C. § 252(d)(1). This is known as a "bottom up" pricing structure, which begins with cost and then fixes the final price by *adding* items to the cost.

The careful distinction Congress crafted between resale and unbundled network elements would be completely obliterated if MCI and AT&T were permitted to purchase at cost-based rates combinations of network elements that replicate an existing retail service. When MCI or AT&T purchases such combinations in order to "migrate" an existing BellSouth customer, it is engaged in resale under a different name, as their own witnesses confirmed. For example, Mr. Walsh, who sponsored the AT&T and MCI Nonrecurring Cost Model, testified that the model generates the same nonrecurring costs for migrating an existing customer either through network element combinations or resale because they are the same thing. As Mr. Walsh explained:

Q. So from the cost, total cost, for a migration of an unbundled network element platform and the total cost for migration, nonrecurring costs for migration for total service resale you said would be the same.

A. Yes, I did.

Q. And that was the same case in Alabama.

A. Yes, it was. And the reason it was the same price is because it's considered that operations support systems would be able to provide that electronically; that they would be able to provision those requests with a minimum amount of fallout so therefore it generates the same price.

. . .

Q. Now, when combinations of unbundled network elements are migrated, the way you used the term migrated, do you believe that only an update of records by BellSouth is what is required?

A. Absolutely.

Q. And is all that is required by BellSouth to process a resale order an update of records.

A. Yes, it is.

(Walsh, Tr. at 237-238).

Likewise, according to MCI witness Hyde, whether MCI requests combinations of network elements to "migrate" a BellSouth customer or requests to migrate that customer through resale, the provisioning process "would be the same" in either case. (Hyde, Tr. at 123). Mr. Hyde agreed that the only difference would be the "way that MCI asks for the migration, either using UNE combinations or resale." (Hyde, Tr. at 119).

If MCI or AT&T is permitted to purchase at cost-based rates network combinations that replicate existing BellSouth retail services, they could obtain a larger

effective discount simply by changing the words used when ordering the service. For example, assume that a customer, Mr. Smith, is a typical BellSouth business customer providing service to his full-service gas station located in Miami. Currently, Mr. Smith pays the tariffed rate for his service, a rate approved by this Commission.

Acting as a reseller and after persuading Mr. Smith to change local telephone companies, MCI would call BellSouth to inforrn BellSouth that Mr. Srnith was no longer BellSouth's customer, but was now the customer of MCI. Thereafter, BellSouth would bill MCI the regular single line business rate, minus the applicable wholesale discount. MCI , in turn, would bill Mr. Smith at the appropriate rate.

What MCI proposes is that it also can provide service to Mr. Smith, not as a reseller, but under the guise of something else by simply choosing a different set of words to order the service. Instead of calling BellSouth to inform it that Mr. Smith was now a customer of MCI, the reseller, MCI seeks to be permitted to call BellSouth and request that Mr. Smith's service be "migrated" through network element combinations. *Simply by placing the order as network combinations instead of resale, MCI would receive an effective discount from retail rates of 53.5%.* MCI would not have added anything to the basic elernents or provide new or additional service to the customer, but would have simply gamed the system. (Varner, Tr. at 391-393; Exhibit 22).

How can this possibly make sense? Clearly, when MCI calls BellSouth and says "We want to resell Mr. Smith's 1FB service," the price to MCI would be the price for a resold 1FB. But evidently, under MCI's theory, when it calls BellSouth and says, "Please pretend you have unbundled Mr. Smith's loop and the switch, and then pretend

you have put them back together again, and, after you do all this pretending, keep providing Mr. Smith his service, but only bill me the sum of the price of the two elements." This cannot be so.

Normal rules of statutory construction suggest that Congress would not have included a separate section establishing pricing for resold services (Section 252(d)(3)) if Congress believed that such a provision would never apply. However, this is exactly what will happen if MCI can purchase combinations of elements that replicate a retail service offered by BellSouth for resale, and pay the individual prices of the "unbundled network elements," rather than at the price for resold services.

Furthermore, allowing MCI to purchase at cost-based rates network combinations of elements that replicate a BellSouth retail service also would circumvent the joint marketing restrictions contained in Section 271(e)(1) of the 1996 Act. Section 271(e)(1) prohibits a telecommunications carrier that serves more than 5% of the nation's access lines -- carriers such as MCI and AT&T -- from jointly marketing their toll services with services obtained from local exchange carriers through resale under Section 251(c)(4). *This prohibition lasts for 36 months or until the entry of the incumbent LEC into the interLATA market*, whichever occurs first. Through this provision, Congress clearly recognized that local exchange carriers will be at a distinct marketing disadvantage when their local markets are opened to resale competition, but they are prevented from offering interLATA services. However, the Section 271(e)(1) restrictions on joint marketing do not apply to local service provided through unbundled

network elements, which gives MCI and AT&T further incentive to order BellSouth's existing retail services using network combinations rather than resale.

Recognizing MCI's and AT&T's proposal for what it is -- a thinly veiled attempt to undercut the resale provisions of the 1996 Act -- nearly every state commission in BellSouth's region has prohibited both MCI and AT&T from obtaining network elements at cost-based rates when those elements are combined to replicate an existing BellSouth retail service. This is precisely the conclusion reached by the Georgia Public Service Commission in MCI's arbitration with BellSouth:

> [C]learly, all relevant portions of the FCC rules and the Act provide that MCI may purchase unbundled elements from BellSouth and combine or "rebundle" those elements in any manner that is technically feasible. However, the Commission finds that unrestricted recombination of unbundled elements would allow MCI to purchase unbundled elements from BellSouth, rebundle those elements without adding any additional capability, and "create" or replicate a service that is identical to a BellSouth retail offering. Such replication of a BellSouth retail service goes beyond the scope of combining unbundled elements and instead becomes *de facto* resale. If this result were not treated as *de facto* resale, MCI would avoid not only the Act's resale pricing standard, but also the Act's restrictions regarding joint marketing, and access charge requirements. The Commission further finds that the incentive for CLECs to construct their own facilities could be precluded if CLECs were allowed to avoid the resale pricing standard in such a fashion. *The Commission concludes as a matter of law and regulatory policy that the pricing standard of Section 252(d)(3) applies to the de facto resale which occurs from rebundling BellSouth network elements to replicate BellSouth retail services, without employing any MCI functionality or capability (other than MCI operator services.)*

Order Ruling On Arbitration, *In re Petition by MCI for Arbitration of Interconnection Rates, Terms and Conditions with BellSouth Telecommunications, Inc.*, Docket 6865-U, at 28-29 (Dec. 23, 1996) (emphasis added).

The Georgia Commission reached the same result in the AT&T arbitration. *See* Order Approving Arbitrated Interconnection Agreement, *In re: Petition by AT&T for Arbitration of Interconnection Rates, Terms and Conditions with BellSouth Telecommunications, Inc.*, Docket No. 6801-U, at 14-15 (March 4, 1997) (when AT&T purchases network elements that replicate BellSouth's existing services, "this situation constitutes plain resale, and the Act's express provisions concerning resale must apply if those provisions are to have any meaning at all").

Similarly, the Mississippi Public Service Commission held that:

> AT&T has not demonstrated that there is a difference between resale and the rebundling of UNEs for services identical to BellSouth's tariffed service offerings, in order to justify treating such rebundling differently from resale. AT&T's objections on this point merely contain conclusory allegations that such differences exist, without citations or factual support. On the other hand, *the record demonstrates that AT&T's "rebundling" of unbundled network elements to create services identical to BellSouth's services would render the Act's resale provisions meaningless as a practical matter.* Congress provided different pricing mechanisms for the two distinct ways to enter local markets - through resale, or through the use of network elements combined with the new entrant's own facilities. When the new entrant provides its customers with services identical to BellSouth's services, by using only BellSouth's network elements, it is essentially reselling BellSouth's services. For such a situation, Congress directed that the reseller pay BellSouth its retail rates minus a wholesale discount based on the costs BellSouth can avoid as a result of selling to the reseller. 47 U.S.C. § 252(d)(3).
>
> The Commission is not persuaded by AT&T's assertions that the rebundling of BellSouth's network elements to create a service identical to BellSouth's service can be construed as something different from the resale of BellSouth's service. *Allowing AT&T to purchase unbundled elements at unbundled element prices and "rebundle" them to mimic BellSouth's retail services would obviate the resale provisions of Section 251(c)(4). In addition, it would arguably allow AT&T to circumvent the Act's joint marketing restriction*, by allowing AT&T (prior to BellSouth's entry into in-region interLATA markets) to jointly market AT&T's long distance services with local services identical to BellSouth while using solely BellSouth's network elements.

Order Approving Arbitrated Interconnection Agreement, *In The Matter Of The Interconnection Agreement Negotiations Between AT&T Communications. of the South Central States, Inc. and BellSouth Telecommunications. Inc., Pursuant to 47 U.S.C. § 252*, No. 96-AD-0559, at 13-14 (May 18, 1997) (emphasis added) (citations omitted).

In Alabama, the arbitration panel concluded that the issue was not "whether AT&T can combine network elements, but what they should pay when those elements are recombined/rebundled in a manner that duplicates or recreates an existing retail service." In resolving this issue, the arbitration panel reasoned:

> There is little disagreement that the same service can be provided under these different alternatives, "resale" and "recombination/rebundling." *Accepting AT&T's position would allow the price AT&T pays for the same service to be substantially different, depending on which ordering method is chosen. One price, paid by a reseller, is based on "avoided" costs (a top-down approach) and the other, paid by a competitor recombining unbundled network elements, is based simply on costs plus a profit (a bottoms-up approach).* It is illogical to conclude that Congress provided for the resale of LEC retail services and at the same time provide a mechanism to circumvent its resale provisions through the "unbundling and rebundling/recombination" of individual network elements.

Arbitration Report, *In the Matter of The Arbitration Between AT&T Communications. of the South Central States, Inc. and BellSouth Telecommunications., Inc.*, Docket No. 25703, at 42-43 (Feb. 6, 1997) (emphasis added). The Alabama Public Service Commission affirmed the arbitrators' recommendations on this issue. Joint Order on Reconsideration, Docket No. 25703, at 31 (May 14, 1997).

On January 8, 1997, Arbitrator Brian Eddington issued his report and recommendations to the Louisiana Public Service Commission in the AT&T arbitration

with BellSouth. His conclusions and recommendations, which were subsequently adopted by the Louisiana Commission on January 15, 1997, advocated that recombinations of network elements be treated as resale when such recombination replicates BellSouth's retail services:

> To the extent AT&T purchases unbundled network elements and then recombines them to replicate BellSouth services, it is reselling BellSouth's services. *As Shakespeare pointed out, a rose by any other name is still a rose, and so it is with resale, even when AT&T chooses to call it a combination of unbundled elements.* Both the FCC and this Commission have issued Orders strongly supporting an aggressive resale market. This commitment to resale would be rendered meaningless if AT&T were allowed bypass resale through the fiction of "rebundling." Unrestricted pricing on the recombination of unbundled elements would allow AT&T to purchase unbundled elements from BellSouth and then rebundle those elements without adding any additional capability, in order to create a service which is identical to a retail offering already being provided by BellSouth and therefore subject to mandatory resale. Such an arrangement would allow AT&T to avoid both the Act's and this Commission's pricing standards for resale, avoid the Act's restrictions regarding joint marketing and avoid access charge requirements. Such an arrangement would also serve as a disincentive to the ILECs to construct their own facilities.

Report and Recommendation of the Arbitrator, *In re Interconnection Agreement Negotiations*, Docket U-22145, at 39 (Jan. 8, 1997) (emphasis added).

Both the North Carolina Utilities Commission and the Public Service Commission of South Carolina also concluded that recombined elements which replicate an existing BellSouth retail service should be treated as resale. *See* Order Ruling, *In re: Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications., Inc.*, No. P-140, Sub 50, at 16 (April 11, 1997) ("... the purchase and combination of unbundled network elements by AT&T to produce a service offering that is included in BellSouth's retail tariffs on the date of the

Interconnection Agreement will be presumed to constitute a resold service for purposes of pricing, collection of access and subscriber line charges, use and user restrictions in retail tariffs, and joint marketing restrictions"); Order on Arbitration, *In re: Petition of AT&T Communications. of the Southern States, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications., Inc.*, No. 96-358-C, at 10-11 (March 10, 1997) ("If network elements are rebundled to produce an existing tariffed retail service, the appropriate price to be charged to AT&T by BellSouth is the wholesale price (discounted retail price). AT&T should be required to pay to BellSouth the applicable wholesale rate of the replicated service and not just the rates for the unbundled network elements that are purchased").[2]

While rendered before the Eighth Circuit's decision in *Iowa Utilities Bd. v. FCC*, the reasoning of these arbitration decisions is equally compelling today. Indeed, the Georgia Commission has affirmed its pricing policy on network element combinations on at least two occasions since the Eighth Circuit's ruling. The Georgia Commission concluded that the Eighth Circuit's decision was "consistent" with its decision to treat the combination of elements that replicate an existing BellSouth service as resale because of the court's finding "that the incumbent LEC should not be required to perform the function of rebundling UNEs." According to the Georgia Commission, "This

[2] The Tennessee Regulatory Authority ("TRA") took a somewhat different approach, prohibiting AT&T and MCI from recombining network elements to provide the same service offered by BellSouth with the same combination of network elements, capabilities, and functions. To the extent either AT&T or MCI violate this prohibition, BellSouth can petition the TRA "to investigate such violation, and, if necessary and appropriate, to impose the wholesale rate upon the violator." Second and Final Order of Arbitration Awards, Dockets Nos. 96-01152 & 96-01271, at 42-43 (Jan. 23, 1997).

implies that if the incumbent LEC does perform the rebundling function for the CLEC, the price to the CLEC may be different from the mere total of the underlying UNE prices." *See* Order Establishing Cost-Based Rates, *In re: Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Docket No. 7061-U, at 48 (Dec. 16, 1997).

In this case, under its existing contracts with AT&T and MCI, BellSouth is obligated to perform the rebundling function when either AT&T or MCI orders network element combinations in Florida. However, any network element combinations that recreate an existing BellSouth retail service should be priced at the retail price of that service minus the applicable wholesale discount. Any other result would allow AT&T and MCI to circumvent the resale rates set by this Commission and the joint marketing restrictions in the 1996 Act -- an outcome that would be contrary to the stated concerns of this and nearly every other Public Service Commission in BellSouth's region.

The necessity of preserving the distinction between resale and unbundled network elements is not as critical when AT&T and MCI order network element combinations that do not replicate an existing BellSouth retail service. As a result, the price of these network element combinations should be negotiated between the parties, although such prices should be market-based to reflect the increased risk associated with the use of unbundled network elements. (Varner, Tr. at 388-390).

There is no need for the Commission to decide in this proceeding the price of network element combinations that do not replicate an existing BellSouth retail service. First, there is no evidence that either AT&T or MCI have ordered any such

combinations. (Varner, Tr. at 391). Rather, the network element combinations ordered by AT&T and MCI have been in connection with requests to "migrate" an existing BellSouth customer, which, by definition, are combinations that replicate BellSouth's existing retail service. Second, the Commission has previously indicated its preference for negotiations; the parties should be given the opportunity to negotiate the price of any combinations that AT&T and MCI may decide to order in the future before the issue is decided by the Commission.

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

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

b) that do create an existing BellSouth retail telecommunications service?

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

As was the case with MCI, this Commission did not decide in the arbitration the price AT&T would pay for combinations of network elements. Order No. PSC-96--1579-FOF-TP, at 37-38; Order No. PSC-97-0298-FOF-TP, at 7-8; Order No. PSC-97-0600-FOF-TP, at 7. AT&T witness Eppsteiner acknowledged as much:

Q. Now, did this Commission set a price for combinations of UNEs in the AT&T/BellSouth arbitration order?

A. They set prices for individual unbundled network elements.

Q. So your answer that, no, they did not set a price for combinations of network elements?

A. What they said was we set prices in part for -- they established individual unbundled network element prices, and they said with respect to multiple unbundled network elements they had concerns about duplicative charges and charges for work that was not necessary when elements were combined.

Q. Well, let me ask it this way: Would you agree that this Commission specifically stated that they were not presented with the issue of what the prices for unbundled network element combinations should be?

A. I believe that what's they said in the Motion for Reconsideration.

(Eppsteiner, Tr. at 174).

Furthermore, as was the case with MCI, there is simply no evidence to suggest that BellSouth voluntarily agreed that AT&T could purchase combinations of network elements at cost-based rates in Florida, particularly when BellSouth had opposed AT&T's doing so in every other state. (Gillan, Tr. at 297-298; Varner, Tr. at 425). Although AT&T points to the prices set forth in Part IV, Table 1 of the AT&T/BellSouth agreement, there is no dispute that those prices are for individual unbundled network elements, not combinations. (Eppsteiner, Tr. at 176; Hendrix, Tr. at 644). As Mr. Eppsteiner conceded, nothing in Part IV, Table 1, or anywhere else in the agreement, states that the price for combinations of network elements is simply the sum of the individual element prices. (Eppsteiner, Tr. at 176).

AT&T's reference to Section 36.1 of the agreement is unconvincing, as this provision only underscores the lack of agreement between BellSouth and AT&T on the price of network element combinations. It requires BellSouth and AT&T to "work

together to mutually agree upon the total non-recurring and recurring charge(s) to be paid by AT&T when ordering multiple Network Elements. If the parties cannot agree to the total non-recurring and recurring charges to be paid by AT&T when ordering multiple Network Elements within sixty (60) days of the Effective Date, either party may petition the Florida Public Service Commission to settle the disputed charge or charges." (Eppsteiner, Tr. at 148). There would have been no need for the parties to agree to "work together" to negotiate the price of combined network elements if, as AT&T contends, the parties had already agreed on that price.

AT&T's claim that BellSouth voluntarily agreed that combinations of network elements could be purchased at cost-based rates is the contractual equivalent of a second-rate movie Dracula that collapses when exposed to the realities of daylight. That exposure comes from BellSouth's insistence upon language in the contract to the effect that further negotiations were required on the price of network combinations as well as from the words of AT&T's own witness, Mr. Eppsteiner. In his prefiled testimony, Mr. Eppsteiner stated that "... although there was no dispute following negotiations with BellSouth's obligation to provide combinations of unbundled network elements, BellSouth *continued to refuse* to provide such combinations at cost based rates where such combinations replicated existing BellSouth retail services." (Eppsteiner, Tr. at 145). BellSouth's continued refusal during negotiations as well as at all times thereafter to agree to provide network combinations at cost-based rates is fatal to AT&T's claims, which, like the B-movie Dracula, should be dispatched with the regulatory equivalent of a stake through the heart.

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

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

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

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

See BellSouth's response to Issue No. 3.

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

**Position: The Commission must analyze the core functions, features, and attributes of the requested combination to determine if those functions, features and attributes mirror the functions of an existing retail offering. "Migration" of BellSouth customers through network element combinations should be treated as the recreation of an existing BellSouth retail service.

There can be little doubt that when MCI or AT&T seeks to "migrate" an existing BellSouth customer, whether through resale or network element combinations, MCI or AT&T is ordering an existing BellSouth retail service which they, in turn, can resell to their end user customer. As Mr. Hyde conceded, there would not be "any specific attributes that would distinguish a resale order from an order to migrate a customer using UNE combinations." (Hyde, Tr. at 119). In other words, a request to migrate an existing customer through the use of network elements is resale by another name and represents the clearest example of network combinations used to recreate an existing BellSouth retail service. The nature of the request does not change simply because MCI or AT&T may make slight changes to the existing retail offering, such as eliminating or adding a vertical feature. (Hendrix, Tr. at 628).

The argument of AT&T and MCI witness Gillan that an ALEC cannot "recreate" a BellSouth retail service under any circumstances, regardless of the network elements involved, is absurd. (Gillan, Tr. at 252-253). First, AT&T and MCI's own witnesses have admitted that a loop and port combination is the equivalent of BellSouth's basic local exchange service. For example, as Mr. Hyde testified:

> Q. Well, you stated on page 7 of your deposition -- and I'm looking at Lines 16 through 19, you state "with a loop and port combination, the service dial tone, the loop, the connection to the customer premise, everything is there that is needed to provide basic dial tone service." Do you see that?
>
> A. Yes.
>
> . . .
>
> Q. That is your testimony today.
>
> A. Yes, it is.

Q. In fact, I think you also testified at the deposition that if MCI had a combined loop and port MCI would not need to provide any other network elements to offer basic local service; isn't that correct?

A. It would not necessarily -- that is correct, it would not necessarily have to provide any additional services.

(Hyde, Tr. at 114-115). Mr. Walsh also conceded that a combined loop and port (which he referred to as the "platform") "would be equal to some kind of retail service." (Walsh, Tr. at 232-237).

Second, Mr. Hyde's and Mr. Walsh's testimony is confirmed by the actions of MCI, which has attempted to "migrate" BellSouth customers by placing fifty orders for combined loops and ports. (Parker, Tr. at 52-53). Obviously, MCI believes that it only needs a combined loop and port to provide basic local exchange service. Indeed, Mr. Parker's testimony makes clear that MCI's migration efforts will take the form of either resale or "a loop/port combination purchased from BellSouth." (Parker, Tr. at 23). In either case, when an existing BellSouth customer is migrated to MCI, MCI is "recreating" BellSouth's basic local exchange service.

Finally, although Mr. Gillan asserts that such "soft" dimensions as billing and packaging differentiate the product, these "soft" dimensions amount to a distinction without a difference since the technical functionality of the service obtained through combined network elements or resale is the same as that provided through a BellSouth retail service. If either AT&T or MCI were to use unbundled elements combined with facilities of their own, unique local services could be developed. However, by simply using combined network elements or resale to provide service, AT&T and MCI is

obtaining the same capabilities of the network that BellSouth uses when providing its retail services. (Varner, Tr. at 417-418).

Equally flawed is AT&T and MCI's suggestion that they do not recreate BellSouth's basic local exchange service through network combinations when they provide their own operator services (including directory assistance). Of course, neither AT&T nor MCI has any intention of purchasing BellSouth's operator services under any circumstances. Accordingly, the creation of an "operator services" exception to a rule that network element combinations which recreate an existing BellSouth retail service should be priced as resale would immediately render the rule meaningless.[3]

Other state Commissions have reached this same conclusion, holding that AT&T and MCI must do more than simply offer operator services in order to distinguish their service from BellSouth's. *See* Order Ruling on Arbitration, Docket No. 6865-U, at 30 (holding by Georgia Public Service Commission that, "if MCI purchases elements and only adds its own operator services, then the price MCI pays shall be computed using the resale discount"); Order Ruling, Docket No. P-140, Sub 50, at 16 (holding by North Carolina Utilities Commission that "[a]ncillary services such as operator services ... are not considered substantive functionalities or capabilities" for purposes of distinguishing AT&T's service offering from BellSouth's retail service). For example, according to the Louisiana Public Service Commission:

[3] As part of basic local exchange service, BellSouth customers are provided access to operator services. As Mr. Varner explained, access to operator services is different than the service itself. (Varner, Tr. at 441-442). This is also true for 911, signaling, and BellSouth's database services. (Varner, Tr. at 436-440).

> AT&T will be deemed to be "recombining unbundled elements to create services identical to BellSouth's retail offerings" when the service offered by AT&T contain the functions, features and attributes of a retail offering that is the subject of properly filed and approved BellSouth tariff. Services offered by AT&T shall not be considered "identical" when AT&T utilizes its own switching or other substantive functionality or capability in combination with unbundled elements in order to produce a service offering. For example, *AT&T's provisioning of purely ancillary functions or capabilities, such as operator services*, Caller ID, Call Waiting, etc., in combination with unbundled elements *shall not constitute a "substantive functionality or capability" for purposes of determining whether AT&T is providing services identical to a BellSouth retail offering.*

Order U-22145, *In re Interconnection Agreement Negotiations*, Docket U-22145, at 40 (Jan. 15, 1997) (emphasis added).

Likewise, the Alabama Public Service Commission held that AT&T could purchase unbundled network elements from BellSouth at cost-based rates when such elements are used "to provide new, similar or different services" from those offered by BellSouth. However, according to the Alabama Commission, AT&T would pay the resale rate when it uses recombined network elements without providing its own "substantial functionalities or capabilities" because then "AT&T will be providing essentially the same retail service as is offered by BST." The Alabama Commission made clear that "*[o]perator services are not considered a substantive functionality or capability.*" Joint Order on Reconsideration, *In re: Arbitration Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc.*, Docket No. 25703, at 31.

Consistent with these decisions, this Commission should not adopt a standard for identifying network combinations that recreate an existing BellSouth retail service based on the provision of operator services or other ancillary functions. Otherwise, the

Commission's concerns about the circumvention of the resale rate and the joint marketing restriction would be realized.

Issue 8: What is the appropriate non-recurring charge for each of the following combinations of network elements for migration of an existing BellSouth customer:

(a) 2-wire analog loop and port;
(b) 2-wire ISDN loop and port;
(c) 4-wire analog loop and port;
(d) 4-wire ISDN DS1 and port?

**Position: BellSouth proposes that prices that cover total cost be set for these combinations. BellSouth's proposed Non-recurring Charges, as set forth in Exhibit 22, do not include duplicate charges or charges for functions or activities that are not required when two or more network elements are combined in a single order.

BellSouth's position on this issue is consistent with the Commission's requirement to provide nonrecurring charges for individual unbundled network elements when ordered at the same time on the same order. That requirement was described in the Commission's March 19, 1997 Order, No. PSC 97-0298-FOF-TP, wherein the Commission ordered "BellSouth to provide [nonrecurring charges] that do not duplicate charges or charges for functions or activities that AT&T does not need when two or more network elements are combined in a single order." The Commission also stated that the same requirement was applicable to MCI. (Varner, Tr. at 401).

The nonrecurring costs listed in Exhibit 22 reflect the elimination of all duplicate costs. As BellSouth witness Landry explained, BellSouth analyzed the work functions

involved in provisioning unbundled network elements and identified certain functions that would be unnecessary when individual unbundled network elements are ordered at the same time on the same order. (Landry, Tr. at 710-712). Discounted nonrecurring costs were then developed by considering: (1) the sum of the nonrecurring costs for each of the applicable elements on a stand-alone basis; and then (2) the total nonrecurring costs on a per order basis eliminating duplicative or unnecessary work functions if the stand-alone elements were ordered at the same time on the same order. BellSouth then compared these results and calculated a percentage difference that BellSouth used as the basis to discount the nonrecurring charge for the specific combination. (Varner, Tr. at 401).

By contrast, MCI and AT&T have taken a completely different view of this issue and have proposed nonrecurring charges as low as $.21 which they claim should apply when a BellSouth customer is migrated through the use of the network combinations. (Hyde, Tr. at 84-85; Walsh, Tr. at 213). Their approach to this issue only underscores AT&T's and MCI's hypocrisy.

During the arbitration, both AT&T and MCI objected to BellSouth's nonrecurring charges which they alleged included "duplicate" or unnecessary costs "when two or more network elements are combined in a single order." Because the parties also arbitrated the extent to which AT&T and MCI could recombine unbundled network elements, AT&T and MCI presumably sought to avoid the payment of "duplicate" nonrecurring costs when they placed an order for multiple network elements which they in turn would recombine. However, in this proceeding, AT&T and MCI did not present

any evidence about duplicate costs when elements are ordered at the same time on the same order which suggests either that: (1) AT&T and MCI were not really concerned about such "duplicate" costs after all; or (2) AT&T and MCI have no intention of recombining network elements themselves.

AT&T and MCI's proposal that the Commission adopt new nonrecurring charges associated with the "migration" of an existing BellSouth customer through network element combinations also is inconsistent with their claim that the prices for such combinations are contained in their interconnection agreements. The contractual provisions cited by AT&T and MCI in support of this claim do not distinguish between recurring and nonrecurring charges; if this language governs recurring charges, as AT&T and MCI contend, it also would govern nonrecurring charges. By only proposing new nonrecurring charges while insisting that the recurring charges are contained in their agreements, AT&T and MCI's true motivation becomes apparent -- they like the recurring charges, but do not like the nonrecurring prices. However, the same contractual language cannot be used both to dictate prices and not dictate prices, as AT&T and MCI attempt to do.

Even assuming the Commission were inclined to establish nonrecurring charges associated with the migration of an existing BellSouth customer through loop and port combinations, the Commission should not adopt either set of nonrecurring charges proposed by AT&T and MCI. The first is based upon AT&T and MCI's Nonrecurring Cost Model sponsored by Mr. Walsh, which also was submitted in Dockets 960757-TP, 960833-TP, and 960846-TP. The Staff has proposed in its Recommended Decision in

those dockets that nonrecurring charges not be established based upon the AT&T and MCI Nonrecurring Cost Model, and no reason exists to reach a different result here.

The second set of nonrecurring charges proposed by AT&T and MCI is based upon Mr. Hyde's adjustments to BellSouth's nonrecurring cost studies. However, Mr. Hyde used BellSouth's studies from Georgia, not Florida. Mr. Hyde admitted that there are differences between the Georgia and Florida studies and acknowledged that he should have used the Florida-specific nonrecurring cost studies, had he been given the choice. (Hyde, Tr. at 109-110). Even putting aside the other flaws in Mr. Hyde's analysis, no one can seriously suggest that the Commission should establish nonrecurring charges in Florida based upon cost studies from another state.

In addition to these problems, AT&T and MCI's proposed nonrecurring charges cannot be reconciled with Mr. Walsh's and Mr. Hyde's admission that the work activities associated with provisioning an order to migrate a customer through network element combinations are identical to those associated with migrating a customer through resale. (Walsh, Tr. at 237-238; Hyde, Tr. at 119-123). If the work is the same, the charge should be the same. Even though AT&T and MCI acknowledge that no distinction exists between network element combinations and resale, they do not want to pay the nonrecurring charges associated with either, opting instead to concoct entirely new nonrecurring charges. In essence, AT&T and MCI are inviting the Commission to disregard completely the nonrecurring charges applicable to resale -- an invitation the Commission should respectfully decline.

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

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

Because MCI devoted less than 40 lines of its prefiled testimony to Issue 9, it is not clear what MCI claims BellSouth is or is not doing with respect to recording and providing switched access usage data to MCI. However, Mr. Parker agreed that "the only issue before this Commission is the obligation of BellSouth to provide usage data so that MCI can bill interexchange carriers." (Parker, Tr. at 59).

Under FCC rules, an ALEC that purchases unbundled local switching from an incumbent is deemed to be providing interstate access services and thus is entitled to bill interexchange carriers for such access. Consistent with these rules, BellSouth will transmit to MCI (and AT&T) interstate access records via the Access Daily Usage File, which they can receive over a Connect:Direct feed or on a mag tape. (Hendrix, Tr. at 632). However, this Commission has not held that an ALEC purchasing unbundled local switching is entitled to bill for intrastate interLATA access. (Varner, Tr. at 403). As a result, BellSouth will continue to bill the applicable access charges on intrastate

interLATA calls, and thus, there is no need for BellSouth to furnish intrastate interLATA data to MCI.

To the extent that MCI (or AT&T) is requesting that the Commission consider whether an ALEC purchasing unbundled local switching should bill for intrastate interLATA access, this is not the proper forum. Access charges have provided and continue to provide a significant source of universal service support. (Varner, Tr. at 403). Any decision by the Commission to remove a source of such support would affect every incumbent local exchange company in the State of Florida. Thus, the Commission cannot decide an issue that would affect companies which are not even parties to this proceeding without violating fundamental principles of due process.

Notwithstanding MCI's claims to the contrary, the Interconnection Agreement does not obligate BellSouth to record and provide MCI with intrastate interLATA data when MCI is purchasing unbundled local switching from BellSouth. Although MCI points to Section 7.2.1.9 of Attachment III, that provision merely provides that "BellSouth shall record all billable events, involving usage of the element, and *send the appropriate recording data to MCIm as outlined in Attachment VIII.*" Not surprisingly, MCI cannot point to any language in that Section which obligates BellSouth to provide intrastate interLATA usage data.

MCI erroneously relies upon upon Sections 2.3, 2.6, and 7.1.1 of Attachment III, which spell out the capabilities that MCI will receive when it purchases local switching from BellSouth, including the capability to route local intraLATA calls. However, none of these provisions outlines BellSouth's obligation to provide usage data.

The only provision in Attachment VIII expressly cited by MCI is Section 4.1.1.3 of Attachment VIII, which states as follows:

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

While insisting that this provision obligates BellSouth to provide usage data on all "completed calls," which, according to MCI, would include intrastate interLATA data, MCI misreads Section 4.1.1.3. It does not state that BellSouth is required to provide usage data for all completed calls, nor does it even set forth the usage data BellSouth is required to provide. Rather, Section 4.1.1.3 simply defines the categories of information included in the usage data BellSouth provides. One such category is "completed calls."

Furthermore, Section 4.1.1.3 cannot be read in isolation, as MCI attempts to do. The first paragraph in this Section of the Interconnection Agreement makes clear that the entire Section "sets forth the terms and conditions for BellSouth's provision of Recorded Usage Data ...." That the scope of BellSouth's obligation to furnish usage data must be gleaned from the Interconnection Agreement read as a whole and not merely from one sentence is reinforced in Section 4.1.1.2, which states that "BellSouth shall provide MCIm with Recorded Usage Data in accordance with provisions of Section 4 of this document."

Section 4 of Attachment VIII makes clear that BellSouth's obligation to provide usage data is limited to "billable" usage and is confined to circumstances when MCI is engaged in resale. Section 4.2.1.1 states clearly that "BellSouth shall provide MCIm with unrated EMR records associated with all *billable* intraLATA toll and local usage which they record on lines purchased by MCIm for *resale*. Any *billable* Category, Group, and/or Record types approved in the future for BellSouth shall be included if they fall within the definition of local service *resale*." Nothing in this provision or any other provision in Section 4 of Attachment VIII imposes upon BellSouth the obligation to provide MCI with intrastate interLATA usage data when MCI is purchasing unbundled local switching from BellSouth.

Issue 10: Does the AT&T-BellSouth interconnection agreement require BellSouth to record and provide AT&T with detail usage data for switched access service, local exchange service and long distance service necessary for AT&T to bill customers when AT&T provides service using unbundled network elements either alone or in combination?

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

AT&T admits that its Interconnection Agreement does not specifically "spell out" any obligation on the part of BellSouth to provide intrastate interLATA usage data when AT&T is purchasing unbundled local switching from BellSouth. (Eppsteiner, Tr. at 152).

Thus, the resolution of this issue should be the same as Issue 9: because this Commission has not held that an ALEC purchasing unbundled local switching is entitled to bill for intrastate interLATA access, BellSouth will continue to bill the applicable access charges on intrastate interLATA calls. As a result, there is no need for BellSouth to furnish intrastate interLATA data to AT&T.

Respectfully submitted this 6th day of April, 1998.

BELLSOUTH TELECOMMUNICATIONS, INC.

Robert G. Beatty (BW)

ROBERT G. BEATTY
NANCY B. WHITE
c/o Nancy Sims
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5555

William J. Ellenberg II (BW)

WILLIAM J. ELLENBERG II
BENNETT L. ROSS
675 West Peachtree Street
Suite 4300
Atlanta, Georgia 30375
(404) 335-0711

115408