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M E M O R A N D U M

September 24, 1998

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

FROM: DIVISION OF COMMUNICATIONS (MUSSELWHITE) *BJM*  
DIVISION OF LEGAL SERVICES (B. KEATING) *SK MCB*

RE: DOCKET NO. 980119-TP - COMPLAINT OF SUPRA  
TELECOMMUNICATIONS & INFORMATION SYSTEMS AGAINST  
BELLSOUTH TELECOMMUNICATIONS, INC. FOR VIOLATION OF THE  
TELECOMMUNICATIONS ACT OF 1996; PETITION FOR RESOLUTION  
OF DISPUTES AS TO IMPLEMENTATION AND INTERPRETATION OF  
INTERCONNECTION, RESALE AND COLLOCATION AGREEMENTS; AND  
PETITION FOR EMERGENCY RELIEF.

AGENDA: OCTOBER 6, 1998 - REGULAR AGENDA - POST HEARING DECISION  
- MOTIONS FOR RECONSIDERATION AND MOTION TO DISMISS  
MOTION FOR RECONSIDERATION - ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\980119RR.RCM

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CASE BACKGROUND

On January 23, 1998, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged violations of the Telecommunications Act of 1996 (Act) and Petition for resolution of certain disputes between BellSouth and Supra regarding interpretation of the Interconnection, Resale, and Collocation Agreements between Supra and BellSouth (Petition). On February 16, 1998, BellSouth filed its Answer and Response to Supra's Petition. On April 30, 1998, the Commission held a hearing in which it received testimony concerning Supra's complaint. By Order No. PSC-98-1001-FOF-TP, issued July 22, 1998, the Commission rendered its final determination regarding the complaint.

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On August 6, 1998, BellSouth filed a Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP. That same day, Supra filed a Motion for Reconsideration and Clarification, as well as a Motion to Take Official Notice of the Record in Docket No. 960786-TL. On August 17, 1998, BellSouth filed its Response to Supra's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TL. BellSouth also filed its Opposition to Supra's Motion to Take Official Recognition of the Record in Docket No. 960786-TL. On August 18, 1998, Supra filed its Response to BellSouth's Motion for Reconsideration and Clarification, as well as a Request for Oral Argument. On August 21, 1998, BellSouth filed its Opposition to Supra's Request for Oral Argument.

On September 2, 1998, Supra filed a Motion to Dismiss BellSouth's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP and Motion to Strike BellSouth's Answer in Docket No. 980800-TP for Misconduct. Supra also requested oral argument on its motion. On September 9, 1998, BellSouth filed its Opposition to Supra's Motion to Dismiss and Motion to Strike and its own Motion to Strike and Motion for Oral Argument. BellSouth also included a Motion for Sanctions in its filing. On September 21, 1998, Supra filed its Response to BellSouth's Motion to Strike Supra's Motion to Dismiss and Motion for Sanctions. Supra also included a request to accept its Response Out of Time. On September 23, 1998, BellSouth filed its Opposition to Supra's request to accept its Response to BellSouth's Motion to Strike.

Supra's Motion to Dismiss and Motion to Strike and BellSouth's Opposition are only addressed in this recommendation to the extent that they apply to Docket No. 980119-TP. To the extent that they apply to Docket No. 980800-TP, they are addressed by a separate recommendation. Staff notes that Dockets Nos. 980119-TP and 980800-TP are assigned to different Commission panels.

This is staff's recommendation on these post-hearing motions.

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**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant Supra's Request for Oral Argument on its September 2, 1998, Motion to Dismiss BellSouth's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP and BellSouth's Motion for Oral Argument on its Motion to Strike Supra's Motion?

**RECOMMENDATION:** Yes. The companies filed their requests for oral argument in accordance with Rule 25-22.058, Florida Administrative Code. Due to the nature of Supra's Motion and BellSouth's responsive Motion to Strike, staff believes that limited oral argument would assist the Commission in its decision. Staff recommends that oral argument be limited to 5 minutes per side.

**STAFF ANALYSIS:** Supra and BellSouth filed their requests in accordance with Rule 25-22.058, Florida Administrative Code. Due to the nature of Supra's Motion and BellSouth's responsive Motion to Strike, staff believes that limited oral argument would assist the Commission in its decision. Staff recommends that oral argument be limited to 5 minutes per side.

**ISSUE 2:** Should the Commission grant Supra's Motion to File its Response to BellSouth's Motion to Strike Supra's Motion to Dismiss Out of Time?

**RECOMMENDATION:** No. Supra's Motion was not timely filed. This is the second response to a post-hearing motion that Supra has asked leave to file out of time. Because this is the second instance, staff recommends that Supra's Motion be denied.

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**STAFF ANALYSIS:**

**SUPRA**

Supra states that BellSouth's Motion was served by hand delivery on September 10, 1998. As such, Supra's Response was four days late. Supra states that it was unable to timely file its response due to activities and deadlines in this docket and Docket No. 980800-TP. Supra asks, therefore, that the Commission accept its late-filed Response.

**BELLSOUTH**

In its response, BellSouth argues that Supra has not stated good cause for filing its response out of time. BellSouth states that a busy schedule does not excuse an untimely filing. BellSouth notes that Supra could have sought an extension of time to file its response before the filing deadline, but did not. BellSouth asks, therefore, that the Commission deny Supra the right to file its response out of time.

**STAFF'S ANALYSIS**

Staff notes that this is Supra's second request to file a response out of time in this docket. (See Issue 5). Staff is aware that there have been numerous activities in this docket and Docket No. 980800-TP. Staff believes, however, that the filing deadlines set forth in Rule 25-22.037, Florida Administrative Code, were established to ensure that pleadings are filed in a timely manner and that no party is unduly burdened or inappropriately benefitted by the timing of pleadings and motions. These rules are equally applicable to the parties in this case. Because this is Supra's second, post-hearing, request for the Commission to accept a late response, staff recommends that Supra's request be denied.

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**ISSUE 3:** How should the Commission dispose of Supra's Motion to Dismiss BellSouth's Motion for Reconsideration for Misconduct and BellSouth's Motion to Strike Supra's Motion to Dismiss?

**RECOMMENDATION:** Staff recommends that the Commission should grant BellSouth's Motion to Strike Supra's Motion to Dismiss for Misconduct.

**STAFF ANALYSIS:**

**SUPRA**

Supra asks that the Commission dismiss BellSouth's Motion for Reconsideration of Order No. PSC-98-1001-FOF-TP for misconduct in this proceeding. Supra alleges that BellSouth engaged in misconduct by offering a staff person that had been involved in this Docket a position with BellSouth. Supra states that this staff person, MaryRose Sirianni, was lead on this docket, as well as Docket No. 980800-TP. Because she was offered a position with BellSouth, and has now accepted that position, Supra complains that she can no longer participate in resolving this case. Supra asserts that Ms. Sirianni was the key, senior staff person in formulating the staff recommendation in Docket No. 980119-TP, and that she would have been the staff person to develop the staff recommendation regarding the Motions for Reconsideration of Order No. PSC-98-1001-FOF-TP.

Supra asserts that the Commission's decision on the Motions for Reconsideration of Order No. PSC-98-1001-FOF-TP has great import for BellSouth. Specifically, Supra asserts that requiring BellSouth to provide online edit checking to Supra could ". . . cost BellSouth a great deal of money and cause BellSouth a good deal of trouble." September 2, 1998, Motion to Dismiss at p. 3. Supra argues that in view of the importance of this case, BellSouth's actions in offering Ms. Sirianni a position are clearly improper. Supra complains that BellSouth has the resources to hire anyone. Supra adds that it ". . . is not an accident that this staff person was offered a position by BellSouth at this point in time." September 2, 1998, Motion to Dismiss at p. 4. Supra charges that BellSouth offered Ms. Sirianni a position in order to avoid Ms. Sirianni's further involvement in this docket and in Docket No. 980800-TP. Supra argues that Ms. Sirianni has demonstrated her knowledge, experience, and ". . .willingness to challenge BellSouth. . .," therefore, BellSouth would prefer to

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have her removed from these cases so that less experienced staff members will be required to complete these cases. September 2, 1998, Motion to Dismiss at p. 5. Supra states that no other Commission staff member is able to handle these cases as capably as Ms. Sirianni. Thus, Supra argues it is a violation of due process for BellSouth to offer Ms. Sirianni a position with BellSouth.

Supra asserts that this is "misconduct of the highest order. . .," which has deprived Supra of its right to a fair hearing. Supra argues that this is analogous to jury tampering. Supra argues that, according to Rule 1.540, Florida Rules of Civil Procedure, BellSouth's actions are a sufficient basis for the Commission to dismiss BellSouth's Motion for Reconsideration of Order No. PSC-98-1001-FOF-TP. Rule 1.540, Florida Rules of Procedure, states, in part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

Supra states that BellSouth's action is ". . . premeditated, targeted, and abusive of the process." September 2, 1998, Motion to Dismiss at p. 14. Supra asks, therefore, that BellSouth's Motion for Reconsideration be dismissed.

#### **BELLSOUTH**

In its Opposition and Motion to Strike, BellSouth asserts that Supra's allegations are without merit. BellSouth states that its offer of employment to Ms. Sirianni is permissible under Section 112.313(9)(a)(6)(c), Florida Statutes. In accordance with that Section, the restrictions on employment set forth in Section 112.313, Florida Statutes, do not apply to a person employed by the agency prior to December 31, 1994. BellSouth has also attached the affidavit of Nancy Sims to its Opposition and Motion to Strike. The affidavit states that BellSouth did not offer Ms. Sirianni a position in order to avoid her participation in these dockets or to influence the outcome of the dockets.

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BellSouth states that it had no "sinister" motive in hiring Ms. Sirianni. BellSouth also asserts that the Commission staff is capable of handling these dockets without Ms. Sirianni's participation and assistance. BellSouth adds that Supra has offered no evidence to substantiate its claims that BellSouth's misconduct was premeditated.

BellSouth states that Supra knew that BellSouth's conduct was lawful.<sup>1</sup> BellSouth argues, therefore, that Supra's Motion should be denied as a sham pleading pursuant to Rule 1.150, Florida Rules of Civil Procedure.<sup>2</sup> BellSouth adds that Supra's Motion contains "scandalous" matters, that should be stricken in accordance with Rule 1.140, Florida Rules of Civil Procedure. BellSouth states that scandalous matters are accusations against another party that are unnecessary and accusatory. BellSouth argues that such things include allegations that reflect upon one's moral character or that detract from the dignity of the court.<sup>3</sup>

**SUPRA-----Supra's response to BellSouth's Motion to Strike has been included in the analysis for consideration by the Commission, if the Commission denies staff's recommendation in Issue 2.**

Supra argues that BellSouth's actions are clearly abusive of the process. Supra states that Ms. Sirianni was clearly active in Dockets No. 980119-TP and 980800-TP, and was the primary, senior staff member on those cases. Supra argues the Ms. Sims' affidavit is completely inadequate considering the facts of this situation.

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<sup>1</sup> Citing Supra's Motion at ¶ 22, where Supra notes that the employment restrictions in Section 112.313, Florida Statutes, do not apply to Ms. Sirianni, in accordance with Section 112.313(9)(a)(6)(c), Florida Statutes.

<sup>2</sup>Citing Menke v. Southland Specialities Corp., 637 So. 2d 285 (Fla. 2nd DCA 1994).

<sup>3</sup>Citing Burke v. Mesta Machinery Co., 5 F.R.D. 134 (Pa. 1946) and Martin V. Hunt, 28 F.R.D. 35 (D.C. Mass. 1961). BellSouth also cites Ropes v. Stewart, 45 So. 31 (Fla. 1907), wherein the Court granted a motion to strike scandalous allegations that the defendant had used perjury and evil influence on the judge and jury.

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Supra also argues that Section 112.313(9), Florida Statutes, does not give BellSouth the authority to tamper with the process by hiring key staff members. Supra adds that it does not wish to criticize other Commission staff members, nor does it believe that Ms. Sirianni has done anything wrong. Supra argues, however, that staff members are not "fungible," and that hiring Ms. Sirianni has clearly violated Supra's right to due process. Supra's Response at pages 4 and 5.

#### **STAFF'S ANALYSIS**

Staff believes that Supra's Motion to Dismiss BellSouth's Motion for Reconsideration for Misconduct should be considered a sham pleading.

As indicated in Ms. Sims's affidavit, BellSouth offered Ms. Sirianni a position after Order No. PSC-98-1001-FOF-TP was issued, and before any Motions for Reconsideration of the Order were filed. At the time of BellSouth's offer, Ms. Sirianni had already completed her participation in developing the staff recommendation regarding Docket No. 980119-TP and presenting the recommendation to the Commission. Thus, BellSouth's offer could not have impaired the staff's evaluation of this case.

As for Supra's assertions that Ms. Sirianni would have been the key staff person involved in evaluating the pending Motions for Reconsideration and in drafting the staff recommendation on these motions, staff notes that legal staff has the primary role in evaluating Motions for Reconsideration of the Commission's final orders based upon the legal standard set forth in Issues 6 and 8, and in drafting the staff recommendations regarding such motions. Staff also notes that the main point upon which BellSouth has sought reconsideration is online edit checking. Ms. Sirianni was not the staff person that drafted the original staff recommendation on this issue, although she was the staff member's supervisor. While Ms. Sirianni's knowledge and experience were valuable assets to the Commission, the staff member responsible for addressing online edit checking is certainly capable of assisting legal staff in reviewing this point for purposes of making a recommendation on BellSouth's Motion for Reconsideration.

Based on the facts as known by staff and as set forth in Ms. Sims's uncontroverted affidavit, staff believes that Supra's Motion is factually false and may be considered a sham pleading in accordance with Rule 1.150, Florida Rules of Civil Procedure.



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Staff also believes that Supra's Motion may be considered a frivolous pleading in accordance with Section 120.57 (1)(b)(5), Florida Statutes, because there is no legal basis or justification for the motion. In past cases, the Commission has stated that "In determining whether a motion is improper pursuant to Section 120.57(1)(b)(5), Florida Statutes, we must solely focus on whether there was some legal justification for its filing." Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21. Supra has stated in its own Motion that the agency employment restrictions set forth in Section 112.313, Florida Statutes, are not applicable to Ms. Sirianni. Supra's only other asserted legal basis for its Motion is Rule 1.540, Florida Rules of Civil Procedure, regarding dismissal for fraud or misconduct. Supra does not allege fraud, but alleges that BellSouth has engaged in misconduct. Misconduct is defined by Black's Law Dictionary as

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior. . .

Black's Law Dictionary, 6th Ed. (1990). Supra has not identified any rule or law which BellSouth broke when it offered Ms. Sirianni a position, nor has Supra provided any factual or legal support for its assertions that BellSouth hired Ms. Sirianni in an attempt to improperly influence the outcome of these two dockets. Staff also does not believe that Rule 1.540, Florida Rules of Civil Procedure, is applicable in this instance. Supra is asking the Commission to strike BellSouth's Motion for Reconsideration. Supra is not seeking relief from a judgment, decree or order. Staff does not believe there is any legal basis for Supra's Motion. Thus, staff believes Supra's Motion to Dismiss may be considered a frivolous motion. Staff further addresses this point in the staff analysis of the following issue.

For these reasons, staff recommends that BellSouth's Motion to Strike Supra's Motion be granted.

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**ISSUE 4:** Should the Commission grant BellSouth's request for sanctions, including attorneys' fees and costs?

**RECOMMENDATION:** Yes. Staff recommends that BellSouth's request be granted. As set forth in Issue 3, Supra's Motion to Dismiss should be stricken. Staff also recommends that Supra be required to pay BellSouth's attorneys' fees and costs associated with responding to Supra's Motion to Dismiss BellSouth's Motion for Reconsideration for Misconduct.

**STAFF ANALYSIS:**

**BELLSOUTH**

BellSouth asks that sanctions be imposed upon Supra for filing this Motion. BellSouth argues that administrative proceedings are no place for improper or frivolous pleadings, as set forth in Section 120.57(1)(b)(5), Florida Statutes. BellSouth argues that Supra's Motion to Dismiss qualifies as an improper and frivolous pleading. BellSouth argues that the only purpose for Supra's Motion is to "throw mud," delay the case, and harass BellSouth. September 9, 1998, Opposition and Motion to Strike at p. 5. According to BellSouth, there is no legal basis for Supra's Motion. Thus, BellSouth asks that the Commission impose reasonable sanctions on Supra, including the imposition of attorneys' fees and costs.<sup>4</sup>

**SUPRA**-----Supra's response has been included in the analysis for consideration by the Commission, if the Commission denies staff's recommendation in Issue 2.

Supra argues that it has presented a valid legal basis for its Motion. Supra states that it has based its motion on its inability to obtain due process in this proceeding and in Docket No. 980800-TP, because BellSouth has hired Ms. Sirianni. Supra argues that it can no longer obtain a fair and impartial result, because of BellSouth's actions. Supra asks, therefore, that BellSouth's request for sanctions be denied.

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<sup>4</sup>Citing Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, wherein the Commission stated that it has the authority to impose sanctions pursuant to Section 120.57(1)(b), Florida Statutes.

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STAFF'S ANALYSIS

As set forth in the previous issue, staff believes that Supra's Motion to Dismiss may be considered a frivolous pleading in accordance with Section 120.57 (1)(b)(5), Florida Statutes. There is no legal basis or justification for Supra's motion.

In Order No. PSC-96-1320-FOF-WS, the Commission relied on Mercedes Lighting and Elec. Supply, Inc. v. State, Dep't of General Services, 567 So. 2d 272, 278 (Fla. 1st DCA 1990) in rendering its decision on a request for attorney's fees and costs. The Commission noted that in Mercedes Lighting, the court stated:

"The rule [against frivolous or improper pleadings contained in Rule 11, Federal Rules of Civil Procedure] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." The court further noted, that "a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition."

Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. The Commission also noted the court's determination that improper purpose in a pleading "may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." Id. at 278, Order No. PSC-96-1320-FOF-WS at 19. The Commission added that ". . . it is important to consider what was reasonable at the time the pleading was filed." Order No. PSC-96-1320-FOF-WS at p. 20. The Commission also stated that there must be some legal justification for the filing in question. Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21.

Supra has stated in its Motion to Dismiss that the agency employment restrictions set forth in Section 112.313, Florida Statutes, are not applicable to Ms. Sirianni. As indicated in Issue 3, Supra's only other asserted legal basis for its Motion is Rule 1.540, Florida Rules of Civil Procedure, regarding relief from a decree or order based upon fraud or misconduct. Misconduct is, however, defined as

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior,

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willful in character, improper or wrong  
behavior. . .

Black's Law Dictionary, 6th Ed. (1990). Supra has not identified any rule or law that BellSouth violated when it offered Ms. Sirianni employment. Staff does not believe there is any legal basis for Supra's Motion. Even if one considers that the proceedings in Docket No. 980119-TP have been quite contentious between the parties and that the end results of this case may be quite significant for both parties, staff does not believe that this pleading can be considered reasonable under the circumstances. Staff believes Supra's Motion to Dismiss should be considered a frivolous motion.

While staff believes that Supra's Motion to Dismiss is frivolous, staff acknowledges that sanctions should only be imposed when truly warranted, in order to avoid ". . .chill[ing] an attorney's enthusiasm or creativity in pursuing factual or legal theories." Nevertheless, in this specific circumstance, staff believes that limited sanctions are warranted. Staff recommends, therefore, that Supra be required to pay BellSouth's attorneys' fees and costs associated with responding to and defending against Supra's Motion to Dismiss.

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**ISSUE 5:** Should the Commission accept Supra's late-filed Response to BellSouth's Motion for Reconsideration and Clarification?

**RECOMMENDATION:** Yes. The Commission should accept and consider Supra's late-filed Response.

**STAFF ANALYSIS:** In its Response to BellSouth's Motion, Supra states that it failed to timely file its Response because it erroneously assumed the Motion had been served by U.S. Mail. Supra believed, therefore, that it had 12 days to file its Response. The Motion had, however, been served by hand delivery. As such, Supra's Response was five days late. When the error was detected, Supra served its Response by hand delivery. Supra asks, therefore, that the Commission accept its late-filed Response.

In its Opposition to Supra's Request for Oral Argument, BellSouth indicates that it does not object to Supra's late-filed Response.

It appears that this error was inadvertent and that it has not caused any undue prejudice to BellSouth. Staff recommends, therefore, that the Commission accept and consider Supra's late-filed Response.

**ISSUE 6:** Should the Commission grant Supra's Request for Oral Argument on its Motion for Reconsideration and its Response to BellSouth's Motion for Reconsideration?

**RECOMMENDATION:** No. The Commission should deny Supra's Request for Oral Argument. The issues are clearly set forth in the pleadings and in the record. Staff does not believe that oral argument would aid the Commission in evaluating the Motions for Reconsideration and Clarification. Furthermore, as it applies to Supra's Motion for Reconsideration, Supra's Request for Oral Argument was not filed in accordance with Rule 25-22.058, Florida Administrative Code.

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**STAFF ANALYSIS:** Supra asks that the Commission hear oral argument on its Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP and upon its Response to BellSouth's Motion for Reconsideration and Clarification. Supra asserts that oral argument is necessary because the issues are complex and the motions indicate points in the Commission's Order that require clarification. Thus, Supra states that oral argument will assist the Commission in making its determination on this matter.

BellSouth asks that Supra's request for oral argument be denied. BellSouth notes that Supra's Response to BellSouth's Motion for Reconsideration and Clarification was not timely filed, as acknowledged by Supra in its Response. BellSouth states that it does not object to the late-filed pleading. BellSouth argues, however, that Supra's Request for Oral Argument is not timely, in accordance with Rule 25-22.058, Florida Administrative Code. Pursuant to that Rule, a request for oral argument must be submitted at the same time as the pleading upon which oral argument is requested. BellSouth argues that Supra did not submit its request at the time that Supra filed its Motion for Reconsideration and Clarification. Furthermore, BellSouth argues that although Supra did submit its request at the time that Supra filed its Response to BellSouth's Motion, the Response was late. BellSouth argues, therefore, that the request was not timely as applied to either Supra's Motion for Reconsideration and Clarification or to Supra's Response to BellSouth's Motion for Reconsideration and Clarification.

In addition, BellSouth argues that Supra failed to state with particularity how oral argument would assist the Commission in its decision, as required by Rule 25-22.058, Florida Administrative Code. BellSouth argues that Supra's indications that the issues are complex is not sufficient to meet the requirements of Rule 25-22.058, Florida Administrative Code.

Staff agrees with BellSouth that Supra's Request for Oral Argument was not timely filed as it applies to Supra's Motion for Reconsideration and Clarification. Furthermore, staff does not believe that oral argument will assist the Commission in its decision.

As it applies to Supra's Response to BellSouth's Motion for Reconsideration and Clarification, staff believes that the request may be considered to be timely filed. If the Commission accepts

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Supra's late-filed Response, as recommended in Issue 1, staff believes that the contemporaneously filed Request may be considered timely. Staff does not, however, believe that the request should be granted. Staff does not believe that Supra has adequately indicated how oral argument will assist the Commission in making its determination, as required by Rule 25-22.058, Florida Administrative Code. Supra has merely indicated that the issues are not simple and that the motions demonstrate conflict in the Commission's Order. Supra does not state how oral argument will further illuminate the issues. Furthermore, staff does not believe that oral argument will assist the Commission in making a determination on these motions. Staff recommends that Supra's Request for Oral Argument be denied as it applies to Supra's Motion and its Response to BellSouth's Motion.

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**ISSUE 7:** Should the Commission grant BellSouth's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP?

**RECOMMENDATION:** No. BellSouth has failed to identify any point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-98-1001-FOF-TP. BellSouth's motion should, therefore, be denied. Staff does, however, recommend that the Commission clarify that the edit checking databases used by Supra should apply edits simultaneously in Supra's ordering process as BellSouth's FUEL and Solar databases apply edits simultaneously during BellSouth's ordering process. The Commission should also grant BellSouth's request for clarification regarding the provision of PLATS to Supra. The Order should be clarified to reflect that BellSouth shall provide PLATS to Supra on a per request basis, and may do so subject to a protective agreement between the parties, if necessary.

**STAFF ANALYSIS:** The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

#### **BELLSOUTH**

BellSouth asks that the Commission reconsider its decision to require BellSouth to provide Supra with the same online edit checking capability that BellSouth's retail ordering systems provide. BellSouth argues that the Commission went beyond the evidence and the testimony in reaching this decision. BellSouth states that the Commission's decision is arbitrary and ignores



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evidence that contradicts the Commission's decision.<sup>5</sup> In addition, BellSouth states that the Commission should clarify certain requirements set forth in Order No. PSC-98-1001-FOF-TL.

Specifically, BellSouth argues that online edit checking capability was never an issue in this case. BellSouth acknowledges that electronic access to Operations Support Systems (OSS) was an issue, but argues that the issue of electronic access to OSS did not include online edit checking. BellSouth asserts that Supra did not raise the issue of online edit checking in its complaint or in its testimony. BellSouth notes that Supra's witness Ramos never mentioned online edit checking; rather, witness Ramos asked that Supra be provided with the exact same systems as BellSouth. BellSouth argues that Supra's only complaint about edits was that EDI and LENS orders that contain errors go to the LCSC for handling. BellSouth emphasizes that the Commission determined at page 23 of the Order that BellSouth was not required to provide the exact same systems to Supra. The Commission also found that BellSouth had provided all of the interfaces required by the agreement between the parties. Order PSC-98-1001-FOF-TL at page 23. Furthermore, the Commission found that BellSouth had added the capability to allow ALECs to electronically supplement and correct orders in both LENS and EDI. See Order at page 22. BellSouth argues that by making a further determination that BellSouth must provide online edit checking capability, the Commission improperly went beyond the issues and the evidence.

In addition, BellSouth argues that if it is required to provide the same edit checking capability that its retail systems provide, BellSouth would have to install computer hardware and software on Supra's premises. BellSouth asserts that this would require a substantial amount of time and money. BellSouth states that it would have to duplicate its Regional Navigation System (RNS) and its Direct Order Entry system (DOE) for Supra at Supra's premises. BellSouth argues that this goes beyond the requirements of the Act and the FCC's Interconnection Order. BellSouth notes that it has provided ALECS with the specifications to build their own systems. BellSouth further argues that if it had known this was an issue, it would have provided testimony on it. BellSouth

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<sup>5</sup> Caranci v. Miami Glass & Engineering Co., 99 So. 2d 252, 254 (Fla. 3rd DCA 1957).

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argues that the Commission erred in making a decision on this point.

BellSouth also seeks clarification of certain requirements in the Order. BellSouth was required by the Commission to provide Supra with any outstanding documentation requested by Supra. With regard to database documentation, BellSouth states that it believes it has provided everything requested, but asks the Commission to identify what other documentation may be required, if any. BellSouth also seeks clarification of the requirement to provide Supra with PLATS. BellSouth states that PLATS is the cable layout and engineering records of BellSouth. BellSouth asserts that these records are voluminous and proprietary. BellSouth believes that providing these records goes beyond the requirements of the Act. BellSouth asks, therefore, that the Commission clarify that BellSouth need provide access to these records only on a request basis when access is necessary. BellSouth states that it would provide access in a reasonable amount of time.

#### **SUPRA**

Supra argues that Supra's inability to perform online edit checking was addressed on several occasions, including in the depositions of BellSouth's employees. Supra argues that witness Ramos's statement that Supra needs the exact same systems as those maintained by BellSouth demonstrates that the OSS provided to Supra was not adequate, and that the lack of online edit checking contributed to that inadequacy.

Supra asserts that BellSouth failed to present adequate evidence on this issue and is now trying to argue that online edit checking was not an issue, because BellSouth does not like the Commission's determination. Supra argues that the Commission should not reconsider its decision on this issue simply because BellSouth does not like the outcome.

Staff notes that Supra did not respond to BellSouth's request for clarification regarding the provision of PLATS.

#### **STAFF'S ANALYSIS**

Staff does not believe that BellSouth has identified any facts that the Commission overlooked, or any point of law upon which the Commission made a mistake in requiring BellSouth to provide Supra

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with online edit checking capability. Supra's inability to check its orders for errors so that corrections can be made in a timely manner was addressed by Supra's witness Hamilton, and considered by the Commission at pages 21-22 of Order No. PSC-98-1001-FOF-TP. As set forth at page 21:

The witness [Hamilton] stated that if an error is made by its customer service representative, Supra will not learn of this error until BellSouth processes the order. Witness Hamilton asserted that in such a case, BellSouth will send Supra a clarification form, which states that an error has been made and that a corrected order must be resubmitted. Witness Hamilton also asserted that the correction must be handled manually, because it is an update to an existing order. This, he argued, makes it impossible for Supra to provide reliable, timely service to its customers.

At page 22, the Commission found that

We do, however, note that Supra contended that BellSouth's ALEC ordering systems do not provide the same online edit checking capability that BellSouth's retail ordering systems provide. We believe the same interaction and edit checking capability must take place when an ALEC is working an order as when BellSouth's retail ordering systems interact with BellSouth's FUEL and Solar databases to check the accuracy of BellSouth's orders.

Although the Commission determined that BellSouth had adequately addressed Supra's concerns regarding supplementing orders electronically, the Commission found that BellSouth must also provide the same edit checking capability in order to comply with the terms of the agreement.

Staff also believes that edit checking capability clearly falls within Issue 1 (d), which was identified by Order No. PSC-98-

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0416-PCO-TP, issued March 24, 1998, as an issue to be addressed at the hearing. This issue states:

Issue 1: Has BellSouth Telecommunications, Inc., failed to properly implement the following provisions of its Resale, Collocation, and Interconnection Agreements with Supra such that Supra is to provide local exchange service on parity with that which BellSouth provides:

(d) Electronic access to Operational Support Systems (OSS) and OSS interfaces (Ordering and Provisioning, Installation, Maintenance and Repair)

In addition, BellSouth's witness Stacy addressed the ALECs' ability to process an order, including how errors are handled, in his testimony. See Transcript pages 578 and 573. This testimony was considered and addressed by the Commission at pages 21-22 of the Order. Based upon the testimony already considered by the Commission, it is clear that BellSouth's online edit checking capability results in a disparity in how errors are handled and orders are processed. For these reasons, staff recommends that BellSouth's Motion for Reconsideration be denied. In view of BellSouth's assertions that it would be necessary to place equipment at Supra's premises, staff suggests that the Commission clarify that BellSouth does not need to provide the exact same interfaces that it uses. As set forth in the Commission's order, BellSouth's FUEL and Solar databases have simultaneous interaction with BellSouth's ordering interfaces, so that errors in an order being worked by a service representative are immediately identified. If an error is identified, the BellSouth service representative can make corrections before the order is completed. Supra should be provided with this same capability through the ordering interfaces provided to it, as identified in the parties' agreement.

BellSouth has also asked for clarification of the requirement to provide PLATS to Supra. BellSouth has indicated that PLATS contains proprietary information and is quite voluminous. BellSouth asks, therefore, that it be allowed to provide this

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information on a per request basis, as needed. Staff notes that in Order No. PSC-98-1001-FOF-TP, at page 35, the Commission found that Supra had not supported its claims that it had requested this information from BellSouth. In view of this finding, and BellSouth's assertions that the material is proprietary and voluminous, staff recommends that the Commission clarify Order No. PSC-98-1001-FOF-TP to reflect that BellSouth shall provide PLATS to Supra on a per request basis, and may do so subject to a protective agreement between the parties, if necessary.

**ISSUE 8:** Should the Commission grant Supra's Motion to Take Official Notice of the Record in Docket No. 960786-TL?

**RECOMMENDATION:** No. Pursuant to Section 120.569 (2)(g), Florida Statutes, it is not appropriate to take official recognition unless all parties have been given the opportunity to examine and contest the material.

**STAFF ANALYSIS:**

**SUPRA**

Supra asks that the Commission take official notice of the record of Docket No. 960786-TL, Consideration of BellSouth Telecommunications, Inc.'s Entry into InterLATA Services pursuant to Section 271 of the Federal Telecommunications Act of 1996. Supra argues that this is necessary because BellSouth's witness Stacy presented evidence at the April 30, 1998, hearing in this Docket that is contradicted by evidence presented in Docket No. 960786-TL. Supra asserts that BellSouth's witness Stacy testified at the April 30, 1998, hearing that AT&T did not have any serious problems with EDI. Citing Transcript at p. 574. Supra alleges, however, that AT&T's witness Bradbury presented testimony in Docket No. 960786-TL that AT&T had extensive problems with EDI and LENS and that neither was an adequate interface with BellSouth's OSS. Supra notes that the Commission took official notice of its final order in Docket No. 960786-TL in this proceeding. Supra states that it is appropriate for the Commission to also recognize the record upon which that Order was based.

In addition, Supra asserts that it was previously unaware of witness Bradbury's testimony in Docket No. 960786-TL. Supra states

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that due to the number of Commission proceedings in which interconnection issues have been addressed, it was not possible for Supra to identify this testimony before now. Now that this information has been discovered, Supra argues that the Commission should take official notice of it, because it is sworn testimony, which BellSouth had the opportunity to rebut during the proceedings in Docket No. 960786-TL.

#### **BELLSOUTH**

In response, BellSouth argues that Supra's request is inappropriate and untimely. BellSouth also argues that it is only proper to take official notice when other parties have been given the opportunity to address the propriety of the official notice and of the nature of the matter noticed, in accordance with Section 90.204(1), Florida Rules of Evidence. BellSouth further argues that a party must demonstrate good cause for not having given timely notice of its request to take official notice. BellSouth argues that Supra's assertions that it was impossible to be aware of the relevance of prior testimony in other dockets does not amount to good cause.

In addition, BellSouth argues that Supra is incorrect in its assertion that witness Stacy's testimony in this docket is contradicted by evidence in Docket No. 960786-TL. BellSouth incorporates its argument in its Response to Supra's Motion for Reconsideration and Clarification, and states that AT&T witness Bradbury testified in Docket No. 960786-TL regarding whether the EDI interface meets the criteria of Section 271 of the Act. Witness Bradbury indicated that AT&T was testing the EDI interface in Georgia, but was not using it commercially. BellSouth argues that witness Stacy testified that there were no operational problems placing orders using EDI. BellSouth states that it does not dispute that AT&T alleged that the EDI interface did not meet the Section 271 requirements. BellSouth argues, however, that the testimony in Docket No. 960786-TL does not contradict witness Stacy's testimony, because witnesses Stacy and Bradbury did not address the same issue. BellSouth adds that witness Bradbury's testimony was offered over a year ago, and that many changes and modifications have been made to BellSouth's OSSs since that time.

#### **STAFF'S ANALYSIS**

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Staff recommends that Supra's Motion to Take Official Notice should be denied. The testimony that Supra asks the Commission to accept is clearly intended to be submitted for purposes of impeachment. Supra has submitted its request after the Commission's hearing and the Commission's post-hearing decision in this docket. It would not be proper to take official recognition of this testimony without giving BellSouth an opportunity to examine and contest the material, as required by Section 120.569(2)(g), Florida Statutes. See Citizens of State of Florida v. Florida Public Service Commission, 383 So. 2d 901 (Fla. 1980) (finding that Section 120.61, Florida Administrative Code, *renumbered as Section 120.569(2)(g), Florida Administrative Code*, guarantees parties notice and opportunity to contest material before the Commission relies upon it).<sup>6</sup>

BellSouth's response and opposition to Supra's request is not the same as an opportunity to examine and contest the material that Supra asks the Commission to recognize. See Citizens of State of Florida v. Florida Public Service Commission, 383 So. 2d 901 (Fla. 1980) (opposition to motions was not 'opportunity to examine and contest the material' under Section 120.61, Florida Statutes). Furthermore, BellSouth's prior opportunity to cross-examine witness Bradbury in proceedings conducted over a year ago is not a basis for granting Supra's request. Staff believes that it is likely that circumstances have changed since the hearing in Docket No. 960786-TL, and, thus, the relevance of the testimony here is questionable. Also, the testimony offered by witness Bradbury in Docket No. 960786-TL was offered to address issues different than those addressed in this docket. As such, cross-examination of the witness in the prior docket may not be adequate or comparable to cross-examination in this docket. For these reasons, staff recommends that Supra's request be denied.

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<sup>6</sup> See also Florida Gas Co. v. Hawkins, 372 So. 2d 1118 (Fla. 1979) (quashing Commission order apparently based upon presumption that circumstances in existence in previous case were still applicable.)

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**ISSUE 9:** Should the Commission grant Supra's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP?

**RECOMMENDATION:** No. Supra has failed to identify any point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-98-1001-FOF-TP. Supra's Motion for Reconsideration should, therefore, be denied. Staff recommends that Supra's request for clarification be granted. The Commission should clarify Order No. PSC-98-1001-FOF-TL to reflect that BellSouth must complete the required modifications to LENS by February 28, 1999. The Commission should also clarify that BellSouth must provide Supra with online edit checking capability by December 31, 1998.

**STAFF ANALYSIS:** The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

#### **SUPRA**

Supra argues that the Commission should reconsider and clarify its decision that BellSouth has provided Supra with adequate access to BellSouth's OSS systems. Supra asserts that there is ample evidence in the record that faxing orders to BellSouth causes problems for ALECs, and that ALECs only do so because BellSouth has not provided a viable alternative. Supra asserts that the Commission has overlooked this evidence, much of which, Supra alleges, comes from BellSouth's own witnesses.

Supra alleges that BellSouth's witness Stacy explained how BellSouth employees take orders for new service and provide telephone numbers to customers in the same conversation. Supra



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states that this capability comes from BellSouth's RNS systems. Supra contrasts this capability with the capability provided by the interfaces BellSouth offers to ALECs. Supra asserts that none of the interfaces offered to ALECs allow the ALECs to electronically access and check new orders. Referring to the depositions of BellSouth employees Stephanie Hurt and Teresa Gentry, Supra states that there is extensive manual intervention in the ALEC's ordering process, which causes delays and an increase in errors.

Supra also argues that BellSouth's LCSC employees can check the accuracy of orders easily and with minimal training. Supra alleges that ALECs do not have this same capability, which causes significant delays in processing orders for ALECs. Supra argues that this is a serious competitive disadvantage.

Supra also refers to the testimony offered by AT&T's witness Bradbury in Docket No. 960786-TL. Staff has not addressed this portion of Supra's Motion for Reconsideration and Clarification in view of staff's recommendation in Issue 8.

In addition, Supra argues that the Commission has overlooked its statements in Order No. PSC-97-1459-FOF-TL, issued in Docket No. 960786-TL. In that Order, the Commission stated that BellSouth's interfaces and functions do not allow an ALEC to perform the same OSS functions that BellSouth can. Supra argues that BellSouth is still not providing the same capabilities to ALECs that it provides to itself.

Finally, Supra states that the Commission directed BellSouth to take several specific actions by Order No. PSC-98-1001-FOF-TL. The Commission ordered BellSouth to modify LENS to give Supra the same ordering capability that BellSouth's RNS system provides to BellSouth and to provide online edit checking capability. Supra asks that the Commission clarify when and how BellSouth is to complete these requirements. Supra argues that clarification on this point will ensure that the requirements are met.

#### **BELLSOUTH**

BellSouth argues that Supra's Motion for Reconsideration and Clarification reargues matters fully addressed in the Commission's Order, and, therefore, should be denied. BellSouth states that the Commission addressed manually faxed orders at page 18 of Order No. PSC-98-1001-FOF-TL. There, the Commission stated that the evidence

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did not support Supra's assertions. BellSouth also argues that Supra's assertion that there is no alternative to manually faxing orders is inaccurate, nor was it the issue addressed at hearing. BellSouth states that the issue was whether BellSouth had made the interfaces specified in the parties' agreement available to Supra. The Commission found that BellSouth had provided access to interfaces in accordance with the parties' agreement. See Order No. PSC-98-1001-FOF-TL at page 23. BellSouth further notes that whether the interfaces specified in the agreement are acceptable was also not an issue in this case. BellSouth states that the Commission should not ignore the agreement between the parties.

In addition, BellSouth states that it has outlined in its own Motion for Reconsideration and Clarification when and how it plans to meet the requirements of Order No. PSC-98-1001-FOF-TL. BellSouth adds that the Commission has continuing jurisdiction over the Order for enforcement purposes.

#### **STAFF'S ANALYSIS**

Staff believes that the arguments raised by Supra in its Motion for Reconsideration have been thoroughly addressed by the Commission in Order No. PSC-98-1001-FOF-TL. At pages 17-19 of the Order, the Commission addresses manual faxing of orders. The Commission determined that there was not sufficient evidence to support Supra's assertions that BellSouth required Supra to manually fax all of its orders. The Commission did, however, require BellSouth to modify LENS to allow Supra to have the same ordering capability that BellSouth's employees have through RNS. The Commission addressed access to OSS at pages 22-23 of the Order. The Commission determined that BellSouth is not required to provide the exact same interfaces that BellSouth uses for its retail operations. The Commission further determined that BellSouth had made electronic interfaces available to Supra, in accordance with the parties' agreement. Supra has presented nothing new, nor has it demonstrated that the Commission erred in its decision. Supra has simply reargued its case, which is improper. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Staff recommends, therefore, that Supra's Motion for Reconsideration be denied.

Regarding Supra's request for clarification of when and how BellSouth must fulfill the requirements set forth in Order No. PSC-

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98-1001-FOF-TL, staff recommends that some clarification is appropriate.

In BellSouth's response to Supra's Motion for Reconsideration and Clarification, BellSouth refers to its own Motion for Reconsideration and Clarification. There, BellSouth indicates that it expects to have the modifications to LENS that were required by the Commission to be completed by February, 1999. Staff believes that this is reasonable, but suggests that BellSouth be encouraged to complete the modifications by the end of 1998. As for the online edit checking capability, staff again emphasizes, as explained in Issue 7, that BellSouth should not be required to duplicate its RNS and DOE interfaces at Supra's premises. In accordance with Order No. PSC-98-1001-FOF-TL, BellSouth should be required to provide Supra with the same interaction and online edit checking capability through its interfaces that occurs when BellSouth's retail ordering interfaces interact with BellSouth's FUEL and Solar databases to check orders. Order No. PSC-98-1001-FOF-TL at pages 22 and 47. Staff believes that BellSouth should be required to do so by December 31, 1998. If, however, BellSouth is able to sufficiently demonstrate that it is not possible to provide online edit checking by that date, staff believes that BellSouth should be allowed to file a Motion for Extension of Time for separate consideration by the Commission.

**ISSUE 10:** Should this Docket be closed?

**RECOMMENDATION:** Yes. Whether or not the Commission approves staff's recommendations in Issues 1-9, no further determinations will remain to be made by the Commission. This Docket should, therefore, be closed.

**STAFF ANALYSIS:** Yes. Whether or not the Commission approves staff's recommendations in Issues 1-9, no further determinations will remain to be made by the Commission. This Docket should, therefore, be closed.