

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DIRECT TESTIMONY

OF

MARY CONQUEST

ON BEHALF OF

ITC^DELTACOM COMMUNICATIONS, INC.

DOCKET NO. 030137-TP

MAY 19, 2003

DOCUMENT NUMBER-DATE

04483 MAY 19 8

FPSC-CUMM DESIGN CLERK

1 **Q: PLEASE STATE YOUR NAME, POSITION AND BUSINESS**
2 **ADDRESS.**

3 A: My name is Mary Conquest. I am Program Manager for Inter-Company
4 Relations, at ITC^DeltaCom Communications, Inc., ("ITC^DeltaCom").
5 My business address is 4092 S. Memorial Parkway, Huntsville, Alabama
6 35802.

7
8 **Q: PLEASE DESCRIBE YOUR BUSINESS EXPERIENCE AND**
9 **BACKGROUND.**

10 A: I received a Masters Certificate from George Washington University in
11 the area of Project Management. I have been employed in the
12 telecommunications industry for over 35 years. I began my career with
13 Southern Bell, now known as BellSouth Telecommunications, Inc.
14 ("BellSouth"), in 1966. I held various positions within BellSouth over that
15 time. My last position with BellSouth was as a Certified Project Manager
16 in information technology ("IT"). I also have been engaged as a
17 consultant to BellSouth in the area of billing. As part of the billing
18 assignment, I supported BellSouth's development of J Billing ("UNE-P")
19 and Single C Order Process. I retired from BellSouth in December of
20 1996. My consultant assignment for BellSouth was between 1997-1999.
21 As a manager of BellSouth's Regional Service Order Support ("RSOS")
22 staff, I am very familiar with BellSouth's legacy systems. I was an
23 ITC^DeltaCom employee between December 1999 and September

1 2000. In October of 2000, I became an independent consultant to
2 ITC^DeltaCom in the areas of Operational Support Systems ("OSS") –
3 ordering systems and gateway support to incumbent local exchange
4 companies ("ILECs"), including but not limited to BellSouth. Since
5 October 2001, I have again been an employee of ITC^DeltaCom in Inter-
6 Company Program Management.

7

8 **Q: HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS COMMISSION?**

9 A: No. I have been an active participant in the Florida Competitive Issues
10 Forum, the Bearing Point Testing, and the DSL proceeding. I have
11 testified in Alabama, Georgia, and Louisiana regarding OSS and
12 Performance Metric Issues.

13

14 **Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

15 A: The purpose of my testimony is to address operational issues critical to
16 the success of ITC^DeltaCom and the continued quality of service for our
17 local customer. Specifically, I address service-impacting facets of the
18 business for which contract language must be adopted. I will focus on
19 those issues related to OSS, Directory and Billing.

20

21 **Issue 2: Directory Listings**

22 **Q: WHY IS ITC^DELTACOM REQUESTING DIRECTORY LISTING**
23 **INFORMATION FROM BELL SOUTH?**

1 A: BellSouth has refused to allow ITC^DeltaCom to adopt the AT&T
2 contract language regarding directory listings. Pursuant to 47 C.F.R.
3 51.809, BellSouth is required to make available any individual
4 interconnection, service or network element arrangement contained in
5 any agreement to which it is a party that is approved by a state
6 commission. Additionally, BellSouth is required to provide directory
7 listings pursuant to Section 271 of the Telecommunications Act of 1996
8 ("Telecommunications Act" or "Act") because directory listings are
9 "access or interconnection that is offered by a Bell operating company to
10 other telecommunications carriers." (See Section 271(c) (2) (B) of the
11 Telecommunications Act of 1996.) Directory listings rates, terms and
12 conditions are considered an interconnection service and therefore
13 should be available for adoption pursuant to 47 C.F.R. 51.809.
14
15 ITC^DeltaCom conveys its end user customers' listing to BellSouth for
16 intermingling and inclusion in the local telephone directory. While some
17 orders are defined to "flow through" the systems without intervention and
18 deliver to BAPCO, the publisher selected by BellSouth, others are
19 manually keyed and all iterations are not viewable by ITC^DeltaCom. To
20 ensure accuracy, ITC^DeltaCom has requested an electronic feed for its
21 customers' listings prior to each directory close, or alternatively, a one-
22 time snapshot of the BAPCO database for ITC^DeltaCom's data and a
23 file with changed data prior to the book closing.

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ITC^DeltaCom should have the right to review and edit directory listing information. BellSouth has admitted to dropping some UNE-P subscribers from the directory due to system problems. In fact, the Atlanta Journal-Constitution published a story on March 18, 2003 indicating that BellSouth had published a phone sex number as its own internet service contact number. All parties need the ability to validate their published data.

To protect itself from costly adjustments, litigation and customer dissatisfaction, ITC^DeltaCom needs a mechanical method of validation. The BAPCO website allows a person to view one listing at a time for the "top 100" directories, thus requiring extended time and labor charges to be borne by ITC^DeltaCom. ITC^DeltaCom has the ability to individually access the Customer Service Record. However, this does not reflect the yellow page advertisement, or any alterations made by BAPCO. ITC^DeltaCom hopes that in the upcoming Performance Measure Dockets, metrics are established for the directory accuracy. It also should be noted that BellSouth is protected from penalties beyond the billed amount. Business customers frequently seek damages in excess of the tariffed listing rates.

Issue 9: OSS Interfaces

1 **Q: SHOULD BELLSOUTH BE REQUIRED TO PROVIDE INTERFACES**
2 **FOR OPERATIONAL SUPPORT SYSTEMS WHICH HAVE**
3 **FUNCTIONS EQUAL TO THAT PROVIDED TO THEIR RETAIL**
4 **DIVISION?**

5 A: Yes, it is a requirement of the Telecommunications Act that OSS
6 be nondiscriminatory. BellSouth contends that only the
7 information provided to ITC^DeltaCom must be nondiscriminatory.
8 However, delays due to lack of OSS support make CLECs like
9 ITC^DeltaCom appear inefficient and unreliable to customers.
10 ITC^DeltaCom's center support personnel receive comments from
11 end user consumers who ask why BellSouth can perform certain
12 tasks but ITC^DeltaCom cannot. In summary, Bellsouth should
13 have a contractual commitment to provide to ITC^DeltaCom
14 access to all functions for pre-order which are provided to the
15 BellSouth retail groups. Systems may differ, but all functions will
16 be at parity in all areas, i.e., operational hours, content
17 performance. All mandated functions, i.e. facility checks, should
18 be provided in the same timeframes in the same manner as
19 provided to BellSouth retail centers.

20

21 **Issue 25: Provision of ADSL Where ITC^DeltaCom is the UNE-P Local**
22 **Provider**

1 **Q: SHOULD BELLSOUTH BE ALLOWED TO REFUSE TO PROVIDE**
2 **ADSL SERVICE TO ITC^DELTACOM'S UNE-P END USERS?**

3 A: No. BellSouth acknowledges that no technical reason exists for its
4 unwillingness to serve ITC^DeltaCom's UNE-P end users with
5 BellSouth's Fast Access, or ADSL service. We live in the information
6 age where most homes and businesses have computer access. By
7 limiting the service, BellSouth places ITC^DeltaCom at a competitive
8 disadvantage. BellSouth's proposed solution to leave a line as resale is
9 insufficient for several reasons, including the fact that resale and UNE-P
10 lines cannot hunt.

11
12 **Q: SHOULD BELLSOUTH CONTINUE PROVIDING THE END USER**
13 **ADSL SERVICE WHERE ITC^DELTACOM PROVIDES UNE-P LOCAL**
14 **SERVICE TO THAT SAME END USER ON THE SAME LINE?**

15 A: Yes. BellSouth should not be permitted to tie local service to its ADSL
16 service. There are three principal practical anti-competitive effects of this
17 type of "tying" policy. First, tying arrangements force a competitor to
18 enter two markets, thereby raising a competitor's cost of entry. In this
19 instance, a competitor seeking to provide local voice service is forced to
20 also offer DSL service because the customer is precluded from
21 purchasing his or her DSL service from BellSouth. The competitor
22 therefore must incur the entry costs associated with providing DSL
23 service, even if such costs were not part of the competitor's business

1 plan. Alternatively, the competitor may just give up the customer seeking
2 both voice and DSL – an outcome that is clearly at odds with the mission
3 of a for-profit company and the intent of local competition.

4
5 Second, tying arrangements allow a monopoly to “cherry pick” the most
6 attractive customers from the mass market, thereby reducing the
7 profitability of entry into that market by would-be competitors. Inasmuch
8 as there is a positive correlation between DSL purchasers and the most
9 profitable voice service customers (those with high toll and vertical
10 feature usage), BellSouth can use tying arrangements to acquire and
11 “lock up” only the most profitable customers, leaving its non-DSL
12 providing competitors to compete for those relatively less profitable
13 customers. Through its tying arrangements, BellSouth therefore
14 “monopolizes” all the attractive customers so that voice competitors do
15 not have the ability to compete effectively in the local exchange market.

16
17 Third, and most importantly, tying arrangements limit consumer choice.
18 BellSouth’s practice of tying together its voice and DSL FastAccess
19 services effectively prevents consumers from obtaining the voice
20 provider of their own choosing. Customers are often locked into a long-
21 term DSL contract with BellSouth through various marketing
22 mechanisms, such as a rebate on the DSL modem or early termination
23 fees. Faced with the decision to forego the modem or pay the

1 termination fees in order to change to another local voice service
2 provider, DSL customers are likely to stay with BellSouth. Thus, from a
3 practical standpoint, Florida consumers with BellSouth DSL are hindered
4 in their ability to switch to another provider for local voice service. This is
5 wholly contrary to true competitive choice, which enables consumers to
6 choose whatever service they desire from whichever service provider
7 they select. Florida consumers should not be held hostage to
8 BellSouth's tying arrangements.

9

10 **Q: ARE YOU AWARE OF ANY STATE COMMISSIONS THAT HAVE**
11 **ADDRESSED THIS ISSUE?**

12 A: Yes. Both the Louisiana and Kentucky Commissions have issued
13 decisions prohibiting BellSouth from disconnecting DSL service to the
14 consumer where a CLEC provides voice service via UNE-P. (See *In the*
15 *Matter of Petition of Cinergy Communications Company For Arbitration*
16 *of an Interconnection Agreement with BellSouth Telecommunications,*
17 *Inc.*, Kentucky Public Service Commission, Case No. 2001-00432, rel.
18 Feb. 28, 2003 and *In re BellSouth's Provision of ADSL Service to End*
19 *Users Over CLEC Loops*, Docket R-26173, Louisiana Public Service
20 Commission, Order No. 26173 (rel. January 24, 2003) and Clarification
21 Order No. 26173-A (rel. April 4, 2003)).

22

1 These decisions are attached as Exhibit MQ-1. Additionally, there is an
2 open docket in Florida, 020507-TP on this issue.

3

4 **Q: DO YOU HAVE ANY EXAMPLES OF HOW BELL SOUTH'S POLICY**
5 **HAS IMPACTED FLORIDA CONSUMERS AND ITC^DELTA COM**
6 **CUSTOMERS?**

7 A: Yes. Attached as Exhibit MQ-2 is the letter from Greg Follensbee to
8 Tom Mullis wherein BellSouth first announced that it would discontinue
9 any ADSL service to a customer of ITC^DeltaCom that was using UNE-
10 P. Consumers want choice and they want the ability to choose different
11 service providers. BellSouth should not be permitted to deny these
12 customers the ability to choose.

13

14 **Issue 64: ADUF**

15 **Q: WHAT TERMS AND CONDITIONS SHOULD APPLY TO ADUF?**

16 A: ADUF is the Access Daily Usage File, which ITC^DeltaCom purchases
17 from BellSouth. When ITC^DeltaCom purchases unbundled local
18 switching from BellSouth, BellSouth provides ITC^DeltaCom an ADUF
19 record for the billing of the access charges. These ADUF records
20 currently include local calls. ITC^DeltaCom should not be billed for
21 ADUF records associated with local calls.

22

1 **Issue 65: Notification of Changes to OSS; Changes to Business**

2 **Rules/Practices**

3 **Q: SHOULD BELLSOUTH BE REQUIRED TO PROVIDE**
4 **ITC^DELTACOM 60 DAYS ADVANCE NOTICE OF DEPLOYMENT OF**
5 **OSS CHANGES THAT IMPACT CLECS?**

6 A: Yes. Like BellSouth, ITC^DeltaCom has vendor relationships within the
7 OSS suite. When purchasing outside IT support, less than 60 days
8 notice could cause ITC^DeltaCom to pay premium charges or to be
9 forced to utilize expensive and inefficient alternatives. ITC^DeltaCom
10 has experienced such disruptions to its operations, such as USOC
11 changes, rate sheets not provided in advance, and delay with loading to
12 our rate file. Rates when not ordered by the Commission, require time
13 for negotiation of the contract amendment and loading to BellSouth's
14 rating systems. In the Florida Collaborative, BellSouth has reported that
15 a vendor is working on mechanization to improve the process. However,
16 ITC^DeltaCom is delayed by BellSouth until the updates are complete.

17

18 **Issue 66: Testing of End User Data**

19 **Q: SHOULD BELLSOUTH PROVIDE ITC^DELTACOM THE ABILITY TO**
20 **TEST ITS DATA TO THE SAME EXTEND BELLSOUTH TESTS ITS**
21 **OWN END USER DATA?**

22 A: Yes. CLECs via Change Control have requested BellSouth to enhance
23 its testing tools. Currently, the CAVE test environment only supports the

1 latest version of TAG and the latest EDI map. The test deck is loaded
2 with a catalogue of cases with expected results. BellSouth enjoys the
3 ability to test its data "end to end" using the tools and format that will be
4 in its production systems. BellSouth then captures the "test" accounts
5 and removes after bill verification. To use their Operating Customer
6 Number (OCN), CLECs must order test accounts as real active accounts
7 and pay the associated rates. Once the accounts are established the
8 CLEC can request the BellSouth testing team to create a test plan. All
9 test environments should mirror production systems and be available for
10 all non-retired interfaces. BellSouth did offer the CLECs a work-around
11 solution that if accounts and scenarios were submitted 60 days in
12 advance of testing, BellSouth would determine if they could load. This
13 further illustrates the need for 60 days' advance notification of OSS
14 Changes.

15
16 **Issue 67: Availability of OSS Systems**

17 **Q: SHOULD BELLSOUTH BE ALLOWED TO SHUT DOWN OSS**
18 **SYSTEMS DURING NORMAL WORKING HOURS WITHOUT**
19 **CONSENT FROM THE CLECs?**

20 **A:** No. Operational hours and maintenance windows are posted on
21 BellSouth's website. ITC^DeltaCom schedules its Customer Agents
22 accordingly. BellSouth on December 27, 2002, took ALL interfaces

1 down at noon for a system upgrade. A system upgrade is not an
2 emergency situation.

3
4 This occurred on a Friday at the end of the month, a very crucial time for
5 most CLECs. CLECs were closing the month and year, and had orders
6 which needed to be entered into the systems. CLECs had staff on site
7 and no tools with which to work. If BellSouth wants to schedule an OSS
8 outage any time Monday thru Friday, between the hours of 8 A.M. and 5
9 P.M. it should first obtain the CLECs' approval or consent.

10 **Issue 69: Inadvertent Transfer of Customers**

11 **Q: SHOULD BELL SOUTH PROVIDE A PROCESS THAT IS END USER**
12 **FRIENDLY WHEN A MISTAKE HAS OCCURED AND A CUSTOMER**
13 **IS SWITCHED?**

14 **A:** Yes. On rare occasions, a simple typing mistake will cause a customer
15 to be switched. Under the current process, when the error occurs within
16 BellSouth's retail division, BellSouth simply corrects the error. When the
17 error occurs within ITC^DeltaCom, BellSouth requires that both
18 ITC^DeltaCom and the affected consumer have to be on the line in order
19 to correct the mistake. ITC^DeltaCom is requesting BellSouth to
20 reinstate the service to the former state in parity with its own customers.
21 ITC^DeltaCom wishes to handle all the coordination on behalf of the end
22 user, rather than forcing a customer who has no idea of what happened
23 with his/her service to call the retail center and reapply. ITC^DeltaCom

1 fully accepts the charges associated with the change and has offered to
2 compensate BellSouth if service is restored within four hours.

3

4 **Q: DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

5 **A: Yes.**

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CINERGY COMMUNICATIONS)	
COMPANY FOR ARBITRATION OF AN)	CASE NO.
INTERCONNECTION AGREEMENT WITH)	2001-00432
BELLSOUTH TELECOMMUNICATIONS, INC.)	
PURSUANT TO U.S.C. SECTION 252)	

O R D E R

This matter arises upon the parties' inability to agree on language for their interconnection agreement regarding certain issues which the Commission arbitrated. The Commission required that BellSouth Telecommunications, Inc. ("BellSouth") shall not refuse to provide its digital subscriber line ("DSL") to a customer on the basis that the customer receives voice service from a competitive local exchange carrier ("CLEC") that provides service by a means of unbundled network element platform ("UNE-P").¹ Upon motions for clarification by Cinergy Communications Company ("Cinergy") and BellSouth, the Commission clarified its Order to state that BellSouth may not refuse to provide DSL pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P. Moreover, BellSouth shall not require a DSL to pay loop costs of a separate loop simply because the customer receives voice from a competitor on a UNE-P basis.²

¹ Order dated July 12, 2002.

² Order dated October 15, 2002.

The language contained in Appendix A, attached hereto and incorporated herein, should be the language appearing in the parties' interconnection agreement for reasons stated herein.

Regarding ¶ 2.10.1.1, the Commission will permit the definitions of relevant terms to remain as requested by BellSouth. However, the Commission will require the addition of language ensuring that those terms are as defined in the Federal Communications Commission tariff as of the date of this Order. Regarding Cinergy's proposed ¶ 2.10.1.1.2, the Commission finds this provision a reasonable safeguard for Cinergy. Paragraph 2.10.1.3 memorializes BellSouth's lack of obligation to provide its retail, DSL-based high-speed access service to an end-user that receives UNE-P-based voice services from Cinergy. The Commission will require, however, that BellSouth notify the end-user at least 10 days prior to discontinuing its retail, DSL-based high-speed Internet access service as proposed by Cinergy. Paragraphs 2.10.1.4 and 2.10.1.5 are not in dispute and thus have been included as proposed.

Paragraph 2.10.1.6 addresses BellSouth's obligations to Cinergy prior to BellSouth's completion of the modifications of its systems and processes to comply with the Commission's Orders. After reviewing both parties' proposals, the Commission finds that the language contained in Appendix A at ¶ 2.10.1.6 is most appropriate in addressing the concerns of both parties. The parties do not dispute the language provided in ¶ 2.10.1.7 in the attached Appendix.

Paragraph 2.10.1.8 requires Cinergy to cooperate with BellSouth in an effort to determine loop makeup and qualification status when a request is made for DSL on an existing Cinergy UNE-P line. The Commission has required that the procedure for doing so should be reduced to writing.

BellSouth proposed that Cinergy be required to determine whether DSL transport was on the line which was to be converted and if so to notify BellSouth of the existence of DSL on the line. BellSouth should determine if DSL service is on a BellSouth voice line or resold line, not Cinergy. The Commission finds that this language should not be included in the parties' agreement.

BellSouth requested the insertion of a paragraph that it not be obligated to pay self-effecting evaluation measures ("SEEM") penalties for delays in provisioning UNE-P resulting from the tariffed DSL being converted from a BellSouth resold voice line to Cinergy UNE-P. An arbitration proceeding and the resulting interconnection agreement is not an appropriate context in which to relieve BellSouth of SEEM penalties. If BellSouth believes penalties are unwarranted, it should seek relief in Case No. 2001-00105.³

The Commission, having been otherwise sufficiently advised, HEREBY ORDERS that, within 20 days of the date of this Order, BellSouth and Cinergy shall file their final interconnection agreement containing terms consistent with our July 12, 2002 Order, our October 15, 2002 Order, and the attached Appendix A.

³ Case No. 2001-00105, Investigation Concerning The Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996.

Done at Frankfort, Kentucky, this 28th day of February, 2003.

By the Commission

ATTEST:


Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2001-00432 DATED February 28, 2003

2.10.1.1 For purposes of this Section 2.10.1.1, the term "DSL," "DSL transport," or "DSL Transport Services" shall mean that DSL transport service in the BellSouth F.C.C. Number 1 tariff in effect as of the date of this Order. In order to comply with the Kentucky Public Service Commission's Order in Case No. 2001-00432, BellSouth shall not refuse to provide any DSL transport service to a network service provider pursuant to a request from such network service provider who serves, or desires to serve, an end-user that receives UNE-P-based voice services from Cinergy Communications. However, BellSouth shall have no obligation to provide DSL transport on any loop that is not qualified for DSL, provided that BellSouth shall not make a change to any loop so as to make it not qualify for DSL on the basis of that such loop is being converted to UNE-P, rather than on the basis of architectural, mechanical, or physical limitations.

2.10.1.2 The Kentucky Public Service Commission's Order in Case No. 2001-00432 is predicated upon the ability of customers of Cinergy Communications to receive wholesale ADSL transport at the same price it was available pursuant to BellSouth Tariff F.C.C. Number 1 on the date of that Order. In the event this offering is no longer available for any reason, BellSouth agrees to provide to Cinergy Communications a wholesale ADSL transport product for the duration of this interconnection agreement on the same pricing, terms, and conditions as those in the BellSouth Tariff F.C.C. Number 1 as of the date of the Order subject to Section 2.10.1.1 above. The terms and prices of BellSouth Tariff F.C.C. Number 1 as it existed on the date of the Order are incorporated herein by reference as necessary to comply with this section.

2.10.1.3. Notwithstanding the foregoing, BellSouth shall have no obligation to provide its retail, DSL-based high-speed Internet access service, currently known as BellSouth FastAccess® DSL service, to an end-user that receives UNE-P-based voice services from Cinergy. To the extent BellSouth chooses to deny FastAccess® to an end-user, BellSouth shall not seek any termination penalties against, or in any other fashion seek to penalize, any such end-user that Cinergy identifies to BellSouth pursuant to a process to be agreed upon and reduced to writing. BellSouth shall also notify the aforementioned end-user at least 10 days prior to discontinuing its FastAccess® service.

2.10.1.4. Cinergy shall make available to BellSouth at no charge the high frequency spectrum on UNE-P for purposes of enabling BellSouth to provision DSL transport on the same loop as the UNE-P-based voice service.

2.10.1.5. When BellSouth provides tariffed DSL transport over Cinergy UNE-P, BellSouth shall have the right, at no charge, to access the entire loop for purposes of troubleshooting DSL-related troubles.

2.10.1.6. BellSouth shall not be obligated to provide tariffed DSL transport in accordance with this Section 2.10.1 until completion of the modification of systems and processes that will enable BellSouth to qualify Cinergy UNE-P lines for DSL as well as maintain and repair such DSL on Cinergy UNE-P lines. Until such time as BellSouth completes the aforementioned modification of systems and processes, BellSouth agrees to provide to Cinergy Communications wholesale DSL transport service over resale lines on the following conditions: (1) the underlying resale line and its features shall be provided by BellSouth to Cinergy Communications at the rate that Cinergy Communications normally pays for a UNE-P loop/port combination in the pertinent UNE zone; (2) BellSouth shall assign all right to carrier access charges to Cinergy Communications and shall provide detailed CABS records to Cinergy Communications free of charge; (3) because BellSouth cannot provide hunting between resale and UNE-P lines, any other lines of the end-user served by Cinergy Communications shall also be converted to resale at no charge upon submission of an LSR for such conversion and provided pursuant to (1) and (2) above unless and until BellSouth agrees to provide hunting between resale and UNE-P platforms; and (4) once the aforementioned modification of systems and process is completed, BellSouth agrees to convert all end-user lines affected by this section to UNE-P at no charge upon Cinergy Communications' submission of an executable LSR for such conversion.

2.10.1.7. Cinergy Communications shall provide BellSouth with all current pertinent customer information necessary for BellSouth to comply with this section. Cinergy Communications authorizes BellSouth to access customer information on BellSouth systems as necessary for BellSouth to comply with this section. BellSouth shall provide Cinergy Communications with all current pertinent loop information necessary for Cinergy Communications to provide DSL over UNE-P, including but not limited to, loop qualification information for UNE-P lines.

2.10.1.8. If a request is made for DSL on an existing Cinergy Communications UNE-P line, Cinergy shall cooperate with BellSouth in an effort to determine loop make-up and qualification status. The parties shall mutually agree on a procedure and shall reduce same to writing.

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER R-26173

Docket R- 26173, Louisiana Public Service Commission, ex parte. In re: BellSouth's provision of ADSL Service to end-users over CLEC loops- Pursuant to the Commission's directive in Order U-22252-E

(Decided at the December 18, 2002 Business and Executive Session.)

I. BACKGROUND

The Louisiana Public Service Commission Staff ("Staff") filed its Final Recommendation in Docket Number U-22252-E, *In re: BellSouth's Section 271 Pre-application*, on August 31, 2001. Among the numerous issues addressed therein was a discussion of MCI WorldCom Communications, Inc.'s ("WorldCom") contentions regarding BellSouth Telecommunication's, Inc. ("BellSouth") practices in line splitting arrangements.¹ Staff described its understanding of the policy as follows: "BellSouth will not provide a customer with its retail DSL service unless that customer also purchases its voice service from BellSouth."² After discussing the matter in greater detail, Staff ultimately recommended the following:

That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.³

Staff's Final Recommendation, in docket U-22252, Subdocket E, was considered by the Louisiana Public Service Commission ("LPSC", "Commission") at its September 19, 2001 Business and Executive Session. At that Session, Commissioner Blossman moved to adopt Staff's Final Recommendation, with a few modifications, one of which directly addressed the above quoted section. The motion directed Staff to further study the issue of whether BellSouth should be required to provide its ADSL service to end users over

¹ Staff's Final Recommendation, Docket U-22252-E, pages 86-87.

² Id at 86.

³ Id at 113.

the high frequency portion of the same loop being used by a CLEC to provide voice services. The motion was unanimously adopted by the Commission and memorialized in Order U-22252-E, issued September 21, 2001.

In compliance with the Commission's directive, Staff opened and published the following in the Commission's Official Bulletin dated December 7, 2001 Docket R-26173,

Pursuant to the Commission's directive in Order U-22252-E, Staff was to further study the issue of whether BellSouth Telecommunications, Inc. should be required to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice services.

Parties were given 25 days to intervene and/or file comments in the docket. Interventions and/or initial comments were received from the following parties: ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom ("DeltaCom"), Xspedius Corporation ("Xspedius"), Cox Louisiana Telecom, L.L.C., d/b/a Cox Communications ("Cox"), NewSouth Communications Corporation ("NewSouth"), Access Integrated Networks, Inc. ("Access"), BellSouth, KMC Telecom, Inc. ("KMC") and the Southeastern Competitive Carriers Association ("SECCA").

Following the receipt of initial comments, Staff received both formal and informal requests from the interveners to file additional/reply comments. By notice dated May 9, 2002, Staff granted the parties the opportunity to file additional comments by May 24, 2002. The following parties provided additional/reply comments: BellSouth, KMC, SECCA and WorldCom. Access, DeltaCom, NewSouth and Xspedius jointly filed reply comments.

After thoroughly reviewing all initial and reply comments, Staff issued a Proposed Recommendation on July 10, 2002. In order to clarify the opportunity for exceptions and replies to the recommendation, a Procedural Schedule and Order was issued on July 25, 2002. Exceptions were received only from BellSouth. Reply comments were received from KMC, WorldCom and SECCA and jointly from DeltaCom, Access, NewSouth and Xspedius. Additionally, an informal technical conference was held on September 3, 2002, with representatives from all of the above parties present. In connection with its review, Staff prepared a detailed summary of all initial and reply comments which was included in the Proposed Recommendation issued

July 10, 2002. A short summary of the exceptions and replies to the Proposed Recommendation are included herein.

II. JURISDICTION

The powers and duties of the Louisiana Public Service Commission are contained in Article IV § 21 of the Louisiana Constitution of 1974. As stated therein, the Commission has the authority to:

“regulate all common carriers and public utilities and has all other regulatory authority as provided by law. The Commission shall adopt and enforce reasonable rules, regulations and procedures which are necessary for the discharge of its duties including other powers and duties as provided by law.”

Pursuant to its constitutional authority, the Commission adopted the Regulations for Competition in the Local Telecommunications Market (“Local Competition Regulations”, “Regulations”)⁴, as most recently amended by the April 5, 2000 General Order (“General Order”). As stated in the Preamble to the Regulations,

Through the development of effective competition, which promotes the accessibility of new and innovative services at non-discriminatory prices consumers can and are willing to pay, and which results in wider deployment of existing services at competitive prices, the public interest will be promoted.

Section 201. A. of the Local Competition Regulations describes the public policy as follows:

(T)he Louisiana Public Service Commission hereby finds, determines and declares that the promotion of competition in all local telecommunications markets in Louisiana is in the public interest.

In furtherance of the above stated goal to promote competition in all local telecommunications markets in Louisiana, this Commission has initiated a number of rule-making proceedings. One such proceeding, Docket U-22252-C *In re: BellSouth Telecommunications, Inc. Service Quality Measurements*, established performance measurements to monitor the service BellSouth provides to its competitors. No less than four orders have been issued in that docket, all of which have fostered the Commission’s goals of promoting competition. Further, Docket U-24714, Subdocket A, *In re: Final Deaveraging of BellSouth Telecommunications, Inc., UNE Rates*, established new cost

⁴ The actual Regulations are contained in “Appendix B” to the General Order.

based rates for UNEs available to CLECs. Staff notes that following the issuance of the Order in that docket, many new competitors have entered the market. Additionally, in connection with Staff's review of BellSouth's 271 pre-application filing in Docket U-22252-E, several recommendations were made to further promote competition.

III. SUMMARY OF STAFF'S PROPOSED RECOMMENDATION

In Docket U-22252-E, Staff made the following recommendation:

That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.

When the matter was considered at the Commission's September 2001 Business and Executive Session, the Commission voted to accept Staff's Recommendation, with Staff directed to determine whether ADSL service could be added to UNE lines in the future.⁵

Order U-22252, E memorialized the Commission's vote, instructing Staff to,

further study the issue of requiring BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service until such time as the operational and policy issues associated therewith are fully explored.⁶

Based on the above, a presumption existed that Staff's Recommendation in Docket U-22252, E should be adopted, absent any "operational or policy issues" prohibiting its implementation. Comments received from the parties suggested additional concerns must also be addressed, as evidenced by comments received relative to possible jurisdictional and technical issues. Neither the vote of the Commission, nor the directive of the order, suggested any such issues were a concern prior to this docket being opened. Nonetheless, to insure all issues are thoroughly explored, Staff's Proposed Recommendation addressed not only "operational and policy" issues, but jurisdictional

⁵ See Official Transcripts of the September 21, 2001 Business and Executive Session.

⁶ Order U-22252, E.

and technical issues as well. Based on the following conclusions, it was Staff's opinion that the recommendation set forth in docket U-22252-E be reaffirmed and adopted.

A. Policy Issues

Before addressing any "policy" arguments made by the parties, Staff reminded that parties that this Commission's policy, as stated in the Local Competition rules, is to promote competition in all telecommunications markets. Adopting Staff's Recommendation in U-22252, subdocket E will promote that goal, by allowing more end-users to choose an alternative voice provider without fear of losing their DSL service. BellSouth's policy of refusing to provide its DSL service over CLEC voice loops is clearly at odds with the Commission's policy to encourage competition. Likewise, BellSouth's contention that such a regulation would diminish competition in the DSL market is not consistent with the comments received.

Pursuant to its current DSL policy, BellSouth "simply chooses not to sell DSL service that work on CLEC loops."⁷ As summarized in KMC's comments, BellSouth's policy actually deters customers from switching to other providers, thus hindering competition not only in the voice market, but the DSL market as well. Various other examples of the anti-competitive effects of this policy were contained in the CLEC's comments⁸, including (1) disconnection of BellSouth DSL service when an end-user changes voice providers, (2) placing codes on Customer Service Records ("CSRs") that must be removed before transferring service, (3) placing DSL service on primary lines in multi-line situations without explaining the consequences to the end-user and (4) transferring back voice service if BellSouth's DSL is subsequently placed on the primary line. Interestingly enough, the only of the above examples BellSouth addressed in its reply comments is the primary line issue, referring Staff to the FCC's 271 order. BellSouth's failure to even dismiss or deny the other examples caused Staff grave concern, as any of the above puts a voice CLEC in a clear competitive disadvantage by creating more "hoops" a CLEC must jump through to provide voice service, as outlined in Staff's summary of the individual comments.

⁷ See reply affidavit of Thomas G. Williams filed June 25, 2001 in Docket U-22252-E at page 11.

⁸ A detailed summary of the initial comments filed by all parties is contained in Staff's Proposed Recommendation issued in this docket on July 10, 2002.

Rather than discuss the above concerns, BellSouth argued the Commission should make inquiries relative to the investments, personnel and taxes CLECs have made in Louisiana before it makes a decision. Staff was at a loss as to how any of this information, if obtained, would be of any benefit to the Commission or Staff. In furtherance of this position, BellSouth filed a Motion for Leave to Propound Data Requests on June 28, 2002. Staff was concerned this filing could not only result in an unnecessary delay in the issuance of Staff's Recommendation, but also could broaden the scope of the docket beyond the Commission's directive.

In conclusion, the Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive affects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited.

B. Jurisdictional Issues

While "jurisdictional issues" were not contemplated in the Commission's directive, Staff believed it was important to address this Commission's jurisdiction and how it is consistent with that of the FCC. BellSouth's argued the LPSC has no jurisdiction to regulate the provisioning of its DSL service over CLEC voice loops. This argument is couched on the presumption that Staff's recommendation would essentially amount to LPSC regulation of DSL, which is a federally tariffed service. This argument fails to consider the basis of Staff's Recommendation in U-22252-E, i.e. the anticompetitive effect BellSouth's practice has on CLEC voice customers in violation of relevant LPSC, as well as FCC, rules and regulations, by restraining voice competition. Despite BellSouth's arguments to the contrary, Staff's Recommendation in docket U-22252-E is entirely consistent with the Telecommunications Act, the Line Sharing Order and Line Sharing Remand Order.

The prevailing theme of the Local Competition Regulations is the Commission's goal of promoting competition in the local telecommunications market. Conversely, any practice that has a detrimental effect on competition is inconsistent and should be rectified. Further, Section 701 of the Local Competition Regulations, which established BellSouth's Consumer Price Protection Plan, provides in Section 701 G. 10, "Tying

arrangements are prohibited.”⁹ Staff concluded that not only is BellSouth’s current practice regarding the provisioning of its DSL service anti-competitive, it is also a “tying arrangement.” Simply put, BellSouth, as the dominant voice and DSL provider in Louisiana, is tying the provision of its DSL service to its voice service. Only end-users who receive voice service from BellSouth, or end-users of a CLEC reselling BellSouth’s voice service, may receive BellSouth DSL.

Claims that various RBOCs are behaving in an anti-competitive matter concerning the provision of their DSL services to voice service are not new. In support of their policy, RBOCs have continuously argued the provision of DSL is federally regulated and as such cannot be addressed by state commissions. WorldCom’s first raised this issue in Louisiana in its reply comments filed in Docket U-22252-E.¹⁰ To Staff’s knowledge, the RBOC argument has never been successful, as each state commission addressing DSL related issues has done so based on its authority to promote voice competition and address anti-competitive behavior.¹¹

In addition to orders cited by the CLECs, the Michigan Public Service Commission, in an order issued in Case No. U-13193 on June 6, 2002 (“Michigan Order”), determined that Ameritech’s practices concerning the provisioning of its DSL services were anti-competitive and therefore violated state law.¹² As was the case in the Florida Order, the Michigan Commission addressed issues identical to those being considered in this docket. Staff’s Recommendation in U-22252-E, and its recommendation herein, are consistent with both orders.

BellSouth’s was correct in saying the FCC’s Line Sharing Order did not create an obligation that ILECs continue to provide DSL service when they are no longer the voice provider.¹³ However, neither the Line Sharing Order, nor the Line Sharing Remand Order prohibited states from regulating anti-competitive behavior or illegal tying arrangements. In fact, the FCC specifically stated in the Line Sharing Remand Order,

To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the

⁹ A similar provision applying to all certificated TSPs is contained in Section 301 J. 2 of the Local Competition Regulations.

¹⁰ Staff’s recommendation in U-22252-E was based on its consideration of those initial comments, as well as BellSouth’s subsequent reply

¹¹ See California Order at pages 6-11, Florida Order at pages 7-9.

¹² See Michigan Order at page 15.

¹³ As a reminder, the DC Circuit has vacated the Line Sharing Order.

Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action.

Clearly the above pronouncement grants this Commission authority to rule on the issue before it without infringing on the FCC's jurisdiction, as the LPSC is acting in furtherance of its goal (and the FCC's) to promote competition, not attempting to regulate DSL service.

Staff concluded that any perceived conflicts between FCC and LPSC jurisdiction raised by BellSouth should be of no concern to this Commission, as it clearly has the authority to determine BellSouth's practices are contrary to LPSC rules and regulations, without fear of infringing on the FCC's jurisdiction or non-regulated areas.

C. Technical Issues

Staff's discussion of technical issues will be brief. Simply put, there is no technical reason set forth by BellSouth or the CLECs as to why BellSouth's DSL service cannot be provisioned over CLEC voice loops. As mentioned throughout this recommendation, BellSouth's current practice is based on an internal policy decision.

D. Operational Issues

As set forth in Staff's Recommendation in docket U-22252-E, BellSouth's obligation to provide its DSL service over CLEC voice loops could be stayed if BellSouth provided evidence of "substantial operational issues" that must be resolved. Essentially this docket gives the parties the opportunity to review any such operational issues prior to any Commission Order being issued.

As summarized herein, all operational issues addressed by BellSouth in its comments involve additional costs it believes it would incur if it loses control of the local loop, but is still required to provide its DSL service. In response to these operational issues, Staff first notes that in U-22252-E, Staff recommended that CLECs not be allowed to charge BellSouth for use of its UNE loops. Despite the fact that SECCA has suggested otherwise, Staff had no intention of modifying that portion of the recommendation. Therefore, any concerns relative to costs assessed to BellSouth for using the CLEC loop are moot.

Interestingly enough, the remainder of operational issues raised by BellSouth are arguably the same operational issues that exist for competitive DSL providers that do not control the voice portion of the loop. Any DLEC or CLEC providing DSL services only (i.e., one that is not also the voice provider) is in the same position. However, BellSouth argued such an arrangement causes operational issues that would drive up the costs of its DSL. As an alternative, BellSouth proposed CLECs convert UNE loops of BellSouth DSL customers to resale, thereby allowing BellSouth to continue controlling the loop. As evidenced by the comments, not only was such a suggestion infeasible to some CLECs, it would only increase the costs and operational issues associated with providing voice service. Staff was not convinced that any of the operational issues provided by BellSouth were substantial enough to warrant it being absolved of providing its DSL service to CLEC voice customers. If anything, they suggested to Staff that BellSouth is leveraging position as the dominant voice provider with control of the network, to give itself another advantage over CLEC DSL providers.

Accordingly, Staff reemphasized its U-22252-E recommendation to make it clear that BellSouth should not only be required to provision its DSL service to end-users over CLEC voice loops, but must do so utilizing the same non-discriminatory rates, terms and conditions it provides such services to its voice customers, as BellSouth's comments suggest it may simply raise the price of DSL to CLEC voice customers in such a fashion that Staff's Recommendation is rendered moot.

IV. SUMMARY OF BELL SOUTH'S EXCEPTIONS TO STAFF'S PROPOSED RECOMMENDATION

BellSouth's exceptions to Staff's Proposed Recommendation were filed on August 12, 2002, along with three affidavits. As set forth in the filing, BellSouth took exception with Staff's Recommendation in six specific areas, arguing: 1. The Commission's Rules of Practice and Procedure do not authorize Staff to proceed in the manner it did in this docket; 2. The Commission does not have jurisdiction to alter or otherwise regulate BellSouth's Interstate Services; 3. Staff's Presumption that the Commission has prejudged this matter is wholly inappropriate; 4. CLEC Profit Margin, not customer choice is the core issue; 5. Operational issues exist and 6. KMC's

Complaints referred to by Staff are unfounded. Rather than provide an exhaustive summary of these comments, Staff responded to the exceptions in its Final Recommendation.

V. CLEC REPLY COMMENTS

As mentioned *infra*, reply comments to BellSouth's Exceptions were received from WorldCom, SECCA, KMC, Access, DeltaCom, Xspedius and NewSouth. These reply comments addressed BellSouth's exceptions, provided support for the adoption of Staff's Proposed Recommendation, and included affidavits and other exhibits as attachments. No exceptions to Staff's Proposed Recommendation were received from the CLECs. Similarly as with BellSouth's comments, rather than providing an exhaustive summary of the reply comments, Staff addressed the comments in its Final Recommendation.

VI. INFORMAL TECHNICAL CONFERENCE

Following receipt of BellSouth's exceptions and the replies thereto, Staff presided over an informal technical conference. Representatives of BellSouth, several CLECs, as well as Commissioners Blossman and Sittig and Commission Staff, were present at the technical conference. The parties were given an opportunity to respond to the latest filings, ask and field questions and provide further support for their respective positions. Particularly, BellSouth witness Ruscilli went into detail explaining why he concluded in his affidavit that resale is a valid option for the CLECs and BellSouth witness Milner explained his affidavit relative to Operational Issues. Following BellSouth's presentations, CLEC witnesses were given the opportunity to respond and/or ask questions of the witnesses. Questions were also posed by the Commissioners and Staff. Specifically questions were asked as to who would invest in order to ensure the entire state has DSL available. No affirmative response to deploy was received from the CLECs. In addition to the exceptions and replies, Staff considered this information in support of its recommendation.

VII. STAFF'S FINAL RECOMMENDATION

As stated herein, Staff's role in this docket was to determine whether any policy or operational issues existed that would prohibit BellSouth from providing its ADSL service over CLEC loops. That is precisely what Staff considered in detail in its Proposed Recommendation, with Staff ultimately concluding that no such operational or policy issues existed. As no exceptions were provided by the CLECs, Staff's Final Recommendation focused on BellSouth's Exceptions and any impact they had on Staff's Proposed Recommendation.

A. Staff's Reply to Exceptions 1 and 3.

Interestingly, BellSouth began its exceptions not by questioning Staff's Proposed Recommendation, but by questioning the rulemaking procedure employed. BellSouth concluded the procedure violated not only the Commission's Rules of Practice and Procedure, but also Article IV § 21 of the Louisiana Constitution. BellSouth suggested as a remedy the Commission opening up a docket to establish concrete rules for such proceedings. A simple review of recent Commission history would question the correctness of this assumption. Staff, through the undersigned counsel, has been either counsel of record or co-counsel of record in numerous Commission rulemaking proceedings (and all of which included BellSouth as a party) in which essentially the same procedural rules were followed, without objection from BellSouth or others.¹⁴

Further troubling was BellSouth's statement that it was under the impression "Staff would consider the issues presented in this docket in a full and comprehensive manner as the 271 Order requires."¹⁵ Staff assumed BellSouth's was suggesting Staff's consideration of rounds of comments and exhibits received by the parties, numerous informal meetings addressing the issues, review of relevant FCC, LPSC and other PSC decisions, the result of which was a 24 page recommendation, was insufficient. The presumption referred to by Staff, to which BellSouth takes exception, did not in any way diminish the amount of consideration, time and effort that went into Staff's

¹⁴ U-23445, U-23446, U-24050, U-25754, R-26171 and R-26438 were all Rulemaking dockets involving Telecommunications issues. In most instances, fewer comments were received than allowed in this proceeding. Further, BellSouth did not question the procedure followed herein until after Staff's Recommendation, which took a contrary position, was issued.

¹⁵ BellSouth's Exceptions to Staff's Proposed Recommendation at page 5.

Recommendation. It was only after consideration of all information contained in this record that Staff issued its Proposed Recommendation. Nonetheless, any attempts to suggest the Procedure followed herein by Staff were inconsistent with the Commission's Rules and Regulations should be simply dismissed as an effort to create additional issues the Commission must consider.

B. Staff's Reply to Exception 2.

BellSouth also raised many of the same jurisdictional issues contained in its original comments in its exceptions. BellSouth suggested the effect of Staff's recommendation would be the imposition of disincentive to the deployment of DSL service, rather than the goal of promoting the accessibility of new and innovative services. Such a statement creates a slippery slope for Staff (and BellSouth) to tread upon. How can the Commission promote the deployment of a service over which BellSouth argues it has no jurisdiction over? Should Staff assume it is ok for the Commission to establish rules relative to interstate services, provided they only benefit the provider of such services?

By no means was Staff suggesting this recommendation would amount to a regulation of DSL services, however, it is interesting that BellSouth would have the Commission believe the Recommendation would hinder the further deployment of such services. According to BellSouth's experts, approximately 70-75% of BellSouth customers in Louisiana have access to its DSL, while only 5% or so subscribe to it. Staff argued if any disincentive exists prohibiting BellSouth from further deploying its services, it was the demand for the product, not any order of this Commission. Staff's Recommendation, if adopted, would only require BellSouth to continue providing its DSL service to customers currently receiving the service when they switch voice providers, and to voice customers of CLECs opting to receive the service, essentially meaning BellSouth will derive more revenue for its non-regulated service, in addition to furthering competition in the voice market.

BellSouth also objected to Staff's classification that BellSouth is "tying" its DSL service to its voice service, suggesting Staff has transformed this proceeding into an enforcement action. BellSouth's suggestion disregards the fact that Staff had

recommended no penalties, fines or other administrative remedies be levied against BellSouth, only that it (BellSouth) rectify any potential anti-competitive behavior. Staff agreed with SECCA that this Commission has the jurisdiction to rectify any potentially anti-competitive behavior without the necessity of instituting an enforcement action.

C. Staff's Reply to Exception 4.

In this exception, BellSouth provided arguments and testimony in support of its position that resale is a valid option for the CLECs, further arguing CLECs simply choose not to use it for cost reasons. While Staff appreciated BellSouth's comments relative to CLEC profit margins and the work done by Mr. Ruscilli relative to the costs associated with UNE-P versus resale, it respectfully disagreed with the conclusion. UNE-P has been recognized by this Commission as a valid form of competition, most recently in BellSouth's 271 application. As long as it is treated as such, CLECs should have the choice to determine how they choose to compete, rather than the choice being made by their competition. Not only does BellSouth's "Resale Option" restrict the mode of entry a CLEC can use, it also restricts the service offering that can be made to those services contained in BellSouth's tariffs. For example, a CLEC such as WorldCom could not offer its "Neighborhood" plan via resale because BellSouth provides no similarly bundled service it can resell.

D. Staff's Reply to Exception 5.

Despite what is suggested by the CLECs in their reply comments, Staff never determined there were no operational issues that may be incurred by BellSouth. Staff simply concluded that none of the issues were substantial enough to warrant BellSouth being absolved from following Staff's Proposed Recommendation. BellSouth's exceptions and affidavits shed further light on the potential operational issues it believes it will encounter if forced to implement Staff's Recommendation. While BellSouth qualified these operational issues as being burdensome, Staff believed the actual effect of the operational changes must specifically be determined before they absolve BellSouth from implementing Staff's Recommendation. For example, at least two of the operational issues raised by Mr. Milner in his affidavit were rendered moot by Staff's

Proposed Recommendation wherein Staff concluded that CLECs should be prevented from charging BellSouth for use of the high frequency portion of the loop. While there is some overlap, the majority of the remaining operational issues would only apply when BellSouth is required to provide its DSL over CLEC voice loops, not UNE-P. Nonetheless, based on the above, Staff was willing to clarify its recommendation to the extent that the operational issues related specifically to UNE loops (facilities based providers) are later determined to be overly burdensome. If such a determination were made, Staff would recommend that BellSouth be required to provide its DSL service only to CLEC customers via UNE-P, provided that BellSouth shall not prematurely disconnect voice and data service to a customer converting service from BellSouth to a facility based CLEC. Should a premature disconnection occur, BellSouth shall be fined up to \$10,000.00 per occurrence, as well as provide a full refund to the customer for the previous month's voice and data service. Additionally, Staff noted that due to the regional nature of BellSouth's Operational Support Systems, any final decision of a Commission in the BellSouth region on this issue would require BellSouth to make the necessary operational changes, thereby re-instituting Staff's original recommendation.

E. Staff's Reply to Exception 6.

Finally, BellSouth suggests that Staff wrongfully relied on KMC's allegations, suggesting KMC has a history of make allegations without any factual support. Such a suggestion is obviously refuted by the information provided to Staff counsel by KMC in Docket U-22252-E and the series of Collaborative workshops, which were referenced in support of the finding. Copies of those filings are contained herein.

VIII CONCLUSION AND COMMISSION CONSIDERATION

For the reasons stated above, Staff recommended that its recommendation, as contained in docket U-22252-E, and as modified in this docket, be adopted. The matter was considered at the Commission's December 18, 2002 Business and Executive Session. Following oral argument, Commissioner Field moved to accept Staff's Final Recommendation, adding the following provision: "The Louisiana Public Service Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale

or retail DSL service." Following a second by Commissioner Sittig, Commissioner Blossman read a letter from Congressman Billy Tauzin into the record. Roll was taken, with Commissioners Field, Sittig and Dixon voting yes, Commissioner Blossman voting no and Commissioner Owen absent.

IT IS THEREFORE ORDERED THAT

1. Staff's Final Recommendation, for the reasons set forth herein, is adopted.
2. The Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service.
3. This Order shall be effective immediately.

**BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
January 24, 2003**

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
CHAIRMAN JACK "JAY" A. BLOSSMAN

/S/ ABSENT
DISTRICT V
VICE-CHAIRMAN DON OWEN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

/S/ C. DALE SITTIG
DISTRICT IV
COMMISSIONER C. DALE SITTIG

LAWRENCE C. ST. BLANC
SECRETARY

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

LOUISIANA PUBLIC SERVICE COMMISSION

CLARIFICATION ORDER R-26173-A

Docket R- 26173, Louisiana Public Service Commission, ex parte. In re: BellSouth's provision of ADSL Service to end-users over CLEC loops- Pursuant to the Commission's directive in Order U-22252-E.

(Decided at the March 19, 2003 Business and Executive Session.)
(Clarifies Order R-26173 dated January 24, 2003)

I. BACKGROUND

The Louisiana Public Service Commission Staff ("Staff") filed its Final Recommendation in Docket Number U-22252-E, *In re: BellSouth's Section 271 Pre-application*, on August 31, 2001. Among the numerous issues addressed therein was a discussion of MCI WorldCom Communications, Inc.'s ("WorldCom") contentions regarding BellSouth Telecommunication's, Inc. ("BellSouth") practices in line splitting arrangements.¹ Staff described its understanding of the policy as follows: "BellSouth will not provide a customer with its retail DSL service unless that customer also purchases its voice service from BellSouth."² After discussing the matter in greater detail, Staff ultimately recommended the following:

That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.³

Staff's Final Recommendation, in docket U-22252, Subdocket E, was considered by the Louisiana Public Service Commission ("LPSC", "Commission") at its September 19, 2001 Business and Executive Session. At that Session, Commissioner Blossman moved to adopt Staff's Final Recommendation, with a few modifications, one of which directly addressed the above quoted section. The motion directed Staff to further study the issue

¹ Staff's Final Recommendation, Docket U-22252-E, pages 86-87.

² Id at 86.

³ Id at 113.

of whether BellSouth should be required to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice services. The motion was unanimously adopted by the Commission and memorialized in Order U-22252-E, issued September 21, 2001.

In compliance with the Commission's directive, Staff opened and published the following in the Commission's Official Bulletin dated December 7, 2001 Docket R-26173,

Pursuant to the Commission's directive in Order U-22252-E, Staff was to further study the issue of whether BellSouth Telecommunications, Inc. should be required to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice services.

Parties were given 25 days to intervene and/or file comments in the docket. Interventions and/or initial comments were received from the following parties: ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom ("DeltaCom"), Xspedius Corporation ("Xspedius"), Cox Louisiana Telecom, L.L.C., d/b/a Cox Communications ("Cox"), NewSouth Communications Corporation ("NewSouth"), Access Integrated Networks, Inc. ("Access"), BellSouth, KMC Telecom, Inc. ("KMC") and the Southeastern Competitive Carriers Association ("SECCA").

Following the receipt of initial comments, Staff received both formal and informal requests from the interveners to file additional/reply comments. By notice dated May 9, 2002, Staff granted the parties the opportunity to file additional comments by May 24, 2002. The following parties provided additional/reply comments: BellSouth, KMC, SECCA and WorldCom. Access, DeltaCom, NewSouth and Xspedius jointly filed reply comments.

After thoroughly reviewing all initial and reply comments, Staff issued a Proposed Recommendation on July 10, 2002. In order to clarify the opportunity for exceptions and replies to the recommendation, a Procedural Schedule and Order was issued on July 25, 2002. Exceptions were received only from BellSouth. Reply comments were received from KMC, WorldCom and SECCA and jointly from DeltaCom, Access, NewSouth and Xspedius. Additionally, an informal technical conference was held on September 3, 2002, with representatives from all of the above parties present. In connection with its review, Staff prepared a detailed summary of all

initial and reply comments which was included in the Proposed Recommendation issued July 10, 2002. A short summary of the exceptions and replies to the Proposed Recommendation are included herein.

II. JURISDICTION

The powers and duties of the Louisiana Public Service Commission are contained in Article IV § 21 of the Louisiana Constitution of 1974. As stated therein, the Commission has the authority to:

“regulate all common carriers and public utilities and has all other regulatory authority as provided by law. The Commission shall adopt and enforce reasonable rules, regulations and procedures which are necessary for the discharge of its duties including other powers and duties as provided by law.”

Pursuant to its constitutional authority, the Commission adopted the Regulations for Competition in the Local Telecommunications Market (“Local Competition Regulations”, “Regulations”)⁴, as most recently amended by the April 5, 2000 General Order (“General Order”). As stated in the Preamble to the Regulations,

Through the development of effective competition, which promotes the accessibility of new and innovative services at non-discriminatory prices consumers can and are willing to pay, and which results in wider deployment of existing services at competitive prices, the public interest will be promoted.

Section 201. A. of the Local Competition Regulations describes the public policy as follows:

(T)he Louisiana Public Service Commission hereby finds, determines and declares that the promotion of competition in all local telecommunications markets in Louisiana is in the public interest.

In furtherance of the above stated goal to promote competition in all local telecommunications markets in Louisiana, this Commission has initiated a number of rule-making proceedings. One such proceeding, Docket U-22252-C *In re: BellSouth Telecommunications, Inc. Service Quality Measurements*, established performance measurements to monitor the service BellSouth provides to its competitors. No less than four orders have been issued in that docket, all of which have fostered the Commission’s goals of promoting competition. Further, Docket U-24714, Subdocket A, *In re: Final*

⁴ The actual Regulations are contained in “Appendix B” to the General Order.

Deaveraging of BellSouth Telecommunications, Inc., UNE Rates, established new cost based rates for UNEs available to CLECs. Staff notes that following the issuance of the Order in that docket, many new competitors have entered the market. Additionally, in connection with Staff's review of BellSouth's 271 pre-application filing in Docket U-22252-E, several recommendations were made to further promote competition.

III. SUMMARY OF STAFF'S PROPOSED RECOMMENDATION

In Docket U-22252-E, Staff made the following recommendation:

That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.

When the matter was considered at the Commission's September 2001 Business and Executive Session, the Commission voted to accept Staff's Recommendation, with Staff directed to determine whether ADSL service could be added to UNE lines in the future.⁵

Order U-22252, E memorialized the Commission's vote, instructing Staff to,

further study the issue of requiring BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service until such time as the operational and policy issues associated therewith are fully explored.⁶

Based on the above, a presumption existed that Staff's Recommendation in Docket U-22252, E should be adopted, absent any "operational or policy issues" prohibiting its implementation. Comments received from the parties suggested additional concerns must also be addressed, as evidenced by comments received relative to possible jurisdictional and technical issues. Neither the vote of the Commission, nor the directive of the order, suggested any such issues were a concern prior to this docket being opened. Nonetheless, to insure all issues are thoroughly explored, Staff's Proposed

⁵ See Official Transcripts of the September 21, 2001 Business and Executive Session.

⁶ Order U-22252, E.

Recommendation addressed not only "operational and policy" issues, but jurisdictional and technical issues as well. Based on the following conclusions, it was Staff's opinion that the recommendation set forth in docket U-22252-E be reaffirmed and adopted.

A. Policy Issues

Before addressing any "policy" arguments made by the parties, Staff reminded that parties that this Commission's policy, as stated in the Local Competition rules, is to promote competition in all telecommunications markets. Adopting Staff's Recommendation in U-22252, subdocket E will promote that goal, by allowing more end-users to choose an alternative voice provider without fear of losing their DSL service. BellSouth's policy of refusing to provide its DSL service over CLEC voice loops is clearly at odds with the Commission's policy to encourage competition. Likewise, BellSouth's contention that such a regulation would diminish competition in the DSL market is not consistent with the comments received.

Pursuant to its current DSL policy, BellSouth "simply chooses not to sell DSL service that work on CLEC loops."⁷ As summarized in KMC's comments, BellSouth's policy actually deters customers from switching to other providers, thus hindering competition not only in the voice market, but the DSL market as well. Various other examples of the anti-competitive effects of this policy were contained in the CLEC's comments⁸, including (1) disconnection of BellSouth DSL service when an end-user changes voice providers, (2) placing codes on Customer Service Records ("CSRs") that must be removed before transferring service, (3) placing DSL service on primary lines in multi-line situations without explaining the consequences to the end-user and (4) transferring back voice service if BellSouth's DSL is subsequently placed on the primary line. Interestingly enough, the only of the above examples BellSouth addressed in its reply comments is the primary line issue, referring Staff to the FCC's 271 order. BellSouth's failure to even dismiss or deny the other examples caused Staff grave concern, as any of the above puts a voice CLEC in a clear competitive disadvantage by

⁷ See reply affidavit of Thomas G. Williams filed June 25, 2001 in Docket U-22252-E at page 11.

⁸ A detailed summary of the initial comments filed by all parties is contained in Staff's Proposed Recommendation issued in this docket on July 10, 2002.

creating more "hoops" a CLEC must jump through to provide voice service, as outlined in Staff's summary of the individual comments.

Rather than discuss the above concerns, BellSouth argued the Commission should make inquiries relative to the investments, personnel and taxes CLECs have made in Louisiana before it makes a decision. Staff was at a loss as to how any of this information, if obtained, would be of any benefit to the Commission or Staff. In furtherance of this position, BellSouth filed a Motion for Leave to Propound Data Requests on June 28, 2002. Staff was concerned this filing could not only result in an unnecessary delay in the issuance of Staff's Recommendation, but also could broaden the scope of the docket beyond the Commission's directive.

In conclusion, the Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive affects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited.

B. Jurisdictional Issues

While "jurisdictional issues" were not contemplated in the Commission's directive, Staff believed it was important to address this Commission's jurisdiction and how it is consistent with that of the FCC. BellSouth's argued the LPSC has no jurisdiction to regulate the provisioning of its DSL service over CLEC voice loops. This argument is couched on the presumption that Staff's recommendation would essentially amount to LPSC regulation of DSL, which is a federally tariffed service. This argument fails to consider the basis of Staff's Recommendation in U-22252-E, i.e. the anticompetitive effect BellSouth's practice has on CLEC voice customers in violation of relevant LPSC, as well as FCC, rules and regulations, by restraining voice competition. Despite BellSouth's arguments to the contrary, Staff's Recommendation in docket U-22252-E is entirely consistent with the Telecommunications Act, the Line Sharing Order and Line Sharing Remand Order.

The prevailing theme of the Local Competition Regulations is the Commission's goal of promoting competition in the local telecommunications market. Conversely, any practice that has a detrimental effect on competition is inconsistent and should be rectified. Further, Section 701 of the Local Competition Regulations, which established

BellSouth's Consumer Price Protection Plan, provides in Section 701 G. 10, "Tying arrangements are prohibited."⁹ Staff concluded that not only is BellSouth's current practice regarding the provisioning of its DSL service anti-competitive, it is also a "tying arrangement." Simply put, BellSouth, as the dominant voice and DSL provider in Louisiana, is tying the provision of its DSL service to its voice service. Only end-users who receive voice service from BellSouth, or end-users of a CLEC reselling BellSouth's voice service, may receive BellSouth DSL.

Claims that various RBOCs are behaving in an anti-competitive matter concerning the provision of their DSL services to voice service are not new. In support of their policy, RBOCs have continuously argued the provision of DSL is federally regulated and as such cannot be addressed by state commissions. WorldCom's first raised this issue in Louisiana in its reply comments filed in Docket U-22252-E.¹⁰ To Staff's knowledge, the RBOC argument has never been successful, as each state commission addressing DSL related issues has done so based on its authority to promote voice competition and address anti-competitive behavior.¹¹

In addition to orders cited by the CLECs, the Michigan Public Service Commission, in an order issued in Case No. U-13193 on June 6, 2002 ("Michigan Order"), determined that Ameritech's practices concerning the provisioning of its DSL services were anti-competitive and therefore violated state law.¹² As was the case in the Florida Order, the Michigan Commission addressed issues identical to those being considered in this docket. Staff's Recommendation in U-22252-E, and its recommendation herein, are consistent with both orders.

BellSouth's was correct in saying the FCC's Line Sharing Order did not create an obligation that ILECs continue to provide DSL service when they are no longer the voice provider.¹³ However, neither the Line Sharing Order, nor the Line Sharing Remand Order prohibited states from regulating anti-competitive behavior or illegal tying arrangements. In fact, the FCC specifically stated in the Line Sharing Remand Order,

⁹ A similar provision applying to all certificated TSPs is contained in Section 301 J. 2 of the Local Competition Regulations.

¹⁰ Staff's recommendation in U-22252-E was based on its consideration of those initial comments, as well as BellSouth's subsequent reply

¹¹ See California Order at pages 6-11, Florida Order at pages 7-9.

¹² See Michigan Order at page 15.

¹³ As a reminder, the DC Circuit has vacated the Line Sharing Order.

To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action.

Clearly the above pronouncement grants this Commission authority to rule on the issue before it without infringing on the FCC's jurisdiction, as the LPSC is acting in furtherance of its goal (and the FCC's) to promote competition, not attempting to regulate DSL service.

Staff concluded that any perceived conflicts between FCC and LPSC jurisdiction raised by BellSouth should be of no concern to this Commission, as it clearly has the authority to determine BellSouth's practices are contrary to LPSC rules and regulations, without fear of infringing on the FCC's jurisdiction or non-regulated areas.

C. Technical Issues

Staff's discussion of technical issues will be brief. Simply put, there is no technical reason set forth by BellSouth or the CLECs as to why BellSouth's DSL service cannot be provisioned over CLEC voice loops. As mentioned throughout this recommendation, BellSouth's current practice is based on an internal policy decision.

D. Operational Issues

As set forth in Staff's Recommendation in docket U-22252-E, BellSouth's obligation to provide its DSL service over CLEC voice loops could be stayed if BellSouth provided evidence of "substantial operational issues" that must be resolved. Essentially this docket gives the parties the opportunity to review any such operational issues prior to any Commission Order being issued.

As summarized herein, all operational issues addressed by BellSouth in its comments involve additional costs it believes it would incur if it loses control of the local loop, but is still required to provide its DSL service. In response to these operational issues, Staff first notes that in U-22252-E, Staff recommended that CLECs not be allowed to charge BellSouth for use of its UNE loops. Despite the fact that SECCA has suggested otherwise, Staff had no intention of modifying that portion of the recommendation. Therefore, any concerns relative to costs assessed to BellSouth for using the CLEC loop are moot.

Interestingly enough, the remainder of operational issues raised by BellSouth are arguably the same operational issues that exist for competitive DSL providers that do not control the voice portion of the loop. Any DLEC or CLEC providing DSL services only (i.e., one that is not also the voice provider) is in the same position. However, BellSouth argued such an arrangement causes operational issues that would drive up the costs of its DSL. As an alternative, BellSouth proposed CLECs convert UNE loops of BellSouth DSL customers to resale, thereby allowing BellSouth to continue controlling the loop. As evidenced by the comments, not only was such a suggestion infeasible to some CLECs, it would only increase the costs and operational issues associated with providing voice service. Staff was not convinced that any of the operational issues provided by BellSouth were substantial enough to warrant it being absolved of providing its DSL service to CLEC voice customers. If anything, they suggested to Staff that BellSouth is leveraging position as the dominant voice provider with control of the network, to give itself another advantage over CLEC DSL providers.

Accordingly, Staff reemphasized its U-22252-E recommendation to make it clear that BellSouth should not only be required to provision its DSL service to end-users over CLEC voice loops, but must do so utilizing the same non-discriminatory rates, terms and conditions it provides such services to its voice customers, as BellSouth's comments suggest it may simply raise the price of DSL to CLEC voice customers in such a fashion that Staff's Recommendation is rendered moot.

IV. SUMMARY OF BELL SOUTH'S EXCEPTIONS TO STAFF'S PROPOSED RECOMMENDATION

BellSouth's exceptions to Staff's Proposed Recommendation were filed on August 12, 2002, along with three affidavits. As set forth in the filing, BellSouth took exception with Staff's Recommendation in six specific areas, arguing: 1. The Commission's Rules of Practice and Procedure do not authorize Staff to proceed in the manner it did in this docket; 2. The Commission does not have jurisdiction to alter or otherwise regulate BellSouth's Interstate Services; 3. Staff's Presumption that the Commission has prejudged this matter is wholly inappropriate; 4. CLEC Profit Margin, not customer choice is the core issue; 5. Operational issues exist and 6. KMC's

Complaints referred to by Staff are unfounded. Rather than provide an exhaustive summary of these comments, Staff responded to the exceptions in its Final Recommendation.

V. CLEC REPLY COMMENTS

As mentioned infra, reply comments to BellSouth's Exceptions were received from WorldCom, SECCA, KMC, Access, DeltaCom, Xspedius and NewSouth. These reply comments addressed BellSouth's exceptions, provided support for the adoption of Staff's Proposed Recommendation, and included affidavits and other exhibits as attachments. No exceptions to Staff's Proposed Recommendation were received from the CLECs. Similarly as with BellSouth's comments, rather than providing an exhaustive summary of the reply comments, Staff addressed the comments in its Final Recommendation.

VI. INFORMAL TECHNICAL CONFERENCE

Following receipt of BellSouth's exceptions and the replies thereto, Staff presided over an informal technical conference. Representatives of BellSouth, several CLECs, as well as Commissioners Blossman and Sittig and Commission Staff, were present at the technical conference. The parties were given an opportunity to respond to the latest filings, ask and field questions and provide further support for their respective positions. Particularly, BellSouth witness Ruscilli went into detail explaining why he concluded in his affidavit that resale is a valid option for the CLECs and BellSouth witness Milner explained his affidavit relative to Operational Issues. Following BellSouth's presentations, CLEC witnesses were given the opportunity to respond and/or ask questions of the witnesses. Questions were also posed by the Commissioners and Staff. Specifically questions were asked as to who would invest in order to ensure the entire state has DSL available. No affirmative response to deploy was received from the CLECs. In addition to the exceptions and replies, Staff considered this information in support of its recommendation.

VII. STAFF'S FINAL RECOMMENDATION

As stated herein, Staff's role in this docket was to determine whether any policy or operational issues existed that would prohibit BellSouth from providing its ADSL service over CLEC loops. That is precisely what Staff considered in detail in its Proposed Recommendation, with Staff ultimately concluding that no such operational or policy issues existed. As no exceptions were provided by the CLECs, Staff's Final Recommendation focused on BellSouth's Exceptions and any impact they had on Staff's Proposed Recommendation.

A. Staff's Reply to Exceptions 1 and 3.

Interestingly, BellSouth began its exceptions not by questioning Staff's Proposed Recommendation, but by questioning the rulemaking procedure employed. BellSouth concluded the procedure violated not only the Commission's Rules of Practice and Procedure, but also Article IV § 21 of the Louisiana Constitution. BellSouth suggested as a remedy the Commission opening up a docket to establish concrete rules for such proceedings. A simple review of recent Commission history would question the correctness of this assumption. Staff, through the undersigned counsel, has been either counsel of record or co-counsel of record in numerous Commission rulemaking proceedings (and all of which included BellSouth as a party) in which essentially the same procedural rules were followed, without objection from BellSouth or others.¹⁴

Further troubling was BellSouth's statement that it was under the impression "Staff would consider the issues presented in this docket in a full and comprehensive manner as the 271 Order requires."¹⁵ Staff assumed BellSouth's was suggesting Staff's consideration of rounds of comments and exhibits received by the parties, numerous informal meetings addressing the issues, review of relevant FCC, LPSC and other PSC decisions, the result of which was a 24 page recommendation, was insufficient. The presumption referred to by Staff, to which BellSouth takes exception, did not in any way diminish the amount of consideration, time and effort that went into Staff's

¹⁴ U-23445, U-23446, U-24050, U-25754, R-26171 and R-26438 were all Rulemaking dockets involving Telecommunications issues. In most instances, fewer comments were received than allowed in this proceeding. Further, BellSouth did not question the procedure followed herein until after Staff's Recommendation, which took a contrary position, was issued.

¹⁵ BellSouth's Exceptions to Staff's Proposed Recommendation at page 5.

Recommendation. It was only after consideration of all information contained in this record that Staff issued its Proposed Recommendation. Nonetheless, any attempts to suggest the Procedure followed herein by Staff were inconsistent with the Commission's Rules and Regulations should be simply dismissed as an effort to create additional issues the Commission must consider.

B. Staff's Reply to Exception 2.

BellSouth also raised many of the same jurisdictional issues contained in its original comments in its exceptions. BellSouth suggested the effect of Staff's recommendation would be the imposition of disincentive to the deployment of DSL service, rather than the goal of promoting the accessibility of new and innovative services. Such a statement creates a slippery slope for Staff (and BellSouth) to tread upon. How can the Commission promote the deployment of a service over which BellSouth argues it has no jurisdiction over? Should Staff assume it is ok for the Commission to establish rules relative to interstate services, provided they only benefit the provider of such services?

By no means was Staff suggesting this recommendation would amount to a regulation of DSL services, however, it is interesting that BellSouth would have the Commission believe the Recommendation would hinder the further deployment of such services. According to BellSouth's experts, approximately 70-75% of BellSouth customers in Louisiana have access to its DSL, while only 5% or so subscribe to it. Staff argued if any disincentive exists prohibiting BellSouth from further deploying its services, it was the demand for the product, not any order of this Commission. Staff's Recommendation, if adopted, would only require BellSouth to continue providing its DSL service to customers currently receiving the service when they switch voice providers, and to voice customers of CLECs opting to receive the service, essentially meaning BellSouth will derive more revenue for its non-regulated service, in addition to furthering competition in the voice market.

BellSouth also objected to Staff's classification that BellSouth is "tying" its DSL service to its voice service, suggesting Staff has transformed this proceeding into an enforcement action. BellSouth's suggestion disregards the fact that Staff had

recommended no penalties, fines or other administrative remedies be levied against BellSouth, only that it (BellSouth) rectify any potential anti-competitive behavior. Staff agreed with SECCA that this Commission has the jurisdiction to rectify any potentially anti-competitive behavior without the necessity of instituting an enforcement action.

C. Staff's Reply to Exception 4.

In this exception, BellSouth provided arguments and testimony in support of its position that resale is a valid option for the CLECs, further arguing CLECs simply choose not to use it for cost reasons. While Staff appreciated BellSouth's comments relative to CLEC profit margins and the work done by Mr. Ruscilli relative to the costs associated with UNE-P versus resale, it respectfully disagreed with the conclusion. UNE-P has been recognized by this Commission as a valid form of competition, most recently in BellSouth's 271 application. As long as it is treated as such, CLECs should have the choice to determine how they choose to compete, rather than the choice being made by their competition. Not only does BellSouth's "Resale Option" restrict the mode of entry a CLEC can use, it also restricts the service offering that can be made to those services contained in BellSouth's tariffs. For example, a CLEC such as WorldCom could not offer its "Neighborhood" plan via resale because BellSouth provides no similarly bundled service it can resell.

D. Staff's Reply to Exception 5.

Despite what is suggested by the CLECs in their reply comments, Staff never determined there were no operational issues that may be incurred by BellSouth. Staff simply concluded that none of the issues were substantial enough to warrant BellSouth being absolved from following Staff's Proposed Recommendation. BellSouth's exceptions and affidavits shed further light on the potential operational issues it believes it will encounter if forced to implement Staff's Recommendation. While BellSouth qualified these operational issues as being burdensome, Staff believed the actual effect of the operational changes must specifically be determined before they absolve BellSouth from implementing Staff's Recommendation. For example, at least two of the operational issues raised by Mr. Milner in his affidavit were rendered moot by Staff's

Proposed Recommendation wherein Staff concluded that CLECs should be prevented from charging BellSouth for use of the high frequency portion of the loop. While there is some overlap, the majority of the remaining operational issues would only apply when BellSouth is required to provide its DSL over CLEC voice loops, not UNE-P. Nonetheless, based on the above, Staff was willing to clarify its recommendation to the extent that the operational issues related specifically to UNE loops (facilities based providers) are later determined to be overly burdensome. If such a determination were made, Staff would recommend that BellSouth be required to provide its DSL service only to CLEC customers via UNE-P, provided that BellSouth shall not prematurely disconnect voice and data service to a customer converting service from BellSouth to a facility based CLEC. Should a premature disconnection occur, BellSouth shall be fined up to \$10,000.00 per occurrence, as well as provide a full refund to the customer for the previous month's voice and data service. Additionally, Staff noted that due to the regional nature of BellSouth's Operational Support Systems, any final decision of a Commission in the BellSouth region on this issue would require BellSouth to make the necessary operational changes, thereby re-instituting Staff's original recommendation.

E. Staff's Reply to Exception 6.

Finally, BellSouth suggests that Staff wrongfully relied on KMC's allegations, suggesting KMC has a history of make allegations without any factual support. Such a suggestion is obviously refuted by the information provided to Staff counsel by KMC in Docket U-22252-E and the series of Collaborative workshops, which were referenced in support of the finding. Copies of those filings are contained herein.

VIII COMMISSION CONSIDERATION AND ISSUANCE OF ORDER R-26173

For the reasons stated above, Staff recommended that its recommendation, as contained in docket U-22252-E, and as modified in this docket, be adopted. The matter was considered at the Commission's December 18, 2002 Business and Executive Session. Following oral argument, Commissioner Field moved to accept Staff's Final Recommendation, adding the following provision: "The Louisiana Public Service Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale

or retail DSL service.” Following a second by Commissioner Sittig, Commissioner Blossman read a letter from Congressman Billy Tauzin into the record. Roll was taken, with Commissioners Field, Sittig and Dixon voting yes, Commissioner Blossman voting no and Commissioner Owen absent. Order R-26173, memorializing the Commission’s vote was issued January 24, 2003, containing the following ordering language:

1. Staff’s Final Recommendation, for the reasons set forth herein, is adopted.
2. The Commission affirms that it does not regulate the rates or pricing of BellSouth’s wholesale or retail DSL service.
3. This Order shall be effective immediately.

IX CONSIDERATION OF BELL SOUTH’S MOTION FOR RECONSIDERATION

On February 3, 2003, following issuance of Order R-26173, BellSouth timely filed a Motion for Reconsideration, or in the Alternative for Clarification and/or Modification and Stay (“Motion”). MCI WorldCom, Access Integrated, Xspedius, ITC^DeltaCom and NewSouth filed oppositions to the Motion. BellSouth’s Motion was considered at the Commission’s March 19, 2003 Business and Executive Session. Commissioner Field moved to deny BellSouth’s Motion for Reconsideration, Modification and Stay. Additionally, the Commissioner made the following motion in respect to the request for clarification: (1) BellSouth is to continue to provide its wholesale and retail DSL service to customers who choose to switch voice services to a competitive local exchange carrier utilizing the Unbundled Network Element Platform. As stated in Order R-26173, this requirement likewise applies to CLEC voice customers who subsequently choose to receive BellSouth’s wholesale or retail DSL service. Should BellSouth intend to offer its DSL service in the latter scenario over a separate line/loop, it shall file a proposal for consideration by the Commission no later than May 1, 2003. Such alternative offering, if proposed, shall not discriminate against that class of voice customers. The filing of such proposal shall not delay implementation of the Order or suspend BellSouth’s current obligation to provide DSL service over the UNE-P. (2) The Commission affirms that it does not regulate the rates or pricing of BellSouth’s wholesale or retail DSL service and does not establish any pricing for BellSouth’s DSL in Order R-26173. BellSouth continues to have the flexibility under this Order to establish the price for its DSL services and offer discounts off of the established DSL price to its customers who choose packaged service offerings. (Example: BellSouth Complete Choice and

FastAccess Service). Once BellSouth establishes its price for DSL service, however, BellSouth shall not impose any additional charges for its wholesale or retail DSL service on consumers based on their choice of local voice service provider. Nothing herein shall prevent the Commission from investigating claims of anti-competitive or discriminatory pricing or practices, or violations of the Commission's Regulations for Competition in the Local Telecommunications Market. (3) The Order currently requires BellSouth to provide DSL over both the UNE-P and UNE loops. However, in light of the testimony of the facilities-based CLECs in this proceeding that they do not intend to have BellSouth provide DSL over their UNE loops, but intend to offer the consumers both voice and data services, the Commission is willing to clarify its Order. Accordingly, BellSouth is ordered to provide for a seamless transition without disconnection of consumers' voice and DSL service to the CLECs' voice and data services. BellSouth shall not require the disconnection of its wholesale or retail DSL service prior to the consumers' transition of voice and data service to that of the CLECs. BellSouth shall provide and the CLECs may provide the Commission a proposed performance measure that ensures a seamless transition of voice and data service occurs when an end-user changes voice and data service from BellSouth to a facilities-based CLEC that chooses to provide its own voice and data services to an end-user over a UNE loop no later than May 1, 2003. That measure will be included in the docket U-22252-C 6 month performance review. The filing of such proposal shall not delay implementation of the Order or suspend BellSouth's current obligation to provide DSL service over the UNE-P or to provide for the seamless transition, without disconnection, of a consumer's voice and DSL service to the CLE 's voice and data services. (4) Finally, Order R-26173 became effective on January 24, 2003. However, the Commission clarifies that BellSouth shall have until June 1, 2003, to fully implement the requirements of the Order. The motion was seconded by Commissioner Dixon, and unanimously adopted.

IT IS THEREFORE ORDERED THAT:

1. BellSouth is to continue to provide its wholesale and retail DSL service to customers who choose to switch voice services to a competitive local exchange carrier utilizing the Unbundled Network Element Platform. As stated in Order R-26173, this requirement likewise applies to CLEC voice customers who subsequently choose to receive BellSouth's wholesale or retail DSL service. Should BellSouth intend to offer its DSL service in the latter

scenario over a separate line/loop, it shall file a proposal for consideration by the Commission no later than May 1, 2003. Such alternative offering, if proposed, shall not discriminate against that class of voice customers. The filing of such proposal shall not delay implementation of the Order or suspend BellSouth's current obligation to provide DSL service over the UNE-P.

2. The Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service and does not establish any pricing for BellSouth's DSL in Order R-26173. BellSouth continues to have the flexibility under this Order to establish the price for its DSL services and offer discounts off of the established DSL price to its customers who choose packaged service offerings. (Example: BellSouth Complete Choice and FastAccess Service). Once BellSouth establishes its price for DSL service, however, BellSouth shall not impose any additional charges for its wholesale or retail DSL service on consumers based on their choice of local voice service provider. Nothing herein shall prevent the Commission from investigating claims of anti-competitive or discriminatory pricing or practices, or violations of the Commission's Regulations for Competition in the Local Telecommunications Market.
3. The Order currently requires BellSouth to provide DSL over both the UNE-P and UNE loops. However, in light of the testimony of the facilities-based CLECs in this proceeding that they do not intend to have BellSouth provide DSL over their UNE loops, but intend to offer the consumers both voice and data services, the Commission is willing to clarify its Order. Accordingly, BellSouth is ordered to provide for a seamless transition without disconnection of consumers' voice and DSL service to the CLECs' voice and data services. BellSouth shall not require the disconnection of its wholesale or retail DSL service prior to the consumers' transition of voice and data service to that of the CLECs. BellSouth shall provide and the CLECs may provide the Commission a proposed performance measure that ensures a seamless transition of voice and data service occurs when an end-user changes voice and data service from BellSouth to a facilities-based CLEC that chooses to provide its own voice and data services to an end-user over a UNE loop no later than May 1, 2003. That measure will be included in the docket U-22252-C 6 month performance review. The filing of such proposal shall not delay implementation of the Order or suspend BellSouth's current obligation to provide DSL service over the UNE-P or to provide for the seamless transition, without disconnection, of a consumer's voice and DSL service to the CLE 's voice and data services.
4. Order R-26173 became effective on January 24, 2003. However, the Commission clarifies that BellSouth shall have until June 1, 2003, to fully implement the requirements of the Order.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
April 4, 2003

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
CHAIRMAN JACK "JAY" A. BLOSSMAN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

/S/ C. DALE SITTIG
DISTRICT IV
COMMISSIONER C. DALE SITTIG

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

LAWRENCE C. ST. BLANC
SECRETARY

/S/ FOSTER L. CAMPBELL
DISTRICT V
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Docket No. 030137-TP
Witness: Mary Conquest
Exhibit No. _____ (MC-2)
Page 1 of 2

DATE: April 3, 2003

TIME: 3:24 PM

SENT TO:

SENT FROM:

Nanette Edwards

Clay Jones 404-853-8806

Phone Number: (256) 382-3856
Fax Number: (256) 382-3936

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Date & Sign

Number of Pages (Including this cover sheet): _____

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COMMENTS

Exhibit to Mary's testimony

Please call Angela Losey at (256) 382-3843 if transmission is incomplete. Thank you.

June 25, 2001

Tom Mullins
DeltaCom Inc.,
700 Blvd South, Suite 101, Huntsville, AL, 35802

RE: BellSouth Tariffed Digital Subscriber Line ("DSL") Service on Unbundled Network
Element - Platform ("UNE-P") Loops

Dear Tom,

BellSouth has recently discovered that, as a result of a recent failure of a systems edit, BellSouth is currently providing its tariffed Asymmetrical Digital Subscriber Line ("ADSL") service to certain Internet Service Provider ("ISP") customers on one or more UNE-P loops purchased by your company. (A list of the affected telephone numbers is attached hereto.)

Since your company owns all features and functionalities of unbundled loops purchased from BellSouth, BellSouth does not have access to the high frequency spectrum on those loops for purposes of providing tariffed ADSL to its ISP customers. BellSouth thus intends to notify the affected ISPs, within twenty (20) days of the date of this letter, that it will be discontinuing tariffed DSL service on the affected lines. (The affected ISPs include BellSouth® Internet Services.)

To the extent your company desires to have ISPs continue to provide tariffed DSL on the affected lines, those lines could be converted to resold lines. On a resold line, BellSouth would continue to have access to the high frequency spectrum, as your company is only purchasing the low frequency spectrum in a resold situation. Unless we hear to the contrary within twenty (20) days of the date of this letter, the DSL will be disconnected.

Very truly yours,



Gregory R. Follensbee

Attachment

#252061