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January 7, 2004

Honorable Deborah Taylor Tate
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN

Re: BellSouth's Complaint to Enforce Interconnection Agreement Between BellSouth and ITC^DeltaCom Communications Inc. and Request for Expedited Proceedings
Docket No. 02-01203

Dear Chairman Tate:

In connection with the above-captioned proceeding, I would like to bring to the attention of the Authority two recently issued decisions:

(1) An opinion issued December 29, 2003 by the United States District Court for the Eastern District of Kentucky; and

(2) A final Order of the Georgia Public Service Commission, issued November 19, 2003, on a complaint filed by MCI against BellSouth.

Both decisions address at some length the issue of whether a state utility commission has power under federal and state law to require BellSouth Telecommunications, Inc. ("BellSouth") to provide broadband DSL service over a UNE-P line.

Copies of both decisions are attached.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: [signature]
Henry Walker

HW/pp

Cc: Guy Hicks

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ATTACHMENT 2

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NOV 19 2003

EXECUTIVE SECRETARY
G.P.S.C.

COMMISSIONERS:

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DOCKET NO. 11901-U

68445

In Re: **Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996.**

ORDER ON COMPLAINT

BY THE COMMISSION:

On April 29, 2002, MCImetro Access Transmission Services and MCI WorldCom Communications, Inc. (collectively "MCI") filed with the Georgia Public Service Commission ("Commission") a Complaint against BellSouth Telecommunications, Inc. ("BellSouth"). MCI claimed that BellSouth was refusing to provide its digital subscriber line ("DSL") service, known as "FastAccess," to MCI users over the high frequency portion of their telephone lines. (MCI Complaint, p. 1). MCI requested that the Commission order BellSouth to discontinue this practice and to permit MCI to provide what is known as UNE-P[1] voice over the same lines over which BellSouth provides its DSL service. Id. at 8.

I. JURISDICTION AND PROCEEDINGS

A. Jurisdiction

The Commission has general jurisdiction over this matter pursuant to O.C.G.A. §§ 46-2-20(a) and (b), which vests the Commission with authority over all telecommunications carriers in Georgia. O.C.G.A. § 46-5-168 vests the Commission with jurisdiction in specific cases in order to implement and administer the provisions of the State Act. The Commission also has jurisdiction pursuant to Section 252 of the Federal Telecommunications Act of 1996 ("Federal Act"). Since the Interconnection Agreement between the parties was approved by Order of the Commission on December

[1] "UNE-P" stands for unbundled network element – platform. The term describes when UNEs are combined into a complete set in order to provide an end-to-end circuit.

ATTACHMENT 2

COMMISSIONERS:

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14, 2001, a Complaint that a party is in violation of the Agreement equates to a claim that a party is out of compliance with a Commission Order. The Commission is authorized to enforce, and to ensure compliance with its orders pursuant to O.C.G.A. Sections 46-2-20(b), 46-2-91 and 46-5-169. The Commission has enforcement power and has an interest in ensuring that its Orders are upheld and enforced. Campaign for a Prosperous Georgia v. Georgia Power Company, 174 Ga. App. 263, 264, 329 S.E.2d 570 (1985).

BellSouth raised arguments that the Commission did not have jurisdiction to grant the relief sought by MCI in this docket. First, BellSouth argued that the Commission does not have authority to grant the complaint because its DSL service is a non-regulated enhanced service that is not within the jurisdiction of this Commission. (BellSouth Brief, p. 6). This argument misconstrues the nature of the alleged harm and the action MCI requests that the Commission take. MCI's claim is that BellSouth refuses to provide its DSL service to MCI voice customers. This alleged practice would impact local voice competition. A situation in which a voice customer receives a benefit for receiving service with one provider, or conversely, is punished for receiving voice service from another, has a foreseeable impact on that customer's choice of provider. The Commission's jurisdiction over local competition has not been questioned. The Commission has the authority "necessary to implement and administer the express provisions of [the State Act] through rule-making proceedings and orders in specific cases." O.C.G.A. § 46-5-168(a). MCI has raised in its complaint a specific provision of the State Act that prohibits companies electing alternative regulation from engaging in "any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law." O.C.G.A. § 46-5-169(4). The issues raised in the Complaint are well within the Commission's jurisdiction.

BellSouth also argues that the relief sought by MCI is inconsistent with its Federal Communications Commission ("FCC") Tariff No. 1, ¶7.217(A). (BellSouth Brief, p. 6). MCI counters that the tariff was not entitled to deference because BellSouth filed the tariff in its discretion. (MCI Brief, p. 24). BellSouth argues that its tariff "requires the existence of an 'in-service, Telephone Company [i.e., BellSouth] provided exchange line facility.'" (BellSouth Brief, p. 6 quoting BellSouth FCC Tariff No. 1, ¶7.217(A)). MCI notes that the tariff defines "in-service exchange line facility as 'the serving Central Office line equipment and all the plant facilities up to and including the Telephone Company-provided Network Interface Device (NID).'" (MCI Brief, p. 24, quoting BellSouth FCC Tariff No. 1 ¶7.217). MCI concludes that UNE-P fits into this category because "BellSouth is the wholesale provider of UNE-P facilities and a UNE-P arrangement includes the Central Office line equipment and all the plant facilities up to and including the NID." Id.

BellSouth's argument is that its FCC tariff preempts the Commission from granting the relief requested because it construes the tariff to prohibit MCI from providing voice service over the same line that it provides DSL service. The touchstone of any preemption analysis is Congressional purpose. *See,* Oxygenated Fuels Association

Incorporated v. Gray Davis, 331 F.3d 665, 668 (9th Cir. 2003). That BellSouth drafted this tariff impacts the analysis of whether the FCC intended to prohibit this practice, or whether the FCC in approving this language did not identify the issue that BellSouth argues before this Commission. This distinction is highlighted by the cross-examination of BellSouth witness, Joseph Ruscilli, on BellSouth's FCC tariff.

> Q (MCI Counsel) Now one thing about this language is that it describes what BellSouth contemplates with respect to the design, maintenance and operation of its ADSL service; not what is required, correct?
>
> A (Mr. Ruscilli) Well, yes and no. I wrote tariffs for a period of time for BellSouth and for its long distance company. What this is telling you, and if you read a little bit prior to it where it talks about the overlay, is that the design of this tariff is built around this set of assumptions. That is, it's contemplating that this is an in-serve telecommunications telephone company provided line and that you've got these kinds of circuits and then as you drive through the tariff, you're this kind of provider and you can handle this many lines and expertise. So it's outlining in general terms, *when we designed this tariff, this is what we were thinking of doing.*

(Tr. 312). (emphasis added).

The Commission is unwilling to read into BellSouth's FCC tariff meaning that is not apparent from the language of the tariff itself. For BellSouth to prevail on a preemption argument based on what it claims to have intended when it drafted the language of a tariff that the FCC later approved is unfair to other parties. The relevant question is what the FCC intended in approving the tariff. In its effort to discern the intent of the FCC in approving BellSouth's tariff, the Commission will limit its analysis to the actual language of the tariff.

In order to find preemption, there must either be "express preemption," in which the intent to preempt state law is explicitly stated, "field preemption," in which federal regulation is pervasive to the degree that the intent to occupy the field exclusively may be inferred, or "conflict preemption," in which it is impossible to comply with both state and federal law. Lewis v. Brunswick Corp., 107 F.3d 1494, at 1500 (11th Cir. 1996). BellSouth's apparent argument is that the last of these three, conflict preemption, prevents this Commission from ordering BellSouth to discontinue the complained of practice. However, BellSouth has failed to rebut the explanation offered by MCI as to why no conflict exists. Even under BellSouth's construction of the tariff, all that is required on this issue is for the end-user to be served by an existing, in-service Telephone Company provided exchange line facility. The UNE-P arrangement that BellSouth provides to MCI meets the tariff's definition of an in-service exchange line facility. The tariff does not state that the customer cannot receive service from an exchange line facility that BellSouth provides at the wholesale level to a competitive local exchange carrier.

For the reasons stated above, the Commission finds that it has jurisdiction to grant the relief sought in this docket.

B. Proceedings

This proceeding was initiated on April 29, 2002 when MCI filed a Complaint against BellSouth. MCI's complaint included two counts. The first count charged that BellSouth's practice violated the nondiscriminatory provisions in the parties' interconnection agreements. Id. ¶¶15-19. The two interconnection agreements in question are identical in all material respects, except that one is signed by MCImetro and the other is signed by MCI WorldCom. Id. at ¶16. The second count charged that BellSouth's practice violated the Telecommunications and Competition Development Act of 1995, O.C.G.A. § 46-5-160, et seq. (the "State Act"), specifically O.C.G.A. § 46-5-169(4), which prohibits BellSouth from engaging in "any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law." Id. at ¶¶20-21. MCI requested that the Commission order BellSouth to stop refusing to provide FastAccess to MCI voice customers over the high frequency portion of their voice lines, to order BellSouth to permit MCI to provide UNE-P voice service over the same lines BellSouth uses to provide FastAccess service, and to order such further relief as the Commission deems just and appropriate. Id. at p. 8. On May 29, 2002, BellSouth filed its Answer to the Complaint. In its Answer, BellSouth contended that MCI's policy was both factually and legally flawed. (BellSouth Answer, p. 1). Further, BellSouth claimed that its policy was consistent with both state and federal law. Id.

The Commission assigned the matter to a Hearing Officer on July 23, 2002. On August 22, 2002, the Hearing Officer entered a Consent Schedule addressing discovery and the filing of pre-filed testimony. Finding that the Complaint raised issues of significant policy importance, the Commission issued an order on September 13, 2002 stating that the full Commission would hear the matter. On October 17, 2002, AT&T Communications of the Southern States, LLC petitioned for intervention in the docket.

On February 10-11, 2003, the Commission held hearings on MCI's complaint. The Commission heard argument of counsel and testimony from witnesses. BellSouth, MCI and the Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs ("CUC") submitted briefs on April 11, 2003. The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. COUNT 1: VIOLATION OF INTERCONNECTION AGREEMENTS

In its Complaint, MCI referenced provisions of the parties' interconnection agreements that it charged BellSouth's policy violated. (MCI Complaint, ¶¶ 17-18).

> BellSouth agrees that it shall provide to MCIm on a nondiscriminatory basis unbundled Network Elements and auxiliary services as set forth in this Agreement . . . . BellSouth further agrees that these services, or their functional components, must contain all the same features, functions and capabilities and be provided at a level of quality at least equal to the level which it provides to itself, its Affiliates, and other telecommunications carriers.

Interconnection Agreements, Part A, Section 12.2.

> BellSouth shall offer Network elements to MCIm on an unbundled basis at rates and on terms and conditions that are just, reasonable, and nondiscriminatory and in accordance with the terms and conditions of this Agreement. BellSouth shall provide MCIm with unbundled Network Elements of at least the same level of quality as BellSouth provides itself, its Customers, subsidiaries, or Affiliates, or any third party.

Interconnection Agreements, Attachment 3, Section 2.1.

MCI argues that BellSouth's policy is discriminatory in violation of the parties' interconnection agreements because BellSouth provides FastAccess over its own loops but not those leased to MCI. (MCI Brief, p. 20). MCI also claims a violation of Attachment 3, Section 2.1 because under its policy BellSouth does not provide MCI UNE-P loops that are "of at least the same level of quality as BellSouth provides itself, its Customers, subsidiaries, or Affiliates, or any third party." Id. The unbundled network element in question in this Complaint is the line that MCI leases from BellSouth. In accordance with the parties' interconnection agreements, BellSouth must provide the line to MCI on a nondiscriminatory basis. It is undisputed that under BellSouth's policy an MCI voice customer cannot receive BellSouth's service; whereas a BellSouth voice customer may receive this service. Discrimination is not only present in this policy, but discrimination is the policy. Precisely because it is a line leased by MCI to serve an MCI voice customer, BellSouth will not allow its DSL service to be provided over the line.

BellSouth responds with two independent arguments for why its policy does not violate Part A Section 12.2 of the Interconnection Agreements. First, BellSouth argues that BellSouth and MCI voice customers are not similarly situated because BellSouth customers are served over a line owned by BellSouth and MCI customers are served by a line leased from BellSouth by MCI. (BellSouth Brief, p. 34). BellSouth argues that the relevance of this distinction is that MCI determines the services to offer on the line that it leases from BellSouth. Id. In essence, BellSouth defends this practice, even if it involves discrimination, because it claims that the groups of customers involved are not similarly situated. For an argument that discrimination is justified because the discrimination does not occur between those similarly situated, the distinction cited must be relevant. *See, e.g.*, Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996); Young v. Alongi, 123 Ore. App. 74 (1993); Estate of Antonios Legatos v. Bank of California, 1 Cal. App. 3d 657 (1969). The distinction BellSouth relies upon is that the customers that cannot receive BellSouth's DSL service receive voice service via a line leased by MCI, and that therefore, MCI makes the decision of what services can be offered over the line. (BellSouth Brief, p. 14). Of course, by virtue of BellSouth's policy MCI cannot choose to have BellSouth's DSL served over its line. This point alone is sufficient to demonstrate that BellSouth's distinction is not relevant. It does not matter that MCI leases the line if BellSouth can still prevent MCI voice customers from receiving the same services that BellSouth's voice customers can.

Moreover, the record reflects that BellSouth maintained a distinct advantage over its competitors in building a DSL network in Georgia as a result of its position as the incumbent local exchange carrier and monopoly provider of voice service. (Tr. 165). The record demonstrates that BellSouth has a large majority of the DSL customers in Georgia, and, as will be discussed in detail later, that BellSouth possesses market power in Georgia's high speed internet market. (MCI Exhibit 5, BellSouth Trade Secret Exhibit 14). To be clear, it is not necessary for the purposes of finding BellSouth in violation of its interconnection agreements with MCI to determine that BellSouth has market power in the relevant market. However, independent of any market power analysis, consideration of BellSouth's substantial presence in the high speed internet market emphasizes that the distinction that BellSouth tries to draw to evade a claim that its policy is discriminatory is not relevant. As stated above, that it is BellSouth's decision, and not MCI's, to deprive MCI voice customers of the option of DSL makes the distinction that MCI leases the line irrelevant. That BellSouth is the overwhelming choice for those customers who wish to select DSL service merely demonstrates the degree to which BellSouth's policy is discriminatory.

BellSouth's second argument pertains to decisions of the FCC. BellSouth first cites to the FCC order that approved BellSouth's Louisiana/Georgia Section 271 Application. The FCC stated that "under [its] rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities." *In Re: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35 (May 15, 2002) ("GA/LA 271 Order") ¶157. The FCC states further that it did not find discriminatory BellSouth's policy of not offering its wholesale DSL service to an ISP or other network services provider on a line provided over UNE-P. Id. The FCC reached much the same finding in the context of BellSouth's 271 application for Alabama, Kentucky, Mississippi, North Carolina, and South Carolina. *See,* Memorandum Opinion and Order, *In re: Joint Application by BellSouth*

Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, WC Docket No. 02-150, FCC 02-260, ¶164 (September 18, 2002).

Both FCC orders state that its rules do not prohibit BellSouth's practice. MCI's Complaint does not charge that BellSouth's practice has violated FCC rules. MCI's Complaint states that BellSouth's policy violates the parties' interconnection agreements and Georgia state law. The FCC did not address those issues and therefore its orders have little if any bearing on the Commission's decision in this docket. As to the FCC's statements that BellSouth's policy is not discriminatory, these findings did not stem from a complaint interpreting an interconnection agreement between the parties, but rather BellSouth's application for authority to provide long-distance services. Examining BellSouth for checklist compliance in a 271 proceeding is meaningfully different than consideration of a complaint that BellSouth is violating an interconnection agreement with a competitor. Moreover, the evidence presented to the Commission in this proceeding was not identical to what was presented to the FCC in its review of BellSouth's 271 applications. In fact, the FCC did not hold an evidentiary hearing on this issue. (MCI Brief, p. 25). Finally, the FCC decision was a snapshot in time and did not indicate that the policies considered permissible for BellSouth to meet its obligations would never change. In sum, to argue that the Commission is precluded from finding BellSouth's policy discriminatory in violation of the parties' interconnection agreement would be to conclude that no matter what evidence was presented in this docket BellSouth would prevail on this issue. That is not a reasonable conclusion, and it is not an intent that can reasonably construed from the FCC's 271 orders.

B. COUNT 2: VIOLATION OF STATE LAW

MCI's second count charges that BellSouth's policy violates the State Act, specifically O.C.G.A. § 46-5-169(4).

This statute provides that:

> A company electing alternative regulation shall not, either directly or through affiliated companies, engage in any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law.

MCI alleges that BellSouth's conduct violates both the prohibition against tying arrangements and anticompetitive acts or practices in general. The Commission will take these claims up separately.

1. Tying Arrangement

In prohibiting companies that elect alternative regulation from engaging in tying arrangements, O.C.G.A. § 46-5-169(4) states that this term shall be construed consistent with its application in antitrust law. Tying arrangements coerce the "abdication of a buyer's independent judgment" with respect to the desirability of the tied product. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 604 (1953). In doing this, tying arrangements insulate the tied product from competition. Id. For these reasons, tying arrangements do not fare well under laws prohibiting restraints of trade. Id. at 605. Not every refusal to sell two products separately constitutes an antitrust violation. The United States Supreme Court has held that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). For guidance in determining when such an invalid tying arrangement exists, courts have required that in order to establish an unlawful tying arrangement, plaintiffs must demonstrate the existence of the following four elements: "1) that there are two separate products, a 'tying' product and a 'tied' product; 2) that those products are in fact 'tied' together -- that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a 'not insubstantial' amount of interstate commerce in the market of the tied product." Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d. 1407, 1414 (11^{th} Cir. 1987).

Turning to the first component, the tied product is the product that the seller must purchase if the seller wants to be able to purchase the tying product. MCI demonstrated the tied product is BellSouth's voice service and the tying product is BellSouth's DSL service. (Tr. 38-39). BellSouth argues that MCI's tying claim is backwards. That is, BellSouth argues that for the tying claim to be illegal it would have to be requiring customers to purchase its DSL service in order to receive its voice service. (BellSouth Brief, p. 39-40). This claim is addressed in detail in the discussion of market power below.

The second criterion involves whether BellSouth's policy forces customers to purchase BellSouth's voice service in order to receive BellSouth's DSL service. BellSouth disputes that MCI has established this component. BellSouth argues that MCI can resell BellSouth's voice service to a BellSouth DSL customer. (Tr. 17-18). MCI responds that the resale option is not a realistic option. Counsel for MCI argued that, "Resale has never been used effectively to serve residential customers on a mass market basis. It failed everywhere it was tried on a mass market basis." (Tr. 10). Further, MCI's witness, Sherry Lichtenberg, testified that the companies that have tried to mass market resale have either gone out of business or discontinued that strategy. (Tr. 120). In addition, Mr. Gillan testified that in light of the "death spiral" that the resale industry was undergoing it was not worth re-examining its viability. (Tr. 183). Mr. Gillan testified further that resale was fundamentally flawed because it attempted to make the entrant develop a cost structure reflective of the incumbent local exchange company's cost structure. (Tr. 184). CUC agrees with MCI that reselling BellSouth's voice service, and providing BellSouth's DSL as an overlay to that resold service is not a viable option. (CUC Brief, pp. 6-7). CUC argues that the record in this docket reflects that UNE-P, and not resale, has been responsible for the growth in residential competition. Id. at 7. BellSouth responds that the financial barriers for resale would not be the same given that MCI would not have to offer it to a large percentage of its customers. (Tr. 249).

An initial question is whether the viability of an option should be considered in this analysis. The Commission concludes that it must consider the viability of the resale option. Hypothetically, if it was universally agreed upon that success in resale was an absolute impossibility, it would make no sense to hold it out as an alternative worthy of defeating any tying claim. An unrealistic option does not reduce the risk of harm. The question then becomes whether the evidence demonstrated that resale was not a viable option. MCI's testimony that resale is not a viable option is persuasive. The testimony concerning the failure of entrants into the resale market and the general direction of the resale business explains MCI's reluctance to rely upon reselling BellSouth's voice service as a solution to its problem. CUC is correct that the record reflects that it has been UNE-P has been responsible for successes in residential competition in Georgia. In fact, this conclusion can be gleaned from the testimony of BellSouth as well as MCI. (Tr. 161-162, 296). As previously stated, the second component of an illegal tying arrangement is to force a buyer to purchase one service in order to receive the other service. If the only condition under which this coercion can be avoided requires an imprudent business decision, such as investing in a strategy that promises a remote chance for success, then in all likelihood the coercion will occur. It is unreasonable to blame MCI for not pursuing an option that has been shown to lack viability.

Independent of the rationale that resale is not a viable option, and perhaps more fundamental to a tying analysis, the resale option still involves BellSouth's voice service. In explaining the resale alternative to UNE-P, counsel for BellSouth stated that "MCI could resell BellSouth's voice service." (Tr. 18). Therefore, BellSouth's voice and DSL services would still be tied even if MCI were to pursue this option. To determine the significance of BellSouth allowing the resale option in conjunction with the provisioning of its DSL service, it is necessary to examine the differences between UNE-P and resale. UNE-P involves a CLEC purchasing network components and developing its own configuration to provision its own service. Resale involves a CLEC purchasing BellSouth's service and putting its name on it in place of BellSouth's. In addition, the resale discount is determined under the FCC's avoided cost methodology. This avoided cost methodology means that the incumbent's monopoly profit is not impacted.

That MCI can resell BellSouth's service to a BellSouth DSL customer does not excuse the packaging from the tying analysis. To conclude otherwise would be to state that as long as a company superficially conceals its tying arrangement, then no illegal tying has taken place. The resale option does not change that a customer must still purchase BellSouth's voice service to receive BellSouth's DSL service. Because the resale discount is based on BellSouth's avoided costs, that BellSouth is willing to provide

DSL to a resale customer does not change that before BellSouth will allow a customer to receive its DSL service it requires that it receive its monopoly profit from that customer's voice service. For both of the reasons stated above, the Commission determines that the second component of an illegal tying arrangement has been satisfied.

The third component is that the seller has sufficient economic power in the tying product market to coerce buyer acceptance of the tied product. A major point of contention between the parties relating to whether BellSouth's policy constitutes an illegal tying arrangement is whether MCI must demonstrate market power. MCI argues that it is not necessary to demonstrate market power in order to show that BellSouth's policy represents an illegal tying arrangement. (MCI Brief, p. 17). However, MCI maintains that the evidence in this proceeding demonstrates that BellSouth does have market power in the appropriate market. Id. For the purposes of this analysis, the Commission will assume that it is necessary to demonstrate market power in the relevant market.

The first step in resolving whether this element exists is to identify the tying product market. MCI states should the Commission determine that a showing of market power is necessary the market in question is the DSL market in BellSouth's Georgia territory. (MCI Brief, pp. 17-18). MCI explains that that the other options for high speed access to the internet involve "significantly different features." Id. at 18. MCI also cites to the testimony of BellSouth witness, Bill Smith, for the proposition that a substantial number of Georgia customers have access to BellSouth's DSL service and not to cable broadband. Id. at FN 18. Finally, MCI argues that the considerable success that DSL has had in Georgia in comparison to broadband indicates that the services are significantly different. Id. at 18.

BellSouth claims that MCI has not identified the proper market. (BellSouth Brief, pp. 40-43). BellSouth argues that the DSL market is not a market within itself because there are functional substitutes for this service. Id. at 41. BellSouth further argues that other means of internet access may lure customers away from its DSL service. Id. BellSouth specifically cites to cable modem service, satellite and wireless. Id. at 42. Finally, BellSouth references the dial-up service alternative to broadband service. Id. at 43.

Identifying the proper market is a question of fact. "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484 (9th Cir. 1991). For antitrust purposes, defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." Thurman Indus. v. Pay 'N Pak Stores, Inc. 875 F.2d 1369, 1374 (9th Cir. 1989) (citing Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1392-93 (9th Cir.), *cert. denied*, 469 U.S. 990, 83 L. Ed. 2d 331, 105 S.Ct. 397 (1984)). Relevant factors to consider in defining the boundaries of a submarket include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Brown Shoe Company v. United States, 370 U.S. 294, 325 (1962).[2]

Dial up internet service has different characteristics than high speed internet service. Customers of dial-up service must either incur the expense of an additional line or undergo the considerable inconvenience of not being able to use their internet and phone service at the same time. In addition, the quality of DSL is materially superior to that of dial-up service. Also, dial up service is less expensive than high speed internet. Given these substantial distinctions, it is unlikely that customers interested in, or already receiving, DSL service may be persuaded to settle for, or return to, dial-up service. It is a policy question as to how the Commission must weigh the factors in order to define the relevant market. Because of the differences in characteristics, price and customers between dial up service and high speed internet service, the Commission concludes that dial up service does not have the actual or potential ability to deprive high speed internet providers of significant levels of business. Therefore, the Commission finds that the relevant market for evaluating whether BellSouth has market power should not include dial up service.

The differences between DSL and other forms of high speed internet access are not substantial enough to warrant defining DSL as its own market. The Commission finds that the appropriate market to examine is the high speed internet market.

The next step in determining whether BellSouth has sufficient economic power is to examine what it means to have such power. An illegal tying arrangement involves the ability to force a customer into buying a product or service that the customer does not want or would have preferred to purchase elsewhere. Jefferson Parish Hospital District No. 2 et al v. Hyde, 466 U.S. 2 (1984). BellSouth has argued that in order to have market power a company must possess a fifty percent share of the relevant market. (BellSouth Brief, p. 45). For support of this position, BellSouth cites to the eleventh circuit decision in Bailey v. Allgas, Inc., 284 F.3d 1237 (11th Cir. 2000). However, the Bailey court states that "a market share at or less than 50% is inadequate as a matter of law to constitute *monopoly* power." Bailey, at 1250. (emphasis added). It is not necessary to demonstrate monopoly power or even a dominant position throughout the market for there to be sufficient economic power with respect to a tying claim. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969) Therefore, the decision in Bailey does not require that MCI demonstrate that BellSouth possesses a fifty percent share of the high speed internet market in Georgia.

BellSouth also relies upon Rebel Oil Company v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995). As in Bailey, the Rebel Oil Court holds that numerous cases have

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[2] While Brown Shoe involved a vertical merger case, the issue of defining the relevant market is comparable and those same or substantially similar considerations have been employed in tying cases. See E.T. Barwick Industries, Inc. v. Walter E. Heller & Co., 692 F. Supp. 1331 (N.D.Ga. 1987); White & White, Inc. v. American Hospital Supply Corp., 723 F.2d 495 (6th Cir. 1983); Heatransfer Corp. v. Volkswagenwerk, A. G., 553 F.2d 964 (5th Cir. 1977).

held that a market share of less than fifty percent is presumptively insufficient when addressing claims of *actual monopolization*. Rebel Oil, at 1438. (emphasis added). The Court continues that courts have found a thirty percent market share to be insufficient to establish market power in an attempted monopoly case. Id. This observation has been made by other courts as well. *See, e.g.*, Commercial Data Servers, Inc. v. IBM, 262 F. Supp. 2d 50, 74, (S.D.N.Y. 2003); Sea-Land Serv. v. Atlantic Pac. Int'l, 61 F. Supp. 2d 1092, 1099 (D.Haw. 1999); Wilson v. Mobil Oil Corp., 940 F. Supp. 944 , 949 (E.D.La. 1996). In Sea-Land, the Court determined that it was a question of fact for the jury whether a company with a thirty-three percent market share had market power. Sea-Land, at 1100. The Commission finds that the Rebel Oil decision does not indicate that the benchmark for determining market power in this docket should be a fifty percent market share. The Commission will take guidance from other courts that a market share of thirty percent or less is presumptively not sufficient to demonstrate market power.

The first step in determining BellSouth's share of the high speed internet market in Georgia is to establish DSL's share of this market. This percentage together with determining BellSouth's share of the Georgia DSL lines will produce BellSouth's share of the high speed internet market in Georgia. As of December 2001, DSL maintained a 41.1 percent share of Georgia high speed lines. (MCI Exhibit 5). This figure compared to a 37.1 percent share for cable modems. Id.[3] BellSouth's percentage of the DSL market as of December 2001 was introduced into evidence as BellSouth's trade secret Exhibit 14. By taking BellSouth's percentage of the DSL lines in Georgia and multiplying that number by DSL's share of the high speed internet market, it is possible to determine BellSouth's percentage of the relevant market.[4] The result of this multiplication is a share that is significantly higher than thirty percent. By June of 2002, DSL's share of the high speed market had increased to 46.5 percent, and DSL had captured 71.1 percent of the growth within this market over the intervening six months. (MCI Exhibit 5). It is reasonable to conclude, although not required for the purpose of this showing, that given BellSouth's substantial majority of Georgia's DSL lines, BellSouth's share of the high speed internet market would have increased over the six month time period to an even higher percentage.

BellSouth criticized the FCC data on the grounds that it only addressed facilities-based providers and that the data is self-reported. (BellSouth Brief, p. 44). The discussion of the number of lines not reflected in the FCC Report focused upon general observations and did not include any specific numbers, or even ranges of numbers, as to how this alleged gap in the data may impact BellSouth's share of the market. (Tr. 337-338). While MCI has the burden in this docket, MCI met this burden as to this issue through the data on the number of DSL lines, as compared to cable lines, in Georgia and BellSouth's share of those lines. In rebutting this evidence, BellSouth must be required to do more than merely raise potential problems with the data without providing an idea

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[3] The source for the data on MCI's Exhibit 5 was FCC high speed internet access reports.

[4] BellSouth's precise market share percentage of the high speed internet market for the time period discussed cannot be stated without revealing information from which it would be possible to calculate BellSouth's share of the DSL lines in Georgia. This percentage has been declared trade secret.

as to how or whether this potential problem would impact the question of whether it share is above a minimum threshold for a finding of market power. Moreover, given that BellSouth's share of the relevant market is significantly over thirty percent it is unlikely that the lines not included in the FCC data would impact the conclusion that BellSouth has an adequate market share to make it a question of fact as to whether it has market power. The Commission is similarly not persuaded by BellSouth's argument that the data is less reliable because it is self-reported. Reliance upon self-reported data is consistent with other telecommunication proceedings before the Commission, such as its generic cost dockets. The Commission concludes that BellSouth's share of the Georgia high speed internet access market is above the minimum threshold for a demonstration of market power.

A market share of greater than thirty percent does not translate uniformly to a showing of market power. Courts have identified other considerations that are relevant to the inquiry. The United States Supreme Court has held that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977). MCI witness, Joseph Gillan testified that because of BellSouth's position as the incumbent it had an advantage in the DSL market over other competitive local exchange companies ("CLECs") in Georgia.

> Quite frankly, I think it's pretty obvious that the reason that BellSouth has a completely different DSL penetration than anyone else is the fact that they started out with this inherited position and that this DSL position -- true, they built it up, but they built it up as a compliment (sic) to a voice position that is an inheritance of prior government policy.
>
> So I think it's important that that explanation, that consumers are made better off because they deny it, other people go out and replicate this, is inherently false. Nobody has the Georgia market position that BellSouth has and to the extent they used that to develop their DSL footprint, which is their own testimony, then you shouldn't expect that somebody else is going to be able to put it together either.

(Tr. 165).

The above testimony accurately distinguishes between BellSouth's position and the position of CLECs. The Commission concludes that BellSouth did have an advantage over CLECs in establishing a DSL network and competing in the high speed internet market.

The Commission also finds that while high speed internet, and not DSL, is the relevant market, the Commission is not precluded from considering the evidence that illustrates the direction of the internet market in Georgia. The evidence indicates that DSL is capturing most of the growth in the high speed internet market. (MCI Exhibit 5). The Commission concludes from this evidence that BellSouth's power in having an overwhelming majority of the DSL lines in Georgia is greater than it would be if DSL was not expanding its lead over cable in the relevant market.

The Commission concludes for all of these reasons that BellSouth has market power in the Georgia high speed internet market.

The final element for an unlawful tying arrangement is to demonstrate "involvement of a 'not insubstantial' amount of interstate commerce in the market of the tied product." Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d. 1407, 1414 (11th Cir. 1987). As explained in Jefferson Parish, under an invalid tying arrangement, a buyer is coerced into making a decision that it would rather not make, including buying a product that the buyer would have preferred to purchase elsewhere on different terms. Jefferson Parish, 466 U.S. at 12. The United States Supreme Court has explained that in determining whether this criteria exists, "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie." Fortner Enterprises, Inc., 394 U.S. at 501 (1969).

MCI provided evidence that it received more than 4,900 DSL rejects relating to more than 4,056 customer telephone numbers. (Tr. 38-39, 75). After BellSouth altered its systems, more than 2,000 DSL customers were migrated to MCI that previously would have been rejected and returned to BellSouth. (Tr. 59). In addition, MCI presented testimony that it informs potential customers that they cannot migrate to MCI if they wish to maintain their DSL service. (Tr. 26, 39). Therefore, in addition to the substantial number of customers that have actually been rejected, there are others that are informed on the front end of the problems with switching away from BellSouth's voice service. The Commission concludes that BellSouth's policy has a greater than *de minimis* impact, and involves a "not insubstantial" amount of interstate commerce.

BellSouth argues that MCI has not demonstrated that it has charged more for the services together than it could have if the services were sold separately. (BellSouth Brief, p. 46). The United States Supreme Court has held that the question is whether "the seller has the power to raise prices, *or impose other burdensome terms such as a tie-in*, with respect to any appreciable number of buyers within the market. Fortner Enterprises Inc., 394 U.S. at 504. (emphasis added). Customers that wish to select a different provider for local voice service are coerced to receive voice service from BellSouth because otherwise they will not be able to receive BellSouth's DSL service. These particular customers believe that voice service at MCI, instead of BellSouth, is the better deal. They are not able to take advantage of what they view as the better deal without losing their DSL service. This condition is the burdensome term referenced in Fortner. This condition also directly relates to the court's identification in Jefferson Parish of the "essential characteristic" of an invalid tying claim. The customer is coerced into buying a service that it "preferred to purchase elsewhere on different terms." Jefferson Parish, 466 U.S. at 12.

It is difficult to separate this coercion from the demonstration that a company has charged more for its tied products than it otherwise could. Presumably, a BellSouth customer would consider the price of the voice service when deciding which provider to select. There was no evidence that the customers that selected MCI, were rejected because they had BellSouth's DSL service and returned to BellSouth's voice service were offered any discount in their service to induce them to stay. Customers that did not want to purchase BellSouth's voice service at the price it was offered ended up doing just that because the customer did not want to lose its DSL service. A customer that receives voice service from BellSouth at a certain price only because it is tied to DSL service is paying BellSouth more than he or she would be willing to if not for the tying arrangement. If BellSouth offered voice service at that same price without the tying arrangement in place, the evidence shows that a significant number of customers would have chosen to receive voice service from MCI. This is not to say that price was the only factor that inspired the customer to choose MCI's voice service (it is not even to say that MCI's voice service was less expensive than BellSouth's), it is only to say that price is a factor in the selection process. Instead of offering a more competitively priced voice service to maintain its share of the local voice market, BellSouth's policy attempts to insulate its voice service from the competition that might drive prices down.

The purpose of such a policy can only be so that BellSouth can charge more for the services together than it could apart. The evidence indicates that it could not maintain the same number of voice customers at the price it charges for the service if the service was not tied to its DSL service.

For the reasons stated above, the Commission concludes that BellSouth's policy of requiring customers to receive its voice service in order to receive its DSL service constitutes an illegal tying arrangement in violation of O.C.G.A. § 46-5-169(4).

2. Anticompetitive Act or Practice

The second violation of the State Act alleged by MCI is that BellSouth's policy of requiring customers to purchase its voice service in order to receive its DSL service constitutes an anticompetitive act or practice in violation of O.C.G.A. § 46-5-169(4). This code section prohibits BellSouth from engaging in "any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law." The tying arrangement is an example of a prohibited anticompetitive act; however, the statute makes clear that the expressly stated examples are not exhaustive of the types of activity that can be found to violate the statute. Therefore, even if this Commission had not found that BellSouth's policy constituted an unlawful tying arrangement as that term is commonly applied in antitrust law, the Commission could still conclude that the policy was anticompetitive in violation of this code section. The Georgia legislature has provided the Commission with discretion in interpreting what constitutes an anticompetitive act or practice for the purposes of this statute. Not all conduct that will benefit the incumbent provider or help the incumbent maintain its share of the local voice market is anticompetitive. For guidance, the Commission looks to how courts have explained the anticompetitive effects of invalid tying arrangements. If the tie is used to impair competition on the merits and insulate a potentially inferior product from competition, then such an arrangement could create barriers to competition in the market for the tied product. Jefferson Parish, 466 U.S. at 14. If a policy has no justification other than to maximize profits by chilling competition and removing choices from consumers then such a policy should be deemed anticompetitive.

In arguing that BellSouth's policy is anticompetitive as a general matter, MCI points out that BellSouth is willing to refuse an option to customers even at the risk of losing the customer. (MCI Brief, p. 12). MCI claims that BellSouth is using its dominant position in the DSL market to protect its monopoly voice profits. Id. at 14. BellSouth is technically capable of providing the DSL service to an MCI voice customer. At one point, voice customers of other CLECs received BellSouth's DSL service. (Tr. 499). During this time BellSouth did not experience any ordering and provisioning or maintenance and repair problems that it was unable to handle. (Tr. 501-502). The potential harm from BellSouth's policy is that as its DSL service grows, it will be able "to seal off more and more Georgia consumers from the benefits of local competition." (MCI Brief, p. 14).

The apparent motivation behind BellSouth's policy is to maintain its voice customers by denying them options in a separate market. The customers do not receive a benefit from being denied this option. In fact, they are harmed by being denied the option of receiving BellSouth's DSL service and another provider's voice service. While BellSouth will inevitably lose some DSL customers because of this policy, the only reasonable assumption is that BellSouth believes that it will keep enough voice customers that would have otherwise departed for a preferred CLEC that BellSouth will still come out ahead financially. This policy then insulates BellSouth's voice service from competition because customers that would like to switch to a preferred CLEC for voice service have a disincentive to do so.

BellSouth points to alternatives available to MCI, such as resale, cable modems, MCI's own DSL service and line splitting. As a preliminary observation, BellSouth's arguments do not ring true on this point. If BellSouth believed that customers would pursue these other options, then it could not afford to continue its policy. The whole premise has to be that customers are not likely to leave BellSouth's DSL service for these other options. The record reflects both the reasons why customers would want to avoid switching DSL providers and the limitations inherent in each of the options BellSouth raises. MCI witness, Ms. Lichtenberg, testified that switching out of BellSouth's DSL service to another mode of high speed internet access would require "disconnecting the FastAccess service, obtaining a different DSL modem, and possibly having to pay early termination fees." (Tr. 25). In addition, the customer would have to establish broadband service with a different provider, incur any connection fees, change his or her email address and notify his or her contacts of that change. (Tr. 25). Ms. Lichtenberg also testifies that the most obvious reason for a BellSouth DSL customer not wanting to switch to another high speed internet provider is because the customer wanted to receive voice and DSL service over the same line. (Tr. 25). CUC argues that customers who have grown accustomed to BellSouth's DSL service are not likely to forfeit these features in order to switch to a preferred voice provider. (CUC Brief, p. 6).

The limitations of the resale option were discussed in the tying analysis. Both of MCI's witnesses described the lack of success that has been achieved in resale. Ms. Lichtenberg observed the failure of the strategy for companies that have tried to mass market resale. (Tr. 120). Mr. Gillan testified that resale was fundamentally flawed. (Tr. 184). The Commission finds that the resale option is not a realistic alternative, and therefore, does not diminish the anticompetitive effects of BellSouth's policy.

The alternatives of cable modems, MCI's DSL service and line splitting raise the same basic question and thus can be analyzed together. The question is whether the ability to look elsewhere for DSL service, or other modes of high speed internet access, means that BellSouth's policy is not anticompetitive. MCI has argued that "given the current reality of the Georgia market," that other providers offer DSL service does not impact the anticompetitive effect of BellSouth's policy. (MCI Brief, p. 29). MCI again discusses the built-in advantage BellSouth has over other providers and the limitations in the size and scope of the offerings of other CLECs. Id. This argument is emphasized by the testimony of Mr. Gillan who argues, specifically in connection with the impracticality of MCI offering a competing package through line splitting, that "no carrier has been able to surmount the capital and operational barriers involved in providing DSL service to Georgia consumers on anything approaching the scale of BellSouth's FastAccess service." (Tr. 138). In addition, MCI asserts that the emergence of alternative DSL services will not affect those customers that have already locked into BellSouth's service and who will potentially incur expense and inconvenience in switching providers. (Tr. 41). CUC points out that since the FCC's Line Sharing Order was released on December 9, 1999, all three national DSL providers have filed for bankruptcy, and only Covad Communications Company has survived. (CUC Brief, p. 8, citing to MCI Complaint at 3, 5). CUC also draws attention to a subtlety in BellSouth's policy that is relevant to the issue of alternatives to BellSouth's FastAccess. An end-user cannot migrate to UNE-P service with a CLEC and maintain its DSL service with any DSL provider that buys DSL service wholesale from BellSouth. (CUC Brief, p. 11). Finally, CUC argues that regardless of any competitive broadband options, BellSouth is not relieved of its obligation under the law to not act in an anticompetitive manner. Id. at 14-16.

The Commission finds that the alternatives to BellSouth's DSL service do not substantially diminish the anticompetitive impact of BellSouth's policy on local voice competition, nor do they relieve BellSouth from its obligation to comply with the prohibition in O.C.G.A. § 46-5-169(4) against anticompetitive acts and practices.

While the Commission is not bound by decisions of other state commissions, it can be of assistance to review how this issue has been treated in other jurisdictions. The

Louisiana Public Service Commission ("LPSC") found that BellSouth's policy of requiring a customer to receive voice service from BellSouth in order to receive its DSL service was anticompetitive. *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,* Order R-26173 (January 24, 2003). ("Louisiana Order"). The LPSC determined that the anticompetitive effects of BellSouth's policy were inconsistent with the LPSC's policy to promote competition. (Louisiana Order, p. 6). The full title of the State Act under which MCI has in part filed its complaint in this docket is "The Telecommunications and Competition Development Act of 1995." As indicated by this title, the framework of the State Act is structured to encourage competition in Georgia's local telecommunications market. The Commission administers the State Act. Similar to the LPSC, the Commission has an interest in striking down anticompetitive policies. The LPSC also emphasized that there were no technical reasons as to why BellSouth could not offer its DSL service to a CLEC voice customer. Id. at 8.

In an arbitration proceeding, the Florida Public Service Commission ("FPSC") ordered BellSouth to provide its FastAccess Internet Service to customers that receive voice service from Florida Digital Network. *In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Final Order on Arbitration, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (Florida Public Service Commission, June 5, 2002) ("Florida Order"). The FPSC concluded that BellSouth's policy unreasonably penalized customers who wished to receive BellSouth's DSL service and voice service from the CLEC. (Florida Order, p. 11). The Commission agrees that BellSouth's policy is punitive for such customers because it denies them an option without there being any legitimate technical or policy reason. The FPSC also found BellSouth's policy to be inconsistent with the provision in Florida law that charges the FPSC with preventing any anticompetitive behavior. (Florida Order, p.11, citing FLA. STAT. ch. 364.01(g). MCI has brought this complaint under a Georgia statute that similarly prohibits anticompetitive acts or practices. O.C.G.A. § 46-5-169(4).

Whether BellSouth's policy is anticompetitive in violation of the State Act involves a policy as well as legal decision by the Commission based on the evidence that it has before it. For the reasons addressed in this portion of the order, the Commission finds that BellSouth's policy is anticompetitive in violation of O.C.G.A. § 46-5-169(4). In sum, BellSouth uses the tying arrangement to insulate its voice service from competition by impairing the customer's ability to choose its provider of local service. It would inhibit local voice competition for BellSouth to gain advantage over its current competitors in the local voice market because of the history of regulation in the industry. BellSouth's argument that it should be rewarded for its decision to lead the pack in investing in a DSL network is misguided for two reasons. First, as previously discussed, the argument ignores BellSouth's unique ability as a result of the industry's regulatory history to invest in a Georgia DSL network of that scope and scale. Second, the argument is misguided because BellSouth is reaping the rewards of its decision to invest in a DSL network of broad scope and scale. This Commission's decision is not telling

BellSouth that it cannot sell its DSL service. Nor is this Commission telling BellSouth that it cannot be compensated for selling its DSL service. It is not even telling BellSouth what price to offer for its DSL service. All the Commission is telling BellSouth is not to refuse customers an option separate from voice service in an effort to preserve its monopoly share of the voice market and insulate its voice service from the effects of competition. Any implication that as a result of this order BellSouth would be discouraged from investing in innovative technology in the future appears wholly inconsistent with the record in this docket. The record reflects that BellSouth has an overwhelming majority of the DSL lines in Georgia and that DSL, despite a relatively late start, has overtaken cable modems in Georgia.

While BellSouth's policy has the same anticompetitive effect as courts have warned against in the context of tying arrangements, namely insulating a product or service from competition, O.C.G.A. § 46-5-169(4) does not limit the prohibition on anticompetitive acts or practices to the confines of antitrust law. The phrase "as such terms are commonly applied in antitrust law" modifies the examples of anticompetitive acts or practices set forth in the statute. It does not limit the type of anticompetitive acts or practices that are prohibited. The Commission finds that BellSouth's practice violates the prohibition set forth in O.C.G.A. § 46-5-169(4) against anticompetitive acts or practices because it denies customers an option in a separate market for the purpose of preventing customers from exercising unfettered choice for local telecommunications service.

C. GENERAL FINDINGS AND CONCLUSIONS

The Commission notes that either Count 1, related to the interconnection agreement, or Count 2, related to state law, independent of the other count, would suffice to compel this Commission to order BellSouth to discontinue its policy. Moreover, either part of the count related to state law, illegal tying or generally anticompetitive act or practice, independent of the other violation, would suffice to compel this Commission to order BellSouth to discontinue its policy.

The Commission also notes that MCI testified that it would provide BellSouth access to the high frequency portion of its line without charging BellSouth for this access. (Tr. 170-171). The ordering of BellSouth to discontinue its policy is contingent upon MCI not imposing a charge on BellSouth for accessing the high frequency portion of the line that it leases from BellSouth.

Finally, the Commission's conclusions were based on the record before it. The Commission recognizes that the realities of the marketplace change. With that in mind, the Commission finds that it is prudent to conduct a review of the CLECs' efforts to build out their own network with DSL capability and the impact on the marketplace. The Commission shall issue an order on the results of that review thirty months from the date of this order.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues presented to the Commission for decision should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to the terms of the parties' interconnection agreements and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that BellSouth shall discontinue its policy of requiring that customers receive voice service from BellSouth in order to receive BellSouth's DSL service. For the reasons stated herein, this policy is in violation of the parties' interconnection agreements and in violation of O.C.G.A. § 46-5-169(4).

ORDERED FURTHER, that the Commission's direction to BellSouth to discontinue its policy of requiring that customer receive voice service from BellSouth in order to receive BellSouth's DSL service is contingent upon MCI allowing BellSouth access free from any charge to the high frequency portion of the line leased from BellSouth.

ORDERED FURTHER, that the Commission conduct a review of the CLECs' efforts to build out their own network with DSL capability and the impact on the marketplace. The Commission shall issue an order on the results of that review thirty months from the date of this order.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 21st day of October, 2003.

Reece McAlister	Robert B. Baker, Jr.
Executive Secretary	Chairman
Date: 11-19-03	Date: Nov. 19, 2003

Attachment 1

Eastern District of Kentucky
FILED

DEC 29 2003

AT FRANKFORT
LESLIE G WHITMER
CLERK U S DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 03-23-JMH

BELLSOUTH TELECOMMUNICATIONS, INC., PLAINTIFF,

v. **MEMORANDUM OPINION AND ORDER**

CINERGY COMMUNICATIONS COMPANY, et al., DEFENDANTS.

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In this action, BellSouth Telecommunications, Inc. ("BellSouth") seeks review of a Kentucky Public Service Commission ("PSC" or "Commission") decision. The decision at issue was the result of an arbitration conducted by the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§251-252 (the "1996 Act"). The crux of the decision to which BellSouth objects states that:

> BellSouth may not refuse to provide Digital Subscriber Line ("DSL") service 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 Competitive Local Exchange Carrier ("CLEC") that provides service over the Unbundled Network Elements Platform ("UNE-P").

Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.

46

Pursuant to 47 U.S.C. Section 252; Case 2001-00432, October 15, 2002 Order. BellSouth asserts that the Commission's decision purports to regulate interstate telecommunications services in a manner that is directly contrary to binding Federal Communications Commission ("FCC") rulings and to BellSouth's federal tariff. BellSouth also claims that the Commission should never have decided the issue presented in this case because it was not set forth in Cinergy's arbitration petition as required by the 1996 Act. Additionally, BellSouth argues that the PSC's decision was arbitrary and unsupported by the record.

I. BACKGROUND

A. Procedural Background

Cinergy is a privately-owned, Kentucky corporation which has been operating in Kentucky as a telecommunications provider since 1977. To facilitate its service to Kentucky residents, Cinergy entered into an initial interconnection agreement with BellSouth which expired on November 29, 2001. On May 30, 2001, Cinergy commenced negotiations with BellSouth for a new interconnection agreement pursuant to Section 251 of the 1996 Act. Despite a number of negotiation sessions over the next several months, the parties were unable to reach agreement on a number of issues. As a result, on December 10, 2001, Cinergy filed a Petition for Arbitration pursuant to Section 252 of the 1996 Act, requesting the PSC resolve sixteen disputed issues.

BellSouth filed its formal Response to the Petition on January 3, 2002, admitting the Commission had jurisdiction over the issues raised by Cinergy. The Commission set a procedural schedule for resolution of the case. Pursuant to the schedule, the parties filed agreed-upon portions of the interconnection agreement, as well as "Best and Final Offers" on the disputed issues. On January 31, 2002, the Commission Staff sponsored an informal conference at which the remaining issues were discussed and debated, including the precise issue BellSouth claims was not properly part of the proceeding. Limited discovery occurred, followed by the filing of direct, and some rebuttal testimony by the parties.

As a result of continued settlement negotiations, only four issues were ultimately submitted to, and decided by, the Commission. The Commission heard the case in a formal hearing on May 22, 2002, which lasted a full day. The parties filed post-hearing briefs, proposed findings of fact and conclusions of law, and an additional brief on a specific issue requested by the Commission. The Commission issued its decision on July 12, 2002.[1]

Both parties sought clarification or rehearing of the Commission's Order. On October 15, 2002, the Commission clarified its Order, and issued a further Order on February 28, 2003,

[1] PSC Chairman Huelsmann dissented on the issue of BellSouth's refusal to provide Broadband services to a customer of a CLEC who is providing voice services via UNE-P citing regulatory uncertainty, inconsistency with FCC rulings, and lack of harm to Cinergy as the main reasons for his dissent.

necessitated by the parties' inability to agree on the language for the interconnection agreement which would effectuate the Commission's decisions. On March 20, 2003, the parties submitted the interconnection agreement to the Commission, containing language specified by the Commission, on the disputed provisions. The Commission approved the interconnection agreement on April 21, 2003.

BellSouth commenced the present appeal by filing its complaint on May 9, 2003. Timely answers and briefs were filed. BellSouth challenges only the Commission's decision that BellSouth may not refuse to provide DSL capabilities to customers for whom a CLEC, such as Cinergy, is the voice provider through means of the UNE-P.

B. The Telecommunications Act of 1996

The 1996 Act places certain obligations on incumbent local exchange carriers ("ILECs") such as BellSouth - the companies that have traditionally offered local telephone service in particular areas. These obligations are intended to assist new local telecommunications providers such as Cinergy, AT&T, and MCI; these new local competitors are often referred to as competitive local exchange carriers or "CLECs."

ILECs like BellSouth must, among other things, lease to their competitors "for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." See 47 U.S.C. § 251(c)(3).[2] In addition to requiring access to UNEs, the 1996 Act requires ILECs such as BellSouth to offer their complete, finished retail telecommunications services provided to end users, to new entrants for resale. See 47 U.S.C. § 251(c)(4).

The 1996 Act contains a specific scheme for implementing the new obligations imposed by the federal statute. This scheme contains three parts. *First*, Congress intended the mandates of Section 251 to be implemented in the first instance through the negotiation of private, consensual agreements between ILECs and CLECs. Thus, Section 251 imposes on both ILECs and CLECs "[t]he duty to negotiate in good faith in accordance with Section 252 of this title the particular terms and conditions of agreements to fulfill" the specific duties imposed on incumbents by Section 251. *Second*, as a backstop to reliance on privately negotiated agreements, Congress enlisted the aid of state public utility commissions like the PSC. If the parties are unable to agree on all issues within 135 days after the competitor's initial request for negotiation, either party may petition the state commission to arbitrate any "open issues." 47 U.S.C. § 252(b)(1). Regardless of whether the parties reach agreement through voluntary negotiation, mediation, or arbitration, the private parties must submit their

[2] These "network elements" are piece parts of the local telecommunications network.

agreement to the relevant state commission for approval. *See id.* § 252(e)(1). *Third,* and lastly, state commission decisions under this statute are subject to review in federal district courts for conformity with the terms of the Act. *See id.* § 252(e)(6).

C. Factual Background

Until recently, customers wishing to access the Internet relied chiefly upon "dial-up" services that relied on the voice channel of a basic telephone line to transmit and receive data at relatively low speeds. Over the last several years, however, BellSouth and other companies have invested billions of dollars to make "broadband" internet access available - that is, to provide access at much higher speeds.[3]

There are several competing technologies that provide such high-speed broadband transmission for Internet access. For instance, one of the leading technologies is cable modem service offered over cable television facilities - not telephone lines- by companies such as AOL Time Warner. BellSouth offers a competing high-speed transmission service that does use telephone lines.

[3] In an earlier case in front of the PSC, *Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan,* KPSC Case 99-434. Order, Aug. 3, 2000, the Commission conducted a review of BellSouth's rates, earnings, and method of regulation. Finding that the Company had excess earnings, BellSouth faced the prospect that the Commission would require it to substantially reduce the rates of its retail ratepayers by millions of dollars. BellSouth proposed to keep the excess earnings in order to build a broadband network into rural markets in Kentucky where standard business case analysis would not support such an investment. BellSouth stated that it would "make these same capabilities available to its competitors on a wholesale basis and therefore, would not have any competitive advantage." *Cinergy Hearing Exhibit 1 (Cinergy App. 3).* The Commission accepted BellSouth's proposal.

This service is known as DSL. DSL makes use of the portion of the spectrum on a basic copper telephone line (also known as a "local loop") that is not used for voice services. DSL thus enables customers to download information from the Internet at high speeds without interfering with the normal operation of the voice channel on the telephone line.

By itself, DSL service is simply a high-speed data transmission (or transport) service. One can conceptualize DSL as the offering of a particularly large pipe for the transmission of data. In order to provide broadband Internet access on a retail basis, one must combine that DSL transmission service (the pipe) with the information routing and processing capabilities (the water running through the pipe) offered by an Internet Service Provider or "ISP" such as America Online or Earthlink.

BellSouth combines those two functions in its retail high-speed Internet access service, known as FastAccess. In addition to that retail service, BellSouth offers wholesale DSL transmission to independent ISPs so those companies can combine DSL transmission with their own capabilities in order to provide finished broadband Internet access to retail customers. The PSC's decision in this case relates only to BellSouth's wholesale offering of DSL transmission.

The PSC ruled that BellSouth may not refuse to provide DSL service pursuant to a request from an Internet service provider who serves, or wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P. In other words, the PSC determined that BellSouth may not refuse to provide DSL to Cinergy, AT&T, and MCI customers; a Kentucky customer must be able to obtain DSL service regardless of the voice carrier he chooses.

II. STANDARD OF REVIEW

Along with the majority of other circuits, the Sixth Circuit has adopted and utilized a two-tiered review procedure when reviewing a ruling of a state administrative body. This bifurcated standard is employed because arriving at a decision in these types of disputes involves an understanding of the interplay between federal and state law.

The federal judiciary first reviews *de novo* whether a state public service commission's orders comply with the requirements of the Telecommunications Act. The Court also reviews the Commission's interpretation of the Act de novo, according little deference to the Commission's interpretation. *Michigan Bell Tel. Co. v. Strand* 305 F.3d 580, 586 (6th Cir. 2002). If no illegality is uncovered during such a review, the question of whether the state commission's decision is correct must then be analyzed, but under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles. *See Michigan Bell Tel. Co. v. MFS Intelenet* *of Michigan, Inc.*, 339 F.3d 428, 433 (6th Cir. 2003); *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 482 (5th Cir. 2000); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *U.S. West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999).

The arbitrary and capricious standard is the most deferential standard of judicial review of agency action, upholding those outcomes supported by a reasoned explanation, based upon the evidence in the record as a whole. *See Killian v. Helthsource Provident Adm'rs, Inc.*, 152 F.3d 514, 520 (6th Cir. 1998). The Court will uphold decision "if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence." *Id.* Thus, absent clear error in interpretation of federal law or unsupported, arbitrary and capricious findings by a state commission, the decisions of state commissions generally stand. *Michigan Bell Tel. Co. v. MCIMetro Access Trans. Svcs. Inc.*, 323 F.3d 348, 353 (6th Cir. 2003) (citing *Michigan Bell Tel. Co.*, 305 F.3d at 586-87.

III. ANALYSIS

A. Whether the PSC violated Section 252(b) of the Act

Section 252(b)(4)(a) of the 1996 Act states that a "State commission shall limit its consideration of any petition ...to the issues set forth in the petition and in the response, if any." 47 U.S.C. § 252(b)(4)(a). Cinergy filed a petition with the PSC that set forth fifteen unresolved issues arising out of interconnection negotiations with BellSouth. As stated above, due to continued negotiations, only four of these issues were ultimately addressed by the Commission.

BellSouth contends that one of the issues ultimately decided by the Commission, BellSouth's alleged obligation to continue to provide DSL service over CLEC UNE-P lines, was not raised in Cinergy's petition for arbitration. BellSouth relies on the plain language of Section 252(b)(4)(A) and states that it is improper for state commissions to resolve issues not presented in a petition for arbitration under the 1996 Act. Issues related to issues actually raised in a petition are, in BellSouth's opinion, not to be arbitrated by the PSC because of lack of notice to the parties. In any event, BellSouth contends, the issue ultimately decided by the PSC is in no way related to the issue set forth in Cinergy's original petition. Therefore, BellSouth argues that the PSC's ruling requiring BellSouth to provide DSL service on a UNE-P line was inappropriate and in violation of Section 252(b).

Cinergy takes the position that the Act does not require precise pleadings and, once an issue is open, the PSC has the discretion to review related issues. Relying on *TCG Milwaukee, Inc. v. Public Service Com'n of Wisconsin*, 980 F. Supp. 992 (W.D. Wis. 1997), Cinergy states that once the parties create an open issue, the PSC has considerable latitude to resolve the related issues necessary to finalize the interconnection agreement and make it a working document. Cinergy also contends that BellSouth had sufficient notice that this was an issue before the Commission. The issue of DSL over UNE-P was debated by the parties at the informal conference, again at the hearing, and once again in the briefs, all without objection from BellSouth.

The PSC determined in its October 15, 2003, Order that the DSL issue was "directly related" to the line-splitting issue that Cinergy raised as Issue No. 7 in its original petition, and that both parties had addressed this issue at later points in the proceeding.[4] Therefore, the PSC determined that the issue of DSL over the UNE-P was properly before the Commission. We agree and find no violation of Section 252(b).

B. Whether the PSC's Order is Preempted

BellSouth argues that PSC's Order must fail because of federal preemption, stating that, "as a matter of federal law, the Federal Communications Commission ("FCC") - not state commissions - has exclusive jurisdiction over interstate communications." Cinergy counters that this is an oversimplification that results in a

[4] The Commission also stated that determinations such as the one at issue reflect the policy of the PSC. The Commission cited Administrative Case No. 382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements, Order dated December 18, 2001 at 36 which states, "The Commission also makes clear in this Order that ordinarily combined UNEs must also be made available where line-splitting occurs. Line-splitting must be made available to all CLECs on a nondiscriminatory basis. Moreover, BellSouth may not discontinue the provision of line-splitting when a CLEC provides voice service through UNE-P, regardless of which xDSL provider is used." BellSouth did not contest this Commission ruling.

flawed characterization of the current law.

BellSouth maintains that DSL service, as used to provide Internet access, is an interstate service subject to the FCC's jurisdiction. Cinergy, on the other hand, states that since 1996, responsibility for increasing competition in the realm of telecommunications services, including those with an interstate dimension, has become the responsibility of both federal and state legislatures. Cinergy points to the concept of "cooperative federalism," and states that the Sixth Circuit has described this concept as "harmoniz[ing]" the efforts of federal and state agencies. *Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 352 (6th Cir. 2003).

The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service "neatly into two hemispheres," one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. *Louisiana Pub. Serc. Comm'n v. FCC*, 476 U.S. 355, 360 (1986); *see also Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000). Rather, observed the Court, "the realities of technology and economics belie such a clean parceling of responsibility." *Id.* The FCC has also rejected the argument advanced by BellSouth, noting that "state commission authority over interconnection agreements pursuant to Section 252 extends to both interstate and intrastate matters." Reciprocal Compensation Ruling ¶25, quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 F.C.C.R. 15499 ¶ 84, 1996 WL 452885 (1996).

In its Order, the PSC concluded that it did in fact have jurisdiction over this issue and that the FCC determinations were not preemptive:

> We also have jurisdiction over the issue of whether BellSouth acts reasonably in refusing to provide DSL service to CLEC UNE-P customers under, inter alia, 47 U.S.C. § 252(e) and K.R.S. 278.280. The FCC's determination on this issue is not, and does not purport to be, preemptive.

July 12, Order at 2.

State laws can be expressly or impliedly preempted by federal law. *Michigan Bell Tel. Co.*, 323 F.3d at 358. Federal law may preempt state law when federal statutory provisions or objectives would be frustrated by the application of state law. *Id.* Moreover, where Congress intends for federal law to govern an entire field, federal law preempts all state law in that field. *Id.* The Sixth Circuit has held that when a state law is not expressly preempted, courts must begin with the presumption that the law is valid. *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 244 (6th Cir. 1997). "'It will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so.

The exercise of federal supremacy is not lightly presumed.'" *Id.* (quoting *New York State Dep't of Soc. Servs. v. Dublino,* 413 U.S. 405, 415 (1973).

When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. *Michigan Bell,* 323 F.3d at 358. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. *Id.* Specifically, Section 251(d)(3). of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).

The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act." *Michigan Bell Tel. Co.,* 323 F.3d at 359 (citing *Verizon North, Inc., v. Strand,* 309 F.3d 935 (6th Cir. 2002)). "Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets...however, Congress did not intend to permit state regulations that conflicted with the 1996 Act...Thus, a state may not impose any requirement that is contrary to terms of sections 251 though 261 or that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Michigan Bell Tel. Co.,* 323 F.3d at 359 (quoting *In re Public Utility Commission of Texas,* 13 F.C.C.R. 3460, ¶ 52 (Oct. 1, 1997) (internal citations omitted). According to the FCC, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted. *Id.* (citing *In re Public Utility Commission of Texas,* 13 F.C.C.R. 3460, ¶ 50-52). The Court finds that nothing in the state regulations stand as an obstacle to the accomplishment and execution of the full objectives of Congress.

The 1996 Act incorporated the concept of "cooperative federalism," whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership." *Michigan Bell,* 323 F.3d at 352. Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements. The PSC's order, challenged here by BellSouth, embodies just such a requirement. 47 U.S.C. § 251(d)(3)(C). It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission. The PSC order does not substantially prevent implementation of federal statutory requirements and thus, it is the Court's determination that there is no federal preemption.

C. **Whether the PSC's decision is arbitrary and capricious.**

Aside from BellSouth's other arguments, the company alleges that the PSC's decision is arbitrary and capricious in that it is unsupported by substantial evidence in the record as a whole. BellSouth contends that the Commission lacked any support for its conclusion that BellSouth's policy of refusing to provide DSL service on CLEC UNE-P lines has a "chilling effect on competition."

The Kentucky PSC determined that it would consider "whether BellSouth acts reasonably in refusing to provide DSL service to competitive carrier UNE-P customers under, inter alia, 47 U.S.C. § 252 (e) [which preserves state law] and KRS § 278.280." July, 12, 2002 Order at 2. Kentucky law provides:

> Whenever the commission...finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction...are unjust [or] unreasonable,...the commission shall determine the just [or] reasonable...practices,...service or methods to be observed,...and shall fix the same by its order, rule or regulation.

KRS § 278.280(1). The PSC determined that BellSouth violated the above statute because its "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers." July 12, 2002 Order at 7.

By claiming that the PSC's findings lack any support in the record, BellSouth vastly understates the administrative record. Cinergy offered voluminous testimony describing BellSouth's anti-competitive practices and explaining how they would cripple Cinergy's ability to compete in the local voice market. For instance, prior to this arbitration, the PSC entered an advisory opinion stemming from a separate investigation of BellSouth's policies and found such policies to have a chilling effect on competition:

> BellSouth is aggressively offering customers bundled voice and advanced services while, according to AT&T, BellSouth consistently precludes CLECs who use the unbundled network element platform (UNE-P) from offering customers this same option. This has the effect of chilling local competition for advanced services.

Kentucky 271 Advisory Opinion, pp. 13-14. Cinergy also presented multiple witness to testify regarding BellSouth's policy's effect on competition.

The PSC's decision is supported by a reasoned explanation and is based upon the evidence in the record as a whole. Consequently, the Court sees nothing that points to the PSC's decision being arbitrary or capricious. Therefore, because the PSC's decision seems to be the result of a deliberate principled reasoning process, and is supported by substantial evidence, the Court finds that the decision of the state commission should stand.

Accordingly,

IT IS ORDERED, that the PSC's decision be, and the same hereby is, **AFFIRMED**.

This the 29th day of December, 2003.

Signed By:

Joseph M. Hood JMH

United States District Judge

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON 12-29-03
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3:03-cv-23 Notice will not be electronically mailed to:

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