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Guy M. Hicks
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March 28, 2000

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0050

Re: *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*
Docket No. 99-00430

Dear Mr. Waddell:

BellSouth is in receipt of the March 24, 2000 letter from H. LaDon Baltimore on behalf of ITC^DeltaCom Communications, Inc. ("DeltaCom") advising the Authority that "the parties have reached a clear impasse" on the issues the parties had agreed to settle. BellSouth was surprised to receive this letter, particularly since the parties had exchanged revised language to resolve the settled issues on Thursday, March 23. Without getting into the specifics of the negotiations, BellSouth was led to believe that the revised language proposed by BellSouth on most of the settled issues was satisfactory to DeltaCom. In fact, on Thursday, March 23, 2000, the day before DeltaCom sent its letter to the Authority, the parties had set up a telephone conference call for Monday, March 27 to discuss the revised language one more time. Given that the parties were still in the midst of negotiations, BellSouth does not agree that "impasse" had been reached. Rather, in BellSouth's view, DeltaCom has simply had second thoughts about its decision to settle, and it is misleading for DeltaCom to suggest otherwise.

With that said, and in light of DeltaCom's request that the Authority "release its arbitration decision as soon as possible," BellSouth respectfully would like to bring to the Authority's attention two recent decisions that are relevant to the Authority's deliberations. First, enclosed is a copy of the Florida Public Service Commission's order resolving the issues raised by DeltaCom in its arbitration in Florida. The Florida Commission issued its written order on March 15, 2000.

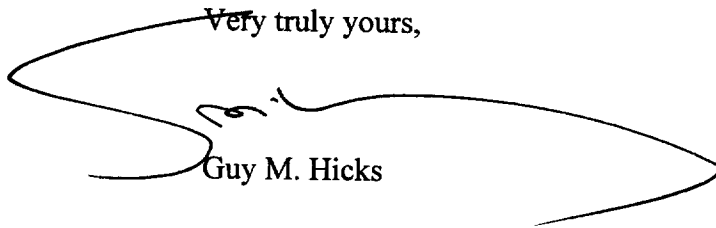
Second, as the Authority is undoubtedly aware, on March 17, 2000, the United States Court of Appeals for the District of Columbia Circuit reversed and vacated certain portions of the FCC's March 1999 order in *In re: Deployment of Wireline Services Offering Advanced*

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Telecommunications Capability, 14 FCC Rcd. 4761 (1999). See *GTE Service Corp. v. FCC*, 2000 US App. LEXIS 4111 (D.C. Cir. March 17, 2000). In particular, the D.C. Circuit vacated portions of paragraph 42 of the FCC's order which required that incumbent local exchange carriers "give competitors the option of collocating equipment in any unused space within the incumbent's premises, to the extent technically feasible, and may not require competitors to collocate in a room or isolated space separate from the incumbent's own equipment." *Id.* at *26. Importantly, this language which the Court of Appeals has vacated was relied upon by DeltaCom witness Don Wood in support of DeltaCom's proposed 30-day provisioning interval for cageless physical collocation. See Transcript of Proceedings, Vol. IIA at 277-78 & Vol. IIB at 284.

Thank you for your attention to this matter.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to be "Guy M. Hicks".

Guy M. Hicks

GMH/jem

Enclosure

CERTIFICATE OF SERVICE

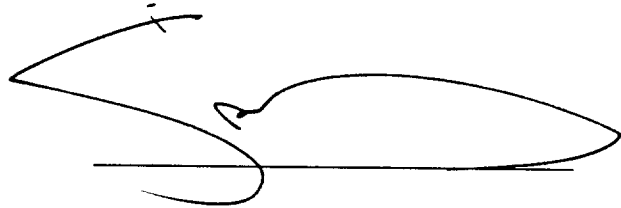
I hereby certify that on March 28, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☒ Hand
- ☐ Mail
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Gary Hotvedt, Esquire
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- ☒ Hand
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A handwritten signature in black ink, appearing to read 'H. LaDon Baltimore', written over a horizontal line.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by ITC^DeltaCom DOCKET NO. 990750-TP
Communications, Inc. d/b/a ORDER NO. PSC-00-0537-FOF-TP
ITC^DeltaCom for arbitration of ISSUED: March 15, 2000
certain unresolved issues in
interconnection negotiations
between ITC^DeltaCom and
BellSouth Telecommunications,
Inc.

The following Commissioners participated in the disposition
of this matter:

JOE GARCIA, CHAIRMAN
SUSAN F. CLARK
E. LEON JACOBS, JR.

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On behalf of BellSouth Telecommunications, Inc.

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On behalf of the Commission Staff

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MAR 20 2000

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FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

I. CASE BACKGROUND

On June 11, 1999, ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom (ITC^DeltaCom) filed a Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 (Act)¹ seeking arbitration of certain unresolved issues in the interconnection negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc. (BellSouth). On July 6, 1999, BellSouth filed its response. The Petition enumerated 72 issues. At the issue identification meeting conducted by Commission staff (staff), the parties notified staff that 23 issues had been resolved. Eight additional issues were removed at the Prehearing Conference conducted by the Prehearing Officer.

An administrative hearing was held on October 27-29, 1999, on the remaining issues. Subsequent to the hearing, the parties filed a Joint Motion of the Parties Notifying the Commission of Recently Resolved Issues, by which 16 additional issues were resolved by the parties through negotiation and thus removed from this arbitration proceeding.

II. OPERATIONAL SUPPORT SYSTEMS (OSS)

The first issue we consider is what constitutes parity for access to operational support systems (OSS). This issue focuses on the OSS interfaces that enable ITC^DeltaCom to access BellSouth's OSS functionalities. We must determine whether BellSouth's OSS interfaces provide ITC^DeltaCom comparable access to BellSouth's OSS and databases. We must also determine whether these interfaces allow ITC^DeltaCom to perform equivalent functions as BellSouth does, be it pre-ordering, ordering, provisioning, repair and maintenance, or billing. We note that this issue should not be construed to anticipate what OSS systems are on the horizon; instead, this issue addresses the existing systems BellSouth uses

¹ 47 U.S.C. 252(b)

for its retail activities and whether these equivalent systems are available to provide ITC^DeltaCom nondiscriminatory access to BellSouth's OSS or interfaces.

The parties indicated in their briefs that Issue 3(a), which defined parity as it pertains to the parties' interconnection agreement, had been resolved. The record does not contain the definition that the parties agreed upon; thus, for purposes of determining this issue, as well as the next two issues relating to unbundled network elements (UNEs) and unbundled loops using integrated digital loop carrier (IDLC) technology, we rely upon the following definition found in FCC Rules 51.311(a) and (b), and 51.603:

Parity is a three (3) part requirement for non-discrimination for interconnection, unbundled network elements and resale. Parity is nondiscriminatory or equivalent access, meaning that the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC (ILEC) provides to a requesting telecommunications carrier shall at least (at minimum) be equal in quality to that which the ILEC provides to itself. For resale, the ILEC must provide services to requesting telecommunications carriers that are equal in quality, subject to the same conditions, and within the same provisioning intervals that the ILEC provides these services to others, including its end users.

A. Analysis

ITC^DeltaCom witness Thomas argues that BellSouth is not providing nondiscriminatory access to its OSS and databases as required by the Act, FCC Orders, and state commission Orders. Witness Thomas testifies that the Act, FCC Orders, and state commission Orders require BellSouth to provide ordering and provisioning services to ALECs at parity with itself [BellSouth], its subsidiaries and affiliates. Witness Thomas asserts that without nondiscriminatory access and parity of service, ITC^DeltaCom will be severely disadvantaged in competing against BellSouth. He states that nondiscriminatory access means that ". . . whatever access BellSouth provides to itself, BellSouth must provide 'equally'

to ITC^DeltaCom." Witness Thomas further testifies that nondiscriminatory OSS interfaces for ITC^DeltaCom mean OSS access in the same time and manner as BellSouth enjoys.

BellSouth witness Pate states that the Act requires ILECs to provide nondiscriminatory access to their OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing for UNEs and resale services. Witness Pate argues that the FCC's requirement for nondiscriminatory access simply means that the ILECs must provide ALECs access to the required functions and information for resold services in substantially the same time and manner as they provide access for themselves. Witness Pate further argues that neither the Act nor the FCC requires that ALECs' access be identical to the ILEC's, but only that such access must be nondiscriminatory. Witness Pate contends that the FCC applies a standard of substantially the same time and manner for resale services, and access that allows an efficient competitor the ability to compete for UNEs. He further testifies that "substantially the same time and manner" means that one should expect the actual time to provision a service to be about the same and be performed in a similar manner as BellSouth. Witness Pate states that "[A] process that defines how you order and provision services, for example, would be similar for the retail unit as it would be for the ALEC community." Witness Pate contends that this definition is consistent with the FCC's interpretation of parity.

ITC^DeltaCom witness Thomas testifies that nondiscriminatory access to pre-ordering information is necessary for submitting accurate orders to BellSouth. He states that ITC^DeltaCom currently uses the Local Exchange Navigation System (LENS) and Electronic Data Interchange (EDI) OSS interfaces for pre-ordering and ordering, respectively. Witness Thomas testifies that ITC^DeltaCom uses LENS to access pre-ordering information; however, LENS does not allow ITC^DeltaCom to integrate this pre-ordering information into EDI to place orders. Witness Thomas argues that since LENS does not parse² the customer service record (CSR) in pre-ordering, this renders LENS

² Parsing is the ability to break the customer service record (CSR) information into simple pieces of information for further use, e.g., in the ordering function.

unintegratable with EDI. Witness Thomas argues that because LENS is not integrated with EDI, ITC^DeltaCom must re-enter the pre-ordering information into the EDI ordering interface. He contends that this is inefficient, prone to human error, and concludes that this is not at parity with BellSouth. Witness Thomas states that without a fully integratable EDI interface, BellSouth cannot provide ITC^DeltaCom nondiscriminatory OSS access.

BellSouth witness Pate testifies that BellSouth provides three electronic OSS interfaces for ALECs' use. He further states that two of these interfaces have real-time access to the same pre-ordering databases used by BellSouth's retail unit. Witness Pate states that all three interfaces provide both pre-ordering and ordering functionalities. Witness Pate further testifies that the Telecommunications Access Gateway (TAG) system and EDI are industry standards-based systems, and that the pre-ordering function of TAG is integratable into the EDI ordering functionality. Witness Pate contends that while ITC^DeltaCom uses LENS for some orders, more than 80% of ITC^DeltaCom orders are submitted through EDI. Witness Pate argues that with more electronic flow-through, there is little need for human intervention; however, he observes that with human intervention, there is room for errors, longer processing time, and operational inefficiency.

ITC^DeltaCom witness Thomas testifies that LENS is an integrated interface that performs both pre-ordering and ordering functions. Witness Thomas testifies that LENS can only process a maximum of six resold lines per order. Further, he testifies that EDI is a nondiscriminatory ordering interface which does not have pre-ordering capability. Witness Thomas testifies that the TAG interface is supposed to be able to integrate both pre-ordering and ordering functions. However, witness Thomas states that ITC^DeltaCom has learned that TAG does not parse the CSR. Witness Thomas argues that due to limitations in EDI's ability to handle certain types of orders and number of lines, on occasion, ITC^DeltaCom has had to submit orders manually. Witness Thomas further testifies that it cannot use EDI to place orders with a hubbing arrangement³ and orders with more than six lines, because

³ A hubbing arrangement is the situation where ITC^DeltaCom

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BellSouth's OSS will not accept such orders from EDI. Witness Thomas contends that certain complex orders, e.g., hunting and hubbing with intercept message, cannot be processed with LENS.

virtually collocates by leasing equipment in the Bell central office.

BellSouth witness Pate argues that LENS was designed for the most basic, easiest transactions, such as conversions of accounts from BellSouth to the ALEC. He testifies that LENS supports pre-ordering and ordering for resale services and is specifically geared towards the smaller ALECs that do not want to develop their own internal OSS. Witness Pate asserts that since EDI is a standards-based system, it has multiple users. Although EDI supports both ordering and provisioning functions for simple resale services, witness Pate conceded that EDI can only process seven kinds of UNES.

Witness Pate asserts that the TAG interface supports pre-ordering, ordering, and provisioning functions for simple resale services and seven UNES. He argues that TAG is capable of performing the "up-front" edits that mirror those in BellSouth's systems. On order fall-out⁴, witness Pate argues that certain types of orders were designed to fall out in downstream electronic processes. He testifies that complex orders, e.g., hunting, synchronet, and PBX trunks, are designed to fall out because the functionality is not there for the Local Exchange Service Order Generator (LESOG) to translate such orders into the service orders necessary for downstream electronic processing. Witness Pate argues that ALECs enter their orders using the Local Service Request (LSR) format; however, for these complex orders to continue downstream electronically into the Direct Order Entry system (DOE), these orders must be submitted in a Sales Service Order format. For an order that falls out, witness Pate explains that a BellSouth Local Carrier Service Center (LCSC) representative resubmits this order using the same system that BellSouth's retail operation uses, the DOE system.

In response, ITC^DeltaCom witness Thomas contends that his company is not receiving nondiscriminatory access to BellSouth's pre-ordering capability, because ITC^DeltaCom cannot access pre-ordering information and then parse it into ITC^DeltaCom's ordering system. Witness Thomas testifies that although ITC^DeltaCom can validate addresses using LENS, it cannot integrate this information into EDI. Witness Thomas argues that his company does not have

⁴ Order fall-out refers to ALECs' orders that do not electronically flow through the downstream systems in BellSouth's OSS either because of an error or because the network is not designed to process the order downstream.

validation checks because the two interfaces (LENS and EDI) are not integratable. Witness Thomas further argues that BellSouth has the capability to conduct validation checks, which allows BellSouth to detect errors in its orders before they are submitted. Witness Thomas testifies that ITC^DeltaCom is not aware of any errors in its orders until the order is returned by BellSouth. He attributes this problem to the fact that ITC^DeltaCom's two interfaces are not integrated and to the absence of validation checks. Witness Thomas testifies that BellSouth uses the Service Order Language Analysis Routine (SOLAR) and the FID and USOC Edit Library (FUEL) databases for validation checks, which allow BellSouth to discover possible errors in pre-ordering before submitting an order. ITC^DeltaCom witness Thomas asserts that his company does not have access to these databases and indicates that ITC^DeltaCom needs access to this functionality. He argues that the ability to perform error checks will prevent order rejection downstream and shorten provisioning intervals for ITC^DeltaCom's customers.

BellSouth witness Pate argues that the problem of address validation is not unique to ITC^DeltaCom, but is a common problem in the ALEC community. Witness Pate argues that since EDI has no pre-ordering functionality, TAG has been designed with a pre-ordering component, which can take the pre-ordering information and integrate it into EDI. Witness Pate explains that TAG is integratable with EDI so that it will allow the ALECs to perform "[a]ddress validation on their side of the interface because they are experiencing some errors there." He states that by making TAG integratable with EDI, ALECs are able to continue using an interface (i.e. EDI) they are comfortable with while they learn TAG. Witness Pate asserts that the ability to complete the edit checks up front before submitting an order improves the overall accuracy and completeness of that order. Witness Pate further contends that by putting an order in the sales service order format, most of the edits necessary to ensure that all the information is accurate are in place.

We note that the FCC determined:

. . . an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself. Such nondiscriminatory access necessarily includes access to the

functionality of any internal gateway systems the incumbent employs in performing the above functions for its own customers. (FCC 96-325, ¶1523)

Further, in the Ameritech Section 271 Application, the FCC found that for those OSS functions that the Bell Operating Company (BOC) uses which have retail analogues, the BOC must "[p]rovide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers or its affiliates, in terms of quality, accuracy and timeliness." (FCC Order 97-298, FCC Docket 97-137, issued August 19, 1997)

While ITC^DeltaCom argues that the Act, FCC Orders, and state commission Orders require BellSouth to provide access to OSS at parity, BellSouth counters that the Act only requires them to provide nondiscriminatory access to their OSS functions in substantially the same time and manner in which they provide this access to themselves. We agree with ITC^DeltaCom that BellSouth is obligated to provide ITC^DeltaCom nondiscriminatory access to its OSS functions at parity to that which BellSouth provides to its customers.

The evidence clearly shows that both LENS and EDI are electronic OSS interfaces. While LENS has pre-ordering and ordering capabilities, EDI is a standards-based interface with only ordering and provisioning capabilities. The evidence further shows that LENS does not parse the CSR in its pre-ordering mode, and thus, the pre-ordering information in LENS is not integratable into EDI's ordering functionality. We note BellSouth's assertion that LENS was developed to ". . . do the most basic easy transaction, which is conversion of accounts from BellSouth to ALEC. . . . and specifically oriented towards the smaller LECs that don't want to develop their own internal OSS systems. . . . It supports preordering and ordering for resale." Further, we agree with ITC^DeltaCom that since LENS is not integratable with EDI, pre-ordering information from LENS must be re-entered into EDI to place an order, and this process is prone to human errors and is inefficient. BellSouth concurs that absent complete electronic flow-through, any human intervention creates room for errors, longer processing times, and is operationally inefficient. While we are unsure whether TAG can parse the CSR, the evidence supports BellSouth's claim that TAG is a standards-based interface with pre-ordering, ordering and provisioning capabilities. Also, TAG is capable of performing address validation and is integratable with

EDI. We believe that TAG appears to be a more adequate interface than the combination of EDI and LENS.

B. Decision

The record shows that while ITC^DeltaCom can perform validation checks during pre-ordering with LENS, it cannot integrate this information into EDI for ordering. Therefore, ITC^DeltaCom is not aware of any errors in submitted orders until BellSouth returns the orders. The record supports the fact that BellSouth is able to detect errors in its orders before submitting them. We agree with BellSouth that the ability to perform up-front edits before submitting any orders improves the overall accuracy and completeness of the orders, and note that TAG allows the ALECs to perform address validation and other up-front edits on their side of the interface.

While BellSouth provides ALECs access to its OSS using three electronic interfaces, two of these interfaces (LENS and EDI) have limitations with regards to handling capacity, parsing pre-ordering information, performing error checks, and integration with other interfaces. Although ITC^DeltaCom has no first-hand experience with TAG, there is record evidence that shows that TAG has pre-ordering, ordering and provisioning capabilities. The record also indicates that TAG is integratable with EDI and is able to perform up-front edits.

Upon consideration, we find it appropriate to require BellSouth to provide ITC^DeltaCom access to its OSS functionalities that is of the same quality, accuracy and timeliness to that which it provides to its retail operations for pre-ordering, ordering, provisioning, repair and maintenance, and billing for UNEs and resale services. We note that it appears BellSouth is capable of providing these functionalities through TAG.

III. UNBUNDLED NETWORK ELEMENTS (UNEs)

This issue seeks determine what constitutes parity in the provision of UNEs for the purpose of the parties' interconnection agreement. This issue does not address parity as it relates to any specific UNE. Instead, this issue addresses parity using ITC^DeltaCom's experiences with UNEs as expressed in this proceeding compared to BellSouth's provisioning of retail services. As stated earlier, the definition of parity was resolved between the parties

but the record does not contain the definition agreed to by the parties. Again, we rely upon the FCC rules for the definition.

A. Analysis

ITC^DeltaCom witness Hyde testifies that during negotiations, BellSouth indicated that it cannot provide UNEs at parity since it does not provide UNEs to itself. Witness Hyde argues that although BellSouth does not bill itself UNE rates for the local service it provides, the same loop and switch UNE functions are used for the BellSouth retail service. Witness Hyde argues that "[A] service to an end user just isn't going to work unless you've got the loop. And a loop for retail service and a UNE loop is equivalent functionality." Witness Hyde further argues that there are other BellSouth retail services that utilize transport functionality in addition to the loop and switch function, and he asserts that BellSouth provides itself functionally identical facilities and equipment as UNEs. Witness Hyde contends that the "meaningful opportunity to compete" standard means:

If a customer has to give up features, such as forward disconnect that works on BellSouth integrated digital loop carrier (IDLC) and not on universal digital loop carrier (UDLC) UNEs, or suffer modem degradation on changing from that same IDLC, then the ALEC is being denied a meaningful opportunity to compete. If recurring charges for UNEs are set too high, such as the ADSL, then a barrier to meaningful competition is raised. If UNEs are not maintained as well as retail, then meaningful competition is not possible.

Witness Hyde concurs with BellSouth that BellSouth's duty, under the Act, is not parity, "but it's actually nondiscriminatory access on an unbundled basis with respect to UNEs." Witness Hyde argues that the "nondiscriminatory access" is justification for a higher standard of service for UNEs than for retail service. He further concurs with BellSouth that the parties' interconnection agreement should be consistent with the FCC's standards for ensuring nondiscriminatory access. However, he asserts that this agreement needs to include the "at least equal" phrasing. Witness Hyde contends that:

At least equal in quality means that it can be better and still meet the FCC requirements and the Act. . . . ITC^DeltaCom is not requesting that stringent an interpretation but rather one that says, if you give us parity with retail, that would be acceptable to us as nondiscriminatory access.

ITC^DeltaCom witness Hyde further argues that the "at least equal" phrasing simply means equal to or greater than; nonetheless, he testifies that ITC^DeltaCom will "accept one hundred percent of our UNEs exactly equal" to BellSouth's retail service.

BellSouth witness Varner testifies that it is obligated to provide ITC^DeltaCom with nondiscriminatory access to UNEs. Witness Varner argues that BellSouth complies with its obligations under the Act and FCC Orders, and provides ALECs service in a non-discriminatory manner. Witness Varner further argues that what ITC^DeltaCom is seeking with this issue is "an impossible circumstance, not parity." Witness Varner then testifies that:

ITC^DeltaCom wants to require BellSouth to provide UNEs to ITC^DeltaCom on the same terms that BellSouth provides services to its retail customers. This is impossible, because the provision of UNEs is not the same as the provision of retail service. BellSouth does not provide UNEs to itself or to its retail customers.

Witness Varner testifies that parity means "that UNEs are provided in a manner that gives an efficient ALEC a meaningful opportunity to compete." BellSouth witness Varner argues that the phrase, "a meaningful opportunity to compete," calls for a two-part assessment of the individual ALEC's business plan and technical ability. Witness Varner explains further:

. . . what you're doing is you're saying, okay, when I provide them with these UNEs, . . . can they come in and actually compete against BellSouth or against other CLECs for these customers given the standards under which they're going to get these UNEs? . . . do they have a real opportunity to come in and compete . . . Another way of looking at it is the

technical standards. Let's say we gave them a loop that was inferior quality to loops that we use to provide service. Obviously, that's not something you'd say gives them meaningful opportunity to compete.

Witness Varner further argues that nothing in the Act or FCC Orders requires BellSouth to provide UNEs at a greater standard than they provide to themselves. However, during cross examination, witness Varner testified that BellSouth can work with the language of "at least equal to" if ITC^DeltaCom will agree to drop the "or greater than" phrase. Witness Varner then conceded that the language will be satisfactory, if it is clarified to read: "at least equal to or greater than" and it is up to BellSouth to decide if they want to provide a greater than service."

ITC^DeltaCom witness Hyde responds by recounting an incident where BellSouth told ITC^DeltaCom, "[i]t is impossible to have parity with BellSouth's retail services." Witness Hyde testifies that with UNEs, ITC^DeltaCom desires something that is equivalent. Witness Hyde testifies that when ITC^DeltaCom converts a customer from BellSouth to ITC^DeltaCom, "[W]e don't specifically order IDLC. We order a UNE loop for that customer and the conversion of that customer." Witness Hyde explains that in so doing, ITC^DeltaCom is seeking the equivalent of whatever the customer "is being currently provided." Witness Hyde testifies further that ITC^DeltaCom receives degraded service when a customer migrates from BellSouth with IDLC, and gets to ITC^DeltaCom with non-IDLC UNEs. Witness Hyde testifies that:

. . . only when BellSouth serves the customer currently with IDLC does ITC^DeltaCom want the IDLC equivalency. When BellSouth serves a retail customer with copper pair, then we will be very happy with copper pair. . . . If BellSouth uses UDLC to serve that retail. . . . then ITC^DeltaCom will be happy to accept the UDLC. . . .

As previously stated, BellSouth witness Varner testifies that the provision of UNEs is not the same as the provision of retail services. Witness Varner contends that the fact that a network element is unbundled is what sets the element apart from other elements that BellSouth uses. Witness Varner further argues that BellSouth does not provide UNEs to its retail customers. He

testifies that "[U]NES are made available to an ALEC in such a way that the ALEC may either combine those UNEs with the ALEC's other facilities or combine those UNEs with other UNEs acquired from BellSouth." He then explains that this means that "there must be provisions made for giving the ALEC access to the individual UNEs" that is rather unique to the ALEC community. Witness Varner contends that there is no true parallel to a BellSouth retail service. Witness Varner further testifies that "BellSouth does not need such special provisions since BellSouth does not provide UNEs to itself." Witness Varner also dismisses the notion that BellSouth has equivalent retail functionality for UNEs, asserting that BellSouth does not provide itself a loop or any UNE that is separated from everything else in the network.

With respect to IDLC, BellSouth witness Varner testifies that IDLC is an integrated technology that integrates the loop into the switch. Witness Varner explains that "if you want an unbundled loop separate from the switch and that customer is getting basic service off IDLC, you can't get it." However, he insists that BellSouth's set-up for provisioning IDLC meets the technical specifications for an unbundled loop. Witness Varner asserts that BellSouth does not guarantee service levels above the minimum for its customers or for the loops that it provides to ITC^DeltaCom.

B. Decision

As earlier stated, we have considered the issue of parity in the provisioning of UNEs in the context of the parties' interconnection agreement. Both the Act and FCC Orders provide ample guidelines on this subject. Section 251(c)(2)(c) of the Act provides that the ILEC shall provide interconnection for ALECs:

that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; . . .

With respect to unbundled access, §251(c)(3), provides in part:

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically

feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

In implementing the Act, the FCC concluded that the ILECs' obligation to provide nondiscriminatory access to network elements on an unbundled basis covers both physical and logical connection to the element and the element itself. The FCC found that:

. . . new entrants . . . would be denied a meaningful opportunity to compete if the quality of the access to unbundled elements provided by incumbent LECs, as well as the quality of the elements themselves, were lower than what the incumbent LECs provide to themselves. Thus, we conclude it would be insufficient to define the obligation of incumbent LECs to provide "nondiscriminatory access" to mean that the quality of the access and the unbundled elements incumbent LECs provide to all requesting carriers is the same. . . . Accordingly, we conclude that the phrase "nondiscriminatory access" in Section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides itself.

The FCC further defined what constitutes a UNE and concluded:

. . . operations support systems and the information they contain fall squarely within the definition of "network element" and must be unbundled upon request under section 521(c)(3), . . .

We note that FCC Rules 51.311(a) and (b) incorporate the provisions of ¶312 of FCC Order 96-325, in CC Docket 96-98, issued

August 8, 1996. These two provisions provide adequate ground for understanding parity as it relates to UNEs both at the physical and the logical levels.

We agree with the parties that both the Act and FCC Orders require BellSouth to provide nondiscriminatory access to UNEs. However, the parties disagree as to the degree of compliance BellSouth has achieved. Similarly, the parties disagree on the level of access to UNEs that meets the Act's requirement for parity. We note ITC^DeltaCom's assertion that:

If a customer has to give up features, such as forward disconnect that works on BellSouth IDLC and not on UDLC UNEs, or suffer modem degradation on changing from that same IDLC, then the ALEC is being denied a meaningful opportunity to compete.

We agree that the ALECs will be denied "a meaningful opportunity to compete" with BellSouth if the quality of access to a UNE and the UNE itself are lower than BellSouth provides to itself. The FCC found in FCC 96-325, ¶312, that "where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides itself." We believe that conditions where customers must receive lesser quality of service or forfeit certain features because the customers elect to receive service from an ALEC do not foster competition in the local market.

We are not persuaded by BellSouth's arguments that there are no retail analogues for any UNEs, and thus BellSouth cannot provision UNEs at parity with its retail services. We agree that UNEs are provisioned to ALECs in a manner that allows the ALECs to combine these UNEs with other network elements. Except for the "special provision for access", we believe that BellSouth uses these same network elements that it "unbundles" for ALEC's use. Therefore, we believe that a case can be made that absent this "special provision for access," BellSouth and the ALECs utilize the same network elements to serve their end-user customers.

Upon consideration, based on the testimony in the record and provisions of the Act and FCC Order 96-325, the quality of the access to the UNEs or the UNEs that BellSouth has provisioned in this proceeding do not provide ITC^DeltaCom with a meaningful opportunity to compete with BellSouth. We find that for competition to flourish in the local market, customers must come to

rely on the ALECs' services just as they have come to depend on the timeliness and quality of the ILECs' services. For this to occur, the ILECs must provision services to the ALECs that are at least equal to that which the ILECs enjoy. Therefore, we find that ITC^DeltaCom is entitled to receive the same quality of UNEs and access to UNEs as any other requesting carrier. In addition, UNEs and access to UNEs must be at parity with any equivalent functions which BellSouth performs in the provision of retail services.

IV. UNBUNDLED LOOP USING INTEGRATED DIGITAL LOOP CARRIER (IDLC) TECHNOLOGY

Integrated Digital Loop Carrier, or IDLC, by definition, is a platform used by BellSouth and other facilities-based local exchange providers that unites loop and switch facilities by eliminating certain interfacing equipment known as Central Office Terminals, or COTs, housed in central offices. IDLC is not a single product, service, or UNE, but rather, it is a technology used for the provisioning of telecommunications service. IDLC equipment employs advanced electronic circuitry which concentrates, or "channelizes" the switching function from the host central office.

A. Analysis

BellSouth Witness Milner states that BellSouth has deployed IDLC systems in cable relief applications for old or deteriorated plant, for the replacement of excessively long loops in service, and in high growth or high density applications. Witness Milner states that in BellSouth's Florida network, IDLC equipment is used for the provisioning of 28% of all loops, with 13% using Universal Digital Loop Carrier (UDLC), and the remaining 59% utilizing copper alone.

BellSouth's IDLC systems, however, have technical limitations with respect to ALEC unbundling, primarily due to the direct "integration" of the loop and switch facilities. With an IDLC configuration, the channelized loop cannot be easily unbundled, nor can the switching function be directly performed by non-host switching equipment. Witness Milner states that:

. . . if an ALEC wants to serve an end-user over the ALEC's own switch and that end-user customer was previously served over [BellSouth's] IDLC equipment, the

loop can no longer be "integrated" with the BellSouth switch.

Nonetheless, witness Milner indicates that, when technically feasible, BellSouth will unbundle and provide loops to ALECs, including ITC^DeltaCom, on a nondiscriminatory basis.

ITC^DeltaCom witness Hyde, however, contends that BellSouth provides an inferior service to the ALECs because they refuse to provide IDLC equivalent service in most instances. The witness further states that, instead, BellSouth uses either excessively long copper loops, outdated Universal Digital Loop Carrier (UDLC), or in rare instances, provides the "side-door" IDLC, but does so via a voice-grade interface, which will not always provide the same quality and features of BellSouth provisioned IDLC.

Witness Hyde challenges BellSouth to ". . . deliver to a CLEC a digital signal that is equivalent to that which enters a [BellSouth] switch when IDLC is employed." His discussion of the need for equality is in the context of analog-to-digital conversions, noise on the loop, and degraded computer modem performance. Witness Hyde asserts that, absent an IDLC equivalent product from BellSouth, ITC^DeltaCom is not being given a meaningful opportunity to compete in about one-fourth of BellSouth's exchange areas. In sum, the witness offers that "in any event, the quality is less than BellSouth provides to itself," and that in raising the issue, all ITC^DeltaCom truly wants is "something equal." Witness Hyde believes that BellSouth should employ the IDLC unbundling method known as "side-door" provisioning more extensively.

Witness Hyde explains that unbundling the IDLC and provisioning the UNE via the "side-door"

. . . pulls off [from the BellSouth IDLC] a voice-grade byte stream and puts it out to the side to another connection . . . enabling an individual connectivity in the central office."

Witness Hyde acknowledges that the "side-door" connectivity has been deployed for ITC^DeltaCom, but that the deployment has been limited. The witness describes the "side door" provisioning as "IDLC-equivalent." He further explains that ITC^DeltaCom wants "whatever it takes to provide . . . at least equal service . . . by whatever methodology it takes to do it." Witness Hyde indicates

that ITC^DeltaCom wants its loops provisioned in the exact medium as BellSouth provisions its own services, stating that "if BellSouth serves a retail customer with a copper pair, then we will be happy with a copper pair . . . if BellSouth serves a customer with an old-fashioned UDLC, then ITC^DeltaCom will accept the UDLC." In conclusion, witness Hyde states that all ITC^DeltaCom wants is an "equivalency to what BellSouth is providing their end users."

BellSouth witness Milner contends that, in order to provision the IDLC loop to the ALEC, ". . . the loop must be removed from BellSouth's switch so that it can be connected to the ALEC's switch."

He identifies six technically feasible methods to unbundle loops served by IDLC. They are: (1) Remove the loop distribution pair from the IDLC and re-terminate to a spare UDLC or copper loop facility; (2) Remove the loop distribution pair from the host IDLC and re-terminate the pair to use an Integrated Network Access system or other IDLC; (3) Utilize a "side-door" capacity of the host IDLC, if equipped; (4) Utilize a "side-door" capacity of an alternative IDLC; (5) Install and activate a new UDLC or alternative system, and (6) Convert some existing IDLC capacity to UDLC. BellSouth witness Varner concurs, adding that BellSouth cannot provision an IDLC-delivered unbundled loop separate from their switch. Witness Varner states that a UNE ". . . stripped off of a [BellSouth] IDLC would not become a functional equivalent to [BellSouth provisioned] IDLC until ITC^DeltaCom put in their own IDLC system, but if they did that, they'd probably just buy from us the loop distribution facilities, not the unbundled loop . . ."

Witness Varner further states that BellSouth will provide either analog or digital loops to ITC^DeltaCom, depending solely upon what has been requested. The witness states that any loop provisioned on an unbundled basis adheres to:

. . . a set of technical specifications that go with that loop regardless of whether that loop is over UDLC or over copper or whether it was previously a part of basic service provided over IDLC, it's going to meet those minimum technical specifications."

Witness Varner adds that BellSouth will not guarantee service levels above the minimum technical standards for any loops, whether provisioned to a BellSouth end user or to an ALEC such as ITC^DeltaCom. Witnesses Milner and Varner both contend that

BellSouth's retail services meet the same technical standards as UNEs, maintaining that BellSouth does not provide UNEs to itself or to its end user customers.

Witness Milner states that "the inherent capabilities of the various types of loops (copper loops, IDLC loops, and UDLc loops) are the same whether used for a BellSouth retail customer or an ALEC's customer."

Witness Varner addresses capability in the context of transmission specifications and modem performance, drawing a distinction, however, on whether a certain level will be guaranteed, or not. Witness Varner concludes by stating that:

. . . no matter what technology we use, whether it's UDLc, plain copper wire, next generation digital carrier, or whatever, we're obligated to provide them . . . a loop that [will] meet those standards, those [minimum] technical specifications, and that is all that BellSouth will guarantee."

Witness Varner states that any achieved performance level that exceeds the technical specifications for a given loop will not be guaranteed. If a higher level of performance is sought, Varner suggests that ITC^DeltaCom could purchase other types of unbundled loops that have a higher set of technical specifications. Witness Milner states that requests for specific transmission parameters on a given UNE could be accommodated for ITC^DeltaCom via the Bona Fide Request (BFR) process, but that he is unsure if ITC^DeltaCom has submitted any BFRs.

Witness Varner again reiterates that BellSouth provides and will continue to provide ITC^DeltaCom with nondiscriminatory access to unbundled loops, including IDLC delivered loops.

However, ITC^DeltaCom argues that the IDLC-provisioned unbundled loop is not an equivalent product and the end-user customer receives degraded service (i.e., degraded from that which he receives directly from BellSouth). Witness Hyde discusses at length the "inferior" service, particularly in the context of the analog-to-digital conversions necessary for the unbundling of IDLC loops, and the resultant effect on the performance of a V.90 computer modem. He claims that the multiple conversions (analog-to-digital, digital-to-analog) are responsible for slower processing speeds, excessive noise, or otherwise unequal

performance on the ITC^DeltaCom provisioned loop, and without the equivalent UNE to match up with the incumbent, ITC^DeltaCom is not being provided a "meaningful opportunity to compete." Witness Hyde supports that the "side-door" provisioning method is "the closest thing to the [BellSouth-provisioned] IDLC itself."

B. Decision

Upon consideration, we believe that within its technical capabilities, BellSouth is required to provide an unbundled loop using IDLC technology, if requested by ITC^DeltaCom. The testimony in this proceeding demonstrates that an IDLC-delivered loop can be unbundled by BellSouth in various ways. BellSouth asserts that certain factors determine which method to employ for unbundling the IDLC loop, and not all methods are universally applicable across their network, contending, though, that all UNE loops meet the minimum transmission specification for the particular loop type.

We believe that technical considerations do, in fact, enter into the unbundling issue for IDLC-delivered loops. We accept BellSouth's assertion that its six named methods of unbundling IDLC loops will provide a UNE product that meets the appropriate technical specifications, as BellSouth's witnesses contend. BellSouth witness Varner states that a non-affiliated standards body has established the technical performance levels for various loops, and that all BellSouth provisioned loops meet those standards. The witness specifically identified a transmission parameter for a two-wire analog loop, citing that the specification allows the ability to transmit at 9,600 cycles per second.

We recognize that various central office platforms are in use across the BellSouth service areas in Florida, and that certain specific IDLC unbundling methods may not be available in all cases.

We note, however, that BellSouth provides the BFR option for individual, specific transmission parameters, if requested. We conclude that, absent any specific BFR, BellSouth is equally provisioning a UNE that meets the minimum transmission or technical standard to the ALECs, including ITC^DeltaCom. BellSouth argues that the same minimum standards for IDLC-provisioned UNEs are adhered to in provisioning service to its own retail customers.

We agree with ITC^DeltaCom witness Hyde's assertion that a "side-door" configuration of an IDLC UNE loop is the method that

most nearly replicates the BellSouth provisioned IDLC loop. Witness Hyde asserts that the side-door connectivity for IDLC unbundling is the most preferable method.

With the "side-door" arrangement, the physical path that the telephone circuit follows is virtually the same for the UNE as for the BellSouth provisioned IDLC loop, which is not the case for the other methods. Under the "side-door" method, the telephone circuit for the UNE actually enters the BellSouth host switching equipment, but the signal is separated to a permanent connection panel or interface, before any switching functions are performed. The switching, therefore, is performed by the ALEC's (ITC^DeltaCom) equipment, because the switching function was enabled via the permanent "side-door" interface panel.

BellSouth's witness Milner, however, states that the "side-door" configuration cannot be supported by certain switches in the BellSouth network, and furthermore, where it is available, the capacity for its functionality is very limited. He did acknowledge that most of its switches do have the "side-door" provisioning capability, but stated that maintaining that connection consumed their limited switching resources. The witness stated that there were "no more or no less . . . analog-to-digital transformations . . ." when comparing the "side-door" IDLC provisioning to BellSouth's own IDLC provisioning.

We acknowledge that the limited capacity for "side-door" provisioning of IDLC does impose some constraints on BellSouth. Nonetheless, we believe that where technically feasible, BellSouth should employ the "side-door" arrangement option as a preferred method for provisioning IDLC UNES. We also agree with BellSouth's assertion that any UNE, whether provisioned via the "side-door," copper loop, or any other method will meet the given technical standards for that type of loop. Witness Milner states that if ITC^DeltaCom requests a particular transmission parameter over and above a standard voice-grade loop, that BellSouth would accommodate them through their normal ordering process, or through the BFR mechanism. Furthermore, we agree, and absent any specific directive such as a BFR, and within the existing functionality and capacity of the serving switch, BellSouth should be required to provide an unbundled loop using IDLC technology, and specifically, a "side-door" method, if possible. If an unbundled loop using IDLC technology is not within the existing functionality and capacity of the serving switch, ITC^DeltaCom may submit its order for an unbundled loop using IDLC technology through the BFR process.

Based upon the foregoing, we find that the record supports that BellSouth has met its obligation under Section 251 of the Act to provide non-discriminatory access to UNE loops. We believe that BellSouth provides the avenue of choice to ITC^DeltaCom, and there is little, if any, evidence in this record to support that ITC^DeltaCom has requested loops with specific transmission characteristics from BellSouth. BellSouth states that if ITC^DeltaCom, or any other ALEC, desires a loop which was provisioned by it via an IDLC and having certain capabilities, the ALEC may order it, and where technically feasible, BellSouth will provide the service, as requested.

We believe that the performance and inherent capabilities of UNE loops are a function of what the ALEC orders, and less about what the incumbent provisions. A two-wire voice grade loop, for example, will have limited performance characteristics whether provisioned from BellSouth via IDLC or not, and if more stringent performance parameters are desired, then a UNE loop other than a two-wire voice grade loop should be ordered by ITC^DeltaCom.

It appears to us that ITC^DeltaCom's claim of an inferior product stems from its expectations of greater capabilities from BellSouth provisioned voice-grade UNES, without actually identifying the transmission parameters it seeks. IDLC, after all, is a provisioning technique employed by BellSouth, and if ITC^DeltaCom requests a loop to be provisioned using IDLC technology, BellSouth states that, within its technical abilities, it will oblige.

Upon consideration we find that, within the existing functionality and capacity of the serving switch, BellSouth shall provide an unbundled loop using IDLC technology. In addition, if it is within the existing functionality and capacity of the serving switch, BellSouth shall use a "side-door" method. If an unbundled loop using IDLC technology is not within the existing functionality and capacity of the serving switch, ITC^DeltaCom may submit its order for an unbundled loop using IDLC technology through the BFR process.

V. UNES AND UNE COMBINATIONS

We must also determine whether BellSouth should be required to continue providing those UNES and UNE combinations that it is currently providing to ITC^DeltaCom under the interconnection

agreement previously approved by this Commission until a decision on UNEs or UNE combinations is made by us or the FCC.

A. Analysis

When asked which UNE combinations are in dispute, ITC^DeltaCom witness Hyde states that "for purposes of this contract, ITC^DeltaCom is more than willing to limit it to the extended loop." Thus, the only combination that appears to be in dispute here is the enhanced extended loop (EEL), which we address in Part VI.

Regarding UNEs, witness Hyde contends that all ITC^DeltaCom is requesting is that the status quo be maintained until such time as an FCC order on UNEs and any UNE combinations is issued. BellSouth witness Varner contends that BellSouth will continue to provide any individual UNE currently offered and notes that those elements are subject to change once the FCC completes its proceeding. Witness Varner reaffirms BellSouth's position and agrees with ITC^DeltaCom when he states:

Until that time, there is no minimum list of UNEs that BellSouth is required to offer. However, BellSouth has agreed to continue providing UNEs as listed in the now vacated Rule 51.319, until the new rulemaking is complete.

Both parties agree that the UNEs being provided under their previously approved agreement will suffice until such time that new UNE rules are adopted by the FCC.

B. Decision

Since both parties appear to agree to continue the status quo with respect to individual UNEs, we find that it is reasonable that BellSouth continue to provide those UNEs that it currently provides to ITC^DeltaCom under the interconnection agreement previously approved by this Commission. We note that the FCC has issued its order on Rule 51.319 remand, and although not part of the record, the parties' new agreement may need prospective modifications to comport with this remand order. See FCC Order 99-238, CC Docket No. 96-98.

VI. EXTENDED LOOPS AND LOOP/PORT COMBINATIONS

The issue before us is to determine whether BellSouth should be required to provide ITC^DeltaCom with enhanced extended loops (EELs) and the loop/port combination as UNEs. There is no dispute as to whether BellSouth will provide these combinations. BellSouth has agreed to do so. The dispute is over whether BellSouth is obligated under Section 251 of the Telecommunications Act to provide these combinations as UNEs.

A. Argument

We note that neither party presented much evidence on the loop/port combination. Moreover, we note that BellSouth has agreed to provide the loop/port combination to ITC^DeltaCom. In fact, ITC^DeltaCom witness Hyde states:

To be quite honest, I feel there's only really one [issue] truly in dispute, and that's the extended loop. The loop/port combination, we're quite willing to wait until some final order from the FCC and the courts say yes or no.

So, for the purpose of this contract, ITC^DeltaCom is more than willing to limit it to the extended loop.

Therefore, we have only considered the one combination that is actually in dispute, the EEL.

ITC^DeltaCom witness Hyde explains:

When an ITC^DeltaCom customer is served out of Central Office A but the ITC^DeltaCom collocation site is in Central Office B, ITC^DeltaCom can, under its current contract, obtain an extended loop from Central Office A to the ITC^DeltaCom collocation site in Central Office B via dedicated transport. By declining to provide the extended loop as a UNE, BellSouth forces ITC^DeltaCom to pay a higher rate for that capability or to pay the extra costs of collocation in marginal offices.

Witness Hyde claims that under the parties' current contract there was a provision for BellSouth to provide EELs. Paragraph IV B14 of the current agreement reads:

The parties shall attempt in good faith to mutually devise and implement a means to extend the unbundled loop sufficient to enable DeltaCom to use a collocation arrangement at one BellSouth location per LATA (e.g. tandem switch) to obtain access to unbundled loop(s) at another such BellSouth location over BellSouth facilities.

Witness Hyde states that there is no way to comply with the provisions of paragraph IV B14 except to provide extended loops. He also states that shortly after the original agreement was signed, ITC^DeltaCom took its proposed extended loop arrangement to BellSouth, and BellSouth accepted that arrangement and began installing service. Witness Hyde further states "BellSouth continued to accept orders for extended loops until March of 1999 when ITC^DeltaCom complained about the quality of service being provided."

Witness Hyde further argues:

BellSouth has provided ITC^DeltaCom more than two thousand five hundred loops. It is difficult to comprehend how a company such as BellSouth could provide ITC^DeltaCom more than 2500 extended loops under the provisions of paragraph IV B14 and still claim that it was under no obligation to do so. In order to maintain the status quo, it is necessary for BellSouth to continue to provide extended loops to ITC^DeltaCom.

BellSouth witness Varner counters that "[c]ontrary to their claim, BellSouth has not provided DeltaCom with an EEL. DeltaCom ordered channelized specialized access service, a tariff service, and then ordered unbundled loops to be terminated on the special access facility and BellSouth provided those in error." ITC^DeltaCom witness Hyde agrees that ITC^DeltaCom is being provided a UNE loop, UNE cross connection, and special access transport through the tariff. In other words, ITC^DeltaCom is

buying a tariffed service and combining that with unbundled network elements.

BellSouth witness Varner states that the FCC's Rules 51.315(c) through 51.315(f) addressing the combination of UNEs by ILECs were vacated by the Eighth Circuit Court. He believes that since these rules are not in effect, any action by this Commission requiring BellSouth to combine network elements would be in direct conflict with the Act.

Witness Varner asserts:

ITC^DeltaCom has requested what it terms an "extended loop" or a local loop combined with dedicated transport. There is no question that an extended loop would constitute a combination of a local loop and dedicated transport. Except through voluntary agreements, BellSouth is not required to combine individual UNEs such as the loop and dedicated transport.

ITC^DeltaCom witness Hyde agrees that BellSouth would have to combine the loop and dedicated transport that comprise the EEL. He also agrees that there is no law or rule that requires BellSouth to combine elements.

BellSouth witness Varner states that "[e]ven though the FCC's Rule 51.315(b) (Pre-existing combinations) has been reinstated by the Eighth Circuit, it cannot be effectively applied until the FCC reestablishes the UNE list in FCC Rule 51.319 that was vacated by the Supreme Court." FCC Rule 51.315(b) reads:

Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent currently combines.

Witness Varner asserts:

Last, BellSouth must provide combinations of loops and transport only where they are currently combined. In the case of the EEL, they're not.

The definition of currently combined, I will admit is not clear. But based on the FCC's action, BellSouth believes that currently combined means that the combination of UNEs must already be in existence and providing service to a BellSouth end user.

ITC^DeltaCom witness Wood counters:

. . . you don't need to go to the FCC orders to find the currently combines language. It's actually in the rule. Rule 315(b), that there is agreement among the parties that's in effect today, requires that BellSouth provide those elements in combination when it currently combines those elements in its network.

Well, there is certainly no doubt that BellSouth currently combines local loops and transport facilities in its network today to provide service to its retail customers. It has tariffed services called private line, special access.

However, BellSouth witness Varner asserts that BellSouth provides special access circuits to carriers, not to BellSouth end users.

B. Decision

We agree that FCC Rules 51.315(c)-(f) regarding incumbent LEC provisioning of combinations were vacated by the Eighth Circuit and continue to be vacated. Accordingly, at this time, incumbent LECs are not required to combine network elements for other telecommunications carriers. Moreover, we do not believe that paragraph IV B14 of the parties' existing agreement required BellSouth to provide EELs to ITC^DeltaCom. We believe that this provision only placed an obligation on the parties to negotiate in good faith a means to enable ITC^DeltaCom to utilize only one collocation arrangement at one BellSouth location per LATA. ITC^DeltaCom witness Hyde concurs with this interpretation.

Based on the record, we do not believe that BellSouth provided ITC^DeltaCom with a UNE EEL under their existing agreement. ITC^DeltaCom was provided the combination of a UNE loop combined with special access, purchased at the tariffed price. The evidence

of record does not indicate that ITC^DeltaCom was provided a UNE loop combined with UNE dedicated transport, priced at the sum of the UNE prices.

Because ITC^DeltaCom witness Hyde stated that provisioning the loop/port combination as a UNE was really not an issue and further that ITC^DeltaCom was willing to wait for the FCC to determine whether the loop/port combination was a UNE, we find that BellSouth does not have to provide the loop/port combination as a UNE.

Based upon the foregoing, we also find that BellSouth shall not be required to provide ITC^DeltaCom the EEL as a UNE nor the loop/port combination. However, we note that BellSouth has agreed to provide ITC^DeltaCom both the EEL and the loop/port combination upon execution of a separate commercial agreement.

VII. RATES FOR LOOPS AND LOOP PORT COMBINATIONS

Earlier, we determined that BellSouth shall not be required to provide ITC^DeltaCom extended loops or the loop/port combination as UNEs. BellSouth has, however, agreed to provide ITC^DeltaCom with extended loops and the loop/port combination. Therefore, rates for these combinations are an issue before us.

According to 47 CFR Part 51, Subpart F-Pricing of Elements, certain pricing rules apply to UNEs, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation.

Upon consideration, we find that the FCC's pricing rules do not apply in this situation because we are not requiring BellSouth to provide extended loops or the loop/port combination. We find that the parties should negotiate the rates for these combinations.

VIII. RECIPROCAL COMPENSATION

The issue before us is to determine whether the parties should be required to pay reciprocal compensation for all calls, including calls to ISPs, that are properly routed over local trunks. However, we note that payment of reciprocal compensation for local calls that are not bound for ISPs does not seem to be in dispute.

The real dispute is over payment of reciprocal compensation for ISP-bound traffic. More specifically, the issue is whether or not the party that serves the customer originating the call should pay reciprocal compensation to the other party which serves the ISP

when an end user of one party calls an ISP that is an end user of the other party.

A. Analysis

ITC^DeltaCom witness Rozycki explains that there are multiple parts to each Internet session. He states:

Assuming the call is initiated over standard phone lines, the initial part of the call, its delivery to the Internet service provider or ISP, may be handled by one or more carriers.

Each of these carriers plays a role in delivering the call to its destination, and as such, each should be compensated.

BellSouth witness Varner states that "as previously confirmed by the FCC's Declaratory Ruling, ISP-bound traffic is jurisdictionally interstate; therefore, reciprocal compensation for ISP-bound traffic under Section 251 is not applicable." ITC^DeltaCom witness Rozycki agrees that the FCC did find that ISP-bound traffic is interstate in nature, but he argues that the appropriate level of compensation for ISP-bound traffic is not simplified by this finding. Witness Rozycki further states that ITC^DeltaCom should be paid for delivering ISP-bound traffic for BellSouth regardless of the jurisdictional nature of that traffic. He states that "since ITC^DeltaCom uses the same facilities to deliver those calls as it does to deliver any other local call, then it is appropriate to charge exactly the same rate for the delivery of either type of traffic." He further states that the only way that ITC^DeltaCom can recover those costs is through reciprocal compensation.

BellSouth witness Varner argues that ISPs are carriers and that the service provided to them is access service. Because of this, he believes that this eliminates any possible claim for reciprocal compensation. ITC^DeltaCom witness Rozycki counters that ISPs do not currently obtain certificates of authority to provide telecommunications services in Florida nor are they regulated as carriers by the FCC.

Witness Rozycki also states that ITC^DeltaCom believes in the "calling party pays" concept. In other words, the party or company responsible for originating a call is responsible for the costs associated with that call. BellSouth witness Taylor counters that

the principle of cost causation requires that the ISP customer pay at least the cost its call imposes on the circuit-switched network.

In addition, BellSouth witness Varner does not believe that state commissions should address this issue. In regards to the FCC's recent Declaratory Ruling, he states:

. . . the FCC has, will retain, and will exercise jurisdiction over this traffic. As a practical matter, it appears fruitless for state commissions to deal with this issue at this time. Although the FCC appears to temporarily give states the authority to create an interim compensation arrangement until the FCC establishes rules, the FCC's authority to confer this ability on the states is being challenged in court. Consequently, states could find that they do not have the authority to create even an interim compensation arrangement. Even if the states do have the authority, such authority is valid only until the FCC completes its rulemaking on the subject.

Witness Varner also states that compensation for ISP traffic is not subject to a Section 252 arbitration. He argues that reciprocal compensation in the Act is limited to "local traffic," and that the FCC, in its Declaratory Ruling, makes clear that traffic to ISPs is interstate in nature. ITC^DeltaCom witness Rozycki disagrees and states that the FCC Declaratory Ruling provides the authority for state commissions to arbitrate this issue, and that the FCC tentatively concluded "that even if the FCC ultimately adopts a federal policy, states should still set inter-carrier compensation rates for ISP-bound traffic."

B. FCC Declaratory Ruling

The FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking regarding inter-carrier compensation for ISP-bound traffic in Order FCC 99-38, issued in CC Docket No. 96-98, released on February 26, 1999. In that Order, the FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." (FCC 99-38, ¶2) However, the FCC did not make a determination as to whether reciprocal compensation is due for ISP-bound traffic. Instead, it acknowledged that it currently does not

have a rule governing inter-carrier compensation for ISP-bound traffic, and until it adopts a final rule, state commissions may continue to determine whether reciprocal compensation is due for this traffic. (FCC 99-38, ¶22, ¶28)

Further, in addressing the nature of ISP-bound traffic, the FCC explained:

Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (e.g., by delivering a call to an interexchange carrier (IXC)), the carriers share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act. Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. (FCC 99-38, ¶9)

As explained in the FCC order, carriers share access revenues received from IXCs for delivering interstate traffic. In the case of ISP traffic, the FCC has given enhanced service providers (ESPs), of which ISPs are a subset, an exemption from paying interstate access charges even though it recognized that ESps use interstate access services. The FCC explains that this exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESps, that had been paying the generally much lower business service rates from the rate shock that would result from immediate imposition of carrier access charges. (FCC 99-38, ¶5, footnote 10) In 1997, the FCC decided that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." (FCC 99-38, ¶6) Thus the FCC, as recently as 1997, decided to continue the access charge exemption for ESps.

Further, the FCC directed the states to treat ISP traffic as if it were local, by permitting ISPs to purchase their public switched telephone network (PSTN) links through local business tariffs. (FCC 99-38, ¶9) Therefore, an ISP need only subscribe to services from a LEC's local business tariffs to receive incoming calls from its customers. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.

The FCC readily admits in its recent Declaratory Ruling that it has treated ISP-bound traffic as local traffic even though it was aware that ISPs used interstate access services. The FCC even states that it "continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local." (FCC 99-38, ¶5)

The FCC has acknowledges that its treatment of this traffic has been somewhat confusing. It stated:

Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. . . . As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute. (FCC 99-38, ¶9)

However, the FCC stated that it currently has no rule governing inter-carrier compensation for ISP-bound traffic, but believes that adopting such a rule to govern prospective compensation would serve the public interest. (FCC 99-38, ¶28) To this end, the FCC has issued a Notice of Proposed Rulemaking seeking comments on two proposals for a rule.

We agree with ITC^DeltaCom witness Rozycki that state commissions may determine that reciprocal compensation is due for ISP-bound traffic. The FCC stated:

A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. (FCC 99-38, ¶26)

We acknowledge that the FCC has claimed jurisdiction over this traffic as it stated:

We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic. (FCC 99-38, ¶16)

As mentioned earlier, the FCC does intend to adopt a final rule to govern inter-carrier compensation for ISP-bound traffic. Therefore, any decision we make will only be an interim decision.

C. Decision

Upon consideration, we find it reasonable that the parties shall continue to operate under the terms of their current interconnection agreement regarding reciprocal compensation until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is otherwise due for this traffic. We believe that the root of the problem stems from the FCC's treatment of this traffic. The FCC has, however, determined that a rule concerning prospective inter-carrier compensation for this traffic would be in the public interest. To this end, it has issued a Notice of Proposed Rulemaking seeking comments on two proposals for such a rule. Therefore, any decision this Commission makes presumably will be preempted if it is not consistent with the FCC's final rule.

IX. RATE FOR RECIPROCAL COMPENSATION

In the section immediately preceeding, we have ordered ITC^DeltaCom and BellSouth to continue to operate under the terms of their current agreement regarding reciprocal compensation. The reciprocal compensation rate in their current agreement is \$0.009

per minute. We believe that based on our earlier finding, we could simply order the current rate. However, given that the parties have proposed other rates, we believe that it is also appropriate to evaluate the proposed rates.

A. Analysis

In its brief BellSouth states that

. . . the Commission has already established "just and reasonable" reciprocal compensation rates. In its April 29, 1998 Order [sic] in Docket Nos. 960757-TP, 960833-TP, and 960846-TP, the Commission established rates for the transport and termination of local traffic by BellSouth and certain other ALECs in Florida. [ITC^]DeltaCom has not explained any reason why those rates should not apply to it as well,

We believe that he mistakenly referred to the Order he cited. The content he quoted is found in Order No. PSC-96-1579-FOF-TP issued December 31, 1996. He asserts that the elemental rates he proposes in this proceeding are appropriate "because they will more closely match the costs incurred to transport and terminate the traffic." However, those were not the rates we ordered for reciprocal compensation.

However, BellSouth proposes different rates than those we approved in Order No. PSC-96-1579-FOF-TP and they are shown in Table 1.

Table 1: BellSouth's Proposed Rates

		Rate
End office switching	Initial minute	\$0.0175
End office switching	Additional minute	\$0.0050
Tandem switching	Per minute	\$0.0029
Common transport	Per mile, per minute	\$0.000012
Common transport	Facilities termination per minute	\$0.005

ITC^DeltaCom proposes an "interim" rate of \$0.0045 "until cost-based rates are established." ITC^DeltaCom witness Rozycki did not provide a rationale for \$0.0045. It appears to us as if ITC^DeltaCom simply took its current rate of \$0.009 and divided it in half. A permanent rate, ITC^DeltaCom asserts, "should be based on the tandem local interconnection rate established in Docket No. 960833-TP." It is not clear, however, to which "tandem" rate ITC^DeltaCom is referring.

As an aid in analysis, our staff computed charges for calls of varying lengths using the \$0.009 rate and the \$0.0045 rate from Order No. PSC-96-1579-FOF-TP, and BellSouth's proposed rates. The results are shown in Table 2.

For BellSouth's proposed rates, staff calculated two sets of results. The first set assumes end office switching only and common transport at ten miles. The second set assumes tandem switching only and common transport at ten miles. Naturally, computation of reciprocal compensation charges based on BellSouth's proposed rates requires that assumptions be made. The common transport mileage may vary, changing the charge for a call; however, there is insufficient evidence in the record to determine an average transport mileage. We believe ten miles is a conservative assumption based on the evidence presented and information available.

In Table 2, our staff assumes that either the tandem switching rate or end office switching rate would apply. ITC^DeltaCom asserts that the one switch it has in Florida "performs the same functions as the BellSouth tandem." However, there is insufficient evidence in the record to determine whether the end office switching rate or the tandem switching rate would apply.

Table 2: Charge for Different Length Calls Using the Current Rate and the Proposed Rates

Length of call	Charge for call using current \$0.009 rate	Charge for call using BellSouth's proposed rates (end office switching)	Charge for call using BellSouth's proposed rates (tandem switching)	Charge for call using ITC^DeltaCom's proposed interim \$0.0045 rate
1 minute	\$0.009	\$0.02262	\$0.00802	\$0.0045
10 minute	\$0.090	\$0.11370	\$0.08020	\$0.0450

Length of call	Charge for call using current \$0.009 rate	Charge for call using BellSouth's proposed rates (end office switching)	Charge for call using BellSouth's proposed rates (tandem switching)	Charge for call using ITC^DeltaCom's proposed interim \$0.0045 rate
30 minute	\$0.270	\$0.31610	\$0.24060	\$0.1350
60 minute	\$0.540	\$0.61970	\$0.48120	\$0.2700
120 minute	\$1.080	\$1.22690	\$0.96240	\$0.5400

Use of ITC^DeltaCom's proposed interim rate, \$0.0045, consistently results in calls that are less expensive, even much less than the other proposals. Use of the current rate, \$0.009, results in per call costs that are between BellSouth's proposed rates for use of the tandem switch alone and use of the end office switch alone.

B. Decision

Upon consideration, we believe that there is insufficient evidence in this proceeding's record to determine whether the rates proposed by BellSouth are appropriate for use for reciprocal compensation, particularly in light of BellSouth's proposing UNE rates rather than the Commission-ordered rates for reciprocal compensation. In addition, we believe that there is insufficient evidence in the record to conclude that ITC^DeltaCom's proposed interim rate \$0.0045 is appropriate.

Therefore, because there is insufficient record evidence to conclude that a rate other than the current rate is appropriate, and consistent with our earlier finding that the companies should continue to operate under their old agreement, we find that the rate for reciprocal compensation is set at \$0.009 per minute.

X. PROVISIONING CAGELESS COLLOCATION

The issue before us is to determine whether BellSouth should provide cageless collocation to ITC^DeltaCom 30 days after a firm order is placed. We note that cageless collocation refers to cageless physical collocation.

A. Analysis

ITC^DeltaCom witness Wood describes cageless collocation as:

A cageless collocation arrangement permits a CLEC, such as ITC^D, to place certain equipment in the BellSouth central office for the purpose of interconnecting with the BellSouth network. ITC^D owns the equipment and retains all responsibility for its care and maintenance. In contrast to "caged" or "walled" collocation, however, this equipment is not physically separated from BellSouth's network equipment by the erection of physical barriers or the deployment of separate supporting facilities (such as heating, ventilation, air conditioning (HVAC)).

Witness Wood further states:

ITC^D has requested that BellSouth commit to a 30-day turnaround time for such a collocation arrangement. While such a provisioning interval is significantly shorter than for walled or caged collocation, it is reasonable.

In a cageless collocation arrangement, BellSouth will not need to determine if room exists within its central office for the construction of a physically separated space, design the enclosure, or have it constructed.

The provisioning interval for cageless collocation should also be shorter than that for virtual collocation, because of the lack of the administrative tasks associated with the exchange of ownership of the equipment.

Witness Wood asserts that a cageless arrangement closely resembles a virtual collocation arrangement.

Witness Wood makes many references to the FCC First Advanced Services Order, FCC 99-48, issued in CC Docket No. 98-147, released March 31, 1999. He states that paragraph 40 of the FCC Advanced Services Order requires "incumbent LECs to make each of the new arrangements outlined below available to competitors as soon as possible, without waiting until a competing carrier requests a particular arrangement, so that competitors will have a variety of collocation options from which to choose." Witness Wood opines

that given the requirement by the FCC that BellSouth take a proactive approach to making these new forms of collocation available to competitors, the time frame required to provision a new arrangement once requested must be less than would otherwise be required.

Witness Wood states:

30 days is actually very, very generous in that regard. . . I would have been very comfortable supporting a much shorter provisioning interval for cageless collocation. Thirty days is what DeltaCom was willing to live with.

Witness Wood believes that all that is required after a firm order for cageless collocation is received is administrative work which can be done in 30 minutes.

In response to the 30-day provisioning interval for cageless collocation, BellSouth witness Milner states:

BellSouth has found that its provisioning interval is not controlled by the time required to construct an arrangement enclosure. . . . Included in the overall provisioning interval is the time required to complete the space conditioning, add to or upgrade the heating, ventilation, and air conditioning system for that area, add to or upgrade the power plant capacity and power distribution mechanism, and build out network infrastructure components such as the number of cross-connects requested. When the construction of an arrangement enclosure is not required or is not performed by BellSouth, all other collocation area and network infrastructure work must still take place. The absence of enclosure construction has little, if any, bearing on the overall provisioning interval.

Regarding whether cageless collocation should be shorter than virtual collocation witness Milner asserts:

BellSouth does not "exchange ownership" of virtual collocation equipment, but rather executes a virtual collocation equipment lease agreement. . . . BellSouth's provisioning interval includes the time required to make the space available to a virtual collocator, and not the time required to complete the administrative tasks associated with closing out a project. Since this administrative activity is not included in the provisioning interval for virtual collocation, it has no bearing on the length of the provisioning interval.

Further, witness Milner states that BellSouth is not required by the FCC's Advanced Services Order to provide cageless collocation within 30 days. Witness Milner states that BellSouth has offered to complete ITC^DeltaCom's physical collocation arrangements, whether caged or cageless, as soon as possible but within 90 business days for ordinary circumstances and 130 days for extraordinary circumstances.

We are not persuaded by ITC^DeltaCom witness Wood's arguments that cageless collocation can be provided in 30 days. He makes many references to paragraph 40 of the FCC Advanced Services Order, which reads:

We now adopt new rules requiring incumbent LECs to make certain collocation arrangements available to requesting carriers. In adopting new rules, we reject the arguments of incumbent LEC commenters that additional collocation rules are not necessary. . . . We require incumbent LECs to make each of the arrangements outlined below available to competitors as soon as possible, without waiting until a competing carrier requests a particular arrangement, so that competitors will have a variety of collocation options from which to choose. We note, however, that incumbent LECs and their competitors can, in the course of voluntary negotiations, agree to additional or different collocation terms and conditions beyond those we require in this order. (FCC 99-48, ¶40)

Witness Wood interprets this paragraph to mean that BellSouth must know within all of its existing offices, within the existing equipment bays, where the equipment would be placed and where there is space available that would accommodate ALEC equipment.

We do agree that incumbent LECs are required to know space availability in their central offices. The FCC states:

For network planning purposes, new entrants need to know what incumbent LEC offices are available for collocation. . . Each new entrant cannot be required to apply for collocation space in every central office in order to find out if there is space available in that central office, when such information is readily available to the incumbent LEC that occupies that office. (FCC 99-48, ¶59)

However, we do not agree with the interpretation that ITC^DeltaCom witness Wood holds. We do not believe there is evidence to show that incumbent LECs are required to survey each and every central office to determine where each and every possible combination of the alternative arrangements may be placed.

Witness Wood claims that cageless physical collocation should be provisioned more quickly than virtual collocation. However, when asked ITC^DeltaCom's average time for provisioning virtual collocation, witness Wood did not know and speculated the average time was 30 to 60 days based on his experience with other ILECs.

Witness Wood also does not believe that changes to the central office such as upgrades to the power and HVAC systems are necessary for cageless collocation. BellSouth witness Milner states that these upgrades still take place. While the record does not show that upgrades to these systems are always necessary, we believe it would be prudent to evaluate these systems based on the equipment that the ALEC is collocating and to make the upgrades when required.

BellSouth witness Milner states that "BellSouth's provisioning intervals of 90 business days under normal conditions or 130 business days under extraordinary conditions are appropriately applied to either enclosed (caged) or unenclosed (cageless) physical collocation." He further believes that BellSouth is

operating within the parameters of this Commission's guidelines as they were issued in Order Nos. PSC-96-1579-FOF-TP and PSC-98-0595-FOF-TP. In pertinent part those Orders state:

Upon consideration we conclude that maximum time periods for the establishment of physical collocation of three months and virtual collocation of two months are reasonable for ordinary conditions. (Order No. PSC-96-1579-FOF-TP, p.102)

As set forth above, we clearly stated that three months is a reasonable amount of time for establishment of physical collocation under ordinary conditions. We further indicated that BellSouth may reach an agreement as to a required time for a particular collocation request. If BellSouth is unable to reach an agreement with the requesting party on the time for a particular collocation request, then the parties may seek our guidance. In seeking such guidance, we clearly stated that BellSouth must be prepared to demonstrate to us why more than three months is necessary. (Order No. PSC-98-0595-FOF-TP, pg. 7)

Further, when asked how he arrived at the 30 day provisioning interval for cageless physical collocation, witness Wood replied "the advanced services order." However, the Advanced Services Order specifically reads:

We do not adopt specific provisioning intervals at this time. We have adopted several new collocation rules in this Order, and we do not yet have sufficient experience with the implementation of these new collocation arrangements to suggest time frames for provisioning. While we do not at this time adopt specific intervals, we retain authority to adopt specific time frames in the future as we deem necessary. (FCC 99-48, ¶54)

B. Decision

Upon consideration, we find that the provisioning interval for cageless physical collocation shall be three months in accordance with the Commission's previous Orders. We note that we are considering the provisioning interval for cageless physical collocation in Dockets Nos. 981834-TP and 990321-TP where it is possible that a separate provisioning interval may be determined.

Nevertheless, the evidence of record in this proceeding is unpersuasive that the interval should be 30 days after a firm order is placed; therefore, the three month provisioning interval for physical collocation previously ordered appears reasonable and should apply in this case.

XI. CHARGES FOR OSS

In this proceeding BellSouth proposes to establish and incorporate into its agreement with ITC^DeltaCom, charges to recover costs BellSouth has incurred associated with the development and implementation of nondiscriminatory electronic interfaces to provide ALECs the ability to access certain BellSouth OSS. These interfaces allow ALECs to access BellSouth's OSS for pre-ordering, ordering, provisioning, maintenance and repair, and billing for resale services, and UNEs. Since BellSouth was required by the Act to develop and implement these interfaces, the company asserts it should be allowed to recover the development, implementation, and maintenance costs of these interfaces, as well as any ongoing order processing costs that it incurs.

A. Analysis

BellSouth proposes two types of charges that would be levied per local service request (LSR). The charge for LSRs submitted electronically is \$6.63, while the charge for manual LSRs is \$20.08. According to BellSouth witness Caldwell, the proposed \$6.63 charge for LSRs submitted electronically is designed to recover two cost components. The first component, \$2.45, relates to the development and implementation costs of the electronic interfaces. The second component, \$4.18, represents BellSouth's ongoing order processing costs for an ALEC LSR.

BellSouth's ongoing processing component of \$4.18 is intended to recover costs associated with both recurring and nonrecurring costs. The recurring component, \$2.84, includes both capital and non-capital costs. Capital costs are associated with the purchase of an item of plant, i.e., an investment. They consist of depreciation, cost of money, and income taxes. Non-capital

recurring costs are expenses associated with the use of an investment. These operating expenses consist of plant-specific expenses, such as maintenance, ad valorem, and gross receipts taxes. The nonrecurring component, \$1.34, seeks to recover costs associated with order "fallout." This component is derived from local carrier service center (LCSC) labor costs associated with processing orders submitted manually, \$20.08, multiplied by the forward-looking probability, 6.67%, that an order may "fallout."

According to BellSouth's witness Caldwell, development, implementation, and ongoing support costs for eight interfaces are reflected in the cost study for the per electronic LSR charge: EDI (Electronic Data Interexchange), LENS (Local Exchange Navigational System), TAG (Telecommunications Access Gateway), LEO (Local Exchange Ordering), LESOG (Local Exchange Service Order Generator), BSOG (BellSouth Service Order Generator), TAFI (Trouble Analysis Facilitation Interface), and ECTA (Electronic Communications Trouble Administration). EDI, LENS, TAG, LEO, LESOG, and BSOG pertain to preordering and ordering, while TAFI and ECTA are systems for trouble maintenance and repair.

BellSouth's cost study reflects the Total Service Long Run Incremental Costs (TSLRIC) plus shared and common costs associated with network capabilities. BellSouth applied a three-year interval for cost recovery. The proposed rates were derived by dividing its projected total region-wide LSRs for the period 1999-2001 into the total cost of the eight interfaces. In most cases, all OSS interfaces are supported by the same computer, and have the same OSS support personnel working on the different systems. Therefore, ALECs would pay a flat rate regardless of which system they may or may not use.

ITC^DeltaCom witness Rozycki states that BellSouth offered two pricing options for OSS. The first option is a regional charge of \$3.50 per LSR, while the other is to pay any state-ordered rates.

Because this Commission has determined in Order No. PSC-96-1579-FOF-TP, Docket Nos. 960833-TP, 960846-TP, and 960916, issued on December 31, 1996, that new entrants and incumbents will each incur costs to develop OSS, and concluded that each party should bear its own cost, the second option is the most attractive to ITC^DeltaCom.

ITC^DeltaCom offers several arguments as to why OSS charges are inappropriate. Witness Rozycki refers to the Telecommunications Act of 1996, and FCC and state Orders which require that non-discriminatory access to OSS functions be provided to ALECs by

January 1, 1997. BellSouth is not required to build separate systems for ALECs, but instead is allowed to modify its existing OSS for ALEC access. The witness states that modifying existing OSS would have been less costly, and would have provided ALECs with direct, non-discriminatory access to OSS. Building a separate system requires ALECs to build compatible systems, and therefore, ALECs would incur additional cost.

Witness Thomas states that BellSouth's OSS systems do not provide non-discriminatory access, and ITC^DeltaCom needs non-discriminatory access to pre-ordering information to submit accurate orders to BellSouth. Though LENS provides access to pre-ordering information, LENS information cannot be integrated into EDI. Without such integration, ITC^DeltaCom must re-enter the information into EDI, which the witness maintains is inefficient and subject to human error. Witness Thomas also asserts that the Telecommunication Act of 1996 requires that:

. . . if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether from fairly competing. Thus providing non-discriminatory access to these support systems functions, which would include access to information such systems contain, is vital to creating opportunities for meaningful competition.

According to ITC^DeltaCom witness Thomas, the lack of parity severely disadvantages ALECs when competing against BellSouth. He states that because BellSouth asserts that it only has to provide equal services when it is technically feasible to do so, this essentially would allow BellSouth to pick and choose at its own discretion what is technically feasible.

ITC^DeltaCom witness Wood states that the use of a forward-looking costing methodology is necessary to ensure that the inputs and assumptions to the cost study reflect forward-looking efficient values. He contends that, BellSouth's proposed non-recurring charges (NRCs) are not consistent with forward-looking costs when

electronic systems that flow through without human intervention are not functioning properly, or not providing the full functionality required to provide service to end-use customers. Witness Wood states when evaluating BellSouth's proposals, we should ensure that its NRCs for OSS are based upon the same TELRIC principles that have been adopted by the FCC for setting UNE prices. ILEC NRC studies reflect existing OSS that were designed in a monopoly market. If ILECs are allowed to be compensated for any costs they incur, regardless of how inefficiently the cost was incurred, ALECs will be placed at a competitive disadvantage. Moreover, witness Wood asserts that every carrier must incur costs to effect changes envisioned by the Telecommunication Act, and no carrier should be permitted to use its existing market power to impose costs on another carrier or carriers. Therefore, each carrier should bear its own costs. However, if we conclude that BellSouth should be permitted to recover some portion of its OSS costs through non-recurring charges, witness Wood states the following principles should apply:

Whatever portion of these transition costs BellSouth is permitted to impose should be recovered in a competitively-neutral and non discriminatory manner, which recognizes that BellSouth's customers also benefit from the local competition and should therefore, defray a pro rata share.

ALECs should not pay BellSouth for upgrading systems which would benefit its retail services.

These costs should not be assessed as NRCs, but should be amortized over the expected economic life of the OSS.

Witness Wood also states that BellSouth's inputs for ongoing cost are inconsistent with the language of the FCC's *First Report and Order* in FCC Order No. 96-325. He believes BellSouth ignores the fact that the Order requires studies to be based on the most efficient technology available. If we were to find that ITC^DeltaCom should pay some portion of BellSouth's OSS as well as its own, the TELRIC standard requires these costs be calculated by placing all forward-looking costs in the numerator, and dividing by all users of OSS, including BellSouth (and its retail customers), in the denominator.

ITC^DeltaCom witness Rozycki notes an inconsistency in the "TELRIC cost" of OSS in the states of Florida and Alabama. Witness Rozycki argues that the Alabama rate is around \$11 while the Florida rate is approximately \$6. The witness notes that ALECs are using the same basic OSS regardless of the state, but the costs still differ, even though all users were considered. Witness Rozycki concludes BellSouth is attempting to recover its costs with a proposed \$3.50 charge offered regionally, but the math is not consistent.

B. Decision

Fundamentally, this issue involves whether or not the charges BellSouth proposed for providing OSS functions to this ALEC are recoverable, and if recoverable, whether they are in compliance with the FCC's pricing methodology. To date, we have not determined what costs, if any, should be recovered by BellSouth from ALECs for providing them access to its OSS functions.

We have three basis for our decision. First, we believe the record in this proceeding is not adequate for us to draw a definitive conclusion as to the reasonableness of the OSS costs for which BellSouth seeks recovery. BellSouth witness Caldwell sponsored the cost study. We believe there are certain aspects and assumptions of this study which warrant further scrutiny and evaluation. For example, the nonrecurring charges BellSouth proposes to recover for "fallout" orders are based on the assumption that ALEC errors cause "fallout." However, some "fallout" is due to the inability of existing OSS to be able to process certain types of complex orders (i.e., hunting, synchronet, and PBX orders). Thus, inefficiencies in OSS do not allow complex orders to flow through electronically, but BellSouth seeks to recover these costs from ALECs. Also, we question whether or not the proposed development and use costs associated with TAFI are consistent with the pricing methodology of the other elements. TAFI is the same repair and maintenance interface used by BellSouth retail repair attendants. The systems were modified with a security layer so ALECs would only have access to their accounts. It is questionable whether the cost associated with TAFI should be shared by all customers including BellSouth customers.

Second, BellSouth proposes to recover its OSS costs on a per local service request basis, over three years. We are uncertain why three years is considered most reasonable when OSS usage will be ongoing. Moreover, if costs are to be completely recovered in three years, the early entrants in the market will bear the cost burden for future participants. It is unclear whether BellSouth will seek recovery costs for development and implementation after three years. Further, a review of BellSouth witness Caldwell's Exhibit DDC-3 appears to indicate that a sizable portion of the costs is either non-recurring or volume insensitive. We believe there may be other methods of recovering costs which may have less of an impact on the ALECs.

Finally, BellSouth's interfaces are still in the developmental stage and an independent determination has not been made that these systems provide pre-ordering or ordering functions to ALECs in the same time and manner as BellSouth's internal interfaces.

In conclusion, we find that BellSouth's OSS charges proposed in this proceeding should not be approved for inclusion in the new agreement. We find there are numerous issues related to OSS costs which cannot be adequately resolved based on the record in this proceeding. Further, based on the record from this proceeding, we are unable to determine whether the development, implementation, and ongoing costs associated with processing a LSR are reasonable. We believe that OSS cost recovery more appropriately should be dealt with in a generic proceeding, and not in this arbitration proceeding. If we were to establish OSS charges in this docket, such an action would be a basis for BellSouth including the same charges in all future negotiated agreements. Based upon the foregoing, we find that OSS cost recovery charges shall not be set at this time.

XII. APPROPRIATE RECURRING AND NON-RECURRING RATES AND CHARGES FOR LOOPS

The question of the appropriate cost methodology underlies all of the UNE cost and pricing issues. The current uncertainty in regard to UNE pricing, and BellSouth's view of that uncertainty, is set out by BellSouth witness Varner.

Even though the FCC's pricing Rules 51.501-51.515 (Pricing of Elements) . . . have been reinstated [by the January 25, 1999, Supreme Court decision], they must still be

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reevaluated by the Eighth Circuit because the Eighth Circuit's earlier ruling was based solely upon jurisdictional arguments and did not consider the various challenges raised to these rules on their merits. Although these rules are in effect while the Eighth Circuit revisits them, the final pricing rules will not likely be known until the Eighth Circuit acts, which could be several months in the future. In the interim, BellSouth is proposing prices that are consistent with the FCC's pricing methodology and with this Commission's arbitration decisions. BellSouth also proposes that those prices be modified prospectively, if necessary, when the FCC issues its final rules.

A. Analysis

1. Pricing Methodology and True-Up

We ordered recurring and non-recurring rates for two-wire ADSL and HDSL loops, and four-wire HDSL loops in Order No. PSC-98-0604-FOF-TP, in Dockets Nos. 960757-TP, 960833-TP, and 960846-TP, issued April 29, 1998. In his rate proposal, BellSouth witness Varner proposes the rates, ordered in the April 29, 1998 Order, but also refers to an earlier Order in the same docket, Order No. PSC-96-1579-FOF-TP, issued December 31, 1996. Witness Varner states:

In its December 31, 1996 Order, at page 22, this Commission determined "that the appropriate cost methodology to determine the prices for unbundled elements is an approximation of Total Service Long Run Incremental Cost (TSLRIC)."

Then, on page 32, the Commission found that "BellSouth's cost studies are appropriate because they approximate TSLRIC cost studies and reflect BellSouth's efficient forward-looking costs." Finally, on page 33, the Commission stated that "we find it appropriate to set permanent rates based on BellSouth's TSLRIC cost studies. The rates cover BellSouth's TSLRIC costs and provide some contribution toward joint and common costs."

Subsequently, in the April 29, 1998, Order, the Commission established additional recurring and nonrecurring UNE rates, also covering BellSouth's TSLRIC costs plus some contribution toward joint and common costs.

Witness Varner then provides BellSouth's rationale for proposing the same ADSL/HDSL (xDSL) rates, ordered by this Commission in Order No. PSC-98-0604-FOF-TP, in this proceeding.

BellSouth's cost studies are generic in that they determine the costs to BellSouth of providing UNEs to any requesting carrier. These costs do not vary, whether it is AT&T or ITC^DeltaCom which is requesting the element. Therefore, the costs that this Commission has

already used to establish rates for AT&T, MCI, and other ALECs should be the same for ITC^DeltaCom or for any other ALEC.

. . . the final requirements for pricing are unknown until the Eighth Circuit makes its decision. For this interim period, the most reasonable course is to continue to apply rates that this Commission has already found to be just, reasonable, and cost-based as required by the Act.

ITC^DeltaCom witness Wood contends that,

The Commission's decision in this proceeding should, and must, take into consideration these reinstated rules. As a result, the Commission's previous conclusions in Dockets Nos. 960757-TP, 960833-TP, and 960846-TP must be evaluated in light of the new legal standards that are to be applied.

I strenuously disagree, however, with Mr. Varner's assertions that the Commission should not, and need not, apply the law as it currently stands in this proceeding because the applicable law may change in the future.

. . . Mr. Varner's assertion in his testimony that the Commission is bound in this proceeding by its conclusions in Docket Nos. 960757-TP, 960833-TP, and 960846-TP is both factually incorrect and clearly inconsistent with the language of the order that the Commission was making certain decisions based on the status of the law at that time. . . . It is reasonable for the Commission's conclusions to now be updated as necessary to comply with the decisions of the courts.

Witness Wood is correct when he states that, with reference to the December 31, 1996 Order, we made decisions based on the then-current status of the law. However, we also considered the then-stayed pricing rules:

The FCC states that, 'while we are adopting a version of the methodology commonly referred to as the TSLRIC as the basis for pricing interconnection and unbundled elements, we are coining the term "total element long run incremental cost" (TELRIC) to describe our version of this methodology." See FCC Order 96-325 at ¶ 678. It should be noted that the methodology the FCC uses to define TELRIC would not necessarily be used by this Commission in determining the TSLRIC costs Upon consideration, we do not believe there is a substantial difference between the TSLRIC cost of a network element and the TELRIC cost of a network element. (Order No. PSC-96-1579-FOF-TP, issued December 31, 1996, pp. 23-24)

During the hearing, witness Wood clarified ITC^DeltaCom's position:

I think there is general agreement that we've got some existing rates that were based on the fact that the FCC rules had been stayed at the time. I know they're geographic deaveraging issues, UNE combination costing issues, and that you're resolving a lot of those or addressing a lot of those in a separate generic docket and I don't want to reargue that here because you've already got the appropriate forum for that.

The generic docket that witness Wood is referring to is Docket No. 990649-TP. This docket, with hearings scheduled for July and September 2000, will address recurring and non-recurring prices for UNES.

Decision

Upon consideration, we agree with witness Wood's characterization of Docket No. 990649-TP as the "appropriate forum" for UNE pricing in light of changes in the status of the law. Given the record evidence, we find that it is appropriate to use BellSouth's methodology, as previously approved by us, in this proceeding.

In addition, we do not find ITC^DeltaCom's position advocating rates subject to a true-up pending a final determination of rates in light of the FCC Rules to be persuasive because we find that there is insufficient evidence in the record to conclude that the rates ordered in this proceeding will be out of compliance with the current state of the law and the FCC's rules. Therefore, we find that the rates ordered in this proceeding not be subject to true-up.

2. BellSouth's Cost Study Methodology

According to BellSouth witness Caldwell, BellSouth's cost study is "based on the cost study methodology accepted by this Commission in Order No. PSC-98-0604-FOF-TP in Docket Nos. 960757-TP, 960833-TP, and 960846-TP dated April 29, 1998." In this proceeding, BellSouth proposes the same rates for two-wire ADSL and HDSL, and four-wire HDSL that the Commission ordered in Order No. PSC-98-0604-FOF-TP. BellSouth filed new cost studies for those elements for which the Commission had not ordered rates; namely, recurring and non-recurring rates for the SL1 and SL2 loops and two-wire SL2 loop Order Coordination for Specified Conversion Time.

In Order No. PSC-98-0604-FOF-TP, the Commission made specific adjustments to BellSouth's proposed cost methodology, and, according to witness Caldwell, those adjustments were incorporated into the new cost studies. Some inputs used for the new cost studies were updated to the 1998-2000 time period.

Specific adjustments ordered by the Commission in Dockets Nos. 960757-TP, 960833-TP, and 960846-TP, and incorporated into the new cost studies include: a 9.9 percent cost of capital, depreciation lives and net salvage values, Florida-specific tax factors (although the tax factors have been updated to the 1998-2000 period), a 5.12 percent common cost factor, recalculation of the shared cost factor, the exclusion of the shared component of the labor rate (to be included in the recurring shared factors), and the separate study of disconnect costs. Other specific, Commission-ordered adjustments include an increase of 10 percent to the distribution fill factor and 5 percent to the feeder fill factor (BellSouth calculated the increases based on end-of-1997 fill factors), protector investment in the NID to reflect only the actual number of lines per location, aerial drop length of 200 feet and buried drop length of 150 feet, and the elimination of service inquiry and service order time from the non-recurring study. BellSouth also excluded the Access Customer Advocacy Center (ACAC), as ordered in Dockets Nos. 960757-TP, 960833-TP, and 960846-TP from

the cost studies, although it argues that the cost of the ACAC should be included. We include a discussion of the ACAC costs in our analysis of non-recurring rates.

Updated inputs in BellSouth's cost study included, in addition to Florida tax rates, cable and cross box material prices, drop wire and NID prices, switch weightings, plant loadings, investment inflation factors, plant specific expense, labor rates, and regional Telephone Plant Indexes.

Decision

Based on the record evidence, we find that BellSouth has filed its new cost studies in conformance with Order No. PSC-98-0604-FOF-TP. ITC^DeltaCom did not speak to whether certain inputs should be updated or not for the new cost studies. Considering the record evidence, we find BellSouth's choice of inputs to update for the new cost studies to be reasonable.

3. Recurring Rates

With reference to four-wire ADSL compatible loops, BellSouth states, "ADSL functionality is not applicable to four-wire loops." ITC^DeltaCom witness Hyde agreed that there is not a four-wire ADSL loop. Moreover, ITC^DeltaCom did not propose any adjusted rates for two-wire ADSL/HDSL and for four-wire HDSL loops. Therefore, rates will not be set for four-wire ADSL compatible loops.

Absent any dispute or counter-proposal by ITC^DeltaCom, we find BellSouth's proposed recurring rates, which are identical to those we ordered in Order No. PSC-98-0604-FOF-TP, for two-wire and four-wire ADSL and for four-wire HDSL are reasonable and, therefore, are approved. Furthermore, we note that in our generic Docket No. 990649-TP, we will be considering recurring rates for loops, including xDSL loops. The approved rates are shown in Table 3 below:

Table 3: Approved Recurring Rates - xDSL Loops

xDSL	Recurring Rate
Two-wire ADSL loop	\$15.81
Two-wire HDSL loop	\$12.12
Four-wire HDSL loop	\$18.24

As for two-wire SL1 loops, ITC^DeltaCom included proposed rates for the SL1 and the SL2 loops which is subsequently modified to be as follows:

BellSouth must provide UNEs to ITC^DeltaCom at cost-based rates that comply with Section 252(d) of the Act and FCC pricing Rules. The Commission should modify BellSouth's assumed fill factors and assume utilization of IDLC technology. Rates should be \$14.38 for an SL1 loop and \$17.78 for an SL2 loop.

The analysis to determine the recurring rate for an SL1 loop is the same for the SL2 loop, therefore, we consider them together. According to BellSouth witness Caldwell, an SL1 loop is a "nondesignated circuit," which "would equate more to 'POTS like' service" The SL2 loop "is provided as a designed circuit and includes a test access point." The SL2 loop "would equate more to the unbundled loop currently approved and offered to Alternative Local Exchange Carriers ("ALECs") in Florida."

ITC^DeltaCom witness Wood stated that "ITC^DeltaCom has identified specific inputs, assumptions, or methodologies in the BellSouth cost studies that must be updated in order to comply with the FCC rules now in effect." What follows is the testimony witness Wood provided to substantiate his proposed rates for the SL1 and SL2 loops:

. . . it is possible to change certain inputs and assumptions so that the results produced (and the resulting UNE prices adopted) will more closely approximate what the law requires. For example, the fill factors utilized by BellSouth in its cost studies are based, according to its engineering witness, on historic experience. An additional assumption relates to the use of the forward-looking technology for digital loop carrier systems. The use of integrated DLC ("IDLC") is now appropriate for two reasons. First, the FCC rule has been reinstated requiring BellSouth to provide the loop and port without physical separation. Second, BellSouth's

previous testimony to the contrary, since the hearing in Docket Nos. 960757-TP, 960833-TP, and 960846-TP BellSouth has demonstrated that it is possible to provide a local loop UNE that is physically separate from the switch port utilizing IDLC technology. It is my understanding that BellSouth has provided a number of such arrangements to ITC^DeltaCom.

For each of these reasons, it is appropriate to replace BellSouth's assumption of obsolete universal DLC technology with the "efficient, forward-looking" IDLC technology.

The version of its cost models presented by BellSouth in Docket Nos. 960757-TP, 960833-TP, and 960846-TP are "hardwired" in such a way that IDLC assumptions cannot be introduced. BellSouth presented a version of its models in a recent Georgia proceeding, [footnote omitted] however, that does permit the user to assume that IDLC facilities will be utilized. Based on my analysis conducted in that proceeding, changing this assumption causes the reported local loop cost to decrease by just over 10%. [footnote omitted]

By changing only these two assumptions, it is possible to calculate a more appropriate rate for a 2-wire analog loop (this same loop that would be utilized as part of an extended loop arrangement). As I stated above, these adjustment [sic] to inputs are not sufficient to develop costs (and therefore rates) that comply with the FCC pricing rules. A change to these inputs can be used to produce interim rates that move in the direction of compliance, however, and should be subject to a true-up when the Commission has had the opportunity to conduct a more complete investigation.

Decision

We agree with ITC^DeltaCom witness Wood that the use of higher fill factors and integrated digital loop carrier is likely to

result in lower costs. However, witness Wood did not provide any documentation to support his corrected proposed rates. Furthermore, one of his proposed rates appears to be based on evidence in a Georgia proceeding. We find this lack of supporting documentation curious, because witness Wood believes that accurate information should be available to staff and other parties for their review and understanding.

Table 4 below provides both ITC^DeltaCom's proposed rates and BellSouth's proposed rates.

Table 4: Proposed SL1 and SL2 Recurring Rates

	ITC^DeltaCom's Proposed Rates	BellSouth's Proposed Rates
SL1 Loop	\$14.38	\$17.12
SL2 Loop	\$17.78	\$20.52

We find the record evidence to support ITC^DeltaCom's proposed rates is insufficient, and in fact, does not meet the standards espoused by ITC^DeltaCom's own witness. We believe that the cost study BellSouth has filed for SL1 and SL2 loops is in compliance with Order No. PSC-098-0604-FOF-TP, issued April 29, 1998. Upon consideration, we find that BellSouth's proposed recurring rates for SL1 and SL2 loops, \$17.12 and \$20.52, respectively, are reasonable and are approved.

4. Non-Recurring Rates for ADSL/HDSL loops

For the ADSL/HDSL loops, BellSouth proposed the non-recurring rates we ordered in Order No. PSC-98-0604-FOF-TP, issued April 29, 1998.

ITC^DeltaCom proposed non-recurring rates for two-wire ADSL and HDSL loops, but not for four-wire HDSL loops. In its testimony, ITC^DeltaCom refers only to ADSL loops. It is unclear to us whether ITC^DeltaCom means "ADSL" to include HDSL or not.

ITC^DeltaCom witness Hyde asserts that because "ADSL is an overlay service placed on voice grade facilities," its non-recurring charge "should be the NRC for an equivalent voice grade loop plus an incremental cost for checking to see if the loop will

meet the ADSL criteria." Witness Hyde disagrees with BellSouth's assumption that a dispatch is always required for an ADSL loop.

It is important to note that the dispatch assumed by BellSouth is the same dispatch that is necessary for the installation of a loop regardless of whether or not that loop is the BellSouth retail exchange service loop or a UNE loop. Dispatch of a technician to the customer premises for ADSL alone is more a function of non-regulated customer premises equipment than of the loop itself. If an end user is served by an existing non-loaded copper facility (plain old copper wire), no dispatch is required to convert that end user to ADSL UNE loops.

In addition, witness Hyde charges that the BellSouth cost study is not forward-looking, because BellSouth's original study did not include the possibility of competitive losses of existing BellSouth ADSL customers. He contends that "[C]onversion of an existing BellSouth ADSL service to ADSL UNE loop would not require a dispatch since the loop is already ADSL compatible. Work would only be required in the central office."

Witness Hyde also contends that when an existing BellSouth customer is served by a plain old copper or ADSL compatible loop, dispatch is not required. In addition, he opines that there is some quantity of spare ADSL compatible loops already connected to NIDs which would not require dispatch.

In further support of his position, witness Hyde states that BellSouth's non-recurring charge for its (interstate) tariffed ADSL service is \$50. He further states:

The majority of the costs are associated with installation of the central office ADSL equipment and connection of that equipment with transport Permanent Virtual Circuits (PVCs). A very small portion of the costs are to verify through loop records that the loop is "plain old copper" without such equipment as load coils and bridge taps.

He estimates this "small portion" of the costs "could be as low as \$1 or \$2," which "should then be added to the appropriate voice

grade UNE loop NRC cost." However, he asserts that BellSouth has not produced "an appropriate voice grade UNE loop NRC cost to apply to ADSL," because voice grade UNE loop non-recurring costs include digital loop carrier.

BellSouth witness Milner provided some highlights of the steps BellSouth takes in provisioning an ADSL compatible loop.

One is to create a design layout record. One is to ensure that there are no bridge taps, load coils, other impediments; and third, to do what we call end-to-end testing to make sure that the loop does support the right characteristics, that it has the technical parameters necessary to support ADSL service.

Witness Milner stated that "a dispatch is done in order to make sure that loop conforms to the technical standards or specifications for an ADSL compatible loop." With tariffed ADSL service, however, BellSouth "provide[s] information to internet service providers that give [sic] them an indication of which loops we believe can support ADSL service, and, by like token, which cannot. ADSL compatible loops though is a guarantee that it will work."

According to witness Milner, a customer receiving the ADSL service provided by an internet service provider is not guaranteed that the line will always have the capability for ADSL service. An ADSL compatible loop, though, is different. As stated by witness Milner:

One of the things that BellSouth does in providing an ADSL compatible loop to DeltaCom or any other ALEC is to so note that is an ADSL compatible loop in our inventory records, such that we don't do things that would render it not compatible, such as moving it to IDLC [integrated digital loop carrier, which cannot support ADSL], adding bridge taps, adding load coils or other things that we might do not knowing that particular loop was ADSL compatible. So we mark those loops in our inventory base to make sure that we don't do those things knowingly which would interrupt the ADSL compatibility of that loop.

BellSouth and ITC^DeltaCom appear to have a fundamental disagreement about what activities are necessary in order to provision an ADSL compatible loop. ITC^DeltaCom witness Hyde portrays an ADSL compatible loop as a regular copper loop except that someone has to spend no longer than five minutes to check the loop to see if it is or is not compatible. He also does not believe that end-to-end testing is necessary all of the time. ITC^DeltaCom witness Hyde agrees that if BellSouth "is doing more work than just looking at a cable record," he has "underestimated the non-recurring charges BellSouth should be able to recover," but only if "one assumes" that functions other than checking a cable record "are required and are necessary."

ITC^DeltaCom witness Hyde also argues that a guarantee of ADSL compatibility, initial or ongoing, is associated with recurring costs, not non-recurring costs. In addition, he contends that although ITC^DeltaCom wants a design record, it is not necessary for an ADSL compatible loop.

ITC^DeltaCom witness Hyde provided an estimate of what he believes the appropriate non-recurring costs for two-wire ADSL and HDSL compatible loops to be. His non-recurring costs are based on "the Voice Grade SL2 costs and added time for verifying the facilities for ADSL compatibility." He states that his proposed non-recurring costs "still contain some unnecessary costs which cannot be identified until BellSouth files a cost study that complies with the FCC's reinstated rules."

Table 5 below compares BellSouth's and ITC^DeltaCom's proposed non-recurring rates for two-wire ADSL and HDSL loops.

Table 5: Proposed Non-Recurring Rates for Two-Wire ADSL/HDSL

	BellSouth's Proposed Non-Recurring Rate	ITC^DeltaCom's Proposed Non-Recurring Rate
Two-wire ADSL/HDSL: First	\$113.85	\$45.27
Two-wire ADSL/HDSL: Additional	\$99.61	\$22.55
Four-wire HDSL: First	\$116.91	
Four-wire HDSL: Additional	\$101.71	

Decision

We are not persuaded by ITC^DeltaCom witness Hyde that a guarantee of initial compatibility is a recurring cost. We are also not persuaded that a guarantee of compatibility going forward is a recurring cost. The very nature of a non-recurring cost is that of a one-time cost. We find it difficult to believe that determining compatibility is an on-going cost either the first time a loop is checked for compatibility or when records are changed to ensure that a loop remains compatible.

We are also not persuaded by witness Hyde's arguments that dispatch is rarely, if ever, required. In the context of providing a customer with what the customer has ordered, and ensuring that the product works properly, the record evidence does not support the proposition that end-to-end testing is inappropriate. We suspect that if ITC^DeltaCom purchased ADSL compatible loops that were not tested and did not work, ITC^DeltaCom would be very dissatisfied. Therefore, we find that there is insufficient record evidence to conclude that BellSouth's non-recurring ADSL functions are inappropriate.

Upon consideration, we find that ITC^DeltaCom has provided no persuasive argument concerning ADSL/HDSL non-recurring costs. Therefore, we find that the non-recurring rates for two-wire ADSL/HDSL and four-wire HDSL contained in Order No. PSC-98-0604-

FOF-TP, issued April 29, 1998, and proposed by BellSouth are appropriate in this case.

5. ACAC charges

The analysis for non-recurring charges for SL1 loops also applies to SL2 loops, therefore, we consider them together. Table 6, below, shows BellSouth's proposed non-recurring charges for both SL1 and SL2 loops. The proposed rates are shown including the Access Customer Advocacy Center (ACAC) charges and excluding the ACAC charge.

Table 6: BellSouth's Proposed Non-Recurring Rates for SL1 and SL2 Loops

	Proposed Rate Including ACAC	Proposed Rate Excluding ACAC
SL1 Loop: First	\$34.04	\$31.79
SL1 Loop: Additional	\$31.12	\$28.87
SL2 Loop: First	\$84.40	\$38.02
SL2 Loop: Additional	\$81.56	\$35.18

BellSouth contends that the costs associated with the ACAC, which were excluded in Order No. PSC-98-0604-FOF-TP, should be included in the new cost studies. Witness Caldwell states:

ACAC is responsible for order coordination during connect and test for SL1 and SL2 loops.

One of the characteristics of a SL2 loop is that it includes manual order coordination performed by the ACAC. At the time the ALEC requests provisioning there are up to three separate activities which occur, Disconnect, Connect, and Remote Call Forwarding. A service order is generated for each of these three activities. In a purely mechanized environment these three orders can get out of sequence. This creates a potential service outage time of one hour. The only way to keep the orders in sequence is to manually coordinate them. This activity is performed by the ACAC and reduces the service outage

time to no more than fifteen minutes. Since the ALEC ordering SL2 receives order coordination, it is appropriate to include these costs.

However, by Order No. PSC-98-0604-FOF-TP, issued April 29, 1998, at page 165, we excluded the ACAC from recovery, stating, ". . . all ordering charges, manual or electronic, shall be excluded from the non-recurring rates in these proceedings."

For the SL1 loop, BellSouth's proposed ACAC time for the first and each additional loop is 0.055 hour. For the SL2 loop, BellSouth's proposed ACAC time for the first and each additional loop is 1.1361 hours. For the two-wire SL2 Order Coordination for Specified Conversion Time BellSouth's proposed ACAC time is 0.3333 hour.

ITC^DeltaCom provided no testimony on the ACAC. However, when asked about BellSouth's proposal to include the ACAC in the new non-recurring cost studies, ITC^DeltaCom witness Hyde replied that he does not believe that the ACAC time should be added to the cost.

Decision

Based upon the foregoing, we find it appropriate to exclude ACAC time from recovery. This finding is consistent with our decision in Order No. PSC-98-0604-FOF-TP and BellSouth has not provided any new testimony compelling us to change our policy. However, we believe that the remainder of BellSouth's non-recurring cost study for the SL1 and SL2 loops is in conformance with Order No. PSC-98-0604-FOF-TP and is appropriate for this case.

6. Non-recurring rates for SL1 and SL2 loops and work times

ITC^DeltaCom witness Hyde proposed non-recurring costs for the SL1 and SL2 loops and adjustments to the additional loop work time, calculated as follows:

Basically, what I have done here in order to reflect a best estimate, if you will, of those efficiencies to be gained is to take the initial time and apply a very conservative factor to it, which the factor I used was half, to say that if there is an amount of time for that first loop, then each additional

loop should be no more than one-half. I applied that to everything, excluding the cross-connect, that had an additional time framework on it.

Table 7 provides BellSouth's and ITC^DeltaCom's proposed work times, excluding ACAC times.

Table 7: BellSouth's and ITC^DeltaCom's Proposed Work Times for the SL1 and SL2 Loops (Hour)

	BellSouth Proposed: First	BellSouth Proposed: Additional	ITC^DeltaCom Proposed: Additional
SL1: Engineering (Address & Facility Inventory)	0.2000	0.2000	0.1000
SL1: Engineering (Outside Plant Engineering)	0.1000	0.1000	0.0500
SL1: Connect & Test (CO I&M Field - Ckt & Fac)	0.0583	0.0583	0.0583
SL1: Connect & Test (I&M)	0.3175	0.3175	0.1588
SL1: Travel (I&M)	0.0667	0	0
SL1 Total Time	0.7425	0.6758	0.3671
SL2: Engineering (Address & Facility Inventory)	0.2000	0.2000	0.1000
SL2: Engineering (Circuit Provisioning Group)	0.1300	0.1300	0.0650
SL2: Engineering (Outside Plant Engineering)	0.1000	0.1000	0.0500
SL2: Connect & Test (CO I&M Field -	0.0583	0.0583	0.1588

	BellSouth Proposed: First	BellSouth Proposed: Additional	ITC^DeltaCom Proposed: Additional
Ckt & Fac)			
SL2: Connect & Test (I&M - Spec. Svcs)	0.3175	0.3175	0.0583
SL2: Travel (I&M - Spec. Svcs)	0.0600	0	0
SL2 Total Time	0.8658	0.8058	0.4321

During his deposition, witness Hyde acknowledged that the 50 percent reduction in work time was based on his experience, although no cost studies were provided to support the 50 percent reduction.

Witness Hyde did not modify the work times for the first loop, for both the SL1 and SL2 loops. However, he does not accept BellSouth's time because he does not believe BellSouth's cost study complied with the FCC's reinstated rules.

When asked about witness Hyde's reduction of additional work times for both the SL1 and SL2 loops, BellSouth witness Caldwell agreed that travel time is only needed for the first loop. With regard to the other functions, witness Caldwell stated,

In terms of the other work time, the subject matter experts that provided this information did not see a difference between the first and additional. In other words, they felt that the amount of time necessary to perform the activities would be the same on the first as well as the additional. . . . Yes, that answer would hold true for the installation time. There is no additional travel.

Decision

Upon consideration of the foregoing, we find that the non-recurring rate for the SL1 loop shall be \$31.79, and \$28.87 for each additional loop. We also find that BellSouth's proposed non-

recurring rate of \$38.02 for the first SL2 loop and \$35.18 for each additional SL2 loop, is reasonable and, therefore, is approved.

We are not persuaded by ITC^DeltaCom's argument for reducing the additional work times. ITC^DeltaCom offered no cost studies or other documentation to support a reduction in additional work times. Based on the record evidence, we find BellSouth's proposed non-recurring rates, less the ACAC charge for the SL1 loop, are reasonable and, therefore, they are approved. As with the ADSL/HDSL rates, we expect that non-recurring charges will be scrutinized in detail in the generic docket, Docket No. 990649-TP.

Upon consideration of the foregoing, we find that the non-recurring rate for the SL1 loop shall be \$31.79, and \$28.87 for each additional loop. We also find that BellSouth's proposed non-recurring rate of \$38.02 for the first SL2 loop and \$35.18 for each additional SL2 loop, is reasonable and, therefore, is approved.

C. Summary

In light of the foregoing, we find the following rates in Table 8 are reasonable and, therefore, are the approved recurring and non-recurring rates and charges for the loops addressed in this proceeding.

Table 8: Rates

	Recurring Rate	Non-Recurring Rate (First)	Non-Recurring Rate (Additional)
two-wire ADSL	\$15.81	\$113.85	\$99.61
two-wire HDSL	\$12.12	\$113.85	\$99.61
four-wire ADSL	not applicable	not applicable	not applicable
four-wire HDSL	\$18.24	\$116.91	\$101.71
two-wire SL1	\$17.12	\$31.79	\$28.87

XIII. TWO-WIRE SL2 LOOPS AND TWO-WIRE SL2 LOOP ORDER COORDINATION

BellSouth agreed, in its direct testimony, to provide two-wire SL2 loops and two-wire SL2 loop Order Coordination for Specified Conversion Time, and provided cost studies. ITC^DeltaCom did not provide testimony on this issue. Therefore, it appears that the issue whether BellSouth should provided loops and order coordination is resolved.

XIV. RECURRING AND NON-RECURRING RATES AND CHARGES FOR THE PROVISION OF TWO-WIRE SL2 LOOPS AND TWO-WIRE SL2 LOOP ORDER COORDINATION

A. Analysis

BellSouth witness Varner defines the two-wire SL2 loop order coordination as follows:

The option of order coordination for specified conversion time is offered on SL2 loops. This option allows an ITC^DeltaCom [sic] to request a specific conversion time and BellSouth will make every effort to accommodate the request. Such a charge would be appropriate in a situation where the requested time was during a period when the serving central office involved was not manned.

The charge covers the cost to provide coverage at that office to complete the cut over work. If the ITC^DeltaCom [sic] desires a cutover time outside of normal working hours, then overtime rates may also apply.

A specified order conversion charge would only apply to the first loop on the order. Therefore, whether there is one loop or 10 loops on the order, a single charge for specified conversion time would be applied.

Witness Hyde's exhibit containing his proposed non-recurring costs for the xDSL, SL1, and SL2 loops does not mention an SL2 loop order coordination charge for specified conversion time. When asked during his deposition whether ITC^DeltaCom had proposed a rate for this service, witness Hyde responded, "I believe that was filed back with the original UNE cost case . . . as best I can recall, the reason that I did not file was because I did not have the appropriate information from which to go through and develop those costs." Witness Hyde went on to say that, "[T]he SL1 and SL2, I believe, as well as the ADSL, were filed more recently than the

original SL2 with order coordination time. And the reason I did not file it was, again, I did not have access to the appropriate programs. I do not, however, concur that it's appropriate times reflected [sic] there." It is unclear to us to which "original UNE cost case" witness Hyde is referring. However, if it was the consolidated case consisting of Dockets Nos. 960757-TP, 960833-TP and 960846-TP, then we note that this element did not appear in that proceeding. BellSouth's direct testimony in this proceeding does include a cost study for the SL2 loop order coordination charge for specified conversion time.

BellSouth's proposed rate for this non-recurring charge includes a charge of \$13.61 for the ACAC, for a total rate of \$36.85. Consistent with our earlier finding in Part XI above and Order No. PSC-98-0604-FOF-TP we also find that the additional ACAC charge shall be eliminated from this rate.

B. Decision

Consistent with our findings herein related to the appropriate recurring and non-recurring rates and charges, we do not find ITC^DeltaCom's position advocating rates subject to a true-up pending a final determination of rates in light of the FCC Rules to be persuasive because there is insufficient evidence in the record to conclude that the rates ordered in this proceeding will be out of compliance with the current state of the law and the FCC's rules. Therefore, we find that the rates ordered in this proceeding shall not be subject to true-up.

As we noted earlier, we find that rates for the SL2 loop also apply to the SL1. Therefore, we adopt our rationale and findings for SL1 rates and apply it to the recurring and non-recurring rates for the SL2 loop. Accordingly, we find that BellSouth's proposed recurring rate for the SL2 loop, \$20.52, is fair and reasonable, and is, therefore, approved. In addition, we find BellSouth's proposed non-recurring rate of \$38.02 for the first SL2 loop and \$35.18 for each additional SL2 loop, are reasonable and are, therefore, approved.

Based on the record evidence, we find that BellSouth's proposed rate for the two-wire SL2 loop order coordination for specified conversion, less the additional ACAC charge, is reasonable and shall be approved. Thus, the non-recurring rate is \$23.24 for two-wire SL2 loop order coordination for specified conversion time.

XV. DISCONNECTION CHARGES

The issue before us is to determine if BellSouth should be permitted to charge a disconnection charge when it incurs no costs associated with that disconnection.

A. Analysis

ITC^DeltaCom witness Wood raises two areas of contention related to this issue: timing and double counting of costs. First, witness Wood explains that incumbent LECs will often charge retail customers for service disconnection at the time service is installed, out of concern for customers disappearing without paying the charge when disconnection occurs. Witness Wood contends that ALECs have an ongoing relationship with BellSouth, and as a result, this concern does not exist. He states that "[i]t is clear, therefore, that, at a minimum, disconnect charges should not be assessed to ALECs until the customer actually leaves the system."

BellSouth witness Varner argues that while BellSouth does charge a discounted disconnection fee at the time service is installed in states where this is permitted, in Florida BellSouth does not assess disconnection charges until the disconnection actually occurs. BellSouth witness Caldwell further addresses this by stating:

This Commission has already made a decision on this aspect of disconnect costs in Dockets Nos. 960757-TP, 960833-TP, and 960846-TP where it stated; "it is appropriate to assess those [disconnect] charges at the time the costs are in fact incurred." (Order PSC-98-0604-FOF-TP at Page 69) Thus, BellSouth presented these costs as separate items in this docket.

ITC^DeltaCom witness Wood's second contention is that "disconnect charges should not be assessed if a disconnect does not actually occur." Witness Wood explains that in many cases a line is not disconnected even when a customer leaves the premises, but rather the line is maintained in "soft dial tone" mode pending a new customer taking residence. Witness Wood argues that "[i]t is clearly not appropriate to assess a nonrecurring charge, whose calculation is based on work times for a physical disconnection, when no such physical disconnection takes place."

BellSouth witness Caldwell argues that "disconnect charges only apply when the ALEC requests that a UNE no longer be provided by BellSouth." Witness Caldwell argues that when BellSouth is the end-to-end provider of service, it may not perform a physical disconnect (although a records change would still occur), but when an ALEC no longer wants to purchase UNEs from BellSouth, certain physical activities will take place, e.g., disconnecting the unbundled loop from the cross-connects. Witness Caldwell further states that "[i]f ITC^DeltaCom wants, for some unknown reason, to retain the original loop, then no disconnect charges would be assessed. However, ITC^DeltaCom would still be responsible for the recurring charges associated with that retained loop."

ITC^DeltaCom witness Wood further contends that even if a disconnect does take place, the nonrecurring charge assessed to the ALEC may not be appropriate. Witness Wood argues that if the disconnect is the result of a customer selecting another local service provider, the disconnect from one carrier and connect to the new carrier is a single activity. Witness Wood states that "[u]nder such a circumstance, it would be an overcharge to assess both a connect charge and a disconnect charge, because both would represent the same work activity."

BellSouth witness Caldwell argues that "the activities may take place at the same time, but different transactions, potentially involving different work groups, occur and can be separately identified into connect and disconnect categories." Witness Caldwell gives an example of an end user served by ITC^DeltaCom via UNEs purchased from BellSouth. If this customer were to switch back to BellSouth and ITC^DeltaCom were to relinquish the UNEs, a records change would be made and the cross-connects to ITC^DeltaCom's collocation space would be removed. These activities would be billed to ITC^DeltaCom as a disconnection charge. Separate activities re-establishing the end user's service with BellSouth would occur and those costs would then be billed to the end user.

BellSouth witness Varner states that "[i]f there are any instances when BellSouth does not incur any costs associated with a disconnection, BellSouth should not charge ITC^DeltaCom for the disconnection. However, BellSouth is entitled to recover its costs incurred to disconnect service."

B. Decision

The evidence of record supports the assertion that there will always be a cost involved with disconnection. If an ALEC purchases UNEs from an ILEC and then requests a disconnect, the ILEC will perform certain physical activities involved in disconnecting that UNE. If an ALEC purchases ILEC services for the purpose of resale, the ILEC will perform at least an administrative records change in response to a disconnection request. These incurred costs are then assessed as a disconnection charge.

The one gray area regarding disconnection argued by the parties involves the status of a UNE purchased by an ALEC, but for which the end user vacates the premises. In this case the line is not disconnected, but instead it is held in "soft dial tone" mode awaiting a new customer taking residence. ITC^DeltaCom argues that a UNE maintained in "soft dial tone" mode should not generate a disconnection charge. BellSouth witness Caldwell contends that if ITC^DeltaCom wants to retain the original loop, then no disconnect charges would be assessed. However, ITC^DeltaCom would still be responsible for the recurring charges associated with that loop. We do not believe it reasonable that ITC^DeltaCom would continue to lease the UNE loop after the customer vacates the premises, because any new resident would not be obligated to take service from ITC^DeltaCom. However, in the case of "soft dial tone," we are unconvinced that ITC^DeltaCom actually requests a disconnection, and BellSouth has stated that no disconnect charge is assessed when the loop is retained by the ALEC. Therefore, we find that the scenario of "soft dial tone" mode is a non-issue when addressing disconnection charges.

Based on the foregoing, it appears that BellSouth does not, and does not intend to, assess a disconnect charge in instances where BellSouth does not incur a cost related to the disconnect.

For clarity, however, we emphasize that BellSouth shall not be permitted to charge ITC^DeltaCom for disconnection where BellSouth incurs no cost related to such disconnect. Nevertheless, based upon the record, it appears that a disconnection charge will always apply because BellSouth will always incur at least an administrative cost related to disconnection.

XVI. CHARGES FOR CAGELESS AND SHARED COLLOCATION

In this proceeding ITC^DeltaCom wishes to incorporate into its agreement with BellSouth rates for cageless and shared collocation,

two forms of collocation that were approved by the FCC in the recently issued Advanced Services Order, FCC 99-48. There are two major areas that we considered in the determination of charges for shared and cageless physical collocation. First, we looked at how the FCC's Advanced Services Order No. 99-48 defines cageless and shared collocation. Second, we considered to what extent the prices and rate structures previously approved by this Commission are applicable to new types of collocation arrangements.

A. Analysis

1. Cageless - Shared Collocation Definitions

ITC^DeltaCom witness Wood states that a cageless physical collocation arrangement is different than a traditional caged physical collocation arrangement. Witness Wood offers a general description of the process involved in physical collocation:

. . . where BellSouth would have to go into a central office. They'd first have to identify some available space, generally in a hundred or fifty-foot increments. They would have to design an enclosure for that space. They would have to build or have someone build the enclosure for that space. They'd have to take power cables to that space. They'd have to take heating, ventilation, and air conditioning capability to that space

Witness Wood believes the Commission approved rates reflect the significantly higher cost associated with these activities. Witness Wood states that from a costing perspective, the characteristics of a virtual collocation arrangement are more applicable to a cageless physical collocation arrangement than are those of a traditional caged physical collocation arrangement. He contends that the FCC's description of cageless collocation mirrors the characteristics of a virtual collocation arrangement. Unlike virtual collocation, a ALEC would be responsible for the installation, maintenance, and repair of its own equipment. In support of ITC^DeltaCom's argument, Witness Wood cites excerpts from paragraphs 42 and 43 of the Advanced Service Order:

. . . caged collocation space results in the inefficient use of the limited space in a LEC premises, and we consider the efficient use of

collocation space to be crucial to the continued development of the competitive telecommunication market . . . (FCC 99-48, ¶ 42)

. . . incumbent LECs must allow competitors to collocate in any unused space in the LEC's premises, without requiring the construction of a room, cage, or similar structure, and the creation of a separate entrance to the competitor's space. . . (FCC 99-48, ¶ 42)

. . . We require incumbent LECs to make collocation space available in single bay increments . . . (FCC 99-48, ¶ 43)

According to ITC^DeltaCom witness Wood's interpretation of the two paragraphs, ALECs are allowed to place their own equipment in any space that is available in BellSouth's equipment racks. Further, ALECs only have to purchase space sufficient for their needs. Witness Wood contends that BellSouth has not done a cageless physical collocation cost study. He also states that until a cost study is completed, the rates for virtual collocation should apply with an exception for the cost of maintenance.

Witness Milner argues that ITC^DeltaCom's assertion that physical collocation is the same as virtual collocation except for the maintenance, is just fundamentally wrong. BellSouth witness Milner argues that cageless physical collocation is not like virtual collocation. He cites paragraph 38 of FCC Order No. 99-48 to support his position. The difference between physical and cageless collocation is that cageless assumes equipment housed in the central office without the cages. Witness Milner states that ITC^DeltaCom witness Wood gave the impression that BellSouth owns the equipment in a virtual arrangement, but that is not true.

Addressing the definitions for cageless and shared collocation, the initial definition of "cageless" collocation is provided in paragraph 38 of Order No. 99-48:

. . . Physical collocation that does not require the use of collocation cages ("cageless" collocation). . .

We believe this definition supports BellSouth's position that the rates approved by Order No. PSC 98-0604-FOF-TP included a separate cage construction element; therefore, the other previously approved rates for physical collocation should apply to cageless collocation. However, the FCC's Order further clarifies what space ILECs must make available for cageless collocation:

. . . Subject only to technical feasibility and the permissible security parameters outlined below, incumbent LECs must allow competitors to collocate in any unused space in the incumbent LEC's premises. . . (FCC 99-48, ¶ 42)

Incumbent LECs must also ensure that cageless collocation arrangements do not place unreasonable minimum space requirements on collocating carriers. Thus, a competitive LEC must be able to purchase collocation space sufficient, for example, to house only one rack of equipment, and should not be forced to purchase collocation space that is much larger than the carrier requires. We require incumbent LECs to make collocation space available in single-bay increments, meaning that a competing carrier can purchase space in increments small enough to collocate a single rack, or bay, of equipment. . . (FCC 99-48, ¶ 43)

Finally, we require incumbent LECs, when space is legitimately exhausted in a particular LEC premises to permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible. . . (FCC 99-48, ¶ 44)

Decision

We agree with ITC^DeltaCom witness Wood's argument that the FCC's Order establishes differences between cageless physical collocation and traditional physical collocation arrangements. However, we are not persuaded that the rate elements for virtual collocation should apply. We believe the FCC's Order defines cageless physical collocation more specifically than physical

collocation without the use of a cage. Under our interpretation of cageless collocation, ALEC's locating their own equipment within an ILEC's central office may purchase space increments small enough to accommodate a particular carrier's arrangement. We note that cageless physical collocation offers new arrangement possibilities that were not available when the Commission approved Order No. PSC-98-0604-FOF-TP for physical collocation. Further, we believe that though cageless collocation arrangements may mirror caged physical collocation arrangements without a "cage", they may also "structurally" resemble virtual collocation arrangements depending on availability in a particular central office.

2. Prices and Rate Structure

Next, we address the second area, which is to what extent the prices and rate structures previously approved by this Commission are applicable to new types of collocation arrangements. We note that ITC^DeltaCom did not provide its own cost studies, relying upon its interpretation that the rates for virtual collocation set in Order No. PSC-98-0604-FOF-TP should apply. This Order included rates for a collocater's application, cage construction, floor space, power, and cross connects.

BellSouth proposes that the charges for cageless and shared collocation should be the applicable rates contained in Order No. PSC-98-0604-FOF-TP. Because the rate for cage construction is a separate element which may or may not be applied, BellSouth contends that nothing in the Advanced Services Order requires that these rates be revisited. BellSouth's witness Caldwell states that cageless collocation is a form of physical collocation which does not require a cage. BellSouth also proposes interim rates for a keyless Security Access System. These interim rates are based upon the rates approved by this Commission, in Order No. PSC-98-0604-FOF-TP, until a cost study can be completed.

In Order No. PSC-98-0604-FOF-TP, the physical collocation rates assumed ALECs would require separate floor space, cable racks, additional power facilities, and additional ventilation. Our Order did not incorporate equipment rack sharing or single bay offerings. We believe that certain modifications to the rate structure previously approved in Order No. PSC-98-0604-FOF-TP are appropriate pursuant to the FCC's Order. The specific rate elements and basis for change from Order No. PSC 98-0604-FOF-TP are addressed below.

a. Application Fee/Planning Fee

The application fee recovers costs associated with man-hours of planning and design engineering required to establish a separate facility for collocators, incurred after receiving an application. According to ITC^DeltaCom witness Wood, an application for traditional physical collocation requires that ILECs identify floor space, power, and HVAC capabilities which cageless physical collocation does not require. However, BellSouth witness Milner contends that the processes involved in handling an application and the subsequent cost will not change, because they are ALEC specific.

Our previous Order approved AT&T/MCI's proposed charges with minor modifications to the nonrecurring and recurring charges. According to the FCC's Order, the process must be changed to:

_____ . . . require incumbent LECs to make each of the arrangements outlined below available to competitors as soon as possible, without waiting until a competing carrier requests a particular arrangement, so that competitors will have a variety of collocation options from which to choose. (FCC 99-48, ¶ 40)

_____ Prior to the FCC's Order, ILECs were responsible for conducting the planning and design activities only after a request from a potential collocator. ILECs were not required to inventory or provide space availability information to ALECs until an application was submitted.

Decision

At a minimum, we believe the language in the FCC's Order clearly requires ILECs to make space availability information accessible to ALECs who may want to collocate. In compliance with the Order, BellSouth is conducting an inventory of available space per central office. Once the inventory is completed, the information will be released on their web site.

We do agree with witness Wood that the fundamental change in the process subsequently affects the labor cost involved in processing an application. Processing an application now requires the LEC to review the space inventory, respond, and to determine if

power and ventilation upgrades are necessary. Acknowledging the fact that this is a dynamic process, based upon the record we find nine hours is an appropriate labor time for verification and coordination. Also, we find it reasonable to add 11 labor hours for Common Systems Management, Circuit Capacity Management, and Outside Plant Engineering associated with determining possible plant upgrades per applicant. We also find that 20 hours is an appropriate assumption for calculating a nonrecurring rate for cageless physical collocation. This labor estimate is derived from labor hours used in Order No. PSC-98-0604-FOF-TP and is reasonable based upon the facts in this case. Finally, applying all the appropriate factors based upon the evidence, we find that \$1,279 should be the rate for the application and planning fee. We note that BellSouth will still be recovering some additional hours on a recurring basis.

b. Space Preparation

The space preparation charge recovers the cost of the survey, engineering design, and building/support system modifications for collocation. In Order No. PSC-98-0604-FOF-TP, we concluded that space preparation charges should be determined on an individual case basis (ICB). We believe the FCC's Order supports ICB rates for space preparation. We note that any power and air conditioning upgrade costs should be prorated in accordance with space used. In particular, the FCC Order states:

We conclude, based on the record, that incumbent LECs must allocate space preparation, security measures, and other collocation charges on a pro-rated basis so the first collocator in a particular incumbent's premises will not be responsible for the entire cost of site preparation. For example, if an incumbent LEC implements cageless arrangements in a particular central office that requires air conditioning and power upgrades, the incumbent LEC may not require the first collocating party to pay the entire cost of site preparation. (FCC 99-48, ¶ 51)

Decision

Upon consideration, when additional air conditioning and power

is required, these non-recurring costs shall be recovered by a nonrecurring space sensitive charge. Further, we note these charges only apply where upgrades are required. Where ITC^DeltaCom has an existing virtual collocation arrangement which it wishes to convert to a cageless physical collocation, BellSouth may not impose a space preparation charge on ITC^DeltaCom, unless, power and ventilation upgrades become necessary due to other collocators.

c. Floor Space/Cabling/Power/Connects

Decision

Upon consideration, we find the charges approved in Order No. 98-0604-FOF-TP are appropriate for application in this case because those charges were based upon a cost study and no evidence was presented to controvert those charges. The physical collocation rates approved for floor space, power, cable installation, and cross connects shall apply for cageless physical collocation. However, cable rack rates for virtual collocators who wish to convert existing equipment to cageless physical collocation should remain the same. In Order No. 98-0604-FOF-TP, the cable rack charges were approved in 1/4 rack units. Because virtual collocators share the same cable racks as the ILECs, the charges approved reflected the lesser cost. In the event ITC^DeltaCom wishes to convert its equipment to a cageless physical collocation arrangement, the cable rack charge shall continue to reflect the shared rate. We note that cable rack rates depend upon the equipment location in the central office.

d. Security

Decision

Upon consideration, we find the charges approved in Order No. 98-0604-FOF-TP are appropriate for application in this case because those charges were based upon a cost study and no evidence was presented to controvert those charges. The security charge recovers costs for access cards and maintenance in central offices where card readers are in place. We agree with BellSouth that the previously adopted rates should also apply to cageless physical collocation, until BellSouth has conducted a new study of security access costs. In the case where there are no card readers in place, we find that BellSouth shall be required to install card readers or provide other methods of non-discriminatory access at the same cost.

B. Summary

Upon consideration of the foregoing, we find that BellSouth shall be allotted a reasonable time interval to make available space accessible to ALECs. The space preparation fee shall recover the cost for upgrades in power and air conditioning from all collocators where applicable, consistent with FCC 99-48, ¶ 51. We find the following rates for cageless collocation are reasonable and are, therefore, approved:

TABLE 9
CAGELESS COLLOCATION RATES

ELEMENT	UNIT	APPROVED NON-RECURRING RATES	APPROVED RECURRING RATES
APPLICATION FEE/ PLANNING FEE	PER REQUEST	\$1,279.00***	\$15.53 **
	PER REQUEST *	NOT APPLICABLE	\$15.53**
SPACE PREPARATION	PER REQUEST	ICB**	ICB PER** CENTRAL OFFICE
	PER REQUEST *	NOT APPLICABLE	ICB PER** CENTRAL OFFICE
FLOOR SPACE/ LAND & BUILDING	PER SQUARE FT.	NOT APPLICABLE	\$4.25**
CABLE INSTALLATION	PER CABLE	\$1,056.00**	\$2.77**
CABLE RACK	PER RACK	NOT APPLICABLE	\$22.94**
	PER 1/4 RACK*	NOT APPLICABLE	\$2.24**
POWER	PER AMP	NOT APPLICABLE	\$6.95**

ELEMENT	UNIT	APPROVED NON-RECURRING RATES	APPROVED RECURRING RATES
CROSS CONNECTS			
2-WIRE	PER 100 CIRCUITS	\$1,157.00**	\$5.24**
4-WIRE	PER 100 CIRCUITS	\$1,157.00**	\$5.24**
DS-1/DCS	PER 28 CIRCUITS	\$1,950.00**	\$226.39**
DS-1/DSX	PER 28 CIRCUITS	\$1,950.00**	\$11.51**
DS-3/DCS	PER CIRCUIT	\$528.00**	\$56.97**
DS-3/DSX	PER CIRCUIT	\$528.00**	\$10.06**
OPTICAL CIRCUITS	PER CONNECTION	\$2,431.00**	\$6.46**
SECURITY ACCESS	PER CARD	\$85.12**	NOT APPLICABLE

* - represents a virtual collocater converting existing equipment and the equipment remains in the same location in BellSouth's line-up.

** - rates or approach approved in PSC-98-0604-FOF-TP.

*** - rate not approved in a prior order, but based upon testimony and evidence presented in this case.

XVII. TAX LIABILITY

The issue before us is to determine if language covering tax liability should be included in the agreement, and, if so, what that language should include.

A. Analysis

ITC^DeltaCom's position is that tax liability should be addressed outside the interconnection agreement and is a matter between the particular companies and the taxing authorities. ITC^DeltaCom witness Rozycki states that "ITC^DeltaCom's current interconnection agreement contains no language regarding taxes. During the two years that the existing agreement has been in place, there have been no disputes over the payment of taxes." Witness Rozycki further contends that BellSouth's proposed agreement

introduces extensive language to deal with a problem that does not exist. While ITC^DeltaCom contends that there is no need for tax language in the agreement, ITC^DeltaCom has introduced its own language and does not understand why it is not suitable. Witness Rozycki argues that each party should simply comply with all applicable local, state and federal rules and regulations.

BellSouth witness Varner contends that BellSouth's proposed language is based upon its experiences with tax matters and liability issues in connection with the parties' obligations under interconnection agreements, and the variety of taxes that are imposed upon telecommunications carriers. Witness Varner further argues that "[a]s would be expected, problems and disputes over the application and validity of these taxes will, and do, occur. The interconnection agreement should clearly define the respective rights and duties for each party in the handling of such tax issues so that they can be resolved fairly and quickly." BellSouth asserts that this issue is not appropriate for arbitration proceedings under Section 252 of the Act.

B. Decision

We agree that tax liability is not an issue appropriate for arbitration under Sections 251 and 252 of the Act. Section 252(c) of the Act provides in part:

Standards for Arbitration - In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall -

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

In arbitrating any open issues under Section 252 of the Act, we have to ensure that the resolution meets the requirements of Section 251. Section 251 promulgates no requirements regarding tax liability; therefore, we find this issue is not appropriate for arbitration. However, both parties have proposed language covering tax liability and through negotiation may decide to include this language in the interconnection agreement.

XVIII. CONCLUSION

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We believe that our decisions are consistent with the terms of Section 251, the provisions of the FCC's implementing Rules that have not been vacated, and the applicable provisions of Chapter 364, Florida Statutes.

Based upon the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom is entitled to receive the same quality of unbundled network elements and access to unbundled network elements as any other requesting carrier. It is further

ORDERED that unbundled network elements and access to unbundled network elements must be at parity with any equivalent functions which BellSouth Telecommunications, Inc., performs in the provision of retail services. It is further

ORDERED that within the existing functionality and capacity of the serving switch, BellSouth Telecommunications, Inc., shall provide an unbundled loop using IDLC technology. In addition, if it is within the existing functionality and capacity of the serving switch, BellSouth Telecommunications, Inc., shall use a "side-door" method. If an unbundled loop using IDLC technology is not within the existing functionality and capacity of the serving switch, ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom may submit its order for an unbundled loop using IDLC technology through the Bona Fide Request ("BFR") process. It is further

ORDERED that BellSouth Telecommunications, Inc., shall continue providing those UNEs that it is currently providing to ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom under the interconnection agreement previously approved by this Commission. It is further

ORDERED that BellSouth Telecommunications, Inc., shall not be required to provide ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom extended loops or the loop/port combination. However,

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PAGE 84

BellSouth Telecommunications, Inc., has agreed to provide ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom with extended loops and the loop/port combination and, therefore, the parties shall negotiate the rates for these combinations. It is further

ORDERED that the parties shall continue to operate under the terms of their current interconnection agreement regarding reciprocal compensation until the FCC issues its final ruling on whether reciprocal compensation is due for ISP-bound traffic. It is further

ORDERED that cageless physical collocation shall be provisioned within three months in accordance with the conditions set forth in FPSC Order No. PSC-96-1579-FOF-TP. It is further

ORDERED that no charges shall be imposed at this time for operational support systems. It is further

ORDERED that the appropriate rates for two- and four wire ADSL/HDSL shall be as set forth in the body of this Order. It is further

ORDERED that the appropriate recurring rate for the two-wire SL2 loop, the appropriate non-recurring rate for the two-wire SL2 loop and the appropriate non-recurring rate for two-wire SL2 loop Order Coordination for Specified Conversion Time are as set forth in the body of this Order. It is further

ORDERED that a disconnection charge will apply when there is a cost for disconnection. It is further

ORDERED that the language covering tax liability is not appropriate for arbitration. However, the parties may decide through negotiation to include tax provisions in their agreement. It is further

ORDERED that the parties shall submit a signed agreement that complies with the Commission's decisions in this docket for approval within 30 days of issuance of this Order. It is further

ORDERED that this docket should remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996. It is further

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By ORDER of the Florida Public Service Commission this 15th
day of March, 2000.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed
copy of the order may be obtained by
calling 1-850-413-6770.

(S E A L)

DWC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

1ST CASE of Level 1 printed in FULL format.

GTE SERVICE CORPORATION, ET AL., PETITIONERS v. FEDERAL COMMUNICATIONS
COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS; NORTHPOINT
COMMUNICATIONS, INC., ET AL., INTERVENORS

No. 99-1176, Consolidated with 99-1201

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2000 U.S. App. LEXIS 4111

February 2, 2000, Argued

March 17, 2000, Decided

PRIOR HISTORY: [*1] On Petitions for Review of an Order of the Federal Communications Commission.

DISPOSITION: Granted the petitions for review in part and vacated the challenged Collocation Order insofar as it embraces unduly broad definitions of "necessary" and "physical collocation." Case remanded for further consideration by the FCC with respect to these two points. On all other points, the petition for review denied.

COUNSEL: Mark L. Evans argued the cause for petitioners. With him on the briefs were William P. Barr, M. Edward Whelan III., John F. Raposa, Dan L. Poole, Robert B. McKenna, Michael K. Kellogg, Lawrence E. Sarjeant, Linda Kent, John W. Hunter, and Julie E. Rones.

Laurence N. Bourne, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were Joel I. Klein, Assistant Attorney General, United States Department of Justice, Catherine G. O'Sullivan and Nancy C. Garrison, Attorneys, Christopher J. Wright, General Counsel, Federal Communications Commission, and John E. Ingle, Deputy Associate General Counsel.

Mark C. Rosenblum, Peter D. Keisler, James P. Young, William Single, IV., Mark D. Schneider, Ruth M. Milkman, Robert J. Aamoth, Jonathan Jacob [*2] Nadler, Leon M. Kestenbaum, Jay C. Keithley, H. Richard Juhnke, Glenn B. Manishin, Christy C. Kunin, Renee R. Crittendon, Randall B. Lowe, Eric J. Branfman, Andrew D. Lipman, and Rodney L. Joyce. Harold R. Juhnke were on the brief for intervenors AT & T Corporation, et al. Michael B. Fingerhut, David W. Carpenter, Jodie L. Kelley, Mark B. Ehrlich, and Emily

M. Williams entered appearances.

JUDGES: Before: EDWARDS, Chief Judge, GINSBURG and SENTELLE, Circuit Judges. Opinion for the Court filed by Chief Judge EDWARDS.

OPINIONBY: EDWARDS

OPINION: EDWARDS, Chief Judge: Section 251(c)(6) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 251(c)(6), imposes a statutory duty on incumbent local exchange carriers ("LECs") to provide physical or virtual collocation for competing providers ("competitors"). The Act also requires the Federal Communications Commission ("FCC" or "Commission") to issue implementing regulations to fulfill the collocation mandate. See 47 U.S.C. § 251(d)(1). In March 1999, in *Deployment of Wireline Services Offering Advanced Telecommunications Capability ("Collocation Order")*, 14 FCC Rcd 4761 (1999), [*3] the FCC issued rules purporting to implement § 251(c)(6). According to the Commission, a principal purpose of the Collocation Order is to "adopt ... additional measures to further facilitate the development of competition in the advanced services market ... [by] strengthening ... collocation rules to reduce the costs and delays faced by competitors that seek to collocate equipment in an incumbent LEC's central office." *Id.* at 4764 P 6.

The petitioners before the court are LECs who challenge the Collocation Order on the ground that it impermissibly imposes intrusive "physical collocation" requirements on them. Section 251(c)(6) says that LECs must provide for physical collocation of equipment "necessary for interconnection or access to unbundled net-

work elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). The FCC has taken the position that "necessary" means that "an incumbent LEC may not refuse to permit collocation of any equipment that is 'used or useful' for either interconnection or access to unbundled network elements, regardless of other functionalities inherent in such equipment." *Collocation Order*, 14 FCC Rcd at 4776 [*4] - 77 P 28. Petitioners argue that, with the adoption of this rule, the FCC seeks to require collocation well beyond what has been authorized by Congress. Petitioners also claim that the Collocation Order is unauthorized and unreasonable in forcing LECs to offer competitors "cageless collocation," defining "premises" in § 251(c)(6) to include a LEC's central office and adjacent property, allowing competitors to have too much say over the placement of their equipment in a LEC's central office, and depriving LECs of an opportunity to gain full recovery of the initial costs of preparing collocation space for competitors.

Petitioners' position that "physical collocation" under the Act is limited to caged collocation is meritless, as is the claim that the FCC's definition of "premises" is unduly broad. We also reject petitioners' challenge to the cost recovery mechanism under the Collocation Order. We agree with petitioners, however, that the FCC's interpretations of "necessary" and "physical collocation" appear to be impermissibly broad. We therefore vacate the challenged Collocation Order insofar as it embraces unduly broad definitions of "necessary" and "physical collocation" [*5] and remand for further consideration by the FCC.

I. BACKGROUND

In recent years, the FCC has sought to increase competition in the market for interstate access services, which connect long-distance companies with local telephone networks and subscribers. In 1992 and 1993, the Commission issued orders requiring LECs to set aside portions of their premises for occupation and use by competitive access providers, thus generating legal battles that have continued to the present. See *Bell Atlantic Telephone Cos. v. FCC*, 306 U.S. App. D.C. 333, 24 F.3d 1441 (D.C. Cir. 1994). In their initial attempts to require LECs to permit physical collocation of competitors' equipment on demand, the FCC relied on § 201(a) of the Communications Act of 1934, 47 U.S.C. § 201(a), which empowers the agency to order "physical connections" as necessary for the public interest. The FCC reasoned that its efforts to create a level playing field of competition in the market for interstate access services served the public interest. On review, however, this court upheld a challenge to

the Commission's physical collocation rule, finding that nothing in the Communications [*6] Act of 1934 explicitly authorized the FCC to order takings of LECs' property through physical collocation. See 24 F.3d at 1446 ("The Commission's power to order 'physical connections,' undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LEC's central offices."). The court was concerned that

Chevron deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen.

Id. at 1445 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)). Thus, absent a more definite congressional authorization, the court was unwilling to defer to the FCC's unduly broad reading of § 201(a).

The FCC responded to the court's ruling in *Bell Atlantic Telephone* by adopting new rules that gave LECs the option to rely more on "virtual collocation" in lieu of physical collocation. See Expanded Interconnection with *Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994). [*7] Virtual collocation allows a LEC to retain physical control of the equipment, along with the responsibility for installing, maintaining, and repairing it. Virtual collocation therefore minimizes the takings problem, because competitors do not have physical access to a LEC's property. The LECs petitioned for review of this order, but the issue on appeal was rendered moot with the passage of the Telecommunications Act of 1996. The court therefore remanded the case for reconsideration in light of 47 U.S.C. §§ 251(c)(6) & (g), as applied after the enactment of the Telecommunications Act of 1996. See *Pacific Bell v. FCC*, 317 U.S. App. D.C. 191, 81 F.3d 1147 (D.C. Cir. 1996).

The 1996 Act completely revamped the statutory landscape by providing explicit congressional authorization for physical collocation. Under § 251(c)(6), LECs are now required

to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual [*8] collocation if the local exchange carrier demonstrates to the State commission that physical col-

location is not practical for technical reasons or because of space limitations.

47 U.S.C. § 251(c)(6) (emphasis added).

Armed with this explicit congressional authorization, the FCC first adopted rules resembling earlier orders mandating collocation. See Implementation of the Local Competition Provisions in the *Telecommunications Act of 1996* (CC Docket No. 96-98), 11 FCC Rcd 15499 ("Local Competition Order"), aff'd in part and rev'd in part, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), rev'd in part and aff'd in part, *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). However, under the heat of critical commentary, the Commission decided that more was necessary "to remove[] barriers to competition so that competing providers are able to compete effectively with incumbent LECs and their affiliates in the provision of advanced services." *Collocation Order*, 14 FCC Rcd at 4763 P 3. After studying the issue and reviewing comments, the FCC "adopted [*9] several measures" in the Collocation Order that are designed to "promote competition in the advanced services market." *Id.* P 4.

The Collocation Order obviously strengthens the Commission's stance on physical collocation. First, the Order requires LECs to allow competitors to collocate "all equipment that is necessary for interconnection or access to unbundled network elements, regardless of whether such equipment includes a switching functionality, provides enhanced service capabilities, or offers other functionalities." *Id.* at 4776 P 28. In particular, the Order says that "an incumbent LEC may not refuse to permit collocation of any equipment that is 'used or useful' for either interconnection or access to unbundled network elements, regardless of other functionalities inherent in such equipment." *Id.* at 4776-77 P 28. Second, the Order requires LECs to offer competitors both caged and cageless collocation. Third, the Order requires LECs to offer collocation space in both their central offices and in adjacent controlled environmental vaults or similar structures; and it prohibits LECs from imposing unreasonable minimum space requirements on collocators. [*10] Finally, the Order requires LECs to bear the initial costs of preparing collocation space for their competitors, as opposed to requiring the first collocator to bear the entire cost of preparing new collocation space--and thus bear the risk of unoccupied space--as an up-front charge. Petitioners claim that these new rules are neither authorized by the Act nor justified by reasoned decisionmaking.

II. DISCUSSION

A. Standard of Review

The principal issue in this case is whether the Commission's interpretation of § 251(c)(6) of the Telecommunications Act of 1996 can withstand scrutiny. In particular, petitioners challenge the FCC's Collocation Order on the ground that the agency's constructions of "necessary," "physical collocation," and "premises" will allow unauthorized takings of LEC property by their competitors.

As this court noted in *Bell Atlantic Telephone Companies v. FCC*, 327 U.S. App. D.C. 390, 131 F.3d 1044 (D.C. Cir. 1997),

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), governs review of agency interpretation of a statute which the agency administers. [*11] Under the first step of *Chevron*, the reviewing court "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Natural Resources Defense Council, Inc. v. Browner*, 313 U.S. App. D.C. 37, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. at 2782 n.9). The traditional tools include examination of the statute's text, legislative history, and structure, see *Southern California Edison Co. v. FERC*, 325 U.S. App. D.C. 163, 116 F.3d 507, 515 (D.C. Cir. 1997); as well as its purpose, see *First Nat'l Bank & Trust v. National Credit Union*, 319 U.S. App. D.C. 302, 90 F.3d 525, 529-30 (D.C. Cir. 1996). This inquiry using the traditional tools of construction may be characterized as a search for the plain meaning of the statute. If this search yields a clear result, then Congress has expressed its intention as to the question, and deference is not appropriate. See *Hammontree v. NLRB*, 282 U.S. App. D.C. 279, 894 F.2d 438, 441 (D.C. Cir. 1990). If, however, "the statute is silent or ambiguous [*12] with respect to the specific issue," *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782, Congress has not spoken clearly, and a permissible agency interpretation of the statute merits judicial deference. *Id.*

131 F.3d at 1046-47.

There is no doubt here that Congress has delegated to the FCC the authority to issue regulations implementing § 251(c)(6). See 47 U.S.C. § 251(d)(1). It is equally clear that, given the complexity of the task at hand, any search for "plain meaning" in the statute is fruitless. The disputed terms at issue--"necessary," "physical collocation," and "premises"--all bear relatively clear definitions if taken out of the context of the statutory provision in which they are found. The problem here is that these

terms are found in a circumscribed statutory provision that seeks to ensure competition in areas of advanced technology in telecommunications; i.e., the statute gives competitors access to the private property of LECs by requiring LECs to offer physical collocation on reasonable terms, but this access is neither open-ended nor is it even required if not practical for technical reasons or because of space [*13] limitations. This is hardly the stuff of "plain meaning."

Because the disputed terms in § 251(c)(6) are ambiguous in their meanings, we are required to consider the Commission's interpretations. Under the second step of *Chevron*, we will defer to the Commission's interpretations if they are reasonable and consistent with the statutory purpose. See *Troy Corp. v. Browner*, 326 U.S. App. D.C. 249, 120 F.3d 277, 285 (D.C. Cir. 1997) (noting that an agency's interpretation must be "reasonable and consistent with the statutory purpose"); *City of Cleveland v. U.S. Nuclear Regulatory Comm'n*, 314 U.S. App. D.C. 310, 68 F.3d 1361, 1367 (D.C. Cir. 1995) (providing that an agency's interpretation must be "reasonable and consistent with the statutory scheme and legislative history"). However, a court will not uphold an interpretation "that diverges from any realistic meaning of the statute." *Massachusetts v. Department of Transp.*, 320 U.S. App. D.C. 227, 93 F.3d 890, 893 (D.C. Cir. 1996). In this case, as will be shown below, the FCC's interpretations of "necessary" and "physical collocation" appear to diverge from any realistic meaning of [*14] the statute, because the Commission has favored the LECs' competitors in ways that exceed what is "necessary" to achieve reasonable "physical collocation" and in ways that may result in unnecessary takings of LEC property.

Petitioners' claim that the Collocation Order unfairly precludes LECs from gaining full recovery of the initial costs of preparing collocation space for competitors raises a matter that is subject to review under the traditional "arbitrary and capricious" standard. As the Supreme Court explained in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983),

the scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962). In reviewing that explanation, we must "con-

sider whether [*15] the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, [419 U.S. 281, 285, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974)]; *Citizens to Preserve Overton Park v. Volpe*, [401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971)]. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947). We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, [419 U.S. at 286]. [*16] See also *Camp v. Pitts*, 411 U.S. 138, 142-143, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973) (per curiam).

Id.; see also *Communications Satellite Corp. v. FCC*, 266 U.S. App. D.C. 459, 836 F.2d 623 (1988) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). As we indicate below, the cost allocation rules under the Collocation Order easily survive arbitrary and capricious review. There is a discernible, reasoned basis for the agency's action, and the decision reached by the agency does not reflect a clear error of judgment.

We now turn to a consideration of the statutory interpretation questions, focused on the meaning of § 251(c)(6).

B. "Necessary"

The first question in this case centers on the meaning of "necessary" under 47 U.S.C. § 251(c)(6). As noted above, the statute requires LECs to provide physical collocation of equipment as "necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." This statutory provision is, at first blush, fairly straightforward. Something is necessary if it is required or indispensable to [*17] achieve a certain result. Thus, competitors who are protected by the Act have a right to collocate any equipment that is required or indispensable to achieve interconnection or access to unbundled network elements at the premises of the local exchange carrier. In the Collocation Order, however, the FCC appears to

ignore the statutory reference to "necessary" in requiring LECs to collocate any competitors' equipment that is "used or useful" for either interconnection or access to unbundled network elements, regardless of other functionalities inherent in such equipment." 14 FCC Rcd at 4776-77 P 28. Petitioners argue that by interpreting "necessary" as "used or useful" and by permitting competitors to collocate equipment that may do more than what is required to achieve interconnection or access, the FCC's Collocation Order impermissibly invites unwarranted intrusion upon LECs' property rights. The petitioners' argument has merit, for the Collocation Order as presently written seems overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6).

The Collocation Order makes two critical points in interpreting "necessary" under [*18] § 251(c)(6): First, the Order says that "an incumbent LEC may not refuse to permit collocation of any equipment that is 'used or useful' for either interconnection or access to unbundled network elements, regardless of other functionalities inherent in such equipment." *Id.* at 4776-77 P 28 (emphasis added). Second, the Order makes it clear that LECs must allow competitors to collocate "all equipment that is necessary for interconnection or access to unbundled network elements, regardless of whether such equipment includes a switching functionality, provides enhanced services capabilities, or offers other functionalities." *Id.* at 4776 P 28 (emphasis added). In other words, the Collocation Order appears to permit competitors to collocate equipment that may do more than what is required to achieve interconnection or access.

Petitioners' concerns with the breadth of the Collocation Order are not idle. The Supreme Court recently had occasion to address a similar problem in reviewing a challenge to the FCC's interpretation of 47 U.S.C. § 251(d)(2), which provides, in relevant part, that in

determining what network [*19] elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider ... whether ... access to such network elements as are proprietary in nature is necessary.

47 U.S.C. § 251(d)(2). In *AT & T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999), the Court faced a controversy over what "necessary" meant in the context of § 251(d)(2). See *id.* at 388. The Court rejected the FCC's formulation, concluding that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do." *Id.* The Court noted that

the Commission announced that it would regard the 'necessary' standard as having been met, regardless of whether 'requesting carriers can obtain the requested proprietary element from a source other than the incumbent,' since 'requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the [*20] goals of the 1996 Act.' ... The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. That failing alone would require the Commission's rule to be set aside. In addition, however, the Commission's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' ... is simply not in accord with the ordinary and fair meaning of [the statute's] terms.

Id. at 389-90.

As is clear from the Court's judgment in *Iowa Utilities Board*, a statutory reference to "necessary" must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, i.e., so as to limit "necessary" to that which is required to achieve a desired goal. The Court's admonition seems particularly relevant here where a broader construction of "necessary" under § 251(c)(6) might result in an unnecessary taking of private property.

One clear example of a problem that is raised by the breadth of the Collocation Order's interpretation of "necessary" is seen in the Commission's rule requiring LECs to allow collocating [*21] competitors to interconnect their equipment with other collocating carriers. See *Collocation Order*, 14 FCC Rcd at 4780 P 33 ("We see no reason for the incumbent LEC to refuse to permit the collocating carriers to crossconnect their equipment, subject only to the same reasonable safety requirements that the incumbent LEC imposes on its own equipment."). The obvious problem with this rule is that the cross-connects requirement imposes an obligation on LECs that has no apparent basis in the statute. Section 251(c)(6) is focused solely on connecting new competitors to LECs' networks. In fact, the Commission does not even attempt to show that cross-connects are in any sense "necessary for interconnection or access to unbundled network elements." Rather, the Commission is almost cavalier in suggesting that cross-connects are efficient and therefore justified under § 251(c)(6). This will not do. The statute requires LECs to provide physical collocation of equipment as "necessary for interconnection or access to unbundled network elements at the premises

of the local exchange carrier," and nothing more. As the Supreme Court made clear in *Iowa Utilities Board*, the FCC [*22] cannot reasonably blind itself to statutory terms in the name of efficiency. Chevron deference does not bow to such unbridled agency action.

There are other examples, as well, to demonstrate that the FCC's interpretation of "necessary" under § 251(c)(6) is impermissibly broad. At oral argument, counsel was asked whether, under the Collocation Order, a LEC would be required to afford collocation of a competitor's equipment that included unnecessary multipurpose features, such as enhancements that might facilitate payroll or data collection features. In other words, must a LEC allow collocation of equipment that is not truly "necessary" for a competitor's "interconnection or access to unbundled network elements"? Counsel could offer no satisfactory answer to the question. Counsel seemed to recognize that to require collocation on such broad terms would not really square with the terms of § 251(c)(6); yet, the literal terms of the Collocation Order seem to embrace any and all equipment that is otherwise necessary without regard to whether such equipment unnecessarily "includes a switching functionality, provides enhanced service capabilities, or offers other functionalities [*23]." *Collocation Order, 14 FCC Rcd at 4776 P 28* (emphasis added). The FCC's Collocation Order seeks to justify this broad rule by contending that "competitive telecommunications providers must be permitted to collocate integrated equipment that lowers costs and increases the services they can offer their customers." *Id. at 4777-78 P 29*. It was precisely this kind of rationale, based on presumed cost savings, that the Supreme Court flatly rejected in *Iowa Utilities Board*. See 525 U.S. at 389-90. In short, the FCC's interpretation of "necessary" under § 251(c)(6) goes too far and thus "diverges from any realistic meaning of the statute." *Massachusetts v. Department of Transp.*, 93 F.3d at 893.

Because, in some significant respects, the FCC's current definition of "necessary" finds no support in the Act, we vacate the offending portions of the Collocation Order and remand the case to the agency for further consideration. We do not mean to vacate the Collocation Order to the extent that it merely requires LECs to provide collocation of competitors' equipment that is directly related to and thus necessary, required, or indispensable [*24] to "interconnection or access to unbundled network elements." Anything beyond this, however, demands a better explanation from the FCC, for the current rules under the Collocation Order make no sense in light of what the statute itself says. And the Commission must operate within the limits of "the ordinary and fair meaning of [the statute's] terms." *Iowa Utilities Bd.*, 525 U.S. at 390.

C. "Physical Collocation" and "Premises"

Petitioners also challenge the FCC's interpretations of "physical collocation" and "premises" under § 251(c)(6). The Collocation Order requires LECs to make "cageless" collocation available to requesting competitors. Absent problems related to technical feasibility or specific security concerns, new competitors are entitled "to collocate in any unused space in the incumbent LEC's premises." *Collocation Order, 14 FCC Rcd at 4785 P 42*. And to protect against bogus claims by LECs that they have run out of space, the Collocation Order provides that, when space is legitimately exhausted, LECs must "permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible. [*25]" *Id. at 4786 P 44*.

Petitioners claim that the FCC lacks the authority to promulgate such sweeping rules in support of cageless collocation, because "as the language, structure, and history of § 251(c)(6) reflect, Congress understood 'physical collocation' to mean the installation of a competitor's equipment in an area that is physically separate from the incumbent's own facilities." Br. of Petitioners at 24. Petitioners also contend that Congress intended collocation to be limited to available space within a LEC's central office, and not to extend to anywhere on a LEC's property beyond the confines of the central office.

Although petitioners raise some telling points, their arguments go too far. Section 251(c)(6) merely provides that incumbents have a duty to provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). Congress chose not to define either "premises" or "physical collocation," and, at least in this context, the meaning of these terms is far from selfevident. Moreover, nothing in the statute can [*26] be read to require caged collocation, so the FCC surely was free to promulgate reasonable rules implementing physical collocation under a cageless regime.

The FCC has satisfied its burden under step two of Chevron in interpreting § 251(c)(6) as requiring cageless collocation. The Collocation Order points out that caged collocation results in the "inefficient use of the limited space in a LEC premises," *Collocation Order, 14 FCC Rcd at 4784 P 42*. A cageless regime, the Order notes, ensures that LECs do not place unreasonable minimum space requirements on collocating competitors; the rule thus has the effect of reducing the cost of collocation and reducing the likelihood of premature space exhaustion. See *id. at 4785-86 P 43*. We find that the agency's interpretation in support of cageless collocation is reasonable

and consistent with the statutory purpose of promoting competition, without raising the threat of unnecessary takings of LEC property. Indeed, on the record at hand, it is hardly surprising that the FCC opted to prohibit LECs from forcing competitors to build cages, particularly given the alternative means available to LECs to ensure [*27] the security of their premises.

We also reject petitioners' claim that the FCC lacks authority to require LECs to make available space beyond their central offices for the collocation of competitors' equipment. The Collocation Order simply requires "incumbent LECs, when space is legitimately exhausted in a particular LEC premises, to permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible." *Id.* at 4786 P 44. The rule seeks to address the "issue of space exhaustion by ensuring that competitive carriers can compete with the incumbent, even when there is no space inside the LEC's premises." *Id.* The rule clearly furthers the purpose underlying § 251(c)(6). The rule is also eminently reasonable: adjacent collocation is required only when space in the central offices is exhausted; adjacent collocation may occur only to the extent that it is technically feasible; adjacent collocation is subject to state regulations over zoning, design, and construction parameters; and adjacent collocation is subject to reasonable safety and maintenance requirements. And petitioners can find no argument to show that this [*28] rule is impermissible under § 251(c)(6), for the simple reason that the disputed "adjacent" properties all are on the LECs' "premises," which is all that is required by the statute.

In sum, the FCC's regulations forbidding LECs from requiring competitors to "cage" their equipment and requiring LECs, under limited circumstances, to use adjacent property for the collocation of competitors' equipment are permissible and reasonable under step two of *Chevron*. This is not the end of the inquiry, however, regarding petitioners' challenge to the FCC's interpretation of "physical collocation" under § 251(c)(6).

Petitioners argue that, even conceding the validity of cageless collocation and an interpretation of "premises" that includes both the central office and adjacent property, the Collocation Order still goes too far in giving competitors rights well beyond what is reasonably required by § 251(c)(6). In particular, petitioners point to paragraph 42 of the Collocation Order, which states, in part, that LECs

must give competitors the option of collocating equipment in any unused space within the incumbent's premises, to the extent technically feasible, and may

not [*29] require competitors to collocate in a room or isolated space separate from the incumbent's own equipment.

Id. at 4785 P 42 (emphases added); see also Reply Br. at 16 (complaining about paragraph 42). The Order acknowledges that a LEC "may take reasonable steps to protect its own equipment, such as enclosing the equipment in its own cage," *id.*, but this gloss does not save the rest of the paragraph.

The FCC offers no good reason to explain why a competitor, as opposed to the LEC, should choose where to establish collocation on the LEC's property; nor is there any good explanation of why LECs are forbidden from requiring competitors to use separate entrances to access their own equipment; nor is there any reasonable justification for the rule prohibiting LECs from requiring competitors to use separate or isolated rooms or floors. It is one thing to say that LECs are forbidden from imposing unreasonable minimum space requirements on competitors; it is quite another thing, however, to say that competitors, over the objection of LEC property owners, are free to pick and choose preferred space on the LECs' premises, subject only to technical feasibility. [*30] There is nothing in § 251(c)(6) that endorses this approach. The statute requires only that LECs reasonably provide space for "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier," nothing more.

The sweeping language in paragraph 42 of the Collocation Order appears to favor the LECs' competitors in ways that exceed what is "necessary" to achieve reasonable "physical collocation" and in ways that may result in unnecessary takings of LEC property. Once again we find that the FCC's interpretation of § 251(c)(6) goes too far and thus "diverges from any realistic meaning of the statute." *Massachusetts v. Department of Transp.*, 93 F.3d at 893.

The Collocation Order again suggests that there may be cost savings that will flow from the enunciated approach. See *Collocation Order*, 14 FCC Rcd at 4785 P 42. This is a weak claim. First, there is no explanation from the FCC as to why this would be so. It is not intuitive that all of what is required by paragraph 42 of the Collocation Order will support a decrease in the cost of collocation and an increase in [*31] the amount of available collocation space, as suggested by the FCC. See *id.* And merely saying it does not make it so. Second, and more importantly, as noted by the Court in *Iowa Utilities Board*, "delay and higher costs for new entrants ... [that may] impede entry by competing local providers and de-

lay competition" cannot be used by the FCC to overcome statutory terms in the Telecommunications Act of 1996. 525 U.S. at 389-90.

We therefore vacate the Collocation Order insofar as it embraces the aforementioned sweeping rules on physical collocation in paragraph 42. On remand, the FCC will have an opportunity to refine its regulatory requirements to tie the rules to the statutory standard, which only mandates physical collocation as "necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). Even counsel for the Commission seemed unwilling to embrace an expansive view of paragraph 42: He suggested that LECs should be allowed to choose the collocation space; he also suggested that the LECs should be allowed to segregate collocation space from the rest of a LEC's property. [*32] If counsel's interpretation is correct, the FCC must make that clear. In any event, paragraph 42, as presently written, does not withstand scrutiny under step two of Chevron.

D. The FCC's Cost Allocation Rule

The final issue before the court is petitioners' challenge to the FCC's cost allocation rule. The Collocation Order provides that LECs

must allocate space preparation, security measures, and other collocation charges on a pro-rated basis so the first collocater in a particular incumbent premises will not be responsible for the entire cost of site preparation.... In order to ensure that the first entrant into an incumbent's premises does not bear the entire cost of site preparation, the incumbent must develop a system of partitioning the cost by comparing, for example, the amount of conditioned space actually occupied by the new entrant with the overall space conditioning expenses.

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Collocation Order, 14 FCC Rcd at 4789 P 51. State commissions are charged to oversee this process "to ensure that incumbent LECs properly allocate site preparation costs among new entrants." *Id. at 4790 P 51.*

Petitioners claim that the new [*33] rule is arbitrary and capricious, because it forces LECs to bear the risk of unoccupied space. On this score, petitioners argue that "it is bad enough that the incumbent must prepare space so that its competitors can take its property; it is beyond the pale that the Commission would make incumbents

pay to do so." Br. of Petitioners at 32. This argument is specious.

The approach adopted by the Commission is fully justified as a reasonable way to ensure that LECs do not impose prohibitive requirements on new competitors and thus kill competition before it ever gets started. As the Government pointed out in its brief in support of the FCC,

new entrants asserted that incumbent LEC pricing practices with respect to the preparation of collocation space acted as an unreasonable barrier to competitive entry. In particular, they assailed the practice of many [LECs] of charging the first collocater up front for the entire cost of preparing new collocation space (e.g., air conditioning and power generation upgrades), even if that collocater was only going to use a small portion of the available central office space.

See Br. of Respondents at 16. Petitioners do not [*34] seriously challenge this assertion.

Petitioners nonetheless contend that the Commission's cost allocation rules fail to give them any reasonable mechanism to recover their costs for space that is not fully or permanently occupied. Petitioners' complaints are based, however, upon an apparent misreading of the Collocation Order. The Order does not define the contours of a recovery mechanism, but it clearly does not foreclose mechanisms for the recovery of LECs' prudently incurred costs. Rather, the Order simply notes that state commissions are charged with the responsibility of "determining the proper pricing methodology," which undoubtedly may include recovery mechanisms for legitimate costs. *Collocation Order, 14 FCC Rcd at 4789- 90 P 51*; see also Br. for Respondents at 51 ("The Order, fairly read, contemplates mechanisms for the recovery of [a LEC's] prudently incurred costs."). The FCC's cost allocation rule thus withstands judicial scrutiny, because it is neither arbitrary nor capricious.

III. CONCLUSION

Consistent with the foregoing opinion, we grant the petitions for review in part and hereby vacate the challenged Collocation Order insofar [*35] as it embraces unduly broad definitions of "necessary" and "physical collocation." The case will be remanded for further consideration by the FCC with respect to these two points. On all other points, the petition for review is denied.