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January 21, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996*
Docket No. 99-00797

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Brief. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

194135

FILE

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996***

Docket No. 99-00797

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF

This arbitration was initiated by BellSouth Telecommunications, Inc. ("BellSouth") before the Tennessee Regulatory Authority ("TRA") pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 ("1996 Act"). BellSouth respectfully files this Brief to address the single issue in dispute between Time Warner Telecom of the Mid-South, L.P. ("Time Warner") and BellSouth and requests that the Authority adopt BellSouth's position on this issue.[1]

ISSUE

What should be the appropriate definition of "local traffic" for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act?

The sole issue in dispute concerns the definition of "local traffic" under the new interconnection agreement between BellSouth and Time Warner. BellSouth proposes the following definition:

[1] BellSouth submits its Brief in accordance with the Agreed Procedural Order entered by the Hearing Officer on December 16, 1999. The order in pertinent part provides that: (1) the Arbitrators should take administrative notice of the records developed in Docket No. 99-00377 ("the ICG proceeding") and Docket No. 99-00430 ("the DeltaCom proceeding"); (2) the record from these proceedings will be used as the evidentiary record for the Arbitrators' decision; (3) the parties' briefs may reference the record developed in the ICG and DeltaCom proceeding; and (4) the parties will submit the case to the Arbitrators for resolution without the submission of testimony or cross-examination.

> Local Traffic is defined as any telephone call that originates and terminates in the LATA and is billed by the originating party as a local call. As clarification of this definition and for reciprocal compensation, Local Traffic does not include traffic that originates from or terminates to or through an enhanced service provider or information service provider. As further clarification, Local Traffic does not include calls that do not transmit information of the user's choosing. In any event, neither Party will pay reciprocal compensation to the other if the "traffic" to which such reciprocal compensation would otherwise apply was generated, in whole or in part, for the purpose of creating an obligation on the part of the originating carrier to pay reciprocal compensation for such traffic.

This basic definition appears in several places in the proposed agreement, including the General Terms and Conditions – Part B and Sections 1.1, 8.1 and 8.3 of Attachment 3. BellSouth's definition is consistent with the Telecommunications Act of 1996 ("1996 Act") and orders of the Federal Communications Commission ("FCC").

Time Warner's position is that dial-up calls to Internet Service Providers ("ISPs"), which are a subset of Enhanced Service Providers or Information Service Providers, should be included in the definition of local traffic. However, no serious dispute exists that ISP-bound traffic is "non-local interstate traffic." *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, ¶ 26, n.87 (Feb. 26, 1999) (hereinafter "*Declaratory Ruling*"). The Authority should decline to include ISP-bound traffic in the local traffic definition or to require the payment of reciprocal compensation for ISP-bound traffic, since "reciprocal compensation obligations should apply only to traffic that originates and terminates within a local calling area ...." *First Report and Order,* CC Docket 96-98, ¶¶ 1034-35 (Aug. 8, 1996). This is the result reached by the South Carolina Public Service Commission, which recently held in an arbitration involving DeltaCom that reciprocal compensation is not an appropriate compensation mechanism for ISP-bound traffic. *Order No. 1999-690, In Re: Petition of ITC^DeltaCom Communications for Arbitration with BellSouth Telecommunications, Inc., Docket No. 1999-259C, (October 4, 1999),* (copy attached) at 64 ("Further, since Section

251 of the 1996 Act requires that reciprocal compensation be paid for local traffic, the Authority further finds that the 1996 Act imposes no obligation on parties to pay reciprocal compensation for ISP-bound traffic").

Indeed, because the FCC intends to establish an inter-carrier compensation mechanism for ISP-bound traffic, there is no requirement that the Authority establish an interim compensation arrangement at this time, and BellSouth has not asked the Authority to arbitrate this issue. However, to the extent the Authority decides to do so, the Authority should select one of the interim mechanisms proposed by BellSouth. These include: (1) bill and keep; (2) tracking and holding any compensation in abeyance pending the establishment of an inter-carrier compensation mechanism by the FCC; or (3) the establishment of a compensation arrangement similar to that which exists for other access traffic. Any of these three interim inter-carrier compensation mechanisms would be consistent with the 1996 Act and applicable FCC rules. The same cannot be said about Time Warner's proposal that reciprocal compensation be paid for ISP-bound traffic.[2]

1. Reciprocal Compensation Is Not An Appropriate Cost Recovery Mechanism for ISP-Bound Traffic.

Although both parties agree that there are costs associated with calls by BellSouth end users to ISPs served by competing local exchange carriers ("CLECs") such as Time Warner, the question before the Authority is what is the appropriate mechanism to allow Time Warner to

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[2] Because ISP-bound traffic is "non-local interstate traffic" not governed by the reciprocal compensation requirements of Section 251(b)(5) of the 1996 Act or the FCC's rules, *Declaratory Ruling*, ¶ 26, n.87, BellSouth submits that the establishment of an inter-carrier compensation mechanism for ISP-bound traffic is not properly the subject of arbitration under the 1996 Act. Although the FCC purported to empower state commissions to regulate ISP-bound traffic in the context of Section 252 arbitration, the FCC's authority to do so is being challenged in court. *See Bell Atlantic Telephone Companies, et al. v. FCC,* Action No. 99-1094 (D.C. Cir. March 8, 1999).

recover such costs. Notwithstanding Time Warner's claims to the contrary, however, reciprocal compensation is not an appropriate cost recovery mechanism, interim or otherwise.

By its very nature, reciprocal compensation is a *cost-based mechanism* designed to provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of local traffic. 47 U.S.C. § 251(b)(5). Reciprocal compensation rates should compensate a carrier for the forward-looking costs its incurs. CLECs agree that reciprocal compensation, as provided for in Sections 251(b)(5) and 252(d)(2) of the 1996 Act, is a cost recovery mechanism. Rozycki, Tr. Vol. IIB at 349.

Nevertheless, while insisting that reciprocal compensation will allow it to recover its cost of handling ISP-bound traffic, no CLEC, including Time Warner, has never presented to the Authority any evidence to establish what these costs actually are. Rozycki, Tr. Vol. IIB at 346. As DeltaCom witness Rozycki explained, "... we have not done a cost study, so we do not know the precise costs." *Id.* There is no doubt that it is essential that CLECs quantify their cost of handling ISP-bound traffic for the Authority, and even DeltaCom witness Rozycki acknowledged that the Authority should be concerned about the "overrecovery of costs by the CLEC for ISP traffic." Rozycki, Tr. Vol. IIB at 347-50. Yet, without cost studies or some determination of a CLEC's costs in handling ISP-bound traffic, it is entirely possible that the payment of reciprocal compensation for ISP-bound traffic would result in a CLEC overrecovering its costs, as Mr. Rozycki was forced to admit:

> Q. ... Without knowing what DeltaCom's costs are in handling ISP traffic, can this Authority ensure that DeltaCom is not overrecovering its costs associated with handling that traffic through the payment of reciprocal compensation?
>
> A. It cannot ensure that.

Rozycki, Tr. Vol. IIB at 352. No one seriously contends that ISP-bound traffic should be "a gravy train or a get rich mechanism for CLECs." However, Time Warner can give no assurances that it would not receive a windfall from the payment of reciprocal compensation for ISP-bound traffic. The potential for such a windfall is very real, which explains why CLECs use reciprocal compensation to "pass along price breaks to the ISP that would not normally occur in a non-distorted, competitive market." Varner, Tr. Vol. IIIA at 57-138.[3]

Time Warner cannot overcome its failure to prove that it would only recover its costs if reciprocal compensation were paid for ISP-bound traffic by relying upon BellSouth's costs rather than developing a cost study of its own. This argument fails for two reasons. First, BellSouth has not studied the costs associated with ISP-bound traffic. BellSouth's cost studies, which may be used by the Authority to establish reciprocal compensation rates, examined the costs of transporting and terminating voice traffic, not the costs of handling ISP-bound traffic. The distinction is important because, as DeltaCom acknowledged, ISP-bound traffic has, on average, significantly longer hold times than traditional voice traffic. Rozycki, Tr. Vol. IIB at 348; *see also Report of the NARUC Internet Working Group, Pricing and Policies for Internet Traffic on the Public Switched Network,* at 2 (March 1998); Atai and Gordon, *Impacts of Internet Traffic on LEC Networks and Switching Systems,* at 3-4 (Bellcore 1996). These longer hold times make ISP-bound traffic a different animal in terms of cost than traditional local voice traffic, and the

[3] Mr. Rozycki did not know whether DeltaCom offers special credits, refunds, or reciprocal compensation sharing arrangements to ISPs in order to attract their business. Rozycki, Tr. Vol. IIC at 359. Mr. Rozycki made no attempt to determine whether DeltaCom offered such enticements, even though he had been previously asked the same question in the arbitration hearings in North Carolina and even though Mr. Rozycki could have obtained that information from another department within DeltaCom. Rozycki, Tr. Vol. IIC at 360 & 368-69.

reciprocal compensation rates currently in place do not account for those cost differences. Rozycki, Tr. Vol. IIB at 349; Starkey, Tr. Vol. IIC at 404.[4]

Because of the longer hold times for ISP calls, the payment of reciprocal compensation for ISP-traffic based upon rates for transporting and terminating local voice traffic will result in an over-recovery of call set up costs. Taylor, Tr. Vol. IIIA at 532-56. In its *Declaratory Ruling*, the FCC recognized that "efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures." *Declaratory Ruling* ¶ 29. The FCC expressed concern that "pure minute-of-use pricing structures are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic." *Id.* Time Warner's reciprocal compensation proposal cannot be reconciled with the FCC's concerns.

Second, any argument that FCC rules permit Time Warner to use BellSouth's costs as a proxy is a red herring. The rule in question – 47 C.F.R. § 51.711 – governs symmetrical reciprocal compensation rates for local traffic, not ISP-bound traffic. The FCC has made clear that these rules do not govern ISP-bound traffic. *See Declaratory Ruling*, ¶ 26 n.87. As a result, the FCC's rules do not and cannot excuse the absence of evidence that reciprocal compensation for ISP-bound traffic would only allow Time Warner to recover its costs rather than generating a windfall for Time Warner at the expense of BellSouth customers.[5]

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[4] In recognition of the differences in the average hold times between ISP-bound traffic and traditional local voice traffic, ICG Telecommunications, Inc. ("ICG") submitted to the North Carolina Utilities Commission an adjusted call length proposal that reduced the proposed reciprocal compensation rate in an attempt to ensure that ICG did not recover more setup costs than ISP-bound calls actually generate. Starkey, Vol. IIC Tr. at 389-94; Exhibit 3. For whatever reason, ICG did not make the same proposal in this proceeding.

[5] Although the Authority previously has ordered the payment of reciprocal compensation for ISP-bound traffic, it did so prior to issuance of the FCC's *Declaratory Ruling*. Here, the Authority is not interpreting the terms of an existing interconnection agreement, as was the case in *Brooks Fiber*, Docket 98-00118. The only arbitration involving BellSouth to date in which

2. Reciprocal Compensation For ISP-Bound Traffic Is Bad Public Policy.

The Authority should not focus solely on the effect on ISPs of a decision not to require the payment of reciprocal compensation for ISP-bound traffic. Rather, when considering the establishment of an interim inter-carrier compensation mechanism for ISP-bound traffic, the Authority should focus on the effect that mechanism would have on the *overall* development of competition in Tennessee, rather than on only *one* segment of the market. Time Warner and other CLECs should be encouraged to serve all markets segments, which does not occur when reciprocal compensation is paid for ISP-bound traffic.

A number of adverse consequences to competition will result from the payment of reciprocal compensation for ISP-bound traffic. Specifically, such payment harms competition by: (1) reducing CLECs' incentive to service residence and business end user customers; (2) further subsidizing ISPs; (3) encouraging uneconomic preferences for CLECs to serve ISPs due to the fact that CLECs can choose the customers they want to serve and CLECs could offer lower prices to ISPs without reducing the CLECs' net margin; (4) establishing unreasonable discrimination among providers (interexchange carriers versus ISPs); and (5) creating incentives to arbitrage the system, such as schemes designed solely to generate reciprocal compensation. Taylor, Tr. Vol. IIIA at 532-98; Varner, Tr. Vol. IIIA at 577-135. None of these results is desirable in Tennessee or anywhere else.

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the Authority has addressed the reciprocal compensation issue was the NEXTLINK arbitration, Docket 98-00123. There, the Authority directed NEXTLINK and BellSouth to treat ISP-bound traffic as "local" traffic for reciprocal compensation. However, the Authority's decision was based upon its order in *Brooks Fiber* and did not take into account the FCC's *Declaratory Ruling.* On December 6, 1999, BellSouth filed a motion requesting that the Authority reject the provision in BellSouth's interconnection agreement with NEXTLINK requiring the payment of reciprocal compensation for ISP-bound traffic. That motion remains under advisement.

The market distortion caused by reciprocal compensation for ISP-bound traffic has been recognized by several State commissions. Most notably, the Commonwealth of Massachusetts Department of Telecommunications and Energy made the following findings of relevance here:

> The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, *does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders.* This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition.

Order, D.T.E. 97-116-C, p. 32 (May 19, 1999) (emphasis added). The Massachusetts Commission saw through the veneer of the reciprocal compensation argument advanced by Time Warner, and the Authority should do likewise.

The market distortions recognized by the Massachusetts Commission have occurred in Tennessee and elsewhere in BellSouth's region. Between April 1999 and September 1999, for example, the total minutes of use from BellSouth end users to ISP customers served by CLECs in Tennessee grew by approximately 63%. By contrast, the local minutes of use from BellSouth end users to non-ISP customers served by CLECs in Tennessee grew by less than 1% during the same time period. Varner, Tr. Vol. IIIA at 574-92. Likewise, some CLECs have billed BellSouth more in reciprocal compensation than the revenues these CLECs receive from their own end-user customers. Schonhaut, Tr. Vol. IID at 496-97 (ICG's reciprocal compensation billings to BellSouth in July 1999 in Tennessee exceeded ICG's revenues from end user customers in the State by approximately 159%); Starkey, Tr. Vol. IIC at 429-30 (KMC generated approximately $636,000 in revenues from ten ISP customers in Louisiana, while billing BellSouth approximately $2 million in reciprocal compensation for traffic to those ten ISPs). Such evidence vividly demonstrates that CLECs are targeting ISPs at the expense of non-ISP

customers and are attempting to make reciprocal compensation from ISPs a separate line of business, which is hardly consistent with this Authority's mission to promote competition in all market segments.

3. Consistent With Cost Causation Principles, Time Warner Should Recover The Costs Associated With ISP-Bound Traffic From ISPs, Not BellSouth.

In seeking reciprocal compensation for ISP-bound traffic, Time Warner wants BellSouth to pay the cost of calls to the Internet rather than the ISPs whose customers generate such calls. Time Warner's position violates basic principles of cost-causation, which dictate that the cost of ISP-bound traffic should be recovered from the ISPs Time Warner serves, not BellSouth.

There is no serious dispute that costs should be borne by the cost causer. Rozycki, Tr. Vol. IA at 31-27; Taylor, Tr. Vol. IIIA at 532-9. The question becomes who is the cost causer when a call is placed to the Internet through an ISP. The logical answer to this question is that when an end user places a call to an ISP, that end user is acting as a customer of the *ISP*, much as when that end user places a long distance call as a customer of the interexchange carrier. Taylor, Tr. Vol. IIIA at 532-14. As Dr. Taylor noted, "the same subscriber that acts in the capacity of a customer of the originating ILEC when making a local voice call is seen to act in the capacity of a customer of the ISP when making an Internet call." Taylor, Tr. Vol. IIIA at 532-11. As a result, the carrier whose customer originates the call, prices the service, and receives the money, ought to charge the full cost of that call to the customer. Thus, according to Dr. Taylor, the price the ISP charges ought to cover the full cost that the end user causes. *Id.* at 532-15-16.

The Authority should disregard the lament of those CLECs which claim that they will be unable to compete in the marketplace if required to recover the cost of ISP-bound traffic from ISP customers. *See* Rozycki, Tr. Vol. IA at 31-29. This claim ignores that the prices BellSouth

charges its ISP customers do not reflect receipt of any reciprocal compensation, and it is those prices against which Time Warner is competing. Varner, Tr. Vol. IIIA at 577-135. Thus, Time Warner should be able to charge its ISP customers for the costs associated with ISP-traffic, as BellSouth attempts to do, and still compete successfully for ISP customers.

A decision by the Authority not to award Time Warner reciprocal compensation would *not* mean that Time Warner would have uncompensated costs. Rather, the crucial point is that "*[t]he CLECs' ISP customers compensate the CLECs for services that are provided just like an ILEC's ISP customer compensates the ILEC.*" Varner, Tr. Vol. IIIA at 574-32 (emphasis added). If Time Warner does not recover its costs from the ISP it services, it is likely charging the ISP rates that are below cost. Furthermore, the payment of reciprocal compensation for ISP-bound traffic would result in BellSouth's end user customers subsidizing the operations of CLECs in Tennessee. Varner, Tr. Vol. IIIA at 577-57. The subsidy stems from the fact that a CLEC such as Time Warner is the only party compensated in the two-carrier arrangement because Time Warner receives revenue from its ISP customer, while BellSouth receives no compensation.

Consistent with principles of cost causation, BellSouth has proposed that the Authority direct the parties to implement a bill and keep mechanism for ISP-bound traffic pending the establishment of an inter-carrier compensation mechanism by the FCC. Under a bill-and-keep arrangement, neither of the two interconnecting carriers would charge the other for ISP-bound traffic that originates on the other carrier's network. Varner, Tr. Vol. IIIA at 577-34. Instead, it would ensure that the parties recover their costs from the cost causer, namely the ISP.[6]

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[6] Although Mr. Starkey testified that FCC Rule 51.713 would preclude the Authority from adopting a bill and keep arrangement for ISP-bound traffic, Starkey, Tr. Vol. IIC at 414, the FCC has made clear that this rule and other rules that govern the payment of reciprocal compensation for local traffic do not apply to ISP-bound traffic. *Declaratory Ruling*, ¶ 26, n.87.

4. Any Interim Inter-Carrier Compensation Mechanism Should Recognize That ISP-Bound Traffic Is Interstate In Nature And Will Be Regulated As Such By The FCC.

In its *Declaratory Ruling*, the FCC confirmed that ISP-bound traffic is not local, and ISP-bound traffic does not terminate at the ISP's local server, but continues over the Internet to host computers that may be located in another state or another nation. *Declaratory Ruling* ¶ 12. The FCC also made clear that ISPs are users of exchange access service. *Id.* ¶ 5. The FCC confirmed this view just last month. *See* Order on Remand, *In re: Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 98-147, *et al.*, ¶ 35 (Dec. 23, 1999) ("... we conclude that the service provided by the local exchange carrier to the ISP is ordinarily exchange access service because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange ...") (copy attached). Rather than paying local carriers for their use of such exchange access service through the payment of access charges, as do interexchange carriers, however, ISPs pay for exchange access that is equal to the rate for local exchange service. *Declaratory Ruling,* ¶ 12. The FCC made clear that its decision to exempt ISPs from the payment of access charges does not change the nature of the service ISPs receive – it is exchange access service for which ISPs pay local exchange rates. *Id.* at ¶ 16.

Because ISPs use exchange access service, BellSouth also has proposed an interim inter-carrier compensation mechanism premised upon the revenue sharing arrangement that exists in the access world. The fact that the FCC has exempted enhanced service providers, including ISPs, from paying access charges and instead allowed them to purchase service out of the business exchange tariff is precisely the reason that a separate sharing plan is necessary. Unlike other access services, which are billed on a usage-sensitive basis, ISPs purchase flat rate basic

business local exchange services. Only one carrier can bill the ISP, and the business exchange rate billed to the ISP is the only source of revenue to cover any of the costs incurred in provisioning access service to the ISP. Varner, Tr. Vol. IIIA at 577-38. Thus, a plan to share the access revenue paid by the ISP among all the carriers involved in handling the traffic is appropriate.

Because of the FCC's plans to establish an inter-carrier compensation mechanism of its own, the Authority may decline to establish the sharing plan proposed by BellSouth, particularly since it is likely to be preempted once the FCC rules. Under the circumstances, the Authority may decide simply to require that the parties track ISP-bound traffic originating on each parties' network on a going-forward basis. Once there is an effective order from the FCC establishing an inter-carrier compensation mechanism for ISP-bound traffic, the parties will "true-up" any payments retroactively from the effective date of the interconnection agreement. Varner, Tr. Vol. IIIA at 577-34. *See* Order, *In re: Petition of Birch Telecom of Missouri, Inc.,* Case No. TD-98-278 (Mo. Pub. Service Comm'n April 16, 1999) (no reciprocal compensation for ISP-bound traffic, but requiring parties to track ISP traffic and "true up" once FCC rules).[7]

[7] At least one state commission in BellSouth's region has adopted a variation of this proposal. In *In re: Petition by ICG Telecom Group, Inc. for Arbitration,* Docket No. 27069 (Nov. 10, 1999), the Alabama Public Service Commission required BellSouth and ICG to pay reciprocal compensation for ISP-bound traffic pending a decision from the FCC. However, such payments are to be retroactively "trued-up' to the level of inter-carrier compensation ultimately adopted by the FCC." Order at 19.

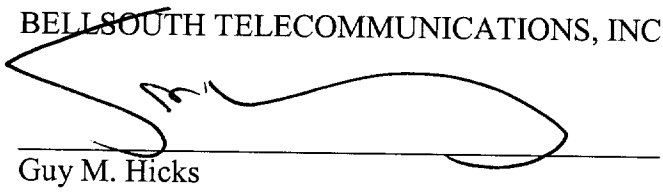
CONCLUSION

The Authority should adopt BellSouth's definition of "local traffic" and decline to award the payment of reciprocal compensation for ISP-bound traffic, as requested by Time Warner.

This 21st day of January, 2000.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

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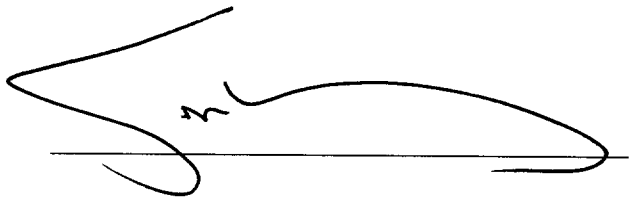

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 1999-259-C - ORDER NO. 1999-690

OCTOBER 4, 1999

IN RE: Petition of ITC^DeltaCom Communications, Inc. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.	))))	ORDER ON ARBITRATION

I. INTRODUCTION

This arbitration proceeding is pending before the South Carolina Public Service Commission ("Commission") pursuant to Section 252 (b) of the Telecommunications Act of 1996 ("1996 Act"). This proceeding arose after ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and BellSouth Telecommunications, Inc. ("BellSouth") were unable to reach agreement on all issues despite the good faith negotiations conducted over an extended period of time. On June 11, 1999, ITC^DeltaCom filed a Petition for Arbitration with BellSouth in South Carolina. BellSouth filed its Response to ITC^DeltaCom's Petition on July 6, 1999. The Petition and Response included a list of some seventy-three (73) issues to be decided by this Commission.

The Hearing of this Arbitration was held on September 8 – 9, 1999, with the Honorable Philip T. Bradley, Chairman, presiding. Prior to the evidentiary hearing, the parties were able to resolve approximately forty (40) of the disputed issues that were originally listed in the Petition. Thus, this Commission will only address in this Order the remaining disputed issues as of the date of the Hearing. At the evidentiary hearing,

ITC^DeltaCom was represented by Mitchell Willoughby, Esquire; B. Craig Collins, Esquire; David I. Adelman, Esquire; and Nanette S. Edwards, Esquire. ITC^DeltaCom offered the testimony of Christopher J. Rozycki; Stephen D. Moses[1]; Michael Thomas; Michael Starkey and Don J. Wood. BellSouth was represented by Caroline N. Watson, Esquire; William F. Austin, Esquire; Lisa Foshee, Esquire; and Thomas B. Alexander, Esquire. BellSouth offered the testimony of Alphonso J. Varner; Dr. William Taylor; D. Daonne Caldwell; David L. Thierry; David D. Scollard; Ronald M. Pate and W. Keith Milner.

The purpose of this Arbitration proceeding is the resolution by the Commission of the remaining disputed issues set forth in the Petition and Response. 47 U.S.C.§ 252(b)(4)(C). Under the 1996 Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission ("FCC") regulations pursuant to Section 252; shall establish rates according to the provisions of Section 252(d) for interconnection, services, and network elements; and shall provide a schedule for implementation of the terms and conditions by the parties to the Agreement. 47 U.S.C. § 252(c).

II. Procedural Motions

A. BellSouth's Motion to Strike.

At the beginning of the Hearing the Commission heard oral arguments from counsel for BellSouth and counsel for ITC^DeltaCom regarding BellSouth's Motion to Strike and Exclude Certain Testimony of ITC^DeltaCom. (Tr. Vol. 1 at 10-46).

[1] ITC^DeltaCom prefiled the testimony of Thomas Hyde; however, due to personal reasons, Mr. Hyde did

Specifically, through its Motion, BellSouth sought to strike certain portions of the prefiled direct and rebuttal testimony of ITC^DeltaCom witnesses, Thomas Hyde (whose testimony was adopted by Stephen D. Moses) and Don Wood, and to exclude any related live testimony at the Hearing. Principally, the Motion to Strike and Exclude was directed at testimony by Mr. Hyde (Moses) and Mr. Wood that attempted to put in evidence information regarding BellSouth's recurring and nonrecurring costs as to certain unbundled network elements ("UNEs") and the expansion of Issue No. 5 from one (1) issue stated in ITC^DeltaCom's Petition to four (4) separate issues. At the conclusion of oral argument, the Commission announced that it would take BellSouth's Motion to Strike and Exclude under advisement and rule on it in the Commission's Final Order. (Tr. Vol. 1 of p. 46). Upon review, the Commission finds now that BellSouth's Motion to Strike and Exclude should be denied.

With regard to the portion of BellSouth's Motion to Strike that seeks to have portions of rebuttal testimony of ITC^DeltaCom's witnesses Wood and Hyde excluded, BellSouth asserts that it is not appropriate for ITC^DeltaCom, through this two-party arbitration, to attempt to re-litigate UNE cost issues that this Commission decided in an open generic proceeding regarding BellSouth's costs to provision UNEs in South Carolina. (*See* Order, June 1, 1998, Docket No. 97-374-C, *Proceeding to Review BellSouth Telecommunications, Inc. 's Cost Studies for Unbundled Network Elements).* Further, BellSouth asserts that portions of the testimony are based on evidence that is not in the record of the instant proceeding. ITC^DeltaCom argues that the law with regard to

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not appear and was replaced at the Hearing by Mr. Stephen D. Moses, also an employee of ITC^DeltaCom.

UNE rates has changed since the Commission's approved UNE rates for BellSouth and that the rates are not compliant with FCC Rules. ITC^DeltaCom states that it propounded discovery to BellSouth, to which BellSouth properly responded, and that the discovery led to information upon which the ITC^DeltaCom witness based his opinion. Therefore, ITC^DeltaCom contends that it may properly challenge and present evidence of FCC compliant rates within the context of this Arbitration proceeding.

Upon consideration of the Motion to Strike, the Commission is cognizant that it has broad discretionary powers in admitting or excluding evidence much like that of a trial court. *See Hoeffer v. The Citadel,* 311 S.C. 361, 429 S.E.2d 190 (1993), rehearing denied. Further, the Commission is aware that the South Carolina Rules of Evidence allow for an expert to rely on information which is not admissible into evidence to form his or her expert opinion. See, Rule 703, SCRE. The Commission concludes that the Motion to Strike relating to witness Wood's rebuttal testimony and witness Hyde's rebuttal testimony should be denied and that the testimony should be admitted. In admitting the evidence, the Commission is not concurring with ITC^DeltaCom's assertion that the UNE rates are properly challenged in this Arbitration proceeding. The Commission is merely admitting evidence which the Commission may, or may not, consider in its deliberations and give that evidence whatever weight or credibility the Commission deems appropriate.

BellSouth also contends that it is not appropriate for ITC^DeltaCom to attempt to add new issues to this Arbitration proceeding by expanding Issue No. 5 from one (1) issue in the Petition to four (4) separate issues. ITC^DeltaCom asserts that it expressly

incorporated a proposed interconnection agreement and summary issues matrix into its Petition for Arbitration which was filed on June 11, 1999. Additionally, ITC^DeltaCom states that the binding forecast issue was addressed in the prefiled testimony of BellSouth witness Varner.

The Commission concludes that BellSouth's Motion to Strike as regarding Issue 5 should be denied. The Commission recognizes that the issue of binding forecast, as stated in the restated Issue 5 proposed by ITC^DeltaCom, was addressed by BellSouth in its prefiled testimony. Further, the subtopics identified in Issue 5 as stated by ITC^DeltaCom are set out in the Exhibit B which was attached to the Petition and incorporated by reference; Exhibit B provided a summary of the issues on which the parties had not reached agreement. *See* Petition for Arbitration of ITC^DeltaCom, p. 3, ¶ 7 and Exhibit B to Petition. Inasmuch as BellSouth filed testimony on the restated issue, including the issue of binding forecast, the Commission can find no prejudice to BellSouth. As no prejudice has been demonstrated, the Commission denies BellSouth's Motion to Strike with regard to Issue 5.

B. ITC^DeltaCom's Objection to Introduction of BellSouth's Service Quality Measurements.

During the Hearing, the Commission requested both parties to review and compare the other party's performance measurements and to report back with the results. BellSouth prepared a written analysis comparing the two sets of measurements. ITC^DeltaCom did not do so. In order to make the comparison document meaningful, BellSouth also presented the Commission with a copy of BellSouth's most recent version

of its performance measurements, which it calls, Service Quality Measurements ("SQMs"). Counsel for BellSouth requested that both documents be admitted into evidence in this proceeding. ITC^DeltaCom objected to admission of the SQMs. The Commission marked the documents for identification only and stated that it would rule on their admissibility in the Final Order. The Commission now overrules ITC^DeltaCom's objection and allows the exhibits to be admitted into the evidence of record in this proceeding as Hearing Exhibit No. 17. The Commission has wide latitude in accepting evidence at proceedings such as this one, akin to that of a trial court. *See Hoeffer v. The Citadel, supra.* The Commission requested both parties to provide comparisons of the other's performance measurements. BellSouth was the only party to do so. The Commission finds BellSouth's comparison document extremely helpful. Moreover, the Commission finds that it is both necessary and useful to have BellSouth's actual Service Quality Measurements in the record to determine an unresolved issue in this proceeding.

III. DISCUSSION OF ISSUES FOR ARBITRATION.

Based upon a careful consideration of the entire record in this Arbitration proceeding, the Commission makes the following determinations and decisions regarding the issues presented in this arbitration proceeding:

Issue 1(a)
Should BellSouth be required to comply with performance measures and guarantees for pre-ordering/ordering, resale, and unbundled network elements ("UNEs"), provisioning, maintenance, interim number portability and local number

portability, collocation, coordinated conversions and the bona fide request processes as set forth fully in Attachment 10 of Exhibit A to this Petition?

ITC^DeltaCom Position:

Yes. BellSouth should be required to provide performance measures and three-tiered performance guarantees as proposed by witness Rozycki and incorporated into contract language in Attachment 10 to Exhibit A to the Petition. Section 251(c)(3) of the Act requires nondiscriminatory unbundled access to all UNEs including OSS. See First Report and Order of the FCC (OSS is UNE) CC Docket 96-98, ¶ 525. Thus it is also a requirement of Section 271 of the Act. BellSouth itself proposed self-executing performance guarantees. See BellSouth's Ex Parte Proposal to the FCC for Self Effectuating Measures, April 3, 1999.

BellSouth Position:

BellSouth disagrees that the so called "performance measures" and performance "guarantees" in Attachment 10 to the Petition are appropriate. The South Carolina Commission has previously declined to establish additional performance and service measurements in an arbitration proceeding, having found that: "[t]his Commission already has service measurements in place. BellSouth must provide the same quality of services to AT&T that it provides to its own customers.... " (*See* Order No. 97-189, at 5-6, March 10, 1997, Docket No. 96-358-C, *AT&T/BellSouth Arbitration*). BellSouth has offered a comprehensive set of performance measurements (Service Quality Measurements or "SQMs") which ensure that BellSouth provides ITC^DeltaCom and all other CLECs with nondiscriminatory access as required by the 1996 Act and applicable rules of the Federal Communications Commission ("FCC"). BellSouth also is willing to provide ITC^DeltaCom any additional performance measurements that the Commission may order BellSouth to provide to other CLECs in this state.

With respect to performance "guarantees", BellSouth does not believe that financial incentives, "guarantees", penalties or liquidated damages are appropriate matters for arbitration under the 1996 Act. ITC^DeltaCom's proposal is not required by the 1996 Act and represents a supplemental enforcement scheme that is inappropriate and unnecessary. ITC^DeltaCom has adequate legal recourse in the event BellSouth breaches its interconnection agreement. Moreover, the South Carolina Commission has previously determined that it "lacks the jurisdiction or legislatively-granted authority to impose penalties or fines" in the context of a similar arbitration proceeding. (See Order No. 97-189, at 6, March 10, 1997, Docket 96-358-C, AT&T/BellSouth Arbitration).

Discussion:

The Commission has been presented with two (2) sets of performance measurements by which BellSouth's provision of services to competitive local exchange

carriers ("CLECs"), such as ITC^DeltaCom, may be measured. On the one hand, ITC^DeltaCom witness Mr. Rozycki offered a set of performance measures and performance guarantees which may be found as Attachment 10 to Exhibit A of ITC^DeltaCom's Petition. Mr. Rozycki testified that these were very similar to a set of performance measures/performance guarantees that had been used by CLECs and the incumbent local exchange carrier ("ILEC") in Texas. (Rozycki, Tr. Vol. 1 at 69). Mr. Rozycki testified that the performance guarantee aspect of the performance measurements that ITC^DeltaCom was supporting included a three-tiered system of financial consequences if BellSouth were not to meet certain levels of performance under the forty-five (45) different measurements proposed by ITC^DeltaCom. For example, a failure under the second tier constitutes a "specified performance breach" and would require BellSouth to compensate ITC^DeltaCom $25,000 for each measurement BellSouth failed to meet. A failure to perform under the third tier constitutes a "breach-of-contract" which would require BellSouth to pay penalties in the amount of $100,000 for each default for each day the breach or default continues. (Rozycki, Tr. Vol. 1 at 68 - 71). At the Hearing, Mr. Rozycki changed positions and offered to have any such penalties made payable to the State of South Carolina rather than individually to ITC^DeltaCom. (Tr. Vol. 1 at 119 and 691).

On the other hand, BellSouth offered its own detailed set of performance measurements developed over the last two years by working with various state commissions and CLECs. (Tr. Vol. 1 at 727). BellSouth witness Mr. Varner testified that BellSouth is taking very seriously the FCC's request for "clear and precise"

measurements by which CLECs and regulators can confirm nondiscriminatory provisioning of network facilities and services. (Ameritech-Michigan Order 12 FCC Rcd. at 20655-56, ¶ 209. Mr. Varner testified that BellSouth's Service Quality Measurements ("SQMs") covered nine (9) separate categories of measurements: (1) Pre-Ordering OSS; (2) Ordering; (3) Provisioning; (4) Maintenance & Repair; (5) Billing; (6) Operator Services (Toll) and Directory Assistance; (7) E911; (8) Trunk Group Performance; and (9) Collocation. (Varner, Tr. Vol. 1 at 405 - 406 and Hearing Ex. 17 at 1 (Table of Contents)). BellSouth's Service Quality Measurements, which comprise some 69 pages of details regarding how these nine (9) categories are measured, is part of Hearing Exhibit No. 17.

Also, a part of Hearing Exhibit No. 17 is BellSouth's Matrix which compares ITC^DeltaCom's proposed performance measurements to BellSouth's Service Quality Measurements. Mr. Varner stressed that by using BellSouth's detailed set of measurements, along with the raw data provided, ITC^DeltaCom and the Commission can monitor BellSouth's performance and verify that services are being provided at parity with BellSouth and with other CLECs. Rather than attempting to negotiate different performance measurements in the various individual interconnection agreements for each CLEC doing business in BellSouth's region, as ITC^DeltaCom is attempting to do through its own version of performance measurements taken from another state outside BellSouth's region, BellSouth states that it is committed to delivering BellSouth's Service Quality Measurements equally to all CLECs, including ITC^DeltaCom. (Varner, Tr. Vol. 1 at 405 - 407). Significantly, BellSouth's SQMs have been approved by several

state Commissions and have been incorporated into numerous interconnection agreements with other CLECs in BellSouth's region. (Tr. Vol. 1 at 726-727).

Mr Varner also testified that the so-called performance "guarantees" are nothing more than penalties or liquidated damages. As such, they are not an appropriate matter to be determined through arbitration. (Varner Tr. Vol. 1 at 407 - 408) None of the requirements found in Section 251 of the 1996 Act involves a duty for the parties to agree on a set of financial performance guarantees or liquidated damages-type provisions. The 1996 Act does not specifically require an arbitrated agreement to satisfy any conditions regarding performance guarantees, penalties or liquidated damages. BellSouth noted that state law and state and federal commission procedures are available, and perfectly adequate, to address any performance or breach of contract situation should it arise. For example, BellSouth's SQMs are fully enforceable through commission complaints in the event of BellSouth's failure to meet such measurements.

Dr. William Taylor, on behalf of BellSouth, testified that performance measures "based on penalties or liquidated damages are completely unnecessary and inappropriate. Apart from the fact that legal and other remedies are already available, ITC^DeltaCom's proposed performance guarantee system suffers from an important incentive problem known in economics as *moral hazard.*" (Dr. Taylor, Tr. Vol. 1 at 548). (emphasis in original). As Dr. Taylor explained, moral hazard is a form of gaming by which one party to a contract may resort to actions – within the contract – that create unanticipated competitive or financial advantage for that party *at the expense of the other party* to the contract. (Dr. Taylor, Tr. Vol. 1 at 548 – 549). Dr. Taylor's testimony on this point may

explain Mr. Rozycki's change in positions --- the penalties are now proposed to be paid to the State rather than ITC^DeltaCom. Even with this change of position, the problem of "moral hazard" still exists.

Finally, Mr. Varner testified that BellSouth is currently working with the FCC to decide on a BellSouth voluntary proposal for self-effectuating enforcement measures. These measurements would take effect on a state-by-state basis concurrent with approval for BellSouth to enter the long distance market (i.e. obtain Section 271 interLATA relief). (Varner, Tr. Vol. 1 at 407).

Upon consideration of this issue, the positions of the parties, and the evidence from the hearing, the Commission concludes that a generic docket should be opened to investigate and rule on proper performance measures to be imposed on BellSouth and potentially other ILECs. As illustrated by the performance measures admitted in this proceeding and by the positions of the parties, the Commission recognizes that the issue of performance measures has far-reaching implications in the telecommunications industry, especially relating to competition under the 1996 Act.

In the interim, the Commission finds that BellSouth's Service Quality Measurements (as contained in Hearing Exhibit No. 17) are appropriate and should be adopted as performance measures for the parties to use until the Commission can conclude a generic proceeding on performance measures. In deciding to use the BellSouth SQMs, the Commission notes that BellSouth's SQMs have undergone two years of review and formulation by the FCC and several state commissions and input from various CLECs. As such, the Commission recognizes that these performance

measurements are in place and ready to be implemented within the context of this agreement until this Commission can conclude its generic proceeding.

With regard to the performance guarantees, the Commission expressly rejects imposing any sort of "performance guarantee" or penalty provision associated with performance measurements. The Commission finds that neither the 1996 Act nor state law allows the Commission to impose penalties or fines in this arbitration. Additionally, this Commission has previously determined in the context of a proceeding resolving disputed issues for an arbitrated agreement under the 1996 Act that it lacks the jurisdiction or legislatively-granted authority to impose penalties or fines in the context of an arbitrated agreement. (*See* Order No. 97-189, at 6, March 10, 1997 in Docket No. 96-358-C (*AT&T/BellSouth Arbitration*).

The Commission also notes, with respect to ITC^DeltaCom's witness Mr. Rozycki's statements concerning so-called "anti-back sliding measures" that this matter is more appropriate for consideration under the public interest standard under Section 271 of the 1996 Act than an arbitration for an interconnection agreement. The Commission further notes that BellSouth is currently working voluntarily with the FCC to develop such measures.

Ordering Paragraph:

By this Order, the Commission directs that a generic docket be established to investigate and rule on proper performance measures to be followed by BellSouth and potentially other ILECs operating in South Carolina. In the interim until a generic docket can be concluded, the Commission directs the parties to utilize the BellSouth Service

Quality Measurements as a part of the parties' interconnection agreement for South Carolina. The Commission rejects imposing any sort of "performance guarantee" or penalty provision associated with performance measurements.

Issue 1(b)
Should BellSouth be required to waive any nonrecurring charges when it misses a due date? If so, under what circumstances and for which UNEs?

ITC^DeltaCom Position:

Yes. If BellSouth's assigned due date is missed as a result of BellSouth's error, BellSouth should waive the non-recurring charges. BellSouth seems to have agreed with this position in a brief submitted in Tennessee. Other guarantees are needed to assure the due date is not missed repeatedly. This applies to all UNEs. This issue is covered by witness Rozycki in his direct testimony pages 6 through 9.

BellSouth Position:

A contract requirement obligating BellSouth to waive nonrecurring charges when it misses a due date would constitute a penalty or liquidated damages provision which is inappropriate for arbitration under the 1996 Act (nothing in Section 251 or 252 requires penalties or liquidated damages to be either agreed upon or arbitrated). (Also See BellSouth's position on Issue 1(a)). The only remedies that should be included in an interconnection agreement between BellSouth and ITC^DeltaCom are those mutually agreed upon by the parties. BellSouth has voluntarily agreed to the waiver of nonrecurring charges when it misses the due date for the conversion (cut-over) of UNE loops. Thus, this issue is not appropriate for arbitration. (Exhibit "A" attached to this Issues Matrix contains BellSouth's proposed contract language on this issue).

Discussion:

The specific question presented by this issue is whether in cases where BellSouth misses a due date (*e.g.* fails to cut over a customer on the scheduled date for such a cut over) should BellSouth be allowed to impose nonrecurring charges for such a missed appointment and should BellSouth be permitted to impose charges when it finally meets the deadline. ITC^DeltaCom asserts that BellSouth offers similar performance guarantees to its customers in its tariffs and also argues that without performance

guarantees, BellSouth has both economic and competitive incentives to miss scheduled due dates. (Rozycki, Tr. Vol. 1 at 97) Mr. Rozycki testified that ITC^DeltaCom incurs costs for each scheduled event and further that the ITC^DeltaCom customer often incurs cost when the customer has scheduled a vendor or technician to be on site during a scheduled event. (Rozycki, Tr. Vol. 1 at 97) Mr. Rozycki contends that BellSouth has taken conflicting positions on this issue when it voluntarily offered to the FCC, in its self-effectuating enforcement measures document, to waive certain charges, but takes the position here that a mandatory waiver of nonrecurring charges, such as here for a missed due date, constitutes a penalty. (Rozycki, Tr. Vol. 1 at 98) BellSouth witness Mr. Varner testified that a requirement obligating BellSouth to waive nonrecurring charges when it misses a due date would be a penalty or liquidated damages provision. (Varner, Tr. Vol. 1 at 408) Mr. Varner also offered that this Commission has no authority to award the relief sought by ITC^DeltaCom and further offered that ITC^DeltaCom has adequate remedies available before the commission, the FCC, and the courts to address any breach of contract situation. (Varner, Tr. Vol. 1 at 407)

Upon consideration of this issue, the positions of the parties, and the evidence from the hearing, the Commission concludes that BellSouth should waive the non-recurring charges if BellSouth's assigned due date is missed as a result of BellSouth's error. This required waiver is on an interim basis until the Commission concludes a generic proceeding on performance measures. The Commission finds that this required waiver of the nonrecurring charges is not a penalty but is compensation for costs incurred when a due date is missed. Further, the Commission finds that this required waiver of

nonrecurring charges provision is consistent with similar provisions contained in BellSouth's tariffs approved by this Commission. In the generic proceeding on performance measures, the Commission will entertain proposals on "performance guarantees," penalties, and liquidated damages provisions. Therefore, this provision will be subject to the Commission's ruling in the generic proceeding on performance measures established herein.

Ordering Paragraph:

The Commission directs the parties to include a provision in the interconnection agreement that BellSouth should waive the non-recurring charges if BellSouth's assigned due date is missed as a result of BellSouth's error. This provision will be in effect on an interim basis until the Commission concludes its generic proceeding on performance measures, including proposals on "performance guarantees," penalties, and liquidated damages provisions, and issues a ruling.

Issue 2 and 2(a)(iv)

(a) What is the definition of parity?
(b) Pursuant to this definition, should BellSouth be required to provide the following and if so, under what conditions and at what rates:
(1) Operational Support Systems ("OSS"),
(2) UNEs,
(3) Access to Numbering Resources and
(4) An unbundled loop using Integrated Digital Loop Carrier ("IDLC") technology.

ITC^DeltaCom Position:

(a) Where BellSouth provides service to ITC^DeltaCom at least equal-in-quality to that provided to BellSouth or any BellSouth subsidiary. See Section 3.1 and 3.2 of ITC^DeltaCom's Proposed Interconnection Agreement.

(b)(1) Yes. At no charge pursuant to the testimony of witness Wood or, if so, at FCC compliant TELRIC rates spread equally over all end-user consumers pursuant to the testimony of witness Rozycki.

(b)(2) Yes. At FCC compliant TELRIC rates. The *Iowa Utilities Board* case upholds the FCC's Rules regarding the appropriate prices of UNEs under Section 252(d). This issue is discussed by witness Wood at pages 21 and 22.

(b)(3) Yes. At FCC compliant TELRIC rates. (*Id.*)

(b)(4) Yes. At FCC compliant TELRIC rates. (*Id.*)

BellSouth Position:

(a) BellSouth offers services to ITC^DeltaCom at parity. BellSouth has offered to include language in the interconnection agreement which defines parity as the provision of UNEs and resold services in a manner that gives an efficient CLEC a meaningful opportunity to compete. This definition is consistent with the 1996 Act and the FCC's rules regarding parity of service (47 C.F.R. §51.311 (UNEs) and 47 C.F.R. §51.603 (Resale).

(b)(1) BellSouth provides CLECs with nondiscriminatory access to its OSS through electronic and manual interfaces. (See BellSouth's position on Issue 6(a) and 6(b) for discussion of rates).

(b)(2) BellSouth provides CLECs with nondiscriminatory access to UNEs pursuant to 47 U.S.C. §251(c)(3) and 47 C.F.R. §51.311. (See BellSouth's position on Issue 6(b) for discussion of rates).

(b)(3) BellSouth is fulfilling its duties under 47 U.S.C. § 251(b)(2) and (b)(3) with respect to providing number portability and dialing parity. BellSouth should not be required to provide access to numbering resources since BellSouth has not been the North American Numbering Plan Administrator ("NANPA") since 8-14-98.

(b)(4) BellSouth provides access to all of its loops on an unbundled basis including those loops served by IDLC equipment. BellSouth will provide ITC^DeltaCom with loops that meet ITC^DeltaCom's specific transmission requirements at the appropriate rates. (See BellSouth's position on Issue 6(b) for discussion of rates).

Discussion:

Because this issue has multiple sub-parts, the Commission will address each item in order.

(a): ITC^DeltaCom contends that parity is at the heart of the Telecommunications Act because it is vital to the survival of companies like ITC^DeltaCom. (Rozycki, Tr. Vol. 1 at 71). Mr. Rozycki testified that ITC^DeltaCom

wants specific contract language in the parties' Interconnection Agreement to make clear the parties' obligations under the law. (Rozycki, Tr. Vol. 1 at 103). Mr. Rozycki references the FCC's First Report and Order released on August 8, 1996, at ¶312, indicating that ITC^DeltaCom must receive nondiscriminatory access that is "at least equal-in-quality to that which the incumbent LEC provides to itself". (Rozycki, Tr. Vol. 1 at 104 -- 105). BellSouth acknowledges that it is obligated by the 1996 Act to provide ITC^DeltaCom, and any other CLEC, with nondiscriminatory access to UNEs including its operations support systems ("OSS"). Mr. Varner testified that BellSouth complies with its obligations under the Act and the FCC's Orders and provides services to CLECs in a nondiscriminatory manner. (Varner, Tr. Vol. 1 at 408 – 409). The question remaining for the Commission is what definition of parity should be used in the parties' interconnection agreement. According to BellSouth witness Varner, ITC^DeltaCom, relying on the "at least equal-in-quality" language from the FCC's First Report and Order, has proposed language which would require BellSouth to provide access that is "equal to or greater than that which BellSouth provides to its own end-users". (Varner, Tr. Vol. 1 at 410) (emphasis added). BellSouth does not agree to such language and states that the language proposed by ITC^DeltaCom goes beyond the parity requirements of the 1996 Act and the FCC's orders. BellSouth's position is that the Commission should reject ITC^DeltaCom's request to have this Commission impose a totally unnecessary additional requirement on BellSouth that is different from the expressed language of the Act or the FCC's rules. BellSouth has acknowledged that it must provide nondiscriminatory access to UNEs, including BellSouth's OSS, in a manner that will

provide a reasonable competitor with a meaningful opportunity to compete. (*See* 47 C.F.R. Section 51.311) (UNEs) and (47 C. F. R. Section 51.603) (Resale).

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that the definition of parity as proposed by BellSouth should be used in the interconnection agreement. The definition proposed by BellSouth is consistent with the FCC's rules which require the provision of UNEs and Resale services in a manner that gives an efficient CLEC a meaningful opportunity to compete. The Commission finds that ITC^DeltaCom's proposed definition of parity goes beyond the requirements of the 1996 Act and, therefore, is not acceptable.

Ordering Paragraph:

The Commission directs the parties to include in the interconnection agreement the definition of parity as proposed by BellSouth since this definition comports with the FCC's rules which require the provision of UNEs and Resale services in a manner that gives an efficient CLEC a meaningful opportunity to compete.

(b)(1) & (2) **Access to OSS and UNEs:** ITC^DeltaCom contends that BellSouth should be required to provide access to its Operations Support Systems ("OSS") at parity, meaning at least equal-in-quality, to that which BellSouth provides to itself, but that BellSouth currently is not doing so for a variety of reasons. Mr. Rozycki testified that (1) BellSouth's OSS currently does not work; (2) ITC^DeltaCom did not request a separate system to be constructed for it and thus should not have to pay for it; (3) ITC^DeltaCom should not be required to pay for any system or interface that it does not use; and (4) that the prices that BellSouth is seeking to charge for its OSS are unacceptable and have no

competitive analogy. (Rozycki, Tr. Vol. at 72 - 74). BellSouth witness, Mr. Ronald Pate, testified that BellSouth is indeed providing nondiscriminatory access to its operations support systems and provided details as to the various nondiscriminatory electronic interfaces BellSouth provides to its OSS for CLECs. (Pate, Tr. Vol. 1 at 607). Mr. Pate testified that these interfaces allow CLECs to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for resale services in substantially the same time and manner as BellSouth does for itself; and, in the case of unbundled network elements, provides a reasonable competitor with a meaningful opportunity to compete. BellSouth's OSS is in compliance with the 1996 Act and the FCC's rules. (Pate, Tr. Vol. 1 at 607 – 608). Rates for OSS shall continue as established by Order No. 98-214 (June 1, 1998) in Docket No. 97-374-C; the issue of rates is more fully discussed and decided as part of Issue 6(a).

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that BellSouth is providing nondiscriminatory access, as required by the 1996 Act and the FCC's rules, to its Operations Support Systems ("OSS") through a variety of electronic and manual interfaces which have been designed specifically for CLECs such as ITC^DeltaCom. The 1996 Act requires BellSouth to provide access to OSS; it does not specify the type of access or direct that the access must be as requested by a CLEC. The Commission finds that BellSouth's interfaces allow for nondiscriminatory access should a CLEC desire to access BellSouth's OSS.

With regard to rates for OSS, the Commission finds that its previously issued Cost Orders in Docket No. 97-374-C are controlling. The Commission finds that its

previously approved UNE rates should apply to the new interconnection agreement. This arbitration proceeding is not the proper forum for challenging UNE rates previously established in Docket No. 97-374-C.

Ordering Paragraph:

As the Commission finds that BellSouth is providing nondiscriminatory access to its Operations Support Systems ("OSS") through a variety of electronic and manual interfaces which have been designed specifically for CLECs, the Commission does not require the parties to include any additional access to BellSouth's OSS in the parties' interconnection agreement. The interconnection agreement shall incorporate rates for OSS as established by Order No. 98-214 (June 1, 1998) in Docket No. 97-374-C.

(b)(3): ITC^DeltaCom contends that it needs access to numbering resources. BellSouth contends that it should not be required to provide any additional access to numbering resources to ITC^DeltaCom because BellSouth is no longer the North American Numbering Plan Administrator ("NANPA"). BellSouth witness, Mr. Keith Milner, testified that the transition of responsibility from BellSouth to the new NANPA, Lockheed-Martin, took place over a year ago, on August 14, 1998. (Milner, Tr. Vol. 1 at 657).

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that BellSouth is not required to provide any further access to numbering resources as ITC^DeltaCom requests since BellSouth is no longer the North American Numbering Plan Administrator. The Commission finds that BellSouth is

only required to fulfill its duties under Section 251(b)(2) and (b)(3) under the 1996 Act with respect to providing number portability and dialing parity.

Ordering Paragraph:

BellSouth is not required to provide additional access to numbering resources provided by the North American Numbering Plan Administrator ("NANPA").

(b)(4): ITC^DeltaCom contends that BellSouth should provide it with an unbundled loop using Integrated Digital Loop Carrier ("IDLC") technology. ITC^DeltaCom witness, Mr. Stephen Moses, testified as to a number of reasons that he believes BellSouth should be required to provide IDLC loops rather than long copper loops or loops using the Universal Digital Loop Carrier ("UDLC") technology. (Moses, Tr. Vol. 1 at 127 - 130). In general, Mr. Moses contends that BellSouth does not make IDLC loops available, but instead provides the UNE loop on different (non-IDLC) facilities. (Moses, Tr. Vol. 1 at 138).

BellSouth's witness, Mr. Keith Milner, testified that BellSouth provides access to all of its loops on an unbundled basis, including those loops that are served by IDLC technology, by any means that are technically feasible. Mr. Milner further testified, however, that IDLC equipment allows the "integration" of loop facilities with switch facilities by eliminating equipment in the central office referred to as Central Office Terminals ("COTs"). Mr. Milner further explained that if a CLEC wants to serve an end-user customer over the CLEC's own switch and that end-user customer was previously served by BellSouth over IDLC equipment, then the loop can no longer be integrated with the BellSouth switch. Mr. Milner also further explained that to the extent that

ITC^DeltaCom contends that IDLC loops are somehow engineered to provide a better level of service than non-IDLC loops that this is simply an incorrect assumption. BellSouth designs its network to meet particular transmission parameters for particular grades of services. (Milner, Tr. Vol. 1 at 658 - 659). Mr. Milner further testified that the real issue between the parties is whether ITC^DeltaCom has requested specific transmission parameters for a given unbundled loop and whether BellSouth has agreed to provide such an arrangement. The bona fide request ("BFR") process is available to ITC^DeltaCom to request specific transmission parameters for any UNE loops that it may desire to order. Mr. Milner testified that he is unaware of any such BFR having been issued by ITC^DeltaCom; however, should ITC^DeltaCom do so, Mr. Milner testified that BellSouth will investigate the technical feasibility of ITC^DeltaCom's request and, if technically feasible, BellSouth will comply with it. (Milner, Tr. Vol. 1 at 659 - 662).

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds BellSouth is providing nondiscriminatory access to all of its loops on an unbundled basis, including loops served by integrated digital loop carrier ("IDLC") technology by any means that is technically feasible. The Commission finds that BellSouth provides access to all of its loops on an unbundled basis, including those loops served by IDLC technology. Further, the Commission finds that ITC^DeltaCom may and should utilize the bona fide request ("BFR") process to request specific transmission parameters for any UNE loops that it wants to order. The record establishes

after receipt of a BFR that BellSouth will investigate the technical feasibility of the request and, if technically feasible, will comply with the request.

With regard to rates for unbundled loops, the Commission finds that its previously issued Cost Orders in Docket No. 97-374-C are controlling. The Commission finds that its previously approved UNE rates should apply to the new interconnection agreement. This arbitration proceeding is not the proper forum for challenging UNE rates previously established in Docket No. 97-374-C.

Ordering Paragraph:

As the Commission finds that BellSouth is providing nondiscriminatory access to its unbundled loops, including loops served by IDLC technology, the Commission does not require the parties to include any additional access to unbundled loops. The interconnection agreement shall incorporate rates for unbundled loops as established by Order No. 98-214 (June 1, 1998) in Docket No. 97-374-C.

Issue 2(a)(i) [Question 2]
Should BellSouth be required to provide a download of the Regional Street Address Guide (RSAG)? If so, how?

ITC^DeltaCom Position:
[Question 2]: Yes. This is required by Section 251(c)(3) of the Act and supported by the First Report and Order, §525. This issue is close to resolution and will be incorporated into the interconnection agreement. However, BellSouth must provide the rates, terms and conditions for the RSAG download. BellSouth should recover costs associated with this requirement only one time. The cost issue may remain outstanding.

BellSouth Position:
[Question 2]: BellSouth currently makes the Regional Street Address Guide ("RSAG") available on a real time basis electronically through the Local Exchange Navigation System ("LENS") and the TAG pre-ordering interfaces. This access includes updates to RSAG. Thus, BellSouth is providing nondiscriminatory access to its OSS in a manner

that allows ITC^DeltaCom and other CLECs to access the RSAG, even though ITC^DeltaCom may prefer a different method of access. Appropriate cost based rates should apply for the initial and subsequent downloads of this data.

Discussion:

ITC^DeltaCom has requested that BellSouth provide it with an electronic download of the Regional Street Address Guide ("RSAG") database, which contains address and facility availability information. ITC^DeltaCom witness, Mr. Michael Thomas, contends that ITC^DeltaCom needs this information to incorporate it into ITC^DeltaCom's "back office systems" to check the validity of the customer's address, just as BellSouth's systems use the RSAG database to check BellSouth's orders. (Thomas, Tr. Vol. 1 at 189 - 190). Mr. Don Wood, on behalf of ITC^DeltaCom, testified that ITC^DeltaCom should receive the RSAG download on a daily basis at no charge. (Wood, Tr. Vol. 1 at 338). BellSouth witness, Mr. Ronald Pate, testified that BellSouth's electronic interfaces provide CLECs with access to BellSouth's OSS for the required functions and informational databases, including the RSAG database, in substantially the same time and manner that BellSouth provides to its retail service representatives (Pate, Tr. Vol. 1 at 617). BellSouth is therefore in compliance with the 1996 Act and the FCC's rules. Mr. Pate further testified that, although it is not required to provide a download of the RSAG, BellSouth has made a proposal to ITC^DeltaCom to provide such a download at rates and conditions to be negotiated. Regardless, Mr. Pate testified that BellSouth currently provides to all CLECs, including ITC^DeltaCom, nondiscriminatory access to the RSAG database on a real time basis through the Local Exchange Navigation System ("LENS") and the Telecommunications Access Gateway ("TAG") pre-ordering

interfaces. Because the RSAG database is updated nightly, CLECs have real-time access by means of these electronic interfaces to an up-to-date database. Mr. Pate testified that if ITC^DeltaCom were to integrate the pre-ordering functionality of the TAG interface with the Electronic Data Interexchange ("EDI") ordering interface, it would eliminate the need to re-key or re-enter certain information obtained during pre-ordering from the customer service record ("CSR") and/or the RSAG database into the EDI or TAG ordering interface. (Pate, Tr. Vol. 1 at 620). At the Hearing, Mr. Thomas, on behalf of ITC^DeltaCom, testified that ITC^DeltaCom plans to implement TAG in the near future. (Tr. Vol. 1 at 230 and Tr. Vol. 2 at 69 - 70).

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that BellSouth currently makes available nondiscriminatory access to the Regional Street Address Guide ("RSAG") database on a real-time basis, electronically through the Local Exchange Navigation System ("LENS") and the Telecommunications Access Gateway ("TAG") pre-ordering interfaces. The Commission finds that this access is reasonable and nondiscriminatory under the 1996 Act.

Ordering Paragraph:

As the Commission finds that BellSouth currently makes available nondiscriminatory access to the Regional Street Address Guide ("RSAG") database on a real-time basis, the Commission will not require any additional or alternative method to obtain the RSAG in the interconnection agreement. If ITC^DeltaCom desires to utilize an

alternative method to obtain a download of the RSAG database, it must negotiate on its own (outside of this arbitration) with BellSouth toward that end.

Issue 2(a)(ii)
Should BellSouth be required to provide changes to its business rules and guidelines regarding resale and UNEs at least 45 days in advance of such changes being implemented? If so, how?

ITC^DeltaCom Position:

Yes. ITC^DeltaCom must be given the opportunity to make adjustments for changes to BellSouth's rules and guidelines. See Section 251(c)(3) of the Act. Because such guidelines are developed by BellSouth, by definition BellSouth will have adequate notice. 45 days is adequate notice. BellSouth should e-mail changes to ITC^DeltaCom. In an emergency, less notice would be acceptable.

BellSouth Position:

BellSouth posts changes to its business rules on the BellSouth Interconnection Web Page which provides fair and reasonable notice to all CLECs, including ITC^DeltaCom. BellSouth uses its best efforts to provide thirty (30) days advance notice of any such changes, which strikes a reasonable balance between BellSouth's need for flexibility to modify its processes and the CLECs' need to have advance notice of such modifications. Individual notices to ITC^DeltaCom or other CLECs (whether by e-mail, facsimile transmission or U.S. Mail) would be an additional administrative expense and would have the potential for discriminatory treatment to occur in the event some, but not all, CLECs received such individual notice or if receipt of the notice varied in time.

Discussion:

ITC^DeltaCom witness, Mr. Michael Thomas, testified that ITC^DeltaCom needs at least 45 days advanced notice, by e-mail or other electronic means, of changes to BellSouth's business rules for CLECs that will affect its systems and business rules. Mr. Thomas testified that this advanced time is necessary in order to receive training or to make the necessary changes to ITC^DeltaCom's systems. Mr. Thomas acknowledged that BellSouth provides carrier notifications on its website on a weekly basis. (Thomas, Tr. Vol. 1 at 192 - 193).

BellSouth witness, Mr. Alphonso Varner, testified that BellSouth agrees that it should provide advanced notice of changes to its business rules and ordering guidelines, but there should not be a requirement that such notice be given in a specified number of days in advance. Today, BellSouth posts changes to its business rules and ordering guidelines regarding resale and UNEs on an easily accessible Internet website. As a general rule, BellSouth makes a good faith effort to post all OSS-related notifications at lease thirty (30) days prior to the implementation of the change or rule. Mr. Varner noted, however, that there may be circumstances in which the thirty-day timeframe is simply not possible. Mr. Varner testified that the current process is both appropriate and practical because it strikes a proper balance between BellSouth's flexibility to modify its processes and the CLECs need to have advanced notice of such modifications. (Varner, Tr. Vol. 1 at 411 - 412). Providing individual notices to ITC^DeltaCom or to other CLECs would be an additional administrative expense. Additionally, this method of notice could potentially cause discriminatory treatment if some, but not all, CLECs receive such individual notices or if receipt of such notices varied in time between CLECs.

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds BellSouth's good faith effort to provide 30 days notice is a good starting point for the notice requirement. The 45 day advance notice requested by ITC^DeltaCom strikes the Commission as too lengthy a time frame. The Commission concludes that 30 days notice strikes a reasonable balance between BellSouth's need for flexibility to modify its processes and systems and the CLECs need to have advanced

notice of such modifications. With regard to the manner of notification, the Commission agrees with BellSouth's concern that requiring individual notices would invite complaints of discriminatory treatment. Additionally, the Commission does not believe that the benefit of individual notices would be justified in terms of administrative expenses. Therefore, the Commission finds that BellSouth's method of notification of changes to business rules or ordering guidelines is reasonable and appropriate and should be continued without modification.

Ordering Paragraph:

The Commission finds that BellSouth should provide at least thirty (30) days advance notice of any changes to its business rules or ordering guidelines and directs the parties to include language in the interconnection agreement to this effect.

Issue 2(b)(ii)
Until the Commission makes a decision regarding UNEs and UNE combinations, should BellSouth be required to continue providing those UNEs and combinations that it is currently providing to ITC^DeltaCom under the interconnection agreement previously approved?

ITC^DeltaCom Position:

Yes. The current agreement was approved under Section 252 by the authority as compliant with the Act. It remains compliant and should continue until the SCPSC orders otherwise with regard to pricing UNE combinations. ITC^DeltaCom's access should continue as previously approved. All interconnection agreements should be filed with the SCPSC under Section 252 of the Act. Section 252(c)(1) requires approval of "any" interconnection agreement.

BellSouth Position:

BellSouth will continue to comply with its obligations under the 1996 Act and applicable FCC rules. BellSouth also will continue to provide any individual UNE currently offered until the FCC completes its Rule 51.319 proceedings consistent with the U.S. Supreme Court's decision in the *Iowa Utilities Board* case. The 1996 Act does not require BellSouth to combine elements for CLECs, and the FCC's rules (47 C.F.R.

§§51.315(c) – (f)) which purported to impose such an obligation on incumbent LECs such as BellSouth were vacated. Thus, this issue is not appropriate for arbitration. BellSouth is, however, willing to negotiate a voluntary commercial agreement with ITC^DeltaCom to perform certain services or functions that are not subject to the requirements of the 1996 Act.

Discussion:

ITC^DeltaCom's position is that the Commission has the authority it needs to require the parties to maintain the status quo under its existing interconnection agreement with BellSouth until the FCC issues its final decision on UNEs and any UNE combinations. (Moses, Tr. Vol. 1 at 124 - 125). Mr. Wood, on behalf of ITC^DeltaCom, testified that BellSouth must provide combinations of UNEs to CLECs, including ITC^DeltaCom. (Wood, Tr. Vol. 1 at 365 - 369). BellSouth's position is that it will continue to comply with its obligations under the 1996 Act and applicable FCC rules.

Mr. Varner testified that BellSouth made a voluntary commitment to the FCC that until Rule 51.319 is resolved, BellSouth will continue to provide any individual UNE currently offered with the condition that the network elements offered may change once the FCC completes its proceeding and resolves Rule 51.319. (Varner, Tr. Vol. 1 at 414) To the extent that ITC^DeltaCom wants BellSouth to provide UNE combinations at the sum of the individual elements, BellSouth is not required to combine network elements on behalf of ITC^DeltaCom or other CLECs. The FCC's rules (51.315(c) through 51.315(f)) that attempted to impose a requirement on incumbent LECs to combine UNEs for CLECs were vacated by the United States Court of Appeals for the Eighth Circuit in the *Iowa Utilities Board* case and because no party challenged that ruling before the U.S. Supreme Court, those rules are not in effect today. Thus, because those rules are not in

effect, BellSouth is not required to combine network elements on behalf of another carrier. (Varner, Tr. Vol. 1 at 415).

Finally, the Commission is aware that after the Hearing had been completed in this proceeding, the FCC, on September 15, 1999, issued a press release in the Rule 319 proceeding. Although there is no written order yet, it is clear that there will be further work on this rule by the FCC.

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that BellSouth should continue to provide the individual UNEs it is currently offering until further issuance of orders or rulings from the FCC regarding UNEs. This position is supported by BellSouth's voluntary commitment to the FCC that it will continue to offer as a UNE any individual network element currently offered. Further with regard to combinations, the Commission finds that BellSouth should continue to provide to ITC^DeltaCom those combinations of UNEs currently being provided today at the rates provided in Order No. 98-214 (June 1, 1998) in Docket No. 97-374-C. However, no further combinations shall be required until further rulings and orders are issued from the FCC or the courts. The ruling on this issue does not apply to "extended loops" and "loop/port" combinations which are decided in a separate issue.

Ordering Paragraph:

The parties shall include language in the interconnection agreement that BellSouth will provide the individual UNEs it is currently offering until further issuance of orders or rulings from the FCC regarding UNEs. Further with regard to combinations, language shall be included in the interconnection agreement that BellSouth will continue

to provide to ITC^DeltaCom those combinations of UNEs currently being provided today at the rates provided in Order No. 98-214 (June 1, 1998) in Docket No. 97-374-C but that no further combinations shall be required until further rulings and orders are issued from the FCC or the courts. The ruling on this issue does not apply to "extended loops" and "loop/port" combinations which are decided in a separate issue.

Issue 2(b)(iii)

(a) Should BellSouth be required to provide to ITC^DeltaCom extended loops and the loop/port combination?

(b) If so, at what rates?

ITC^DeltaCom Position:

(a) Yes. ITC^DeltaCom currently serves customers through extended loops provided by BellSouth. The Act as interpreted in *Iowa Utilities Board* requires BellSouth to provide a loop/port combination. Until the FCC indicates otherwise, all UNE combinations are available.

(b) Rates should be FCC compliant at TELRIC rates. See *First Report and Order*, CC No. Docket 96-98.

BellSouth Position:

(a) No. First, neither loops, ports, nor transport have been defined by the FCC as unbundled network elements that BellSouth must provide. Second, even if loops, ports, and transport are defined as UNEs, BellSouth is only obligated to provide combinations of those elements where they are currently combined in BellSouth's network. BellSouth is not obligated under the 1996 Act or the FCC's rules to combine network elements on behalf of CLECs such as ITC^DeltaCom. Thus, there is no requirement to provide an "extended loop" (e.g., UNE loop and UNE dedicated transport) or a "loop/port" (e.g., UNE loop and UNE switch port) combination. Further, there is no requirement for BellSouth to combine UNEs with tariffed services such as a loop combined with access transport (See also BellSouth's Position on Issue 2(b)(ii)).

(b) Because BellSouth is not required to combine network elements for CLECs under the 1996 Act, the issue of applicable rates for such network combinations is not properly the subject of arbitration. To the extent the Commission concludes otherwise or determines to establish rates for network elements that are currently combined in BellSouth's network, the Commission should do so in the context of a generic proceeding rather than an arbitration involving one CLEC. Thus, this issue is not appropriate for arbitration. (See also BellSouth's position on Issue 2(b)(ii)).

Discussion:

ITC^DeltaCom takes the position that its current interconnection agreement requires BellSouth to provide what ITC^DeltaCom calls a version of an "extended loop." Mr. Moses, on behalf of ITC^DeltaCom, testified that the current interconnection agreement at ¶ IV B14 requires the parties to attempt in good faith to mutually devise and implement a means to extend the unbundled loop sufficient to enable ITC^DeltaCom to use a collocation arrangement at one BellSouth location per LATA . . .." (Moses, Tr. Vol. 1 at 131 and Moses Tr. Vol. 1 at 159 - 160). Mr. Moses contends that this revision requires BellSouth to provide extended loops. Mr. Moses also testified that BellSouth has provided ITC^DeltaCom with more than 2,500 extended loops of which more than 1,000 are in South Carolina. (Moses, Tr. Vol. 1 at 160). Mr. Wood, on behalf of ITC^DeltaCom, testified that BellSouth is required to provide extended loops as well as a loop/port combination. Mr. Wood contends that, until the FCC indicates otherwise, all UNE combinations must be made available. (Wood, Tr. Vol. 1 at 366 - 369). Mr. Wood also contended that these UNE combinations were "often the only way to provide service to rural customers." (Wood, Tr. Vol. 2 at 106).

BellSouth's position is that although ITC^DeltaCom has requested an "extended loop," which is commonly known as a local loop combined with dedicated transport, there is no question that an extended loop constitutes a combination of a UNE local loop and a UNE dedicated transport. BellSouth is not required to combine individual UNEs such as the loop and dedicated transport under either the 1996 Act or any FCC rules in force today. Further, until the FCC issues its final, non-appealable, decision regarding

Rule 51.319 as to the list of UNEs that ILECs must make available to CLECs, this Commission should not attempt to impose such a requirement in the parties' interconnection agreement. Mr. Varner further testified that, with respect to ITC^DeltaCom's arguments about BellSouth having provided to ITC^DeltaCom a so-called extended loop consisting of a UNE loop combined with BellSouth's tariffed special access service, BellSouth did so by mistake and, more importantly, BellSouth has taken steps to correct it. Mr. Varner testified that the prior ITC^DeltaCom/BellSouth interconnection agreement, contrary to Mr. Moses' testimony, does not require the provision of such combinations. In fact, in order to bring these service arrangements into compliance, ITC^DeltaCom and BellSouth reached a mutual understanding whereby ITC^DeltaCom submitted over 50 additional collocation applications in May, 1999. As soon as these collocation arrangements are completed, BellSouth's provisioning of these service arrangements will be curtailed and these unique combinations will be converted. (Varner, Tr. Vol. 1 at 418 - 421).

According to Mr. Varner, there is no requirement in the 1996 Act or the FCC's rules for BellSouth to combine network elements on behalf of CLECs such as ITC^DeltaCom, nor is there any requirement for BellSouth to combine UNEs with tariffed services such as a loop combined with special access transport. BellSouth's position is that it is not required to provide loop/port combinations to ITC^DeltaCom and that such a requirement will be poor public policy, because the combination of the local loop and the switch port would replicate local exchange service and create an opportunity for price arbitrage. (Varner, Tr. Vol. 1 at 418). The FCC's rules 51.315(c) through

51.315(f), which required ILECs to combine UNEs for CLECs, remain vacated today. Although FCC rule 51.315(b) which prohibits ILECs from separating currently combined UNEs is still in effect, until the FCC finalizes its rule 51.319 proceeding, there is no required set of UNEs that must be available, either individually, or on a currently combined basis. Nonetheless, Mr. Varner testified that BellSouth has agreed, and indeed committed to the FCC, to continue offering every individual UNE currently offered until Rule 51.319 is resolved. (Varner, Tr. Vol. 1 at 418 - 420). Mr. Varner also testified that BellSouth had agreed to provision the existing "extended loop" arrangements until ITC^DeltaCom made collocation arrangements to replace the existing "extended loops." (Varner, Tr. 2 at 97)

With respect to ITC^DeltaCom"s contention that it needs UNE combinations to provide service to rural areas, first, there is no evidence that ITC^DeltaCom is making any serious attempt to serve rural customers today. Second, as Mr. Varner testified, "[r]esale is the way [that Congress set up as an alternative means to serve customers] for ... [ITC^DeltaCom] to go to the rural areas when they have a relatively few customers to use as a temporary measure until they build a market and decide to put in a switch or whatever other infrastructure they [want] to put in. ... Their inability to have [UNE] combinations doesn't preclude them from serving these small volume [i.e. rural] situations." (Varner, Tr. Vol. 2 at 239-240). Finally, the Commission is aware of the FCC's announcement, on September 15, 1999, regarding its decisions in the Rule 319 proceeding. Specifically, in its press release, the FCC indicated that it will initiate further proceedings on the question of the ability of carriers to use unbundled network elements

as a substitute for the incumbent LEC's special access services. The FCC also issued a Further Notice of Proposed Rulemaking on this issue, and, therefore, this issue is still open.

Based upon this issue, the positions of the parties, and the evidence of record, the Commission finds that the FCC Rules presently in effect do not require BellSouth to provide combinations of unbundled network elements to ITC^DeltaCom in the form of the so called "extended loop" consisting of a UNE loop combined with UNE dedicated transport. The "extended loop" which ITC^DeltaCom has in place consists of a UNE loop combined with BellSouth's tariffed special access transport service and was provided to ITC^DeltaCom in error under the prior interconnection agreement. However, as BellSouth admitted providing ITC^DeltaCom with numerous "extended loops" in error and as ITC^DeltaCom is presently serving customers over those "extended loops," the Commission finds that BellSouth should continue to provide the existing "extended loops" to ITC^DeltaCom at existing rates until ITC^DeltaCom can arrange to convert these "extended loops" to collocation arrangements. The Commission's decision is supported by BellSouth's agreement to continue to provision these existing "extended loop" arrangements until such time as ITC^DeltaCom obtains collocation arrangements. Further, the Commission concludes that no additional "extended loops," consisting of the UNE loop and UNE dedicated transport, should be required to be provided until further rulings of the FCC or the courts require such provision. Additionally, BellSouth is not required to provide ITC^DeltaCom with the loop/port combination of UNEs. Neither the 1996 Act nor the FCC's rules as presently in effect require incumbent LECs to combine

network elements on behalf of CLECs such as ITC^DeltaCom. To the extent that the FCC resolves any of these issues in its Rule 319 proceeding, the Commission will revisit these issues upon the request by a party.

Ordering Paragraph:

BellSouth shall continue to provide ITC^DeltaCom with the existing "extended loops" at existing rates. However, BellSouth is not required to provide additional "extended loops" under the new interconnection agreement. Nor is BellSouth required to provide ITC^DeltaCom with the "loop/port" combination of UNEs under the new interconnection agreement.

Issue 2(c)(i)
Should BellSouth be required to provide NXX testing functionality to ITC^DeltaCom? If so, how and at what rate?

ITC^DeltaCom Position:
Yes. BellSouth has this ability to provide service to its own customers. Parity requires it to provide the service to ITC^DeltaCom. See Section 251(c)(3) of the Act. It should be provided at FCC compliant TELRIC Rates. Use of an FX is cost prohibitive and does not represent a methodology of parity with BellSouth. See testimony of witness Moses at 26.

BellSouth Position:
BellSouth is not required to provide NXX testing functionality to ITC^DeltaCom. Nonetheless, BellSouth has offered to provide an NXX testing option to ITC^DeltaCom that is equivalent to the means by which BellSouth carries out NXX testing for itself (which involves the use of a foreign exchange ("FX" line). ITC^DeltaCom is unwilling to pay for the FX line to accomplish its testing.

Discussion:

ITC^DeltaCom's witness Moses described problems encountered by ITC^DeltaCom with BellSouth incorrectly loading NXX codes. (Moses, Tr. Vol. 2 at 12 –13) ITC^DeltaCom has requested a method which allows BellSouth to provide NXX

testing capabilities to CLECs at a reasonable cost based price. ITC^DeltaCom's proposal is to order remote call forwarding at cost based rates, rather than tariffed rates. ITC^DeltaCom has tested this method by purchasing from the GSST (General Subscriber Service Tariff) at full retail price remote call forwarding for the sole purpose of testing NXX codes loaded by BellSouth. (Moses, Tr. Vol. 2 at 113 –115) ITC^DeltaCom recommends that BellSouth provide remote call forwarding functionality at the rate that BellSouth provided remote call forwarding for interim number portability which is $2.73 per month per call forward number. Additionally, ITC^DeltaCom requests that it be able to purchase the software function for Remote Call Forward with Remote Access without having to buy a business line as specified in the GSST. (Moses, Tr. Vol. 2 at 114 -115)

BellSouth's position is that it has met its obligations under the 1996 Act and the FCC's rules by offering the foreign exchange line option to ITC^DeltaCom. This is the same means by which BellSouth accomplishes NXX testing for its own purposes. Mr. Keith Milner, on behalf of BellSouth, testified that at least as early as May 1998, BellSouth advised ITC^DeltaCom that it could accomplish the desired NXX testing by installing a foreign exchange line to the BellSouth offices in which ITC^DeltaCom desired to conduct test calls. Mr. Milner testified that this suggestion was based on the fact that BellSouth itself utilizes FX lines to test its own switch provisioning. Mr. Milner testified that in May, 1998, BellSouth had implemented an NXX activation Single Point of Contact ("SPOC"). Among other functions, the NXX SPOC coordinates the activation of CLEC NXX codes within BellSouth and provides a trouble-reporting center for CLEC

code activation. (Milner, Tr. Vol. 1 at 666 - 668). Mr. Milner testified that, since it began its operation, the NXX SPOC has tracked the provisioning and testing of approximately 1,700 NXXs for facility-based CLECs and Independent Telephone Companies and has been involved in the resolution of 121 customer related routing troubles. (Milner, Tr. Vol. 1 at 668).

Upon consideration of the issue, the positions of the parties, and the record from the hearing, the Commission concludes that ITC^DeltaCom should be provided with NXX testing capabilities that are both economically and technically viable. BellSouth has testified that FX lines are the method by which BellSouth tests its own switch provisioning and has suggested this method to ITC^DeltaCom. ITC^DeltaCom has suggested that the FX line is not the most efficient available mechanism to test NXXs and certainly not the most economical either. ITC^DeltaCom has investigated using remote call forwarding by purchasing remote call forwarding from the GSST at full retail rates. The Commission concludes that BellSouth should provide ITC^DeltaCom with a free FX line for NXX functional testing until such time as BellSouth can provide ITC^DeltaCom with remote call forwarding at TELRIC rates by which ITC^DeltaCom can accomplish its NXX testing.

Ordering Paragraph:

The Commission directs BellSouth to provide ITC^DeltaCom with a free FX line for NXX functional testing until such time as remote call forwarding is available at TELRIC rates.

Issue 2(c)(ii)
What should be the installation interval for the following loop cutovers:
(a) Single
(b) Multiple

ITC^DeltaCom Position:

(a) Per the existing interconnection agreement, the standard time expected from disconnection of a live exchange service to the connection of the UNE to ITC^DeltaCom collocation arrangement is 15 minutes.

(b) Per the existing interconnection agreement, the standard time expected from disconnection of a live exchange service to the connection of the UNE to the ITC^DeltaCom collocation arrangement is 15 minutes.

BellSouth Position:

(a) BellSouth has proposed a loop cutover installation interval time of fifteen (15) minutes for a single circuit conversion.

(b) With respect to multiple loop cutovers or circuit conversions, BellSouth has proposed to use fifteen (15) minutes as the maximum interval time for one loop with multiple loop cutovers being accomplished in increments of time per loop or circuit conversion of less than fifteen (15) minutes. The loop cutover process is a multiple step process that requires a great deal of mutual cooperation and coordination between BellSouth and the CLEC. Thus, it is appropriate for different installation intervals to be established based upon the number of loops to be cutover to the CLEC.

Discussion:

ITC^DeltaCom contends that BellSouth is obligated to provide all loop conversions in an interval time of fifteen minutes. (Moses, Tr. Vol. 2 at 118). ITC^DeltaCom contends that the multiloop cutover should be done one loop at a time, with each loop taking less than 15 minutes. (Moses, Tr. Vol. 2 at 119). BellSouth witness Milner testified that the loop cutover process is a multi-step process that requires a great deal of mutual cooperation and coordination between BellSouth and the CLEC. Mr. Milner's testimony set forth the thirteen steps involved in a single loop cutover. According to BellSouth, fifteen minutes is the target time interval for a single loop cutover with multiple loop cutovers done in increments of 15 minutes. In other words,

BellSouth will commit to intervals of sixty minutes for up to ten loops in a group and for 120 minutes for orders up to thirty loops. (Milner, Tr. Vol. 2 at 120). BellSouth also testified that it takes measures such as doing cutovers after hours to minimize customer disruption (Milner, Tr. Vol. 2 at 120).

BellSouth also pointed out that it is not in total control of the loop cutover process and, thus, not in total control of the time intervals. If a CLEC fails to perform a function in a timely fashion, the delay directly impacts the overall cutover time. (Milner, Tr. Vol. 2 at 121). Therefore, any measurement of average loop cutover times will reflect the efficiency and skill level of both BellSouth and the CLEC. Thus, while BellSouth endeavors to complete loop cutovers in as timely and efficient a manner as possible, BellSouth contends that it cannot be entirely responsible for meeting the stated interval given the heavy involvement of the CLEC in the process.

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that the loop cutover installation time for a single loop conversion should be 15 minutes. Both parties testified that 15 minutes was an appropriate time interval for a single loop conversion. With respect to multiple loop cutovers, the Commission finds BellSouth's proposed interval times of sixty minutes for up to ten loops in a group and of 120 minutes for orders up to thirty loops in a group reasonable and appropriate. These intervals for multiple cutovers recognize that efficiencies are gained through the provisioning of multiple loops. It is unreasonable to expect BellSouth to provision multiple loop cutovers in the same time interval as for a single loop cutover (i.e. 15 minutes). Moreover, the Commission recognizes the greater

interval for multiple loop cutovers takes into consideration the fact that delays in the cutover process may arise from sources outside BellSouth's control. Further, the Commission encourages BellSouth to minimize customer outage time during loop cutovers.

Ordering Paragraph:

The parties shall include provisions in the interconnection agreement that require the loop cutover installation time for a single loop conversion to be completed within 15 minutes. Further for multiple cutovers, the interconnection agreement shall require interval times of sixty minutes for up to ten loops in a group and of 120 minutes for orders up to thirty loops in a group.

Issue 2(c)(iii)
Should SL1 orders without order coordination be specified by BellSouth with either an a.m. or p.m. designation? [NOTE: ITC^DeltaCom believes that this issue should be worded as follows: BellSouth has offered order coordination; should SL1 orders without order coordination be specified by BellSouth with an a.m. or p.m. designation?]

ITC^DeltaCom Position:

Yes. BellSouth has this ability for its own customers. Parity requires it do so for ITC^DeltaCom. ITC^DeltaCom must be at parity with BellSouth—not BellSouth's retail customers. See Section 251(c)(3) for fee parity requirements of the Act. *Also See First Report and Order,* cc Docket 96-98 at ¶ 525.

BellSouth Position:

BellSouth is willing to continue offering order coordination service with SL1 orders. BellSouth will agree to accept a customer's request for an A.M. or P.M. designation when access to the customer's premises is required. In those instances where access to the customer's premises is not required, or if access is required but the customer is indifferent as to the time of day, BellSouth should not be required to designate A.M. or P.M. installation. This process is comparable to the scheduling BellSouth offers to its retail customers, thus placing ITC^DeltaCom at parity with BellSouth. (Exhibit "A"

attached to this Issues Matrix contains BellSouth's proposed contract language on this issue.)

Discussion:

ITC^DeltaCom wants every SL1 order without order coordination to have an A.M. or P.M. designation. (Moses, Tr. Vol. 2 at 124). ITC^DeltaCom contends the designation is necessary so that ITC^DeltaCom can schedule its technician. (Moses, Tr. Vol. 2 at 125). BellSouth testified that it understands ITC^DeltaCom's desire to make switching to ITC^DeltaCom service easy for its customers and, thus, is willing to accept a customer's request for an A.M. or P.M. designation in those cases in which access to the customer's premises is required and the customer expresses a preference as to A.M. or P.M. appointment. (Varner, Tr. Vol. 2 at 123). In instances in which access to the customer's premises is not required, or access is required but the customer is indifferent as to A.M. or P.M., BellSouth argues it should not be obligated to make an A.M. or P.M. designation. (Varner, Tr. Vol. 2 at 123). In these instances, according to BellSouth, no end user customer need is met by the A.M. or P.M. designation. The designation will, however, require BellSouth to tie up resources and incur additional costs to meet scheduling requirements for customers who are indifferent as to when their service is actually turned on. BellSouth witness Varner testified that the treatment BellSouth is proposing for ITC^DeltaCom's customers is comparable to the scheduling BellSouth offers its retail customers and thus, BellSouth's proposal satisfies the parity and nondiscrimination requirements of the Act. (Varner, Tr. Vol. 2 at 123).

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that BellSouth should only be required to utilize an A.M. or

P.M. designation in situations in which access to the customer's premises is required and the customer expresses a preference as to A.M. or P.M. BellSouth will then be providing ITC^DeltaCom A.M. or P.M. designation under the same circumstances as it does for providing service to its own end-user customers.

Ordering Paragraph:

BellSouth is only required to designate A.M. or P.M. designation in situations in which access to the customer's premises is required and the customer expresses a preference as to A.M. or P.M.

Issue 2(c)(iv)
Should the party responsible for delaying a cutover also be responsible for the other party's reasonable labor costs? If so, at what cost?

ITC^DeltaCom Position:
Yes. The rate depends upon the labor required or caused. It should be determined on an individual case basis. This policy was previously approved by the SCPSC in the existing interconnection agreement. It was compliant with the Act then, and it remains so.

BellSouth Position:
ITC^DeltaCom's proposal is nothing more than a penalty, liquidated damages or financial "guarantee" provision which is not appropriate for arbitration. (See BellSouth's position on Issue 1(b)). In the event ITC^DeltaCom experiences problems as a result of loop cutover delays, ITC^DeltaCom has adequate remedies under the law. Moreover, to track costs and assess blame for each instance of delay would be unduly burdensome and expensive, particularly when it is unclear which party is at fault.

Discussion:

ITC^DeltaCom contends that if one party is responsible for delaying loop cutover, the responsible party must pay the other's labor costs. ITC^DeltaCom contends that the payment of labor costs will work as an incentive to BellSouth. (Moses, Tr. Vol. 2 at 127).

ITC^DeltaCom also offers that a similar provision is in the interconnection agreement under which the parties have operated for the past two years, and ITC^DeltaCom recommends that the Commission order the continuation of the provision in the interconnection agreement which is the subject of the instant arbitration proceeding. (Hyde, adopted by Moses, Tr. Vol. 1 at 174 -175) BellSouth contends that because ITC^DeltaCom's proposal constitutes either a penalty, liquidated damages clause, or a financial "guarantee", the issue should not be arbitrated. According to BellSouth, neither Section 251 nor 252 of the Act obligate BellSouth to pay penalties for alleged breaches of the agreement. (Varner, Tr. Vol. 2 at 128). Moreover, the Commission "lacks the jurisdiction to impose penalties or fines" in the context of an arbitration proceeding. (*See* Order No. 97-189, Docket No. 96-358-C, 3/10/97, at 6). Even if the Commission could award penalties, the incorporation of ITC^DeltaCom's proposal into the agreement is unnecessary. South Carolina law and Commission procedures are available and adequate to address any breach of contract issue should it arise.

BellSouth further contends that ITC^DeltaCom's proposal is unworkable. (Varner, Tr. Vol. 1 at 422). Cutovers are complicated, and both parties to the cutover as well as the end user customer are heavily involved in the process. Consequently, if a cutover is delayed, fault is difficult, if not impossible, to apportion. (Moses, Tr. Vol. 2 at 126; Varner, Tr. Vol. 2 at 127). BellSouth witness Varner testified that ITC^DeltaCom's proposal would, in all likelihood, create more litigation expenses arguing over fault than either party would incur in labor charges. To track costs for each instance would be a burdensome and unnecessary business practice. For a further discussion of this issue, see

the Commission's discussion of Issue 1(a).

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds each party should be responsible for its own labor costs. The Commission recognizes that the cutover is a complicated process and that many difficulties arise in tracking labor costs. The record shows that it is sometimes simply impossible to apportion fault in situations in which cutovers are delayed. In the generic proceeding on performance measurements established by this Order, the Commission will entertain proposals on "performance guarantees," penalties, and liquidated damages provisions. The instant issue may be addressed by parties during the generic proceeding on performance measures.

Ordering Paragraph:

The interconnection agreement should not contain a provision for a party being responsible for the other party's reasonable labor costs for delaying a cutover. Each party will incur its own labor costs, and therefore pay for its own labor costs.

Issue 2(c)(v)
Should BellSouth be required to designate specific UNE center personnel for coordinating orders placed by ITC^DeltaCom?

ITC^DeltaCom Position:
Yes. ITC^DeltaCom will accept a designated single point of contact person. BellSouth should identify the individual to ITC^DeltaCom.

BellSouth Position:
BellSouth should not be required to specifically dedicate its personnel to serve only ITC^DeltaCom or any other individual CLEC. BellSouth incurs significant costs in connection with providing personnel to handle all CLEC orders for services and UNEs. BellSouth reviews anticipated and historical staffing requirements and assigns work activity in the most efficient manner possible in order to complete all necessary work functions for all CLECs.

Discussion:

ITC^DeltaCom contends that it is entitled to designated personnel at the UNE center to handle its UNE cutovers and proposes that "as people work together they work better together." (Moses, Tr. Vol. 2 at 130). ITC^DeltaCom contends that it will have a better working relationship with designated personnel with more accountability, more understanding, and more flexibility. (Moses, Tr. Vol. 2 at 130 - 131).

BellSouth contends that there is no requirement in the Act that obligates BellSouth to designate specific personnel for cutovers for ITC^DeltaCom. BellSouth's obligation under the 1996 Act is to provide nondiscriminatory access to UNEs, which BellSouth does today. BellSouth witness Milner testified that the most efficient way for BellSouth to meet its obligation under the 1996 Act for ITC^DeltaCom and all other CLECs is for BellSouth to carefully monitor workload requirements and to assign personnel as necessary to meet those requirements. (Milner, Tr. Vol. 2 at 131 – 132). BellSouth today must monitor total workload results and forecast future workload requirements and the personnel needed to meet those requirements based on historic trends, business forecasts, and the experience of local managers and technicians. Mr. Milner testified that BellSouth incurs real costs in connection with providing personnel to handle all CLEC orders for services and UNEs; therefore, BellSouth should retain the flexibility needed to meet its service and contractual obligations without any requirement to dedicate specific personnel to particular functions. (Milner, Tr. Vol. 2 at 132). ITC^DeltaCom appeared to indicate that it would cover BellSouth's costs for designating personnel, but then quickly backed off that commitment by arguing "that it is very possible for BellSouth to realize

economies of scale also in designating personnel to one of its larger purchasers." (Rozycki, Tr. Vol. 2 at 134).

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that BellSouth is not obligated to designate specific UNE center personnel for coordinating orders placed by ITC^DeltaCom, and the Commission will not require BellSouth to provide specific UNE personnel for coordinating orders placed by individual CLECs. Requiring such a designation could interfere with BellSouth from managing its workload in the most cost effective and efficient manner, thereby hindering BellSouth in accomplishing the very goal that the provision is meant to achieve, that is giving the best possible service to all CLECs.

Ordering Paragraph:

BellSouth is not required to specifically designate personnel to serve ITC^DeltaCom or to coordinate orders placed by ITC^DeltaCom.

Issue 2(c)(vi)

Should each party be responsible for the repair charges for troubles caused or originated outside of its network? If so, how should each party reimburse the other for any additional costs incurred for isolating the trouble to the other's network?

ITC^DeltaCom Position:

Yes. Where the root cause was not DeltaCom's network, BellSouth should bear such costs. BellSouth should reimburse DeltaCom for any additional costs associated with isolating the trouble to BellSouth's facilities and/or equipment.

BellSouth Position:

The party responsible for the repairs should bear the costs associated with those repairs. (See FCC First Report and Order at ¶258, CC Docket 96-98 (8-8-96)). BellSouth has agreed to be responsible for such costs that are incurred due to BellSouth's network. However, BellSouth should not be responsible for costs due to ITC^DeltaCom's network.

BellSouth and ITC^DeltaCom should each be responsible for its own costs incurred in determining the cause of any trouble. Thus, this issue is not appropriate for arbitration. (Exhibit "A" attached to this Issues Matrix contains BellSouth's proposed contract language on this issue.)

Discussion:

According to Mr. Moses for ITC^DeltaCom, the party who has the trouble in the network should pay the cost of repairing the trouble in the network. ITC^DeltaCom asserts that the trouble arises if ITC^DeltaCom has to isolate a trouble to BellSouth's network a second time; ITC^DeltaCom contends it is entitled to reimbursement for the costs incurred in the second trouble isolation. Mr. Moses also stated that if BellSouth isolates trouble with ITC^DeltaCom's network multiple times that BellSouth should be compensated for the additional testing and diagnosis. (Moses, Tr. Vol. 2 at 143). BellSouth testified that the party responsible for the repairs should bear the costs associated with those repairs. According to Mr. Varner, when ITC^DeltaCom leases facilities from BellSouth, the cost of those facilities includes the costs associated with maintenance and repair as specified in the FCC's First Report and Order, paragraph 258. ITC^DeltaCom should, however, be responsible for maintenance and repair on its own facilities. (Varner, Tr. Vol. 2 at 144).

With initial trouble isolation, ITC^DeltaCom should be responsible for the initial trouble report. When determined by ITC^DeltaCom that the trouble resides on BellSouth's network, BellSouth will assume repair responsibilities via a trouble report. BellSouth further testified that BellSouth should not reimburse ITC^DeltaCom for any additional costs ITC^DeltaCom incurs in isolating the trouble to BellSouth's network. Likewise, if a BellSouth end user experiences trouble calling an ITC^DeltaCom

customer, BellSouth does not bill ITC^DeltaCom for the costs incurred to isolate a trouble to ITC^DeltaCom's network. (Varner, Tr. Vol. 1 at 423).

BellSouth contends that the reimbursement system proposed by ITC^DeltaCom would be unwieldy, and is not required by the Act. Each party should bear its own costs – such a system is fair and manageable. (Varner, Tr. Vol. 1 at 423).

Based upon the issue, the positions of the parties, and the evidence of record, the Commission finds that each party should be responsible for the repair cost of the initial investigation or isolation of repairs. Thereafter, if additional testing and diagnosis are required to isolate trouble on the network for the same complaint, the party on whose network the trouble is ascertained shall bear the cost of the repairs and shall reimburse the other party for the additional cost incurred in isolating the trouble. At the hearing, the parties seemed to agree to this result, and the Commission finds it acceptable.

Ordering Paragraph:

With respect to repair charges or troubles caused or originated outside of the party's network, each party shall be responsible for the repair cost of the initial investigation or isolation of repairs. Thereafter, if additional testing and diagnosis are required to isolate trouble on the network for the same complaint, the party on whose network the trouble is ascertained shall bear the cost of the repairs and shall reimburse the other party for the additional cost incurred in isolating the trouble.

Issue 2(c)(viii)
Should BellSouth be responsible for maintenance to HDSL and ADSL compatible loops provided to ITC^DeltaCom? If so, at what rate?

ITC^DeltaCom Position:

Yes. BellSouth should maintain these loops at industry standard quality levels. Maintenance should be priced at FCC compliant TELRIC rates. See Section 251(c)(3) of the Act.

BellSouth Position:

BellSouth will provide maintenance and repair for HDSL and ADSL compatible loops as the parties may agree. However, the loop modifications requested by ITC^DeltaCom (and other CLECs) are not a UNE offering. Thus, if BellSouth is providing a loop that has been modified from its original technical standards at the request of ITC^DeltaCom, such as HDSL or ADSL compatibility, then BellSouth cannot guarantee that the modified loop will meet the technical standards of a non-modified loop.

Discussion:

ITC^DeltaCom contends that if it buys a UNE that is HDSL compatible, it should remain HDSL compatible -- in other words, BellSouth has an obligation to maintain it as HDSL compatible. (Moses, Tr. Vol. 2 at 146). BellSouth contends that ITC^DeltaCom has failed to draw a distinction between the services BellSouth provides to its end-user customers. According to BellSouth witness, Mr. Milner, BellSouth does not provide HDSL and ADSL "facilities" as UNEs to ITC^DeltaCom or to any other CLEC. What BellSouth does provide is a federally-tariffed wholesale ADSL service to certain wholesale customers, such as ISPs (Internet Service Providers). BellSouth's ADSL wholesale service, however, is a separate and distinct offering from BellSouth's ADSL or HDSL UNE compatible loop offering. The UNE offering is a unique network capability offered to CLECs via the service inquiry process. (Milner, Tr. Vol. 2 at 147). Mr. Milner explained that "in terms of HDSL and ADSL compatible loops (the UNE

offering), if it breaks then we fix that. If we do something to make it not compatible, then we'll fix that too. The costs for the maintenance are recovered through our recurring charges for ADSL and HDSL compatible loops." (Milner, Tr. Vol. 2 at 147).

BellSouth further testified that while BellSouth offers an ADSL compatible loop, all of BellSouth's loops are not ADSL compatible. (Milner, Tr. Vol. 1 at 674 – 676). ADSL service requires that certain technical standards be met. BellSouth's ADSL compatible loops meet those technical standards, but other BellSouth loops do not. Many significant activities are required to transform a voice grade loop into an ADSL compatible loop, including service inquiry, design engineering, and connection and testing activities. If BellSouth provides ITC^DeltaCom with a modified loop (i.e. BellSouth has transformed a voice grade loop from its original technical standards to meet the standards requested by ITC^DeltaCom and/or required for ADSL and HDSL), BellSouth cannot guarantee that the modified loop will meet the technical standards of a non-modified loop. (Milner, Tr. Vol. 1 at 675).

Based upon the issue, the positions of the parties, and the evidence from the hearing, the Commission finds that original technical standards on HDSL and ADSL compatible loops should be maintained. BellSouth acknowledged at the hearing that it will repair its ADSL and HDSL UNE compatible loops and that the costs of repair and maintenance are recovered through the recurring charges for ADSL and HDSL compatible loops. For non-standard or modified HDSL and ADSL compatible loops, the Commission requires BellSouth to provide the same standards as BellSouth uses on its

network. The Commission believes that this result will ensure that the loops used by ITC^DeltaCom will meet the specifications required.

Ordering Paragraph:

The Commission requires that original technical standards on HDSL and ADSL compatible loops should be maintained. Further for non-standard or modified HDSL and ADSL compatible loops, the Commission requires BellSouth to provide the same standards as BellSouth uses on its network. Costs for repair and maintenance are recovered through the recurring charges for these UNEs which were established in Docket No. 97-374-C.

Issue 2(c)(xiv)

(a) Should BellSouth be required to coordinate with ITC^DeltaCom 48 hours prior to the due date of a UNE conversion?

(b) If BellSouth delays the scheduled cutover date, should BellSouth be required to waive the applicable nonrecurring charges?

ITC^DeltaCom Position:

(a) Yes. Customer transfers should be completed smoothly and efficiently.

(b) Yes. Performance guarantees are also required to ensure scheduled cutover dates are not missed repeatedly.

BellSouth Position:

(a) No. BellSouth does not agree that coordination 48 hours prior to the due date is necessary on every type of UNE conversion. However, with respect to SL2 type loops only, BellSouth will agree to use its best efforts to schedule a conversion date and time 24 to 48 hours prior to the conversion.

(b) No. BellSouth does not agree to waive the applicable nonrecurring charges whenever a cutover is delayed, particularly when any number of variables and circumstances may cause a delay in the schedule. Thus, this issue is not appropriate for arbitration. (See BellSouth's position on Issue 1(b)).

Discussion:

ITC^DeltaCom contends that the parties must coordinate on all UNE conversions 48 hours in advance of the conversion. (Moses, Tr. Vol. 2 at 150). Mr. Moses testified that coordination will benefit both parties as well as the customer and will help enable ITC^DeltaCom to provide more cost-effective and efficient service. (Moses, Tr. Vol. 2 at 152 – 153). BellSouth opposes ITC^DeltaCom's proposal that BellSouth be required to coordinate with ITC^DeltaCom 48 hours prior to the due date of a UNE conversion because BellSouth contends the proposal is overbroad. (Milner, Tr. Vol. 2 at 151). For example, according to BellSouth, by requiring coordination 48 hours in advance for *all* UNEs, ITC^DeltaCom includes SL1 loops, a UNE that is not normally subject to coordination. BellSouth witness Milner says ITC^DeltaCom's proposal will create unnecessary work and costs with no corresponding gain in improved provisioning. (Milner, Tr. Vol. 2 at 152). Recognizing the importance of coordination, however, BellSouth has agreed with regards to SL2 loops to exert its best efforts to schedule a conversion date and time 24 to 48 hours prior to a conversion. (Milner, Tr. Vol. 1 at 678).

BellSouth also states that it should not be obligated to waive applicable nonrecurring charges if a scheduled cutover date is delayed. First, BellSouth contends that waiving nonrecurring charges constitutes a penalty and, thus, is outside the jurisdiction of this Commission. (Varner, Tr. Vol. 1 at 427). BellSouth points out that the Commission held in the AT&T arbitration, the Commission "lacks the jurisdiction to impose penalties or fines" in the context of an arbitration proceeding. (*See* Order No. 97-

189, Docket No. 96-358-C, 3/10/97, at 6). Moreover, BellSouth contends that it is not required under the Act or under FCC rules to waive nonrecurring charges in such a situation. According to BellSouth, the Act does not obligate BellSouth to pay penalties, and thus, imposing penalties would be outside the scope of the Act and therefore inappropriate. Furthermore, BellSouth witness Varner pointed out that both parties may have reasonable circumstances which might cause a delay in the schedule. There is no mechanism in place to track all delays, nor to identify the responsible party. According to BellSouth, such a tracking system would be unworkable according to BellSouth because in many cases, both parties contribute to delays. (Varner, Tr. Vol. 1 at 427). Moreover, any attempt to allocate fault would, of necessity, be largely arbitrary.

Based upon this issue, the positions of the parties, and the hearing record, the Commission finds BellSouth and ITC^DeltaCom shall coordinate all cutovers 24 hours in advance of the scheduled cutover. The parties have operated under an informal agreement of coordination for SL2 cutovers since the Spring of 1999, and the Commission ordered provision expands and memorializes that informal agreement as part of the interconnection agreement. The Commission hopes that 24 hour coordination will ensure efficient and smoothly accomplished customer cutovers.

Additionally and consistent with the Commission's decision on Issue 1(b), the Commission finds that BellSouth should waive the non-recurring charges if BellSouth's assigned due date is missed as a result of BellSouth's error. This provision regarding the waiver of nonrecurring charges is on an interim basis until the Commission has concluded its generic proceeding on performance measures and performance guarantees.

Ordering Paragraph:

The Commission requires BellSouth and ITC^DeltaCom to coordinate all cutovers 24 hours in advance of the scheduled cutover. Additionally, BellSouth shall waive the non-recurring charges if BellSouth's assigned due date is missed as a result of BellSouth's error. This provision regarding the waiver of nonrecurring charges is on an interim basis until the Commission has concluded its generic proceeding on performance measures and performance guarantees.

Issue 2(f):
Should BellSouth be required to establish Local Number Portability (LNP) cutover procedures under which BellSouth must confirm with ITC^DeltaCom that every port subject to a disconnect order is worked at one time?

ITC^DeltaCom Position:
BellSouth must establish procedures for LNP cutovers pursuant to which BellSouth must confirm with ITC^DeltaCom that every port subject to a disconnect order is worked at one time. ITC^DeltaCom's proposed procedures are identified in Attachment 5, Section 2.6 of the proposed interconnection agreement.

BellSouth Position:
BellSouth agrees with ITC^DeltaCom that coordination between itself and ITC^DeltaCom is extremely important for LNP order cutovers. BellSouth and ITC^DeltaCom have agreed to proposed language whereby BellSouth will ensure that a disconnect order is completed for all ported numbers once the Number Portability Administration Center ("NPAC") notification of ITC^DeltaCom's Activate Subscription Version has been received by BellSouth. The issue to which BellSouth cannot agree is the timeframes proposed by ITC^DeltaCom. The proposed timeframes are not reasonable and should not be adopted by the Commission.

Discussion:

ITC^DeltaCom is seeking the implementation of quality control assurances for LNP. (Moses, Tr. Vol. 2 at 155). The major difference in the parties' proposals is a

question of how much checking of work steps will be done. (Milner, Tr. Vol. 2 at 155). According to Mr. Milner, "[w]e have agreed with DeltaCom that we will put language in place that we believe will ensure that those disconnect orders are worked in a timely manner." (Id.) Given that ITC^DeltaCom had not even reviewed the most recent proposals on this issue, their position on this issue seems fairly tenuous. (Moses, Tr. Vol. 2 at 156).

Based upon this issue, the positions of the parties, and the evidence of record, the Commission denies ITC^DeltaCom's proposed LNP procedures set forth in Attachment 5, Section 2.6 of ITC^DeltaCom's proposed interconnection agreement as the proposed language contains timeframes that are unreasonable and should not be required. For LNP cutover procedures, the Commission requires that (a) if BellSouth receives a disconnect order by 12:00 noon that BellSouth will work that conversion that same day, and (b) if BellSouth receives a disconnect order after 12:00 noon that BellSouth will work that conversion by close of business the next day. The Commission finds these timeframes to be reasonable.

Ordering Paragraph:

For LNP cutover procedures, the Commission requires that (a) if BellSouth receives a disconnect order by 12:00 noon that BellSouth will work that conversion that same day, and (b) if BellSouth receives a disconnect order after 12:00 noon that BellSouth will work that conversion by close of business the next day.

Issue 2(g):
Should "order flow-through" be defined in the interconnection agreement, and if so, what is the definition?

ITC^DeltaCom Position:

Flow-through should be defined in the parties' interconnection agreement. The definition of flow through should include pre-ordering functions. Specifically, ITC^DeltaCom seeks the following definition be included in the agreement: "Flow Through is defined as an end-to-end pre-ordering and ordering process (including legacy BellSouth applications) without manual intervention. Specifically, Flow Through, includes electronic reporting of order status, electronic reporting of errors and electronic notification of critical events such as 'jeopardy notification' and rescheduled due dates. BellSouth shall provide Flow Through of electronic processes in a manner consistent with industry standards and, at a minimum, at a level of quality equivalent to itself or to any CLEC with comparable systems."

BellSouth Position:

It is not necessary for the interconnection agreement to contain a definition of "flow through," nor is ITC^DeltaCom's proposed definition appropriate. ITC^DeltaCom's definition of flow-through is contrary to the manner in which the term is commonly used by the Federal Communications Commission. Based upon the FCC's definition, BellSouth contends that a service request flows through an electronic order system only when a CLEC or BellSouth representative takes information directly from an end user customer, inputs it directly into an electronic order interface without making any changes or manipulating the customer's information, and sends the complete and correct request downstream for mechanized order generation.

Discussion:

ITC^DeltaCom wants a definition of flow-through included in the agreement to clarify the meaning of flow-through and to include an obligation on BellSouth to provide complete electronic pre-ordering, ordering, and provisioning of all UNEs and resale services. (Thomas, Tr. Vol. 2 at 157). BellSouth, on the other hand, contends that there is no need to incorporate any definition of flow-through into the interconnection agreement. (Pate, Tr Vol. 2 at 160). The FCC has established the meaning of flow-through in its orders, and has approved, at least informally, BellSouth's calculation of flow-through in its Service Quality Measurements, which is derived from the FCC's definition of flow-

through. BellSouth's position is that adding a definition to the Agreement is redundant and unnecessary, particularly when ITC^DeltaCom is seeking to alter the FCC's definition of flow-through. (Pate, Tr. Vol. 1 at 620; Vol. 2 at 159).

BellSouth states that to the extent the Commission determines that a definition of flow-through should be incorporated into the agreement, the Commission should adopt BellSouth's definition. (Pate, Tr. Vol. 2 at 159 – 160). In Paragraph 107 of its Second Louisiana Order in CC Docket No. 98-121, the FCC stated that "a competing carrier's orders 'flow-through' if they are transmitted electronically through the gateway and accepted into BellSouth's back office order systems without manual intervention." (Pate, Tr. Vol. 1 at 622). BellSouth's definition of flow-through mirrors the FCC's definition and therefore is appropriate. (Pate, Tr. Vol. 2 at 159). Under BellSouth's definition, flow-through for a CLEC Local Service Request (LSR) begins when the complete and correct electronically-submitted LSR is sent via one of the CLEC ordering interfaces (*i.e.* EDI, TAG or LENS), flows through the mechanical edit checking and local exchange service order generation system ("LESOG"), is mechanically transformed into a service order by LESOG, and is accepted by the Service Order Control System ("SOCS") without any human intervention. BellSouth believes these steps mirror the steps that the FCC envisioned encompassed in flow through. Contrary to ITC^DeltaCom's position, BellSouth contends pre-ordering is not part of this process, nor is electronic notification of order status and jeopardies. (Pate, Tr. Vol. 1 at 622).

BellSouth objects to ITC^DeltaCom's attempt to broaden the definition of flow-through to create an obligation on BellSouth to provide complete electronic pre-ordering,

ordering, and provisioning of all UNEs and resale services. (Pate, Tr. Vol. 1 at 624). According to BellSouth, the Act obligates BellSouth to provide CLECs with access to the required functions and information through CLEC electronic interfaces in substantially the same time and manner as BellSouth does for itself. Such access provides efficient CLECs with a meaningful opportunity to compete. BellSouth provides CLECs with access to electronic pre-ordering, ordering and provisioning in substantially the same time and manner as BellSouth has for itself. (Pate, Tr. Vol. 1 at 624).

BellSouth witness Pate testified that the key point is that BellSouth does not place all of its orders electronically. (Pate, Tr. Vol. 1 at 626). According to Pate, many of BellSouth's retail services, primarily large business complex services, involve substantial manual handling by BellSouth's account teams for BellSouth's own retail customers. Nondiscriminatory access requires only that CLECs be given access in substantially the same time and manner as BellSouth, not that CLECs place all orders electronically. BellSouth testified that the manual processes that BellSouth uses for complex resold services offered to the CLECs are accomplished in substantially the same time and manner as the processes used for BellSouth's complex retail services. BellSouth believes that the specialized and complicated nature of complex services, together with their relatively low volume of orders as compared to basic exchange services, renders them less suitable for mechanization, whether for retail or resale applications. BellSouth contends that because the same manual processes are in place for both CLECs and BellSouth retail orders, the processes are competitively neutral and are therefore in compliance with both the Act and the FCC rules. (Pate, Tr. Vol. 1 at 626-27).

BellSouth further contends that neither the Act nor the FCC rules require that an interconnection agreement contain a definition of flow-through. BellSouth requests that to the extent, the Commission determines that such a definition is appropriate, the Commission should adopt BellSouth's definition because it is the only one that comports with the requirements of the Act and the FCC. BellSouth contends that ITC^DeltaCom's definition is overly broad, and places obligations on BellSouth that are above and beyond those set forth in the Act and thus, it is not an appropriate or necessary definition for an interconnection agreement.

Based upon this issue, the positions of the parties, and the evidence from the hearing, the Commission finds that it is necessary to include a definition of flow-through in the interconnection agreement. Of the two definitions, BellSouth's definition of flow-through comports with the requirements of the Act and the FCC. Therefore, the Commission adopts the definition of flow-through as proposed by BellSouth and which is contained in the FCC Second Louisiana Order, at ¶ 107, CC Docket 98-121 (8-13-98).

Ordering Paragraph:

The Commission requires the inclusion of the definition of "flow-through" in the interconnection agreement and requires that the definition of flow-through as contained in the FCC Second Louisiana Order, at ¶ 107, CC Docket 98-121 (8-13-98) be used.

Issue 3:
[Question 1] Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to Information Service Providers ("ISPs")?

[Question 2] What should be the rate for reciprocal compensation per minute of use, and how should it be applied?

ITC^DeltaCom Position:
[Question 1] BellSouth should be required to pay reciprocal compensation for ISP-bound traffic. The appropriate inter-carrier compensation mechanism for ISP-bound traffic is reciprocal compensation because the caller's provider should bear the costs of the call to the ISP.
[Question 2] ITC^DeltaCom is entitled to the tandem termination rate for reciprocal compensation because ITC^DeltaCom's switch serves the same geographic area as BellSouth's tandem switch, and performs the same functions as BellSouth's tandem switch.

BellSouth Position:
[Question 1] Under 47 U.S.C. § 251(b)(5) and 47 C.F.R. § 51.701, reciprocal compensation is applicable only to local traffic. "Local" trunks may actually carry access or toll traffic in addition to local traffic, and thus reciprocal compensation is not applicable to all traffic that travels over local trunks. ISP-bound traffic, even if it is carried over local trunks, is not local traffic and is not subject to the reciprocal compensation obligations of the Act. In addition to being contrary to the law, treating ISP-bound traffic as local for purposes of reciprocal compensation is contrary to sound public policy. The Commission need not address this issue at this time because the FCC has jurisdiction over ISP-bound traffic and the FCC decision in this matter will preempt any decision the Commission renders in this docket.
[Question 2] The appropriate rates for reciprocal compensation are the elemental rates for end office switching, tandem switching and common transport that are used to transport and terminate local traffic and were established by this Commission in the cost orders in Docket No. 97-374-C. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function.

Discussion:

[Question 1]

This issue requires the Commission to address the economic principles and public policy concerns underlying reciprocal compensation for ISP-bound traffic for the purposes of this interconnection agreement on a going forward basis. The parties appear to agree that the FCC has deemed ISP-bound traffic to be jurisdictionally interstate. The question pending before the Commission is how, or whether, to provide for compensation

for ISP-bound traffic. ITC^DeltaCom contends that, despite the fact that the FCC found that ISP-bound traffic is in large part jurisdictionally interstate, the Commission should order that reciprocal compensation be paid for ISP-bound traffic. (Starkey, Tr. Vol. 1 at 238 - 241). ITC^DeltaCom contends that treating ISP-bound traffic as if it were local for purposes of reciprocal compensation is sound public policy (Starkey, Tr. Vol. at 241). BellSouth, on the other hand, contends that reciprocal compensation is a mechanism that applies only to the exchange of *local* traffic. (Varner, Tr. Vol. 1 at 434). As recently reiterated by the FCC in its Declaratory Ruling FCC 99-38 in CC Docket Nos. 96-98 and 99-69 adopted February 25, 1999, released February 26, 1999, (*"Declaratory Ruling"*) and, as even ITC^DeltaCom admits, ISP-bound traffic is jurisdictionally interstate. (Starkey, Tr. Vol. 1 at 239) Thus, according to BellSouth, it is not included in the Act's requirements regarding reciprocal compensation. BellSouth seeks an order that states that reciprocal compensation only should be applied to traffic that meets the FCC's definition of "local traffic."

ITC^DeltaCom argues that BellSouth should pay reciprocal compensation for all traffic that travels over "local" trunks. ITC^DeltaCom witness Starkey testified that a call originating on the BellSouth network and directed to the ITC^DeltaCom network travels the same path, requires the same use of faciltities and generates the same level of cost regardless of whether the call is dialed to an ITC^DeltaCom local residential customer or to an ISP provider. (Starkey, Tr. Vol. 1 at 245) Thus, Mr. Starkey asserts that the rates associated with recovering the costs for both calls should be the same since both calls

travel the same path and the same equipment to reach their destination. (Starkey, Tr. Vol. 1 at 246)

BellSouth responds to ITC^DeltaCom's proposal by arguing that such a reciprocal compensation mechanism is inappropriate. According to BellSouth, "local" trunks may properly route or carry access or toll traffic in addition to local traffic. (Varner, Tr. Vol. 1 at 429). Simply because a local trunk carries ISP-bound traffic, which is jurisdictionally interstate, reciprocal compensation is not applicable. BellSouth witness Varner testified that the test for the application of reciprocal compensation payments should not be the type of trunk used to transport the traffic; rather the test is the end-to-end nature of the call, as the FCC has reaffirmed. (Varner, Tr. Vol. 1 at 429-30).

In considering this issue, the Commission recognizes the FCC's *Declaratory Ruling*. In that *Declaratory Ruling*, the FCC concluded that ISP-bound traffic is non-local interstate traffic. FCC 99-38, footnote 87. In reaching its conclusion, the FCC acknowledged that it has construed the reciprocal compensation mechanism of Section 251(b)(5) to apply only to the transport and termination of local traffic. FCC 98-38, ¶ 7. The FCC carefully examined the nature of ISP-bound traffic and noted that "the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destinations, specifically at a Internet website that is often located in another state." FCC 98-38, ¶ 12. Further, the FCC acknowledged that "an Internet communication does not necessarily have a point of 'termination' in the traditional sense." FCC 98-38, ¶ 18. The FCC clearly stated that state commissions could decide to impose reciprocal compensation obligations in an arbitration proceeding and

also stated that state commissions were "free not to require the payment of reciprocal compensation for this traffic." FCC 98-38, ¶ 26.

Based upon the evidence before it, the positions advocated by the parties, and the Declaratory Ruling of the FCC, the Commission finds that reciprocal compensation should not apply to ISP-bound traffic. The FCC in its *Declaratory Ruling* concluded that ISP-bound traffic is non-local interstate traffic and clearly left the determination of whether to impose reciprocal compensation obligations in an arbitration proceeding to the state commissions. FCC 98-38, footnote 87 and ¶ 26.This Commission concludes that ISP-bound traffic is not subject to reciprocal compensation. While it may be true that ISP-bound traffic travels similar paths across the same facilities as local calls to residential customers as advanced by ITC^DeltaCom, it is also clear that ISP-bound calls do not terminate at the ISP. In the example given by witness Starkey for ITC^DeltaCom, the local call to the residential customer clearly terminates on the ITC^DeltaCom network. ISP-bound traffic, on the other hand, does not terminate at the ISP's server but continues to the ultimate Internet destination which is often located in another state. *See* FCC 99-38, ¶ 12. As ISP-bound traffic does not terminate at the ISP's server on the local network, this Commission finds that ISP-bound traffic is non- local traffic. Further, since Section 251 of the 1996 Act requires that reciprocal compensation be paid for local traffic, the Commission further finds that the 1996 Act imposes no obligation on parties to pay reciprocal compensation for ISP-bound traffic.

The Commission is also aware that the FCC has initiated further proceedings regarding the issue of ISP-bound traffic and reciprocal compensation. Of course, this

Commission will revisit this issue if the FCC issues a ruling impacting the decision rendered herein.

[Question 2] :

With regard to the appropriate rate for reciprocal compensation, Mr. Starkey for ITC^DeltaCom stated that the rate should be based upon the last approved reciprocal compensation rate in South Carolina which is $.009 per minute. (Starkey, Tr. Vol. 2 at 179) Mr. Varner for BellSouth testified that the rate should be the same rate between the parties but further stated that the rate should only apply to those elements that are actually used to transport and terminate traffic. (Varner, Tr. Vol. 2 at 180) BellSouth contends that it is not appropriate for ITC^DeltaCom to charge BellSouth for tandem switching functions it does not perform. According to BellSouth, if a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. (Varner, Tr. Vol. 1 at 433). According to ITC^DeltaCom, it is entitled to the tandem switching rate because its switch serves the same geographic area as BellSouth's tandem switch. (Starkey, Tr. Vol. 1 at 255). ITC^DeltaCom further contends that its switch performs many of the same functions that BellSouth's tandem performs (Starkey, Tr. Vol. 1 at 257).

In determining the appropriate reciprocal compensation rate, the Commission notes that the previously approved interconnection agreement contained a reciprocal compensation rate of $.009 per minute for termination of local traffic. This Commission found that rate to be compliant with the requirements of Section 252(d) of the 1996 Act. The Commission finds that nothing has changed in the past two years that causes the

Commission to conclude that the underlying costs associated with transport and termination have changed. The Commission concludes that the $.009 per minute is appropriate and approves the previously approved rate of $.009 per minute as the rate for reciprocal compensation for the new interconnection agreement.

Ordering Paragraph:

[Question 1] The Commission finds that ISP-bound traffic is non-local interstate traffic. As such, the Commission finds on a going-forward basis and for the purposes of this interconnection agreement that ISP-bound traffic is not subject to the reciprocal compensation obligations of the 1996 Act.

[Question 2] The Commission approves a reciprocal compensation rate of $.009 per minute for local traffic and directs the parties to include this rate in the interconnection agreement. However, as explained above, reciprocal compensation will not apply to ISP bound traffic.

Issue 3(h):
If ITC^DeltaCom needs to reconnect service following an order for a disconnect, should BellSouth be required to reconnect service within 48 hours?

ITC^DeltaCom Position:

Following an order for a disconnect, BellSouth should be required to reconnect the service to ITC^DeltaCom's customer within 48 hours. According to ITC^DeltaCom, the issue often arises in situations in which a customer pays an outstanding bill and has been disconnected for failure to pay, or when a reconnect must be made quickly as in the case of slamming.

BellSouth Position:

BellSouth cannot reserve facilities for 48 hours following an order for a disconnect. As a practical matter, once a UNE facility has been disconnected for any reason, that facility is subject to immediate reuse, whether by CLECs or by BellSouth's end users. BellSouth should not be required to maintain facilities for any set period of time once service has been disconnected. Nonetheless, BellSouth will agree to use its best efforts to reconnect service within 24 hours.

Discussion:

ITC^DeltaCom witness, Mr. Moses testified that BellSouth should be obligated to reconnect a customer within 48 hours of a disconnect. (Moses, Tr. Vol. 2 at 181) According to BellSouth, ITC^DeltaCom's proposal is unworkable, unfair, and is not required under the Act. BellSouth witness Milner testified that once a UNE facility has been disconnected for any reason, that facility is subject to immediate reuse. (Milner, Tr. Vol. 2 at 186) In an area experiencing a shortage of facilities, it would not be unusual for a facility used by a CLEC or by a BellSouth retail unit to be reassigned within minutes to complete another order for another CLEC or BellSouth retail end-user. (Milner, Tr. Vol. 1 at 680). Mr. Milner further testified that reservation of facilities for ITC^DeltaCom could slow provisioning intervals for all other providers. According to BellSouth, such preferential treatment for ITC^DeltaCom is antithetical to the goals of the Act. Therefore, while BellSouth will agree to use its best efforts to reconnect the service as expeditiously as possible, BellSouth cannot commit to maintain facilities after disconnect for any period of time. Mr. Milner also stressed that the "best efforts" BellSouth is willing to provide to ITC^DeltaCom is the same interval it provides to itself. (Milner, Tr. Vol. 2 at 187).

With regard to this issue and based upon the record from the hearing, the Commission finds that BellSouth is not obligated to reconnect ITC^DeltaCom customers within 48 hours. The Commission finds that such a commitment would require BellSouth reserve facilities for ITC^DeltaCom for a period of time after a UNE facility has been disconnected. Such reservation of facilities would be detrimental to

provisioning efforts for other CLECs and BellSouth retail customers. While the Commission will not require BellSouth to reconnect within 48 hours for the reasons stated herein, BellSouth has stated in its position that it will use its best efforts to reconnect service within 24 hours. The Commission encourages BellSouth to meet this goal.

Ordering Paragraph:

While BellSouth is not required to reconnect ITC^DeltaCom customers within 48 hours, the Commission strongly encourages to BellSouth to meet its stated goal of using its best efforts to reconnect service within 24 hours.

Issue 3(m):
What type of repair information should BellSouth be required to provide to ITC^DeltaCom such that ITC^DeltaCom can keep the customer informed?

ITC^DeltaCom Position:

ITC^DeltaCom wants the ability to receive timely notification if a repair technician is unable or anticipates being unable to meet a scheduled repair, retrieve a list of itemized time and material changes at the time of ticket closure, provide test results, and electronically notify ITC^DeltaCom when the trouble is cleared.

BellSouth Position:

BellSouth provides ITC^DeltaCom with nondiscriminatory access to BellSouth's maintenance and repair OSS by providing electronic interfaces such as TAFI and the ECTA Gateway, as well as other manual interfaces. Among other things, these interfaces allow ITC^DeltaCom to enter customer trouble tickets into the BellSouth system, retrieve and track current status on all ITC^DeltaCom trouble and repair tickets, and receive an estimated time to repair on a real-time basis. These systems are the same maintenance and repair systems used by BellSouth retail units. TAFI does not provide itemized time and material charges for BellSouth's own retail units, and thus BellSouth is not obligated to provide them for ITC^DeltaCom or any other CLEC.

Discussion:

ITC^DeltaCom contends that it is entitled to an itemized list of time and material charges upon completion of repair work. ITC^DeltaCom contended that it needs timely billing information in order to verify the charges that it incurs for maintenance performed by BellSouth. ITC^DeltaCom contends that without the information, it cannot provide the level of service its customers expect, accurately bill its end-user, and verify BellSouth charges. Moreover, it contends BellSouth is not providing nondiscriminatory access to OSS. (Thomas Tr. Vol. 1 at 222).

BellSouth contends that the Act requires that BellSouth provide nondiscriminatory access to its OSS. In other words, BellSouth must allow CLECs to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for resale services in substantially the same time and manner as BellSouth does for itself; and, in the case of unbundled network elements, provide a reasonable competitor with a meaningful opportunity to compete.

BellSouth contends that it provides ITC^DeltaCom and the other CLECs with nondiscriminatory access to its maintenance and repair OSS by providing TAFI and ECTA Gateway. (Pate, Tr. Vol. 1 at 634). BellSouth witness Pate explained that CLEC TAFI is the same maintenance and trouble repair system used by BellSouth's own retail service representatives for non-designed services, except that CLEC TAFI combines functionality for both residential and business services, while BellSouth must use separate TAFI interfaces for its own residential and business retail units. (Pate, Tr. Vol. 1 at 635). Mr. Pate further explained that ECTA uses the T1/M1 national standard for local

exchange trouble reporting and notification. Because it follows the national standard for local exchange trouble reporting and notification, the following functions are available to users of ECTA: the ability to enter a report; to modify a report; to obtain status information during the life of the report; and to cancel a report. (Pate, Tr. Vol. 1 at 636). BellSouth contends that TAFI and ECTA are the same maintenance and repair systems used by BellSouth retail units.

According to BellSouth, it is not obligated to provide ITC^DeltaCom with an itemized time and material charges report because such information is not available to BellSouth's retail units. BellSouth contends that it cannot be required to give a CLEC more than it gives to itself. If the itemized time and material charges are something ITC^DeltaCom feels it needs, BellSouth testified that ITC^DeltaCom can submit a request to BellSouth and BellSouth will investigate the feasibility of instituting such a report for ITC^DeltaCom outside the context of an interconnection agreement. According to BellSouth, the Act does not require BellSouth to develop this capability for ITC^DeltaCom, and does not require BellSouth to provide it at cost-based rates, and, thus, the Commission should not grant ITC^DeltaCom request for relief.

Upon consideration of this issue and the record from the hearing, the Commission finds that BellSouth is providing ITC^DeltaCom nondiscriminatory access to its maintenance and repair OSS by providing ITC^DeltaCom access to TAFI and ECTA, which are the same maintenance and repair systems, used by BellSouth's retail units. As BellSouth is providing access to the same systems which it uses itself, BellSouth is not obligated to provide ITC^DeltaCom any functionalities that are not currently available in

TAFI and/or ECTA. If ITC^DeltaCom desires additional information than the information offered through either TAFI and/or ECTA, ITC^DeltaCom and BellSouth may negotiate a separate agreement outside this arbitration.

Ordering Paragraph:

BellSouth is providing repair information on a nondiscriminatory basis as BellSouth is providing access through OSS to the same maintenance and repair systems used by BellSouth's retail units. BellSouth shall not be required to provide additional repair information. However, the parties may negotiate a separate agreement outside this arbitration should ITC^DeltaCom desire additional information than that which is currently offered.

Issue 4(a):
Should BellSouth provide cageless collocation to ITC^DeltaCom 30 days after a firm order is placed?

ITC^DeltaCom Position:
ITC^DeltaCom is entitled to provisioning of cageless collocation in 30 days after a firm order is placed. Cageless collocation should be provisioned at intervals shorter than standard physical collocation and similar to virtual collocation.

BellSouth Position:
BellSouth is not required by the Act or the FCC to provide cageless collocation within 30 days after a firm order has been placed. In addition, given the numerous factors and activities required to fulfill a collocation request, it is neither practical nor feasible to require BellSouth to complete the collocation request within 30 days.

Discussion:

ITC^DeltaCom contends that because cageless collocation is similar to virtual collocation, it should be provisioned in 30 days or less. (Wood, Tr. Vol. 1 at 331).

ITC^DeltaCom witness Wood assumes that provisioning cageless collocation should be similar to provisioning virtual collocation and, thus, the intervals should be similar. (Wood, Tr. Vol. 1 at 331). ITC^DeltaCom contends that BellSouth will save time because it 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. (Wood, Tr. Vol. 1 at 332).

BellSouth contends that it has no legal or regulatory duty to provision cageless collocation in 30 days or less. (Thierry, Tr. Vol. 1 at 581). Moreover, BellSouth contends that its provisioning interval for collocation is not controlled by the time required to construct an arrangement enclosure, as ITC^DeltaCom implies. (Thierry, Tr. Vol. 1 at 581). Rather, according to BellSouth witness Thierry, the overall provisioning time is controlled by 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 cable racking and the number of cross-connects requested. Because these provisioning activities are performed, to the extent possible, in parallel, as opposed to serially, the absence of enclosure construction has little, if any, bearing on the provisioning interval. (Thierry, Tr. Vol. 1 at 581-2).

Moreover, Mr. Wood also contends that the interval for cageless collocation should be shorter than that for virtual collocation because of the "lack of administrative tasks associated with the exchange of ownership of the equipment." (Wood, Tr. Vol. at 332). BellSouth contends that "administrative tasks" are not included in the provisioning

interval for virtual collocation, and thus have no bearing on the provisioning interval for cageless collocation. (Thierry, Tr. Vol. 1 at 583).

BellSouth commits to complete its construction and provisioning activities as soon as possible but, at a maximum, within 90 business days under normal conditions or 130 business days under extraordinary conditions. (Thierry, Tr. Vol. 1 at 581). BellSouth contends that these intervals are appropriate, and provide CLECs a reasonable opportunity to compete. Thus, according to BellSouth, its proposed intervals meet the requirements of Section 251 of the Act.

Upon consideration of this issue, the positions of the parties, and the evidence of record, the Commission finds that BellSouth should provide cageless collocation within 90 days from receipt of a bona fide firm order. In reaching this decision, the Commission considered the 30 days proposed by ITC^DeltaCom and concluded that 30 days did not allow adequate time for BellSouth to complete its provisioning activities as explained by witness Thierry. On the other hand, the time intervals proposed by BellSouth appear to the Commission to be unusually generous, as 90 business days is over 4 months while 130 business days stretches to over 6 months. In order to provide a CLEC a meaningful opportunity to compete, the CLEC must be allowed access to the market. The Commission finds that 90 calendar days, which is approximately 3 months, should balance the interests between the parties on this issue.

Ordering Paragraph:

The Commission hereby orders BellSouth to complete its construction and provisioning activities for cageless collocation as soon as possible, but no later than 90

calendar days from receipt of a bona fide firm order. The Commission believes that this interval will provide CLECs a meaningful opportunity to compete and therefore meet the requirements of the Act.

Issue 5:
Should the parties continue operating under existing local interconnection arrangements?

ITC^DeltaCom Position:
[NOTE: ITC^DeltaCom believes that Issue 5 should be worded as follows: (BellSouth disagrees with this wording)]
(a) Should the current interconnection agreement language continue regarding cross-connect fees, reconfiguration changes or network redesigns and NXX translations?
(b) What should be the definition of the terms local traffic and trunking options?
(c) What parameters should be established to govern routing ITC^DeltaCom's originating traffic and each party's exchange or transit traffic?
(d) Should the parties implement a procedure for binding forecasts?

As the issue is proposed by ITC^DeltaCom, the answers are:
(a) Yes. BellSouth should continue to charge for cross-connect reconfiguration/network redesign and NXX translations in the same way it does under the agreement previously approved by the Authority.
(b) Local traffic and trunking option should be defined in the same way they are defined in the current agreement.
(c) The same parameters should be applied as those in the existing interconnection agreement.
(d) The parties must implement binding forecasts.

BellSouth Position:
As to Issue 5 as it is phrased, the parties should not continue operating under existing local interconnection arrangements. The purpose of negotiations is to incorporate new language, terms and obligations into an interconnection agreement in recognition of new technologies, changed circumstances, and changes in applicable law. BellSouth has negotiated with ITC^DeltaCom in good faith and will continue to do so in an effort to reach a new agreement regarding local interconnection.

Discussion:

The redrafted Issue 5, as set forth in "ITC^DeltaCom's Position" above includes several subtopics. For most of the subtopics, ITC^DeltaCom sought to continue the

language from the 1997 interconnection agreement in the new interconnection agreement with regard to these subtopics. Mr. Moses stated that the previous interconnection agreement approved by this Commission contained provisions regarding cross-connect fee, reconfiguration charges or network redesigns, and NXX translations. Mr. Moses also testified that the 1997 interconnection agreement defined the terms "local traffic" and "trunking options" as well as established parameters to govern routing ITC^DeltaCom's originating traffic and each party's exchange of transit traffic. With regard to all of these items contained in the 1997 interconnection agreement, Mr. Moses testified that ITC^DeltaCom desired the same terms as contained in the 1997 interconnection agreement. (Moses, Tr. Vol. 2 at 206 –207) While the issue of binding forecasts was not included in the previous interconnection agreement, Mr. Moses also stated that the Commission should implement a procedure for binding forecasts. (Moses, Tr. Vol. 2 at 207) Mr. Moses also acknowledged that it was not ITC^DeltaCom's position that the entire 1997 interconnection agreement be continued but just the issues that the existing agreement contained upon which the parties could not agree. (Moses, Tr. Vol. 2 at 208)

Mr. Varner for BellSouth stated that BellSouth did not want to continue with the definition of "local traffic" as contained in the 1997 interconnection agreement. (Varner, Tr. Vol. 2 at 209) Mr. Varner also testified that the issue of binding forecasts was not contained in the 1997 interconnection agreement and further stated that he did not believe that BellSouth was obligated to do binding forecasts. (Varner, Tr. 2 at 211)

With respect to binding forecasts, ITC^DeltaCom desires binding forecasts to ensure that BellSouth can provision the capacity that ITC^DeltaCom believes it will need

to serve its customers. Mr. Moses proposes that ITC^DeltaCom enter into a binding forecast with BellSouth as part of the interconnection agreement. (Moses, Tr. Vol. 1 at 148) Such an arrangement would presumably guarantee ITC^DeltaCom a certain level of capacity on BellSouth's network. Additionally, ITC^DeltaCom would reimburse BellSouth's costs even if the capacity were not actually used by ITC^DeltaCom. (Moses, Tr. Vol. 1 at 148)

Although not required under the Act or by FCC rules, BellSouth testified that it is currently analyzing the possibility of providing a service whereby BellSouth commits to provisioning the necessary network buildout and support when a CLEC agrees to enter into a binding forecast of its traffic requirements. While BellSouth stated that it has not yet completed the analysis needed to determine if this is a feasible offering, BellSouth testified that it is willing to discuss the specifics of such an arrangement with ITC^DeltaCom outside of this arbitration, because the issue is not a part of this proceeding. (Varner, Tr. Vol. 1 at 402)

Upon consideration of this issue, the positions of the parties, and the evidence from the record, the Commission concludes that the parties will use the language from the 1997 agreement as it relates to the 4 subtopics identified in Issue 5, unless otherwise negotiated and agreed between the parties, to the extent that (1) the 1997 contract contains language related to these issues, (2) the parties have not agreed to other language in the course of their negotiations, and (3) such language is not contrary to any Commission or FCC rule or order, including this Order. The Commission will allow the limited use of terms from the 1997 interconnection agreement as set forth above. The

parties have negotiated for many months on this interconnection agreement, and the Commission does not want to infringe upon the agreements that the parties have thus far reached.

Ordering Paragraph:

Unless otherwise negotiated and agreed between the parties with respect to ITC^DeltaCom's restated issues (a), (b), (c), and (d) set forth under the heading of "ITC^DeltaCom Position" above, the parties will use the language from the 1997 interconnection agreement as it relates to these four issues, to the extent that (1) the 1997 contract contains language related to these issues, (2) the parties have not agreed to other language in the course of their negotiations, and (3) such language is not contrary to any Commission or FCC order, including this Order.

Issue 6(a):
Should BellSouth be permitted to impose charges for BellSouth's OSS on ITC^DeltaCom?

ITC^DeltaCom Position:
BellSouth is not entitled to charge for development costs for OSS. If the Commission imposes development charges, such charges should be spread over all end user customers.

BellSouth Position:
This issue is not appropriate for arbitration because the Commission has already determined in a generic UNE cost proceeding the appropriate OSS rates for ITC^DeltaCom or any other CLEC. As determined previously by this Commission, under the Act and the FCC's orders and rules BellSouth is entitled to recover the reasonable charges it incurs in developing, providing, and maintaining the interfaces that make BellSouth's OSS accessible to CLECs.

Discussion:

ITC^DeltaCom contends that compensation for the use of BellSouth's OSS must

be contingent upon fully implemented systems "that are functioning properly " (Wood, Tr. Vol. 1 at 320). ITC^DeltaCom also contends that it is not obligated to compensate BellSouth for the development costs incurred in creating BellSouth's CLEC OSS. (Wood, Tr. Vol. 1 at 320)

According to Mr. Wood, requiring CLECs to pay for OSS development would constitute a significant barrier to entry. (Wood, Tr. Vol. 1 at 320) ITC^DeltaCom contends that if BellSouth is compensated for the costs it incurs, it has no incentive to provide OSS capabilities efficiently and in a nondiscriminatory manner. (Wood, Tr. Vol. 1 at 322) Mr. Wood proposes that the equitable solution to recovery of OSS costs is that each carrier, including ILECs and CLECs, should bear its own costs in developing and implementing effective and efficient OSS systems. (Wood, Tr. Vol. 1 at 325) Additionally, Mr. Wood asserts that the only truly competitive neutral mechanism for recovery of OSS transition costs is for each carrier to be fully responsible for its own OSS. Alternatively, Mr. Wood offers that the most competitively neutral mechanism, should the Commission conclude that some portion of BellSouth's OSS transition costs are to be paid for by the CLECs, would be a per customer charge that includes all retail customers in the denominator of the calculation and which amortizes the costs over the appropriate economic life of the assets. (Wood, Tr. Vol. 1 at 328)

BellSouth contends that it is entitled, under both the Act and the FCC's orders and rules, to recover its costs in providing access to OSS to CLECs. According to BellSouth, this issue has been addressed in numerous forums. For example, in AT&T's appeal of the Kentucky Commission's decisions on UNE cost rates from AT&T's arbitration proceeding, the U.S.D.C. for the Eastern District of Kentucky confirmed that BellSouth is entitled to recover its costs for developing operations support systems. (C.A. No. 97-79,

9/9/98) The District Court's Order at 16 states: "Because the electronic interfaces will only benefit the CLECs, the ILECs, like BellSouth, should not have to subsidize them. BellSouth has satisfied the nondiscrimination prong by providing access to network elements that is substantially equivalent to the access provided for itself. AT&T is the cost- causer, and it should be the one bearing all the costs; there is absolutely nothing discriminatory about this concept." More importantly, BellSouth pointed out that this Commission has previously found BellSouth's OSS cost recovery proposal to be consistent with its prior ruling in the AT&T arbitration case (Docket No. 96-358-C) which stated that the costs would be shared equitably among all the parties that benefited from the interfaces. BellSouth witness Varner testified that the rates that BellSouth proposes to charge ITC^DeltaCom, or any other CLEC, for use of OSS in South Carolina are the rates adopted by the Commission in its Cost Orders and contained in Exhibit AJV-1 to Mr. Varner's testimony (Hearing Exhibit 10). (Varner, Tr. Vol. 1 at 474).

BellSouth contends that Mr. Wood's criticisms of BellSouth's methodology for determining its OSS costs are without merit. According to BellSouth, this Commission has already addressed the validity of the OSS costs in its Cost Orders. Mr. Varner testified that Mr. Wood ignores the fact that the costs BellSouth presented in the Generic UNE Cost docket reflect only those costs directly attributable to establishing interfaces for use by CLECs. According to BellSouth, Mr. Wood's statement on page 13 of his testimony that "the new OSS implemented by BellSouth will benefit its own retail customers" is simply false. These interfaces are merely another layer to an existing legacy system, not an improvement to that legacy system. Thus, the OSS development and improvement can only benefit the CLEC. (Varner, Tr. Vol. 1 at 475)

Moreover, Dr. Taylor contends on behalf of BellSouth that Mr. Wood's analysis

is improper because it ignores the economic principle of cost causation. According to Dr. Taylor, cost causation determines the source of a cost and assesses charges on that source for effecting full cost recovery. Because BellSouth has had to develop OSS for use by *other* carriers, then those other carriers should be responsible for recovery of the additional OSS-related costs caused directly by them. Any failure to charge those other users of BellSouth's OSS for the additional OSS costs they cause – especially costs to develop OSS – would only generate perverse incentives and encourage inefficient behavior by the users. Dr. Taylor testified that if cost causation principles are not applied, entrants will demand excessively capital-intensive systems, and costs to telecommunications users will be higher than necessary. (Taylor, Tr. Vol. 1 at 537-39)

BellSouth contends that the Commission should reaffirm its previous holdings that BellSouth is entitled to recover its OSS development costs from the cost-causer – namely, the CLECs for whom the interfaces were developed. According to BellSouth, such an action is consistent with the Act and with FCC orders and rules.

Upon consideration of this issue, the positions of the parties, and the evidence from the hearing, the Commission finds that its previously issued Cost Orders in Docket No. 97-374-C are controlling. The Commission finds that its previously approved UNE rates should apply to the new interconnection agreement. This arbitration proceeding is not the proper forum for challenging UNE rates previously established. Moreover, under the principles of cost causation, the costs incurred in developing CLEC OSS should be recovered from the cost- causer – namely, the CLEC.

Ordering Paragraph:

The interconnection agreement shall incorporate rates for OSS as established by

Order No. 98-214 (June 1, 1998) in Docket No. 97-374-C. This Commission affirms its previous ruling that BellSouth is entitled to recover its OSS development costs, as well as costs incurred in the use of the OSS, from ITC^DeltaCom, and other CLECs who utilize the OSS.

Issue 6(b):
What are the appropriate recurring and non-recurring rates and charges for:
(a) two-wire ADSL/HDSL compatible loops?
(b) four-wire ADSL/HDSL compatible loops?
(c) two-wire SL1 loops?
(d) two-wire SL2 loops?
(e) two-wire SL2 Order Coordination for Specified Conversion Time?

ITC^DeltaCom Position:
ITC^DeltaCom contends that the Commission needs to set new rates for each of the referenced items that will be FCC compliant TELRIC rates.

BellSouth Position:
This issue is not appropriate for arbitration because this Commission has previously determined rates for the referenced items in a generic UNE cost proceeding. The UNE rates adopted by this Commission should be the rates incorporated into the parties' interconnection agreement. The exception to this position is for item (b), four-wire ADSL/HDSL compatible loops, because the ADSL functionality is not applicable to four-wire loops.

Discussion:

ITC^DeltaCom contends that the Commission needs to establish new rates for the specified elements because the rates the Commission established in Docket No. 97-374-C are not FCC compliant TELRIC cost studies. (Wood, Tr. Vol. 1 at 347 – 348) Mr. Wood contends that because the cost studies were adopted while the FCC pricing rules were vacated, the studies are not compliant with the FCC's cost methodology. (Wood, Tr. Vol. 1 at 349) Mr. Wood contends that "[a]s a result of the reinstatement of the FCC rules,

certain inputs, assumptions, and methodologies inherent in the BellSouth cost studies do not comply with the current law" (Wood, Tr. Vol. 1 at 350)

BellSouth contends that Issue 6(b) is one of several issues in this proceeding that does not need to be arbitrated because the Commission has already decided the issues. According to Mr. Varner, the appropriate rates for the UNEs identified by ITC^DeltaCom are the rates specified in the Commission's cost orders. (Varner, Tr. Vol. 1 at 476) BellSouth contends that an arbitration proceeding is not the appropriate place for a single CLEC to challenge the rates that were established in a generic, open cost proceeding. The Commission simply should adopt the rates established in its generic cost proceeding, and order that the parties incorporate such rates into the agreement.

ITC^DeltaCom challenges the rates established by the Commission on the grounds that the rates are not TELRIC-based rates. BellSouth contends that despite Mr. Wood's extensive testimony on the subject, he produced no evidence to contradict Ms. Caldwell's testimony that the studies BellSouth presented in conjunction with the Commission's cost proceeding were FCC-compliant TELRIC cost studies. Mr. Wood criticized the studies because they did not provide for geographic deaveraging of rates. (Wood, Tr. Vol. 2 at 232) BellSouth contends that this criticism is irrelevant because the FCC has stayed the implementation of geographic deaveraging until after the implementation of universal service and thus geographic deaveraging is not required at this point in time. According to BellSouth, until the FCC reinstates the geographic deaveraging requirement, there is no obligation for BellSouth, or this Commission, to deaverage cost studies or rates. BellSouth contends that there is no reason for the

Commission to alter its finding in the cost proceeding that "BellSouth has submitted detailed cost studies, which we believe, as modified, comply with all applicable legal standards." (Caldwell, Tr. Vol. 1 at 568)

ITC^DeltaCom witness, Mr. Moses, challenged BellSouth's nonrecurring charge for ADSL compatible loops. BellSouth contends that Mr. Moses' position was based on a fundamental misunderstanding of the difference between ADSL wholesale service and ADSL compatible loops. (Varner, Tr. Vol. 1 at 476) Mr. Varner explained BellSouth's ADSL offerings as follows: BellSouth's ADSL service, contained in BellSouth's FCC Tariff No. 1, is a non-designed interstate transport service which is an overlay to the customer's existing service, i.e., basic residence or business service, which the customer orders and pays for separately. ADSL service provides the ability to offer high-speed data service over the same line that is used to provide an existing end user's basic local exchange service. It is offered on a wholesale basis typically to Internet Service Providers ("ISPs"). These ISPs in turn resell the service to end users and charge the end users for the high speed data access. For example, BellSouth.net has one ADSL service option for which it charges $59.95 per month plus an installation charge of $199.00. The end user obtains voice grade basic local exchange service, vertical features, and access to toll services from BellSouth or from a reseller of BellSouth's basic local service. (Varner, Tr. Vol. 1 at 477)

Mr. Varner further testified that by comparison, an ADSL compatible loop is a connection from the BellSouth wire center to the end user's premises that is technically capable of providing both ADSL and basic local exchange service. This loop is an

unbundled capability sold to a CLEC. The CLEC generally installs equipment in BellSouth's central office to provide the voice and data service over this loop. A CLEC utilizing an ADSL compatible loop would provide its end user with basic local exchange service, vertical features, access to toll service, and ADSL service. It is also important to note that a CLEC's purchase of an ADSL compatible loop ensures that the loop will remain ADSL compatible. With BellSouth's wholesale ADSL service, there is a possibility that certain network reconfigurations could cause the line to lose its ability to support ADSL service. (Varner, Tr. Vol. 1 at 477-78)

Mr. Varner contended that the $100 installation charge to which Mr. Moses referred is for overlaying ADSL tariffed service onto the customer's existing service. That charge, according to BellSouth, does not represent installation of an additional physical facility. The cost-based non-recurring price for the ADSL compatible loop recovers the cost associated with service inquiry, service order, engineering, connect and test, and travel activities. Because ADSL compatible loops are designed, they require production of a Design Layout Record (DLR), as well as involvement of special services work groups. ADSL service does not generally require a premises visit unless the Network Interface Device ("NID") needs to be replaced. By comparison, the ADSL compatible loop offering always requires a designed physical loop facility and always requires dispatch of a BellSouth technician to the customer's premises. (Varner, Tr. Vol. 1 at 478)

BellSouth contends that ITC^DeltaCom has inappropriately attempted to represent one rate element of BellSouth's wholesale ADSL tariff offering as an exact

substitute for the nonrecurring installation rate for an ADSL compatible loop. This is an "apples to oranges" comparison, according to BellSouth. Based on the information presented above, BellSouth requested that the Commission require that ITC^DeltaCom purchase ADSL compatible loops at the cost-based rates specified in the Commission's Cost Orders as shown on Exhibit AJV-1 to Mr. Varner's testimony (Hearing Exhibit #10).

BellSouth contends that the studies adopted by the Commission in Docket No. 97-374-C were FCC-compliant TELRIC studies. Mr. Varner testified that the Commission, therefore, should order that the parties adopt the rates set for the identified elements in the generic cost proceeding and incorporate such rates into the interconnection agreement.

Upon consideration of this issue and the positions of the parties, the Commission finds that its previously issued Costs Orders in Docket No. 97-374-C are controlling. The Commission finds that its previously approved UNE rates should apply to the new interconnection agreement. This arbitration proceeding is not the proper forum for challenging UNE rates previously established. The Commission finds that the rates in Docket No. 97-374-C were derived using TELRIC cost methodology and thus are appropriate.

Ordering Paragraph:

The Commission finds that the rates previously established in Docket No. 97-374-C are appropriate and should be utilized in the instant proceeding. The interconnection agreement shall incorporate the rates established in Docket No. 97-374-C for each of the identified elements.

Issue 6(c):
Should BellSouth be permitted to charge ITC^DeltaCom a disconnection charge when BellSouth does not incur any costs associated with such disconnection?

ITC^DeltaCom Position:
BellSouth does not incur any costs associated with disconnection and therefore there should be no charge for disconnection.

BellSouth Position:
This issue is not appropriate for arbitration because this Commission has previously determined, in its generic UNE cost proceeding, that the disconnect costs which are included in the nonrecurring rates, are appropriate. BellSouth should recover disconnection costs in cases in which it incurs costs associated with disconnection.

Discussion:

ITC^DeltaCom contends that BellSouth is not entitled to charge an up-front disconnection charge when no physical disconnection of facilities occurs. (Wood, Tr. Vol. 1 at 335) Mr. Wood also contended that BellSouth should not charge a disconnect charge when the customer selects another local provider because "the disconnect from the initial local service provider and the connect to the new local service provider are a single activity." (Wood, Tr. Vol. 1 at 335)

BellSouth contends that ITC^DeltaCom is burdening this Commission with an issue that the Commission has already decided. BellSouth testified that in Docket No. 97-374-C (the generic UNE cost proceeding), the Commission made a decision on disconnect costs, the precise question ITC^DeltaCom is raising in Issue 6(c). According to BellSouth, the Commission allowed BellSouth to recover its disconnect costs in the initial installation price of the UNE, just as an end user customer pays for disconnect costs in the installation price of a BellSouth retail service. BellSouth contends that Mr.

Wood is seeking to have this Commission reverse its decision now, despite the fact that ITC^DeltaCom apparently did not deem the issue important enough to participate in the UNE cost proceeding where this decision and other UNE pricing decisions were made. (Varner, Tr. Vol. 1 at 478-479; Caldwell, Tr. Vol. 1 at 566-67)

BellSouth testified that the Commission's decision on disconnect costs was the right decision. According to BellSouth, it incurs costs to disconnect services provided to CLECs, and it is appropriate to recover those costs in prices charged to CLECs. Any applicable costs to disconnect UNEs are included in the rates adopted by the Commission in its Cost Orders and are reflected in the rates contained in Exhibit AJV-1 to Mr. Varner's testimony (Hearing Exhibit #10).

Upon consideration of this issue and the positions of the parties, the Commission finds that its previous Costs Orders in Docket No. 97-374-C are controlling. The Commission finds that its previously approved UNE rates should apply to the new interconnection agreement. In Docket No. 97-374-C, the Commission, in establishing the installation price of the UNE, found it appropriate to allow recovery of the disconnect costs. The Commission does not believe that the present arbitration proceeding is the proper forum for challenging UNE rates previously established. The Commission finds that the rates in Docket No. 97-374-C were derived using TELRIC cost methodology and thus are appropriate.

Ordering Paragraph:

BellSouth is entitled to charge ITC^DeltaCom a disconnection charge in cases in which BellSouth incurs costs associated with such disconnection. Any applicable costs

to disconnect UNEs are included in the rates adopted by the Commission in Docket No. 97-374-C and should be incorporated into the parties' interconnection agreement.

Issue 6(d):
What should be the appropriate recurring and nonrecurring charges for cageless and shared collocation in light of the recent FCC Advanced Services Order No. FCC 99-48, issued March 31, 1999, in Docket No. CC 98-147?

ITC^DeltaCom Position:

Until BellSouth produces, and the Commission adopts, the results of a cost study for cageless collocation consistent with the FCC's TELRIC pricing rules, interim rates should be based on BellSouth's rates for virtual collocation with appropriate adjustments to remove costs associated with installation, maintenance and repair of ITC^DeltaCom's equipment.

BellSouth Position:

The Commission has previously determined, in Docket No. 97-374-C (generic UNE cost proceeding) the recurring and nonrecurring rates that are applicable for physical collocation, which are the same rates applicable to cageless and shared collocation. Thus, with respect to these previously determined rates, there is no need for further review. There are, however, some additional collocation elements that ITC^DeltaCom may request for such collocation: specifically, fiber cross-connects and fiber point of termination ("POT") bays. BellSouth has submitted cost studies and proposed rates for these elements, consistent with the Commission's Order in Docket No. 97-374-C. Finally, BellSouth is also proposing an interim rate for card key security access to collocation space, until such time as permanent rates can be established.

Discussion:

ITC^DeltaCom contends that BellSouth does not have rates for cageless and shared collocation. (Wood, Tr. Vol. 1 at 329) Thus, ITC^DeltaCom contends that until appropriate rates are adopted, BellSouth should use BellSouth's rates for virtual collocation with appropriate adjustments to remove costs associated with installation, maintenance and repair of ITC^DeltaCom's equipment. (Wood, Tr. Vol. 1 at 329-330)

BellSouth contends that the Commission adopted rates for physical collocation in Docket No. 97-374-C. According to BellSouth, BellSouth's physical collocation rates, as established by the Commission, appropriately apply to physical collocation whether an arrangement is enclosed (caged) or unenclosed (cageless) or whether collocation is shared. Mr. Varner testified that rates have been established for floor space on a per square foot basis and for power on a per amp basis. Cross-connect charges apply on a per connection basis, and entrance cable installation charges apply only if the CLEC requests such installation. Because BellSouth structured the physical collocation elements in such a manner, BellSouth contends that all of the piece parts required for cageless collocation have established rates. (Varner, Tr. Vol. 1 at 480)

BellSouth further testified that since Docket No. 97-374-C, CLECs have requested additional elements related to physical collocation, specifically wire cages and fiber cross-connects. BellSouth witness Varner explained that BellSouth did cost studies for these rates consistent with the Commission's cost orders in the generic UNE cost proceeding. (Varner, Tr. Vol. 1 at 480) According to BellSouth witness Ms. Caldwell, the cost studies presented by BellSouth reflect both recurring and nonrecurring costs. Recurring costs include 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 tax. 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 taxes and gross receipts taxes. Nonrecurring costs are one-time expenses associated with provisioning, installing and disconnecting network

capability. These costs typically include five major categories of activity: service inquiries, service order, engineering, connect and test, and technician time. (Caldwell, Tr. Vol. 1 at 565)

Ms. Caldwell testified that the Commission should accept BellSouth's cost studies because the methodology is identical to that adopted by the Commission in the generic UNE cost proceeding. In that proceeding the Commission ruled that "BellSouth has submitted detailed cost studies, which we believe, as modified, comply with all applicable legal standards." (Order, Docket No. 97-374-C, at 40) Contrary to ITC^DeltaCom's position, Ms. Caldwell explained, the recent Supreme Court ruling does not alter the appropriateness of BellSouth's cost studies, because BellSouth adhered to the guidelines of a TELRIC study when it filed its cost studies in Docket No. 97-374-C. Specifically, Ms. Caldwell testified that BellSouth adhered to the following guidelines which are still in place:

- Costs should reflect forward-looking network architecture, engineering and materials and equipment;
- Costs should be developed individually for each unbundled network element;
- Costs should be based on the particular materials, equipment, and installation requirements associated with provisioning a specific unbundled network element, to the greatest extent possible;
- Costs should be developed on state-specific characteristics and data;
- Costs should be complete, reflecting the full costs of installation as well as the inclusion of shared and common costs. (Caldwell, Tr. Vol. 1 at 568-69)

Moreover, according to Ms. Caldwell, BellSouth incorporated the adjustments to BellSouth's inputs that the Commission ordered in Docket No. 97-374-C. BellSouth utilized a 10.86% cost of capital, the approved depreciation rates, and the Commission's 4.79% common cost factor. Furthermore, BellSouth used the adjusted fall-out factors of 5%. Thus, BellSouth contends that the cost studies filed by BellSouth in this proceeding comport with the adjustments the Commission ordered in the cost proceeding. (Caldwell, Tr. Vol. 1 at 570-71)

Additionally, Mr. Varner testified that it is necessary for BellSouth to offer an interim rate for Security Access System in order to meet the requirements of the FCC's recent Advanced Services Order as it relates to the provision of collocation. The Commission is aware that this security offering is an optional feature that the FCC has required. According to Mr. Varner, BellSouth proposes an interim rate, subject to true-up, equal to the rate approved by the Florida Public Service Commission on April 29, 1998, for Physical Collocation – Security Access System until a cost study for South Carolina can be completed. The proposed interim rate is contained in Exhibit AJV-1 (Hearing Exhibit No. 10). (Varner, Tr. Vol. 1 at 480)

For these reasons, BellSouth contends that the Commission should order the parties to adopt the rates for physical collocation previously established by the Commission in Docket No. 97-374-C for cageless and shared collocation. Moreover, BellSouth contends that the Commission should adopt the rates for wire cages and fiber cross connects proposed by BellSouth in this proceeding as well as adopt the interim rate proposed for Security Access. Finally, BellSouth contends that the Commission should

adopt for Security Access System an interim rate, subject to true-up, equal to the rate approved by the Florida Public Service Commission on April 29, 1998, for Physical Collocation – Security Access System until a cost study for South Carolina can be completed.

Upon consideration of this issue and the positions of the parties, the Commission finds it appropriate to use the elements of physical collocation established in Docket No. 97-374-C as the rates for cageless and shared collocation. The Commission finds these rates apply to physical collocation whether the collocation arrangement is caged or cageless or whether the collocation is shared as the rates have been established for floor space on a square foot basis and for power on a per amp basis. Further, the Commission finds that the rates proposed for wire cages and fiber cross connects should be approved as these rates were calculated using cost studies with methodology identical to that adopted by the Commission in the generic UNE cost proceeding. The Commission has previously found these studies to be TELRIC cost studies that comply with all federal and state regulations and orders. The Commission also finds the interim rate proposed by BellSouth for the Security Access System to be reasonable and adopts the interim rate, subject to true-up upon completion of a cost study for South Carolina.

Ordering Paragraph:

The parties shall adopt the rates for the elements of physical collocation previously established by this Commission in Docket No. 97-374-C as the rates for cageless and shared collocation, and shall incorporate such rates into the parties' interconnection agreement. The parties shall also adopt BellSouth's proposed rates for

wire cages and fiber cross connects. Further for Security Access System, the parties shall utilize as an interim rate, subject to true-up upon completion of a cost study for South Carolina, the rate approved by the Florida Public Service Commission on April 29, 1998, for Physical Collocation – Security Access System.

Issue 6(e):
Should BellSouth be permitted to charge for ITC^DeltaCom conversions of customers from resale to unbundled network elements? If so, what is the appropriate charge?

ITC^DeltaCom Position:
BellSouth should be required to convert a customer's bundled local service to an unbundled element or service and assign such unbundled element or service to ITC^DeltaCom with no penalties, rollover, termination or conversion charges to ITC^DeltaCom or the customer.

BellSouth Position:
BellSouth is not obligated under the Act or FCC rules to convert a CLEC's customer from resale to UNEs at no cost. BellSouth is entitled to recover its reasonable costs if it performs this function. More importantly, ITC^DeltaCom, and other CLECs, should not be permitted to convert resale service to UNEs because this conversion would in essence require BellSouth to provide a combination of UNEs, which the Act does not obligate it to provide. Moreover, the UNEs that ILECs must provide on an individual, much less combined basis will not be defined until the FCC all parts of completes its Rule 319 proceeding.

Discussion:

ITC^DeltaCom contends that it is entitled to convert any services it purchased as resale services to individual UNEs for no charge. (Wood, Tr. Vol. 2 at 255 – 256) ITC^DeltaCom further contends that if BellSouth is permitted to charge for this conversion, the rate must be cost-based. (Wood, Tr. Vol. 2 at 255) BellSouth contends that contrary to what ITC^DeltaCom is seeking in this proceeding, a CLEC cannot convert resale service to individual UNEs; rather, the resale service would be converted

to a *combination* of UNEs. BellSouth contends that it is not obligated under the Act to combine UNEs for CLECs at the sum of the individual UNE prices. According to BellSouth, converting resale to combined UNEs at the sum of the UNE prices simply would be an end run around the Act's division between resale and UNEs and would create an unjustified windfall for the CLEC. (Varner, Tr. Vol. 1 at 481) After the Rule 319 proceeding,[2] when the individual UNEs are defined, resold services that are converted to UNE combinations will, by definition, recreate a BellSouth retail service. According to BellSouth, UNE combinations that replicate resale should be priced at resale rates. In summary, Mr. Varner testified that if ITC DeltaCom wants "individual UNEs, they could buy them. There's no such thing as converting in that case." (Varner, Tr. Vol. 2 at 258)

Upon consideration of this issue and the positions of the parties, the Commission concludes that there may be instances where a customer may be properly converted from resale to a UNE based platform. When such a conversion occurs, there may, or may not, be network changes associated with the conversion. BellSouth is entitled to recover its reasonable costs incurred in converting the customer from resale to unbundled network elements Where there are no network changes associated with the conversion, the Commission is aware that there may be administrative costs for which BellSouth is entitled to recovery. Therefore, BellSouth should be allowed to recover administrative costs associated with a conversion where no network changes are required. If a

[2] The Commission is aware of the FCC's September 5, 1999, press release on the Rule 319 proceeding. The FCC's written order may impact this proceeding.

conversion requires network changes, BellSouth should be allowed recovery of the costs associated with those network changes.

Ordering Paragraph:

If ITC^DeltaCom converts customers from resale to unbundled network elements and if no network changes are required, BellSouth should be allowed to recover its administrative costs associated with that conversion. If ITC^DeltaCom converts customers from resale to unbundled network elements and if network changes are required to make the conversion, BellSouth shall be allowed to recover the costs for the network changes.

Issue 7(b)(ii):
What procedures should be adopted for meet point billing?

ITC^DeltaCom Position:
MECAB and MECAD methods do not require ITC^DeltaCom to file NECA FCC Tariff No. 4 and thus ITC^DeltaCom should not be required to accept BellSouth's proposed default meet point billing parameters.

BellSouth Position:
BellSouth seeks to have ITC^DeltaCom conform with the standard industry procedures, to the extent possible, that have been in place for ILECs and IXCs since 1986. These procedures are documented in the Multiple Exchange Carrier Access Billing ("MECAB") and Multiple Exchange Carrier Ordering Document ("MECOD"), each of which was developed by the Ordering and Billing Forum ("OBF") and are contained in the OBF Guidelines.

Alternatively, BellSouth proposes that default parameters be used in lieu of the National Exchange Carriers Association ("NECA") FCC Tariff No. 4 which is the foundation for the MECAB and MECOD methods. Under this proposal, all meet point arrangements will be billed on a multi-tariff, multi-bill method with the border interconnection percentage ("BIP") fixed at 95% BellSouth and 5% ITC^DeltaCom. The interim method would be discontinued once ITC^DeltaCom becomes a member of NECA and begins to use the NECA infrastructure (e.g. MECAB and MECOD methods) or when the industry develops a (better) alternative solution.

Discussion:

The parties agree that the only issue regarding meet point billing that remains between the parties is the means by which the parties will notify other interconnecting companies of the meet point billing arrangements made between BellSouth and ITC^DeltaCom. Meet point billing arrangements are the means by which companies inform other interconnecting carriers of the terms of the companies' interconnection arrangement. In other words, if both BellSouth and ITC^DeltaCom are providing services to AT&T, AT&T needs a means by which it can verify its bill for those services and confirm the division of services between ITC^DeltaCom and BellSouth. (Scollard, Tr. Vol. 1 at 597-98) Over the years, the industry has used the infrastructure surrounding the NECA FCC Tariff No. 4 to provide the requisite information. (Scollard, Tr. Vol. 1 at 598)

ITC^DeltaCom contends that it should not be required to become a member of NECA in order to conduct meet point billing. ITC^DeltaCom contends such an arrangement is not necessary because ITC^DeltaCom does not jointly provide dedicated facilities with BellSouth. (Moses, Tr. Vol. 2 at 264) BellSouth contends that ITC^DeltaCom's proposal is unworkable because the relevant issue is how a third party will find out the terms of the arrangement between BellSouth and ITC^DeltaCom; the terms of the actual arrangement between BellSouth and ITC^DeltaCom are irrelevant to this issue. (Scollard, Tr. Vol. 2 at 265) According to BellSouth, the MECAB and MECOD methods are based on the industry guidelines and will efficiently handle the information needs of all impacted companies. BellSouth believes that ITC^DeltaCom's

refusal to become a member of NECA will create a myriad of administrative complications. In an effort to compromise, however, BellSouth has proposed to ITC^DeltaCom an interim arrangement that can be used in lieu of NECA processes. As explained by BellSouth witness Scollard, under this proposal all meet point arrangements will be billed based on a multi-tariff, multi-bill method with the border interconnection percentage ("BIP") fixed at 95% BellSouth and 5% ITC^DeltaCom. Under this proposal, all impacted companies will have a reasonable opportunity to have the information necessary to validate the bills received from both BellSouth and ITC^DeltaCom. BellSouth testified that this interim method would be discontinued once ITC^DeltaCom begins to use the NECA infrastructure or when the industry develops an alternative solution. (Scollard, Tr. Vol. 1 at 598-99)

BellSouth contends that ITC^DeltaCom's refusal to conform to industry practice will not just impact its relationship with BellSouth, but will impact the business of all the carriers who do business with both BellSouth and ITC^DeltaCom. For these reasons, BellSouth asked the Commission to order ITC^DeltaCom to accept BellSouth's proposals for meet point billing.

Upon consideration of this issue and the positions of the parties, the Commission finds that meet point billing is not necessary. The record establishes that ITC^DeltaCom provides 100% of the transport facilities to the BellSouth tandem. Therefore, the meet point billing percentage is 100% ITC^DeltaCom and 0% BellSouth. Thus the Commission concludes there is no need to adopt procedures for transport meet point billing in the interconnection agreement.

Ordering Paragraph:

The Commission finds that there is no need to file meet point billing percentage. Since ITC^DeltaCom provides 100% of the transport facilities to the BellSouth tandem, there is no need to adopt meet point billing procedures in the interconnection agreement.

Issue 7(b)(iv):
Which party should be required to pay for the Percent Local Usage (PLU) and Percent Interstate Usage (PIU) audit, in the event such audit reveals that either party was found to have overstated the PLU or PIU by 20 percentage points or more?

ITC^DeltaCom Position:
The party seeking the audit should pay under all circumstances.

BellSouth Position:
BellSouth agrees that the party requesting an audit should be responsible for the costs of the audit, except in the event the audit reveals that either party is found to have overstated the PLU or PIU by 20 percentage points or more, in which case that party should be required to reimburse the other party for the costs of the audit. This proposal does not constitute a penalty because the costs are those actually incurred in performing the audit.

Discussion:

ITC^DeltaCom contends that in all cases, the party that requests an audit should be the party that pays for the audit. (Rozycki, Tr. Vol. 2 at 267) BellSouth contends that a party who overstates the PLU or PIU by 20 percentage points or more should pay for the cost of the audit. (Varner, Tr. Vol. 2 at 268) BellSouth contends that its proposal is supported by industry practice. Mr. Varner testified that PLU and PIU reporting are an integral part of parties' interconnection with one another's networks, and is done essentially on the honor system. In an ideal world, according to BellSouth, neither party would need to audit the reports of the other. BellSouth contends that if, however, one

party overstates PLU or PIU by more than 20 percentage points, questions about reliability and good faith are raised. In those circumstances, according to BellSouth, audits will need to be conducted and costs will be incurred. BellSouth testified that those costs should be paid by the cost causer, i.e. the party that overstates the PLU or PIU. BellSouth contends that this proposal is not, as ITC^DeltaCom contends, akin to a penalty provision because BellSouth is proposing only that actual costs incurred be reimbursed. Mr. Varner testified that BellSouth is not seeking to impose a deterrent in the form of a punitive payment on ITC^DeltaCom. (Varner, Tr. Vol. 1 at 482) Thus, according to BellSouth, its proposal is not improper.

Upon consideration of this issue and the positions of the parties, the Commission concludes that the position espoused by BellSouth is reasonable. The Commission finds it reasonable that the party which requests the audit to pay for the audit. Furthermore, the Commission concludes that the provision that requires a party who overstates the PLU or PIU by more than 20 percentage points to be fair and reasonable in light of the fact that PLU and PIU reporting is done so on the honor system. The Commission finds that this position is not a penalty provision for poor performance as suggested by ITC^DeltaCom. This position of requiring a party who overstates the PLU or PIU by more than twenty percentage points is not intended as punitive but is intended to encourage the parties to accurately and honestly make their accounting reports.

Ordering Paragraph:

The Commission orders that the party seeking the audit of PLU or PIU reporting will pay for the audit, except that if the audited party is found to have overstated the PLU or PIU by 20 percentage points or more, the audited party will pay for the audit.

Issue 8(b):
Should the losing party to an enforcement proceeding or proceeding for breach of the interconnection agreement be required to pay the costs of such litigation?

ITC^DeltaCom Position:
The losing party to an enforcement proceeding or proceeding for breach of the interconnection agreement should pay the costs of such litigation to ensure that frivolous lawsuits are not brought and to deter BellSouth from gaming the regulatory process by forcing ITC^DeltaCom to bring enforcement actions at its own expense.

BellSouth Position:
This issue is not appropriate for arbitration. The Act does not address, much less discuss, fee provisions. There is no statutory obligation for BellSouth to agree to a "loser pays" arrangement, and thus the issue should not be arbitrated. Moreover, the inclusion of a "loser pays" provision would have a chilling effect on both parties to the agreement to the extent that even meritorious claims may not be filed.

Discussion:

ITC^DeltaCom contends that the agreement should include an attorneys' fee provision that obligates the losing party in an enforcement proceeding to pay the fees of the prevailing party. (Rozycki, Tr. Vol. 2 at 270) Mr. Rozycki stated that a "loser pays" provision will prevent a party from filing frivolous lawsuits or complaints. (Rozycki, Tr. Vol. 2 at 270) According to BellSouth, a "loser pays" provision would have a chilling effect on claims before state commissions. BellSouth believes that with the current uncertainty in the regulatory and legal landscape, there are often questions of interpretation and enforcement in which state commissions should be involved. (Varner,

Tr. Vol. 2 at 271) Moreover, according to BellSouth, often there is no clear winner or loser in regulatory proceedings, so that a "loser pays" provision would in all likelihood do no more than generate additional litigation over who should pay the attorneys' fees. (Varner, Tr. Vol. 1 at 483-4)

BellSouth states that it will agree to appropriate language regarding jurisdictional issues that would allow the parties to seek damages under the Agreement from the courts. BellSouth contends that the parties should agree at the time they execute the interconnection agreement the forum in which disputes will be resolved. Such language is standard contract language which gives the parties certainty as to how and where disputes will be resolved. As explained by Mr. Varner, these provisions help prevent the potential for "forum shopping" as well as the potential for inconsistent decisions under the agreement. (Varner, Tr. Vol. 1 at 483-4)

Upon consideration of this issue and the positions of the parties, the Commission finds that a form of the "loser pays" provision should be included. Therefore, the Commission concludes that the proper "loser pays" provision should include language that the "loser pays" only in those cases where the outcome is clear and there is a clear winner in the proceeding. The Commission believes that the provision as adopted herein will have the desired effect of thwarting frivolous litigation but will not have the chilling effect on claims before state commissions as suggested by BellSouth.

Ordering Paragraph:

The Commission directs the parties to include a "loser pays" provision in the interconnection agreement, but the provision should include the caveat that the "loser pays" only in those cases where the outcome is clear and there is a clear winner and loser.

Issue 8(e):
Should language covering tax liability be included in the interconnection agreement, and if so, should that language simply state that each Party is responsible for its own tax liability?

ITC^DeltaCom Position:
Language covering tax liability is not necessary in the interconnection agreement. If such language must be included, the language should specify that the parties implement the contract consistent with applicable tax laws. Each party should bear its own tax liability.

BellSouth Position:
Tax issues are not addressed in Sections 251 or 252 of the Act. Thus, this issue is not subject to arbitration under Section 252 of the Act. If the Commission chooses to address this issue, the Commission should order that the parties include language in the agreement that clearly defines the respective duties of each party in the handling of tax issues

Discussion:

ITC^DeltaCom contends that it is unnecessary to have tax language in the interconnection agreement. (Rozycki, Tr. Vol. 2 at 272) It further contends that if the Commission deems such language appropriate, the language should be simple and require only that each party should obey all applicable tax laws and bear its own tax liability. BellSouth contends that neither Sections 251 nor 252 of the Act address tax liability and that consequently, this issue should be left to negotiation by the parties and should not be arbitrated. BellSouth contends that if the Commission chooses to address this issue, it

should order the parties to include language in the agreement that clearly defines the respective duties and obligations of each party with respect to tax issues. (Varner, Tr. Vol. 2 at 273) BellSouth contends that its proposed tax language is based on its experiences with tax matters and liability issues in connection with the parties' obligations under interconnection agreements.

Upon consideration of this issue and the positions of the parties, the Commission concludes that each party should be responsible for its own tax liability. The Commission believes that tax liability should be assessed outside the interconnection agreement, but if the parties desire a provision in the interconnection agreement, the provision should simply provide that each party will be responsible for its own tax liability.

Ordering Paragraph:

The Commission orders that a provision regarding tax liability in the interconnection agreement, if any, should simply require each party to be responsible for its own tax liability.

Issue 8(f):
Should BellSouth be required to compensate ITC^DeltaCom for breach of material terms of the contract?

ITC^DeltaCom Position:
ITC^DeltaCom seeks performance penalties from BellSouth when BellSouth fails to meet certain performance benchmarks.

BellSouth Position:
This issue is not appropriate for Section 252 arbitration. Moreover, the South Carolina Commission has previously determined that it "lacks the jurisdiction or legislatively-granted authority to impose penalties or fines" in the context of an arbitration proceeding. Finally, ITC^DeltaCom's proposal represents a supplemental

enforcement scheme that is inappropriate and unnecessary. ITC^DeltaCom has adequate legal recourse in the event BellSouth breaches its interconnection agreement. For further information, see BellSouth's position on Issue 1(a).

Discussion:

ITC^DeltaCom requests inclusion in the interconnection agreement of a provision that recognizes a material breach of the interconnection agreement will give rise to liability. According to Mr. Rozycki, this provision is related to ITC^DeltaCom's proposed performance guarantees and will compensate ITC^DeltaCom for BellSouth's failure to comply with the interconnection agreement, particularly for a failure to comply with performance measurements. (Rozycki, Tr. Vol. 2 at 276) BellSouth contends that the issue of compensation for breach of contract, penalties or liquidated damages is not appropriate for arbitration. According to BellSouth, neither Section 251 nor 252 of the Act obligate BellSouth to pay penalties for a breach of the interconnection agreement. Moreover, BellSouth contends that the Commission has already found that it "lacks the jurisdiction to impose penalties or fines" in the context of an arbitration proceeding. (*See* Order No. 97-189, Docket No. 96-358-C (AT&T arbitration), 3/10/97, at 6). Even if the Commission could award penalties, BellSouth contends that the incorporation of ITC^DeltaCom's proposal into the agreement is unnecessary. According to BellSouth, South Carolina law and Commission procedures are available and are adequate to address any breach of contract situation should it arise. (Varner, Tr. Vol. 1 at 486)

Upon consideration of this issue and the positions of the parties, the Commission adopts BellSouth's position as appropriate. This Commission has previously found in this Order, as well as in a previous arbitration order (*See* Order No. 97-189, Docket No. 96-

358-C, March 10, 1997, at 10) that it lacks jurisdiction to impose penalties. In his testimony before the Commission, Mr. Rozycki referred to the compensation from this provision as "penalties." (Rozycki, Tr. Vol. 2 at 277) Further, the Commission believes that South Carolina law and Commission procedures are adequate to address any breach of contract issues that arise and provide the proper redress to ITC^DeltaCom should a breach of the interconnection agreement occur. Therefore, the Commission declines to require a provision in the interconnection agreement that requires BellSouth to compensate ITC^DeltaCom for breach of material terms of the contract.

Ordering Paragraph:

As the Commission has determined that it lacks jurisdiction to impose penalties or fines in the context of an arbitration proceeding and as South Carolina law and Commission procedures adequately address any breach of contract issues that arise, the Commission will not require inclusion of the requested provision in the interconnection agreement.

IV. CONCLUSION

This Order is enforceable against ITC^DeltaCom and BellSouth. BellSouth affiliates which are not incumbent local exchange carriers are not bound by this Order. Similarly, ITC^DeltaCom affiliates are not bound by this Order. This Commission cannot force contractual terms upon a BellSouth or ITC^DeltaCom affiliate which is not bound by the 1996 Act.

This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)

Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	)	
Deployment of Wireline Services Offering	)	CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91
Advanced Telecommunications Capability	)	

ORDER ON REMAND

Adopted: December 23, 1999 **Released: December 23, 1999**

By the Commission: Commissioner Furchtgott-Roth approving in part, dissenting in part and issuing a statement.

I. INTRODUCTION AND OVERVIEW

1. Among the fundamental goals of the Telecommunications Act of 1996 (1996 Act)[1] is the promotion of innovation, investment and competition among all participants and for all services in the telecommunications marketplace, including advanced services.[2] The Commission has issued three orders in this proceeding to date and most recently took an additional step toward implementing Congress's goals for the deployment of competitive advanced services by instituting line sharing obligations for incumbent LECs pursuant to section 251, and establishing spectrum management policies

[1] Telecommunications Act of 1996, Pub. L. 104-104, Feb, 8, 1996, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq. (1996 Act). The 1996 Act amended the Communications Act of 1934. We refer to the Communications Act of 1934, as amended as the "Communications Act" or "the Act."

[2] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) *(Joint Explanatory Statement)*. For purposes of this order, we use the term "advanced services" to mean high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications. The term "broadband" is generally used to convey sufficient capacity – or bandwidth – to transport large amounts of information. As technology evolves, the concept of "broadband" will evolve with it: we may consider today's "broadband" services to be "narrowband" services when tomorrow's technologies appear.

and rules.[3]

2. Central to Congress' goal of widespread deployment of advanced services is section 251 of the 1996 Act. Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets.[4] In the *Advanced Services Memorandum Opinion and Order*, we determined, among other things, that incumbent LECs were subject to the obligations imposed by section 251 in connection with the offering of advanced services that employ packet-switching or other specific technologies such as digital subscriber line (xDSL) technologies.[5] At that time, we found that xDSL-based advanced services were "either" telephone exchange service or exchange access service.[6] Following adoption of the *Advanced Services Memorandum Opinion and Order*, US WEST Communications, Inc., (US WEST) sought review in the United States Court of Appeals for the District of Columbia Circuit, seeking reversal of the Commission's holding that advanced services are either telephone exchange service or exchange access.

3. Upon review of the record we determine that US WEST may not avoid the obligations placed on incumbent LECs under section 251(c) of the Act in connection with the provision of advanced services. We also affirm our initial view in the *Advanced Services Memorandum Opinion and Order* that xDSL-based advanced services are either telephone exchange service or exchange access. We clarify that whether xDSL-based advanced services constitute telephone exchange service or exchange access depends on how such technology is used. We find that when xDSL-based advanced services both originate and terminate "within a telephone exchange," and provide subscribers with the capability of communicating with other subscribers in that same exchange, they are properly classified as "telephone exchange service." We also find that xDSL-based advanced services constitute "exchange access" when they provide subscribers with the ability to communicate across exchange boundaries. We find that "information access service" is not a category separate and distinct from telephone exchange service and exchange access. Therefore, even if xDSL-based advanced services are considered "information access services," this does not remove them from the classifications of

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[3] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998) *(Advanced Services Memorandum Opinion and Order); Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) (*Advanced Services First Report and Order and FNPRM*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, FCC 99-330 (rel. Nov. 9, 1999) (*Advanced Services Second Report and Order*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order, FCC 99-355 (rel. December 9, 1999) (*Advanced Services Third Report and Order*).

[4] *See Advanced Services Memorandum Opinion and Order,* 13 FCC Rcd at 24017, ¶ 11.

[5] *Id.* at 24035-36, ¶ 50.

[6] *Id.* at 24032, ¶40.

telephone exchange service and exchange access.

4. In the *Advanced Services Memorandum Opinion and Order*, we determined, among other things, that incumbent LECs were subject to the obligations imposed by section 251 in connection with the offering of advanced services that employ packet-switching or other specific technologies such as digital subscriber line (xDSL) technologies.[7] At that time, we found that xDSL-based advanced services were "either" telephone exchange service or exchange access service.[8] We found it unnecessary at the time to determine into which of the two service categories the advanced services fell, noting that related issues were pending in other proceedings.[9]

5. In response, the Commission requested the opportunity to consider further the issues raised by US WEST because some of the statutory construction arguments advanced by US WEST in its appellate brief had been presented only summarily and in truncated form before the Commission. The Commission asked that the court grant it the opportunity to address the threshold question of statutory interpretation based on a more complete administrative record. On August 25, 1999, the court granted the Commission's request and remanded the matter back to the Commission.[10] Consequently, on September 9, 1999 the Common Carrier Bureau issued a *Public Notice* seeking comment on the issues raised by US WEST.[11]

6. In response to this *Public Notice*, nineteen comments and twenty replies were filed.[12] The majority of the commenters maintain that the Commission should affirm its holding that xDSL-based advanced services are either telephone exchange service or exchange access.[13] Some commenters maintain, however, that xDSL-based advanced services are telephone exchange service, but not exchange access.[14] Others

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[7] *See Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd 24011, 24035-36 (1998).

[8] *Id.* at 24032, ¶40.

[9] *Id.*

[10] *See US WEST Communications, Inc. v. Federal Communications Commission*, No. 98-1410 (D.C. Cir. Aug. 25, 1999) (order granting motion for remand).

[11] Public Notice: Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order, DA 9901853, released September 9, 1999. The Public Notice listed a number of issues and asked for comment to "aid the Commission in meeting its commitment to the court to consider an address within 120 days the issues raised by US WEST."

[12] Attached as Appendix A is a list of the parties filing comments and replies in this proceeding.

[13] AT&T Comments at 5; CDS Comments at 3-4; Prism Comments at 9; RCN Comments at 2; Sprint Comments at 4-5; Joint CLEC Comments at 10, 19; MGC Comments at 5-6; Williams Reply Comments at 4.

[14] CDS Comments at 2; Focal et. al. Comments at 2; GSA Comments at 3; MCI Comments at 12; MindSpring Comments at 3; RCN Telecom/Connect Comments at 2; TRA Comments at 12; Wisconsin

maintain that such services fall within the definition of exchange access, but not telephone exchange service.[15] A few commenters argue that xDSL-based advanced services are neither telephone exchange service or exchange access, but are more properly classified as "information access" services.[16]

II. US WEST is an Incumbent LEC and May Not Avoid Section 251 Obligations When Providing Advanced Services

7. Sections 251(a) and 251(b) of the Communications Act impose on all LECs certain duties regarding interconnection, resale of telecommunications services, number portability, dialing parity, access to rights-of-way, and reciprocal compensation.[17] Section 251(c) requires incumbent LECs to meet certain additional obligations to potential competitors with respect to interconnection, access to unbundled network elements, resale of their retail services, notification of interoperability changes to their facilities or networks, collocation, and good faith negotiation.[18]

8. US West and other commenters make several arguments in support of the contention that xDSL based advanced services are not subject to the unbundling obligations under section 251(c)(3). US West argues that when a LEC is providing something other than telephone exchange service or exchange access (or network elements used to provide such services), it is not acting as a LEC and therefore is not subject to the obligations of section 251(c)(3). In addition, US WEST argues that if we require access to network elements on an unbundled basis for the provision of advanced services, that could result in unlimited access to all of an incumbent LEC's facilities.[19] None of these arguments has merit. For the reasons set forth below, we conclude that section 251(c)(3) requires incumbent LECs (as defined in section 251(h)) to provide nondiscriminatory access to network elements used to provide all telecommunications services, including advanced services.

9. At the outset, we affirm our prior conclusion that xDSL-based advanced services constitute telecommunications services as defined by section 3(46) of the Act.[20] Although US WEST has argued that these services are neither exchange access nor

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PSC Comments at 3-5.

[15] NorthPoint Comments at 7; Rhythms Comments at 19.

[16] US WEST Comments at 4; SBC Comments at 8; GTE Comments at 8-11; Covad Comments at 7; USTA Reply Comments at 4.

[17] *See* 47 U.S.C. §§ 251(a), 251(b). The interconnection obligation contained in section 251(a) applies to all telecommunications carriers, including LECs. The obligations of section 251(b) apply only to LECs.

[18] *See* 47 U.S.C. § 251(c).

[19] US WEST Reply Comments at 8-9

[20] *See Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd 24012 at ¶¶ 35-36.

telephone exchange services,[21] even US WEST has expressly conceded that advanced services fall within the broad ambit of telecommunications services. In its comments, US WEST has stated that "a telephone company's obligation to provide access to unbundled elements is not dependent on the requester's provision of telephone exchange service or exchange access; rather, unbundled elements must be made available to providers of any telecommunications service, *including advanced services*."[22] Although US WEST has acknowledged that advanced services constitute a type of telecommunications service, US WEST nonetheless argues that the requirements of section 251(c) (3) are not triggered when a carrier provides access to network elements used solely for the provision of advanced services.[23] It contends that when an entity that is otherwise an incumbent LEC is providing something other than telephone exchange service or exchange access service (or network elements used to provide such services), it is not acting as an incumbent LEC and therefore is not subject to the obligations of section 251(c)(3).[24] We reject that assertion.

10. We find no support for US WEST's position in the language of section 251. Nor has US WEST shown how the purposes of the section or the Act would be furthered by making section 251(h) subject to further constraints.[25] Congress has specifically defined an incumbent LEC for purposes of section 251. Pursuant to section 251(h), an incumbent local exchange carrier for any area means the local exchange carrier that "(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area" and (B) was a member of NECA, the exchange carrier association under section 69.601(b) of the Commission's regulations, or a successor or assign of such a member. Thus, the relevant inquiry for purposes of determining who is an incumbent LEC pursuant to section 251(c) is whether a carrier provided telephone exchange and exchange access service in a given service area on February 8, 1996. There can be no dispute that US WEST provided both telephone exchange and exchange access service on that date. US WEST thus satisfies the statutory definition in section 251(h) and is an incumbent LEC for purposes of section 251. Therefore, because advanced services are telecommunications services, an incumbent LEC (as defined in section 251(h)) must provide nondiscriminatory access to network elements used to provide xDSL-based advanced services consistent with the requirements of section 251(c)(3). We further agree with those commenters who argue that if Congress intended to remove xDSL-based advanced services from the reach of section 251(c), Congress would have done so in a more explicit fashion.[26] For example, in section

[21] *See* ¶¶18-19 infra.

[22] US WEST Comments at 19 (emphasis added).

[23] US WEST Comments at 19.

[24] US WEST Comments at 6.

[25] *See* ¶ 19.

[26] *See* Joint CLEC Comments at 11.

251(c)(2) Congress provided that the interconnection obligations thereunder are triggered not for all telecommunications service, but only "for the transmission and routing of telephone exchange service and exchange access."[27]

11. In fact, as demonstrated by section 251, Congress elected to impose different and increasingly more rigorous obligations on "telecommunications carriers," "local exchange carriers," and "incumbent local exchange carriers." The statutory construction proferred by various incumbent LECs would effectively eliminate these distinctions. Congress used these statutory definitions as a means of assigning carriers to the appropriate section 251 "box," or of exempting them from section 251 entirely.[28] Once a carrier is classified as an incumbent LEC pursuant to section 251(h), the extent to which the individual duties established by the provisions of section 251(c) apply to its various services and facilities is determined by the specific provision in which the duty is set forth.[29] For example, because we determine below that xDSL-based advanced services are exchange access or telephone exchange services, incumbent LECs must provide requesting carriers with interconnection pursuant to section 251(c)(2). Pursuant to section 251(c)(3), incumbent LECs must unbundle facilities used to provide xDSL-based advanced services because these services constitute telecommunications services.

12. Moreover, neither US WEST, SBC, nor any other party has explained how exempting xDSL-based advanced services from section 251(c) would further the purposes of this section or the 1996 Act. We find no evidence that Congress intended to eliminate the Commission's authority to require access to network elements used to provide advanced services -- a result which is at odds with the technology neutral goals of the Act and with Congress' aim to encourage competition in all telecommunications markets.[30]

13. Finally, we reject US WEST's contention that if we consider a carrier to be an incumbent LEC under section 251 when it provides a service other than telephone exchange service or exchange access service, then such a reading of section 251 would inevitably require GTE and Sprint, acting in their capacity as incumbent LECs, to unbundle all their facilities, including their long distance facilities.[31] We find no merit to this contention because it ignores the limitations Congress has established in section 251(d)(2).

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[27] 47 U.S.C. § 251(c)(2).

[28] See Letter from Larry Irving, NTIA, to Chairman William E. Kennard at 7 n.22, CC Docket Nos. 98-91; 98-32, 98-26, 98-11 (filed July 11, 1998).

[29] *See* AT&T Comments at 5.

[30] *See* Federal State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45; 12 FCC Rcd. 8776, 8802-8803 (noting the importance of competitive and technological neutrality to promote competition).

[31] US WEST Reply Comments at 8-9.

14. Section 251(d)(2) imposes a limitation on an incumbent LEC's unbundling obligation pursuant to section 251(c)(3). In a recent rulemaking proceeding, we set forth the standards the Commission will apply to determine which network elements should be unbundled.[32] With regard to non-proprietary elements, a requesting carrier typically may access unbundled network elements if the failure to provide such access would impair the ability of a requesting carrier to provide the services it seeks to offer. With regard to proprietary network elements, a requesting carrier typically may obtain unbundled access to an incumbent LEC's network element if such access is necessary. Pursuant to this standard, the Commission has declined to require incumbent LECs to provide unbundled access to their packet switches.[33] These standards provide ample protection that the unbundling obligations under section 251(c) are consistent with section 251's underlying goal of opening the local market to competition.

III. Statutory Classification of xDSL-Based Advanced Services

15. As noted above, certain obligations set forth in section 251 are specific to the provision of "telephone exchange service" or "exchange access." The primary distinction between these two services is that, while telephone exchange services permit communication "within a telephone exchange" or "within a connected system of telephone exchanges within the same exchange area,"[34] exchange access refers to access to telephone exchange services or facilities for the purpose of originating or terminating communications that travel outside an exchange.[35] Thus, in order to determine into which category xDSL-based services fall, we must determine, as a threshold matter, whether such traffic originates and terminates within the equivalent of an exchange area, in which case it may be classified as "telephone exchange service," or whether such traffic originates in one exchange and terminates in another, in which case it is properly classified as "exchange access."[36]

16. The Commission traditionally has determined the nature of communications by looking to the end points of the communication, and has consistently rejected attempts to divide communications at any intermediate points of switching or

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[32] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996;* Third Report and Order, CC Docket No. 96-98; FCC 99-238 at ¶ 49 (rel. November 5, 1999) (*Local Competition Third Report and Order*).

[33] *See Local Competition Third Report and Order*, at ¶ 306.

[34] 47 U.S.C. § 3(47)(A).

[35] 47 U.S.C. § 3(16).

[36] We note that our conclusion that whether advanced, packet-switched services constitute "telephone exchange service" or "exchange access" depends on the circumstances in which they are provided, is no different from the conclusion that circuit-switched services constitute either telephone exchange service or telephone toll service, depending upon the end points of the communication. *See* Joint CLEC Commenters Comments at 8.

exchanges between carriers. [37] With respect to xDSL-based advanced services used to connect Internet Service Providers (ISPs) with their dial-in subscribers, the Commission has determined that such traffic does not terminate at the ISP's local server, but instead terminates at Internet websites that are often located in other exchanges, states or even foreign countries.[38] Consistent with this determination, we conclude that typically ISP-bound traffic does not originate and terminate within an exchange and, therefore, does not constitute telephone exchange service within the meaning of the Act. As explained more fully below, such traffic is properly classified as "exchange access." In contrast, work-at-home applications and other non-Internet communications may be properly classified as "telephone exchange service" if they originate and terminate within a local exchange area.[39]

A. xDSL-Based Advanced Services May be Classified as Telephone Exchange Services

1. Background

17. We first address whether a service that employs xDSL technology may be classified as telephone exchange service within the meaning of the Act.[40] The 1996 Act provides two alternative definitions for the term "telephone exchange service."[41] The

[37] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, , Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, 3695-3696 at ¶10 (1999)("*Reciprocal Compensation Order*).

[38] In reaching this conclusion, the Commission acknowledged the difficulty of identifying a point of "termination" in the packet-switched network environment of the Internet. The Commission noted, for example, that, in a single Internet communication, an Internet user may access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located either in the same local exchange or in another country. *Id.*

[39] As we noted in the *GTE ADSL Tariffing Order*, xDSL-based technology is used to support variety of applications that are potentially local in nature, such as certain "work-at-home" applications. In the *GTE ADSL Tariffing Order*, we noted that such "work-at-home" applications are "intrastate" and, therefore, should be tariffed at the state level. *GTE ADSL Tariffing Order* at ¶ 27.

[40] We note that xDSL itself is not a service. Rather, xDSL is a technology used to provide transmission services.

[41] A "telephone exchange service" is a type of "telecommunications service." *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15636 (1996) (*Local Competition Order*), motion for stay denied, 11 FCC Rcd 11754 (1996), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996). The statutory definition of "telecommunications service" requires the offering of service "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 3(46). The Commission has previously stated that the phrase "for a fee" in section 3(46) of the Act "means services rendered in exchange for something of value or a monetary payment." *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, at ¶ 784 (rel. May 8, 1997), Erratum, CC Docket No. 96- 45, FCC 97-157 (rel. June 4, 1997).

first definition, which is codified in section 3(47)(A), provides that telephone exchange service includes "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge."[42] The second definition, which is codified in section 3(47)(B), provides that the term also includes "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[43] In the *Advanced Services Memorandum Opinion and Order*, we noted that section 3(47)(B) was added to ensure that the definition of telephone exchange service was not limited to traditional voice telephony, but included non-traditional "means of communicating information within a local area."[44]

18. U S WEST contends that prior decisions by the Commission establish that three characteristics must be present before a service may fall within the scope of the "telephone exchange service" definition. First, the service must begin and end "within a telephone exchange" or "within a connected system of telephone exchanges."[45] Second, the service must permit "intercommunication," which U S WEST describes as the ability of every subscriber to communicate with every other subscriber connected to switched network within a particular exchange area.[46] Third, the service must be covered by "the exchange service charge." U S WEST argues that xDSL-based services do not encompass any of the foregoing characteristics and, therefore, do not constitute telephone exchange services within the meaning of the Act.[47]

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[42] 47 U.S.C. § 153(47)(A). The United States Court of Appeals for the Fourth Circuit explains that "telephone exchange service" is a "statutory term of art ... [that] means service within a discrete local exchange system...." *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1045 Cir.1976, *cert. denied*, 434 U.S. 874 (1977). The term "exchange service" generally refers to service within local calling areas which is covered by an exchange service charge, as distinct from "toll service" between exchanges for which there is a separate additional charge. *See In the Matter of Declaratory Ruling on the Application of Section 2(b)(2) of the Communications Act of 1934 to Bell Operating Companies*, CC Docket No. 85-197, FCC 87-53, Memorandum Opinion And Order, 2 FCC Rcd 1750, at ¶ 27 n.47.

[43] 47 U.S.C. § 153(47)(B).

[44] *Advanced Services Order* at ¶ 41 (citing Comments of Senators Stevens and Burns, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (*January 1998 Report to Congress*) (filed Jan. 26, 1998), at 2, n.1).

[45] U S WEST Brief at 19 (citing 47 U.S.C. § 153(47)(A).

[46] U S WEST Brief at 19-20 (citing *BellSouth Louisiana II Order*, 13 FCC Rcd. At 20622; *General Tel. Co. of Calif.*, 13 FCC Rcd. 448, 460 (1968); *Offshore Tel. Co.*, 3 FCC Rcd. 4137, 4142 (1988).

[47] U S WEST Brief at 19 (citing *GTE ADSL Order*, 13 FCC Rcd. At 22470-72; *Bell Atlantic Tel. Cos.*, 13 FCC Rcd. 23667, 23668 (1998)). U S WEST contends, for example, that DSL-based services do not originate and terminate within the equivalent of a local exchange area, but instead terminate at destinations located around the world. U S WEST further argues that, in contrast to traditional telephone exchange service, DSL-based services do not interconnect with the traditional circuit-switched network and,

19. U S WEST acknowledges that section 3(47)(B) may expand the range of services that constitute "telephone exchange service" within the meaning of the Act.[48] It argues, however, that the 1996 Amendment extends only to "those services that are functionally similar to and can substitute for the switched local services" described in section 3(47)(A).[49] According to U S WEST, support for this interpretation of section 3(47)(B) can be found in at least two prior Commission orders. It notes, for example, that the Commission previously has construed the term "comparable" as referring to: (1) services that could become "true economic substitutes for wireline local exchange service;"[50] and (2) the provision of local exchange service over alternative facilities, such as substitutes for the copper loop.[51]

2. Discussion

a) Section 3(47)(A)

20. We conclude that xDSL-based advanced services, when used to permit communications among subscribers within an exchange, or within a connected system of exchanges, constitute telephone exchange services within the meaning of section 3(47)(A) of the Act. U S WEST correctly notes that, in cases involving voice communication, the Commission has long interpreted the traditional telephone exchange definition to refer to "the provision of individual two-way voice communication by means of a central switching complex to interconnect all subscribers within a geographic area."[52] Contrary to U S WEST's contention, however, the Commission has never suggested that the telephone exchange service definition is limited to voice communications provided over the public circuit-switched network.

21. As we noted in the *Advanced Services Memorandum Opinion and Order*, neither the statutory language nor the legislative history accompanying section 3(47) limits the term "telephone exchange service" to the provision of voice services.[53] Moreover, we note that the local public switched network has been used for dial-up

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therefore, do not permit "ubiquitous local intercommunication." U S WEST Brief at 19-20. Finally, US WEST contends that DSL services are not covered by the exchange service charge. U S WEST Brief at 22.

[48] U S WEST Brief at 24.

[49] U S WEST Brief at 23-24.

[50] U S WEST Brief at 24 (citing *Local Competition Order*, 11 FCC Rcd. at 15999-16000).

[51] U S WEST Brief at 25 (citing Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11501, 11528 (1998)).

[52] *Midwest Corp.*, 53 FCC.2d 294, 300 (1975); *Offshore Tel. Co. v. South Cent. Bell Tel. Co.*, 6 FCC Rcd. 2286, 2287 (1991); *Domestic Public Radio Svc.*, 76 FCC.2d 273, 281 (1980); *Application of BellSouth Corp. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599, 20621 (1998).

[53] *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24032, ¶ 41. *See also* Cable and Wireless Reply Comments at 5.

access to data transmission services for many years.[54] For example, whenever a facsimilie is sent from a home or office to another party within the local area, the transmission is a data transmission rather than a voice transmission, but such transmissions nevertheless constitute telephone exchange service. Consistent with this, the Commission has expressly made the rules governing basic telephone exchange service equally applicable to LEC provision of data and voice services.[55] The parties have not persuaded us that we should depart from this long-standing practice. Indeed, in this era of converging technologies, limiting the telephone exchange service definition to voice-based communications would undermine a central goal of the 1996 Act--opening local markets to competition to all telecommunications services. We thus conclude, consistent with past practice, that the term "telephone exchange service" encompasses voice and data services.

22. We further disagree with U S WEST that the statutory language or Commission precedent suggest that the term "telephone exchange service" is limited to services that employ circuit-switching technology. Although the definition of what constitutes an "exchange" traditionally has been linked to the area served by a switch, or by an interconnected system of switches,[56] the statutory language does not support a conclusion that only services that employ circuit-switching technology constitute telephone exchange service within the meaning of the Act.[57] Indeed, we have previously noted that the "[t]he concept of an exchange is based on geography and regulation, not equipment."[58] Thus, the interconnection obligations set forth in section 251(c)(2) apply to packet-switched services as well as circuit-switched services.

23. Although we reject the contention that the term telephone exchange service is limited to voice communications, we agree with U S WEST that the statutory text and Commission precedent support a conclusion that telephone exchange services

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[54] *See e.g.*, CoreComm Comments at 8.

[55] *In the Matter of International Business Machines Corp. Petition for Declaratory Ruling that Southern Bell Telephone and Telegraph Company Offer its Local Area Data Transport Service on an Unbundled and Detariffed Basis Pursuant to Section 64.702 of the Commission's Rules*, FCC 86-122, ENF 83-34, Memorandum Opinion and Order on Reconsideration (1986); *see also Advanced Services Order* at ¶ 47 (noting that the interconnection obligations set forth in section 251 apply equally to voice and data services). Some commenters point out that at least four state commissions have concluded that certain packet-switched services, such as frame-relay service, constitute "telephone exchange services," within the meaning of the Act. *See e.g.*, Joint CLEC Commenters Comments at 17-18.

[56] *See* U S WEST Brief at 7 (citing Harry Newton, NEWTON'S TELECOM DICTIONARY 301 (15th ed. 1999).

[57] We note that in the "pre-switching" era, plugs and cords, not circuit switches, were used to provide the original "telephone service, and this original telephone service actually established a "private line" between two parties. This was the typical arrangement in 1934, the year of the adoption of the original Communications Act.

[58] *BellSouth Louisiana II Order* at ¶ 30 & n.68 (citing H. Newton, NEWTON'S TELECOM DICTIONARY (1998) at 277.

must permit "intercommunication" among subscribers within the equivalent of a local exchange area.[59] The term "intercommunication" is not defined in the Act or the Commission's rules. Commission precedent establishes, however, that, as used in section 3(47)(A), "intercommunication" refers to a service that "permits a community of interconnected customers to make calls to one another over a switched network."[60] We, therefore, find that a service satisfies the "intercommunication" requirement of section 3(47)(A) as long as it provides customers with the capability of intercommunicating with other subscribers.

24. U S WEST contends that because an xDSL-based advanced service subscriber must specify the ISP or third party with whom his or her computer is connected, such services do not permit the type of "intercommunication" described in section 3(47)(A). We find, however, that U S WEST's narrow focus on the manner in which xDSL-based advanced services are provisioned is misplaced. In classifying a particular service the relevant inquiry is broader. We find that although a customer must designate the ISP or third party to whom his or her high-speed data transmissions are directed, once on the packet-switched network, a customer may rearrange the service to communicate with any other subscriber located on that network through the use of packet-switching technology. We thus conclude that xDSL-based services provide end-users with the type of intercommunicating capability envisioned by section 3(47)(A).

25. We further find the cases cited by U S WEST to support its contention that services offered over a predesignated transmission path do not constitute telephone exchange service to be readily distinguishable from the xDSL-based services we consider here. Indeed, the services at issue in each of those proceedings were offered over private lines.[61] Private line service is defined as "a service whereby facilities for

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[59] *See In the Matter of General Telephone Company Of California (formerly California Water and Telephone Company) The Associated Bell System Companies; The General Telephone System And United Utilities, Inc. Companies Applicability of Section 214 of the Communications Act with Regard to Tariffs for ChannelService for Use by Community Antenna Television Systems,* Docket No. 17333, FCC 68-658, 13 Rad. Reg. 2d (P & F) 667, Decision, at ¶ 24. ("Manifestly, the phrase [telephone exchange service] is intended primarily to apply to a telephone or comparable service involving 'intercommunication,' *i.e.*, a two-way communication, not the one-way transmission of signals which takes place with respect to CATV channel service".).

[60] *Offshore Tel. Co.*, 3 FCC Rcd. 4137, 4142 (1988); see also *BellSouth Louisiana II Order*, 13 FCC Rcd. at 20621 (noting that telephone exchange service involves "a central switching complex which interconnects all subscribers within a geographic area"); *see also General Tel. Co. of Cal.*, 13 FCC 2d 448, 460, ¶ 24 (1968) ("Manifestly, the phrase [telephone exchange service] is intended primarily to apply to a telephone or comparable service involving 'intercommunication,' *i.e.*, a two-way communication, not the one-way transmission of signals which takes place with respect to CATV channel service".).

[61] *Midwest Corp.* involved a one-way television service used by commercial and institutional subscribers for the simultaneous reception of specialized communications. *Midwest Corp.* 53 FCC 2d at 300, ¶ 10. *Cox Cable Communications* involved digital transmission services (DTS) offered on a non-switched basis to particular institutions and private businesses, rather than services offered to the public indiscriminately. Unlike non-switched, private line type services, DSL-based services involve packet switching, which allows DSL subscribers to communicate with any other subscriber on the packet-switched network. In addition to the services being offered over private lines, the cases cited by U S WEST involved factual

communications between two or more designated points are set aside for the exclusive use or availability of a particular customer and authorized users during stated periods of time."[62] The xDSL-based services we consider in the instant proceeding function differently than private line services. Although an xDSL-based advanced service subscriber typically will predesignate the ISP or third party to whom his or her high-speed data transmissions are directed, the customer may, with relative ease, designate that his or her traffic be directed to a different ISP or third party. Changing the destination of the permanent virtual connection (PVC) can be done administratively, without disconnecting the customer's service.[63] Customers subscribing to private line service, in contrast, may communicate only between those specific, predetermined points set aside for that customer's exclusive use. If a private line customer wishes to communicate with a second end-point, the customer (unlike a xDSL-based advanced service subscriber) must order another private line. Similarly, if the customer wishes to have only one private line, the customer must have the first line disconnected. Thus, other than the fact that both services involve an initial connection between an end-user and a service provider, xDSL-based advanced services are readily distinguishable from private line service in ways critical to our application of the "telephone exchange service" classification.[64]

26. We recognize that, in the *GTE ADSL Tariffing Order*, the Commission noted that a dedicated connection between an end-user and a service provider's point of presence is similar to private line service.[65] We do not find, however, that such an observation is relevant with respect to determining whether services that employ xDSL

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circumstances substantially different from those here. *Offshore Telephone*, for example, involved a dispute relating to pre-divestiture toll sharing, in which Offshore, a specialized radio communications carrier, complained that AT&T had engaged in unlawful discrimination by refusing to enter into toll sharing arrangements with Offshore while, at the same time, extending such arrangements to local exchange carriers. The Commission found that Offshore had failed to prove that it was a local exchange carrier and, therefore, was not similarly situated with local exchange carriers participating in the toll sharing. The Commission found it relevant that: (1) "Offshore's subscribers were a limited group of specialized business customers that used dedicated private lines to make long distance calls to and from offshore rigs and platforms;" (2) Offshore was not certified as a local exchange carrier; (3) Offshore classified its revenues as private line service revenues derived from interstate toll, not "local service revenues;" and (4) Offshore did not itself provide exchange switching. *Offshore at ¶ 11.* In contrast the record in the instant proceeding indicates that providers of xDSL-based services are certified as local exchange carriers and serve a broad base of customers. *See e.g.,* MGC Communications Comments at 1; DSLnet Comments at 2. Moreover, such carriers typically have deployed their own packet-switched networks and use their own facilities to route their subscribers' communications.

[62] 47 C.F.R. § 21.2.

[63] *See* Joint CLEC Commenters Comments at 9 (noting that setting up a PVC between two end points is a keyboard operation that takes seven minutes or less).

[64] *See* Joint CLEC Commenters Comments at 9 n.8 (stating that, unlike private line service, an end-user with a PVC targeted to one location may use that link to reach any other end user in that network).

[65] *GTE ADSL Tariffing Order* 13 FCC Rcd at 22478, ¶ 25.

technology may constitute telephone exchange service within the meaning of the Act. Rather, the key criterion for determining whether a service falls within the scope of the telephone exchange service definition is whether it permits "intercommunication." As noted above, in this regard, xDSL-based advanced service and private line service are distinguishable in that xDSL-based services permit intercommunication and private line services do not.

27. The final requirement in section 3(47)(A) is that telephone exchange services be covered by "the exchange service charge."[66] Although this term is not defined in the Act or the Commission's rules we glean its meaning from the context in which the phrase is used. We agree with those commenters who argue that the phrase implies that an end-user obtains the ability to communicate within the equivalent of an exchange area as a result of entering into a service and payment agreement with a provider of a telephone exchange service.[67] Specifically, we concur with AT&T that the "covered by the exchange service charge" clause comes into play only for the purposes of distinguishing whether or not a service is a local (telephone exchange) service, by virtue of being part of a "connected system of exchanges," and not a "toll" service.[68] Any other interpretation would confer upon LECs the ability to remove services at will from the definition of "telephone exchange services" simply by calling charges for these services something other than "exchange service charges" on their bills. We thus find that any charges that a LEC assesses for originating and terminating xDSL-based advanced services within the equivalent of an exchange area would be covered by the "exchange service charge."

28. We thus reject U S WEST's contention that, because the price of xDSL-based services is not included within the price of basic local telephone service, such services are not covered by "the exchange service charge." Indeed, we note that, in a competitive environment, where there are multiple local service providers and multiple services, there will be no single "exchange service charge."[69] We further note that, if a service otherwise satisfies the telephone exchange service definition, a LEC has the option of including the price of that service within the price it charges consumers for basic local telephone service. The fact that U S WEST, or any other LEC, chooses to list the charge for basic local telephone service and xDSL-based advanced service separately

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[66] 47 U.S.C. § 3(47)(A).

[67] The Webster's Third New International Dictionary defines the verb to "subscribe" as "to agree to take and pay for something (as stock) by signing one's name to a formal agreement." A subscriber is defined as "one that subscribes." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971 ed.); *see also In* the Matter of Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications act of 1934, As Amended, To Provide In-region, InterLATAa Services in Oklahoma, CC Docket No. 97-121, FCC 97-228, 12 FCC Rcd. 8685 (rel. June 26, 1997) (concluding that the term "subscribers," as used in section 3(47)(A) suggests that persons receiving the service pay a fee).

[68] See AT&T Comments at 11, n. 11.

[69] *See* Level 3 Communications Comments at 5.

on end-users' bills is not relevant to a determination of whether the price for the xDSL-based advanced service offering is covered by the exchange service charge.

(b) Section 3(47)(B)

29. We conclude that a service falls within the scope of section 3(47)(B) if it permits intercommunication within the equivalent of a local exchange area and is covered by the exchange service charge. In setting forth the types of services that may fall within the scope of section 3(47)(B), Congress determined, as an initial matter, that such services must be "comparable" to the services described in section 3(47)(A). Although the term "comparable" is not defined in the Act, it is generally understood to mean "having enough like characteristics and qualities to make comparison appropriate."[70] The xDSL-based advanced services at issue here, when they originate and terminate within an exchange area, satisfy the statutory definition of telephone exchange service under clause (B) of section 3(47) as well, and that clause provides an alternative basis for our conclusion that these services may constitute telephone exchange services. We note that neither the statutory text nor the legislative history accompanying section 3(47)(B) provides guidance on which characteristics and qualities must be present in order for a service to fall within the scope of section 3(47)(B). In these circumstances, we presume that Congress sought to provide the Commission with discretion in determining whether a particular telecommunications service is sufficiently "comparable" to the services described in section 3(47)(A) to constitute telephone exchange service within the meaning of the Act.[71]

30. We agree with U S WEST that the term "comparable," as used in section 3(47)(B), means that the services described therein share some of the same characteristics and qualities as the services described in section 3(47)(A). Because we find that the term "comparable" means that the services retain the key characteristics and qualities of the telephone exchange service definition under subparagraph (A), we reject the argument that subparagraph (B) eliminates the requirement that telephone exchange service permit "intercommunication" among subscribers within a local exchange area. As prior Commission precedent indicates, a key component of telephone exchange service is "intercommunication" among subscribers within a local exchange area.[72]

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[70] WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1976); *see also* MCI Comments at 18; Sprint Comments at 4; U S WEST Brief at 24.

[71] *See United States v. Haggar Apparel Company*, 119 S.Ct. 1392, 1400 (1999) ("Here Congress has authorized the agency to issue rules so that the [statute] may be applied to unforeseen situations and changing circumstances in a manner consistent with general intent."); *see also* RCN Telecom Comments at 5-6; Level 3 Comments at 6.

[72] If section 3(47)(B) were interpreted as eliminating an "intercommunication" requirement, private line services would fall squarely within the definition of telephone exchange service, thus subjecting private line carriers to regulation as LECs. We do not find that, by amending the statute, Congress intended to extend the telephone exchange definition to encompass carriers that historically have been excluded from common carrier regulation. Indeed, in this regard, we agree with U S WEST that section 3(47)(B) was intended to expressly encompass the provision of telephone exchange service over facilities separate from the public switched network, such as packet-switching. Section 3(47)(B) provides, for example, that the

31. We reject U S WEST's contention, however, that section 3(47)(B) is limited to services that are "market substitutes" for two-way switched voice service. We recognize that, in the *Local Competition Order*, the Commission determined that section 3(47)(B) includes cellular and other wireless services because such services provide two-way voice communication that could "become...true economic substitute[s]" for traditional two-way switched voice services. Contrary to U S WEST's contention, however, the Commission never suggested that the telephone exchange service definition is limited to voice services or that substitutability is a necessary criterion for determining whether a particular telecommunications service falls within the scope of section 3(47)(B). We note however that xDSL-based services, in fact, are being used to replace local dial-up traffic to ISPs and third parties.

32. Other provisions in the Act support a conclusion that, although the services described in subsection (A) and subsection (B) of the telephone exchange service share some of the same characteristics and qualities, they are not necessarily identical services. Section 271, in particular, states that, in order for a BOC to obtain authorization to provide in-region, interLATA service, it must demonstrate that it is providing access and interconnection to "one or more unaffiliated competing providers" of the type of telephone exchange service described in section 3(47)(A) to residential and business subscribers. A BOC does not satisfy the requirements of section 271 on the basis of a competing provider of the type of services described in section 3(47)(B). Congress's decision to specifically limit section 271 authorization to the types of services described in section 3(47)(A) suggests that, while the services described in subsection (B) and subsection (A) share similar qualities, they are not necessarily identical service offerings.

B. xDSL-Based Services May Be Classified as Exchange Access

1. Background

33. The next question we address is whether, and under what circumstances, xDSL-based advanced services may be classified as exchange access under the Act. As we have previously found in the *Reciprocal Compensation Order*, xDSL-based advanced services that are used to connect ISPs with their subscribers to facilitate Internet bound traffic typically constitute exchange access service because the call initiated by the subscriber terminates at Internet websites located in other exchanges, states, or foreign countries.[73] The mechanics of the Internet bound call are critical to our determination

services described therein may be provided "through a system of switches, transmission equipment, or *other facilities* (or combination thereof)."

[73] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, , Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999)("*Reciprocal Compensation Order*"). In reaching the determination that calls to ISPs are typically exchange access, the Commission rejected the contention that ISP-bound traffic consists of "two calls," one of which typically originates and terminates within an exchange area, because "'both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications'." Id. at ¶11(citations omitted). The Commission explained that it has consistently "rejected attempts to

that the xDSL-based advanced service provided by the local exchange carrier indeed is exchange access. For that reason, we briefly review the manner in which the call is executed.

34. An ISP is an entity that provides its customers with the ability to obtain a variety of on-line information through the Internet. However, ISPs typically own no telecommunications facilities. In order to provide those components of Internet access services that involve information transport, ISPs lease lines, and otherwise acquire telecommunications, from telecommunications providers - - LECs, CLECs, IXCs and others.[74] ISP's purchase use of analog and digital lines from LECs to connect to their dial-in subscribers. Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. To provide transport within its network, the ISP may purchase interexchange telecommunications services from telecommunications carriers, and for transport beyond its network, the ISP either purchases additional interexchange telecommunications from telecommunications carriers, or makes arrangements to interconnect its leased facilities with one or more Internet backbone providers.[75] Thus, the information service is provisioned by the ISP "via telecommunications" including interexchange telecommunications although the Internet service itself is an "information service" under section 3(2) of the Act, rather than a telecommunications service.[76]

2. Discussion

35. The issue we address here is whether xDSL-based services may constitute

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divide communications at any intermediate points of switching or exchanges between carriers," id. at ¶10 - 11, citing *BellSouth MemoryCall* (rejecting the argument that a call answered by a voice mail service should be treated as a call to the number dialed followed by an information service call from that number to the voice mail address); *Teleconnect* (rejecting the argument that Teleconnect's 800 service should be treated as a call to Teleconnect followed by a call from Teleconnect to the number dialed); *Southwestern Bell* (rejecting the argument that a credit card call should be treated as a call from the card user to an interexchange carrier followed by a second call). *See Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992)("*BellSouth MemoryCall*"); *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995)("*Teleconnect*"), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); and *In the Matter of Southwestern Bell Tel. Co.*, CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988) ("Southwestern Bell")

[74] See Federal – State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd at 11540, ¶ 81 (1998)(hereinafter "Universal Service Report to Congress").

[75] Id. at 13 FCC Rcd 11532-11533, ¶ 66.

[76] Id. at 11536, ¶73. In fact, a service would not satisfy the definition of "information service" unless it had an underlying "telecommunications" component. Further, the telecommunications inputs underlying Internet services are subject to the universal service contribution mechanism. As the Commission has previously explained, "Companies that are in the business of offering basic interstate telecommunications functionality to end users are 'telecommunications carriers," and therefore are covered under the relevant provisions of sections 251 and 254 of the Act. Id. at ¶105

exchange access under the Act. This question arises primarily in the context of services provided to ISPs to facilitate their provision of Internet access services. Applying the definitions contained in section 3 of the Act, we conclude that the service provided by the local exchange carrier to the ISP is ordinarily exchange access service because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange, using both the services of the local exchange carrier and in the typical case the telephone toll service of the telecommunications carrier responsible for the interexchange transport.[77]

36. We evaluate two relevant definitions contained in the Act. Section 3(16), a new provision of the Act, defines "exchange access" as the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of *telephone toll service*." (emphasis added) Section 3(48), which was in the original Act, in turn defines "telephone toll service" as "telephone service between stations in different exchanges for which there is made a separate charge."[78] We conclude that because the local exchange carrier provides access permitting the ISP to complete the transmission from its subscriber's location to a destination in another exchange using the toll service it typically has purchased from the interexchange carrier, the access service provided by the local exchange carrier is for the "origination or termination of telephone toll service" within the meaning of the statutory definition. In reaching this conclusion, we further find that the interexchange carrier that provides the interexchange telecommunications to the ISP charges the ISP for those telecommunications and that charge is separate from the exchange service charge that the ISP or end user pays to the LEC. As a result, the "separate charge" requirement of section 3(48) is satisfied with respect to the underlying interexchange telecommunications.

37. We therefore reject the argument of those commenters who suggest that the *only* service originated or terminated by the local exchange carrier, when it provides access to the ISP, is an information service.[79] We previously rejected a similar argument in the *Universal Service Report to Congress,* where we held that carriers that offer basic interstate telecommunications functionality to end users (such as ISP subscribers) are

[77] These services are "telephone exchange service" when they originate and terminate within an exchange area and "exchange access" when they originate in one exchange and terminate in another. In the *Reciprocal Compensation Order*, we stated that ISPs are "users of access service. *"Reciprocal Compensation Order at ¶17.* We did not mean to suggest there that calls involving ISPs are never "telephone exchange service." To the contrary, we expressly recognized that "ISP-bound traffic is jurisdictionally mixed" (*id.* at ¶19). In concluding in the *Reciprocal Compensation Order* that ISP-bound traffic is not subject to section 251(b)(5), we were focusing on the "substantial portion of Internet traffic" that "involves accessing interstate or foreign websites" (*id.* at ¶18). In particular, we rejected the argument that ISP-bound traffic must be subject to section 251(b)(5) because *all* ISP-bound traffic allegedly consists of "two calls." Consistent with Commission precedent, in the *Reciprocal Compensation Order* we rejected the "two-call" argument and determined that a call from an end users subscriber to an Internet destination constitutes but a single call. *See supra*, note 69.

[78] 47 U.S.C. §(3)(48).

[79] SBC Comments at 9; GTE Reply Comments at 8.

"telecommunications carriers" covered by the relevant provisions of section 251 and 254 of the Act "regardless of the underlying technology those service providers employ, *and regardless of the applications that ride on top of their services.*"[80] In other words, even though the access provided to the ISP by the local exchange carrier facilitates the delivery of an information service because of the "applications that ride on top" of the telecommunications service, that same access necessarily facilitates the origination of the underlying telephone toll service used to transport the ISP's Internet access service. Therefore, while some commenters object that the LECs' services cannot be "exchange access" because there is no origination and termination of traffic to and from a telecommunications carrier, their argument fails whenever the ISP effectuates its transmission using the telephone toll service of a telecommunications carrier, as it generally does.

38. We recognize that this analysis with respect to "exchange access" does not by its terms cover traffic jointly carried by an incumbent LEC and a competitive LEC to an ISP where the ISP self-provides the transport component of its internet service. We leave for another day the question of whether the LEC-provided portion of such traffic (which we believe to be rare) falls within the definition of "exchange access" in section 3(16) and whether, as a result, the incumbent LEC would be subject to the interconnection obligations of section 251(c)(2) with respect to such traffic. We find, however, that even if such traffic traveling over the facilities of an incumbent LEC and a competitive LEC to an ISP falls outside the scope of section 3(16) and is not covered by section 251(c)(2), the ILEC would nevertheless be subject to interconnection obligations imposed by section 251(a) and (to the extent that the service is interstate) section 201(a). Moreover, we note that, to the extent that the LEC-provided portion of such traffic may not fall within the definition of "exchange access," the predominantly inter-exchange end-to-end nature of such traffic nevertheless renders it largely non-local for purposes of reciprocal compensation obligations of section 251(b)(5). In light of our authority to require interconnection under sections 201(a) and 251(a) even in the ISP self-provisioning context, we expect incumbent LECs to continue providing interconnection to competitive LECs without imposing tariff, certification or other requirements on competitive LECs requesting interconnection. We encourage parties alleging the imposition of such requirements to file complaints pursuant to section 208 of the Act.

39. We also reject US WEST's argument that xDSL-based advanced services are not encompassed within the definition of exchange access because such services may not connect one "telephone" to another.[81] US WEST argues that because "telephone toll service" is defined as "*telephone* service *between stations* in different exchange," use of computers or other facilities than telephones as "stations" should remove a service from the classification of telephone toll service. Based on this premise, US WEST further argues that "telephone toll service" should be narrowly construed and that only ordinary telephone to telephone long distance calling can be classified as telephone toll service. We reject these contentions for several reasons.

[80] *Universal Service Report to Congress*, 13 FCC Rcd at 11520, ¶ 39.

[81] US WEST Comments at 8.

40. First, nothing in the Act or legislative history equates the term "station" with any particular type of facility. As several commenters point out, Commission precedent supports the conclusion that the term "station" in section 3(48) refers to *any* device used by an end-user to receive and terminate telecommunications.[82] For example, long distance facsimile transmissions (which clearly involve data) have long been considered telephone toll service; yet those transmissions often are effectuated without the use of a "telephone" device. Rather, as with computers, the facsimile machine is plugged into a telephone jack, and then uses the phone wires for the transmission. US WEST's argument ignores this longstanding precedent. Moreover, a narrow, technology-specific interpretation of the term "station" is not articulated in the Act itself and would be at odds with its "technology neutral" objectives.[83] US WEST would ask us to conclude that Congress intended to ignore the fact that facilities and equipment used to provide telecommunications services evolve over time. We conclude that US WEST's interpretation is neither a "plain meaning," as it asserts, nor, in our view, a reasonable interpretation.

41. Similarly, we reject US WEST's assertion that "telephone service" is limited to voice communications.[84] The local switched network has been used for the origination and termination of interstate data communications for many years. As noted above, the network has long been used to transmit facsimile communications, which are data communications. In fact, in its arbitration with e-spire before the Arizona Corporation Commission, US WEST acknowledged that it is offering the equivalent of exchange access when it permits access to its network for the origination or termination of interstate frame relay services.[85] Similar to xDSL-based services, frame relay service is a high-speed packet switching technology that is used to transmit digital data.[86]

42. We recognize that we did hold, in the *Non-Accounting Safeguards Order,* that ISPs do not receive "exchange access services in connection with their provision of

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[82] In addition, Part 68 of the Commission's rules adopts an expansive interpretation of equipment connected to the Public Switched Telephone Network to included a broad array of customer premesis equipment in addition to analog telephones. *See e.g.,* 47 C.F.R. 68.308; Paradyne Corporation Petition for Waiver of the Signal Power Limitations contained in Section 68.308(e) of the Commission's Rules, *Order*, File Nos.: NSD-L-98-93, DA 99-599 (rel. March 29, 1999). *See* CoreComm Comments at 8; Rhythms Comments at 6.

[83] *See* Federal State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, 8802-8803 (noting the importance of competitive and technological neutrality to promote competition).

[84] US WEST Comments at 8.

[85] *See* US WEST Communications, Inc. Reply Memorandum in Support of its Proposed Amendment Language, Arizona Corporation Commission Docket No. T-0321A-989-0406 (filed May 6, 1999) at 3.

[86] See In the Matter of Independent Data Communications Manufacturers Ass'n, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service and AT&T Co. Petition for Declaratory Ruling that All ISCs be Subject to the ommission's Decision on the IDCMA Petition, DA 95-2190, 10 FCC Rcd 13717 (1995) (*Frame Relay Order*) at para 6.

unregulated information services because of their status as non-carriers."[87] However, that Order constitutes a departure from other Commission precedent on this matter. In a contemporaneous Commission decision, the *Local Competition Order*, we specifically stated that, although "[t]he vast majority" of exchange access service purchasers are telecommunications carriers, non-carriers "do occasionally purchase" such services.[88] In fact, when the *Non-Accounting Safeguards Order* was issued, the question of whether an xDSL-based service offering directed at ISPs could be "exchange access" or "telephone exchange service" was not before the Commission. Indeed, such service was first offered more than a year after release of that Order.

43. On a more complete record in this proceeding, we correct the inconsistency in our prior orders and overrule the determination made in the *Non-Accounting Safeguards Order* that non-carriers may not use exchange access and affirm our determination in the *Local Competition Order* that non-carriers may be purchasers of those services. We find that this conclusion is consistent with the Commission's longstanding characterization of the service that LECs offer to enhanced services providers (which include ISPs) as exchange access. In *MTS and WATS Markets Structure Order*, the Commission held that "[a]mong the variety of users of access service are...enhanced service providers."[89] As recognized in that case, the Commission has always required LECs to offer access services to parties that may not be common carriers.[90] Similarly, we noted in the *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers* that enhanced service providers use "exchange access service"[91] More recently, in *the GTE ADSL Tariffing Order,* we noted that "[t]he Commission traditionally has characterized the link from an end user to an ESP as an interstate access service."[92]

44. These holdings comport with the conclusion in *the Local Competition Order* that non-carriers may purchase exchange access services.[93] This historical treatment properly serves as a lens through which to view Congress's intent in codifying a definition of "exchange access" in the 1996 Act.[94] Nothing in the new definition of the

[87] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996).

[88] *Local Competition Order*, 11 FCC Rcd at 15934-35, ¶ 873.

[89] *MTS and WATS Markets Structure Order*, 97 FCC 2d at 711, ¶ 78.

[90] *Id.*

[91] 2 FCC Rcd at 4305, ¶ 2, 4306, ¶ 7; *see also* 3 FCC Rcd at 2631, ¶ 2 (referring to "certain classes of exchange access users, including enhanced service providers").

[92] *GTE ADSL Tariffing Order*, 13 FCC Rcd at 22478, ¶ 21.

[93] *Local Competition Order*, 11 FCC Rcd at 15934-35, ¶ 873.

[94] *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)("We generally assume that

Act or in its history suggests that Congress intended to narrow, for the first time, the availability of exchange access service to certain telecommunications service providers. For these reasons, we overrule our statements in the *Non-Accounting Safeguards Order* that non-carriers may not use exchange access, which we find to be inconsistent with our own precedent, and with the structure of the Act.

45. Finally, we reject U S WEST's contention that including DSL-based advanced services within the definition of "exchange access" would be inconsistent with the Commission's prior determination that such services constitute "special access." Rather, we find that, with respect to access to the local network for the purpose of originating or terminating an interexchange communication, any service that otherwise constitutes "special access" also falls within the definition of "exchange access." We note that "special access" refers to a dedicated path between an end-user and a service provider's point of presence.[95] We agree that special access, which provides access to the exchange through dedicated facilities, is different than switched access, which provides access to the exchange using switches. Both forms of access, however, provide access to exchange facilities, which is the pertinent point under the statutory definition of "exchange access."

C. "Information Access Service" is Not a Statutory Classification Separate and Distinct from Telephone Exchange Service and Exchange Access

46. US WEST contends that it is not subject to section 251(c) for its provision of xDSL-based advanced services because such services are "information access" services, which it considers a category distinct from both "telephone exchange services" and "exchange access" services.[96] US WEST argues that the category of "information access" in the Modification of Final Judgement (MFJ) should be extended to the Communications Act, notwithstanding that "information access" is not a defined term under the Act, and is cross-referenced in only two transitional provisions. SBC and GTE join US West's argument that advanced services are "information access," which they assert is a category of service distinct from telephone exchange or exchange access under the Communications Act.[97] A number of parties question whether Congress intended to establish "information access" as a separate category of services that are not subject to section 251 requirements.[98] We disagree with US WEST and the commenters who argue that information access services are a separate category of services not subject to section

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Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

[95] *GTE ADSL Tariffing Order* 13 FCC Rcd at 22478, ¶ 24.

[96] US WEST Comments at 8.

[97] SBC Comments at 8; GTE Comments at 8-11.

[98] AOL Reply Comments at 11; CoreComm Comments at 13, n.35; RCN Comments at 5-6; MCI WorldCom Comments at 14-16; Level 3 Comments at 8-9; Focal Comments at 10-11.

251(c). For the reasons set forth below, we decline to find that information access services are a separate category of services, distinct from, and mutually exclusive with, telephone exchange services or exchange access services.

47. Although Congress made a number of changes to the definitional provisions of the Act in the 1996 Act it did not include a definition for the term "information access." That omission is not surprising in light of the fact that this term is referenced only twice in the Act, and only for the purposes of transitioning from the MFJ. In contrast, the 1996 Act did provide for new or modified definitions of several terms critical to the statute, including both "exchange access" and "telephone exchange service," terms that appear throughout the Act. The term "information access" first appears in sections 251(g). That provision is a transitional enforcement mechanism that obligates the incumbent LECs to continue to abide by equal access and nondiscriminatory interconnection requirements of the MFJ when such carriers "provide exchange access, information access and exchange services for such access to interexchange carriers and information service providers...." Because the provision incorporates into the Act, on a transitional basis, these MFJ requirements, the Act uses the MFJ terminology in this section.[99] However, this provision is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree until superseded by subsequent regulations of the Commission.[100]

48. The reference to "information access" in section 274(h)(2)(A) adds little more to US West's argument. That section states that the term "electronic publishing," which section 274 prohibits BOCs form providing for four years, does not include "information access" as defined in the MFJ. The cross-reference to the MFJ reflects the fact that although a BOC would be precluded for a time from engaging in electronic publishing, that prohibition would not encompass other offerings related to information services, including "information access," that otherwise were permitted by the divestiture court. Yet again, in this transitional four-year provision, Congress was merely reconciling certain aspects of the MFJ with the new law. Equally significant, nothing in this provision suggests that "information access" is a category of services mutually exclusive with exchange access or telephone exchange service.

49. For the reasons set forth above, we find that the requirements Congress set forth in section 251 apply to incumbent LECs providing xDSL-based advanced services

[99] In addition to our disagreement with US WEST as to the significance of the MFJ terminology, we question US WEST's underlying premise that the MFJ court considered "information access" to be a category separate and distinct from telephone exchange services and exchange access. In that regard, we note that the MFJ itself defined information access as "the provision of specialized exchange telecommunications services by a BOC in an exchange area...," thus indicating that information access was but a subcategory of a broader category of services. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[100] *See, e.g. United States v. Western Electric Co.*, 741 F.Supp. 1,3 (D.D.C. 1988) ("All information services are provided directly via the telecommunications network. The Operating Companies would therefore have the same incentives and the same ability to discriminate against competing information service providers that they would have with respect to competing interexchange carriers").

and that these services are either telephone exchange or exchange access.

IV. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1-4, 7, 10, 201-205, 251-254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 157, 160, 201-205, 251-254, 256, 271, and 303(r), this *Order on Remand* IS ADOPTED.

51. IT IS FURTHER ORDERED that the Commission's holding in its *Advanced Services Opinion and Order*, that incumbent local exchange carriers are subject to the obligations imposed by section 251 of the Communications Act in connection with the offering of advanced services that employ packet switching or other specific technologies such as digital subscriber line technologies, IS AFFIRMED except to the extent that the Commission has deferred a determination on the narrow question set forth in paragraph 38.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Román Salas
Secretary

Appendix A

List of Commenters in CC Docket No. 98-147

Comments:

Advanced Telcom Group, et al.
AT&T Corp.
CDS Networks, Inc.
CoreComm Limited
Covad Communications Company
DSLnet Communications, LLC
Focal Communications Corporation, et al.
General Services Administration
GTE Service Corporation
Level 3 communications
MCI WorldCom, Inc.
Mindspring Enterprises, Inc.
Northpoint Communications, Inc.
Prism Communications Services
Rhythms Netconnections Inc.
SBC Communications Inc.
Sprint Corporation
Telecommunications Resellers Association
U.S. West Communications, Inc.

Reply Comments:

America Online, Inc.
AT&T Corp.
Cable & Wireless USA, Inc.
Competitive Telecommunications Association
DLSnet Communications, LLC
GTE Service Corporation
GVNW Consulting, Inc.
ICG Communications, Inc.
Level 3 Communications, LLC
MCI WorldCom, Inc.
NARUC
Network Access Solutions Corporation
Northpoint Communications, Inc.
Prism Communications Services, Inc.
RCN TeleCom Services, Inc., et al.
Rhythms Netconnections Inc.

SBC Communications Inc.
U.S. West, Inc.
USTA
Williams Communications, Inc.

STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH APPROVING IN PART & DISSENTING IN PART

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91.

I agree with the Commission's decision that US WEST is an incumbent local exchange carrier and may not avoid the obligations imposed by section 251(c)(3) when providing advanced services. I also agree with its conclusion that "information access service" is not a statutory classification separate and distinct from telephone exchange service and exchange access. I cannot, however, approve of the Commission's conclusions that advanced services are either telephone exchange service or exchange access, and I dissent from this aspect of its order.

The statute supplies two definitions of "telephone exchange service." It is either a "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge," or it is a "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 3(47). Exchange access means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." *Id.* § 3(16).

At the outset, I recognize that these definitions are hardly models of clarity. They incorporate terms better suited to the traditional circuit-switched network, some of which are left undefined in the statute, such as "telephone exchange," "intercommunicating," "the exchange service charge," "origination," and "termination."

Although I agree with the Commission that "telephone exchange service" is not limited to the provision of voice services, I do not think that all advanced services can necessarily be shoehorned into the definition of "telephone exchange service." In my view, some advanced services do not permit the type of "intercommunication" contemplated by section 3(47)(A).

For example, as the Commission acknowledges,[101] an end-user's communication using an xDSL-based service is with an Internet service provider ("ISP") or other third party to which the end-user subscribes. It is not with –and thus not in intercommunication with--other subscribers to a local telephone exchange network, or with subscribers on a different telephone exchange network, or even with the party to whom the end-user's Internet traffic is ultimately directed.

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101 *See, e.g., supra* at para. 24 (noting that "a customer must designate the ISP or third party to whom his or her high-speed data transmissions are directed").

Because communication with an advanced service such as xDSL is with and through an ISP, I find it difficult to classify such services as either telephone exchange service or access service. *First*, as I explained in the reciprocal compensation order, I believe that traffic to an ISP, whether dial-up traffic or provided through an advance service, terminates at a the ISP.[102] The so-called "two-call theory" was properly advanced by the Commission before January of this year and then improperly abandoned to provide a short-term remedy to reciprocal compensation issues. As I view local exchange traffic as terminating at an ISP, I consequently cannot view traffic subsequently routed by an ISP as part of a single call, or part of a telephone exchange service.

Second, the Commission has long held that an ISP is not a telecommunications carrier or telecommunications provider.[103] Thus, even under a single-call theory for ISP-bound traffic, it is hard to explain how traffic handled and routed by an ISP could, end-to-end, be an identifiable telecommunications service. How does one characterize the role and identity of the non-telecommunications ISP in a communication that it routes or delivers? This paradox applies for both dial-up traffic and traffic by means of advanced services.

Third, communications through ISPs do not in most instances "terminate" at the facilities of other subscribers. Rather, messages are stored at remote servers, in region or out of region, but not with the ultimate addressee. The addressee, in turn, retrieves the message from the remote server. All of the activities of sending, storing, and retrieving messages are conducted on facilities that the Commission has not suggested are associated with a particular telecommunications service, much less with a particular telephone exchange service or exchange access service.

Fourth, the current use of xDSL services appears fundamentally at odds with the concept of "intercommunication." The end-user cannot change the ISP to whom his high-speed data communications are directed without first disconnecting from that ISP and designating a replacement ISP. Whatever "intercommunication" is occurring in this scenario is between the end-user and the ISP, and I therefore do not think that the end-user is employing advanced services for "intercommunication" with other subscribers within the meaning of section 3(47)(A). Moreover, because the end-user is not

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[102] *See* Separate Statement of Commissioner Harold W. Furchtgott-Roth, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (1999).

[103] *See, e.g.*, Universal Service Report to Congress, 13 FCC Rcd 11501, 11522-23 (1998) (describing prior conclusions that ISPs do not to offer "telecommunications service" and thus are not "telecommunications carriers").

"intercommunicating" with other subscribers, I do not agree that advanced services can be deemed "comparable services" under section 3(47)(B).

For similar reasons, I do not believe that advanced services may be classified as "exchange access," which the statute defines as the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. 47 U.S.C. § 3(16). In the first place, I do not see how an xDSL-based communication is used in the origination or termination of a "telephone toll service," which is a "telephone service between stations in different exchange areas for which there is made a separate charge not include in contracts with subscribers for exchange access," *Id.* §3(48). In any event, as indicated above, I disagree with the Commission's theory regarding the jurisdictional nature of Internet traffic. In my view, an xDSL-based communication to an ISP terminates with the ISP, and so such traffic is not properly classified as "exchange access."