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January 27, 1997

Mrs. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Docket No. 960833-TP, 960846-TP & 960916-TP

Dear Mrs. Bayo:

Enclosed for filing in the above referenced docket are an original and fifteen (15) copies of AT&T's Response to BellSouth Telecommunications, Inc.'s Motion for Reconsideration.

Copies of the foregoing are being served on all parties of record in accordance with the attached Certificate of Service.

Yours truly,

Tracy Hatch

Tracy Hatch

cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petitions by AT&T Communications of the Southern States, Inc.; MCI Telecommunications Corporation; MCI Metro Access Transmission Services, Inc. for arbitration of certain terms and condition) terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996.	Docket No. 960833-TP Docket No. 960846-TP Filed: January 27, 1997

AT&T COMMUNICATIONS OF THE SOUTHERN STATES INC.'S RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-96-1509-FOF-TP

AT&T Communications of the Southern States, Inc. (AT&T),pursuant to Rule 25-22.060(3), Florida Administrative Code, hereby files its response to BellSouth Telecommunications, Inc.'s (BellSouth's) Motion for Reconsideration of Order No. PSC-96-1509-FOF-TP (the Order), filed January 15, 1997. The Commission's Order addressed the issues presented by AT&T's Petition for Arbitration with BellSouth pursuant to the Telecommunications Act of 1996 (the Act).

BellSouth seeks reconsideration of several of the Commission's decisions: that AT&T be allowed to recombine unbundled network elements (UNEs) in any manner it chooses; that existing tariff terms and conditions on resold services be eliminated except for cross-class restriction; that AT&T be allowed to resell contract service arrangements, grandfathered services, Linkup, Lifeline and promotions less than 90 days; pricing of Channelization and common and dedicated transport; that require BellSouth to refer customer requests for a change in local carrier to the customer's existing carrier and to

provide the customer with a contact number; that AT&T be allowed to avail itself of a blanket letter of authorization to enable it to access customer information in making PIC changes; and that required BellSouth to provide CABs format billing in 120 days. In addition, BellSouth asks, in a footnote, that the Commission reconsider the definition of local switching and declare that vertical services are not network elements, and thus cannot be included in the price for local switching and must be sold at the resale discount. Finally, BellSouth asks that all rates set in this proceeding be declared interim and subject to a true-up until after the pricing issues pending before the Eighth Circuit Court of Appeals have been resolved.

The limited purpose of a motion for reconsideration is to bring to the attention of the Commission some point which it overlooked or failed to consider when it rendered its Order in the first instance. It is not intended to be used to re-argue the whole case merely because the losing party disagrees with the order. Diamond Cab Co. of Miami v. King, 146 So.2d 889(Fla. 1962). Pingree v. Quaintance, 394 So.2d 161 (Fla. 1981). In general, BellSouth's arguments are simply recitations of its prior arguments and should be rejected. Each of the matters raised by BellSouth is addressed in detail below.

I. Pricing of Combined Unbundled Network Elements

BellSouth requests that the Commission reconsider its decision to allow AT&T and MCI to combine UNEs without restriction. In support BellSouth argues that the Commission is

confused about BellSouth's position, that the Commission is confused about the terms "rebundling" and "recombination", that the Commission is confused about its legal authority, that there were erroneous assumptions made about the level of risk, and that the Order must be reconsidered to correctly address its impact on the joint marketing restriction.

Initially, it should be noted that BellSouth merely re-states its arguments that rebundling, as allowed by the Commission, would:

- allow arbitrage,
- be contrary to the intent of Congress,
- discourage facilities based competition,
- circumvent the joint marketing restrictions,
- allow avoidance of access charges,
- require BellSouth to provide "free" vertical services,
- create effective discounts larger than the established resale discounts, and
- avoid tariff restrictions.

These arguments were set forth in the Commission Staff's recommendation and rejected by Commission's Order. As such, these arguments fail to meet the standards for reconsideration and must again be rejected.

Any confusion as to BellSouth's position on recombination is solely of its own manufacture. BellSouth's post-hearing brief precisely and unequivocally states that AT&T and MCI "should not be allowed to rebundle these elements to recreate a retail service that is already available to AT&T/MCI via resale."

(BellSouth Brief p. 28) In its motion for reconsideration, however, BellSouth for the first time concedes that the Act, the Federal Communications Commission's (FCC's) Rules adopted pursuant to the Act (FCC's Rules) and the First Report and Order in Docket No. 96-98, issued August 8, 1996 (FCC's Order), allow the unrestricted combination of UNEs as determined by the Commission. BellSouth now attempts to re-characterize its earlier position so that it may claim the Commission was confused and should, presumably, reconsider its decision.

The Commission exhibited no confusion during its extensive agenda discussion of this item or in the Order reflecting its decisions. The confusion, if any, is created by BellSouth's attempt to induce the Commission to ignore two precise provisions of the Act: 1)the pricing standards set forth in Section 251(d)(1) which requires the prices for UNEs to be set at cost, and 2) the duty of BellSouth set forth in Section 251(c)(3) to provide UNE's in a manner that allows a requesting carrier to combine elements to provide telecommunications service.

Nor is there confusion as to what BellSouth wants the Commission to do; it simply has placed a new spin on its argument. BellSouth still attempts to have the Commission preclude the purchase of UNEs at UNE prices unless a carrier also provides its own facilities. The new spin launched by BellSouth is that the combination of UNEs is really a "matter affecting pricing" which somehow causes the FCC's Order and Rules regarding this issue to be "stayed" pursuant to the stay of the FCC's pricing provisions by the 8th Circuit Court of Appeals (Eighth

Circuit). BellSouth then proceeds to argue that since the issue is a "pricing matter," the Commission has the latitude to ignore the plain language of Sections 251(d)(1) and 251(c)(3) of the Act and impose discounted tariff prices on a combination of UNEs that duplicates an existing BellSouth service. The flaw in this argument is that the FCC's decision on this matter was not stayed by the Court. Further, if the Court had believed that this was a "matter affecting pricing," the Court quite simply would have included the FCC's provisions within the terms of its stay. The Court, however, did not.

Assuming that rebundling is a pricing issue and that the 8th Circuit's Stay Order somehow affects the FCC's determinations regarding combining UNEs, BellSouth cannot escape the simple fact that the Act itself establishes a precise pricing scheme for UNEs, one that is distinctly different from that created for resale. While now conceding that the Act allows carriers to recombine UNEs in any manner, BellSouth would have the Commission ignore the pricing provisions in the Act applicable to UNEs when they are combined in a manner that BellSouth dislikes. Reduced to its essence, BellSouth's pricing argument is as follows: If we can call it something else, we can justify a different result. Such bootstrapping should be rejected by the Commission.

BellSouth states that there is no articulated pricing standard when unbundled elements are recombined. BellSouth is wrong. The pricing standard is very clearly set forth in the UNE pricing standards in Section 251(d)(1). Whether a carrier purchases one element or all of them, the price for a combination

of elements is the sum of the prices of elements purchased. Further, the FCC, both in its Rules adopted pursuant to the Act and its August 8, 1996 Order, clearly has removed any possible doubt regarding the availability of unrestricted combinations of UNEs. The Commission acknowledges this clarity: the Order includes explicit findings that any combination of UNEs must be allowed at the election of the requesting carrier.

BellSouth's argument that allowing a UNE platform to be priced at UNE prices would promote competition based solely on arbitrage is specious. First, arbitrage is simply shopping for the lowest available price for a commodity, no more and no less. There is no evil inherent in this phenomenon. It is the economically rational thing to do. Second, carriers will always enter a market with the lowest cost of production available at the time of entry, whether an avoided cost discount rate, a TSLRIC based element rate or a full facilities rate.

The whole purpose of setting UNEs at TSLRIC is that TSLRIC is the most economically efficient market price for facilities. This is the appropriate milestone at which carriers decide to enter or not based on their own cost of providing service. To impose a market price higher than TSLRIC would send the wrong signals to the marketplace and inappropriately lure facilities-based entrants into the market. This is precisely what BellSouth is seeking here. BellSouth is seeking to impose rates far in excess of its economic costs. This has the dual effect of constricting the ability of BellSouth's competitors to compete through wholesale means as well as encouraging inefficient

facilities entry. By precluding combinations of UNEs at economically efficient cost based rates, BellSouth will be able to preclude any significant price competition until and unless facilities-based competitors can enter the market in some meaningful fashion.

BellSouth's examples of element prices compared to resale prices are misleading in that they fail to accurately reflect all costs incurred by the entrant. BellSouth ignores the excessive nonrecurring charges it charges its competitors. Including nonrecurring charges in the examples increases BellSouth's illustrative typical monthly cost elements by almost $15.00, assuming customer location life of one year. The examples are further misleading and incorrect in that they understate local switching costs. The three "typical" customer-types omit numerous other rate and service configurations. Finally, BellSouth attributes false significance to its attempts to demonstrate that wholesale prices and network element prices are not consistent. The two will not necessarily be consistent, even in the aggregate, because BellSouth's individual retail rates are not always cost-based, and the formula for calculation wholesale differentials is not refined to the degree that it precisely captures the wholesale saving for every individual service combination. More accurate illustrations of the effects of the Commission's pricing decision are attached as Attachment 1.

BellSouth's examples, in fact, demonstrate the opposite of its proposition: price competition will not come to Florida residence customers unless network element prices are lowered.

BellSouth's corrected exhibit demonstrates that when nonrecurring charges are included, a BellSouth competitor would incur network element and retail costs of $56.15 to provide residential services producing revenues of $36.72, which revenues BellSouth characterizes as "typical." This outcome is inconsistent with the general consensus that residential services are profitable. Moreover, it seems unlikely that a company could operate profitably when 80 percent of its customers are unprofitable.

BellSouth's suggestion that it will be providing vertical services for "free" when AT&T purchases local switching as an unbundled element is ludicrous. The reason these features were included in the local switching rate is that each is provided through functions inherent in the switch. The local switching rate more than covers the cost of the functions utilized to provide vertical services. BellSouth's real complaint is that it will be faced with legitimate price competition when competitors purchase UNEs.

Next, BellSouth argues that Congress could not have intended two different pricing schemes that produce different results for what an end-user would perceive as the same service. The simple answer is that if Congress had not intended differing results, it would not have created two starkly different pricing mechanisms. Moreover, if Congress were at all concerned about the differing results from differing pricing schemes, it could and would have placed limitations in the Act. Congress placed no such limitations in the Act. Further, even if one assumes that Congress erred by not placing conditions or restrictions on the

utilization of UNEs at UNE prices, and further assumes that the FCC compounded the error in its interpretations of the Act, it is not the role of the Commission either to rewrite the Act or correct the FCC. It is, instead, the Commission's responsibility to effectuate the provisions of the Act and the Rules and Order of the FCC.

In support of its views on Congressional intent, BellSouth has submitted an amicus brief to the Eighth Circuit signed by four members of U.S. House of Representatives. It is well settled that post-legislative statements by individual members of Congress are entitled to little, if any, weight in statutory construction. Weinberger v. Rossi, 456 U.S. 25, 35-36(1982); Consumer Product Safety Commission v. GTE Sylvania, Inc. 447 U.S. 102, 118(1980). However, to the extent that the Commission views such information as useful or reliable, AT&T has appended as Attachment 2 a copy of the Brief of Amici Curiae filed with the U.S. Court of Appeals for the Eighth Circuit on or about December 23, 1996 by The Honorable Thomas J. Bliley, Jr., M.C., et al. in Case No 96-3321 (and consolidated cases). As set forth in Attachment 2, the six members of Congress signing the Amicus Brief include two members of the U.S. House of Representatives and four members of the U.S. Senate. All six were members of the conference committee that crafted the final language of the Act. If any members of Congress could be said to know Congress's mind in enacting the Act, these are the ones. The Amici specifically note that any suggestion that Congress intended to create a bias towards facilities-based competition is mistaken and that a range

of entry vehicles, including resale and the purchase and combination of UNEs, was created to allow competitors to select whichever method best suited their needs. See Amicus Brief, p. 8.

BellSouth suggests that the Commission look to what other Commissions are doing regarding prices to be charged for a UNE platform. Although irrelevant to the issue of whether the Commission erred, AT&T notes that the great majority of commissions are in accord with this Commission. AT&T has been a party to fifty-two arbitration decisions issued by regulatory bodies in thirty-five states. Other than the three southern states mentioned by BellSouth, only Utah has imposed any limitation on the utilization of a UNE platform. Thirty-one states have concluded that AT&T should be allowed to combine UNEs in any manner it wishes at the applicable UNE prices. The list of states and their respective proceedings is attached as Attachment 3.

After extensive deliberations on this matter, the Commission correctly determined that AT&T and MCI should be allowed to combine UNEs in any manner they desire and obtain UNE prices for any such combinations. BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred in making this determination. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's request for reconsideration of the Commission's decision on this matter be denied.

II. Tariff Terms and Conditions

BellSouth also asks the Commission to reconsider its decision that no restrictions be imposed in the resale of BellSouth services except for cross-class limitation for grandfathered services, residential services and Lifeline/Linkup services. In support of its request, BellSouth argues that competitors should be required to purchase tariffed services subject to all the existing terms and conditions and that all current terms and conditions are reasonable and nondiscriminatory. By way of example, BellSouth takes two isolated tariff terms, one precluding unlawful activity and another to preclude potential injury to BellSouth employees, and extrapolates that all its terms and conditions serve such worthy public purposes. However, BellSouth failed at hearing and again fails in its motion for reconsideration to show that all of its tariff terms and conditions are so reasonable.

Using an example of cross-class resale, BellSouth next attempts to suggest that all terms and conditions are reasonable likeunto the cross-class restriction. This example bears no relevance in view of the retention of cross-class resale restrictions. BellSouth's suggestion that all its terms and conditions are due to social pricing goals is completely unsupported by anything in this record. The vast bulk of BellSouth's terms and conditions are not related to social pricing goals but are directly tied to BellSouth's economic self interest. Further, BellSouth's parade of horribles completely

fails to demonstrate the reasonableness of all of BellSouth's tariff terms and conditions.

BellSouth wonders how it can hope to compete if tariff terms and conditions are not imposed on its competitors. The simple answer is that BellSouth's tariffs are solely within BellSouth's control. It is hard to imagine how BellSouth can be hampered competitively by a tariff that it can change upon a whim. With BellSouth's election of price regulation, BellSouth has virtually unfettered ability to file changes to its tariffs. Most importantly, if all BellSouth's terms and conditions are imposed on its competitors, the Commission will have delegated to BellSouth the ability to very precisely control the nature and type of competition in which its competitors may engage. This would create a competitive straitjacket. Competitors would have no ability to be creative or innovative in packaging services for customers. The only way to vary from BellSouth's self-defined straight-and-narrow competitive path would be to ask BellSouth to alter its terms and conditions. AT&T submits that while this form of competition would suit BellSouth nicely, it would not lead to the robust competition contemplated by the Act.

Finally, it again must be noted that the arguments presented by BellSouth are reiterations of the arguments considered and specifically rejected by the Commission. BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's request for

reconsideration of the Commission's decision on this matter be denied.

III. Services Excluded From Resale

BellSouth next asks the Commission to reconsider its decision to require BellSouth to offer for resale grandfathered services, contract service arrangements (CSAs), and Lifeline/Linkup services. BellSouth argues that the ability to resell CSAs gives AT&T and MCI an unfair competitive advantage. This argument is virtually a verbatim recitation of the argument addressed and rejected by the Commission in its Order. On this basis alone it must be rejected. More importantly, however, the requirement to resell CSAs acts to preclude BellSouth from imposing a price squeeze on its competitors.

There is substantial contribution in excess of cost built into the rates of the most of BellSouth's services. Allowing BellSouth to offer CSAs without a resale requirement would allow BellSouth to price its CSA below its wholesale tariff rates, cover its costs and still receive a contribution. Since a competitor cannot price below its own direct costs, in this case the wholesale tariff rate, BellSouth would be able to squeeze its competitors out of the market in any instance where its own costs are below the wholesale rate. Resale of CSAs is the only check on BellSouth's ability to engage in such predatory behavior. One need only examine Exhibit No. 72 in this proceeding, attached as Attachment 4, to illustrate this problem. The Commission Staff's audit of a BellSouth CSA for the provision of ESSX Service to

various state confinement facilities indicates that the cost to provide the ESSX loop, intercom, and features is $8.14 per line. This is substantially below what would be BellSouth's discounted rate under current tariffs. Without resale of CSAs no competitor could hope to compete with BellSouth. BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's request for reconsideration of the Commission's decision to subject BellSouth's CSAs to resale be denied.

Similarly, BellSouth's sole support of its request that the Commission reconsider its decision to require resale of Lifeline/Linkup Services is a recitation of a concern noted by Commissioner Deason in his dissent. AT&T submits that while Commissioner Deason's dissent shows a difference of opinion, it does not in any way establish an error in the Commission's decision -- the standard required for reconsideration. BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's request for reconsideration of the Commission's decision on this matter be denied.

In support of its request for clarification of the Commission's decision regarding the availability of promotional prices for resale, BellSouth cites to Section 51.613(a)(2) of the FCC Rules. It should be noted that this provision merely states that discounts do not apply to promotional offerings of 90 days

or less. Nothing in this rule provision precludes a competitor from purchasing a promotional offering at the retail rate. BellSouth's citation to the FCC rule reveals no error or matter that the Commission overlooked in reaching its decision. BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's request for reconsideration of the Commission's decision on this matter be denied.

IV. Pricing of Channelization and Common and Dedicated Transport

BellSouth requests that, for clarity, the Commission utilize the term "Unbundled Loop Channelization system (DS1 to VG)-per system" in lieu of Channelization per System as used in the Commission's Order. AT&T does not object to the adoption of the term proposed by BellSouth.

BellSouth also seeks reconsideration of the rate set by the Commission for portions of common and dedicated transport. Specifically, BellSouth seeks to have the Commission increase the price nearly 1000%, from $1.60 to $16.75. In support of this request, BellSouth states that the Order did not specifically discuss the derivation of the $1.60 rate. BellSouth further states that since BellSouth did not perform a cost study for this item and instead proposed its tariff rate, the tariffed rate should be charged.

The $1.60 per mile rate was recommended by Staff in its Memo dated November 21, 1996, describing revisions to the main

recommendation. In its revision memo, Staff stated that its recommended rate was revised from the $16.75 tariff rate proposed by BellSouth down to the $1.60 rate in order to comply with the Act's pricing guidelines governing UNEs. The $1.60 rate is amply supported in the record by Exhibit 10 to Wayne Ellison's testimony. The $1.60 rate is further supported by the BellSouth's Local Transport Restructure cost study which establishes that it is substantially in excess of BellSouth's cost for dedicated transport. The specific cost information is found in the study at Tab 393, page 902811 in Exhibit 17. BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's request for reconsideration of the Commission's decision on this matter be denied.

BellSouth also seeks clarification that the $.0005 per termination rate listed under dedicated transport should be clarified to apply to common transport. It appears that the rate in question was inadvertently applied to the incorrect element. Accordingly, AT&T supports BellSouth's request for clarification on this matter.

V. PIC Changes

BellSouth next requests clarification of the Commission's decision that BellSouth should direct the PIC requests of the customer of another local exchange carrier to such carrier. In support of its request for reconsideration, BellSouth states that

the Order could be interpreted to preclude carriers other than AT&T and MCI from utilizing BellSouth's "CARE" system to process PIC changes. In view of BellSouth's commitment to implement the Orders provisions for AT&T, AT&T does not object to clarification on this matter.

BellSouth further asks for reconsideration of the Commission's decision to require BellSouth to maintain a list of contact numbers for other carriers. In essence, BellSouth argues that it should only be required to tell customers to call their local carriers, but should not have to provide a number to call. In support of its motion BellSouth states that this requirement is unduly burdensome on BellSouth's service representatives and will increase administrative costs for which the Commission has provided no recovery.

Initially, it should be noted that the contact number list would be only for those carriers that do not elect to use BellSouth's CARE system. Second, there is no suggestion in the record that it is unduly burdensome simply to maintain a list of carriers with the contact numbers provided by those carriers. In fact, most companies seem to have had no problem doing so in order to direct their customers to their choice of long distance provider. Assuming the incremental cost of this function can be measured, BellSouth will provide for its recovery just like every other carrier, through the rates it charges for its services. BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's

request for reconsideration of the Commission's decision on this matter be denied.

VI. CABS - Formatted Billing

In its motion, BellSouth has requested that it be allowed 180 days from the issuance date of the Order in which to complete activities necessary to implement CABS - Format billing. AT&T continues to be willing to work with BellSouth toward interconnection, and accordingly, does not object to granting BellSouth the requested extension of time.

VII. Access to Customer Records

BellSouth also seeks reconsideration of the Commission's decision that BellSouth provide direct on-line access to full customer records before protections against "roaming" are implemented. In support of its request, BellSouth argues that until it has the means to limit access to a specific customer's records, all customers' privacy would be jeopardized. BellSouth further argues that unrestricted access to customers records has the potential to take slamming to new heights. BellSouth states that blanket letters of authorization are not new and have not precluded slamming. In lieu of electronic access as required by the Commission's Order, BellSouth proposes that customers who cannot locate their bills in order to identify the specific services to which they currently subscribe may utilize a three-way call to the BellSouth Center or send a faxed copy of the record conditioned upon a verbal authorization of the customer.

Initially, it must be noted that AT&T is at least as concerned about maintaining the privacy of customers as BellSouth. AT&T always strives to maintain the integrity of its customers' records. BellSouth's privacy arguments, however, are the same ones that were addressed and rejected by the Commission in its Order. As the Order noted, privacy concerns will be further addressed both by the FCC and through the development of appropriate electronic safeguards. Further, BellSouth appears to be attempting, under the guise of customer privacy, to recede from the interactive electronic interfaces that the Commission has required and to substitute inefficient manual methods for ordering and preordering that will frustrate competitive entry.

BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred in reaching its decision on this matter. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's request for reconsideration of the Commission's decision on this matter be denied.

VIII. Pricing - General

BellSouth asks that all the rates established in this proceeding be declared interim and subject to true-up after the pricing controversies currently pending before the Eighth Circuit Court of Appeals. In addition, BellSouth asks that, if the rates are declared interim, it then be relieved of the requirement to file certain cost studies. AT&T does not object to an explicit declaration that the rates in this proceeding shall be interim

rates, so long as the Commission's Order states that AT&T will have a subsequent opportunity to address all rates established in Order No. PSC-96-1509-FOF-TP when the controversy surrounding pricing standards has been resolved.

BellSouth's request for a true-up, however, is merely a smokescreen designed to draw the Commission's attention away from the anti-competitive effect of too-high interconnection costs. Prices that are set at inefficient levels now will keep AT&T and others out of significant portions of the market and maintain BellSouth's local monopoly -- consequences which cannot be corrected by an after-the-fact true-up. While AT&T believes that prices ultimately will be set at economically efficient levels and therefore would welcome a retroactive true-up in its favor, the Commission should be clear that such a true-up will not compensate for an inefficient market setting.

IX. Local Switching

In a novel approach to reconsideration, BellSouth, in footnote 3 of its Motion, seeks reconsideration of the definition of unbundled local switching. In support of its request BellSouth argues that the Commission erred when it defined local switching to include all the features the switch is capable of providing, including vertical services. According to BellSouth, the vertical services included in the switch are the same retail services provided via tariff and thus they should be sold at the resale discount, not included in the price of switching.

BellSouth's argument here is again a reiteration of its prior argument in its brief. The FCC's definition of local

switching has resolved any question regarding how local switching is to be provided and the Commission appropriately has adopted the FCC's determination. BellSouth has not brought to the attention of the Commission any matter that it overlooked or upon which it erred. Accordingly, for the reasons set forth above, AT&T requests that BellSouth's request for reconsideration of the Commission's decision on this matter be denied.

X. Conclusion

Based on the foregoing, AT&T requests that BellSouth's Motion for Reconsideration be denied except as specifically noted above.

Respectfully submitted this 27th day of January, 1997.

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ATTORNEY FOR AT&T
COMMUNICATIONS OF THE
SOUTHERN STATES, INC.

Network Element Charges
Typical Residence Customer
Florida

	Florida PSC Approved Network Element Rate	Capacity Per Network Element Tariff Unit	Network Element Price Per Unit of Capacity	Required Tariff Qty Per Customer	Monthly Cost Using Network Elements	BellSouth Retail Rate	Cost to AT&T using BellSouth Retail Tariff
Summary by Traffic Category							
Loop							
Recurring					$17.00		
Nonrecurring					$11.67	$3.33	$2.61
Port							
Recurring					$2.00		
Nonrecurring					$3.17		
Local Usage					$5.67		
Local Optional Usage					$0.27	$2.16	$1.69
IntraLATA Toll Usage					$0.75	$1.38	$1.08
InterLATA Toll-State					$3.53	$3.53	$3.53
InterLATA toll- Interstate					$7.17	$7.17	$7.17
Total Network Elements					**$51.23**		
Subscriber Line Charge						$3.50	$3.50
Exchange Line						$10.65	$8.33
Features & Functions, Average						$5.00	$3.91
Total Wholesale Cost					$51.23		$31.81
Retail Costs (based on discount differential)					$3.67		$3.67
Operator Services Costs					$1.25		$1.25
Total Service Cost					$56.15		$36.72
Total Service Revenue						$36.72	

Network Element Charges
Combination
Typical Individual Business
Florida

	Florida PSC Approved Network Element Rate	Capacity Per Network Element Tariff Unit	Network Element Price Per Unit of Capacity	Required Tariff Qty Per Customer	Monthly Cost Using Network Elements	BellSouth Retail Rate	Cost to AT&T using BellSouth Retail Tariff
Summary by Traffic Category							
Loop							
Recurring					$17.00		
Nonrecurring					$11.67	$4.67	$3.88
Port							
Recurring					$2.00		
Nonrecurring					$3.17		
Local Usage					$6.16		
Local Optional Usage					$0.52	$4.54	$3.78
IntraLATA Toll Usage					$1.23	$3.19	$2.65
InterLATA Toll-State					$5.04	$5.04	$5.04
InterLATA toll- Interstate					$7.99	$7.99	$7.99
Total Network Elements					**$54.77**		
Subscriber Line Charge						$6.00	$6.00
Exchange Line						$29.10	$24.21
Features & Functions, Average						$13.67	$11.37
Total Wholesale Cost					$54.77		$64.93
Retail Costs (based on discount differential)					$7.77		$7.77
Operator Services Costs					$1.50		$1.50
Total Service Cost					$64.05		$74.20
Total Service Revenue						$74.20	

Network Element Charges
Typical Small PBX w/o DID
Florida

Summary by Traffic Category							
Loop							
Recurring					$17.00		
Nonrecurring					$11.67	$4.67	$3.88
Port							
Recurring					$2.00		
Nonrecurring					$3.17		
Local Usage					$13.19		
Local Optional Usage					$0.47	$4.54	$3.78
IntraLATA Toll Usage					$1.23	$3.19	$2.65
InterLATA Toll-State					$5.04	$5.04	$5.04
InterLATA toll- Interstate					$7.99	$7.99	$7.99
Total Network Elements					**$61.75**		
Subscriber Line Charge						$6.00	$6.00
Exchange Line						$49.47	$41.15
Features & Functions, Average						$10.42	$8.67
Total Wholesale Cost					$61.75		$79.17
Retail Costs (based on discount differential)					$10.90		$10.90
Operator Services Costs					$1.25		$1.25
Total Service Cost					$73.90		$91.32
Total Service Revenue						$91.32	

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321
(and consolidated cases)

IOWA UTILITIES BOARD, ET AL.,
Petitioners,

v*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petitions for Review of an Order of the
Federal Communications Commission

BRIEF OF AMICI CURIAE THE HONORABLE THOMAS J. BLILEY, JR. THE HONOR4BLE ERNEST F. HOLLINGS THE HONORABLE TED STEVENS THE HONORABLE DANIEL K. INOUYE THE HONORABLE TRENT LOTT THE HONORABLE EDWARD J. MARKEY

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321
(and consolidated cases)

IOWA UTILITIES BOARD, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petitions for Review of an Order of the
Federal Communications Commission

BRIEF OF AMICI CURIAE
THE HONORABLE THOMAS J. BLILEY, JR.
THE HONORABLE ERNEST F. HOLLINGS
THE HONORABLE TED STEVENS
THE HONORABLE DANIEL K. INOUYE
THE HONORABLE TRENT LOTT
THE HONORABLE EDWARD J. MARKEY

INTEREST OF AMICI CURIAE

Amici are six members of the United States Senate and the United States House of Representatives who played leadership roles in the drafting, deliberation, and enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the Act). Representative Bliley (R-VA) is the Chairman of the House Commerce Committee. Senator Hollings (D-SC) is the ranking member of both the Senate Committee on Commerce, Science, and Transportation ("Senate Commerce Committee") . and its Communications Subcommittee. Senator Stevens (R-AK) is a member of both the

Senate Commerce Committee and its Communications Subcommittee. Senator Inouye (D-HI) is a member of both the Senate Commerce Committee and its Communications Subcommittee. Senator Lott (R-MS) is the Senate Majority Leader and a member of the Senate Commerce Committee and its Communications Subcommittee. Representative Markey (D-MA) is a member of the House Commerce Committee and the ranking member on its Telecommunications and Finance Subcommittee. Amici were each members of the Conference Committee that considered and reported out the legislation at issue in this appeal.

Each of us has been closely involved in telecommunications matters in the Congress for a decade or more. Each has an especially keen interest in seeing that the Act is properly applied and that its objective of opening monopoly telephone exchange and exchange access markets to competition, and bringing the benefits of that competition to the nation's residential and business consumers, is achieved.

We do not customarily file amicus briefs in federal court addressing legislation we have authored because we believe that the law, with its legislative history, should speak for itself. Several of the briefs filed in this case, however, purport to characterize the intent of Congress in passing the Act in ways that we know to be inaccurate and highly one-sided. Those filings, and the importance of this particular appeal, prompted us to prepare this brief in order to ensure that the Court has a more complete and balanced record as it considers the important issues before it.

SUMMARY OF ARGUMENT

The undersigned amici each strongly supported -- and worked to persuade our colleagues to support -- ultimate passage of the Telecommunications Act of 1996. That was not because we agreed completely with each and every one of its provisions, or with each other on every question the Act addresses. Rather, as is virtually always the case with landmark legislation that implicates broad and diverse issues, the Act was the product of many successful compromises among a variety of competing views and interests, and reflects the customary give and take of the legislative process.

We are completely united, however, in our commitment to the Act's central goal of bringing competition to residential and business customers in what are presently monopoly markets for telephone exchange and exchange access services. The Nation's commitment to competition rests on the recognition, confirmed through experience across innumerable different industries, that competition is the surest way to spur innovation, to broaden the availability of services, and to lower prices to consumers. The compromises struck in the Act between federal and State governmental interests, and among the various segments of the industry, were all designed with those fundamental pro-competitive objectives in mind.

Amici file this brief because many of petitioners' arguments in this case, if adopted, would undo those careful compromises and jeopardize the Act's most fundamental objectives. The petitioners seek effectively to replace the Act with an overwhelmingly one-sided piece of legislation that could not, we believe, hold any prospect of achieving Congress' pro-competitive goals.

Petitioners' arguments to this Court reflect several critical misconceptions about the Act and the purposes underlying it. For example, petitioners appear to contend that merely eliminating State laws prohibiting competitive entry would enable such entry to occur. To the contrary, however, the Act reflects Congress' recognition that economic barriers to entry have been at least as powerful in frustrating competition in these markets as **legal** barriers to entry, and it therefore not only preempts State law barriers to entry but also establishes affirmative new federal law obligations on incumbent LECS to open their networks to potential competitors on just and reasonable terms. Similarly, petitioners repeatedly assert that the Act's overarching goal was to create facilities-based competition, and that encouraging any other forms of competition, such as resale, would somehow undermine that goal. But the Act was expressly designed to authorize a range of different entry vehicles, and Congress specifically recognized the importance of **resale** in enabling carriers to enter the market now and to build facilities over time, as it becomes economical for them to do so.

Perhaps most fundamentally, petitioners seek to remove the Federal Communications Commission (FCC) from any role whatsoever in implementing the Act's provisions requiring that incumbent local exchange carriers **(LECs)** charge their competitors rates that are "just, reasonable, and nondiscriminatory, " and to leave that critical duty solely to the States. That result would bean extraordinary reversal of a clear Congressional decision. Indeed, it would directly negate the balanced partnership between the FCC and States that Congress sought to establish. While we take no position here on the substance of the FCC's rules, its overall authority to implement the **local**

competition sections of the Act is plain. Section 251 (d) of the Act expressly gives the FCC not only the authority, but also the duty, to promulgate rules to implement all of the requirements of § 251, and § 251 includes the duty to ensure that incumbent LECS provide interconnection and unbundled access 'on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." See 47 U.S.C. §§ 251(c)(2)& (c)(3) (emphasis added). Because the facilities to which § 251 applies are used for both interstate and intrastate services, Congress would not have made -- and did not make -- regulation of their rates the exclusive province of either the federal or State governments. The Act instead expressly contemplates overlapping federal and State participation: it directs the FCC to adopt regulations implementing the requirements, including the rate requirements, of § 251, while at the same time relying on the States to arbitrate specific agreements between earners consistent with those regulations and the provisions of the Act.

The Act is thus firmly predicated on the understanding that the FCC will continue to play its customary role as the nation's expert agency on telecommunications in interpreting provisions of the nation's telecommunications laws, and in applying its understanding of the economic and technical realities of the industry to fashion and enforce federal rules to implement Congressional intent. The recent passage of the Act makes that role especially important, because the Act replaces a patchwork of differing State policies with a single, overriding national policy. The current campaign to eliminate any significant FCC role in implementing that national policy, to impose extra-statutory restrictions on how the Act's federal law provisions may be applied, and to make State commissions the sole regulatory authority in determining how those federal

law provisions will be enforced would, in the words of petitioners and their supporting amici, "turn[] the 1996 Act on its head." See Brief of Petitioners Regional Bell Companies and GTE, p. 1 ("Bell-GTE Brief"); Brief of Amici Curiae The Hon. John D. Dingell, et al. ("Brief of Federal Legislators Supporting Petitioned"), p. 1.

ARGUMENT

We focus in this amicus brief on two critical points. First, the Act's central purpose is to encourage competition in the telephone exchange and exchange access markets by imposing new, affirmative federal law requirements on the incumbent LECS to open their networks to competitors through a variety of means in order to achieve, at some future point, facilities-based competition. Second, the Act assigns the FCC an integral role in adopting regulations to implement those requirements in conjunction with the States, including the central requirement that rates for network facilities be just, reasonable, and nondiscriminatory.

I. THE CENTRAL GOAL OF THE ACT IS TO PROMOTE ALL FORMS OF COMPETITION BY AFFIRMATIVELY REMOVING LEGAL AND ECONOMIC BARRIERS TO ENTRY

Sections 251, 252, and 253 of the Act establish a new national policy to promote the competitive provision of local telephone exchange and interstate exchange access services to residential and business customers. See S. Rep. No. 23, 104th Cong., 1st Sess. 5 (1995); H.R. Rep. No. 204, 104th Cong., 1st Sess. 48 (1995) ("House Report"). Historically, these markets have been dominated by a single provider, whose position has been protected both by explicit State policies prohibiting competition and by powerful economic obstacles to the competitive provision of such services. The Act

seeks to eliminate both legal and economic barriers to entry as a matter of national policy and federal law. It therefore directs the FCC to preempt barriers to entry, and imposes a series of affirmative federal law duties on incumbent LECS so as to establish a wide range of means by which new carriers can enter these markets and provide services to consumers in competition with those incumbents.

The view of the Act pressed on the Court by petitioners and their supporting amici deviates from this core understanding in two fundamental respects. First, they suggest that Congress believed that merely eliminating the explicit pro-monopoly laws in various States would itself naturally lead to the development of competitive alternatives. See, e.g., Brief of Federal Legislators Supporting Petitioners, p. 13. That is not so. Experience has shown that the economic barriers have been at least as powerful as the legal ones, particularly " [t]he inability of other service providers to gain access to the local telephone companies' equipment" (see House Report, p. 49) and the charging of excessive rates to competitors. It was essential that the competitive provision of service be not only lawful, but economically and commercially viable. We therefore recognized that only by establishing affirmative federal law obligations requiring incumbent LECS to offer their facilities and services to new entrants on pro-competitive terms, and at just and reasonable rates, could our objective of bringing competition to these markets succeed. The central terms of the Act reflect that recognition. See 47 U.S.C. §3251(c)(2-4) & 252(d)(1-3).

Second, several of the briefs also contend that Congress' overriding goal was to establish facilities-based competition, and that any requirements that encourage

other forms of competition, such as resale, would be contrary to Congressional intent because they would improperly discourage the building of facilities. See, e.g., Brief of Federal Legislators Supporting Petitioners, pp. 3-4, 13-16. That suggestion is likewise mistaken. We saw the various entry vehicles that § 251 seeks to encourage as mutually reinforcing, not conflicting -- as the history of telecommunications competition amply confirms. The number of facilities-based carriers now in the long-distance industry is a product of the fact that many earners, like MCI, were permitted to enter at first through resale in order to develop experience in the industry and a base of customers, so that they could later build and add facilities gradually as it became economical for them to do so. *

With respect to telephone exchange and exchange access services, therefore, we similarly sought in the Act to make possible a range of entry vehicles, favoring no one vehicle over any other. This was particularly important to ensure that smaller carriers would have the opportunity to compete and to develop a customer base that would allow them to build facilities over time. The plain language of the Act clearly shows that Congress intended the method of entry to be selected by the competitor based upon whichever method is best suited to its needs. Thus, for example, Congress authorized competitors both to purchase LEC services "for resale" (see 47 U.S.C. § 251(c)(4)) and to purchase 'access to network elements on an unbundled basis" (see 47 U.S.C. § 251(c)(3)), and, with respect to the latter, specifically provided that such

[1] See House Report, p. 72 (explaining that it is "imperative that meaningful resale opportunities are available" so that "non-facilities-based carriers [] have an opportunity to compete in the local exchange market, in the same way that it was critical initially for the early development of competition in the long distance market").

elements must be provided "in a manner that allows requesting carriers to combine [them] in order to provide . . . telecommunications service" (see id.).[2]

xx. **THE FCC IS** DIRECTED TO PLAY A SPECIFIC ROLE IN IMPLEMENTING ALL THE REQUIREMENTS OF SECTION 251, INCLUDING THE REQUIREMENT THAT RATES BE JUST, REASONABLE, AND NONDISCRIMINATORY.

Sections 251 through 253 make up the heart of the Act's requirements with respect to local competition. Throughout the drafting process, Congress wrestled with defining the respective roles of the FCC and the States. In the end, Congress crafted a compromise that assigned both levels of government significant and overlapping responsibilities.

Sections 251 and 252 establish the framework for creating interconnection agreements between the LECS and their competitors. While the Act permits parties to reach negotiated agreements where they can, we recognized that incumbent LECS have no natural incentive to surrender their market position through such negotiations, and that in many cases arbitrated rather than negotiated agreements would be inevitable. We therefore provided in Section 251 for certain minimum standards to ensure that there

[2] On this and many other points, the briefs that have been filed in support of petitioners make frequent references to wholly unrelated actions of individual Members as claimed support for their arguments. For example, the withdrawal of one amendment by Senators Stevens and Inouye, it is suggested, "indicates] the Senate's concurrence" with petitioners' position on resale. See Brief of Federal Legislators Supporting Petitioners, p. 15 n. 10. That particular amendment was withdrawn because both Senators were assured of being members of the Conference Committee and were asked by the managers of the bill to address the issue in that forum, which they then did. The claim that this withdrawal somehow indicates Senate support for petitioners' litigating position here is inaccurate and not supported by the final statutory language.

would be competitive opportunities. By establishing those market-opening requirements as a matter of federal law, we determined that a uniform approach to the fundamental issues that would be raised in those arbitrations was necessary to effectuate the pro-competitive intent of the Act in the face of a history of contrary policies in numerous States.

Section 251 thus sets out the specific requirements and minimum standards that Congress concluded were needed to permit local competition to grow, and tasks the FCC with promulgating federal rules to ensure that competition occurs nationwide. At the same time, in recognition that State regulatory commissions have a greater familiarity with the unique circumstances of each local area, § 252 establishes procedures that give the States a central role in arbitrating and approving the specific interconnection agreements. But Congress fully recognized that competitive entry in some States could be impeded if it were left, as it had been in the past, exclusively to the States,[3] so we required the States to ensure that arbitrated agreements "meet the requirements of section 2S1, including the regulations prescribed by the [FCC] ." See 47 U.S.C. § 252(c)(l). Further, Congress required the FCC to preempt any contradictory State or local barrier to competitive entry in § 253.

[3] That Congress did not want to leave matters entirely in the hands of the States is clearly evidenced by the numerous provisions in § 252 that limit State discretion. See 47 U.S.C. §§ 252(c)(1) (requiring States to follow FCC rules), 252(d) (providing specific rules for establishing rates), 252(e)(2) (establishing grounds for State approval), 252(e)(5) (allowing FCC to preempt if State fails to act quickly), 252(e)(6) (preempting State court review of State commission action), and 252(i) (limiting State discretion by requiring LECS to provide any service included in a State-approved agreement on same terms and conditions to third party).

The Act thus directed the FCC to adopt national rules implementing **all** of the "requirements" of **§ 251 (see** § 251(d)(1)), including the pivotal requirement that rates **be "just,** reasonable, **and nondiscriminatory " (see 47 U. S. C. §§ 251(c)(2) & (c)(3)).** The Act similarly relies on both the FCC and the States to interpret and apply the other general requirements of the Act. We note in that regard that the **amici** supporting petitioners erroneously suggest the Act was designed to mandate the outcomes on a wide range of quite specific issues, both rate issues and other issues, in ways favorable to the LECS, and to foreclose contrary results from either the FCC or the States. See Brief of Federal Legislators Supporting Petitioners, pp. 12-19. That is quite incorrect. Congress did not, nor would it normally, specify particular outcomes at that level of **detail.**[4]

The FCC's role under the Act is a natural one and entirely consistent with pre-1996 law -- not only because **§ 25** 1's requirements are themselves matters of federal law that require a nationally uniform interpretation, but also because of the nature of the facilities and services that **§ 251** addresses. Contrary to the assertions some have made @Brief of Federal **Legislators** Supporting petitioners, p. 9), the Act specifies that these . are **not** purely "local facilities and services. " The interconnection agreements covered

[4]Some of the briefs make liberal reference to general floor statements by Members of Congress, including by some of us, and seek to convey the erroneous impression that those general statements express support for their litigation position on these very specific issues. We take strong exception to those characterizations. For example, the statement **by** Senator **Hollings (see** Brief of Federal Legislators Supporting Petitioners, p. 16 n. 11) that competitors should generally not be able to "cherry pick" had absolutely nothing to do with the issue the brief claims it supports regarding resale and the provision of unbundled elements. Senator **Hollings** was instead expressing the entirely unrelated view that it was important that the benefits of competition reach not only lucrative urban areas but rural areas as well. See 142 **Cong.** Rec. S716-17 (daily ed. Feb. 1, 1996).

by § 251 apply to a single set of facilities that are used jointly for the "transmission and routing of telephone exchange service [an intrastate service] and exchange access [an interstate service]. " See 47 U.S.C. § 251(c)(2)(A) (emphasis added).

These facilities are thus not purely intrastate, but jurisdictionally mixed. The Act was enacted against the backdrop of uniform judicial decisions holding that the FCC has authority to regulate, and to preempt contrary State regulation over, facilities that are used inseverably for interstate and intrastate calling. See, e.g., NARUC v. FCC, 880 F.2d 422, 431 (D.C. Cir. 1989) ("'unless there were two separate phone systems with one being used wholly intrastate, unbundled cost-based pricing for a piece of equipment at the federal level necessarily precludes any other result by the states'") (citation omitted); Puerto Rico Tel. Co. v. FCC, 553 F.2d 694,700 (1st Cir. 1977) (FCC may preempt State rules prohibiting connection of equipment with local network despite the fact that the equipment "is used predominantly for intrastate calls" because otherwise "local telephone companies [could] control access to the interstate telephone system free of FCC regulation").5 Consistent with those decisions, and with the federal-State partnership that we sought to establish, the Act created roles for both the FCC and the State commissions in establishing and implementing the rules relating to rates and to other issues. Indeed, it would be extraordinary if, in light of the interstate aspects of those

[5] See also North Carolina Utils. Comm'n v. FCC, 537 F.2d 787, 791-94 (4th Cir. 1976) (FCC may regulate "intrastate communications facilities" used for intrastate and interstate communications because otherwise "the Commission will be frustrated in the exercise of that plenary jurisdiction over the rendition of interstate and foreign communication services that the Act has conferred upon it"); California v. FCC, 39 F.3d 919, 933 (9th Cir. 1994) (same).

facilities and the fact that the duties imposed by the Act are matters of federal law, we had excluded the FCC from any role in assuring just and reasonable rates.

Some of the petitioners' briefs nonetheless contend that we did just that. They make three principal statutory arguments: (1) that we gave the FCC rulemaking authority only with respect to those subsections of § 251 that expressly provide for such authority within the subsection, such as § 251(b)(2) (number portability); (2) that because § 252 directs States to set the rates, the FCC is by implication divested of any role in ensuring that those rates are just and reasonable; and (3) that the absence of an express amendment or reference to § 2(b) precludes the FCC from playing such a role. Each of these arguments misperceives both the statutory scheme and Congress' intent in establishing that scheme.

First, the suggestion that Congress only meant the FCC to adopt roles with respect to those subsections of § 251 that expressly mention an FCC role is refuted by § 251(d)(1). It is a cardinal rule that a statute is to be read as a whole. Massachusetts v. Morash, 490 U.S. 107, 115 (1989). Section 251(d)(1) provides that the FCC is authorized -- indeed, directed -- to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]." The Communications Act elsewhere also gives the FCC rulemaking authority to implement all its provisions. See 47 U.S.C. §§ 154(i), 201(b)& 303(r). We did not need to repeat in every subsection of § 251 that such authority existed, because such authority had already been expressly granted for § 251 in its entirety.

If there were any basis for doubt that this was the understanding of the Act, the other provisions of § 251(d) would eliminate that doubt. Section 251(d)(2) lists certain factors the FCC should consider in determining what network elements the incumbent LECS must unbundle under § 251(c)(3), which makes no explicit reference to the FCC. Section 25 l(d)(3) establishes that the FCC's rules may not preclude State laws and regulations that do not prevent the achievement of the purposes of § 251. Neither of those provisions is itself a grant of rulemaking authority. To the contrary, each are framed as limitations that presuppose that the FCC is elsewhere granted rulemaking authority.

Second, the contention that § 252 divests the FCC of any role in assuring just and reasonable rates likewise mischaracterizes both the Act and Congressional intent. Just as the facilities involved are used to provide both interstate services and intrastate services, §§ 251 and 252 of the Act contemplate a significant sharing of responsibilities between the FCC and the State commissions. One of the key compromises reflected in the Act is its establishment of a partnership between the FCC and State commissions, rather than granting one or the other an exclusive role on any critical issue -- as each would have preferred.

Thus, with respect to rates, § 252 of the Act gives State commissions the responsibility to set rates when the parties cannot agree, using their particular expertise concerning cost and demand conditions in their States.[6] Section 251 of the Act, by

[6] Moreover, to ensure States did not set rates that would impede competition, (continued...)

contrast, gives the FCC the responsibility to set overall principles that must be **applied** to ensure that the rates are "just and reasonable. " It was to ensure that those principles are set by the FCC that that requirement was placed in $251.7

The petitioners' argument that § 252 somehow takes away the substantive FCC authority that § 251 would otherwise grant ignores the language and purposes of both sections. Section 252, as its title indicates, is about "Procedures. " It does not define -- and it certainly does not eliminate -- the authority and responsibility elsewhere bestowed on the FCC. Indeed, if we had meant to carve out from the FCC's jurisdiction all matters pertaining to rates, we never would have included the references to "just, reasonable, and nondiscriminatory rates" in §§ 251 (c)(2) and 251(c)(3). The petitioners' interpretation of the Act would render those words meaningless, for they construe those subsections as if we had instead simply required access and interconnection "in accordance with the terms and conditions of the agreement" rather than "on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the

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' **(...continued)**
Congress set forth specific pricing standards in § 252(d). In addition to constraining the States, § 252(d) constrains the FCC as well, because the FCC is directed in § 251 to adopt regulations ensuring that rates are "just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. " See 47 U.S.C. §§ 251(c)(2) & (c)(3) (emphasis added).

[7] The requirement that rates be "just and reasonable" has a long federal law pedigree. The same requirement is established by § 201(b) with respect to interstate services. The FCC has been enforcing it for decades, and its inclusion in § 251 reflected the understanding that it would continue to do so in this new statutory context.

terms and conditions of the agreement and the requirements of this section and section 252." See 47 U.S.C. §§ 251(c)(2) & (c)(3).

Third, the suggestion that § 2(b) of the 1934 Act precludes FCC jurisdiction over rates or any other aspect of § 251 is likewise incorrect. Section 251 applies by its plain terms to 'classifications," "practices," "services," and "facilities" for both interstate and- intrastate services, and requires the FCC to adopt rules implementing the requirements it imposes.* Section 2(b) is a rule of construction that does not apply where Congress has used "straightforward" language giving the FCC authority -- as we did here. See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 377 (1986). Moreover, even if the issue had not thus been directly addressed, it has long been established that "section 2(b) of the Act does not deprive the Commission of control over facilities used interchangeably for intrastate and interstate calls" (see Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 115 (D.C. Cir. 1989)) --as the Act establishes that these facilities are. See 47 U.S.C. § 251(c)(2)(A); see sums pp. 11-12.

There was thus no need to amend or refer to § 2(b) in the Act in order to grant the FCC its traditional authority. The suggestion that the absence of such a reference reflects some unstated Congressional intent to establish a principle of exclusive State jurisdiction is absolutely wrong. A rule of exclusive State jurisdiction would have been wholly unprecedented had we applied it to federal law obligations concerning these

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[8] See, e.g., 47 U.S.C. §§ 251(c)(2) (interconnection obligations for exchange service and exchange access), 251 (c)(3) (provision of unbundled network elements for any telecommunications services), 251 (c)(4) (resale of all telecommunications services provided at retail), and 251(d)(l) (FCC must implement § 251's "requirements").

jurisdictionally mixed facilities, and had we meant to establish such a unique rule we would have said so directly.

Indeed, as petitioners and their **amici** concede, both the Senate bill and the House bill instead made clear that the FCC would adopt rules relating to all the Act's interconnection requirements, including those related to rates. **See** Bell-GTE Brief, p. 23; Brief of Federal Legislators Supporting Petitioners, p. 9. The Conference Committee, on which we all served, had no reason to reopen the existing House-Senate consensus on that issue, or to tilt Congress' carefully crafted compromise in a single radical direction. The suggestion that we in the Conference Committee nonetheless did so, without any public record made of any purported discussion of, or rationale for, any such fundamental last-minute reversal, is merely an unfortunate attempt at historical revisionism.

For **all** these reasons, we urge the Court to reject the petitioners' arguments. Congress established in the Act a careful and moderate balance between the competing claims of federal and State authority with which we were presented, a balance that preserved a significant role for both authorities over **all** critical issues. The Act received such overwhelming support from both parties in both chambers precisely because it was **careful** to strike such balances. Recasting that balance by giving one level of government exclusive authority over any central question would disregard Congress' actual intent, render pointless the tortuous legislative process of reaching consensus on such difficult

issues, and profoundly disserve the public interest by impeding Congress' plan to move rapidly towards nationwide competition.

Respectfully submitted,

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December 23, 1996

Arbitration Docket No./Order No.

SOUTHERN REGION

STATE	BOC	DOCKET NO.	ORDER NO.	DATE
Alabama *	BellSouth	25677-Resale 25703-Arbitration		
Mississippi	BellSouth	95-UA-358		
South Carolina	BellSouth	96-358C		
Kentucky	BellSouth	96-482		
Florida *	BellSouth	960833	PSC96-1579-FOF-TR	12/31/96
Florida *	GTE	960847	PSC97-0064-FOF-TP	01/17/97
North Carolina	BellSouth	P140, Sub 50		12/23/96
Georgia *	BellSouth	6801-U		12/03/96
Tennessee *	BellSouth	96-81152		11/25/96
Louisiana	BellSouth	U22145		01/08/96

ATLANTIC REGION

STATE	BOC	DOCKET NO.	ORDER NO.	DATE
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West Virginia	BellAtlantic	Petition		
DC *	BellAtlantic	Case No. 6 (Unb.)	Order #5	11/08/96
		TAC 6	Order #6	12/02/96
		Case No. 1	Order #7	12/02/96
Maryland *	BellAtlantic	Case No. 8731	73010	11/08/96
New Jersey *	BellAtlantic	TO-96070519		11/08/96
Pennsylvania *	BellAtlantic	A310125F002		10/03/96
Pennsylvania *	GTE			
Virginia *	BellAtlantic	PUC 960100		11/08/96
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CENTRAL REGION

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Ohio *	Ameritech	96-752-TP-ARB		12/05/96
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*States with final arbitration decisions

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EASTERN REGION

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Vermont *	NYNEX	5906		12/04/96
New Hampshire *	NYNEX	96-252	#22, 433	12/04/96
New York *	NYNEX	96-C-0723, 96-C-0724	Opinion # 96-31	11/29/96
		95-C-0657 Wh.Sale 94-C-0095 Univ.Ser 91-C-1174 Eff.Int.	Opinion # 96-30	11/27/96

SOUTHWESTERN REGION

STATE	BOC	DOCKET NO.	ORDER NO.	DATE
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Oklahoma *	GTE			12/12/96
Texas *	SWBell	Consolidated 16189, 16196, 16226, 16285, 16290	FTA96¶ 252 Arb. Panel	11/07/96
Texas *	GTE			12/12/96
Missouri *	SWBell	TO-97-40, TO-97-67		12/11/96
Missouri *	GTE			12/10/96

*States with final arbitration decisions

WESTERN REGION

STATE	BOC	DOCKET NO.	ORDER NO.	DATE
New Mexico	Petition			
North Dakota	Petition			
South Dakota	Petition			
Wyoming	Petition			
Arizona *	USWest	U242896417	59915	12/10/96
Colorado *	USWest	96A-345T	C96-1231	11/27/96
Iowa *	USWest	AIA-96-1 (Arb 96-1)		01/10/97
Iowa *	GTE			12/11/96
Minnesota *	USWest	Consolidated P442, 221/M- 96-855; P5321, 421/M-96-909; P3167, 421/M-96-729		12/02/96
Minnesota *	GTE			12/12/96
Nebraska	USWest	Prelim.		12/03/96
Oregon *	USWest	ARB3, ARB6		12/06/97
		Unb.-UM351	96-283	
		Meth.-UM773)	96-284	
Oregon *	GTE			01/13/97
Utah	USWest	96-087-03		12/2/96
Washington	USWest	UT-960309		12/27/96
		Supplemental		01/16/97

*States with final arbitration decisions

Ex. 7R

Attachment 4

M E M O R A N D U M

February 16, 1996

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF AUDITING AND FINANCIAL ANALYSIS (VANDIVER)

RE: DOCKET NO. 950813-TL -- SOUTHERN BELL TELEPHONE COMPANY
ESSX AUDIT REPORT
AUDIT CONTROL NO. 95-184-1-2

The above-referenced audit report is forwarded. Audit exceptions document deviations from the Uniform System of Accounts, Commission rule or order, Staff Accounting Bulletin and generally accepted accounting principles. Audit disclosures show information that may influence the decision process.

The audit working papers are available for review on request. There are confidential working papers associated with this audit.

Please forward a complete copy of this report to:

Southern Bell Telephone Company
A. M. Lombardo
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

DNV/sp
Attachment
cc: Chairman Clark
Commissioner Deason
Commissioner Johnson
Commissioner Kiesling
Commissioner Garcia
Mary Andrews Bane, Deputy Executive Director/Technical
Legal Services
Division of Auditing and Financial Analysis (Devlin/Causseaux/
File Folder)
Division of Communications (Lombardi/Simmons)
Tallahassee District Office (Grayson)

Research and Regulatory Review (Harvey)
Office of Public Counsel

A TRUE COPY
ATTEST _____
Chief, Bureau of Records

DOCUMENT NUMBER-DATE
01916 FEB 19 96
FPSC-RECORDS/REPORTING

2041

FLORIDA PUBLIC SERVICE COMMISSION

AUDIT REPORT

FIELD WORK COMPLETED

FEBRUARY 15, 1996

SOUTHERN BELL TELEPHONE COMPANY

ESSX AUDIT

DOCKET NUMBER - 950813-TL

AUDIT CONTROL NUMBER 95-184-1-2

Michael E. Buckley

MICHAEL BUCKLEY
AUDIT MANAGER

AUDIT STAFF
CHRISTOPHER HOLMAN

MINORITY OPINION
YES____ NO_X_

John M. Grayson

JOHN M. GRAYSON
REGULATORY ANALYST SUPERVISOR
TALLAHASSEE DISTRICT OFFICE

INDEX

I. EXECUTIVE SUMMARY

AUDIT PURPOSE: We have applied the procedures described in Section II of this report to audit the ESSX system of Southern Bell Telephone Company (SBT), AFAD Control No. 95-184-1-2.

SCOPE LIMITATION: An audit exit conference was not held. This report is based on confidential information which is separately filed with the Commission Clerk.

DISCLAIM PUBLIC USE: This is an internal accounting report prepared after performing a limited scope audit; accordingly, this document must not be relied on for any purpose except to assist the Commission staff in the performance of their duties. Substantial additional work would have to be performed to satisfy generally accepted audit standards and produce audited financial statements for public use.

INVESTIGATION OVERVIEW: This investigation was initiated to determine if the fully distributed cost of interbuilding cabling for ESSX services booked to regulated expense accounts, are fully recovered through regulated revenue recognition. It was determined that SBT does not use fully distributed costing but uses a marginal costing system. Since SBT uses ESSX there is no interbuilding cabling, all calls must go through the central office. The ESSX rates are developed through special studies.

II. AUDIT SCOPE

SCOPE OF WORK PERFORMED

ESSX: Obtained Public Service Commission Orders dealing with ESSX; Discussed ESSX system and awarding contracts with Department of Management Services personnel; Requested Southern Bell personnel explain in detail the costs and revenues for four correctional institutions in Florida; Obtained copies of billings to the four correctional institutions; Compared pricing to tariffs; Determined if Southern Bell's pricing of ESSX service was consistent from one bid to another.

III. AUDIT DISCLOSURES

AUDIT DISCLOSURE NO. 1

SUBJECT: Fully Distributed Costing System

STATEMENT OF FACT: According to Southern Bell employees, Southern Bell does not capture fully distributed costs of providing ESSX type service. Southern Bell does not maintain records on a Fully Distributed Cost basis for the provisioning of services. Additionally, outside plant records involving the provisioning of services to any new building or building complex do not discreetly identify the investment involved by the service that utilizes the investment. Fully distributed costs would not capture all costs of providing this service because it is based on historical costs. ESSX service is provided on a 60 month basis, and the costs for providing this service is estimated on a going forward basis. This enables the Company to project costs for the 60 months that they are providing this service. The costs that Southern Bell uses were developed specifically for Correctional Institutions in the State of Florida. The costs were uniform for the prisons that were reviewed, namely: Brevard Correctional Institution, Dade Correctional Institution, Everglades Correctional Institution, and Washington Correctional Institution. Revenue from SBT billings were compared to billings from the correctional institutions and the amounts in all cases reconciled. The costs were compared to the revenue amounts, and only one cost component did not recover nonrecurring costs. Recurring revenue did however recover this cost component. Marginal costs were recalculated and the results compared to Southern Bell's calculation as shown in the following table:

COST COMPONENT	ESSX COST/LINE SBT	INTRASTATE COST/LINE SBT	INTRASTATE COST/LINE AUDITORS
LOOP	$5.68	$4.26*	$4.26
INTERCOM	3.07	3.07	3.07
FEATURES	.79	.79	.79
MARKETING	.10	.10	.02
TOTAL	$9.64	$8.22	$8.14

* Where 25% of the Loop cost goes to interstate.

Each cost component has a supporting cost study that support these amounts.

The one cost component that was not recovered in nonrecurring rates was Item 108, Recap number 263-EBS Line Additive. The revenue and costs per line are shown in the following table:

Item	Nonrecurring Revenue	Recurring Revenue	Nonrecurring Costs	Recurring Cost
108	$13.25	$1.15	$19.05	$0.48

The difference per line of $5.80 ($19.05 less $13.25) is the nonrecurring loss. The difference between cost and revenue for the recurring monthly amount is $.67 ($1.15 less $0.48). The nonrecurring amount of $5.80 is recovered in 9 months of service ($5.80 divided by $0.67).

The Company stated in response to an audit request, that the outside plant cost data involved in the conversion of Brevard Correctional Institute from a PBX to an ESSX system is as follows:

1.	Reinforce existing cable and add new cable plant	$9,734.00
2.	Maintenance work on existing cable	500.00
3.	Plant retirements	1,022.00
	TOTAL	$11,256.00

OPINION: In the case of marketing, as the costs were less than the amount that the Company was showing, the audit calculation allows for a greater recovery than that shown by the Company.

In the case of the fully distributed cost figures, the audit staff could not determine that the total of $11,256.00 represented all costs for the Brevard Correctional Institute.

COMPANY COMMENT: The Company may respond at a later date.

AUDIT DISCLOSURE NO. 2

SUBJECT: ESSX Rates

STATEMENT OF FACT: Staff reviewed the rates with personnel from the Florida Department of Management Services (DMS). This included the rates that were on file from PBX type services provided by Rolm, and the ESSX service provided by Southern Bell Telephone. Rates that were developed by Southern Bell for the Florida Correctional Institutions were unique to the prisons, and specific tariff rates were not listed for most items. The ESSX system as a whole did not have specific tariff rates, but were based on Special Assemblies. However, special studies were developed for Florida prisons, and they all had uniform rates. The audit staff requested bills for all four prisons mentioned in Disclosure 1. Copies of actual monthly bills were read for the four prisons which were provided by Southern Bell. DMS stated that they only bill for Brevard and Everglades Correctional Institutions. Monthly bills were also provided for the same time period by DMS for the two prisons. The other two prisons, Washington and Dade were contacted and provided us with their bills for the same time period. The amounts on the bills were reconciled to each other.

COMPANY COMMENT: The Company may respond at a later date.

AUDIT DISCLOSURE NO. 3

SUBJECT: Bids for ESSX service

STATEMENT OF FACT: Southern Bell Telephone uses one pricing schedule to provide ESSX service for all Florida Correctional Institutions, therefore the rates are uniform. There is no bid process for any of the prisons. Prisons are not subject to the competitive bid requirements of Rule 60A-1.002(2), F.A.C. The contract with SBT is secured by means of a Special Service Arrangement provided to the Division of Communications. Contracts for the prisons were read for the four Correction facilities. The contract specified the same rates for all prisons which were determined on average costs.

COMPANY COMMENT: The Company may respond at a later date.

CERTIFICATE OF SERVICE

DOCKET NOS. 960833-TP, 960846-TP and 960916-TP

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail or hand-delivery to the following parties of record this 27th day of January, 1997:

BellSouth Telecommunications
C/o Nancy H. Sims
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301

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Atlanta, GA 30375

Tracy Hatch

2050

AUDIT DISCLOSURE NO. 4

SUBJECT: Interbuilding Cabling

STATEMENT OF FACT: As the ESSX system is configured, all calls from one telephone line to another, including intercom calls go from the originating station instrument to the Central Office and then to the terminating station. The audit staff found no evidence of any interbuilding cabling in any company record concerning the provisioning of ESSX service at any of the four institutions. The Company responded in a letter to the Auditor that network cable may run physically from building to building, but the cable is used a as a pass-thorough connection from a distant demarcation point to the central office. The network cable in this case does not provide a direct "tie cable" functionality. An ESSX service call from one building to another on the same campus setting must traverse the SBT distribution network at the central office, establish a switched connection to the second ESSX service line, and traverse the SBT distribution network back to the second building.

OPINION: It appears that there is no interbuilding cabling in an ESSX system

COMPANY COMMENT: The Company may respond at a later date.