

# Alabama Public Service Commission

In the matter of the arbitration between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc.

In the matter of the Petition by AT&T Communications of the South Central States, Inc., for arbitration of certain terms and conditions of a proposed agreement with GTE Alabama, Inc., and Contel of the South, Inc., concerning interconnection and resale under the Telecommunications Act of 1996.

DOCKET 25703

DOCKET 25704

## JOINT ORDER ON RECONSIDERATION

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BY THE COMMISSION:

### I. SUMMARY OF THE PROCEEDINGS

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By Order entered in Docket 25703 on February 6, 1997, we adopted in full the recommendations of the arbitration panel appointed to arbitrate the unresolved issues between the parties to that proceeding, AT&T

Communications of the South Central States, Inc. (AT&T) and BellSouth Telecommunications, Inc. (BST). In that same Order, we suspended certain provisions of the Commission's Telephone Rule T-28 in order to allow parties on the Commission's telecommunications service list ten days from the date of said order to file comments on the recommendations of the arbitration panel which were adopted by the Commission. The parties to the arbitration were allowed an additional ten days to file responses to any comments submitted by non-parties. We emphasized that all such comments could, at the option of the filing parties, be styled Motions for Reconsideration.

ose for such reconsideration was to reconcile the inconsistencies of law in the two Orders on arbitration in the best interest of the ratepayers of Alabama. The established deadline for the filing of comments and/or petitions for reconsideration concerning those inconsistencies was February 25, 1997.

As anticipated, the Commission received numerous comments and petitions for reconsideration and clarification on the various issues addressed in the two arbitrations discussed herein. Specifically, comments and or Petitions for Reconsideration/Clarification were received from BST; GTE; AT&T; MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively MCI); DeltaCom, Inc. (DeltaCom); WorldCom, Inc. (WorldCom); Sprint Communications Company, L.P. (Sprint); and the Attorney General of Alabama. (the A.G.). Due to the complexity and import of the issues involved in these proceedings and the filings received, we deemed it advisable to conduct joint oral arguments concerning those filings. The oral arguments were held on May 1, 1997 in the Commission's hearing room. AT&T, Sprint, MCI, the A.G., BST, and GTE all presented oral arguments concerning their respective positions.

## **II. STATUTORY CONSIDERATIONS**

We now embark on perhaps the most difficult task in these proceedings, reconciling the inherent inconsistencies of the two orders on arbitration herein under consideration. We would note at the outset, however, that our review of the Telecommunications Act of 1996 Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat.56 (hereinafter the Act or the 1996 Act) has persuaded us that the Commission is not compelled by the Act to reach identical results in both of the arbitrations before us.

It is clear that Congress intended with the implementation of 47 U.S.C. § 252(a) to strongly encourage private negotiations between interconnecting telecommunications carriers [S. Report 104-23, 104th Cong., 1st Sess.19 (1995)]. Congress obviously recognized that competing telecommunication carriers seeking to interconnect were in a much better position than regulators to assess their individual interconnection needs based on the particular circumstances of their operations. Rigid interconnection requirements were not established in the Act because Congress recognized that inflexible standards would not be effective in promoting the underlying purposes of the 1996 Act and would, in fact, present an obstacle to efficient competition.

In an environment where private negotiations are intended to dictate the terms and conditions of interconnection which are ultimately arrived at by

interconnecting telecommunication carriers, it is axiomatic that there will be many distinctions between the various negotiated interconnection agreements which are submitted to this Commission for approval pursuant to 47 U.S.C. § 252(e). Consistency and uniformity of negotiated interconnection agreements is thus neither expected nor required.

The arbitration process set forth at 47 U.S.C. § 252(b) was adopted by Congress to augment the process of private negotiation. This intention is clearly conveyed by the provisions of 47 U.S.C. § 252 (b)(1) which limit the arbitrating authority of the states to "open issues" between parties petitioning for arbitration. Any and all matters successfully negotiated by parties to arbitration proceedings are expressly not to be disturbed by the state.

As the process of arbitration was clearly intended to be a means of supplementing private negotiations (which yield different terms and conditions of interconnection), it follows that arbitrations also need not necessarily yield uniform, consistent results. 47 U.S.C. § 252 (b)(4)(C) clearly contemplates such differing results upon arbitration by imposing on the states the duty to resolve each issue set forth in petitions for arbitration by imposing appropriate conditions "as required" upon the parties to arbitrations. The emphasized language in that provision seems to recognize the likelihood of differing results based on the individual circumstances presented in each arbitration.

It is with the foregoing discussion in mind that we address the Petitions for Reconsideration and/or Clarification submitted in the arbitrations now before us. Our objective herein is to fulfill the statutory duty imposed upon us by the 1996 Act in a manner that ensures an optimum environment for competition in the telecommunications industry in Alabama while protecting and preserving the best interest of the telecommunications consumers of this state. It is our intention to reconcile the two Orders on arbitration by making them as consistent as they need be under the Act where issues of law are concerned. We do not deem it necessary, however, to totally reconcile the two arbitration orders on issues which are not construed to be of a legal nature.

### III. FINDINGS AND CONCLUSIONS UPON RECONSIDERATION

#### A. INTRODUCTION

The analysis which follows is a discussion of the issues in each arbitration for which reconsideration and/or clarification was sought. We first discuss the issues common to both arbitrations which are herein being reconciled. We then address all Petitions for Reconsideration/Clarification which are distinct to the respective arbitrations.

#### B. RECONCILIATION OF THE CONTRARY ARBITRATION AWARDS ON ISSUES COMMON TO DOCKETS 25703 AND 25704

##### (1) Local Service Resale - Contract Service Arrangements

(BST/AT&T - Issue 1; GTE/AT&T - Issue 1)

**(a) The Commission's February 6, 1997 Order in Docket 25703 (BST/AT&T)**

The Commission's February 6, 1997 Order (at p. 6) required BST to make all its telecommunications services available for resale in Alabama with the following conditions and exceptions on specific services: (1) Short-term promotions of ninety days or less were not made subject to the wholesale discount rate. Instead, they were ordered to be priced at the promotional rate. Promotional offerings greater than ninety days in duration were required to be offered for resale at the discount rate; (2) The Commission found that Contract Service Arrangements (CSAs) on a going forward basis from the date of the February 6, 1997 Order should be made available for resale at the same rates, terms and conditions offered by BST to the same client to whom the CSA was applicable. The Commission ruled that the wholesale discount would not apply to resold CSAs. CSAs were required to be submitted to the Commission for its exclusive review and the information contained therein was deemed proprietary. The Order specifically noted that AT&T was not precluded from offering the same services included in the CSA to the end user through utilization of the wholesale discount applied to the tariffed rate of the services.

**(i) The BST Position**

BST noted its belief that CSAs should not be subject to resale but nonetheless accepted the panel's recommendation and ultimately the Commission's decision on the subject. BST maintained that CSAs are designed to respond to customer specific competitive threats on a customer-by-customer basis and contain rates established specifically for each competitive situation. BST urged the Commission to affirm its conclusions concerning CSAs as set forth in its February 6, 1997 Order in Docket 25703.

**(ii) The AT&T Position**

AT&T requested reconsideration on this issue and asserted that CSAs are required under the Act and the Federal Communications Commission's (FCC's) Interconnection Order 2First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996. CC Docket No. 96-98 (Aug. 8, 1996) [hereinafter the FCC's Order.] to be available for resale at the wholesale discount. AT&T contended that BST avoids at least some cost when it offers CSAs to resellers. AT&T maintained that even if the CSA is priced below cost, there will continue to be cost avoided by BST when it sells such service at wholesale rather than retail.

AT&T further contended that an exception to BST's wholesale obligations for competitive prices could have tremendous anti-competitive effects. According to AT&T, BST could consistently offer the lowest CSA prices

because the new entrant's cost of providing CSAs through resale would equal BST's CSA price plus the new entrant's retail costs.

AT&T concluded that CSAs are essentially long-term promotions offered to a select group of customers at below tariff prices. AT&T urged the Commission to adopt the FCC's position on long-term promotions by requiring CSAs to be resold at the contract price less the applicable wholesale discount.

#### **(iii) The A.G.'s Position**

The A.G. took exception to the BST/AT&T panel's decision that CSAs should not be subject to the resale discount. The A.G. contended that the Act does not provide for such an exception.

#### **(iv) The MCI Position**

MCI requested that the Commission reconsider its findings on this issue and urged the Commission to require BST to make CSAs available at the wholesale discount rate. MCI suggested, however, that it might be appropriate to consider establishing a separate wholesale discount rate to apply to CSAs given the possibility that CSAs may indeed have different avoidable costs than do other retail services.

MCI disagreed with the Commission's determination that CSAs need be reviewed only by the Commission and that they should remain proprietary. MCI asserted that if a new entrant had no opportunity to review BST CSAs, it would be impossible for that new entrant to offer them for resale. MCI also contended that new entrants have the most compelling interest in ensuring that BST CSAs are not anti-competitive. MCI suggested that by allowing new entrants to review BST CSA filings, the Commission could ensure that those entities most interested in preventing anti-competitive behavior by BST would monitor such filings.

#### **(v) The Sprint Position**

Sprint sought reconsideration of the Commission's decision on this issue. Sprint asserted that BST should be required to offer CSAs for resale at the wholesale discount rate. Without such discount, Sprint argued, BST would be made whole by the rate paid for undiscounted CSAs while Sprint and other

local competitors would be required to pay BST a retail rate and then lose money on administrative, marketing and other costs necessary to offer the CSAs. Sprint contended that it and other new entrants could not compete with BST for customers served under CSAs unless the CSAs are discounted to new entrants.

**(vi) The DeltaCom Position**

DeltaCom moved the Commission to reconsider its decision to allow BST to resell its CSAs at the contract rate. DeltaCom asserted that the Commission's decision in this regard was contrary to the 1996 Act wherein all services offered for resale are required to be priced at the wholesale discount rate. 47 U.S.C. § 252(c)(4). DeltaCom further asserted that the Commission's decision was contrary to the FCC's Order at ¶ 948, wherein the FCC concluded that "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by the incumbent Local Exchange Carriers (LECs). A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings thereby eviscerating the resale provisions of the 1996 Act." "If a service is sold to end users, it is a retail service even if it is priced at a volume based discount off the price of another retail service" FCC's Order at ¶ 951.

**(vii) The WorldCom Position**

WorldCom moved the Commission to reconsider its decision to allow BST to resell its contract service arrangements at retail rates, contending that the Act requires that all services offered for resale be priced at the wholesale discount rate. WorldCom's arguments essentially mirrored those raised by AT&T and DeltaCom.

**(b) The Commission's February 12, 1997 Order in Docket 25704 (GTE/AT&T)**

The Commission concluded in its February 12, 1997 Order that GTE was required to resell Contract Service Arrangements at the wholesale discount rate because GTE provides contract service arrangements at retail to carriers as contemplated by 47 U.S.C. § 251(c)(4)(A).

**(i) The GTE Position**

GTE generally contended that CSAs are not provided under a tariff and it would, therefore, be illogical to offer them at a discount. GTE accordingly requested reconsideration concerning the findings of the Commission in its

**(ii) The AT&T Position**

AT&T asserted that CSAs are required under the Act and the FCC's Order to be available for resale at the wholesale discount. AT&T maintained that any other decision by the Commission on this issue would violate the Act, the FCC's Order, and would stifle the development of competition in Alabama. AT&T premised its argument on the contention that allowing a LEC to avoid its resale obligations for CSAs would allow the LEC to use CSAs in an anti-competitive manner. AT&T asserted that if a LEC does not have to resell CSAs at the wholesale rate, a LEC will always be able to underprice its competitors simply by offering a CSA with a lower price. The LEC's competitors will never be able to offer CSAs at anything less than the price offered by the LEC. AT&T contended that LECs could technically use CSAs in such a manner to prevent competition from ever coming into Alabama by offering every single customer in their territories CSAs at less than the wholesale rates paid by competing carriers.

**(c) Reconciliation of the Arbitration Orders Concerning the Local Service Resale - Contract Service Arrangement Issue**

Upon thorough review of the recommendations of both panels on this subject, as well as consideration of all written and oral arguments presented by all parties and petitioners, we are persuaded that the GTE/AT&T arbitration panel reached the more appropriate conclusion concerning the issue of CSA resale. We accordingly adopt in principle their rationale concerning CSAs as set forth in our February 12, 1997 Order (at pp. 13 - 14). More specifically, we find that CSAs should be made available for resale by BST and GTE at the CSA price minus the wholesale discount rate on a going forward basis from the effective date of this Order. We would note, however, that we deem it appropriate that CSAs need only be made available for resale less the wholesale discount to the BST or GTE clients to whom the CSA is applicable.

The 1996 Act indeed mandates at 47 U.S.C. § 251 (c)(4)(A) that incumbent LECs "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunication's carriers." That Section of the Act provides no exceptions and it would be a clear violation of the Act to allow any incumbent LEC to withhold retail services such as CSAs from its resale obligation either by refusing to resell such services, or by refusing to resell such services at the wholesale discount. Such a conclusion is also consistent with the FCC's interpretation of the Act as set forth in its Order at ¶¶ 948-951.

We are fearful that allowing an incumbent LEC to completely avoid its

resale obligations for CSAs would allow such LECs to use CSAs in an anti-competitive manner. If LECs are not required to resell CSAs at the wholesale rate, LECs will be in a position to underprice their competitors by simply offering a CSA with a lower price. Under such a scenario, the LECs would have anti-competitive incentive to migrate all their large customers to CSAs in clear contravention of the Act and its underlying purposes.

We further conclude that competitive carriers should be allowed to review Contract Service Arrangements on file with the Commission provided said competitors have executed a proprietary agreement with the LEC in question concerning review of its CSAs. We are convinced that without an opportunity to review the CSAs of an incumbent LEC, it would be virtually impossible for an alternative LEC to offer CSAs for resale. We note, however, that the scope of review for CSAs will be limited to only such review as is necessary to determine the nature and extent of the service being offered and the price at which said service is being provided. Any disputes concerning the scope of review of a CSA or the execution of proprietary agreements should be brought before the Commission.

Our only concern regarding the resale of CSAs at the CSA price less the wholesale discount rate stems from the possibility that BST and GTE may encounter different avoided costs for CSAs as opposed to other retail service offerings. The evidence of record does not indicate that our concerns are completely valid at this point, however. We will therefore allow BST and GTE to raise this issue during the course of the resale proceedings to be held in Docket 25677 if they determine that differing avoided costs for CSAs are yielding inequitable results. IT IS SO ORDERED BY THE COMMISSION.

**(2) Restrictions on Resale (BST/AT&T - Issue 2; GTE/AT&T - Issue 2)**

**(a) The Commission's February 6, 1997 Order in Docket 25703 (BST/AT&T)**

The Commission's February 6, 1997 Order in Docket 25703 (at p. 10) directed BST to file a complete revised tariff within 90 days of said Order removing any restrictions on resale and barriers to competitive entry in non-compliance with the 1996 Act. The Order provided that competitive carriers could challenge the terms and conditions applicable to specific BST retail services as being unreasonable or discriminatory by an appropriate filing with the Commission. The Order stated that the conclusions reached therein concerning restrictions on resale were interim and subject to the Commission's decision in its pending Resale Order in Docket 25677.

AT&T was the only party to submit comments requesting clarification concerning the Commission's February 6, 1997 findings on this subject. AT&T noted that the 1996 Act prohibits unreasonable and discriminatory conditions at 47 U.S.C. § 251(c)(4)(B). AT&T went on to note, however, that the FCC's Order (at ¶¶ 948 - 950, 962, 968) established that all conditions placed on resale were presumptively unreasonable. AT&T thus concluded that when read in combination, the Act and the FCC Order conclude that until a LEC proves otherwise, all conditions and restrictions on resale are deemed prohibited. AT&T contended that the Act and the FCC's order required the

Commission to prohibit BST from imposing conditions or restrictions on resale unless BST meets its burden of proving that such conditions are reasonable and nondiscriminatory.

AT&T did not object to the procedure contained in the Commission's Order of February 6, 1997 provided that it was clarified that once a competitor challenges a tariff condition or restriction in a BST tariff, BST bears the burden of proving that the challenged condition or restriction on resale is reasonable, nondiscriminatory and is not a barrier to entry.

**(b) The Commission's February 12, 1997 Order in Docket 25704 (GTE/AT&T)**

The Commission concluded in its February 12, 1997 Order in Docket 25704 (at pp. 15-16) that, pursuant to 47 U.S.C. §251 (c)(4)(B), GTE could not prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of its telecommunications services. The Commission adopted the GTE/AT&T arbitration panel's findings that GTE had not shown any justification for restrictions other than the narrowly tailored restrictions recognized by the FCC in its Order as follows: (1) Residential services may not be resold to nonresidential customers; (2) Lifeline or other means tested service offerings may not be resold to noneligible customers; (3) Withdrawn ("grand fathered") services may not be resold to consumers that are not currently receiving those services; and (4) Promotional offers extending 90 days or less must be available for resale but may be priced at the promotional rate rather than the promotional rate less the resale discount. FCC Order at ¶¶ 948-50, 962, 968; 47 CFR §§ 51.613(a)(1)-(2), 51.615.

The Commission did not receive any requests for reconsideration concerning this issue from the parties to the arbitration in Docket 25704 or any other nonparticipating parties.

**(c) Reconciliation of the Arbitration Orders Concerning the Issue of Resale Restrictions**

Although the Commission did not receive a Petition for Reconsideration concerning this particular issue in Docket 25704 and received only a request for clarification in Docket 25703, we nonetheless feel compelled to reconcile the two arbitration orders concerning this matter. Upon a thorough review of the recommendations of both panels on this subject as well as consideration of all arguments presented by AT&T on the subject, we are persuaded that both orders on arbitration should be modified concerning the subject of resale restrictions. We are persuaded that the most efficient method of dealing with restrictions on resale is to adopt a position which represents something of a compromise between the findings on that issue as set forth in the February 6, 1997 Order in Docket 25703 and those reached concerning the same issue in the February 12, 1997 Order in Docket 25704.

Due to the Act's requirement at 47 U.S.C. § 251(c)(4)(A) that any telecommunications service that an incumbent LEC provides at retail to subscribers who are not telecommunications carriers must be offered for resale at wholesale rates, there will be a multitude of incumbent LEC

services which will be subject to resale. Many of the resale restrictions currently in place for those retail service offerings could likely be deemed reasonable and nondiscriminatory. We accordingly reaffirm in part the conclusions reached in our February 6, 1997 Order in Docket 25703 wherein BST was ordered to file a complete revised tariff within 90 days of said Order removing any restrictions on resale and barriers to competitive entry found to be in noncompliance with the 1996 Act. Similarly, we believe it appropriate for GTE to submit within 90 days from the effective date of this order a complete revised tariff removing any restrictions on resale and barriers to competitive entry. We are persuaded that it would be premature to remove all restrictions on resale other than those specific restrictions recognized in our Order of February 12, 1997 in Docket 25704 as being reasonable and nondiscriminatory.

We note, however, that upon the filing of the revised tariffs in accordance with the requirements noted above, AT&T and other new entrants may challenge a tariff condition or restriction imposed by BST or GTE as being unreasonable, discriminatory and a barrier to entry by making an appropriate filing with the Commission. Once such a filing is made by a new entrant, however, we believe that the Act and the FCC's Order mandate that the incumbent LEC whose tariff contains the resale restriction or condition challenged must bear the burden of proving that such condition or restriction is reasonable, nondiscriminatory and is not a barrier to entry. The only restrictions which will be deemed presumptively reasonable are those specifically recognized in our February 12, 1997 Order in Docket 25704 (at pp. 15-16) and set forth herein at B.(2)(b) (at p. 11). IT IS SO ORDERED BY THE COMMISSION.

**(3) The Relationship of Vertical Services to the Unbundled Switching Element (BST/AT&T - Issue 14(c); GTE/AT&T - Issue 15)**

**(a) The Commission's February 6, 1997 Order in Docket 25703 (BST/AT&T)**

In our Order of February 6, 1997, in Docket 25703 (at pp. 33-35), we adopted the findings of the BST/AT&T arbitration panel concerning vertical services and local switching. Contrary to the conclusions of the FCC in its Order, the BST/AT&T panel concluded that vertical switching features such as Caller ID, Call Forwarding and Call Waiting need not be provided as part of the local switching element. The panel reasoned that such features, while technically provided in the central office, were not local switching functions. The panel instead found that those functions were themselves retail services and should be made available as part of BST's resale service offerings. Accordingly, the panel established that such vertical switching features should be priced at their respective retail prices less the wholesale discount.

**(i) The BST Position**

BST submitted comments urging the Commission to affirm its findings on this issue as set forth in its Order of February 6, 1997. BST incorporated by reference its Petition for Reconsideration filed in Docket 25704 wherein

BST addressed the issue of vertical services. The issues raised by BST in that Petition for Reconsideration are discussed in more detail below at B. (3)(b)(iii).

**(ii) The AT&T Position**

AT&T submitted written comments concerning the issue of vertical services and petitioned the Commission to reconsider its decision concerning same. AT&T asserted that BST is required by the Act to provide all the vertical features that are resident in a local switch when AT&T purchases local switching as an unbundled network element. AT&T maintained that these features must be priced as a part of the switch at unbundled network element rates. AT&T contended that pricing vertical features at the wholesale rate would violate the Act's pricing provisions and the findings of the FCC in its Order.

AT&T further maintained that consumers would benefit if new entrants are able to purchase vertical features as part of the switch at cost-based rates. According to AT&T, vertical features typically have large margins of profit built into their retail price. When a new entrant purchases these services at retail, it has little margin for price competition because it must pay BST wholesale prices which are based on retail rates. When a new entrant purchases these services as part of the local switching element at cost-based rates, however, it will have a much greater margin within which to compete with BST. AT&T contended that the end result would be a lower price for consumers.

**(iii) The MCI Position**

MCI also submitted comments on the issue of vertical services and sought reconsideration of the Commission's decision concerning same. MCI argued that the Commission's decision to allow BST to price "so called" vertical features as retail services subject to the wholesale discount as opposed to vertical features which are "part and parcel" of the local switching network element was entirely improper and did not comport with the Act. MCI further asserted that the use of revenue-requirement based "embedded cost" standards would prevent the market from driving local exchange rates to economic costs and would violate the provisions of the Act which preclude a determination of cost based on references to rate of return or rate base proceedings.

**(iv) The DeltaCom Position**

DeltaCom submitted comments in which it contended that the Commission's February 6, 1997 Order in Docket 25703 violated the 1996 Act by requiring competitors to separately purchase vertical features and capabilities which are already included in BST's local switching capabilities such as Call Forwarding, Call Waiting, and Caller ID. DeltaCom noted that the Act defines network elements as including all the "features, functions and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). In 47 CFR § 51.317(c)(1)(C)(2), the FCC decided that the basic local switching function includes custom calling features.

DeltaCom also argued that the rates for the unbundled local switch already include the cost (plus a reasonable profit) of providing all the functions, features and capabilities of the switch. According to DeltaCom, the rate for the switch is not limited to the cost of having the switch provide dial tone only - it includes the cost of having the switch provide every feature, function and capability of the switch. Thus, requiring competitors to purchase vertical features separately would require them to pay for those vertical features twice - once when they purchase the unbundled switch and again if they purchase vertical features. DeltaCom asserted that requiring double payment violated the Act's requirements that all prices for unbundled features be based on their cost. 47 U.S.C. § 251(d)(1). According to DeltaCom, the end result will be unreasonably high rates for consumers.

#### **(v) The WorldCom Position**

WorldCom moved the Commission to reconsider its decision to allow BST to price software features at retail rates minus the wholesale discount. WorldCom asserted that the Act defined network elements as including all features, functions and capabilities that are provided by means of such facility or equipment. WorldCom also noted that in 47 CFR § 51.317(c)(1)(C)(2), the FCC decided that the basic local switching function included custom calling features. WorldCom pointed out that the Commission's Order was contrary to the findings of the FCC on that issue.

WorldCom also asserted that the rates for purchasing the unbundled local switch include the cost of providing all the functions, features and capabilities of the switch. Requiring the payment of the resale rate minus the wholesale discount for any vertical feature of the service would violate the requirement that all prices for unbundled features be based on their cost. 47 U.S.C. § 252(d)(1). WorldCom asserted that new entrants who utilize complex network elements commit to paying incumbent LECs their cost from the underlying network. In exchange for assuming the similar risk of bearing the cost, new entrants should receive the full revenue stream to recover cost as do the incumbent LECs.

**(b) The Commission's February 12, 1997 Order in Docket 25704**

We adopted in full in our February 12, 1997 Order in Docket 25704 (at pp. 37-38), the GTE/AT&T arbitration panel's recommendations concerning local switching and vertical services. The panel in that proceeding found that local switching provides, among other things, dial tone for each line; Call Waiting; Call Forwarding; proper routing of a call; access to AIN triggers to customized call processing; creation of data necessary for customer billing; and the functionality to connect the appropriate originating lines or trunks wired to a desired terminating line, platform or trunk. The panel further concluded that local switching also provides the capability for data switching in addition to voice transmission capabilities. The panel reasoned that vertical features and functions such as Call Waiting and Caller ID were an integral part of the switch's capability and, therefore, were a part of the functionality of local switching. The panel concluded that the Act and the FCC's Order require that when a carrier purchases local switching, these features, and all features, functions and capabilities of the switch are included in the price of the local switching element.

**(i) The GTE Position**

In its Petition for Reconsideration concerning the Commission's findings on vertical services in Docket 25704, GTE contended that the Commission's February 6, 1997 Order in Docket 25703 correctly determined that the vertical features of the switch such as Caller ID, Call Forwarding and Call Waiting are services, not network elements. Therefore, such features need not be unbundled and should be sold at prices determined by the resale discount rate. GTE contended that the FCC's Order wherein the FCC concluded that the price of the switch port included all the features and functions of the switch was "ludicrous." GTE accordingly urged the Commission to adopt the findings concerning vertical services set forth in the Commission's February 6, 1997 Order in the BST/AT&T arbitration proceeding in Docket 25703.

**(ii) The AT&T Position**

AT&T submitted comments urging the Commission to reaffirm the decision reached in its February 12, 1997 Order on this issue. AT&T emphasized that it should not be required to separately purchase vertical features and functions (such as Call Forwarding, Call Waiting or Caller ID) which are included in GTE's local switching capability. As stated by the GTE/AT&T panel, AT&T contended that these features are an integral part of the functionality of local switching. Both the Act and the FCC require that these functions, features and capabilities be included in the price of the unbundled switch. According to AT&T, requiring it to purchase these functions, features and capabilities separately would violate the Act and the relevant pricing provisions of the FCC's Order which have not been stayed by the United States Court of Appeals for the Eighth Circuit.

AT&T also asserted that the rates proposed by both AT&T and GTE for purchasing GTE's unbundled switch already included the cost (plus a reasonable profit) of providing all the functions, features and capabilities of the switch. The rate for the switch is not limited to the cost of having the switch provide dial tone only; it includes the cost of having the switch provide every feature, function and capability of the switch. Thus, requiring AT&T to purchase vertical features separately would require AT&T to pay for those features twice - once when AT&T purchases the unbundled switch and again if AT&T has to purchase unbundled features separately.

AT&T asserted that the imposition of a requirement that it purchase vertical features separately would increase the cost to Alabama consumers and seriously inhibit, if not stifle altogether, the development of competition in Alabama. AT&T asserted that vertical features are often priced several hundred percent above cost. AT&T maintained that if the Commission requires it to purchase these features at retail rates rather than as part of the switch, AT&T will be forced to pay a rate that reflects a 23 percent discount off a several-hundred percent inflated retail rate. AT&T maintained that such a scenario would not allow for competition and submitted that such features must be sold at cost-based rates. AT&T contended that any finding to the contrary would violate the Act, the FCC's Order, and would inhibit the development of competition in Alabama.

### **(iii) The BST Position**

In its Petition for Reconsideration of the Commission's February 12, 1997 Order concerning this issue, BST contended that vertical services are complete telecommunications services offered at retail and should therefore be provided at the wholesale discount. Otherwise, consumers would lose an enormous contribution to the maintenance of reasonably affordable local exchange rates.

BST asserted that the Commission's conclusions concerning vertical services in its February 12, 1997 Order in Docket 25704 were erroneous because vertical services are not network elements, but are instead complete telecommunications services that incumbents currently offer at retail to customers in Alabama. Such services should, therefore, be made available only at resale rates. BST emphasized that this issue is of great importance to the consumers of Alabama because, like business services, vertical services provide an enormous contribution to the maintenance of reasonably affordable local exchange rates. BST represented that it was crucial that BST and GTE not lose customers for these services to resellers who are able to avoid the Act's resale pricing provisions by engaging in resale under another name.

**(c) Reconciliation of the Arbitration Orders concerning the issue of Vertical Services.**

As is apparent from the contrary conclusions reached by this Commission concerning the issue of vertical services in the two arbitration proceedings before us, we continue to find some merit in the positions taken by both arbitration panels on this issue. However, after thorough review of the Act and the FCC's Order, as well as all the arguments raised in the comments and petitions for reconsideration on this issue, we are persuaded that the conclusions reached on this issue in Docket 25704 are, with one exception as noted below, correct. The Act clearly establishes that vertical services are part of the local switching network element since network elements, by definition, include features, functions and capabilities that are provided by means of that facility or equipment. See 47 U.S.C. § 153(29). Such a result is also consistent with the findings of the FCC in its Order at ¶ 412-414. We also find persuasive the FCC's conclusion therein that the availability of vertical switching features through resale does not remove such features from the definition of a network element. We believe that ILECs should make vertical switching features available pursuant to the resale pricing provisions of the Act for competitors who do not desire to purchase the unbundled local switching element. We concur, however, with the FCC's assessment at ¶ 413 of its Order that such retail availability of vertical switching features does not implicitly remove those features from the Act's definition of "network element."

Based on the foregoing, we are compelled to conclude that when local switching is purchased as an unbundled network element pursuant to 47 U.S.C. § 251(c)(3), the pricing provisions of 47 U.S.C. § 252(d)(1) shall apply and vertical services shall be included in the price of the unbundled switching element at no additional charge. We do, however, recognize one notable exception to our conclusion on this matter where the BST/AT&T arbitration proceeding is concerned. More specifically, we conclude that when AT&T is purchasing unbundled network elements from BST and recombining those elements to replicate a BST retail service, AT&T's purchase of the unbundled local switching element will not include the vertical features and functions of the switch. In that scenario, AT&T will be subject to the retail pricing provisions of 47 U.S.C. § 252(d)(3) and must accordingly pay the retail rate for all tariffed vertical services less the wholesale discount. Vertical services which are not in the retail tariff but which can nonetheless be provided by the switch will be available at no additional charge, however. This exception and the supporting justification therefore is more fully explained at B.(4)(c)(iii) herein (at p.30). IT IS TO ORDERED BY THE COMMISSION.

**(4) Recombination of Unbundled Network Elements (BST/AT&T - Issue 15; GTE/AT&T - Issue 16).**

**(a) The Commission's February 6, 1997 order in Docket No. 25703 (BST/AT&T)**

The Commission's February 6, 1997, Order in the BST/AT&T arbitration proceeding (at pp. 42-44) adopted in full the recommendations of the three-member arbitration panel concerning the recombination of unbundled network elements. As was recognized by the BST/AT&T panel, the issue regarding the recombination of unbundled network elements is one of the most critical issues to be considered in the entire arbitration process. The panel recognized that 47 U.S.C. § 251(c)(3) requires local exchange carriers to provide unbundled access in a manner that allows requesting carriers to combine unbundled elements for the purpose of providing telecommunications services. The pricing standard for such individual, discreet elements is established by 47 U.S.C. § 252(d)(1).

The panel also emphasized, however, that 47 U.S.C. § 251(c)(4) requires that retail services be offered for resale at wholesale rates, in accordance with the pricing standards established in 47 U.S.C. § 252(d)(3). The panel then determined that the issue was not whether AT&T could combine network elements, but what they should pay when those elements are recombined/rebundled in a manner that duplicates or recreates an existing BST retail service. The panel noted that the Act does not specifically address the rebundling/replication issue, nor is there an articulated pricing standard in the Act which governs situations when unbundled network elements are simply recombined to duplicate or recreate an existing retail service.

It was the panel's assessment that the acceptance of AT&T's position that unbundled network elements can be purchased pursuant to the cost-plus terms of 47 U.S.C. § 251(d)(1) and recombined in a manner that simply replicates an existing BST resale service would allow AT&T to circumvent the Act's retail pricing standards found at 47 U.S.C. § 252(d)(3). The panel reasoned that it was illogical to conclude that Congress provided for the resale of LEC retail services and at the same time provided a mechanism to circumvent its resale provisions through the "unbundling and rebundling/recombination" of individual network elements.

Our February 6, 1997 Order accordingly stated that the recombination of a loop and port is indistinguishable from retail local service and therefore should be priced under the resale provisions of the Act. We noted that ignoring the resale provisions of the Act would yield results contrary to the totality of the Act's requirements. We in essence adopted the panel's decision to treat this issue as one affecting the pricing of recombined elements. Based on that premise, we noted that AT&T would be permitted to purchase unbundled network elements from BST pursuant to the pricing standards of 47 U.S.C. § 252(d)(1) when such elements were utilized in conjunction with their own network elements to provide new, similar or different services from those provided by BST. However, in situations where AT&T simply recombines unbundled network elements purchased from BST, without utilizing their own substantive network elements, to provide essentially the same retail service as BST, we concluded that AT&T must compensate BST at the retail rate level less the wholesale discount. BST was accordingly ordered to develop and submit to the Commission its proposed procedures to identify instances of rebundling within 90 days from the date of the February 6, 1997 Order.

**(i) The BST Position**

BST submitted comments urging the Commission to affirm its February 6, 1997 decision adopting the three-member panel's recommendations concerning rebundling. BST asserted that the February 6, 1997 Order correctly addressed the rebundling issue on both policy and legal grounds. BST incorporated, by reference, its Petition for Reconsideration submitted in Docket No. 25704 and the arguments raised therein concerning the issue of rebundling. Those arguments are summarized herein at B.(4)(b)(iii).

**(ii) The AT&T Position**

AT&T urged the Commission to reconsider its decision requiring AT&T to pay wholesale rates when it purchases unbundled network elements from BST and combines them in a manner that duplicates an existing BST retail service. AT&T contended that the Commission's position in this regard was contrary to both the Act and the FCC's Order. AT&T requested that the Commission issue an Order requiring BST to sell AT&T unbundled network elements at cost-based rates regardless of how AT&T chooses to combine those elements. It was AT&T's position that the Act clearly specifies that the rates for unbundled network elements must be based on cost. 47 U.S.C. § 252(d)(1).

AT&T further noted that the FCC specifically found that a new entrant may purchase and combine unbundled network elements in any manner it chooses without providing any elements of its own. 47 C.F.R. §§ 51.309(a) and 51.315(c); FCC Order No. 96-325, ¶¶ 292, 296. AT&T contended that the cited provisions of the FCC's Order had not been stayed by the United States Court of Appeals for the Eighth Circuit and that permitting BST to price combinations of unbundled network elements at retail rates would, therefore, violate currently valid provisions of the FCC's Order.

AT&T took exception to the Commission's conclusion that the combination of the loop and port is indistinguishable from local retail service. AT&T asserted that the loop-port combination differs in structure, pricing, risk and flexibility from basic services available for resale. AT&T contended that resellers are restricted to providing exactly the same service which BST offers, while a new entrant purchasing unbundled elements is not so restricted because it can offer all the services made possible by the purchase of those elements and can provide additional features and new services to consumers which BST does not provide. AT&T further asserted that even if a new entrant initially purchases unbundled network elements and recreates a service offered by BST, it has the ability to innovate and offer new or additional services and to substitute its own facilities for one or more of the elements at a later time.

AT&T noted that the Act provides both for resale and the purchasing of unbundled network elements. AT&T contended that BST's position that a new entrant could only use BST's unbundled network elements if it had already built facilities of its own to provide network element functions eviscerated the provisions of 47 U.S.C. § 251(c)(3) by requiring new entrants to either resell BST's services or deploy their own facilities. AT&T noted that such a result was clearly outside the intent of the Act.

AT&T contended that if new entrants are forced to incur the enormous capital expense of deploying their own switches or loops in order to purchase unbundled network elements, competition is unlikely to ever come to anyone in Alabama other than residents of large metropolitan areas. AT&T therefore urged the Commission to revise its position concerning rebundling to permit AT&T to purchase unbundled network elements at cost-based rates regardless of how AT&T chooses to combine those elements.

### **(iii) The A.G.'s Position**

The Attorney General urged the Commission to reject the reasoning of the arbitration panel in this proceeding concerning the resale pricing of combinations of network elements. The A.G. asserted that the Commission must allow new entrants to choose among the different entry alternatives available in the Act in order for Alabama consumers to receive the competitive benefits intended with the promulgation of the Act. According to the A.G., Alabama consumers will continue to pay monopoly-based, as opposed to cost-based, rates if the Commission adheres to its existing decision concerning the recombination of unbundled network elements and the pricing thereof.

### **(iv) The MCI Position**

MCI urged the Commission to reconsider its decision on the issue of rebundling, stating its strong disagreement with the conclusions reached by the Commission on that issue. MCI asserted that the Act clearly requires at 47 U.S.C. § 251(c)(3) that BST provide unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 252(d) sets pricing standards for unbundled network elements and makes clear that the unbundled network elements that BST is required to make available to MCI for possible combination must be priced "based on the cost (determined without reference to a rate of return or other rate-based proceeding) of providing the interconnection or network element ..." MCI contended there was no ambiguity in the Act regarding BST's obligation to make unbundled network elements available to MCI so as to allow MCI to combine those elements to provide a telecommunications service.

Similarly, MCI asserted there is no ambiguity regarding the price for unbundled network elements, which must be based upon cost plus a reasonable profit. MCI also noted that the FCC's Order, at ¶¶ 317-341, affirmed MCI's and AT&T's interpretation of the Act concerning the issue of rebundling.

As a practical matter, MCI noted that the opportunities available through recombination of network elements will certainly be different from those that will be enjoyed by new entrants who enter the market through pure resale. According to MCI, this discrepancy in opportunity will primarily result from the fact that carriers using solely unbundled network elements as compared with carriers purchasing services for resale will have greater opportunities to offer services that are different from those offered by the incumbent LECs. The ability to package and market services in ways that differ from the incumbent LEC's existing service offerings increase the requesting carriers' ability to compete against the incumbent LEC to the benefit of its customers.

MCI noted that the vast majority of other state commissions which had already addressed the issue of rebundling in arbitration proceedings reached results consistent with the position advanced by MCI and AT&T herein. MCI accordingly urged the Commission to reconsider and amend its decision regarding the combination of unbundled network elements. In particular, MCI emphasized that unbundled network elements must be priced according to their cost plus a reasonable profit. MCI also strongly urged the Commission to reconsider its decision requiring BST to identify instances of rebundling.

#### **(v) The Sprint Position**

Sprint urged the Commission to reconsider the portions of its decision on the issue of rebundling which require AT&T to purchase unbundled network elements at wholesale rates when those elements are recombined to provide a service similar to BST's retail service offerings. Sprint recommended that the Commission instead adopt the decision on the rebundling issue reached in its February 12, 1997 Order in Docket 25704, wherein the Commission concluded that AT&T should be permitted to combine unbundled network elements in any manner it chose and to purchase combinations of unbundled network elements at unbundled network element rates.

Sprint also contended that the pricing structure established in the BST/AT&T arbitration ignored the risks and obligations that the purchaser of network elements for recombination must assume. Like AT&T, Sprint asserted that recreating a service from unbundled network elements required

special skills and expertise and involved increased risk over the pure purchase of services for resale. The purchaser of unbundled loops for recombination should be compensated for assuming such risks through the purchase of unbundled network elements priced pursuant to the cost-plus basis established at 47 U.S.C. § 252(d)(1).

**(vi) The DeltaCom Position**

In its petition for reconsideration of the Commission's decision concerning rebundling, DeltaCom asserted that the Act requires BST to provide "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3). DeltaCom also asserted that the Act specifically requires that the combination of the network elements be priced at unbundled network element rates. 47 U.S.C. § 252(d)(1). The Act's provisions for pricing of unbundled network elements, 47 U.S.C. § 252(d)(1), specifically applies to 47 U.S.C. § 251(c)(3), the provisions regarding combinations of elements. Resale prices are not cost based, as required by 47 U.S.C. § 252(d)(1). In DeltaCom's view, requiring the pricing of retail combinations of unbundled network elements as a retail service therefore violates the Act.

DeltaCom also asserted that the Commission's February 6, 1997 Order was contrary to the conclusions reached by the FCC in its Order. The FCC specifically prohibited restrictions on a competitor's ability to combine unbundled network elements in any way it chooses, including the recreation of existing services. The FCC further specified that competitors should be able to purchase any combination of elements without having to provide any of their own elements. 47 C.F.R. § 51.309(a) and 51.315(c), FCC Order No. 96 - 325, ¶¶ 292, 296. DeltaCom asserted that those provisions of the FCC's Order have not been stayed by the United States Court of Appeals for the Eighth Circuit.

DeltaCom concluded that the Commission's Order, as it now stands, will prevent consumers in Alabama from receiving the benefits of competition. DeltaCom accordingly urged the Commission to reconsider its decision concerning the rebundling of network elements and the pricing thereof.

**(vii) The WorldCom Position**

In its Petition for Reconsideration of this issue, WorldCom also asserted that the Commission's findings concerning unbundled network elements were contrary to 47 U.S.C. § 251(c)(3), which requires BST to provide unbundled

network elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." WorldCom's supporting legal arguments in this regard were virtually identical to those raised by DeltaCom immediately above.

WorldCom asserted that there is a very real distinction between providing local service through resale and providing it through a recombination of unbundled network elements. According to WorldCom, there are very real financial risks associated with purchasing unbundled network elements which will drive new entrants to develop products which are competitive with the services offered by incumbent LECs. Competitive entrants who accept the burden and associated risks of purchasing unbundled network elements should be allowed to purchase those elements consistent with the provisions of the 1996 Act.

**(b) The Commission's February 12, 1997 Order in Docket 25704 (GTE/AT&T)**

In our February 12, 1997 Order in Docket No. 25704 (at pp. 40-41), we adopted in full the GTE/AT&T arbitration panel's recommendation that GTE be prohibited from restricting or limiting AT&T in any way from combining unbundled network elements. We also adopted the panel's conclusion that AT&T should be allowed to purchase combinations of unbundled network elements at unbundled network element rates. The panel premised its conclusions on the Act's express requirement that incumbent LECs such as GTE "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C.A § 251(c)(3). The panel noted that the Act specifically requires that combinations of network elements be priced at unbundled network element rates. 47 U.S.C. § 252(d)(1).

The GTE/AT&T panel also found persuasive the provisions of the FCC's Order which state that a new entrant may purchase and combine unbundled network elements in any way it chooses, including the recreation of existing services. 47 C.F.R. §§51.309(a) and 51.315(c); FCC Order No. 96-325, ¶¶ 292, 296. The panel concluded that there was simply no merit to GTE's arguments that it could restrict AT&T's ability to combine network elements.

**(i) The GTE Position**

GTE contended that the Commission should reconsider its decision concerning the recombination of unbundled network elements in this proceeding and adopt the decision it reached on that issue in its February 6, 1997 Order in Docket No. 25703, the BST/AT&T arbitration proceeding. Specifically, GTE urged the Commission to adopt in Docket 25704 the position that AT&T must pay the retail service rate minus the wholesale discount when it purchases unbundled network elements and combines them in such a manner as to replicate an existing GTE retail service offering. GTE asserted that such a decision by the Commission would be consistent with the positions of other

state commissions such as Georgia and Louisiana. As a result, AT&T would have to provide its own switching or other substantial functionality or capability to obtain unbundled network elements at the unbundled network element pricing standards. When AT&T orders unbundled network elements to replicate an existing retail service, GTE asserted that the resale pricing provisions should control. GTE maintained that it was clear that Congress intended to promote competition through both resale and facilities-based competition. To interpret the Act in a manner that effectively eliminates one method of competition, e.g. resale, from the Act, as was done by the Commission in Docket No. 25704, was clearly contrary to the intent of the Act. Such an interpretation would suggest that Congress envisioned competition by arbitrage - an interpretation for which there is no rational basis.

### **(ii) The AT&T Position**

AT&T submitted comments urging the Commission to affirm the findings it reached on this issue in its February 12, 1997 Order. AT&T asserted that the GTE/AT&T arbitration panel's recommendations as adopted by the Commission in that order comported with the plain requirements of the 1996 Act. AT&T maintained that any decision on the recombination of unbundled network elements issue other than the decision reached by the panel and adopted by the Commission would violate the Act. AT&T contended that the Act clearly prohibits GTE from restricting AT&T's ability to combine unbundled network elements in any manner AT&T chooses.

The Act requires GTE to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3)(emphasis added). According to AT&T, the words in the Act could not be more clear - the Act specifically requires that combinations of network elements be priced at unbundled network element rates rather than resale rates. 47 U.S.C. § 252(d)(1). AT&T noted that the section of the Act which establishes the rates for unbundled elements - § 252(d)(1) - specifically refers to the section of the Act containing the combinations provision identified above - § 251(c)(3). Thus, requiring that combinations of network elements be priced as a retail service would violate the Act.

AT&T represented that this result was also required by the FCC Order. The FCC Order specifically prohibits any LEC from restricting AT&T's ability to combine unbundled network elements in any way it chooses, including the recreation of existing LEC services, and also requires that AT&T be able to purchase any combination of elements without having to provide any of its own elements. 47 C.F.R. §§ 51.309(a), and 51.315(c); FCC Order No. 96-325

AT&T asserted that this part of the FCC Order had not been stayed by the United States Court of Appeals for the Eighth Circuit. AT&T represented that contrary to arguments made by GTE, the Eighth Circuit did not stay all parts of the FCC Order related in any way to pricing. The Eighth Circuit only stayed specifically enumerated rules promulgated by the FCC. None of the rules stayed by the Eighth Circuit include the provisions of the FCC's Order addressing the combining of network elements. Thus, any decision other than the decision of the Panel on this issue would violate a part of the FCC Order which has not been stayed.

AT&T asserted that GTE's underlying arguments would require AT&T and all new entrants to purchase their own facilities before such new entrants could ever purchase network elements from GTE. According to AT&T, GTE's interpretation of the Act would eviscerate the provisions of the Act providing for the combination of unbundled network elements as a means of providing service and leave new entrants with only two avenues of entry: resale of a GTE service or building new facilities. AT&T contended that under GTE's view, it was unlikely that new entrants would be able to provide service to rural customers in Alabama, leaving those customers with very few service options. AT&T asserted that if GTE's position on the issue of rebundling were adopted, it would not be likely that competition would come to rural residential customers in Alabama in the near future.

### **(iii) The BST Position**

BST also submitted a Petition for Reconsideration on the rebundling issue as addressed in the Commission's February 12, 1997 Order. BST contended that the Commission's decision in that Order would allow AT&T to avoid the resale pricing rules of the Act through what BST termed "sham unbundling." BST claimed that such "sham unbundling" would undermine a key goal of the 1996 Act - the promotion of facilities-based competition.

BST asserted that access to discrete network elements at special prices was intended only to allow new entrants to combine some of their own facilities with existing facilities of incumbent LECs. BST maintained that "sham unbundling" would make the resale pricing provisions of the Act meaningless, a result which would be contrary to the established rules of statutory construction.

BST further theorized that, in enacting the 1996 Act, Congress intentionally crafted specific limitations on the use of resale as a means of entering local telephone markets. The statute created a pricing mechanism to be used for the purchase of complete services for retail that is quite different from the mechanism used to purchase unbundled network elements. According to BST, this distinct pricing mechanism for resale

serves several crucial purposes: It provides incentives for true facilities-based competition; it prevents incumbents from suffering massive losses of revenue through regulatory gamesmanship; and ultimately it protects many of the residential and rural consumers of Alabama from severe harm.

BST maintained that under the Commission's current decision in Docket 25704, AT&T may avoid the Act's resale pricing rules through "sham unbundling" - purchasing discrete network elements from GTE and then, without adding any of their own facilities, rebundling them into a complete retail service which replicates GTE's retail service offering. BST asserted that such a result would be inequitable and contrary to what Congress intended.

According to BST, Congress required incumbent LECs like GTE and BST to "offer for resale any telecommunications service that it provides at retail." 47 U.S.C. § 251(c)(4). New competitors are thus allowed to purchase complete retail services including basic telephone services from incumbent local exchange carriers.

Congress separately required the incumbent local exchange companies to sell competitors access to unbundled network elements. 47 U.S.C. § 251(c)(3). By allowing competitors to buy access to such discreet network elements, the Act gave new entrants the latitude to combine some of their own facilities with existing facilities to create new services that would be competitive with the incumbent's services.

According to BST, Congress provided different pricing mechanisms for these two distinct ways of entering local markets. Congress directed that existing retail services be priced to resellers at retail rates charged to subscribers less only those costs that will be avoided by the incumbent local telephone company as a result of selling to the reseller and not a consumer. 47 U.S.C. § 252(d)(3). In contrast, Congress required that unbundled network element prices be based not on retail prices but instead on the actual cost of the individual elements to the incumbent to which a reasonable profit could be added. 47 U.S.C. § 252(d)(1).

Accordingly, BST maintained that Congress allowed new entrants to avoid paying the subsidy embedded in the retail rates for business service only if they used some of their own facilities. BST asserted that it was the intention of Congress that if entrants combined some of their own facilities with additional network elements provided by the incumbent, the new entrants could obtain the network elements they needed at cost-based prices. BST represented that the distinct pricing mechanisms for resale and network elements were thus intended to spur true facilities-based

competition and to create real efficiencies for consumers.

### **(c) Reconciliation of the Arbitration Orders Concerning the Rebundling of Network Elements Issue**

#### **(i) Background**

As noted by the BST/AT&T panel, resolution of this issue is perhaps the most critical task facing this Commission in both of the arbitration proceedings before us. It is also likely that the decision we reach herein will have a major impact on interconnection negotiations which are currently under way but have not reached the point of formal arbitration. We have thus approached the resolution of this matter with great diligence.

We would note at the outset that there is no ambiguity in the 1996 Act concerning whether limitations may be placed on the ability of new entrants to recombine unbundled network elements. The Act plainly prohibits such restrictions on the recombination of unbundled network elements. The Act imposes on incumbent LECs the duty to "provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3). This inescapable conclusion is further fortified by the FCC, which found in its Order that a new entrant may purchase and combine unbundled network elements in any way it chooses, including the recreation of existing services. 47 C.F.R. §§ 51.309(a) and 51.315(c); FCC Order at ¶¶ 292, 296.

#### **(ii) The Pricing of Recombinations of Unbundled Network Elements and Competitive Concerns**

While the ability of a new entrant to recombine unbundled network elements in any manner it chooses is indisputable, the pricing provisions that govern instances where new entrants recombine unbundled network elements purchased from an incumbent LEC to provide a service which replicates an existing resale service offered by that LEC is a matter that is widely disputed. BST vehemently asserts that recombinations of unbundled network elements which constitute resold services offered by BST should be priced pursuant to the retail pricing provisions of 47 U.S.C. § 252(d)(3) as opposed to the unbundled network element pricing guidelines of 47 U.S.C. § 252(d)(1). In its Petition for Reconsideration on this issue, GTE has indicated its concurrence with the "pricing" approach taken by BST. This represents something of a departure from GTE's approach to this issue in the arbitration proceedings wherein GTE essentially argued that AT&T should not be allowed to reassemble network elements to avoid purchasing wholesale offerings from GTE.

On the other side of the local service equation, AT&T, MCI, Sprint, DeltaCom, and WorldCom argue that the Act allows new entrants to recombine unbundled network elements in any manner they choose. Further, they argue that unbundled network elements which are recombined may be purchased pursuant to the unbundled network element pricing provisions of 47 U.S.C. § 252(d)(1).

State Commissions across the country have reached varying conclusions concerning this most controversial issue. We are cognizant, however, that the State Commissions of Georgia, Louisiana, South Carolina, North Carolina, Tennessee, and Mississippi In re: Petition by MCI for Arbitration ... Docket 6865-U at 28-29 (Georgia Public Service Commission, Dec. 17, 1996); In re: Interconnecton Agreement Negotiations, Docket U-22145 at 39 (Louisiana Public Service Commission, January 8, 1997); In re: Petition of AT&T Communications of the Southern States, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc., Docket No. 96-358-C, Order No. 97-189 (Public Service Commission of South Carolina, March 10, 1997); In re: Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc., North Carolina Utilities Commission; Docket No. P.140, Sub 50. at 31; In re: Petition of MCI Telecommunications Corporation for Arbitration of Interconnection with BellSouth Telecommunications, Inc., North Carolina Utilities Commission Docket No. P-141, Sub.29, at 31; In Re: In the Matter of the Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., Docket No. 96-AD-0559 (Mississippi Public Service Commission, March 10, 1997). have generally ruled in favor of the BST and GTE position on this issue.

Our decision on this issue is predicated on what we perceive as the primary underlying objective of the Telecommunications Act of 1996. It is our belief that all of the provisions established in the Act were promulgated to encourage competition in the telecommunications industry by placing the various telecommunications carriers in this heretofore widely segmented industry in an equally competitive position. We must, therefore, carefully evaluate the competitive position of the telecommunications carriers that are parties to the arbitration proceedings before us.

**(iii) Recombination of Unbundled Network Elements in Docket 25703 (BST/AT&T)**

It is widely known that AT&T's primary business since Divestiture has been the provision of interstate and interLATA long distance telecommunications services. BST on the other hand has, since Divestiture, been primarily engaged in the provision of local telephone service and intraLATA long distance service. Although the long-term goal of the 1996 Act is to allow

AT&T and BST to compete in each other's traditional markets, certain statutory safeguards and conditions in the Act currently prevent these two telecommunications giants from competing in each other's markets on equal footing. Most notably, BST must meet the competitive requirements established by 47 U.S.C. § 271(c) prior to seeking authority to provide in-region interLATA service in competition with AT&T. On the other hand, AT&T is prohibited by 47 U.S.C. § 271(e)(1) from jointly marketing telephone exchange service obtained from BST through the resale provisions of 47 U.S.C. § 251(c)(4) with its interLATA service offerings until BST obtains authority to provide in-region interLATA service or three years have passed since the adoption of the 1996 Act.

The end result of the aforementioned safeguards is that BST will, prior to its obtaining in-region interLATA authority, be somewhat vulnerable if AT&T is allowed to recombine unbundled network elements to replicate an existing BST retail service at unbundled network element rates. Since AT&T would technically not be reselling such replicated services pursuant to 47 U.S.C. § 251(c)(4), it could evade the purposes and intent of the joint marketing restrictions of the Act unless the Commission specifies that recombined unbundled network elements which replicate existing BST retail services will be governed by the Act's resale pricing provisions and accordingly priced at retail rates minus the wholesale discount.

Due to the above-noted competitive concerns, we find the arguments advanced by BST concerning the recombination of unbundled network elements and the pricing of those elements persuasive. We therefore affirm in part our previous decision concerning this matter as set forth in our order of February 6, 1997 in Docket 25703 (at pp. 42-44). More specifically, we affirm our decision therein that AT&T will be permitted to purchase unbundled network elements from BST pursuant to the cost-based pricing standards of 47 U.S.C. § 252(d)(1) when such elements are used in conjunction with AT&T's own network elements to provide new, similar or different services from those offered by BST. If, however, AT&T simply recombines unbundled network elements purchased from BST without utilizing their own network elements to provide substantial functionalities or capabilities, AT&T must pay the retail rate for such replicated service less the wholesale discount because AT&T will be providing essentially the same retail service as is offered by BST. Operator services are not considered a substantive functionality or capability.

We must, however, modify our previous holding on this issue as set forth in our February 6, 1997 Order in one major respect. We find that the previously discussed competitive positions of AT&T and BST will be substantially altered when BST obtains in-region interLATA authority from the FCC. BST's receipt of in-region interLATA authority will allow it to compete equally with AT&T on an interLATA basis and balance its local and long distance concerns, albeit subject to the separate affiliate requirements of 47 U.S.C. § 272. AT&T, on the other hand, will no longer be subject to the joint marketing restrictions imposed by 47 U.S.C. § 271(e)

(1) and will not be evading the requirements of the 1996 Act by rebundling network elements to replicate BST services and marketing such service jointly with its existing interLATA service. We accordingly modify our decision of February 6, 1997 in Docket 25703 to reflect that upon BST's receipt of in-region interLATA authority, we will revisit our conclusions arrived at herein where the BST/AT&T arbitration proceeding is concerned.

We recognize that disputes concerning whether or not AT&T is replicating an existing BST retail service offering are bound to ensue. Accordingly, we note that AT&T's purchase and recombination of unbundled network elements to produce a service available in BST's retail tariff on the date of the interconnection agreement executed by AT&T and BST will create a presumption that AT&T is reselling an existing BST service for purposes of pricing, collection of access and subscriber line charges, use and user restrictions in BST's retail tariff and the joint marketing restrictions of the Act. AT&T may overcome this presumption by demonstrating that, in addition to unbundled network elements purchased from BST, it is utilizing its own substantive functionalities and capabilities to provide service. Substantive functionalities and capabilities are herein defined to be features such as loop, switch, transport or signalling links. As noted previously, ancillary services such as operator services are not considerative substantive functionalities or capabilities.

Given the above reasoning concerning AT&T's rebundling of network elements purchased from BST to replicate BST retail services, we feel compelled to revisit the issue of vertical services as addressed at B.(3)(c), herein (at pp.17-19). We affirm our general conclusion that when local switching is purchased as an unbundled network element pursuant to 47 U.S.C. § 251(c)(3) the pricing provisions of 47 U.S.C. § 252(d)(1) shall apply and vertical services shall be included in the price of the local switching element at no additional charge. We recognized an exception to this conclusion, however, for purposes of the BST/AT&T arbitration proceeding. Specifically, we noted that when AT&T purchases unbundled network elements from BST and recombines them in a manner which replicates an existing BST retail service, the resale pricing provisions of 47 U.S.C. § 252(d)(3) shall apply. In that scenario, vertical services must also be purchased pursuant to their tariffed retail rate less the wholesale discount. This exception is based on the competitive concerns discussed above, and will cease to be recognized by this Commission at such time as the Commission decides that it is no longer necessary for AT&T to pay retail prices minus the wholesale discount when it recombines unbundled network elements in a manner that replicates a BST retail service.

**(iv) Recombination of Unbundled Network Elements in Docket 25704 (GTE/AT&T)**

With regard to our decision on this issue as set forth in our February 12, 1997 Order in Docket 25704 (at pp. 40-41), we are again guided by the 1996

Act's underlying objective of placing competitive telecommunications carriers on equal footing. Unlike BST, GTE is not subject to many of the Act's competitive safeguards such as the in-region interLATA restrictions of 47 U.S.C. § 271. In fact, GTE is already providing in-region interLATA service in direct competition with AT&T. GTE is accordingly in a position to balance its local and long distance operations in the face of competitive forces. Accordingly, the competitive concerns present in the BST/AT&T arbitration are not a pressing concern in the GTE/AT&T arbitration. We therefore conclude that it is entirely appropriate to affirm our finding on the issue of rebundling in the GTE/AT&T arbitration as set forth in our Order of February 12, 1997. More specifically, we affirm our previous position that GTE be prohibited from restricting or limiting AT&T in any way from combining unbundled network elements and that AT&T should be allowed to purchase recombinations of unbundled network elements at unbundled network element rates.

**(v) Conclusion**

We are aware that the decisions reached herein do not fully reconcile the rebundling issue in the two arbitration proceedings. We nonetheless stand by our previously expressed belief that differing circumstances dictate different arbitration results. We will continue to perform our traditional function of overseeing the telecommunications industry in Alabama and will take whatever actions our monitoring efforts reveal are necessary to promote competitive equality and fairness to all telecommunications carriers while ensuring that the consumers of Alabama receive the best telecommunications services and opportunities available. IT IS SO ORDERED BY THE COMMISSION

**(5) Appropriate Wholesale Rates (BST/AT&T - Issues 21 and 22; GTE/AT&T - Issues 22, 23, 24)**

**(a) The Commission's February 6, 1997 Order in Docket 25703 (BST/AT&T)**

In our February 6, 1997 Order in Docket 25703 (at pp. 57-60), the Commission adopted the results of the avoided cost analysis performed by the three-member BST/AT&T arbitration panel. More specifically, the Commission adopted the panel's conclusion that the appropriate interim wholesale discount rate for both BST residential and BST business services was 17 percent. The panel noted that the interim wholesale discount rate established was subject to the findings subsequently reached by the Commission in its pending resale proceedings in Docket 25677.

In arriving at its interim wholesale discount rate, the arbitration panel made numerous key assumptions. Most notably, the panel assigned 90 percent

of the cost in accounts 6612 (sales) 6613 (product advertising) and 6623 (services) as avoided; and 25 percent of the cost for account 6611 (product management) as avoided. Consistent with its recommendation requiring BST to route AT&T customers calling for operator and directory assistance services directly to an AT&T platform, the panel allocated 25 percent of the cost in account 6621 (call completion services) and 6622 (number services) as avoidable. The panel did not agree with AT&T's position that accounts 6220 (operator services) 6533 - 6534 (plant and testing expenses) and 6560 (depreciation and amortization of operator systems) should be included as directly avoided costs, but did agree with AT&T's assumption that 100 percent of the cost for account 5301 (uncollectibles) were avoided. Another key assumption of the panel in its effort to determine the wholesale discount rate was its decision to utilize the total 1995 basic local service and long distance revenues from the 1995 Armis Report 43-03 for purposes of determining the appropriate amount of BST revenues subject to resale. From that figure, the panel subtracted \$7,465,201 of CSA revenues to reflect the Commission's finding in its February 6, 1997 Order that CSAs had to be offered by BST for resale, but not subject to a resale discount.

#### **(i) The BST Position**

BST submitted a request for clarification concerning certain of the BST/AT&T panel's underlying assumptions in determining the interim wholesale discount rate. Specifically, BST questioned the panel's decision to utilize a 90 percent avoided cost factor for accounts 6612 (sales) and 6613 (product advertising), as well for the customer service expenses account 6623. BST asserted that although the arbitrators did not explain their rationale for assigning 90 percent of the costs in these accounts as avoided, it presumed that those assignments were based on the assumptions made by the FCC in its Order. BST maintained that the FCC's 90 percent "avoided cost assumption" was not intended to replace detailed avoided cost study evidence such as that provided by BST in the instant proceeding. Rather, the FCC's assumptions were hastily derived to help support the calculation of a range of default factors to be used only on an interim basis where such detailed avoided cost study evidence was absent. BST contended that it submitted avoided cost studies in order to accurately identify and calculate avoided costs. BST asserted that actual studies were the FCC's "preferred method" of making the avoided cost determination. BST concluded that the arbitrators, through the use of the FCC's avoided cost assumptions, had significantly overstated BST's avoided cost, thereby overstating the wholesale discount.

BST also pointed out that on the narrative portions of the Commission's February 6, 1997 Order, the Commission adopted an interim rate for transport and termination of local traffic of \$0.01-per-MOU. In the category entitled unbundled element - local interconnection on Appendix B to the February 6, 1997 Order, however, BST asserted that the \$0.01-per-MOU was not reflected. BST asserted that this was a clerical error on the Commission's part and requested clarification.

#### **(ii) The AT&T Position**

AT&T requested reconsideration of the Commission's conclusions concerning this issue in the Commission's February 6, 1997 Order. AT&T asserted that because it will provide its own operator and directory services, these accounts should be treated as 100 percent avoidable. AT&T further asserted that no reduction was given in the Commission Order for cost category 6220 (operator services) or 6560 (depreciation of operator services equipment) despite the fact that both of those cost categories are associated with the provision of operator services. AT&T urged the Commission to revise its February 6, 1997 Order and recalculate the wholesale discount available to AT&T to reflect that 100 percent of BST's operator services costs and all cost categories associated with the provision of those services will be avoided.

**(b) The Commission's February 12, 1997 Order in Docket 25704 (GTE/AT&T)**

The three member GTE/AT&T panel could not reach a unanimous decision concerning the wholesale discount, but the panel majority recommended that GTE's proposed cost study using the "actually avoided" cost methodology not be adopted by the Commission. The panel majority instead recommended a discount of 23 percent, which was a hybrid of AT&T's proposal and GTE's modified cost study. The panel proposed an opportunity after one year for reconciliation of the wholesale discount percentage arrived at, provided the parties demonstrated that reconciliation was necessary. The Commission's February 12, 1997 Order in Docket 25704 adopted the position of the panel majority and accordingly established a wholesale discount of 23 percent on an interim basis. The Order specifically noted that a permanent discount rate would be set in Docket 25677, the Commission's Resale proceedings.

**(i) The GTE Position**

In its Motion for Reconsideration concerning the Commission's adoption of the 23 percent wholesale discount rate, GTE contended that the established rate was grossly overstated and would cause GTE irreparable harm, e.g. lost customers, even if the interim rate is later changed. GTE asserted that the Commission's apparent reliance on the 90 percent avoided cost factor for accounts 6611, 6612, 6613 and 6623 based upon the conclusions reached by the FCC in its Order was blatantly wrong in light of the fact that GTE provided studies which would allow the Commission to identify and calculate the actual costs avoided. GTE asserted that the Commission had accordingly overstated GTE's avoided cost and the wholesale discount. GTE represented that the 11.9 percent wholesale discount rate for GTE and the 9.4 percent wholesale discount rate for Contel reflected in its studies accurately depicted the upper bound of the range of cost GTE could reasonably be expected to avoid when its services are offered for resale.

**(ii) The AT&T Position**

In its request for a partial reconsideration of the Commission's February 12, 1997 Order concerning the wholesale discount rate, AT&T urged the Commission to retain the general principles and methodologies embodied in the Order. AT&T urged the Commission, however, to revise its Order and recalculate the wholesale discount available to AT&T to reflect that 100 percent of GTE's operator services cost will be avoided when it provides its services at wholesale to AT&T due to the fact that AT&T will be providing its own operators and operator services. Moreover, AT&T urged the Commission to reconsider the panel's decision not to include reductions for cost categories 6220 (operator services) or 6560 (depreciation of operator service equipment) despite the fact that both of those cost categories are associated with the provision of operator services. In conclusion, AT&T urged the Commission to revise its February 12, 1997 Order and recalculate the wholesale discount available to AT&T to reflect that 100 percent of GTE's operator service costs in all categories associated with the provision of operator services will be avoided.

**(c) Reconciliation of the Arbitration Orders Concerning the Appropriate Wholesale Discount Rate**

The Commission recognizes the inconsistency of the two arbitration orders concerning the issue of the appropriate wholesale discount. We emphasize, however, that the wholesale discount rates arrived at in both arbitration proceedings were specifically of an interim nature. A determination of a permanent discount rate in both arbitrations will be made in the context of the Commission's resale proceedings under Docket 25677.

We note, however, that even in the context of Docket 25677, we do not contemplate that identical wholesale discount rates for the retail service offerings of BST and GTE will be established. It appears to us that this area of the arbitration process is the most likely to yield inconsistent results due to the different operational characteristics of BST and GTE.

We herein deny, for purposes of this Order, all Requests for Reconsideration/Clarification received concerning the issue of the appropriate wholesale discount for both GTE and BST. The only exception to this conclusion relates to BST's request for clarification concerning Appendix B to the February 6, 1997 Order in Docket 25703 and whether said Appendix reflects the interim rate of \$0.01-per-MOU for transport and termination of local traffic as referenced in the body of the Commission's February 6, 1997 Order. We note that BST is correct in its assessment that Appendix B should include the interim rate of \$0.01-per-MOU for transport and termination of local traffic.

Despite the above-stated denial of the Petitions for Reconsideration received on this issue, we note that all of the issues and concerns raised in those Petitions will be duly considered by the Commission in the context of Docket 25677. We further note that proceedings to establish the appropriate wholesale discount rate for BST must be commenced promptly in

order to rectify the BST/AT&T panel's decision to remove from its wholesale discount calculations \$7,465,201 of CSA revenues from the total 1995 basic local service and long distance revenues of BST for the 1995 Armis Report 43.03. Further adjustment concerning CSA revenues will be necessary in light of our discussion herein requiring BST to resell CSAs at the wholesale discount. IT IS SO ORDERED BY THE COMMISSION.

**(6) Access to Poles and Rights-of-Way, etc. (BST/AT&T Issue 26; GTE/AT&T Issue 29)**

**(a) The Commission's February 6, 1997 Order in Docket 25703 (BST/AT&T)**

In our Order of February 6, 1997 (at p. 76), we required BST to, within three months from the date of said Order, file with the Commission TELRIC cost studies in support of economic prices for support elements. We noted that we would make a final determination on the prices for support elements within six months from the date of the February 6, 1997 Order. We also noted that the interim prices adopted for support elements would be subject to true-up.

**(i) The AT&T Position**

AT&T did not petition for reconsideration of this issue as addressed in the Commission's February 6, 1997 Order. AT&T's position during arbitration, however, was that prices for access to poles, conduit, ducts, rights-of-way, etc. should be set at economic cost. AT&T asserted that BST did not provide sufficient cost information to permit appropriate pricing of those elements and requested the Commission to require BST to produce adequate cost documentation for support elements, including access to poles and rights-of-way.

**(ii) The BST Position**

BST also did not petition for reconsideration of this issue. BST's position during the arbitration proceedings with respect to rates for access to poles, conduits and rights-of-way was that the access it provided to such support functions was priced pursuant to standard licensing agreements. BST asserted that those same agreements should be used for alternative LECs and that to do otherwise would be unreasonable and discriminatory to existing customers using BST support facilities at the prices established in those existing agreements.

**(b) The Commission's February 12, 1997 Order in Docket 25704 (GTE/AT&T)**

In our February 12, 1997 Order (at pp. 81-82) we adopted in full the GTE/AT&T arbitration panel's recommendations concerning the appropriate prices for certain support elements relating to interconnection and network elements. Specifically, we agreed with the panel's recommendation that 47 U.S.C. § 251(b)(4) provides for access to support elements on rates, terms and conditions that are consistent with 47 U.S.C. § 224. The FCC has issued orders pursuant to the provisions of 47 U.S.C. § 224 that have been upheld by the Courts. FCC v. Florida Power Corp., 480 U.S. 245 (1987). Accordingly, we held that those same procedures should be used to determine GTE's compensation for allowing access to its rights-of-way, etc.

**(i) The AT&T Position**

In its comments concerning the issue of the appropriate prices for support elements, AT&T urged the Commission to order that prices for access to poles, conduits, ducts, rights-of-way and other support elements related to interconnection and network elements be priced at TELRIC, as the Commission ordered in the BST/AT&T arbitration. AT&T asserted that GTE did not provide sufficient cost information to permit the Commission to appropriately price access to support elements. Accordingly, AT&T urged the Commission to require GTE to produce adequate cost studies to allow for such determination of cost.

**(ii) The GTE Position**

GTE did not petition for reconsideration of the Commission's February 12, 1997 decision concerning the prices for support elements. GTE's position during the arbitration proceedings, however, was that access to such elements should be priced pursuant to existing GTE tariffs where such tariffs are in existence.

**(c) Reconciliation of the Arbitration Orders concerning the issue of appropriate prices for access to poles and rights-of-way, etc.**

We reconcile the inconsistencies of our February 6, 1997 and February 12, 1997 Orders on this issue by adopting for both arbitrations the conclusion we reached in Docket 25704. More specifically, we find that 47 U.S.C. § 251 (b)(4) provides that access to poles, conduits, rights-of-way, etc. should be provided on rates, terms and conditions that are consistent with 47 U.S.C. § 224 and the Orders issued pursuant to that Section by the FCC. IT IS SO ORDERED BY THE COMMISSION.

**C. CONSIDERATION OF THE PETITIONS FOR RECONSIDERATION/CLARIFICATION DISTINCT TO DOCKET 25703 (BST/AT&T)**

## **(1) Quality of Service Measures (Issue 3)**

In our Order of February 6, 1997 (at p. 12), we noted that the FCC's rules state that the incumbent LEC shall provide interconnection to a competing LEC that is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate or any other party. 47 C.F.R. § 51.503(a)(3). We specifically found that BST had committed to comply with this provision of the FCC's rules by agreeing to monitor service quality for what we perceived to be the six key functions requested by AT&T: provisioning, maintenance service, billing - customer usage data, connectivity billing and recording, line information database processing, and account maintenance.

We further found, however, that there existed a need for the establishment of additional internal quality measures governing the interconnection arrangements between BST and AT&T. Accordingly, we ordered AT&T and BST to develop mutually agreeable specific quality measures governing the interconnection arrangements between them and to submit those measures to the Commission for approval and implementation within 45 days. In the interim period, we determined that the Commission's existing quality of service measures governing BST's provision of service to its end users would be an acceptable surrogate to address quality of service disputes between BST and AT&T.

### **(a) The AT&T Position**

AT&T petitioned the Commission to reconsider its February 6, 1997 holding concerning quality of service measures. More specifically, AT&T asserted that the Commission's decision to require the parties to negotiate acceptable quality of service measures among themselves and to submit the measures agreed upon to the Commission for approval was unacceptable. AT&T pointed out that it had been negotiating with BST for approximately one year and had not been able to reach agreement on the issue of quality of service measures. Moreover, AT&T asserted that the Commission's Order was not accurate in its statement that BST had agreed to measure quality as requested by AT&T on the six key functions identified by AT&T. AT&T maintained that BST had only agreed to certain measurements in those six areas and continued to argue that it need not measure anything other than what it currently measures. AT&T requested the Commission to reconsider its decision concerning quality of service measures and to order BST to abide by the direct measures of quality proposed by AT&T.

### **(b) The Decision of the Commission**

We herein deny AT&T's request for reconsideration of our decision concerning quality of service measures. BST and AT&T are herein directed to continue negotiations aimed at the development of quality of service measures which shall be submitted to the Commission for our approval and implementation no later than 45 days from the date of this Order. In the interim, the Commission's existing quality of service standards for local exchange companies shall be utilized to resolve any quality of service disputes between AT&T and BST. AT&T also has the avenue of the Commission's complaint process by which to resolve quality of service disputes. IT IS SO

**(2) Electronic Interfacing for Preordering, Ordering, Provisioning, Maintenance/Repair and Billing (Issue 5)**

In our order of February 6, 1997 (at pp. 17,18), we concluded that pursuant to 47 C.F.R. § 51.319(f)(2), BST was to complete its efforts to implement full electronic bonding with AT&T by the end of July, 1997. We further ordered that BST provide AT&T nondiscriminatory, on-line access to its databases containing both customer service records and credit histories.

**(a) The BST Position**

BST requested that the Commission clarify its requirement that BST complete its efforts to implement full electronic bonding with AT&T by the end of July 1997. BST based its request on the nine-state agreement reached between AT&T and BST on that issue. Pursuant to said agreement, BST has until December 31, 1997 to implement full electronic bonding unless the parties reach agreement on a later date.

BST further requested reconsideration of certain elements of the Commission's February 6, 1997 decision concerning electronic interfacing. Specifically, BST asserted that unrestricted on-line access to BST's customer service records and credit histories would jeopardize customer privacy. BST noted that all of its customer records, as well as reseller records, were contained in the same database. BST maintained that it had not developed a means of electronically restricting access to individual records in the database without knowing in advance which individual customer's records AT&T would want to view, and more importantly which customers had given their consent. There would be no way to restrict AT&T to viewing just that customer's account.

BST asserted that providing such information would go much further than the Act or the FCC's Orders require. According to BST, there is no need for AT&T to have access to customer credit histories, which are proprietary, sensitive customer data. BST asserted there are other sources available to AT&T for evaluating credit worthiness.

BST also asserted that other data elements are included in its databases, such as toll history and PIC information, which are also not required for the provision of local telephone service. BST pointed out that the FCC recognized the potential for violation of customer privacy in its August 8, 1996 Order and found that the FCC and the state commissions have the authority to protect the confidentiality of proprietary information.

BST concluded that the Commission's February 6, 1997 ruling on access to customer records had the potential for creating a tremendous "slamming" problem and opened the door for an unnecessary, potential violation of customer privacy. Since BST and AT&T are currently involved in negotiations on this issue in an effort to reach consensus as to methodology and process, BST requested that the Commission revise its Order to recognize customer privacy demands and not grant unrestricted access to all customer records or any access to all credit history files. BST requested that it be

required to provide necessary information to AT&T only after customer permission has been granted.

**(b) The Decision of the Commission**

We herein grant BST's request for clarification concerning the time frame in which BST must implement full electronic interfacing with AT&T. We hereby revise our February 6, 1997 Order to reflect the date of December 31, 1997 for the implementation of full electronic interfacing unless AT&T and BST reach an agreement to a contrary date.

Regarding BST's request for reconsideration of our February 6, 1997 Order's requirement that BST provide AT&T with nondiscriminatory, on-line access to its databases containing both customer service records and credit histories, we must deny the relief requested. We find persuasive our original reasoning that the Act permits a LEC to use, disclose, or permit access to, customer proprietary network information for the purpose of initiating new service for customers. 47 U.S.C. § 222(d)(1). Furthermore, the Act places "a duty on all carriers to protect the confidentiality of proprietary information of, and relating to other telecommunications carriers ... customers." 47 U.S.C. § 222(a). IT IS SO ORDERED BY THE COMMISSION.

**(3) Routing of Operator and Directory Assistance Services (Issue 6)**

We noted in our Order of February 6, 1997 (at pp. 21-22) that the FCC's Order specified that customized routing of operator and directory assistance service calls appeared to be feasible and was ordered to be provided for the total service resale and unbundled network element environments. We also noted that our June 11, 1996 Order in Docket U-6352 specified that the ability of a competing carrier to utilize their own operators of customer-branded operator services would enhance the ability of that entity to compete effectively. Accordingly, we ordered BST to route AT&T customers calling for operator and directory assistance services directly to an AT&T service platform. We noted that Advanced Intelligent Network (AIN) call routing logic appeared to be the best long-term solution for direct routing capability, but allowed BST the option of using line class codes to provide customized routing until a long-term solution such as AIN was adopted. BST was ordered to provide customized routing through the use of line class codes on a first-come, first-served basis.

**(a) The MCI Position**

MCI requested clarification of the Commission's February 6, 1997 Order wherein that Order stated that "if BST chooses to use line class codes to provide customized routing until a long-term solution is adopted, BST shall provide customized routing through the use of line class codes on a first-come/first-served basis." MCI interpreted the language "if BST chooses to use line class codes ..." to suggest that BST may choose another mechanism to provide direct routing so long as direct routing is provided immediately. MCI suggested that the Commission clarify this point by expressly requiring BST to provide customized routing immediately.

**(b) The Decision of the Commission**

We herein grant MCI's request for clarification concerning direct routing and specify that the intention of our February 6, 1997 Order was, and is, to require BST to provide customized routing immediately where it is technically feasible to do so. IT IS SO ORDERED BY THE COMMISSION.

#### **(4) Integrated Digital Loop Carrier (Issue 14b)**

In our Order of February 6, 1997 (at pp. 31-32), we held that 47 U.S.C. § 251(c)(3) made it clear that local exchange carriers must provide unbundled access to network elements if it is technically feasible to do so. We found that the evidence showed that it was technically feasible for BST to provide unbundled access to the local loop using integrated digital loop carriers (IDLC). The Commission therefore ordered BST to make such access available on an unbundled basis.

##### **(a) The BST Position**

BST submitted a Petition for Clarification concerning the Commission's decision on this issue as set forth immediately above. BST noted that it had proposed two different methods by which the loops served by IDLC could be made available to AT&T. Where copper facilities are available, BST noted that it would, upon request from AT&T, move loops from its IDLC equipment onto copper facilities. BST pledged to use its next generation digital loop carrier (NGDLC) where it was installed to accommodate AT&T's request for unbundled loops. NGDLC is an advanced version of digital loop carrier that will accommodate loop unbundling. BST asserted that the use of these two methods would allow AT&T access to approximately 88 percent of BST's loops in Alabama.

AT&T proposed three additional methods of unbundling IDLC, but BST asserted that those methods would have the direct effect of lowering the quality of customer service. BST contended that the additional methods recommended by AT&T were, therefore, not technically feasible means of providing local loop access. BST requested that the Commission clarify its Order to require the unbundling of loops served by an IDLC through the two methods that it recommend.

##### **(b) The Decision of the Commission**

We find merit in BST's Request for Clarification and herein specify that BST need only provide IDLC unbundling in the following situations: (1) Where copper facilities are available, BST will, upon request from AT&T, move loops from its IDLC equipment onto copper facilities.; (2) BST will use its next generation digital loop carrier where it is installed to accommodate AT&T's request for unbundled loops. IT IS SO ORDERED BY THE COMMISSION.

#### **(5) Advanced Intelligent Network Mediation Mechanisms (Issue 14f)**

In our Order of February 6, 1997 (at pp. 39-40) we noted our responsibility to ensure network reliability and security and concluded that mediation during call processing between an alternative LEC's database and BST's network, as well as mediation between the alternative LEC and BST during database updates, was essential in order to maintain such network reliability and security. Accordingly, we ordered BST to provide unbundled

access to its STPs and SCPs subject to the following mediation mechanisms: (1) mediation during call processing between AT&T's databases (SCP) and BST's network, and (2) mediation between AT&T's facilities and the contents of the BST database (SCP) during database updates. We ordered that such mediation mechanisms be designed to minimize post-dial delay.

**(a) The BST Position**

BST requested that the Commission clarify its decision concerning AIN mediation mechanisms such that it is clear that all required mediation mechanisms do not exist at present and that cooperation between the parties is both desirable and necessary to ensure that properly functioning efficient mediation mechanisms are created. BST asserted that due to the complexities of SS7 interconnection and the potential for impacts on network performance, several Public Service Commissions have asked involved parties to use the industry forum process to drive interconnection in this area. To ensure that the mediation mechanisms which must be developed meet the needs of all parties, BST requested that the Commission clarify its Order to encourage interested parties to utilize the industry forum process to develop interconnection specifics.

BST further requested that the Commission clarify its decision to state that AT&T has other options for creating and offering new AIN-based services to its customers served by BST, such as the use of BST's DesignEdge\_ and PortEdge\_ service creation tools. BST also requested that the Commission clarify its decision to make it clear that the method for recovery of cost appropriately incurred by BST during the design, development, testing and implementation of AIN mediation mechanisms remains an issue to be resolved. Finally, BST requested that the Commission make explicit its understanding that BST is entitled to recover the costs to design, develop, test and implement such mediation mechanisms.

**(b) The Decision of the Commission**

We find that BST's Motion for Clarification has merit and should be granted. Specifically, we note our agreement with BST's assessment that all required mediation mechanisms do not exist at present and that cooperation between the parties is both desirable and necessary to ensure that properly functioning efficient mediation mechanisms are developed. To further ensure that the mediation mechanisms developed meet the needs of all parties, we encourage BST and AT&T to use the industry forum process to develop interconnection specifics. We also note that the method for recovery of cost appropriately incurred during the design, development, testing and implementation of AIN mediation mechanisms remains an issue to be resolved. We conclude, however, that BST is at least entitled to recover portions of the costs incurred in the design, development, testing and implementation of such mediation mechanisms. IT IS SO ORDERED BY THE COMMISSION.

**(6) Terms and Conditions of Rights-of-Way Availability (Issue 16)**

In our Order of February 6, 1997 (at p. 46), we required BST to provide AT&T with equal and non-discriminatory access to poles, duct, conduit (excluding maintenance spaces), entrances facilities and rights of way under its control and currently not in use. We further ordered that available space on BST's poles and conduits be allocated on a first-come,

first-served basis with the exception of BST's emergency spares.

**(a) The AT&T Position**

AT&T petitioned the Commission to reconsider its decision concerning the terms and conditions of rights of way availability. Specifically, AT&T asserted that BST should not be permitted to use maintenance and emergency spares in a discriminatory manner so as to avoid its obligations under the Act. Moreover, AT&T asserted that it should have the same access to emergency spares and maintenance capacity so as to serve its customers in the same manner that BST is able to serve its customers. AT&T maintained that it understood the need to preserve emergency spares and maintenance capacity, but requested that the Commission order BST to provide non-discriminatory access to maintenance capacity and emergency spares and to work with AT&T and other new entrants to develop procedures for the use of emergency spares and maintenance capacity by all local service providers.

**(b) The Commission's Decision**

We herein conclude that AT&T's request for reconsideration concerning the terms and conditions of rights of way availability should be denied. We do not find it inconsistent with 47 U.S.C. § 224 for BST to exclude maintenance spares from the rights-of-way available to AT&T. We also find that excluding BST's emergency spares from the pole and conduit spacing made available to AT&T is not inconsistent with 47 U.S.C. § 224. IT IS SO ORDERED BY THE COMMISSION.

**(7) The Unbundled, Nonrecurring, Network Element Rate for Directory Assistance (Issue 23)**

**(a) The BST Position**

BST sought clarification of Appendix B to the Commission's February 6, 1997 Order in Docket 25703 (at p. 4 or 5), wherein the rate printed for the nonrecurring rate for signaling connection for directory assistance showed \$915 for the first trunk or connection and \$10 for each additional connection. BST submitted that its witness Scheye's Exhibit RCS-2, which was adopted by the Commission with some exceptions, indicated the rate as \$915 for the first connection and \$100 for each additional trunk or signaling connection. BST requested clarification that the aforementioned reference in Appendix B was in error as specified.

**(b) The Decision of the Commission**

The Commission has reviewed BST's request for clarification concerning the unbundled nonrecurring network element rate set forth in Appendix B of the Commission's February 6, 1997 Order. We have concluded that BST is correct in that Appendix B, page 4 of 5, should reflect that the nonrecurring rates per trunk or signaling connection for directory assistance should be \$915 for the first trunk or connection and \$100 for each additional trunk or signaling connection. Our February 6, 1997 Order is amended in accordance with our findings herein. IT IS SO ORDERED BY THE COMMISSION.

**D. CONSIDERATION OF THE PETITIONS FOR RECONSIDERATION/CLARIFICATION  
DISTINCT TO DOCKET 25704 (GTE/ATT)**

**(1) Electronic Interfacing Requirements (Issue 5)**

In our February 12, 1997 Order (at pp. 19-20), we concluded that GTE must provide non-discriminatory access to Operations Support Systems and any relevant internal gateway access as soon as practicable, and in the same time and manner in which GTE provides such functions to itself, any related entity or other party, including end users. 47 CFR §§ 51.311(b), 51.313(c), 51.319(f)(1). We further ordered GTE to provide AT&T with complete unlimited access to its Operations Support Systems on an equal basis, to the access that GTE provides it to itself, any related entity or other party, including end users.

**(a) The AT&T Position**

AT&T submitted comments concerning the issue of electronic interfacing which referenced the fact that GTE had agreed to provide AT&T with electronic interfaces for Operations Support Systems in Alabama in accordance with the three phase implementation plan the two parties had agreed to in California. AT&T requested that the Commission order GTE to abide by its agreement that it will provide in Alabama the same solution concerning electronic interfacing that it will provide in California, and on the same time schedule agreed to in California.

**(b) The Decision of the Commission**

We believe that the Act and our Order of February 12, 1997 clearly speak to GTE's obligation to provide electronic interfacing as soon as practicable. If the parties have indeed agreed that full electronic bonding will be provided by December 31, 1997, it is unlikely that GTE's failure to provide full electronic bonding until that agreed upon deadline will be considered a violation of the Act or the FCC's Order. We do not, however, feel compelled to adopt the language suggested by AT&T given the clear manifestations of the Act concerning this issue and the FCC's Order concerning same. IT IS SO ORDERED BY THE COMMISSION.

**(2) Routing of Operator and Directory Assistance Service Calls (Issue 6)**

In our Order of February 12, 1997 (at pp. 23-24), we noted that GTE is generally required by the Act and specifically required by the FCC's Order to provide customized routing of operator and directory assistance services directly to AT&T's service platform unless GTE meets its burden of proving that it is technically infeasible to do so. 47 U.S.C. § 252(c)(2), FCC Order at ¶ 418.

**(a) The AT&T Position**

In its comments concerning the routing of operator and directory assistance services, AT&T maintained that the Commission's Order did not specify the

method by which GTE was to provide customized routing. AT&T requested that the Commission specify that if GTE chooses to provide direct routing using line class codes as an interim solution, GTE should work with the industry to develop a long-term solution for direct routing and implement that solution as soon as possible.

**(b) The Decision of the Commission**

As was noted herein in our discussion of this issue at C.(3), we anticipate that line class codes will be used as an interim solution to provide customized routing of operator and directory service calls. We would, however, encourage GTE to work with the industry to develop a long-term solution to the customized routing issue and to implement that solution as soon as possible. IT IS SO ORDERED BY THE COMMISSION.

**(3) Terms and Conditions of Rights-of-Way Availability (Issue 17)**

In our Order of February 12, 1997 (at pp. 43-44), we adopted the arbitration panel's recommendation that GTE be required to provide equal and non-discriminatory access to the poles, ducts, conduits, entrances, facilities and rights-of-way under its control, on terms and conditions equal to those GTE provides to itself or any other party. We noted that the FCC has issued Orders under 47 U.S.C. § 224 for rights-of-way access and has been upheld by the Courts where those Orders were concerned. We concluded that GTE should allow access to rights-of-way in a manner consistent with those FCC Orders.

**(a) The AT&T Position**

In its comments concerning the issue of access to rights-of-way, AT&T requested that the Commission make it clear that AT&T is to be allowed to access all possible pathways to its customers including entrances, facilities, cable vaults, equipment rooms and telephone closets. AT&T asserted that all of those pathways fell under the term "rights-of-way" as defined in the Act. AT&T also requested that the Commission clarify that GTE's obligation to provide equal and non-discriminatory access applied to GTE's spare and maintenance capacity.

**(b) The Decision of the Commission**

Following its review of AT&T's requested clarifications concerning the issue of rights-of-way access, the GTE/AT&T arbitration panel recommended no change to its previous findings in this or any other regard. We accordingly defer to the panel's finding on this issue and deny the request for clarification sought by AT&T in its comments concerning this issue. IT IS SO ORDERED BY THE COMMISSION.

**(4) The Appropriate Prices for Unbundled Network Elements (Issue 26)**

The GTE/AT&T panel recommended that unbundled network element prices be set at TELRIC prices based on the Hatfield Model and a 15 percent common cost allocator. In our February 12, 1997 Order we adopted the panel's recommendation in this regard on an interim basis but specified that revised forward-looking cost studies were to be filed by the parties within three months from the date of said Order. We noted that our decision

concerning permanent prices would be forthcoming within six months from the date of our February 12, 1997 Order with a true-up to follow.

**(a) The GTE Position**

GTE petitioned the Commission to reconsider its decision to utilize the Hatfield Model to determine unbundled network element prices. GTE asserted that the Hatfield Model is clearly not based on GTE's network, but is instead based upon a hypothetical network that has not and will not be built in Alabama or anywhere else. GTE asserted that there was simply no basis in the Commission's Order or the record supporting the adoption of the Hatfield Model.

GTE further asserted that it did not favor interim prices. GTE suggested that if the Commission needed additional time to consider GTE's cost studies and pricing proposals, interim prices be set at the level recommended by GTE. Otherwise, GTE asserted that it would suffer irreparable harm due to the loss of market share resulting from prices which were unconstitutionally low.

**(b) The AT&T Position**

AT&T asserted that the arbitration panel correctly relied upon the Hatfield Model to establish permanent rates for unbundled network elements, but did not object to the establishment of a proceeding to consider further cost studies for purposes of establishing permanent cost-based rates.

**(c) The Decision of the Commission**

We find that the interim rates for unbundled network elements adopted on an interim basis in our February 12, 1997 Order are appropriate until such time as revised, forward-looking cost studies can be submitted by the parties and analyzed by the Commission. The true-up procedure referenced in our February 12, 1997 Order will alleviate the concerns expressed by GTE. We accordingly deny GTE's request for reconsideration and reaffirm our decision requiring the parties to submit forward-looking cost studies within three months from the effective date of this Order. The Commission will enter a decision establishing permanent prices no later than within six months from the effective date of this Order. IT IS SO ORDERED BY THE COMMISSION.

**IV. RETENTION OF JURISDICTION**

It is our firm belief that we have satisfactorily resolved all issues presented to us for reconsideration/clarification. We are ever mindful, however, that the telecommunications industry is one which is undergoing rapid and monumental change. We, therefore, will continue in our role of monitoring the telecommunications industry in Alabama for the benefit of the telecommunications carriers operating in this state as well as Alabama's telecommunications consumers. We accordingly retain jurisdiction in these matters for purposes of issuing such further orders as may become necessary in the premises. IT IS SO ORDERED BY THE COMMISSION.

This Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 14th day of May, 1997.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

Charles B. Martin, Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

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