Witness Parker also testifies that Section 2.2.15.3 of Attachment VIII of the agreement is pertinent. That section provides that:

> When MCIm orders Network Elements or Combinations that are currently interconnected and functional, Network Elements and Combinations shall remain connected and functional without any disconnection or disruption of functionality. This shall be known as Contiguous Network Interconnection of Network Elements.

He states that this provision means that "when MCI orders combinations of elements that are currently connected to each [other] and serving a customer, BellSouth cannot rip those elements apart." He states further that this section also was negotiated.

Witness Parker concludes that the provisions of MCIm's agreement having to do with pricing UNEs are not ambiguous. Rather, they specifically recognize MCIm's right "to migrate existing BellSouth customers to MCI to be served by UNEs." They further prohibit "BellSouth from ripping apart elements that are currently connected when ordered in combination, and . . . specif[y] how the prices for those combinations are determined." He points out that Attachment 3 determines the provisioning of UNEs and Attachment 1 determines how they are to be priced.

MCIm witness Martinez was a principal negotiator of the agreement. He also testifies that the MCIm agreement provides prices for UNE combinations as the sum of the rates for the stand-alone elements. He further testifies that the agreement provides "a mechanism for removing from that sum duplicate charges and charges for services not needed when the elements are ordered in combination."

Witness Martinez also testifies that the phrase "charges in Attachment I are inclusive and no other charges apply" in Section 2.6 of Attachment III means that:

> In essence, again going back to ordering that which already exists to be in place, and that is the combination loop and port. There are no charges to take them apart or put them together because they already exist; that the charges are themselves the charges as reflected in Attachment I.

Witness Martinez testifies that BellSouth voluntarily agreed to Section 2.2.2 of Attachment VIII, Section 2.2.15.3 of Attachment VIII, and Section 2.6 of Attachment III. He contends that these provisions "go to the heart of this case." They establish:

> what rate should MCIm pay when it migrates an existing BellSouth customer to a loop/port combination. They provide that MCIm can migrate existing BellSouth customers to UNEs, as opposed to resale ... When MCIm does so, BellSouth cannot disconnect the currently connected network elements . . . Finally, when MCIm migrates the customer to UNEs, the charges for the network elements set forth in Attachment I apply. Those charges are inclusive and no other charges, including a glue charge, shall apply . . . .

He states that "BellSouth voluntarily agreed that we could migrate customers to UNEs, they agreed that they would not disconnect the currently connected elements, and they agreed not to charge a glue charge." He maintains that this provision existed from the very beginning of the negotiations and that BellSouth's negotiators were "totally aware of what the meaning was of that paragraph."

According to MCIm, BellSouth did not agree to these provisions subject to the adoption of other language that it proposed be included in Section 8 of Attachment I, language that we disallowed in Order No. PSC-97-0602-FOF-TP, issued May 27, 1997. That language would have required the parties to negotiate the price of a retail service that is recreated by combining UNEs. MCIm notes that BellSouth filed a draft agreement on January 30, 1997, following Order No. PSC-96-1579-FOF-TP, with voluntarily negotiated provisions shown in regular typeface and disputed provisions shown in bold. In that draft, Section 2.2.2 of Attachment VIII, Section 2.2.15.3 of Attachment VIII, and Section 2.6 of Attachment III were in regular typeface and they were not subject to or conditioned by any other provisions. MCIm further notes that it was following Order No. PSC-97-0298-FOF-TP, on April 2, 1997, that BellSouth filed its proposed language that UNE combinations could not undercut resale, several months after Section 2.2.2 of Attachment VIII, Section 2.2.15.3 of Attachment VIII, and Section 2.6 of Attachment III had been negotiated.

MCIm's principal argument is that the price for UNE combinations under its agreement, whether they recreate a BellSouth retail service or not, is the sum of the stand-alone prices of the

network elements which make up the combination. It relies on Section 2.6 of Attachment III and Section 1 of Attachment III for this assertion. MCIm argues further that its agreement further recognizes that a UNE combination price may include duplicate charges and charges for services that are not needed when the elements are combined. It concludes, therefore, that it is entitled to request, and BellSouth is obligated to provide, prices for combinations which do not include duplicate charges or charges for services not needed when the elements are combined. It asserts that the appropriate method for determining prices for UNE combinations is to remove from the stand-alone UNE prices in Table 1 of Attachment I all duplicate charges and all charges for services that are not needed when the elements are ordered combined on the same order.

Alternative Argument

In the alternative, MCIm argues that, even though the plain language of its agreement with BellSouth specifies how prices will be determined for network element combinations, if we determine otherwise, then we should find that pricing for network element combinations should be based on forward-looking costs, as required by Section 252(d) of the Act. MCIm also argues that service through network elements and service through resale are different in terms of potential innovation, risk and competitive opportunity.

MCIm asserts that in interpreting Section 251(c)(3) of the Act, the Eighth Circuit, in Iowa Utilities Board I, 120 F.3d at 814-15, affirmed MCIm's right to provide service using network element combinations obtained from BellSouth at cost-based rates, as follows:

> Initially, we believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network. Nothing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements.

MCIm rejects BellSouth witness Varner's contention that, while under the agreement BellSouth will provision UNE combinations that recreate existing BellSouth retail services, the price to MCIm will be the retail price of the service less the applicable wholesale discount. MCIm asserts that the pricing standard in the Act is not conditioned on the use it makes of UNEs.

MCIm/AT&T witness Gillan testifies that there are a number of important differences between the lease of network facilities, particularly those that provide multiple services, and the resale of a single service defined by the ILEC. He explains that with network elements an ALEC steps fully into the role of a local telephone company, compensating the ILEC and taking on the task of pricing a full range of services to recover its costs and make a profit; whereas with service-resale, the ALEC functions effectively as the incumbent's marketing agent, the ILEC having determined what services will be offered and what prices will be charged in its retail tariff.

Witness Gillan testifies that there is much less risk in a service resale environment than in a network element environment because in the former the potential margin is defined by the wholesale discount and it remains fixed as customers purchase more or less service. With network elements, in some cases, much of the ALEC's costs is incurred as a flat-rate per month, with its potential revenues a function of usage, while in others, the ALEC's costs are based on usage, with its revenues fixed. An ALEC purchasing network elements incurs the substantial fixed cost of local service, with the hope that additional services and features will provide additional revenues. It is the uncertainty in this, he claims, that creates the risk, as well as the opportunity, that does not exist with service-resale.

Witness Gillan testifies further that a network element-based carrier's capacity to innovate exceeds that of a service reseller. He argues that service resale limits the entrant to reoffering finished services created by the incumbent LEC. He argues further that even where the entrant superficially appears to have an ability to modify an incumbent LEC service, for instance, by including an optional feature as a standard element, there is little practical flexibility because the entrant's cost structure is defined by the incumbent LEC's retail price. He concludes that with no economic flexibility, there is little the entrant can do to introduce new pricing arrangements or feature mixes.

He argues, in contrast, that with network elements, services can be designed for new customer classes, basic services can include features and functions that BellSouth only makes available as expensive options, or network elements can be used by the entrant to craft its own promotions and special packages. In addition, he argues that by purchasing network elements, entrants can better prepare for a day when alternative networks offer the opportunity to obtain network capacity, i.e., elements, from other vendors.

He observes that the ability to innovate using network elements will increase in the future. He explains that the introduction of Advanced Intelligent Network (AIN) capability will transform the local switch from a service-definition node to a more generic role. He further explains that in the future, service-defining capabilities will be housed in remote software databases which provide call processing instructions to the switch. He ventures that the innovation possible in this environment is limitless, but only if the network facilities that interact with these databases can be efficiently obtained and combined to provide service.

Witness Gillan criticizes the conclusion BellSouth witness Varner draws from his hypothetical comparisons of the costs under service resale and unbundled access. Witness Varner's comparisons for business, PBX and residential customers all show significantly lower costs for unbundled access, which witness Varner describes as "windfalls" for the ALECs. Witness Gillan testifies that these differences are unstable in competitive markets and they will in due time inure to the benefit of customers.

Witness Gillan observes that the retail service recreation argument that BellSouth advances here, and that was accepted in a number of states in BellSouth's region, was rejected in Texas, Illinois, Wisconsin, Michigan, Iowa, Oregon and California. He acknowledges that the Georgia Commission affirmed its decision after the Eighth Circuit ruled, while noting that all the decisions in BellSouth's region came down before the Eighth Circuit ruled.

Witness Gillan concludes that:

> There should be no issue that the entrant will use network elements to provide services and use those network elements in the same way that BellSouth or any other local telephone company would use them. They only go together one way. What makes these plans different is

> that one establishes the entrant as the complete and legitimate phone company in every dimension, and the other establishes the entrant simply as a marketer for BellSouth services.

BellSouth

Principal Argument

According to BellSouth, its interconnection agreement with MCIm specifies prices only for individual network elements; it does not specify how combinations of network elements should be priced. BellSouth maintains that in order to conclude that its agreement with MCIm specifies the prices for combinations of network elements, we must find either that we decided the prices in the arbitration or that BellSouth voluntarily agreed to such prices. BellSouth asserts that neither finding makes any sense or is supported by the evidence.

BellSouth witness Hendrix was the company's lead negotiator. He testifies that, while in Order No. PSC-96-1579-FOF-TP we allowed MCIm to combine UNEs in any manner of their choosing, at pages 37 and 38, we declined to rule on the pricing of recombined elements. He further testifies that in our Order No. PSC-97-0298-FOF-TP on reconsideration we stated that we were not presented with the specific issue of the pricing of recombined elements recreating service resale and that it was not clear to us that our decision included rates for all the elements necessary to recreate a complete retail service.

Witness Hendrix testifies further that, because there was no direction from us on UNE combinations pricing, BellSouth proposed language for inclusion in its agreement with MCIm in Section 8 of Attachment I that addressed that question. The language BellSouth proposed was as follows:

> Negotiations between the parties should address the price of a retail service that is recreated by combining UNEs. Recombining UNEs shall not be used to undercut the resale price of the service recreated.

He notes that, in Order No. PSC-97-0602-FOF-TP at page 5, we rejected the language BellSouth proposed, and stated again that, while we were concerned about the pricing for UNEs duplicating service resale, that issue was not presented for arbitration.

Witness Hendrix maintains that, contrary to MCIm's view, Section 2.6 of Attachment III does not set prices for combinations. He explains that:

> This language was agreed to in conjunction with the pricing language BellSouth tried to incorporate into the agreement, but which was rejected by the Commission. BellSouth has consistently maintained its position that unbundled network elements combined to recreate an existing retail service offering is considered resale. BellSouth would never have voluntarily agreed to a provision in the agreement that would undercut its position on combinations.

He also rejects MCIm's contention that Section 8 of Attachment I provides the pricing standard for UNE combinations. He observes that this section only requires BellSouth and MCIm to work together to develop recurring and non-recurring charges that do not duplicate charges for functions or activities that MCIm does not need when two or more UNEs are combined in a single order.

Witness Hendrix in addition testifies that when MCIm purchases a loop and port combination from BellSouth, it is recreating a BellSouth retail offering. He maintains that the appropriate price in this case is not provided in the agreement as the sum of the prices for the loop and for the port; rather, it is the retail rate less the Commission-approved wholesale discount.

In rejecting an interpretation of Section 2.6 of Attachment III that would specify the pricing standard for UNE combinations, witness Hendrix explains that:

> The first answer being, Attachment I . . . will address individual UNE elements. Nowhere in that attachment will you find the language "combinations."
>
> The reason the language is worded as is, and I remember this language being included, we at one point had tried to make references to the tariffs just to ensure we had all bases covered. MCI did not want references to the tariff. They said Attachment I is an all inclusive attachment and anything that we're wanting to add later we would be able to come in and amend the agreement and amend Attachment I to actually include those rates.

* * *

> So when it says "all inclusive," it does not mean . . . that these are the only rates that you would charge for putting UNEs together in the way the carriers would want to actually do that.

Further, he testifies that Section 2.6 is very clear when read with knowledge of the language that BellSouth proposed to be included in Section 8 of Attachment I, which we disallowed. BellSouth considered the disallowed language to be consistent with our orders and it was left with a problem when we disallowed it. Nevertheless, BellSouth, under the prospect of a penalty if a signed agreement were not timely submitted for approval, decided to await a favorable ruling from the Eighth Circuit that, once final and nonappealable, would enable it to negotiate revised language.

Witness Hendrix testifies that the phrase "no other charges apply" in Section 2.6 means that the rates contained in Attachment I are the rates that would apply for each individual UNE. He summarizes his testimony on this point by agreeing with the suggestion that if MCIm orders an unbundled loop and an unbundled port and combines them itself, the prices in Attachment I apply, but that if MCIm orders a loop and port already combined, while BellSouth must, under the agreement, provide the combination, it would do so at the resale price.

BellSouth argues that MCIm's contention that BellSouth agreed to a combinations pricing standard blatantly ignores BellSouth's consistent position on the pricing of recombined elements, the circumstances surrounding execution of the interconnection agreement, and the language of the agreement itself. BellSouth witness Varner testifies that BellSouth has fought ALEC proposals to purchase UNE combinations that replicate retail services at cost-based rates in every state arbitration proceeding, in Section 271 proceedings, and at the FCC.

Finally, BellSouth argues that language identical to the language in Section 2.6 of Attachment III is in its interconnection agreements with MCIm in every other state in its region, and yet, with the exception of Kentucky, MCIm must pay the resale price when it purchases UNEs that when combined recreate an existing BellSouth service.

BellSouth's basic argument is that its agreement with MCIm simply does not provide a pricing standard for combinations of network elements of any kind.

Alternative Argument

Rejecting MCIm's position that the parties' interconnection agreement provides a single mechanism for pricing network element combinations, BellSouth witness Varner argues that while existing contractual provisions remain in effect obligating BellSouth to provide MCIm with combinations of elements, combinations that recreate an existing BellSouth retail service should be priced at the retail price of that service minus the wholesale discount. Any other result would undercut the resale provisions and the joint marketing restrictions in the Act. Witness Varner testifies that the agreement with MCIm does not contain a pricing standard for UNE combinations of any kind; rather, prices for UNE combinations that do not recreate an existing BellSouth retail service should be negotiated by the parties and should be market-based to reflect the increased risk associated with the use of UNEs.

BellSouth argues that Congress, recognizing that the emergence of facilities-based competition in local markets would take some time, provided two other means in the Act by which ALECs could enter local markets more quickly. Under service resale, ALECs are allowed to purchase existing retail services, including basic telephone service that serves most customers, from the incumbent telephone company at what is commonly described as a wholesale rate. Under unbundled access, ILECs are required to sell ALECs access to discrete pieces of the ILECs' existing networks, with ALECs' gaining the ability to create new telephone services that would be competitive with the ILECs' services.

BellSouth argues further that Congress created two, totally different pricing theories for these two types of market entry. For service resale, Section 252(d)(3) of the Act requires that existing retail services be priced to resellers at "retail rates charged to subscribers" less those "costs that will be avoided" by the ILEC as a result of selling to the reseller. BellSouth explains that this is what is often called a "top down" pricing structure, which begins with the retail price of a good or service and subtracts cost components to arrive at a wholesale price. For unbundled network elements, Section 252(d)(1) of the Act requires ILECs to sell elements to ALECs at prices based on the cost of the individual element, plus a reasonable profit. BellSouth explains that this is known as a "bottom up" pricing structure, which begins with incremental cost and then fixes the final price by building up

the incremental or direct cost by shared and common costs and reasonable profit.

BellSouth contends that the careful distinction Congress crafted between resale and unbundled network elements would be obliterated if MCIm and AT&T were permitted to purchase at cost-based rates combinations of network elements that replicate an existing retail service. Witness Varner testifies that:

> It is expected that the typical request by MCI or AT&T would be for BellSouth to provide a combination of UNEs (as a preassembled combination, or on a switch as is basis) without the physical work of combining the elements. This exemplifies the situation over which the Commission has expressed concern. In essence, MCI or AT&T would order a BellSouth retail service simply by placing the order as a series of UNEs. This situation is, quite frankly, the one most likely to exist and is the one MCI and AT&T have actually demanded. This migration of a customer's service or switch "as is" is simply resale, since MCI and AT&T are not purchasing UNEs, but are, in fact, purchasing a finished retail service. In such cases, BellSouth will bill the retail service rate minus the applicable wholesale discount.

BellSouth claims that the ALEC activity that witness Varner describes here amounts to "gaming the system."

Witness Varner also argues that what MCIm proposes is "sham unbundling" and he illustrates the effect that would have on BellSouth's revenues. He discusses a business customer with two lines and hunting and a single vertical feature on each. The customer's monthly charge is $70.68. If MCIm wins that customer on the basis of service resale, it would pay BellSouth a monthly charge of $62.36, after applying the wholesale discount rate of 16.81 per cent. BellSouth would continue to receive access charges. If MCIm were to provide service to that same customer by means of combined UNEs purchased at cost-based prices, it would pay BellSouth a monthly charge of $32.77, an effective retail discount of 53.66 per cent. BellSouth no longer would receive access charges. The service would be no different and involve the same capabilities and functions, he contends. This, he asserts, would render Section 252(d)(3) of the Act meaningless.

Witness Varner argues that under MCIm's view of the agreement, MCIm would order the functional equivalent of a BellSouth retail service simply by changing the words used when the service is ordered. Moreover, he contends that it should surprise no one that substantial margins exist in business vertical services and access charges. These margins exist as a matter of public policy, he argues, in order to support affordable residential rates. If ALECs skim the business customers under these circumstances through what he calls "sham unbundling," he asserts that residential customers will be harmed, especially high cost customers.

Witness Varner also argues that "switch as is" permits MCIm to wrongly bypass the joint marketing restriction of Section 271(e)(1) of the Act. This restriction would prohibit MCIm from jointly marketing telephone exchange service provisioned pursuant to Section 251(c)(4) of the Act (service resale) with its interLATA services until certain conditions obtain, but not services provisioned pursuant to Section 251(c)(3) (unbundled access).

Witness Varner observes that we expressed concerns in Order No. PSC-96-1579-FOF-TP both with "sham unbundling" and circumvention of the joint marketing restriction.

Witness Varner rejects witness Gillan's assertions that unbundled access and service resale represent different business opportunities. In either, he asserts, what the ALEC can add to the service, what the ALEC can do with the service, the ALEC's ability to innovate and to serve the customer are the same. He argues that the only difference in business opportunity is that the ALEC pays less for the resold service, avoids the payment of access charges and gets around the joint marketing restriction.

Finally, BellSouth points out that state commissions in Georgia, Mississippi, Alabama, Louisiana, North Carolina, South Carolina and Tennessee all have held that the pricing standard of Section 252(d)(3) applies when unbundled network elements are combined in a way so as to recreate an existing BellSouth retail service. BellSouth acknowledges that each of these decisions was reached before the Eighth Circuit upheld the FCC's determination that services provided by means of unbundled access and by means of resale were not the same.

BellSouth's alternative position is that the parties must negotiate market-based prices for combinations that do not recreate an existing BellSouth retail service and that the price for network element combinations that do recreate an existing BellSouth retail

service should be the retail price for the service less the appropriate wholesale discount.

Conclusion

Provisioning

Attachment III, Network Elements, of the MCIm-BellSouth interconnection agreement provides at Section 2.4 that:

> BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers.

Attachment VIII, Business Process Requirements, Section 2, Ordering and Provisioning, provides at Section 2.2.15.1, Specific Unbundling Requirements, that:

> MCIm may order and BellSouth shall provision unbundled Network Elements either individually or in any combination on a single order. Network Elements ordered as combined shall be provisioned as combined by BellSouth unless MCIm specifies that the Network Elements ordered in combination be provisioned separately.

Also, Section 2.2.15.3 of Attachment VIII provides that:

> When MCIm orders Network Elements or Combinations that are currently interconnected and functional, Network Elements and Combinations shall remain connected and functional without any disconnection or disruption of functionality.

We noted above that in Iowa Utilities Bd. II, supra, the court ruled on rehearing that incumbents are only required to provide network elements on an unbundled basis. Nevertheless, MCIm witness Parker testifies that BellSouth is required to provide UNE combinations to MCIm pursuant to Section 2.4 of Attachment III and Sections 2.2.15.1 and 2.2.15.3 of Attachment VIII of the agreement. BellSouth witness Varner acknowledges that an incumbent is free to combine network elements in any manner of its choosing. Moreover, BellSouth witnesses Varner and Hendrix acknowledge that, according to the terms of BellSouth's agreement with MCIm, BellSouth is obligated to accept and provision UNE combination orders.

BellSouth's bundling obligation in its agreement with MCIm is a negotiated one. Witness Varner testifies, however, that BellSouth voluntarily undertook the bundling obligation only because 47 C.F.R. §51.315(a), since vacated, was then in effect. Thus, we find upon consideration that BellSouth has undertaken a contractual obligation to provide network elements in combinations to MCIm. BellSouth is required under the agreement to provide network elements as defined in 47 C.F.R. §51.319 to MCIm individually or combined, whether already combined at the time ordered or not. That obligation is not affected by the Eighth Circuit's nonfinal ruling on rehearing, as witness Varner recognizes.

Pricing

BellSouth witness Hendrix testifies that although BellSouth must provide network elements in combination to MCIm, its agreement with MCIm does not specify how prices will be determined for UNE combinations that recreate an existing BellSouth retail service. We agree. While Section 2.6 of Attachment III of the agreement provides that "[w]ith respect to Network Elements and services in existence as of the Effective Date of this Agreement, charges in Attachment I are inclusive and no other charges apply, including but not limited to any other consideration for connecting any Network Element(s) with other Network Element(s)," we find that this language extends only to elements purchased singly or to combinations of network elements that do not recreate an existing BellSouth retail service. We believe this language is clear and unambiguous but only to this extent. Thus, we construe it as a limited expression of the parties' intent at the time of forming the agreement that prices for network element combinations that do not recreate existing BellSouth retail services shall be determined as the sum of the prices of the component elements. Because this language is plain and unambiguous, it is our task only to determine what intent the language expresses, not to divine another intent that might have been in the minds of MCIm's negotiators. See James v. Gulf Insur. Co., 66 So.2d 62 (Fla. 1953); Acceleration Nat'l Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So.2d 738 (Fla. 3d DCA 1989), rev. den., 548 So.2d 662 (Fla.1989).

We reach this conclusion mindful that the matter of the pricing standard to be applied when unbundled network elements are combined or recombined to recreate an existing BellSouth retail service has been vigorously disputed by these parties from the very beginning. For that reason, we cannot interpret the language in the MCIm-BellSouth agreement to represent a meeting of the minds between the parties with respect to pricing network element combinations that recreate retail services.

We continue to find it troublesome that a service provisioned through unbundled access would have all the attributes of service resale but not be priced based on the Act's resale price standard. Yet, we recognize that in the context of provisioning basic local telecommunications services, entry costs based on unbundled access are likely to be higher than the comparable costs based on resale.

We find that the signed agreement contains no explicit language that can be fairly construed to preserve BellSouth's concern about the pricing of recreated retail services. It is clear to us, however, that the parties were far from agreement on this during the arbitration and no persuasive evidence is before us now that would suggest that they subsequently reached an agreement in favor of MCIm's position.

Based on the evidence in the record, we find that the MCIm-BellSouth interconnection agreement specifies how prices will be determined for combinations of unbundled network elements that exist or do not exist at the time of MCIm's order and that do not recreate an existing BellSouth retail service. The prices for combinations of network elements in existence or not shall be determined as the sum of the prices of the individual elements comprising the combination as set forth in the agreement in Table 1 of Attachment I, except when the network elements are combined in a way to recreate an existing BellSouth retail service.

MCIm and BellSouth shall negotiate the price for those network element combinations that recreate an existing BellSouth retail service, whether or not in existence at the time of MCIm's order. We have, from the very first of the arbitration proceedings that have come before us under the Act, encouraged interconnecting companies and incumbents to reach interconnection agreements through negotiation. This policy reflects the intent of Congress as expressed in Sections 251(c)(1) and 252(a)(1) of the Act.

We find further that a qualification to pricing UNE combinations that do not recreate an existing BellSouth retail service as the straightforward summation of the individual element prices is set forth in Section 8 of Attachment I of the agreement. There, the agreement provides that BellSouth shall provide recurring and non-recurring charges that do not duplicate charges for functions or activities that MCIm does not need when two or more network elements are combined in a single order. This language reflects our decision in Order No. PSC-97-0298-FOF-TP at pages 30 through 32 that the parties work together to establish recurring and non-recurring charges free of duplicate charges or

charges for unneeded functions or activities when UNEs are combined in a single order.

In reaching these decisions, in addition to a concern with the appropriate price for network element combinations recreating an existing BellSouth retail service, we are concerned with the joint marketing restriction of Section 271(e)(1) of the Act and with the right to access charges. Section 271 (e)(1) would restrict MCIm from joint marketing local telecommunications services provisioned by means of resale obtained from BellSouth with its long distance services, until BellSouth is authorized to provide in-region long distance services. Conversely, the restriction is inapplicable where MCIm would provision local services by means of unbundled access. With respect to access charges, in FCC 96-325, supra, at ¶980, the FCC concluded that the Act requires that ILECs continue to receive access charge revenues when local services are resold under Section 251(c)(4), as opposed to Section 251(c)(3). Thus, were MCIm to provision local telecommunications services by means of resale purchased from BellSouth, interexchange carriers (IXCs) would still pay access charges to BellSouth for originating or terminating interstate traffic when the end user is served by MCIm. Conversely, if MCIm were to provision local service by means of unbundled access, it, not BellSouth, would be entitled to access charge revenues.[2]

2. Switched Access Usage Data

The issue presented is whether BellSouth is obligated under the terms of its interconnection agreement with MCIm to furnish switched access usage data to MCIm. As set forth in this part, we conclude that BellSouth is obligated under the terms of the agreement to furnish switched access usage data to MCIm when MCIm provides service using unbundled local switching.

MCIm

According to MCIm, the agreement in plain language specifically requires BellSouth to provide switched access usage data to MCIm. MCIm witness Parker testifies that Section 4.1.1.3

---

[2]We noted that the Eighth Circuit's holding on the obligation of ILECs to provide bundled network elements is before the Supreme Court on certiorari. See n.1. BellSouth witness Varner testifies that if the Supreme Court affirms the Eighth Circuit's holding, the MCIm interconnection agreement at Section 2.4 of Part A, General Terms and Conditions, requires the parties to renegotiate mutually acceptable terms concerning the provisioning of UNEs, since an affirmation would materially affect a material term of the agreement.

of Attachment VIII requires BellSouth to provide recorded usage data on all completed calls. Section 4 of Attachment VIII is entitled Provision of Subscriber Usage Data. Section 4.1.1.3 provides that:

> BellSouth shall provide MCIm with copies of detail usage on MCIm accounts. However, following execution of this Agreement, MCIm, may submit and BellSouth will accept a PON for a time and cost estimate for development by BellSouth of the capability to provide copies of other detail usage records for completed calls originating from lines purchased by MCIm for resale. Recorded usage data includes, but is not limited to, the following categories of information:
>
> Completed Calls
> Use of CLASS/LASS/Custom Features (under circumstances where BellSouth records activations for its own end user billing)
> Calls to Information Providers Reached Via BellSouth Facilities and Contracted by BellSouth
> Calls to Directory Assistance Where BellSouth Provides Such Service to an MCIm Subscriber
> Calls Completed Via BellSouth-Provided Operator Services Where BellSouth Provides Such Service to MCIm's Local Service Subscriber and Usage is Billed to an MCIm Account.
>
> For BellSouth-Provided MULTISERV Service, Station Level Detail Records Shall Include Completed Call Detail and Complete Timing Information Where Technically Feasible.

Witness Parker also testifies that Section 7.2.1.9 provides that the usage data required includes all data, and, particularly, switched access usage information, which MCIm needs to bill IXCs for originating and terminating switched access charges. MCIm argues that BellSouth witness Hendrix acknowledges that the agreement requires BellSouth to provide MCIm data on all completed calls. Section 7 is entitled Local Switching. Section 7.2.1.9 provides that:

> BellSouth shall record all billable events, involving usage of the element, and send the appropriate recording data to MCIm as outlined in Attachment VIII.

MCIm argues that the requirement to provide usage data is derived from the Act's definition of network element at Section 3(a)(2)(45) to include "information sufficient for billing and collection."

MCIm witness Martinez notes that Section 7.1.1 of Attachment III provides that local switching:

> shall include all the features, functions, and capabilities that the underlying BellSouth switch . . . is capable of providing, including but not limited to: . . . Carrier pre-subscription (e.g., long distance carrier, intraLATA toll) . . . . [and] routing local, intraLATA, interLATA, calls to international subscriber's preferred carrier, call features (e.g., call forwarding) and Centrex capabilities.

He also notes that Section 2.6 of Attachment III provides that MCIm may use the local switch to provide any feature, function or capability, or service within the capacity of a network element or network elements. MCIm argues that when it purchases local switching from BellSouth, it is paying BellSouth for the capability to be the access provider and has the right to use that capability.

MCIm argues that the provisioning of a combination of UNEs is a separate consideration from the pricing standard for the combination. Witness Martinez maintains that when MCIm orders combinations of network elements, BellSouth must provision the combinations ordered regardless of the pricing standard applied. He argues that BellSouth witness Hendrix acknowledges that, pursuant to Section 7.1.1, with local switching, MCIm may route local, intraLATA and interLATA calls.

MCIm also argues that BellSouth wrongfully maintains that it is entitled to continue billing intrastate interLATA switched access charges when MCIm provides service through UNE combinations that recreates retail service. MCIm argues that with local switching it acquires the capability to provide switched access service for the price for local switching set forth in Part IV of the agreement. For that reason, witness Martinez argues that it is wrong for BellSouth to retain switched access for itself,

requiring MCIm to effectively pay twice for the same switching capability. He rejects BellSouth witness Varner's contention that to supply intrastate interLATA usage data is inappropriate as a distortion of the language in Section 7.2.1.9.

MCIm argues further that Section 1 of Attachment III requires BellSouth to provide MCIm with UNEs in accordance with FCC rules and regulations. Witness Gillan testifies that the FCC considers that the roles of local service provider and access provider "go hand-in-hand." He notes that in FCC 96-325, supra, at ¶356, the FCC concluded that:

> Section 251(c)(3) permits interexchange carriers and all other requesting carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers.

He also points to 47 C.F.R. §51.307(c) and §51.309(a) and (b) in support of his contention that unbundled access provides AT&T, not BellSouth, with the right to offer switched access. He further notes that in its September 27, 1996, Order on Reconsideration in CC Docket 96-98, FCC 96-394, the FCC determined at ¶11 that:

> when a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single [network] element on a per-line basis . . . Thus, a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user.

He argues that BellSouth's position that it may retain intrastate interLATA access would wrongly define the switch element as providing an entrant with only the functionality to provide some, not all, services to end users. That position, he maintains, is indefensible.

BellSouth

BellSouth witness Hendrix testifies that under Section 7.2.1.9 of Attachment III of the agreement, BellSouth is required to "record all billable events involving usage of the element, and send the appropriate recording data to MCIm as outlined in Attachment VIII." He states that interstate access records will be transmitted to MCIm via the Access Daily Usage File (ADUF).

Witness Hendrix testifies further that, pursuant to Section 7.2.1.15 of Attachment III, MCIm may only offer features within the capability of the switch that BellSouth offers to itself or to another party. He agrees, however, that MCIm has the ability with local switching to route local, intraLATA and interLATA calls.

He also testifies that, pursuant to Section 7.2.1.9, BellSouth will provide usage data to MCIm that will enable MCIm to bill its end users. Since BellSouth claims it retains intrastate interLATA access, however, such calls, he asserts, are not "billable events" for MCIm with respect to its end users, and therefore it is not appropriate for BellSouth to supply usage data for them. Witness Hendrix agrees that no language in the agreement requires that the parties treat interstate access and intrastate interLATA access differently, but he argues there is no language that would preclude different treatment either. BellSouth argues that Section 7.2.1.9, which requires BellSouth to record all billable events and send the appropriate data to MCIm, does not obligate it to provide intrastate interLATA usage data.

Concerning switched access, BellSouth witness Varner testifies that while we have not made a determination that ALECs may bill intrastate, interLATA access when they provide service by means of UNEs, the FCC has determined that they may bill interstate access, thereby removing a source of contribution to the support of local rates. He acknowledges, however, that he cannot be certain that this has happened and he is merely suggesting to us that we ought to inquire into whether the FCC's decision has caused such a problem for the states. He states that access charges are a significant source of universal service support and the question, therefore, of whether ALECs purchasing unbundled local switching may bill for intrastate interLATA access is not one to be properly decided in this proceeding.

Witness Varner asserts, moreover, that, when MCIm orders local service through "switch as is," it is offering service resale and BellSouth will, accordingly, continue to bill the applicable access charges. In that case, he maintains, it is not necessary to provide usage data to MCIm.

Finally, BellSouth observes that Section 4.1.1.2 of Attachment VIII of the agreement requires it to "provide MCIm with Recorded Usage Data in accordance with provisions of Section 4." Section 4 is entitled Provision of Subscriber Usage Data. BellSouth argues that Section 4 obligates it only to provide "billable" usage data and that, only in the context of resale. For support, it cites Section 4.2.1.1, which provides that:

> BellSouth shall provide MCIm with unrated [Exchange Message Record System] records associated with all billable intraLATA toll and local usage which they record on lines purchased by MCIm for resale.

Conclusion

BellSouth's position that it is not obligated to provide MCIm with usage data for intrastate interLATA calls rests on its contention that the service MCIm provides when provisioned with a BellSouth loop and port combination recreates an existing BellSouth retail service. Under service resale, BellSouth is entitled to bill access charges; MCIm does not acquire the functionality of BellSouth's switch. Hence, in that context, a case can be made that BellSouth need not supply MCIm with usage data for intrastate interLATA calls pursuant to Section 7.2.1.9 of Attachment III. Such calls would not be "billable events" to its end users for MCIm.

We have concluded, however, that in providing service by means of purchasing unbundled loops and switch ports from BellSouth, MCIm does not thereby recreate an existing BellSouth service. Here, we note that with the acquisition of local switching through the purchase of an unbundled switch port, the record supports that MCIm gains the right to provide all features, functions, and capabilities technically feasible within the switch, including exchange access service. See 47 C.F.R. §51.319(c); 47 U.S.C. §3(a)(2)(45). In addition, we note that BellSouth must provide MCIm, as a requesting carrier, with access to any unbundled network element in a manner that allows MCIm to provide any telecommunications service that can be offered by means of that network element, 47 C.F.R. §51.307(c), and that BellSouth may not impose limitations, restrictions, or requirements on requests for, or for the use of, unbundled network elements that would impair the ability of MCIm to offer a telecommunications service in the manner that MCIm intends, 47 C.F.R. §51.309(a); 47 U.S.C. §251(c)(3). Accordingly, we find upon consideration that BellSouth is required under the terms of its interconnection agreement with MCIm to

record and provide MCIm with switched access usage data necessary for MCIm to bill IXCs when MCIm provides service using unbundled local switching purchased from BellSouth either on a stand-alone basis or in combination with other unbundled network elements.

Section 7.2.1.9 of Attachment III quite plainly provides that:

> BellSouth shall record all billable events, involving the usage of the element, and send the appropriate recording data to MCIm as outlined in Attachment VIII.

Section 4.1.1.3 of Attachment VIII provides that BellSouth shall supply MCIm with recorded usage data for "completed calls." No language in the agreement sets apart intrastate interLATA calls from "completed calls." We believe that BellSouth's argument that it is required by Section 4 of Attachment VIII only to supply MCIm with billable usage data in a resale context is unsustainable. Section 4 sets forth requirements generally for the provision of subscriber usage data. Section 4.2.1.1, on which BellSouth relies, speaks only of billable intraLATA toll and local usage in the context of resale.

With respect to BellSouth's obligation to provide usage data for all billable events, we find that the pertinent language of the agreement is plain and unambiguous. Again, because it is so, it is our task merely to determine what intent the language expresses.

C. AT&T-BellSouth Interconnection Agreement

1. UNE Combinations Pricing

The issue presented is whether the AT&T-BellSouth interconnection agreement provides a pricing standard for combinations of unbundled network elements. As set forth in this part, we conclude that the agreement provides a pricing standard for combinations of network elements in existence that do not recreate a BellSouth retail service, but requires the parties to negotiate prices for those combinations of network elements not already in existence and for those that recreate a BellSouth retail service, whether in existence or not.

AT&T

Principal Argument

According to AT&T, the interconnection agreement between it and BellSouth expressly and unequivocally requires BellSouth to provide AT&T with combinations of UNEs at cost, even if those combinations could duplicate BellSouth's existing retail service, less duplicative or unnecessary costs. It asserts that nothing in the agreement, our orders, the opinions of the Eighth Circuit, or the Act is to the contrary. It asserts further that the agreement as originally negotiated by AT&T and BellSouth required BellSouth to provide AT&T with combinations of UNEs at the agreement's cost-based UNE prices, and drew no distinction between combinations that would permit AT&T to recreate existing services and those that would not. Moreover, AT&T contends that this issue was revisited during the arbitration proceedings, and the agreement was revised expressly to confirm AT&T's right under the agreement to purchase combinations of UNEs that would recreate existing BellSouth retail services. See Order Nos. PSC-96-1579-FOF-TP, PSC-97-0298-FOF-TP, and PSC-97-0600-FOF-TP.

AT&T argues further that we have indicated a concern if the price for a UNE combination, which would permit AT&T to recreate a BellSouth service, would "undercut" BellSouth's resale rate for that service. It asserts that we are right to be concerned, but that our concern should be directed at BellSouth's retail rate for that service, not at the prices established by the agreement for the UNE combination. Since UNE prices are based on our determination of BellSouth's forward looking costs and a reasonable profit, the economically correct prices that should be found in an efficiently competitive market, AT&T contends that if BellSouth's resale price for a UNE combination exceeds the UNE prices for that combination, the inference to be drawn is that BellSouth is "gouging" its retail customers. AT&T maintains that if competition based on UNE combination prices is permitted, those retail prices will be driven down, to the benefit of Florida's consumers.

AT&T witness Eppsteiner participated in the interconnection agreement negotiations. He testifies that AT&T's agreement with BellSouth requires BellSouth to furnish AT&T with combinations of network elements. He relies on Sections 1 and 1A of the agreement's General Terms and Conditions for this conclusion. Section 1 provides that:

> This Agreement sets forth the terms, conditions and prices under which BellSouth agrees to provide . . . (b) certain Unbundled Network Elements, or combinations of such Network Elements ("Combinations") . . . .

Section 1A provides that:

> AT&T may purchase unbundled Network Elements for the purpose of combining Network Elements in any manner that is technically feasible, including recreating existing BellSouth services.

Witness Eppsteiner also relies on Section 30.5 of Part II of the agreement, Unbundled Network Elements. That section provides that:

> BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit AT&T to provide Telecommunications Services to its Customers subject to the provisions of Section 1A of the General Terms and Conditions of this Agreement.

Witness Eppsteiner testifies that BellSouth and AT&T agreed that Section 1A would be added to their agreement, and referenced in Section 30.5, to express our arbitration of AT&T's complaint that BellSouth was refusing to provide combinations of UNEs that recreated existing BellSouth retail services. He testifies that we ruled that AT&T could combine UNEs in any manner it might choose, including recreating existing BellSouth retail services. He testifies further that our ruling is reflected by the language in Section 1A.

Witness Eppsteiner points to other provisions in the agreement that also address BellSouth's obligation to provide AT&T with UNE combinations. First, Section 2.2 of Attachment 4, Provisioning and Ordering, provides that:

> Combinations, consistent with Section 1.A of the General Terms and Conditions of this Agreement, shall be identified and described by AT&T so that they can be ordered and provisioned together and shall not require enumeration of each Element within that Combination on each provisioning order.

Next, Section 3.9 of Attachment 4, provides that:

> BellSouth will perform testing with AT&T to test Elements and Combinations purchased by AT&T.

Finally, Section 4.5 provides that:

> When AT&T orders Elements or Combinations that are currently interconnected and functional, such Elements and Combinations will remain interconnected and functional without any disconnection or disruption of functionality. This shall be known as Contiguous Network Interconnection of network elements.

He testifies that these provisions were negotiated.

With respect to prices for UNE combinations, witness Eppsteiner testifies that those prices, recurring and nonrecurring, are set forth in Table 1, Unbundled Network Elements, of Part IV, Pricing, as the sum of the individual element prices, except that they reflect duplicate and unnecessary charges that must be removed. As support for this conclusion, he relies on Section 36 of Part IV, which provides that:

> The prices that AT&T shall pay to BellSouth for Unbundled Network Elements are set forth in Table 1.

He relies further on Section 36.1, Charges for Multiple Network Elements, which provides that:

> Any BellSouth non-recurring and recurring charges shall not include duplicate charges or charges for functions or activities that AT&T does not need when two or more Network Elements are combined in a single order. BellSouth and AT&T shall work together to mutually agree upon the total non-recurring and recurring charge(s) to be paid by AT&T when ordering multiple network elements. If the parties cannot agree to the total non-recurring and recurring charge to be paid by AT&T when ordering multiple Network Elements within sixty (60) days of the Effective Date, either party may petition the Florida Public Service Commission to settle the disputed charge or charges.

He maintains that Section 36.1 reflects our ruling in Order No. PSC-97-0298-FOF-TP. AT&T argues that if UNE combinations were to be priced at resale prices, as BellSouth contends, there would be no need for the Section 36.1 provision eliminating duplicative or unnecessary charges when combined elements are provided. AT&T argues that there is no indication in Section 36 or in Table 1, that the UNE prices set forth in Table 1 are not to be used in determining the proper charge for UNEs that are included in a UNE combination.

Witness Eppsteiner observes that we rejected language proposed by BellSouth for inclusion in Section 36.1 that would have required the parties to address the price of a retail service recreated by UNE combinations through further negotiations. Noting our concern with the pricing of services recreated by UNE combinations, he, nonetheless, concludes that our rejection of this language provides for no exception to the manner in which UNE combinations are to be priced under the agreement. He testifies that the agreement contains no language that would ever allow BellSouth to treat UNE combinations as service resale.

Witness Eppsteiner also testifies that BellSouth acknowledged that prices of all UNE combinations are established by Part IV. He states that, because the parties could not agree on language with respect to additional charges, BellSouth proposed the following language (which we rejected in Order No. PSC-97-0300-FOF-TP):

> BellSouth shall charge AT&T the rates set forth in Part IV when directly interconnecting any Network Element or Combination to any other Network Element or Combination ....

AT&T concludes that Sections 1 and 1A of the agreement require BellSouth to provide AT&T with combinations of UNEs to be priced, without exception, according to Table 1 of Part IV.

Finally, AT&T argues that as a logical extension of BellSouth's position concerning recreated retail services, BellSouth could effectively block AT&T, or any ALEC, from purchasing any UNE combination at cost-based rates by simply filing a tariff, thereby invoking the service resale price standard.

AT&T's basic position is that its agreement with BellSouth specifies that the price of a combination of UNEs is the total of the cost-based UNE prices, less any duplicative or unnecessary charges for functions or activities that AT&T does not need when the UNEs are combined. AT&T asserts that the agreement makes no