LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. R-26173

Docket R- 26173, Louisiana Public Service Commission, ex parte. In re: BellSouth's provision of ADSL Service to end-users over CLEC loops- Pursuant to the Commission's directive in Order U-22252-E

(Decided at the December 18, 2002 Business and Executive Session.)

I. BACKGROUND

The Louisiana Public Service Commission Staff ("Staff") filed its Final Recommendation in Docket Number U-22252-E, *In re: BellSouth's Section 271 Pre-application*, on August 31, 2001. Among the numerous issues addressed therein was a discussion of MCI WorldCom Communications, Inc.'s ("WorldCom") contentions regarding BellSouth Telecommunication's, Inc. ("BellSouth") practices in line splitting arrangements.[1] Staff described its understanding of the policy as follows: "BellSouth will not provide a customer with its retail DSL service unless that customer also purchases its voice service from BellSouth."[2] After discussing the matter in greater detail, Staff ultimately recommended the following:

> That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.[3]

Staff's Final Recommendation, in docket U-22252, Subdocket E, was considered by the Louisiana Public Service Commission ("LPSC", "Commission") at its September 19, 2001 Business and Executive Session. At that Session, Commissioner Blossman moved to adopt Staff's Final Recommendation, with a few modifications, one of which directly addressed the above quoted section. The motion directed Staff to further study the issue of whether BellSouth should be required to provide its ADSL service to end users over

[1] Staff's Final Recommendation, Docket U-22252-E, pages 86-87.
[2] Id at 86.
[3] Id at 113

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the high frequency portion of the same loop being used by a CLEC to provide voice services. The motion was unanimously adopted by the Commission and memorialized in Order U-22252-E, issued September 21, 2001.

In compliance with the Commission's directive, Staff opened and published the following in the Commission's Official Bulletin dated December 7, 2001 Docket R-26173,

> Pursuant to the Commission's directive in Order U-22252-E, Staff was to further study the issue of whether BellSouth Telecommunications, Inc. should be required to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice services.

Parties were given 25 days to intervene and/or file comments in the docket. Interventions and/or initial comments were received from the following parties: ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom ("DeltaCom"), Xspedius Corporation ("Xspedius"), Cox Louisiana Telecom, L.L.C., d/b/a Cox Communications ("Cox"), NewSouth Communications Corporation ("NewSouth"), Access Integrated Networks, Inc. ("Access"), BellSouth, KMC Telecom, Inc. ("KMC") and the Southeastern Competitive Carriers Association ("SECCA").

Following the receipt of initial comments, Staff received both formal and informal requests from the interveners to file additional/reply comments. By notice dated May 9, 2002, Staff granted the parties the opportunity to file additional comments by May 24, 2002. The following parties provided additional/reply comments: BellSouth, KMC, SECCA and WorldCom. Access, DeltaCom, NewSouth and Xspedius jointly filed reply comments.

After thoroughly reviewing all initial and reply comments, Staff issued a Proposed Recommendation on July 10, 2002. In order to clarify the opportunity for exceptions and replies to the recommendation, a Procedural Schedule and Order was issued on July 25, 2002. Exceptions were received only from BellSouth. Reply comments were received from KMC, WorldCom and SECCA and jointly from DeltaCom, Access, NewSouth and Xspedius. Additionally, an informal technical conference was held on September 3, 2002, with representatives from all of the above parties present. In connection with its review, Staff prepared a detailed summary of all initial and reply comments which was included in the Proposed Recommendation issued

July 10, 2002. A short summary of the exceptions and replies to the Proposed Recommendation are included herein.

II. JURISDICTION

The powers and duties of the Louisiana Public Service Commission are contained in Article IV § 21 of the Louisiana Constitution of 1974. As stated therein, the Commission has the authority to:

> "regulate all common carriers and public utilities and has all other regulatory authority as provided by law. The Commission shall adopt and enforce reasonable rules, regulations and procedures which are necessary for the discharge of its duties including other powers and duties as provided by law."

Pursuant to its constitutional authority, the Commission adopted the Regulations for Competition in the Local Telecommunications Market ("Local Competition Regulations", "Regulations")[4], as most recently amended by the April 5, 2000 General Order ("General Order"). As stated in the Preamble to the Regulations,

> Through the development of effective competition, which promotes the accessibility of new and innovative services at non-discriminatory prices consumers can and are willing to pay, and which results in wider deployment of existing services at competitive prices, the public interest will be promoted.

Section 201. A. of the Local Competition Regulations describes the public policy as follows:

> (T)he Louisiana Public Service Commission hereby finds, determines and declares that the promotion of competition in all local telecommunications markets in Louisiana is in the public interest.

In furtherance of the above stated goal to promote competition in all local telecommunications markets in Louisiana, this Commission has initiated a number of rule-making proceedings. One such proceeding, Docket U-22252-C *In re: BellSouth Telecommunications, Inc. Service Quality Measurements*, established performance measurements to monitor the service BellSouth provides to its competitors. No less than four orders have been issued in that docket, all of which have fostered the Commission's goals of promoting competition. Further, Docket U-24714, Subdocket A, *In re: Final Deaveraging of BellSouth Telecommunications, Inc., UNE Rates*, established new cost

[4] The actual Regulations are contained in "Appendix B" to the General Order.

based rates for UNEs available to CLECs. Staff notes that following the issuance of the Order in that docket, many new competitors have entered the market. Additionally, in connection with Staff's review of BellSouth's 271 pre-application filing in Docket U-22252-E, several recommendations were made to further promote competition.

III. SUMMARY OF STAFF'S PROPOSED RECOMMENDATION

In Docket U-22252-E, Staff made the following recommendation:

> That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.

When the matter was considered at the Commission's September 2001 Business and Executive Session, the Commission voted to accept Staff's Recommendation, with Staff directed to determine whether ADSL service could be added to UNE lines in the future.[5] Order U-22252, E memorialized the Commission's vote, instructing Staff to,

> further study the issue of requiring BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service until such time as the operational and policy issues associated therewith are fully explored.[6]

Based on the above, a presumption existed that Staff's Recommendation in Docket U-22252, E should be adopted, absent any "operational or policy issues" prohibiting its implementation. Comments received from the parties suggested additional concerns must also be addressed, as evidenced by comments received relative to possible jurisdictional and technical issues. Neither the vote of the Commission, nor the directive of the order, suggested any such issues were a concern prior to this docket being opened. Nonetheless, to insure all issues are thoroughly explored, Staff's Proposed Recommendation addressed not only "operational and policy" issues, but jurisdictional

[5] See Official Transcripts of the September 21, 2001 Business and Executive Session
[6] Order U-22252, E

and technical issues as well. Based on the following conclusions, it was Staff's opinion that the recommendation set forth in docket U-22252-E be reaffirmed and adopted.

A. Policy Issues

Before addressing any "policy" arguments made by the parties, Staff reminded that parties that this Commission's policy, as stated in the Local Competition rules, is to promote competition in all telecommunications markets. Adopting Staff's Recommendation in U-22252, subdocket E will promote that goal, by allowing more end-users to choose an alternative voice provider without fear of losing their DSL service. BellSouth's policy of refusing to provide its DSL service over CLEC voice loops is clearly at odds with the Commission's policy to encourage competition. Likewise, BellSouth's contention that such a regulation would diminish competition in the DSL market is not consistent with the comments received.

Pursuant to its current DSL policy, BellSouth "simply chooses not to sell DSL service that work on CLEC loops."[7] As summarized in KMC's comments, BellSouth's policy actually deters customers from switching to other providers, thus hindering competition not only in the voice market, but the DSL market as well. Various other examples of the anti-competitive effects of this policy were contained in the CLEC's comments[8], including (1) disconnection of BellSouth DSL service when an end-user changes voice providers, (2) placing codes on Customer Service Records ("CSRs") that must be removed before transferring service, (3) placing DSL service on primary lines in multi-line situations without explaining the consequences to the end-user and (4) transferring back voice service if BellSouth's DSL is subsequently placed on the primary line. Interestingly enough, the only of the above examples BellSouth addressed in its reply comments is the primary line issue, referring Staff to the FCC's 271 order. BellSouth's failure to even dismiss or deny the other examples caused Staff grave concern, as any of the above puts a voice CLEC in a clear competitive disadvantage by creating more "hoops" a CLEC must jump through to provide voice service, as outlined in Staff's summary of the individual comments.

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[7] See reply affidavit of Thomas G. Williams filed June 25, 2001 in Docket U-22252-E at page 11.
[8] A detailed summary of the initial comments filed by all parties is contained in Staff's Proposed Recommendation issued in this docket on July 10, 2002.

Rather than discuss the above concerns, BellSouth argued the Commission should make inquiries relative to the investments, personnel and taxes CLECs have made in Louisiana before it makes a decision. Staff was at a loss as to how any of this information, if obtained, would be of any benefit to the Commission or Staff. In furtherance of this position, BellSouth filed a Motion for Leave to Propound Data Requests on June 28, 2002. Staff was concerned this filing could not only result in an unnecessary delay in the issuance of Staff's Recommendation, but also could broaden the scope of the docket beyond the Commission's directive.

In conclusion, the Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive affects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited.

B. Jurisdictional Issues

While "jurisdictional issues" were not contemplated in the Commission's directive, Staff believed it was important to address this Commission's jurisdiction and how it is consistent with that of the FCC. BellSouth's argued the LPSC has no jurisdiction to regulate the provisioning of its DSL service over CLEC voice loops. This argument is couched on the presumption that Staff's recommendation would essentially amount to LPSC regulation of DSL, which is a federally tariffed service. This argument fails to consider the basis of Staff's Recommendation in U-22252-E, i.e. the anticompetitive effect BellSouth's practice has on CLEC voice customers in violation of relevant LPSC, as well as FCC, rules and regulations, by restraining voice competition. Despite BellSouth's arguments to the contrary, Staff's Recommendation in docket U-22252-E is entirely consistent with the Telecommunications Act, the Line Sharing Order and Line Sharing Remand Order.

The prevailing theme of the Local Competition Regulations is the Commission's goal of promoting competition in the local telecommunications market. Conversely, any practice that has a detrimental effect on competition is inconsistent and should be rectified. Further, Section 701 of the Local Competition Regulations, which established BellSouth's Consumer Price Protection Plan, provides in Section 701 G. 10, "Tying

arrangements are prohibited."[9] Staff concluded that not only is BellSouth's current practice regarding the provisioning of its DSL service anti-competitive, it is also a "tying arrangement." Simply put, BellSouth, as the dominant voice and DSL provider in Louisiana, is tying the provision of its DSL service to its voice service. Only end-users who receive voice service from BellSouth, or end-users of a CLEC reselling BellSouth's voice service, may receive BellSouth DSL.

Claims that various RBOCs are behaving in an anti-competitive matter concerning the provision of their DSL services to voice service are not new. In support of their policy, RBOCs have continuously argued the provision of DSL is federally regulated and as such cannot be addressed by state commissions. WorldCom's first raised this issue in Louisiana in its reply comments filed in Docket U-22252-E.[10] To Staff's knowledge, the RBOC argument has never been successful, as each state commission addressing DSL related issues has done so based on its authority to promote voice competition and address anti-competitive behavior.[11]

In addition to orders cited by the CLECs, the Michigan Public Service Commission, in an order issued in Case No. U-13193 on June 6, 2002 ("Michigan Order"), determined that Ameritech's practices concerning the provisioning of its DSL services were anti-competitive and therefore violated state law.[12] As was the case in the Florida Order, the Michigan Commission addressed issues identical to those being considered in this docket. Staff's Recommendation in U-22252-E, and its recommendation herein, are consistent with both orders.

BellSouth's was correct in saying the FCC's Line Sharing Order did not create an obligation that ILECs continue to provide DSL service when they are no longer the voice provider.[13] However, neither the Line Sharing Order, nor the Line Sharing Remand Order prohibited states from regulating anti-competitive behavior or illegal tying arrangements. In fact, the FCC specifically stated in the Line Sharing Remand Order,

> To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the

[9] A similar provision applying to all certificated TSPs is contained in Section 301 J. 2 of the Local Competition Regulations.
[10] Staff's recommendation in U-22252-E was based on its consideration of those initial comments, as well as BellSouth's subsequent reply
[11] See California Order at pages 6-11, Florida Order at pages 7-9.
[12] See Michigan Order at page 15.
[13] As a reminder, the DC Circuit has vacated the Line Sharing Order.

> Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action.

Clearly the above pronouncement grants this Commission authority to rule on the issue before it without infringing on the FCC's jurisdiction, as the LPSC is acting in furtherance of its goal (and the FCC's) to promote competition, not attempting to regulate DSL service.

Staff concluded that any perceived conflicts between FCC and LPSC jurisdiction raised by BellSouth should be of no concern to this Commission, as it clearly has the authority to determine BellSouth's practices are contrary to LPSC rules and regulations, without fear of infringing on the FCC's jurisdiction or non-regulated areas.

C. Technical Issues

Staff's discussion of technical issues will be brief. Simply put, there is no technical reason set forth by BellSouth or the CLECs as to why BellSouth's DSL service cannot be provisioned over CLEC voice loops. As mentioned throughout this recommendation, BellSouth's current practice is based on an internal policy decision.

D. Operational Issues

As set forth in Staff's Recommendation in docket U-22252-E, BellSouth's obligation to provide its DSL service over CLEC voice loops could be stayed if BellSouth provided evidence of "substantial operational issues" that must be resolved. Essentially this docket gives the parties the opportunity to review any such operational issues prior to any Commission Order being issued.

As summarized herein, all operational issues addressed by BellSouth in its comments involve additional costs it believes it would incur if it loses control of the local loop, but is still required to provide its DSL service. In response to these operational issues, Staff first notes that in U-22252-E, Staff recommended that CLECs not be allowed to charge BellSouth for use of its UNE loops. Despite the fact that SECCA has suggested otherwise, Staff had no intention of modifying that portion of the recommendation. Therefore, any concerns relative to costs assessed to BellSouth for using the CLEC loop are moot

Interestingly enough, the remainder of operational issues raised by BellSouth are arguably the same operational issues that exist for competitive DSL providers that do not control the voice portion of the loop. Any DLEC or CLEC providing DSL services only (i.e., one that is not also the voice provider) is in the same position. However, BellSouth argued such an arrangement causes operational issues that would drive up the costs of its DSL. As an alternative, BellSouth proposed CLECs convert UNE loops of BellSouth DSL customers to resale, thereby allowing BellSouth to continue controlling the loop. As evidenced by the comments, not only was such a suggestion infeasible to some CLECs, it would only increase the costs and operational issues associated with providing voice service. Staff was not convinced that any of the operational issues provided by BellSouth were substantial enough to warrant it being absolved of providing its DSL service to CLEC voice customers. If anything, they suggested to Staff that BellSouth is leveraging position as the dominant voice provider with control of the network, to give itself another advantage over CLEC DSL providers.

Accordingly, Staff reemphasized its U-22252-E recommendation to make it clear that BellSouth should not only be required to provision its DSL service to end-users over CLEC voice loops, but must do so utilizing the same non-discriminatory rates, terms and conditions it provides such services to its voice customers, as BellSouth's comments suggest it may simply raise the price of DSL to CLEC voice customers in such a fashion that Staff's Recommendation is rendered moot.

IV. SUMMARY OF BELLSOUTH'S EXCEPTIONS TO STAFF'S PROPOSED RECOMMENDATION

BellSouth's exceptions to Staff's Proposed Recommendation were filed on August 12, 2002, along with three affidavits. As set forth in the filing, BellSouth took exception with Staff's Recommendation in six specific areas, arguing: 1. The Commission's Rules of Practice and Procedure do not authorize Staff to proceed in the manner it did in this docket; 2. The Commission does not have jurisdiction to alter or otherwise regulate BellSouth's Interstate Services; 3. Staff's Presumption that the Commission has prejudged this matter is wholly inappropriate; 4. CLEC Profit Margin, not customer choice is the core issue; 5. Operational issues exist and 6. KMC's

Complaints referred by Staff are unfounded. Rather than provide an exhaustive summary of the comments, Staff responded to the exceptions in its Final Recommendation.

V. CLEC REPLY COMMENTS

As mentioned infra, reply comments to BellSouth's Exceptions were received from WorldCom, SECCA, KMC, Access, DeltaCom, Xspedius and NewSouth. These reply comments addressed BellSouth's exceptions, provided support for the adoption of Staff's Proposed Recommendation, and included affidavits and other exhibits as attachments. No exceptions to Staff's Proposed Recommendation were received from the CLECs. Similarly as with BellSouth's comments, rather than providing an exhaustive summary of the reply comments, Staff addressed the comments in its Final Recommendation.

VI. INFORMAL TECHNICAL CONFERENCE

Following receipt of BellSouth's exceptions and the replies thereto, Staff presided over an informal technical conference. Representatives of BellSouth, several CLECs, as well as Commissioners Blossman and Sittig and Commission Staff, were present at the technical conference. The parties were given an opportunity to respond to the latest filings, ask and field questions and provide further support for their respective positions. Particularly, BellSouth witness Ruscilli went into detail explaining why he concluded in his affidavit that resale is a valid option for the CLECs and BellSouth witness Milner explained his affidavit relative to Operational Issues. Following BellSouth's presentations, CLEC witnesses were given the opportunity to respond and/or ask questions of the witnesses. Questions were also posed by the Commissioners and Staff. Specifically questions were asked as to who would invest in order to ensure the entire state has DSL available. No affirmative response to deploy was received from the CLECs. In addition to the exceptions and replies, Staff considered this information in support of its recommendation.

VII. STAFF'S FINAL RECOMMENDATION

As stated herein, Staff's role in this docket was to determine whether any policy or operational issues existed that would prohibit BellSouth from providing its ADSL service over CLEC loops. That is precisely what Staff considered in detail in its Proposed Recommendation, with Staff ultimately concluding that no such operational or policy issues existed. As no exceptions were provided by the CLECs, Staff's Final Recommendation focused on BellSouth's Exceptions and any impact they had on Staff's Proposed Recommendation.

A. Staff's Reply to Exceptions 1 and 3.

Interestingly, BellSouth began its exceptions not by questioning Staff's Proposed Recommendation, but by questioning the rulemaking procedure employed. BellSouth concluded the procedure violated not only the Commission's Rules of Practice and Procedure, but also Article IV § 21 of the Louisiana Constitution. BellSouth suggested as a remedy the Commission opening up a docket to establish concrete rules for such proceedings. A simple review of recent Commission history would question the correctness of this assumption. Staff, through the undersigned counsel, has been either counsel of record or co-counsel of record in numerous Commission rulemaking proceedings (and all of which included BellSouth as a party) in which essentially the same procedural rules were followed, without objection from BellSouth or others.[14]

Further troubling was BellSouth's statement that it was under the impression "Staff would consider the issues presented in this docket in a full and comprehensive manner as the 271 Order requires."[15] Staff assumed BellSouth's was suggesting Staff's consideration of rounds of comments and exhibits received by the parties, numerous informal meetings addressing the issues, review of relevant FCC, LPSC and other PSC decisions, the result of which was a 24 page recommendation, was insufficient. The presumption referred to by Staff, to which BellSouth takes exception, did not in any way diminish the amount of consideration, time and effort that went into Staff's

[14] U-23445, U-23446, U-24050, U-25754, R-26171 and R-26438 were all Rulemaking dockets involving Telecommmunications issues. In most instances, fewer comments were received than allowed in this proceeding. Further, BellSouth did not question the procedure followed herein until after Staff's Recommendation, which took a contrary position, was issued

[15] BellSouth's Exceptions to Staff's Proposed Recommendation at page 5

Recommendation. It was only after consideration of all information contained in this record that Staff issued its Proposed Recommendation. Nonetheless, any attempts to suggest the Procedure followed herein by Staff were inconsistent with the Commission's Rules and Regulations should be simply dismissed as an effort to create additional issues the Commission must consider.

B. Staff's Reply to Exception 2.

BellSouth also raised many of the same jurisdictional issues contained in its original comments in its exceptions. BellSouth suggested the effect of Staff's recommendation would be the imposition of disincentive to the deployment of DSL service, rather than the goal of promoting the accessibility of new and innovative services. Such a statement creates a slippery slope for Staff (and BellSouth) to tread upon. *How can the Commission promote the deployment of a service over* which BellSouth argues it has no jurisdiction over? Should Staff assume it is ok for the Commission to establish rules relative to interstate services, provided they only benefit the provider of such services?

By no means was Staff suggesting this recommendation would amount to a regulation of DSL services, however, it is interesting that BellSouth would have the Commission believe the Recommendation would hinder the further deployment of such services. According to BellSouth's experts, approximately 70-75% of BellSouth customers in Louisiana have access to its DSL, while only 5% or so subscribe to it. Staff argued if any disincentive exists prohibiting BellSouth from further deploying its services, it was the demand for the product, not any order of this Commission. Staff's Recommendation, if adopted, would only require BellSouth to continue providing its DSL service to customers currently receiving the service when they switch voice providers, and to voice customers of CLECs opting to receive the service, essentially meaning BellSouth will derive more revenue for its non-regulated service, in addition to furthering competition in the voice market.

BellSouth also objected to Staff's classification that BellSouth is "tying" its DSL service to its voice service, suggesting Staff has transformed this proceeding into an enforcement action. BellSouth's suggestion disregards the fact that Staff had

recommended no penalties, fines or other administrative remedies be levied against BellSouth, only that it (BellSouth) rectify any potential anti-competitive behavior. Staff agreed with SECCA that this Commission has the jurisdiction to rectify any potentially anti-competitive behavior without the necessity of instituting an enforcement action.

C. Staff's Reply to Exception 4.

In this exception, BellSouth provided arguments and testimony in support of its position that resale is a valid option for the CLECs, further arguing CLECs simply choose not to use it for cost reasons. While Staff appreciated BellSouth's comments relative to CLEC profit margins and the work done by Mr. Ruscilli relative to the costs associated with UNE-P versus resale, it respectfully disagreed with the conclusion. UNE-P has been recognized by this Commission as a valid form of competition, most recently in BellSouth's 271 application. As long as it is treated as such, CLECs should have the choice to determine how they choose to compete, rather than the choice being made by their competition. Not only does BellSouth's "Resale Option" restrict the mode of entry a CLEC can use, it also restricts the service offering that can be made to those services contained in BellSouth's tariffs. For example, a CLEC such as WorldCom could not offer its "Neighborhood" plan via resale because BellSouth provides no similarly bundled service it can resell.

D. Staff's Reply to Exception 5.

Despite what is suggested by the CLECs in their reply comments, Staff never determined there were no operational issues that may be incurred by BellSouth. Staff simply concluded that none of the issues were substantial enough to warrant BellSouth being absolved from following Staff's Proposed Recommendation. BellSouth's exceptions and affidavits shed further light on the potential operational issues it believes it will encounter if forced to implement Staff's Recommendation. While BellSouth qualified these operational issues as being burdensome, Staff believed the actual effect of the operational changes must specifically be determined before they absolve BellSouth from implementing Staff's Recommendation. For example, at least two of the operational issues raised by Mr. Milner in his affidavit were rendered moot by Staff's

Proposed Recommendation wherein Staff concluded that CLECs should be prevented from charging BellSouth for use of the high frequency portion of the loop. While there is some overlap, the majority of the remaining operational issues would only apply when BellSouth is required to provide its DSL over CLEC voice loops, not UNE-P. Nonetheless, based on the above, Staff was willing to clarify its recommendation to the extent that the operational issues related specifically to UNE loops (facilities based providers) are later determined to be overly burdensome. If such a determination were made, Staff would recommend that BellSouth be required to provide its DSL service only to CLEC customers via UNE-P, provided that BellSouth shall not prematurely disconnect voice and data service to a customer converting service from BellSouth to a facility based CLEC. Should a premature disconnection occur, BellSouth shall be fined up to $10,000.00 per occurrence, as well as provide a full refund to the customer for the previous month's voice and data service. Additionally, Staff noted that due to the regional nature of BellSouth's Operational Support Systems, any final decision of a Commission in the BellSouth region on this issue would require BellSouth to make the necessary operational changes, thereby re-instituting Staff's original recommendation.

E. Staff's Reply to Exception 6.

Finally, BellSouth suggests that Staff wrongfully relied on KMC's allegations, suggesting KMC has a history of make allegations without any factual support. Such a suggestion is obviously refuted by the information provided to Staff counsel by KMC in Docket U-22252-E and the series of Collaborative workshops, which were referenced in support of the finding. Copies of those filings are contained herein.

VIII CONCLUSION AND COMMISSION CONSIDERATION

For the reasons stated above, Staff recommended that its recommendation, as contained in docket U-22252-E, and as modified in this docket, be adopted. The matter was considered at the Commission's December 18,2002 Business and Executive Session. Following oral argument, Commissioner Field moved to accept Staff's Final Recommendation, adding the following provision: "The Louisiana Public Service Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale

or retail DSL service." Following a second by Commissioner Sittig, Commissioner Blossman read a letter from Congressman Billy Tauzin into the record. Roll was taken, with Commissioners Field, Sittig and Dixon voting yes, Commissioner Blossman voting no and Commissioner Owen absent.

IT IS THEREFORE ORDERED THAT

1. Staff's Final Recommendation, for the reasons set forth herein, is adopted.
2. The Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service.
3. This Order shall be effective immediately.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
January 24, 2003

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
CHAIRMAN JACK "JAY" A. BLOSSMAN

/S/ DON OWEN ABSENT
DISTRICT V
VICE-CHAIRMAN DON OWEN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

/S/ C. DALE SITTIG
DISTRICT IV
COMMISSIONER C. DALE SITTIG

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

LAWRENCE C. ST. BLANC
SECRETARY

LOUISIANA PUBLIC SERVICE COMMISSION

CLARIFICATION
ORDER R-26173-A

Docket R- 26173, Louisiana Public Service Commission, ex parte. In re: BellSouth's provision of ADSL Service to end-users over CLEC loops- Pursuant to the Commission's directive in Order U-22252-E.

(Decided at the March 19, 2003 Business and Executive Session.)
(Clarifies Order R-26173 dated January 24, 2003)

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> That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.[3]

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[1] Staff's Final Recommendation, Docket U-22252-E, pages 86-87.
[2] *Id at 86.*
[3] Id at 113.

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II. JURISDICTION

The powers and duties of the Louisiana Public Service Commission are contained in Article IV § 21 of the Louisiana Constitution of 1974. As stated therein, the Commission has the authority to:

> "regulate all common carriers and public utilities and has all other regulatory authority as provided by law. The Commission shall adopt and enforce reasonable rules, regulations and procedures which are necessary for the discharge of its duties including other powers and duties as provided by law."

Pursuant to its constitutional authority, the Commission adopted the Regulations for Competition in the Local Telecommunications Market ("Local Competition Regulations", "Regulations")[4], as most recently amended by the April 5, 2000 General Order ("General Order"). As stated in the Preamble to the Regulations,

> Through the development of effective competition, which promotes the accessibility of new and innovative services at non-discriminatory prices consumers can and are willing to pay, and which results in wider deployment of existing services at competitive prices, the public interest will be promoted.

Section 201. A. of the Local Competition Regulations describes the public policy as follows:

> (T)he Louisiana Public Service Commission hereby finds, determines and declares that the promotion of competition in all local telecommunications markets in Louisiana is in the public interest.

In furtherance of the above stated goal to promote competition in all local telecommunications markets in Louisiana, this Commission has initiated a number of rule-making proceedings. One such proceeding, Docket U-22252-C *In re: BellSouth Telecommunications, Inc. Service Quality Measurements*, established performance measurements to monitor the service BellSouth provides to its competitors. No less than four orders have been issued in that docket, all of which have fostered the Commission's goals of promoting competition. Further, Docket U-24714, Subdocket A, *In re: Final*

[4] The actual Regulations are contained in "Appendix B" to the General Order.

Deaveraging of BellSouth Telecommunications, Inc., UNE Rates, established new cost based rates for UNEs available to CLECs. Staff notes that following the issuance of the Order in that docket, many new competitors have entered the market. Additionally, in connection with Staff's review of BellSouth's 271 pre-application filing in Docket U-22252-E, several recommendations were made to further promote competition.

III. SUMMARY OF STAFF'S PROPOSED RECOMMENDATION

In Docket U-22252-E, Staff made the following recommendation:

> That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.

When the matter was considered at the Commission's September 2001 Business and Executive Session, the Commission voted to accept Staff's Recommendation, with Staff directed to determine whether ADSL service could be added to UNE lines in the future.[5] Order U-22252, E memorialized the Commission's vote, instructing Staff to,

> further study the issue of requiring BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service until such time as the operational and policy issues associated therewith are fully explored.[6]

Based on the above, a presumption existed that Staff's Recommendation in Docket U-22252, E should be adopted, absent any "operational or policy issues" prohibiting its implementation. Comments received from the parties suggested additional concerns must also be addressed, as evidenced by comments received relative to possible jurisdictional and technical issues. Neither the vote of the Commission, nor the directive of the order, suggested any such issues were a concern prior to this docket being opened. Nonetheless, to insure all issues are thoroughly explored, Staff's Proposed

[5] See Official Transcripts of the September 21, 2001 Business and Executive Session
[6] Order U-22252, E.

Recommendation addressed not only "operational and policy" issues, but jurisdictional and technical issues as well. Based on the following conclusions, it was Staff's opinion that the recommendation set forth in docket U-22252-E be reaffirmed and adopted.

A. Policy Issues

Before addressing any "policy" arguments made by the parties, Staff reminded that parties that this Commission's policy, as stated in the Local Competition rules, is to promote competition in all telecommunications markets. Adopting Staff's Recommendation in U-22252, subdocket E will promote that goal, by allowing more end-users to choose an alternative voice provider without fear of losing their DSL service. BellSouth's policy of refusing to provide its DSL service over CLEC voice loops is clearly at odds with the Commission's policy to encourage competition. Likewise, BellSouth's contention that such a regulation would diminish competition in the DSL market is not consistent with the comments received.

Pursuant to its current DSL policy, BellSouth "simply chooses not to sell DSL service that work on CLEC loops."[7] As summarized in KMC's comments, BellSouth's policy actually deters customers from switching to other providers, thus hindering competition not only in the voice market, but the DSL market as well. Various other examples of the anti-competitive effects of this policy were contained in the CLEC's comments[8], including (1) disconnection of BellSouth DSL service when an end-user changes voice providers, (2) placing codes on Customer Service Records ("CSRs") that must be removed before transferring service, (3) placing DSL service on primary lines in multi-line situations without explaining the consequences to the end-user and (4) transferring back voice service if BellSouth's DSL is subsequently placed on the primary line. Interestingly enough, the only of the above examples BellSouth addressed in its reply comments is the primary line issue, referring Staff to the FCC's 271 order. BellSouth's failure to even dismiss or deny the other examples caused Staff grave concern, as any of the above puts a voice CLEC in a clear competitive disadvantage by

[7] See reply affidavit of Thomas G Williams filed June 25, 2001 in Docket U-22252-E at page 11.
[8] A detailed summary of the initial comments filed by all parties is contained in Staff's Proposed Recommendation issued in this docket on July 10, 2002.

creating more "hoops" a CLEC must jump through to provide voice service, as outlined in Staff's summary of the individual comments.

Rather than discuss the above concerns, BellSouth argued the Commission should make inquiries relative to the investments, personnel and taxes CLECs have made in Louisiana before it makes a decision. Staff was at a loss as to how any of this information, if obtained, would be of any benefit to the Commission or Staff. In furtherance of this position, BellSouth filed a Motion for Leave to Propound Data Requests on June 28, 2002. Staff was concerned this filing could not only result in an unnecessary delay in the issuance of Staff's Recommendation, but also could broaden the scope of the docket beyond the Commission's directive.

In conclusion, the Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive affects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited.

B. Jurisdictional Issues

While "jurisdictional issues" were not contemplated in the Commission's directive, Staff believed it was important to address this Commission's jurisdiction and how it is consistent with that of the FCC. BellSouth's argued the LPSC has no jurisdiction to regulate the provisioning of its DSL service over CLEC voice loops. This argument is couched on the presumption that Staff's recommendation would essentially amount to LPSC regulation of DSL, which is a federally tariffed service. This argument fails to consider the basis of Staff's Recommendation in U-22252-E, i.e. the anticompetitive effect BellSouth's practice has on CLEC voice customers in violation of relevant LPSC, as well as FCC, rules and regulations, by restraining voice competition. Despite BellSouth's arguments to the contrary, Staff's Recommendation in docket U-22252-E is entirely consistent with the Telecommunications Act, the Line Sharing Order and Line Sharing Remand Order.

The prevailing theme of the Local Competition Regulations is the Commission's goal of promoting competition in the local telecommunications market. Conversely, any practice that has a detrimental effect on competition is inconsistent and should be rectified. Further, Section 701 of the Local Competition Regulations, which established

BellSouth's Consumer Price Protection Plan, provides in Section 701 G. 10, "Tying arrangements are prohibited."[9] Staff concluded that not only is BellSouth's current practice regarding the provisioning of its DSL service anti-competitive, it is also a "tying arrangement." Simply put, BellSouth, as the dominant voice and DSL provider in Louisiana, is tying the provision of its DSL service to its voice service. Only end-users who receive voice service from BellSouth, or end-users of a CLEC reselling BellSouth's voice service, may receive BellSouth DSL.

Claims that various RBOCs are behaving in an anti-competitive matter concerning the provision of their DSL services to voice service are not new. In support of their policy, RBOCs have continuously argued the provision of DSL is federally regulated and as such cannot be addressed by state commissions. WorldCom's first raised this issue in Louisiana in its reply comments filed in Docket U-22252-E.[10] To Staff's knowledge, the RBOC argument has never been successful, as each state commission addressing DSL related issues has done so based on its authority to promote voice competition and address anti-competitive behavior.[11]

In addition to orders cited by the CLECs, the Michigan Public Service Commission, in an order issued in Case No. U-13193 on June 6, 2002 ("Michigan Order"), determined that Ameritech's practices concerning the provisioning of its DSL services were anti-competitive and therefore violated state law.[12] As was the case in the Florida Order, the Michigan Commission addressed issues identical to those being considered in this docket. Staff's Recommendation in U-22252-E, and its recommendation herein, are consistent with both orders.

BellSouth's was correct in saying the FCC's Line Sharing Order did not create an obligation that ILECs continue to provide DSL service when they are no longer the voice provider.[13] However, neither the Line Sharing Order, nor the Line Sharing Remand Order prohibited states from regulating anti-competitive behavior or illegal tying arrangements. In fact, the FCC specifically stated in the Line Sharing Remand Order,

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[9] A similar provision applying to all certificated TSPs is contained in Section 301 J. 2 of the Local Competition Regulations.
[10] Staff's recommendation in U-22252-E was based on its consideration of those initial comments, as well as BellSouth's subsequent reply
[11] See California Order at pages 6-11, Florida Order at pages 7-9.
[12] See Michigan Order at page 15.
[13] As a reminder, the DC Circuit has vacated the Line Sharing Order.

> To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action.

Clearly the above pronouncement grants this Commission authority to rule on the issue before it without infringing on the FCC's jurisdiction, as the LPSC is acting in furtherance of its goal (and the FCC's) to promote competition, not attempting to regulate DSL service.

Staff concluded that any perceived conflicts between FCC and LPSC jurisdiction raised by BellSouth should be of no concern to this Commission, as it clearly has the authority to determine BellSouth's practices are contrary to LPSC rules and regulations, without fear of infringing on the FCC's jurisdiction or non-regulated areas.

C. Technical Issues

Staff's discussion of technical issues will be brief. Simply put, there is no technical reason set forth by BellSouth or the CLECs as to why BellSouth's DSL service cannot be provisioned over CLEC voice loops. As mentioned throughout this recommendation, BellSouth's current practice is based on an internal policy decision.

D. Operational Issues

As set forth in Staff's Recommendation in docket U-22252-E, BellSouth's obligation to provide its DSL service over CLEC voice loops could be stayed if BellSouth provided evidence of "substantial operational issues" that must be resolved. Essentially this docket gives the parties the opportunity to review any such operational issues prior to any Commission Order being issued.

As summarized herein, all operational issues addressed by BellSouth in its comments involve additional costs it believes it would incur if it loses control of the local loop, but is still required to provide its DSL service. In response to these operational issues, Staff first notes that in U-22252-E, Staff recommended that CLECs not be allowed to charge BellSouth for use of its UNE loops. Despite the fact that SECCA has suggested otherwise, Staff had no intention of modifying that portion of the recommendation. Therefore, any concerns relative to costs assessed to BellSouth for using the CLEC loop are moot.

Interestingly enough, the remainder of operational issues raised by BellSouth are arguably the same operational issues that exist for competitive DSL providers that do not control the voice portion of the loop. Any DLEC or CLEC providing DSL services only (i.e., one that is not also the voice provider) is in the same position. However, BellSouth argued such an arrangement causes operational issues that would drive up the costs of its DSL. As an alternative, BellSouth proposed CLECs convert UNE loops of BellSouth DSL customers to resale, thereby allowing BellSouth to continue controlling the loop. As evidenced by the comments, not only was such a suggestion infeasible to some CLECs, it would only increase the costs and operational issues associated with providing voice service. Staff was not convinced that any of the operational issues provided by BellSouth were substantial enough to warrant it being absolved of providing its DSL service to CLEC voice customers. If anything, they suggested to Staff that BellSouth is leveraging position as the dominant voice provider with control of the network, to give itself another advantage over CLEC DSL providers.

Accordingly, Staff reemphasized its U-22252-E recommendation to make it clear that BellSouth should not only be required to provision its DSL service to end-users over CLEC voice loops, but must do so utilizing the same non-discriminatory rates, terms and conditions it provides such services to its voice customers, as BellSouth's comments suggest it may simply raise the price of DSL to CLEC voice customers in such a fashion that Staff's Recommendation is rendered moot.

IV. SUMMARY OF BELLSOUTH'S EXCEPTIONS TO STAFF'S PROPOSED RECOMMENDATION

BellSouth's exceptions to Staff's Proposed Recommendation were filed on August 12, 2002, along with three affidavits. As set forth in the filing, BellSouth took exception with Staff's Recommendation in six specific areas, arguing: 1. The Commission's Rules of Practice and Procedure do not authorize Staff to proceed in the manner it did in this docket; 2. The Commission does not have jurisdiction to alter or otherwise regulate BellSouth's Interstate Services; 3. Staff's Presumption that the Commission has prejudged this matter is wholly inappropriate; 4. CLEC Profit Margin, not customer choice is the core issue; 5 Operational issues exist and 6. KMC's

Complaints referred to by Staff are unfounded. Rather than provide an exhaustive summary of these comments, Staff responded to the exceptions in its Final Recommendation.

V. CLEC REPLY COMMENTS

As mentioned infra, reply comments to BellSouth's Exceptions were received from WorldCom, SECCA, KMC, Access, DeltaCom, Xspedius and NewSouth. These reply comments addressed BellSouth's exceptions, provided support for the adoption of Staff's Proposed Recommendation, and included affidavits and other exhibits as attachments. No exceptions to Staff's Proposed Recommendation were received from the CLECs. Similarly as with BellSouth's comments, rather than providing an exhaustive summary of the reply comments, Staff addressed the comments in its Final Recommendation.

VI. INFORMAL TECHNICAL CONFERENCE

Following receipt of BellSouth's exceptions and the replies thereto, Staff presided over an informal technical conference. Representatives of BellSouth, several CLECs, as well as Commissioners Blossman and Sittig and Commission Staff, were present at the technical conference. The parties were given an opportunity to respond to the latest filings, ask and field questions and provide further support for their respective positions. Particularly, BellSouth witness Ruscilli went into detail explaining why he concluded in his affidavit that resale is a valid option for the CLECs and BellSouth witness Milner explained his affidavit relative to Operational Issues. Following BellSouth's presentations, CLEC witnesses were given the opportunity to respond and/or ask questions of the witnesses. Questions were also posed by the Commissioners and Staff. Specifically questions were asked as to who would invest in order to ensure the entire state has DSL available. No affirmative response to deploy was received from the CLECs. In addition to the exceptions and replies, Staff considered this information in support of its recommendation.

VII. STAFF'S FINAL RECOMMENDATION

As stated herein, Staff's role in this docket was to determine whether any policy or operational issues existed that would prohibit BellSouth from providing its ADSL service over CLEC loops. That is precisely what Staff considered in detail in its Proposed Recommendation, with Staff ultimately concluding that no such operational or policy issues existed. As no exceptions were provided by the CLECs, Staff's Final Recommendation focused on BellSouth's Exceptions and any impact they had on Staff's Proposed Recommendation.

A. Staff's Reply to Exceptions 1 and 3.

Interestingly, BellSouth began its exceptions not by questioning Staff's Proposed Recommendation, but by questioning the rulemaking procedure employed. BellSouth concluded the procedure violated not only the Commission's Rules of Practice and Procedure, but also Article IV § 21 of the Louisiana Constitution. BellSouth suggested as a remedy the Commission opening up a docket to establish concrete rules for such proceedings. A simple review of recent Commission history would question the correctness of this assumption. Staff, through the undersigned counsel, has been either counsel of record or co-counsel of record in numerous Commission rulemaking proceedings (and all of which included BellSouth as a party) in which essentially the same procedural rules were followed, without objection from BellSouth or others.[14]

Further troubling was BellSouth's statement that it was under the impression "Staff would consider the issues presented in this docket in a full and comprehensive manner as the 271 Order requires."[15] Staff assumed BellSouth's was suggesting Staff's consideration of rounds of comments and exhibits received by the parties, numerous informal meetings addressing the issues, review of relevant FCC, LPSC and other PSC decisions, the result of which was a 24 page recommendation, was insufficient. The presumption referred to by Staff, to which BellSouth takes exception, did not in any way diminish the amount of consideration, time and effort that went into Staff's

[14] U-23445, U-23446, U-24050, U-25754, R-26171 and R-26438 were all Rulemaking dockets involving Telecommunications issues. In most instances, fewer comments were received than allowed in this proceeding. Further, BellSouth did not question the procedure followed herein until after Staff's Recommendation, which took a contrary position, was issued

[15] BellSouth's Exceptions to Staff's Proposed Recommendation at page 5.

Recommendation. It was only after consideration of all information contained in this record that Staff issued its Proposed Recommendation. Nonetheless, any attempts to suggest the Procedure followed herein by Staff were inconsistent with the Commission's Rules and Regulations should be simply dismissed as an effort to create additional issues the Commission must consider.

B. Staff's Reply to Exception 2.

BellSouth also raised many of the same jurisdictional issues contained in its original comments in its exceptions. BellSouth suggested the effect of Staff's recommendation would be the imposition of disincentive to the deployment of DSL service, rather than the goal of promoting the accessibility of new and innovative services. Such a statement creates a slippery slope for Staff (and BellSouth) to tread upon. How can the Commission promote the deployment of a service over which BellSouth argues it has no jurisdiction over? Should Staff assume it is ok for the Commission to establish rules relative to interstate services, provided they only benefit the provider of such services?

By no means was Staff suggesting this recommendation would amount to a regulation of DSL services, however, it is interesting that BellSouth would have the Commission believe the Recommendation would hinder the further deployment of such services. According to BellSouth's experts, approximately 70-75% of BellSouth customers in Louisiana have access to its DSL, while only 5% or so subscribe to it. Staff argued if any disincentive exists prohibiting BellSouth from further deploying its services, it was the demand for the product, not any order of this Commission. Staff's Recommendation, if adopted, would only require BellSouth to continue providing its DSL service to customers currently receiving the service when they switch voice providers, and to voice customers of CLECs opting to receive the service, essentially meaning BellSouth will derive more revenue for its non-regulated service, in addition to furthering competition in the voice market.

BellSouth also objected to Staff's classification that BellSouth is "tying" its DSL service to its voice service, suggesting Staff has transformed this proceeding into an enforcement action. BellSouth's suggestion disregards the fact that Staff had

recommended no penalties, fines or other administrative remedies be levied against BellSouth, only that it (BellSouth) rectify any potential anti-competitive behavior. Staff agreed with SECCA that this Commission has the jurisdiction to rectify any potentially anti-competitive behavior without the necessity of instituting an enforcement action.

C. Staff's Reply to Exception 4.

In this exception, BellSouth provided arguments and testimony in support of its position that resale is a valid option for the CLECs, further arguing CLECs simply choose not to use it for cost reasons. While Staff appreciated BellSouth's comments relative to CLEC profit margins and the work done by Mr. Ruscilli relative to the costs associated with UNE-P versus resale, it respectfully disagreed with the conclusion. UNE-P has been recognized by this Commission as a valid form of competition, most recently in BellSouth's 271 application. As long as it is treated as such, CLECs should have the choice to determine how they choose to compete, rather than the choice being made by their competition. Not only does BellSouth's "Resale Option" restrict the mode of entry a CLEC can use, it also restricts the service offering that can be made to those services contained in BellSouth's tariffs. For example, a CLEC such as WorldCom could not offer its "Neighborhood" plan via resale because BellSouth provides no similarly bundled service it can resell.

D. Staff's Reply to Exception 5.

Despite what is suggested by the CLECs in their reply comments, Staff never determined there were no operational issues that may be incurred by BellSouth. Staff simply concluded that none of the issues were substantial enough to warrant BellSouth being absolved from following Staff's Proposed Recommendation. BellSouth's exceptions and affidavits shed further light on the potential operational issues it believes it will encounter if forced to implement Staff's Recommendation. While BellSouth qualified these operational issues as being burdensome, Staff believed the actual effect of the operational changes must specifically be determined before they absolve BellSouth from implementing Staff's Recommendation. For example, at least two of the operational issues raised by Mr. Milner in his affidavit were rendered moot by Staff's

Proposed Recommendation wherein Staff concluded that CLECs should be prevented from charging BellSouth for use of the high frequency portion of the loop. While there is some overlap, the majority of the remaining operational issues would only apply when BellSouth is required to provide its DSL over CLEC voice loops, not UNE-P. Nonetheless, based on the above, Staff was willing to clarify its recommendation to the extent that the operational issues related specifically to UNE loops (facilities based providers) are later determined to be overly burdensome. If such a determination were made, Staff would recommend that BellSouth be required to provide its DSL service only to CLEC customers via UNE-P, provided that BellSouth shall not prematurely disconnect voice and data service to a customer converting service from BellSouth to a facility based CLEC. Should a premature disconnection occur, BellSouth shall be fined up to $10,000.00 per occurrence, as well as provide a full refund to the customer for the previous month's voice and data service. Additionally, Staff noted that due to the regional nature of BellSouth's Operational Support Systems, any final decision of a Commission in the BellSouth region on this issue would require BellSouth to make the necessary operational changes, thereby re-instituting Staff's original recommendation.

E. Staff's Reply to Exception 6.

Finally, BellSouth suggests that Staff wrongfully relied on KMC's allegations, suggesting KMC has a history of make allegations without any factual support. Such a suggestion is obviously refuted by the information provided to Staff counsel by KMC in Docket U-22252-E and the series of Collaborative workshops, which were referenced in support of the finding. Copies of those filings are contained herein.

VIII COMMISSION CONSIDERATION AND ISSUANCE OF ORDER R-26173

For the reasons stated above, Staff recommended that its recommendation, as contained in docket U-22252-E, and as modified in this docket, be adopted. The matter was considered at the Commission's December 18,2002 Business and Executive Session. Following oral argument, Commissioner Field moved to accept Staff's Final Recommendation, adding the following provision: "The Louisiana Public Service Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale

or retail DSL service." Following a second by Commissioner Sittig, Commissioner Blossman read a letter from Congressman Billy Tauzin into the record. Roll was taken, with Commissioners Field, Sittig and Dixon voting yes, Commissioner Blossman voting no and Commissioner Owen absent. Order R-26173, memorializing the Commission's vote was issued January 24, 2003, containing the following ordering language:

1. Staff's Final Recommendation, for the reasons set forth herein, is adopted.
2. The Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service.
3.. This Order shall be effective immediately.

IX CONSIDERATION OF BELLSOUTH'S MOTION FOR RECONSIDERATION

On February 3, 2003, following issuance of Order R-26173, BellSouth timely filed a Motion for Reconsideration, or in the Alternative for Clarification and/or Modification and Stay ("Motion"). MCI WorldCom, Access Integrated, Xspedius, ITC^DeltaCom and NewSouth filed oppositions to the Motion. BellSouth's Motion was considered at the Commission's March 19, 2003 Business and Executive Session. Commissioner Field moved to deny BellSouth's Motion for Reconsideration, Modification and Stay. Additionally, the Commissioner made the following motion in respect to the request for clarification: (1) BellSouth is to continue to provide its wholesale and retail DSL service to customers who choose to switch voice services to a competitive local exchange carrier utilizing the Unbundled Network Element Platform. As stated in Order R-26173, this requirement likewise applies to CLEC voice customers who subsequently choose to receive BellSouth's wholesale or retail DSL service. Should BellSouth intend to offer its DSL service in the latter scenario over a separate line/loop, it shall file a proposal for consideration by the Commission no later than May 1, 2003. Such alternative offering, if proposed, shall not discriminate against that class of voice customers. The filing of such proposal shall not delay implementation of the Order or suspend BellSouth's current obligation to provide DSL service over the UNE-P. (2) The Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service and does not establish any pricing for BellSouth's DSL in Order R-26173. BellSouth continues to have the flexibility under this Order to establish the price for its DSL services and offer discounts off of the established DSL price to its customers who choose packaged service offerings. (Example: BellSouth Complete Choice and

FastAccess Service). Once BellSouth establishes its price for DSL service, however, BellSouth shall not impose any additional charges for its wholesale or retail DSL service on consumers based on their choice of local voice service provider. Nothing herein shall prevent the Commission from investigating claims of anti-competitive or discriminatory pricing or practices, or violations of the Commission's Regulations for Competition in the Local Telecommunications Market. (3) The Order currently requires BellSouth to provide DSL over both the UNE-P and UNE loops. However, in light of the testimony of the facilities-based CLECs in this proceeding that they do not intend to have BellSouth provide DSL over their UNE loops, but intend to offer the consumers both voice and data services, the Commission is willing to clarify its Order. Accordingly, BellSouth is ordered to provide for a seamless transition without disconnection of consumers' voice and DSL service to the CLECs' voice and data services. BellSouth shall not require the disconnection of its wholesale or retail DSL service prior to the consumers' transition of voice and data service to that of the CLECs. BellSouth shall provide and the CLECs may provide the Commission a proposed performance measure that ensures a seamless transition of voice and data service occurs when an end-user changes voice and data service from BellSouth to a facilities-based CLEC that chooses to provide its own voice and data services to an end-user over a UNE loop no later than May 1, 2003. That measure will be included in the docket U-22252-C 6 month performance review. The filing of such proposal shall not delay implementation of the Order or suspend BellSouth's current obligation to provide DSL service over the UNE-P or to provide for the seamless transition, without disconnection, of a consumer's voice and DSL service to the CLE 's voice and data services. (4) Finally, Order R-26173 became effective on January 24, 2003. However, the Commission clarifies that BellSouth shall have until June 1, 2003, to fully implement the requirements of the Order. The motion was seconded by Commissioner Dixon, and unanimously adopted.

IT IS THEREFORE ORDERED THAT:

1. BellSouth is to continue to provide its wholesale and retail DSL service to customers who choose to switch voice services to a competitive local exchange carrier utilizing the Unbundled Network Element Platform. As stated in Order R-26173, this requirement likewise applies to CLEC voice customers who subsequently choose to receive BellSouth's wholesale or retail DSL service Should BellSouth intend to offer its DSL service in the latter

scenario over a separate line/loop, it shall file a proposal for consideration by the Commission no later than May 1, 2003. Such alternative offering, if proposed, shall not discriminate against that class of voice customers. The filing of such proposal shall not delay implementation of the Order or suspend BellSouth's current obligation to provide DSL service over the UNE-P.

2. The Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service and does not establish any pricing for BellSouth's DSL in Order R-26173. BellSouth continues to have the flexibility under this Order to establish the price for its DSL services and offer discounts off of the established DSL price to its customers who choose packaged service offerings. (Example: BellSouth Complete Choice and FastAccess Service). Once BellSouth establishes its price for DSL service, however, BellSouth shall not impose any additional charges for its wholesale or retail DSL service on consumers based on their choice of local voice service provider. Nothing herein shall prevent the Commission from investigating claims of anti-competitive or discriminatory pricing or practices, or violations of the Commission's Regulations for Competition in the Local Telecommunications Market.

3. The Order currently requires BellSouth to provide DSL over both the UNE-P and UNE loops. However, in light of the testimony of the facilities-based CLECs in this proceeding that they do not intend to have BellSouth provide DSL over their UNE loops, but intend to offer the consumers both voice and data services, the Commission is willing to clarify its Order. Accordingly, BellSouth is ordered to provide for a seamless transition without disconnection of consumers' voice and DSL service to the CLECs' voice and data services. BellSouth shall not require the disconnection of its wholesale or retail DSL service prior to the consumers' transition of voice and data service to that of the CLECs. BellSouth shall provide and the CLECs may provide the Commission a proposed performance measure that ensures a seamless transition of voice and data service occurs when an end-user changes voice and data service from BellSouth to a facilities-based CLEC that chooses to provide its own voice and data services to an end-user over a UNE loop no later than May 1, 2003. That measure will be included in the docket U-22252-C 6 month performance review. The filing of such proposal shall not delay implementation of the Order or suspend BellSouth's current obligation to provide DSL service over the UNE-P or to provide for the seamless transition, without disconnection, of a consumer's voice and DSL service to the CLE 's voice and data services.

4. Order R-26173 became effective on January 24, 2003. However, the Commission clarifies that BellSouth shall have until June 1, 2003, to fully implement the requirements of the Order.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA

April 4, 2003

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
CHAIRMAN JACK "JAY" A. BLOSSMAN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

/S/ C. DALE SITTIG
DISTRICT IV
COMMISSIONER C. DALE SITTIG

/S/ JAMES M. FIELD
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COMMISSIONER JAMES M. FIELD

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/S/ FOSTER L. CAMPBELL
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