BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2001-209-C - ORDER NO. 2002-396

MAY 28, 2002

IN RE: Application of BellSouth Telecommunications, Inc. to Provide In-Region InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996.	))))))	ORDER ADDRESSING PETITIONS FOR RECONSIDERATION, REHEARING AND/OR CLARIFICATION OF ORDER NO. 2002-77

On February 14, 2002, the Public Service Commission of South Carolina ("Commission") issued Order No. 2002-77 in the above-referenced docket in which the Commission addressed BellSouth Telecommunications, Inc.'s ("BellSouth's") compliance with Section 271 of the Telecommunications Act of 1996 ("1996 Act"). By its Order No. 2002-77, the Commission found, inter alia, that BellSouth met the Track A requirements as contained in Section 271(c)(1)(A) of the 1996 Act; that BellSouth's SGAT satisfied the requirements of Sections 251 and 252(d) of the 1996 Act; that BellSouth's SQM is adopted until such time as the Commission or BellSouth chooses to revisit the standards of the SQM; that BellSouth's Self Effectuating Enforcement Mechanism ("SEEM") should be renamed the Incentive Penalty Plan ("IPP") and that the IPP is effective in South Carolina upon BellSouth's 271 approval by the FCC; that the Change Control Process ("CCP") submitted by BellSouth is approved and that to the extent possible the CCP should focus on mediation as the principle vehicle for resolution; that BellSouth complies with the fourteen (14) point competitive checklist contained in

Section 271(c)(2)(B)(i)-(xiv) of the 1996 Act; and that BellSouth's application for Section 271 authority to provide interLATA services in South Carolina is approved.

Thereafter, several parties to the instant docket filed Petitions seeking reconsideration, rehearing, or clarification, or a combination of reconsideration, rehearing, and clarification. Access Integrated Networks, Inc. ("AIN") and NuVox Communications, Inc. ("NuVox") (collectively referred to herein as "AIN/NuVox") filed a joint Petition for Reconsideration and/or Clarification of Order No. 2002-77. AT&T Communications of the Southern States, Inc. ("AT&T"), WorldCom, Inc., and the Southeastern Competitive Carriers Association ("SECCA") (collectively referred to herein as "SECCA") filed a joint Motion for Reconsideration of Order No. 2002-77. The South Carolina Cable Television Association ("SCCTA") also filed a Petition for Rehearing or Reconsideration of Order No. 2002-77. Finally, BellSouth filed a Motion for Reconsideration of Order No. 2002-77. The Commission hereby addresses the Petitions of the parties as set forth below.

PETITION OF AIN/NUVOX

By their Petition, AIN/NuVox seek reconsideration and/or clarification of the following three issues: (1) clarification of the ruling on BellSouth's obligation to provide combinations of unbundled network elements; (2) request that the final IPP be filed with the Commission and served upon all parties to the instant docket on or before a certain date set by this Commission; and (3) request that the Commission require BellSouth either to convert monthly performance data documents directly into PDF format by means of Adobe Acrobat program to reduce disk space and time to download the data or

to require BellSouth to post performance data at a website or other location so that parties have the option of obtaining the data.

(a) Upon consideration of AIN's/NuVox's Petition, the Commission finds clarification should be granted to that portion of the 271 Order that apparently contradicts Commission Order No. 2001-1089 in Docket 2001-65-C (the "UNE Order"). In Order No. 2001-1089 with regard to UNE combinations, the Commission stated

> We have ruled previously that the law does not require BellSouth to combine for CLECs at cost-based rates UNEs that are not currently combined in BellSouth's network. We do not waiver from that decision on legal grounds. We recognize, however, that other States have ruled recently that policy considerations support a decision that BellSouth should be required to combine for CLECs UNEs that are ordinarily combined in BellSouth's network, even if the particular elements being proposed are not physically connected at the time the order is placed. We hereby join those other States and conclude that BellSouth shall provide for CLECs, at cost-based rates, combinations of UNEs that are ordinarily combined in BellSouth's network, regardless of whether the UNEs are in fact combined at the present time. The recurring rates for such new combinations shall be the same as the recurring rate for an existing combination. The nonrecurring rate for a new loop/port combination shall be the sum of the nonrecurring rate for the loop and the nonrecurring rate for the port. The nonrecurring rate for a new loop/transport combination shall be the sum of the nonrecurring rate for the loop and the nonrecurring rate for transport. To the extent that the Commission has not established nonrecurring rates for a particular new combination, the nonrecurring rate shall be the sum of the nonrecurring rates for the individual elements being ordered.

Order No. 2001-1089, p. 16.

In Order No. 2002-77, this Commission in its discussion of UNE combinations stated "[a]s this Commission has recognized, 'currently combines' means elements that

are *actually* combined at the location where the CLEC seeks to provide service, not elements that may be combined elsewhere in the ILEC's network." Order No. 2002-77, p. 76 (emphasis in original). Further, in Order No. 2002-77, the Commission also stated "[n]evertheless, in Docket No. 2001-65-C, the Commission ordered BellSouth to provide both currently combined and new UNE combinations at cost-based rates. The Commission's decision from Docket No. 2001-65-C should address the concerns of CLECs voiced in this proceeding." *Id.* at 77.

It is clear from the UNE Order that the Commission based its UNE decision to require BellSouth to provide UNE combinations that are ordinarily combined in the network on policy reasons to promote increased competition. However, nothing in Order No. 2002-77 modifies the decision of the Commission in the UNE Order. In fact, Order No. 2002-77 specifically refers to the UNE Order and the language contained in that Order. The express deferral to the UNE Order in Order No. 2002-77 (wherein the Commission stated "[n]evertheless, in Docket No. 2001-65-C, the Commission ordered BellSouth to provide both currently combined and new UNE combinations at cost-based rates. The Commission's decision from Docket No. 2001-65-C should address the concerns of CLECs voiced in this proceeding.") does not in any way modify the UNE Order. However, to the extent that confusion exists over this issue, the Commission emphasizes that the cost scheme as provided in the UNE Order is the correct cost scheme applicable to UNEs provided by BellSouth. The Commission finds that the clarification as herein stated should alleviate the confusion expressed by AIN's/NuVox's Petition.

(b) AIN/NuVox next request that the IPP as approved by the Commission in Order No. 2002-77 be filed with the Commission and served on all parties to this docket by a date certain to be determined by the Commission. AIN/NuVox assert that the IPP will affect all CLECs operating in South Carolina and that the parties to the 271 docket would have no way of knowing when BellSouth's SGAT, containing the final version of the IPP, will be filed with the Commission.

Upon consideration of AIN's/NuVox's request, the Commission finds the request reasonable and hereby grants the request. Service of the IPP on the parties to this docket will ensure that all parties have a final version of the IPP as included in BellSouth's SGAT. The Commission hereby orders that BellSouth serve a copy of the IPP as amended by Order No. 2002-77 on all parties to Docket No. 2001-209-C within thirty (30) days of receipt of this Order. Further, BellSouth shall provide proof of such service to the Commission.

(c) Finally, AIN/NuVox request that the Commission require BellSouth either to convert monthly performance data documents directly into PDF format by means of Adobe Acrobat program in order to reduce disk space and time to download the data or to require BellSouth to post the performance data to a website or other location so that parties have the option of obtaining the data. In its Response to AIN's/NuVox's Petition, BellSouth states that it currently, and has for a number of years, posted BellSouth's performance data on the Internet at http://www/interconnection.bellsouth.com/mss/index.html. Further, BellSouth states that it will continue to post performance data on the Internet. The Commission therefore finds

no reason to grant the request of AIN/NuVox on this issue. However, the Commission would suggest ongoing discussion between CLECs and BellSouth to resolve any further questions related to this issue.

PETITION OF AT&T, WORLDCOM, AND SECCA

SECCA seeks reconsideration of Commission Order No. 2002-77 on the basis of BellSouth's withdrawal of its 271 Application to the Federal Communications Commission to provide in-region, interLATA service in Georgia and Louisiana. SECCA asserts that in recommending BellSouth for interLATA approval under Section 271, this Commission accepted BellSouth's heavy reliance on the results of third-party Operational Support Systems ("OSS") testing conducted in Georgia and on performance data produced in a format approved by the Georgia Public Service Commission. (emphasis added). SECCA asserts that the Commission's Order No. 2002-77 is based on a record that the FCC has identified as, and that BellSouth has acknowledged as, inadequate.

SECCA's entire argument is based upon something that transpired at the FCC, not in the record before this Commission. On October 2, 2001, BellSouth filed an Application with the FCC seeking in-region, interLATA approval for the states of Georgia and Louisiana. Subsequently, on December 20, 2001, BellSouth withdrew its Application from the FCC. SECCA asserts that BellSouth withdrew its Application from the FCC due to the FCC expressing its serious concerns regarding BellSouth's compliance with Section 271 after reviewing the Georgia third-party OSS test and associated performance data in connection with BellSouth's FCC Application. SECCA

requests reconsideration of Order No. 2002-77 in light of the concerns addressed by the FCC.

The Commission is aware that the FCC staff raised questions with BellSouth in five areas of the BellSouth Application before the FCC. However, this Commission is not aware of any FCC finding of deficiency with regard to BellSouth 271 Application for Georgia and Louisiana. According to BellSouth in its Response to SECCA's Petition, the five issues on which BellSouth provided the FCC with information pertain to integration; service order accuracy; change control; data reliability; and double FOC.

Contrary to assertions in SECCA's Petition, this Commission took these five issues, as well as the other issues from this proceeding, seriously. Because this Commission did not agree with SECCA's position does not imply that the Commission did not carefully weigh the evidence before it. BellSouth presented evidence to the Commission's satisfaction of each of the five issues enumerated by the FCC staff.

For instance, with respect to integration, BellSouth demonstrated that it provides CLECs with a TAG pre-ordering interface that is capable of interacting on an integrated basis with BellSouth's TAG and EDI ordering interfaces on a machine-to-machine basis. Moreover, BellSouth demonstrated that CLECs have the ability to parse the CSR using the TAG pre-ordering interface at the same level that BellSouth has for itself. No CLEC controverted the evidence that BellSouth's interfaces can be integrated. BellSouth also presented the KPMG third-party test during which KPMG parsed CSR information during its functional test and automatically populated orders with pre-ordering information. KPMG's test demonstrated that KPMG, acting as a CLEC, successfully

integrated pre-ordering, ordering, and backend systems. Finally, in addition to all of the above, the Commission, in the interest of continuing to further the development of local competition and although not required for 271 approval, ordered BellSouth to provide CLECs with fully parsed CSR capabilities no later than the date of BellSouth's approval by the FCC of 271 authority.

With regard to service order accuracy, BellSouth presented performance data as well as testimony demonstrating that BellSouth's performance and its process for handling manual orders is efficient and accurate. On change control, BellSouth demonstrated that it has an effective and active change control process, the format of which incorporates the input of participants. As to data reliability, BellSouth demonstrated that the Commission can rely on BellSouth's data because of BellSouth's extensive internal validation processes, audits conducted by KPMG, and the fact that CLECs are provided with their CLEC-specific data to allow the CLECs to validate the data. Finally, while no CLEC specifically raised the issue of double FOCs in this proceeding, BellSouth demonstrated that it provides CLECs with due date capability for both resale services and UNEs.

The Commission finds that BellSouth has satisfactorily addressed with this Commission each of the topics about which SECCA complains. The fact that there may be additional facts or documentation that BellSouth may provide to the FCC upon consideration of a 271 Application before the FCC does not mean that this Commission needs to revisit its conclusion that BellSouth has demonstrated compliance with the

fourteen point checklist in South Carolina. Accordingly, the Commission denies the Petition for Reconsideration filed by SECCA.

PETITION OF SCCTA

SCCTA, in its Petition for Rehearing and Reconsideration of Order No. 2002-77, challenges the propriety of the Commission approving BellSouth's Self-Effectuating Enforcement Mechanism ("SEEM"), which the Commission renamed the Incentive Payment Plan ("IPP").

(a) First, SCCTA asserts that the SEEM, or IPP, divests the Commission of authority to enforce the plan or to make changes to the plan when BellSouth opposes the enforcement or changes. Thus it appears that SCCTA contests the voluntary nature of the plan. According to SCCTA, effective enforcement measures ensure that a competitive marketplace for local telephone service develops and persist after BellSouth obtains Section 271 approval. Petition, p. 2. The Commission acknowledged in its Order that the IPP is to ensure that a competitive marketplace continues when the Commission stated that "[t]he purpose of the IPP is to prevent any "backsliding" by BellSouth in the level of service it offers to its competitors after it enters the long-distance market." Order No. 2002-77, p. 28.

In Order No. 2002-77, the Commission recognized that while enforcement mechanisms are not required by either the 1996 Act or by any FCC rule, the FCC has stated that "the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet its Section 271 obligations and that its entry [into in-region, interLATA service]

would be consistent with the public interest." Order No. 2002-77, p.29. Further, in Order No. 2002-77, the Commission noted that every grant of interLATA authority by the FCC to date [had] included an enforcement mechanism. *Id.*

BellSouth, in its 271 Application to the Commission, took the position that it is not appropriate for a state commission to order BellSouth to implement a self-executing remedy plan without BellSouth's consent because enforcement mechanisms are not required by either the 1996 Act or by any FCC rule. To the extent that any breach of contract issue should arise, adequate state laws and regulatory authority procedures are available to address such situations. BellSouth's Service Quality Measures ("SQMs") are fully enforceable through regulatory authority complaints in the event of BellSouth's failure to meet such requirements. In addition, this Commission previously ruled in the ITC^DeltaCom/BellSouth arbitration case, Docket No. 1999-259-C, Order No.1999-690, dated October 4, 1999, that "this Commission has previously determined in the context of a proceeding resolving disputed issues for an arbitrated agreement under the 1996 Act that it lacks the jurisdiction or legislatively-granted authority to impose penalties or fines in the context of an arbitrated agreement." Order No. 1999-690, p. 12. Also in Order No. 1999-690, the Commission stated that "with respect to ITC^DeltaCom's witness Mr. Rozycki's statements concerning so-called "anti-back sliding measures" that this matter is more appropriate for consideration under the public interest standard under Section 271 of the 1996 Act than an arbitration for an interconnection agreement." *Id.*

Once BellSouth proposed a penalty plan, however, BellSouth agreed that the Commission could adopt the plan as being consistent with the public interest and could

enforce the penalty plan as proposed in South Carolina. The Commission's decision in Order No. 2002-77 recognized the voluntary nature of the IPP and of BellSouth's right, associated with a voluntary plan, to modify the plan with Commission approval. The Commission did not abdicate all involvement in the plan as implied by SCCTA. The Commission specifically stated that changes proposed by BellSouth would be subject to Commission approval and that the Commission retained the right to propose changes to the plan.

Moreover, the Commission ordered BellSouth to incorporate the IPP into BellSouth SGAT. BellSouth's SGAT contains legally binding terms and conditions pursuant to which BellSouth must provide local service in South Carolina. Thus, when the IPP becomes effective, BellSouth will be obligated to comply with the IPP.

(b) Next SCCTA expresses a concern about the structure of the IPP. As the Commission noted, and as the record made clear, the IPP is designed as incentive to BellSouth to maintain high performance and to prevent backsliding after Section 271 relief is granted by the FCC. The IPP is not designed to compensate any particular CLEC for specific harms incurred. To attempt to create a plan that compensates CLECs for actual harm, such as a liquidated damages provision, would defeat the purpose of a streamlined self-effectuating plan in that every miss by BellSouth would need to be examined by the parties so that the harm, or amount of harm, could be determined. Moreover, as discussed above, there is no need to modify the structure of the IPP to make it enforceable. Pursuant to the Commission's Order No. 2002-77, the IPP will be part of the SGAT and, thus, will constitute a legally binding obligation on BellSouth.

(c) Finally, SCCTA complains that the Commission in Order 2002-77 did not address incorporation of the IPP into BellSouth interconnection agreements. The Commission believes that any CLEC certified in South Carolina can amend its interconnection agreement to incorporate the IPP attachment of the SGAT without adopting the entire SGAT. Further, for those CLECs operating within South Carolina whose current interconnection agreements specify that the parties will use the penalty plan adopted by the state commission in the state in which the CLEC is operating, the IPP would be that plan. Thus, every CLEC who has an interconnection agreement with BellSouth in South Carolina has the opportunity to avail itself of the IPP.

PETITION OF BELLSOUTH

BellSouth requests reconsideration of two issues of the Commission's decision in Order No. 2002-77.

(a) BellSouth first requests that the Commission reconsider the decision to make the new Change Control Process ("CCP") measure a Tier 1 penalty as opposed to a Tier 2 penalty. According to BellSouth, the CCP is an industry-wide and region-wide forum, and, therefore, the appropriate penalty for any CCP measure is a Tier 2 penalty, as opposed to a Tier 1 penalty.

Under the IPP, there are two types of penalty payments, namely Tier 1 payments and Tier 2 payments. Tier 1 penalties are self-executing payments paid directly to a CLEC when BellSouth delivers non-compliant performance on any Tier 1 measurement. Tier 2 payments are assessments paid directly to the Commission or its designee.

According to BellSouth, Tier 1 payments address CLEC-specific harms, and Tier 2 payments address harm to the CLEC industry as a whole.

BellSouth asserts in its Petition that the CCP measure ordered by the Commission should be a Tier 2 measure because the CCP measure addresses BellSouth's performance with respect to the CCP. As the CCP is an industry-wide forum that is open to CLECs that operate in any of BellSouth's nine state region, BellSouth reasons that the Commission ordered CCP measure should be a Tier 2 measure, rather than a Tier 1 measure.

Under the CCP, industry participants propose changes to the CLEC interfaces to BellSouth's operating systems, changes which are then prioritized by the participants and implemented in a software release that affects CLECs as a group and region-wide. While an individual CLEC may propose a change, the proposed change is considered and prioritized by all members of the CCP. Then, once the change request is submitted into the CCP, the change request becomes an industry change request, not a request of an individual CLEC. Thus, if BellSouth fails to meet the implementation date on that change request, BellSouth has failed to meet a commitment to the industry as a whole, not to an individual CLEC.

BellSouth also asserts several practical reasons for including the CCP measure as a Tier 2 measure instead of a Tier 1 measure. First, the Tier 2 measure will provide BellSouth with an additional incentive, in addition to those incentives that already exist, to be responsive to CLEC-initiated change requests. BellSouth asserts there is no

increased incentive achieved for addressing CLEC-initiated changes submitted to the CCP by including the CCP measurement as part of Tier 1 of the IPP.

Second, there exist CLECs who do not operate in South Carolina but that are active participants in the CCP and submit change requests to the CCP. According to BellSouth, if a Tier 1 payment is applied to the CCP measure, it is possible that BellSouth would be ordered to make a payment to an individual CLEC that does not operate in South Carolina. BellSouth submits that this difficulty is remedied by using a Tier 2 payment as opposed to a Tier 1 payment.

Finally, measurements ordered in one state are often considered as candidates for inclusion in another state's measurement plan. Thus, a CCP measurement with a Tier 1 enforcement mechanism in South Carolina could eventually be adopted by other states in the BellSouth region. In such a situation, a CLEC with operations in multiple states would receive multiple payments for the same failure.

Upon consideration of BellSouth's request, the Commission finds that the issue should receive further study. Therefore, the Commission directs the Commission Staff to enter into discussions with BellSouth to resolve the issues relative to Tier 1 and Tier 2 penalties for the CCP and to report back to the Commission prior to the FCC acting on BellSouth's 271 application for South Carolina.

(b) BellSouth next requests that the Commission include certain clarifying language in its order to reconcile the Commission's decisions on recovery of loop additive costs in the instant docket with the decision in the UNE Cost Docket (Docket No.2001-65-C). In the UNE Cost Docket, the Commission denied BellSouth's request to

recover a ULM additive charge. BellSouth proposes that the Commission include language in Order No. 2002-77 in order to ensure that Order No. 2002-77 is consistent with the Commission's decision in Order No. 2001-1089, the UNE Order. BellSouth proposes the following language to ensure consistency between the two orders:

> While a ULM additive charge is consistent with Section 271 compliance, the Commission denied BellSouth's request to recover the ULM additive charge in Docket No. 2001-65-C. The Commission's decision to deny the charge should address the CLECs' concerns voiced in the Section 271 proceeding.

Upon consideration of the language proposed by BellSouth, the Commission finds that the proposed language does in fact clarify the Commission's position with regard to the ULM additive charge and reconciles the Commission's decisions on recovery of loop additive cost in the instant docket and in Docket No. 2001-65-C, the UNE Cost Docket. Therefore, the Commission adopts the clarifying language proposed by BellSouth regarding the ULM additive charge.

IT IS THEREFORE ORDERED THAT:

1. The Petition for Reconsideration and/or Clarification of AIN/NuVox is

(a) granted to clarify that Order 2002-77 did not modify the Commission's decision regarding the provision of UNE combinations as required by Order No. 2001-1089 in Docket No. 2001-65-C (the UNE Order);

(b) granted to require BellSouth to serve a copy of the IPP as amended by Order No. 2002-77 on all parties to Docket No. 2001-209-C within thirty (30) days of receipt of this Order; and

(c) denied as to AIN's/Nuvox's request to require BellSouth either to convert monthly performance data documents directly into PDF format by means of Adobe Acrobat program or to post the performance data to a website or other location because BellSouth currently posts its monthly performance data on the Internet for access by CLECs.

2. The Petition for Reconsideration of SECCA wherein the parties request reconsideration of Order No. 2002-77 on the basis of BellSouth's withdrawal of its 271 Application to the FCC to provide in-region, interLATA service in Georgia and Louisiana is denied.

3. The Petition for Rehearing and Reconsideration filed by SCCTA challenging the propriety of the Commission approving BellSouth's SEEM, which the Commission renamed the IPP, is denied.

4. The Petition for Reconsideration filed by BellSouth wherein BellSouth requested reconsideration the Commission's decision to make the Commission ordered measure for CCP a Tier 1 measurement is granted in part and denied in part as the Commission instructs the Commission Staff to enter into discussions with BellSouth to resolve the issue relative to whether the CCP measurement should be a Tier 1 or Tier 2 measurement and to report to the Commission prior to the FCC acting on BellSouth's 271 Application for South Carolina. BellSouth's request to include clarifying language on recovery of loop additive costs to reconcile the Commission's decision in Order 2002-77 with the decision in Order No. 2001-1089 in Docket No. 2001-65-C (the UNE Order) is granted.

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

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)