GENERIC PROCEEDING TO ESTABLISH PRICES FOR INTERCONNECTION SERVICES AND UNBUNDLED NETWORK ELEMENTS.

DOCKET 27821

ORDER ON RECONSIDERATION

BY THE COMMISSION:

I. Introduction and Background

A. Procedural History

By Order entered in this cause on May 31, 2002, the Commission established revised unbundled network element ("UNE") prices for BellSouth Telecommunications, Inc. ("BellSouth"). Said Order further required BellSouth to provide combinations of UNEs that it ordinarily and typically combines in the normal course of operating its network, even if the particular elements being ordered by competitive local exchange carriers ("CLECs") are not physically connected at the time the orders for such elements are placed.[1]

The Commission's *UNE Order* specified that the newly established UNE prices were to be effective as of May 31, 2002.[2] The Commission further noted that the Alabama UNE prices established in the May 31, 2002 Order should be recognized in all

[1] The Commission's May 31, 2002 Order is hereinafter referred to as the "*UNE Order*".

ongoing interconnection agreements as of the May 31, 2002 effective date of said Order. The Commission also specified that any amendments required by the language of the existing interconnection agreements should be based on the prices established in the Commission's May 31, 2002 *UNE Order* as of the May 31, 2002 effective date of said Order.[3]

By Joint Petition filed on August 6, 2002 (the "Joint Petition" or "Joint Petition for Enforcement"), ITC DeltaCom Communications, Inc. ("ITC DeltaCom"); AT&T Communications of the South Central States, LLC ("AT&T"); TCG MidSouth, Inc. ("TCG"); and Talk America, Inc. ("Talk America") (collectively the "Joint Petitioners") urged the Commission to enforce its *UNE Order* by requiring BellSouth to recognize the revised UNE rates established in the Commission's *UNE Order* as of the May 31, 2002 effective date of said Order. More particularly, the Joint Petitioners maintained that ITC DeltaCom contacted BellSouth on or about June 3, 2002 to propose an amendment to the existing BellSouth/ITC DeltaCom interconnection agreement in order to incorporate the ruling in the Commission's *UNE Order* regarding UNE combinations.[4] ITC DeltaCom maintained that on or about June 6, 2002, it renewed its request to amend the existing interconnection agreement with BellSouth to incorporate the "ordinarily combined" standard and the revised UNE rates established by the Commission's May 31, 2002 *UNE Order.* ITC DeltaCom maintained that BellSouth inappropriately refused to implement the "ordinarily combined" provisions of said Order and would not

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[2] *UNE Order* at p. 91.
[3] *Id.*
[4] Joint Petition at p. 1.

implement the UNE rates established therein until thirty (30) days from the date of the last signature of the parties on an amendment to the existing interconnection agreement.

In the August 6, 2002 Joint Petition, the Joint Petitioners requested that the Commission clarify that its newly established UNE rates were effective as of May 31, 2002. The Joint Petitioners further sought to have the Commission require BellSouth to credit the difference between the existing UNE rates and the lower rates ordered by the Commission, as well as the difference in the charges on those orders the Joint Petitioners were forced to order as resale/special access when they should have been permitted to place such orders pursuant to the “ordinarily combined” provisions of the Commission’s May 31, 2002 *UNE Order*.

On August 29, 2002, BellSouth submitted its response to the August 6, 2002 filing of the Joint Petitioners. BellSouth alleged that the interconnection agreements between it and the Joint Petitioners specifically addressed the manner in which the parties were to go about amending their agreements in the event of regulatory rulings like those set forth in the Commission’s May 31, 2002 *UNE Order.* BellSouth contended that it had already agreed to amend its interconnection agreement with ITC DeltaCom to incorporate the “ordinarily combined” standard and to implement the new UNE rates ordered by the Commission in the *UNE Order*. BellSouth represented that it would agree to do the same for AT&T, TCG and Talk America.

According to BellSouth, the only issue in dispute was whether the amendment to incorporate the new rates would become effective after the parties amended their interconnection agreement. BellSouth contended that per the agreement of the parties, the new rates ordered by the Commission should become effective only after the parties amended their interconnection agreements to adopt the new rates.

With regard to the specific allegations of ITC DeltaCom, BellSouth maintained that it had engaged in several discussions with ITC DeltaCom. As a result of those discussions, BellSouth alleged that on July 24, 2002, it proposed an amendment[5] that not only would allow ITC DeltaCom to receive the new rates ordered by the Commission on a going-forward basis, but would also expressly acknowledge ITC DeltaCom's right to raise the issue of the effective date with the Commission.[6] BellSouth contended that DeltaCom refused to accept its offer in that regard and instead chose to file a complaint with the Commission.

BellSouth pointed out that its interconnection agreement with ITC DeltaCom and virtually all other carriers contained the following provision:

> In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this agreement or the ability of ITC DeltaCom or BellSouth to perform any material terms of this agreement, ITC DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not negotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 11.[7]

[5] Attached as Exhibit A to BellSouth's Response.
[6] BellSouth maintained that the same offer would be available to AT&T, TCG and Talk America. *See* BellSouth Response at p. 3, footnote 3.
[7] *See* General Terms and Conditions/Part A ,¶16.4 of the BellSouth/ITC DeltaCom interconnection agreement.

BellSouth maintained that the above language made it clear that a party requesting an amendment based on regulatory action such as the Commission's May 31, 2002 *UNE Order* must give thirty (30) days' notice before the commencement of negotiations over the terms of the amendment. BellSouth further pointed out that the existing interconnection agreement between BellSouth and ITC DeltaCom provided for a negotiation period of ninety (90) days in order to allow the parties to fairly assess the impact of the regulatory action in question and to determine whether Motions for Reconsideration and/or appeals would be filed. BellSouth asserted that the renegotiation process also allowed for necessary billing system changes to be implemented.

BellSouth further contended that the *UNE Order* did not state that an interconnection agreement amendment incorporating the UNE rates must be deemed effective retroactively to the date of the Order. BellSouth argued that the Commission's *UNE Order* was not intended by the Commission to nullify or override the relevant terms of the Commission approved interconnection agreements that were already in effect.

BellSouth, in fact, contended that an adoption by the Commission of ITC DeltaCom's interpretation would render the terms of interconnection agreements which were negotiated by sophisticated parties at arms length and approved by the Commission a dead letter. Since the hearings preceding the *UNE Order* did not address the terms of existing, Commission-approved interconnection agreements, BellSouth argued that it would be unfair for the Commission to interpret its *UNE Order*

to require retroactive application of the newly established UNE rates when the parties were not heard on such issues.

On September 25, 2002, ITC DeltaCom submitted a Reply to BellSouth's Response. In said Reply, ITC DeltaCom pointed out that there can only be one lawful rate for the telecommunications services at issue – the rates approved by the Commission on May 31, 2002. ITC DeltaCom further contended that the Commission's May 31, 2002 *UNE Order* unequivocally established that the UNE rates adopted therein were effective on May 31, 2002.

ITC DeltaCom asserted in its Reply that BellSouth's claim that its interconnection agreement with ITC DeltaCom, and presumably those with all other CLECs in Alabama, must be amended to incorporate the revised UNE rates established by the Commission failed to recognize that the Alabama Public Service Commission approved the interconnection agreements in question and had the authority to modify them. According to ITC DeltaCom, the Commission's May 31, 2002 *UNE Order* expressly declared that the UNE rates established therein were to be effective from May 31, 2002 forward. ITC DeltaCom contended that if the Commission were to adopt BellSouth's position, BellSouth's Alabama interconnection agreements reflecting the ordered rates could be effective at different times with different carriers resulting in unlawful discrimination.[8]

ITC DeltaCom further argued in its Reply that the provisions of the Commission's *UNE Order* unequivocally established that the UNE rates adopted in said Order were to

[8] ITC DeltaCom Reply at p. 4, *citing Alabama Code* §§37-2-13, 37-8-20 and 37-8-21.

be effective from May 31, 2002 forward. ITC DeltaCom argued that any contractual provision to the contrary must take into account the prescribed rates as of the date specified by the Commission's *UNE Order*. ITC DeltaCom argued that decades of common carrier jurisprudence dictated that BellSouth was prohibited from "bargaining for" rates other than the "lawful" rates prescribed by the Commission.[9]

B. The Entry of the Commission's *Enforcement Order*

On October 18, 2002, the Commission entered an Order addressing the Joint Petitioner's request for the enforcement of the May 31, 2002 *UNE Order*.[10] In the *Enforcement Order,* we noted that the language in the May 31, 2002, UNE *Order* which was disputed by BellSouth and the Joint Petitioners was included to clearly specify that any amendments to existing interconnection agreements necessitated by the revised UNE rates should be retroactively based on the prices established in the *UNE Order* as of May 31, 2002. The Commission noted that it had considered the difficulties that would be associated with the immediate effectiveness of the revised UNE rates that were established, but concluded that the public interest would best be served by requiring the revised UNE rates adopted on May 31, 2002 to be effective on that date.

The Commission ultimately determined in the *Enforcement Order*, however, that there were mitigating circumstances which dictated that the May 31, 2002 effective date of the *UNE Order* should not be strictly enforced. In particular, the Commission found meritorious BellSouth's arguments that its billing systems were not immediately capable of processing the revised UNE rates established on May 31, 2002. The Commission

[9] *Id.* at p. 6, *citing Northern Alabama Ry. Co. v. Phillips*, 126 So. 846, 847 (Ala. 1930).

accordingly concluded that the most equitable resolution of the dispute was to enforce the revised UNE rates from the date on which BellSouth first made a public filing acknowledging the applicability of those rates. The Commission accordingly looked to June 18, 2002, the date on which BellSouth filed its revised Statement of Generally Available Terms and Conditions ("SGAT") with the Commission. More particularly, the Commission noted that BellSouth's SGAT filed on June 18, 2002 included an "Attachment A" which recognized the UNE rates established by the Commission in its May 31, 2002 *UNE Order* and indicated that those rates were generally available to CLECs in Alabama. Given BellSouth's representations in that regard, the Commission found that the revised UNE rates established in the Commission's May 31, 2002 *UNE Order* should be assessed from June 18, 2002 forward with all true-ups going back to that date. The Commission specifically noted that any amendments to existing interconnection agreements which were entered to incorporate the provisions of the Commission's May 31, 2002 *UNE Order* should also date back to June 18, 2002.[11]

C. BellSouth's Motion for Reconsideration

On November 6, 2002, BellSouth filed a Motion for Reconsideration and Petition for a Stay of the Commission's *Enforcement Order*. Specifically, BellSouth sought reconsideration of the Commission's conclusion that there "can only be one lawful set of rates with regard to the telecommunications services at issue in this cause – the rates approved by this Commission in its May 31, 2002 *UNE Order*," as well as the conclusion that "all rates, charges, classifications, rules and regulations adopted or acted upon by

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[10] The Commission's October 18, 2002 Order is hereinafter referred to as the "*Enforcement Order*".

telecommunications carriers which are inconsistent with those prescribed by the Commission when acting within the scope of its authority, or inconsistent with those prescribed by any statute, are unlawful and void." BellSouth further sought reconsideration of the Commission's Order to the extent that it required BellSouth to make available the UNE rates approved by the Commission in its May 31, 2002 Order, as amended, effective as of June 18, 2002, and to assess those rates from June 18, 2002 forward, irrespective of whether a competitive local exchange carrier requested that its contract with BellSouth be amended to include such rates. Additionally, BellSouth sought reconsideration of the Commission's October 18, 2002 *Enforcement Order* to the extent that, when a CLEC does request an amendment of its interconnection agreement with BellSouth to incorporate the newly established UNE rates, such rates must be made retroactively effective to June 18, 2002. Finally, BellSouth sought reconsideration of the Commission's finding that "[s]aid true-up shall also extend to all orders the Joint Petitioners were forced to order as resale/special access when they should have been permitted to place such orders under the "ordinarily combined" standard.[12]

In support of its Motion for Reconsideration, BellSouth noted its understanding that to the extent that it was negotiating interconnection rates with various CLECs in Alabama at the time the Commission's May 31, 2002 *UNE Order* was adopted, the Commission's UNE rates would be the appropriate rates to include in new agreements absent an agreement by the parties to the contrary. BellSouth further noted its

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[11] *Enforcement Order* at p. 9.

understanding that to the extent it had an agreement in place with a CLEC in Alabama that contained interim UNE rates, or there was a prior Commission decision that had a provision that included interim UNE rates that were to be replaced and trued-up once the Commission adopted final UNE rates, BellSouth would be required to implement the newly approved rates with the appropriate true-ups.

BellSouth vehemently disputed, however, the Commission's determination that CLECs which had existing interconnection agreements with BellSouth that were duly approved by the Alabama Public Service Commission had the right to demand that the UNE rates reflected in such interconnection agreements be changed to the rates approved by the Commission in its May 31, 2002 *UNE Order*. BellSouth recognized that requesting CLECs have the right to avail themselves of the terms and conditions of "any interconnection service or network element" provided [by BellSouth] under an agreement approved pursuant to §252 of the Telecommunications Act of 1996.[13] BellSouth argued, however, that the Commission ordered that such changes must occur without requiring that the CLECs comply with any of the requirements of their duly approved interconnection agreements regarding amendments to said agreements. BellSouth contended that in ordering that the newly approved rates be made available to all CLECs as of May 31, 2002 and effective in all existing interconnection agreements as of June 18, 2002, the Commission did not simply allow CLECs to choose to opt into those rates. BellSouth argued that the Commission had in fact mandated that the

[12] BellSouth Motion for Reconsideration at pp. 1 - 2.
[13] Pub. L. No. 104-104, 110 Stat. 56, Codified at 47 U.S.C. §151 et seq. ("the Act", or "the 96 Act") Cites to sections of the Act are accordingly cites to title 47 of the U.S.C.

revised UNE rates be included in all agreements without regard to whether the CLECs wanted the rates, without regard to the contractual requirements related to implementing such changes, and without regard to the timing of such changes. BellSouth maintained that the Commission's actions in that regard constituted a unilateral rewrite of every interconnection agreement entered into between BellSouth and CLECs in Alabama.

BellSouth maintained that the Commission's decision to unilaterally implement the revised UNE rates in all existing contracts gave no weight or consideration to the federal law that gave rise to the interconnection agreements in question. BellSouth contended that the Commission instead predicated its decision on a view that the Commission's jurisdiction with regard to these matters is established by state law and that state law "trumps" federal law regarding the regulation of utilities in Alabama with respect to the manner of amending such interconnection agreements. BellSouth contended that the Commission's conclusion in this regard, and thus the entire underpinning of the Commission's October 18, 2002 *Enforcement Order*, was in error. BellSouth argued that the interconnection agreements which were unilaterally amended by the Commission's Order were entered into solely because of pursuant to §§251 and 252 of the Telecommunications Act of 1996. BellSouth further argued that it was undeniable that in order to be effective, such interconnection agreements had been submitted to and approved by the Commission, including those portions of the agreements which related to amendments or changes to the agreements themselves.

BellSouth asserted that contrary to the position taken by the Joint Petitioners, the Commission did not have the authority to unilaterally revise the interconnection agreements in question. BellSouth contended that the interconnection agreements essentially served the same function as, and evinced the central attributes of, federal tariffs, which are also publicly filed statements of generally available terms and conditions. According to BellSouth, the Supreme Court has consistently held that the construction of a federal tariff raises issues of federal law, not merely state law contract issues.[14] In particular, BellSouth noted that with regard to disputes concerning federal tariffs, the Supreme Court has found that "the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligations."[15] BellSouth argued that an incumbent carrier's "duties and obligations" under a 1996 Act interconnection agreement, like its duties under a federal tariff, relies on federal law. BellSouth thus reasoned that 96 Act interconnection agreements are like federal contracts and federal tariffs which are governed by federal law. As such, BellSouth maintained that it would be federal, not state, law that determined the authority of a state commission to interpret and enforce such agreements. BellSouth accordingly maintained that a state commission could enforce federal obligations only to the extent that Congress had authorized it to do so.

BellSouth maintained that there was absolutely no federal law requirement that rates be uniform across all 96 Act interconnection agreements in a particular state or

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[14] BellSouth Motion for Reconsideration at p. 5 *Citing Louisville & N.R.R. v. Rice*, 247 U.S. 201 (1918); *Thurston Motor Lines, Inc. v. Jordan K. Rand Ltd.*, 460 U.S. 533 (1983).
[15] *Id.* at 535 (quoting *Rice*, 247 U.S. at 203).

region. In fact, BellSouth represented that the federal law was exactly to the contrary given the fact that 47 U.S.C. §252(a)(1) allows parties to voluntarily negotiate an interconnection agreement which may or may not incorporate all of the substantive obligations imposed under §§251(b) and (c) of the 96 Act or any of the implementing rules promulgated by the Federal Communications Commission ("FCC"). BellSouth maintained that the aforementioned provisions allow the parties to interconnection agreements to agree to rates that are not necessarily based on cost. BellSouth contended that the Commission had acknowledged as much given its approval of interconnection agreements which had UNE rates which differed from the UNE rates found in other interconnection contracts in Alabama.[16]

In conclusion, BellSouth argued that the interconnection agreements that CLECs operate under in Alabama must be construed under federal law, not state law as the Commission attempted to do in its October 18, 2002 *Enforcement Order*. BellSouth maintained that the relevant federal law does not require the uniformity of rates that the Commission sought to impose in its October 18, 2002 Order. Just as importantly, BellSouth maintained that the Commission is not free to amend the interconnection agreements at its will, just as it cannot amend a federal tariff under which BellSouth is providing service to CLECs.

BellSouth maintained that the conclusion that the terms of approved interconnection agreements govern the relationship of the parties to such agreements is

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[16] *Id.* at p. 7, footnote 4.

beyond reasonable dispute.[17] BellSouth asserted that the Commission could not alter that situation by relying upon state law contract or regulatory statutes to "eviscerate" the contractual requirements related to amendments to BellSouth's existing interconnection agreements.

BellSouth asserted that the "decades of [state law] common carrier jurisprudence" relied upon by the Joint Petitioners was not applicable to the agreements at issue in this cause. BellSouth asserted that while there are portions of the 96 Act that authorize the states to act based on state requirements, that authority is carefully circumscribed to prohibit acts that are inconsistent with the basic federal law. BellSouth asserted that since the 96 Act clearly and unequivocally allows parties to enter into contracts that differ from other contracts entered into by other parties, the Commission's state law based attempt to impose uniform rates on all carriers, irrespective of the carrier's individual wishes, cannot be sustained.[18]

BellSouth also noted that the effective date of amendments to interconnection agreements incorporating revised UNE rates had also been addressed by the Florida Public Service Commission.[19] BellSouth maintained that the decisions of the Florida Public Service Commission to implement revised UNE rates upon its approval of amendments to interconnection agreements incorporating such rates comported with the requirements of the 96 Act and the terms of the interconnection agreements entered

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[17] *Id.* at p. 8, *Citing Law offices of Curtis B. Trinco, LLP v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002) and *Verizon New Jersey, Inc. v. Ntegrity Teleconnect Services, Inc.,* 219 F. Supp. 2d 616 (D.N.J. 2002), BellSouth Motion for Reconsideration at p. 8.
[18] *Id.* at p. 10.
[19] *Id.* at pp. 10-11, *Citing In Re: Investigation Into Pricing of Unbundled Network Elements* Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP, May 25, 2001 (Florida Public Service Commission) and *Final Order on Rates for*

into by BellSouth and the affected CLECs. BellSouth accordingly urged this Commission to follow the example set by the Florida Public Service Commission.[20]

In addition to the arguments set forth above, BellSouth also contended that the Commission's *Enforcement Order* trampled upon the specific provisions of BellSouth's interconnection agreements relating to the amendment of those contracts and thus impaired BellSouth's contracts in violation of the Contract Clause found at Article I, Section 10, of the United States Constitution. BellSouth pointed out that the Alabama Constitution at Article I, §22 contains similar provisions prohibiting the state from impairing the obligations of contracts.[21]

BellSouth asserted that under the Contract Clause, the threshold inquiry is "whether the state law has, in fact, operated a substantial impairment of a contractual relationship."[22] According to BellSouth, this inquiry in turn depends on three factors: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial."[23] Once a substantial impairment of a contractual relationship is shown, the burden shifts to the state. The state must proffer a "significant and legitimate public purpose for the regulation warranting the extent of the impairment caused by the measure."[24]

BellSouth asserted that with respect to the threshold inquiry, there was no dispute that there was a contractual relationship between the CLECs in question and

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Unbundled Network Elements Provided by BellSouth Telecommunications, Inc. (120-day filing), Docket No. 990649-TP, Order No. PSC-02-1311-FOF-TP, September 27, 2002 (Florida Public Service Commission).

[20] *Id.*

[21] *Id.* at p. 11, *citing Smith v. City of Dothan,* 188 So.2d 532, 534 (Ala. 1966).

[22] *Id. Citing Allied Structural Steel Company v. Spannaaus*, 438 U.S. 234, 245 (1978).

[23] *Id. Citing General Motors Corporation v. Romein,* 503 U.S. 181, 186 (1992).

BellSouth. BellSouth further maintained that the Commission's action in its October 18, 2002 *Enforcement Order* denied BellSouth the revenues associated with its contracts for UNE rates without regard to the explicit provisions of the interconnection contracts in question which related to the amendment of those agreements. BellSouth accordingly argued there was a change in law that impaired those contractual relationships in a substantial manner.[25] BellSouth maintained that the Commission's decision required BellSouth to immediately martial sufficient resources to change all existing interconnection agreements and immediately to modify its billing systems, and further relieved the CLECs of their obligation to pay the agreed upon rates without regard to the provisions of their duly approved contracts regarding changes to those rates.[26]

BellSouth lastly argued that the Commission's decision with respect to the "ordinarily combined" issue was, for all the previously stated reasons, inappropriate. BellSouth contended that the Commission's May 31, 2002 ruling with respect to the "ordinarily combined" issue constituted a change in law which should be governed by the agreed upon amendment procedures contained in the parties duly approved interconnection agreements.[27]

In conclusion, BellSouth maintained that in reaching the decision memorialized in its October 18, 2002 *Enforcement Order*, the Commission sought to impose state law concepts that were in conflict with the federal requirements imposed by the 96 Act.

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[24] *Id.* at p. 12, C*iting Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1998).
[25] *Id.* C*iting Minnesota Association of Healthcare Facilities v. Minnesota Department of Public Welfare*, 742 F.2d 442, 449 (8th Cir. 1984) and *Bannum v. City of Ashland*, 922 F.2d 1997, 202 (4th Cir. 1990).
[26] *Id.* at p. 13

BellSouth, therefore, concluded that the Commission's decision had no basis in law, was invalid, and was due to be reconsidered and vacated. Additionally, BellSouth contended that the Commission's decision substantially impaired the contractual relationship between BellSouth and the CLECs. BellSouth urged the Commission to vacate its *Enforcement Order* and direct the CLECs to seek amendments of their interconnection agreements in the manner envisioned by the provisions of their contracts with BellSouth.

D. The Response of ITC DeltaCom

On November 22, 2002, ITC DeltaCom submitted a Response to BellSouth's Motion for Reconsideration and Petition for a Stay of the Commission's October 18, 2002 *Enforcement Order*. ITC DeltaCom urged the Commission to deny BellSouth's Motion for Reconsideration and the accompanying Petition for Stay.

ITC DeltaCom maintained that the Commission confirmed in its October 18, 2002 *Enforcement Order* that its intention in the original *UNE Order* of May 31, 2002 was to make the newly established UNE rates effective immediately for all CLECs as of May 31, 2002. ITC DeltaCom asserted that the Commission's decision to modify the effective date of the original *UNE Order* to June 18, 2002 was a fair and balanced decision given BellSouth's assertion that its billing systems were not immediately capable of implementing the new UNE rates on a true-up basis as of May 31, 2002.[28]

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[27] *Id.*
[28] ITC DeltaCom Response at p. 4.

ITC DeltaCom asserted that the sole remaining issue was whether for unbundled network elements purchased by ITC DeltaCom from BellSouth on and after June 18, 2002, the parties should apply the new UNE rates as required by the Commission's *Enforcement Order* or alternatively apply the new UNE rates beginning at some unknown future date following the execution of a negotiated amendment to their existing interconnection agreement. ITC DeltaCom maintained that the Commission appropriately exercised its authority under Alabama law in specifying the new effective date for the revised UNE rates and did so in a manner entirely consistent with the provisions of the 96 Act. ITC DeltaCom argued that there would be little utility in setting new UNE rates if CLECs were required to wait months after the Commission's original order to obtain the benefit of those revised rates.[29]

ITC DeltaCom disputed BellSouth's claim that the effective date established by the Commission's *Enforcement Order* was unlawful because interconnection agreements are "federal tariffs" that can never be governed by state law under the 96 Act. ITC DeltaCom maintained that interconnection agreements, whether negotiated or arbitrated, do not function or qualify as federal tariffs. ITC DeltaCom pointed out that interconnection agreements are submitted to, and approved by, the state regulatory bodies pursuant to §252 of the 96 Act, while federal tariffs are filed with the FCC and can become effective without ever being approved by the FCC.[30]

ITC DeltaCom further maintained that interconnection agreements are contracts negotiated between BellSouth and a requesting carrier and cannot unilaterally be

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[29] *Id.* at p. 5.

amended by either party. By contrast, federal tariffs are prepared and filed by BellSouth, and BellSouth has the legal right to unilaterally revise such tariffs. Moreover, a CLEC has the right to request arbitration of any disputed issues in interconnection agreements before they become effective. Such agreements typically provide a dispute resolution mechanism that either the incumbent LEC or the CLEC may invoke. By contrast, a carrier-customer does not have the right to invoke arbitration for disputed tariff provisions, but rather is limited to challenging unlawful provisions by filing a petition or complaint with the FCC after the tariff has become effective. ITC DeltaCom accordingly asserted that interconnection agreements and federal tariffs are two completely separate mechanisms governed by completely separate federal statutory regimes.[31]

ITC DeltaCom further maintained that BellSouth's representation that the Commission improperly relied upon state law when establishing the effective date of the new UNE rates was meritless. With respect to both arbitrated and negotiated agreements, ITC DeltaCom pointed out that the 96 Act expressly gives the Alabama Commission the authority to implement state law in the performance of its duties. In particular, §251(d)(3) of the 96 Act authorizes state action such as the Commission established effective date in the original *UNE Order* and the *Enforcement Order* where such state actions satisfy certain statutory requirements. In particular, §251(d)(3) of the 1996 Act reads as follows:

[30] *Id.* at pp. 6-7.
[31] *Id.* at pp. 7-8.

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that –
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) is consistent with the requirements of this section; and
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part. [47 U.S.C.S. §§251 *et seq.*].[32]

ITC DeltaCom further pointed out that pursuant to *Alabama Code* §37-1-100, the Alabama Commission established June 18, 2002 as the effective date for the new UNE rates set by the Commission. To the extent that the Commission's exercise of such authority satisfies §251(d)(3), ITC DeltaCom maintained that the 96 Act permits the Commission to exercise its authority granted by Alabama law. More specifically, ITC DeltaCom maintained that the Commission's determination that June 18, 2002 would be the effective date for the new UNE rates related directly to BellSouth's access and interconnection obligations and the provision of UNEs to ITC DeltaCom and other CLECs. ITC DeltaCom accordingly argued that the Commission's original *UNE Order* and *Enforcement Order* satisfied §251(d)(3)(A).

ITC DeltaCom similarly argued that the Commission's actions did not contravene any requirements in §251 and did not "substantially prevent implementation" of the requirements or purposes of §251. Contrary to the position taken by BellSouth, ITC DeltaCom argued that the FCC has confirmed on several occasions that the mere

[32] *Id.* at pp. 8-9.

imposition of additional obligations by a state commission is not necessarily inconsistent with the 96 Act or the FCC's rules.[33] ITC DeltaCom accordingly argued that the Commission's establishment of an effective date for the new UNE rates fully satisfied all three prongs of the statutory tests in §251(d)(3).[34]

ITC DeltaCom further pointed out that the 96 Act expressly gives state commissions the authority to "establish any rates for interconnection, services, or network elements."[35] ITC DeltaCom asserted that the U.S. Supreme Court had interpreted that language to mean that state commissions have the exclusive right to set UNE rates under the 96 Act.[36] ITC DeltaCom argued that if the Commission has the exclusive statutory right to establish UNE rates, it clearly has the inherent authority to establish the effective date of those rates. In fact, ITC DeltaCom pointed out that the FCC itself had noted that "Commission Orders adopting rules routinely specify effective dates."[37]

ITC DeltaCom additionally argued that §252(e)(3) supported the Commission's implementation of state law policies when establishing the effective date for the new UNE rates. Section 252(e) provides that "nothing in this section shall prohibit a state commission from establishing or enforcing other requirements of state law in its review of an agreement."[38] ITC DeltaCom asserted that the aforementioned provision applies

[33] *Id.* at p. 10, footnote 14, *Citing Implementation of the Telecommunications Act of 1996*, 17 FCC Rcd. 14860, 14892 (2002).
[34] *Id.*
[35] *Id.* at p. 11, *Citing 47 U.S.C. §252(c)(2).*
[36] *Id. Citing AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999).
[37] *Id., Citing In the Matter of Petition of WorldCom, Inc.,* CC Docket Nos. 00-218, 00-249 & 00-251, DA 02-1731, rel. July 17, 2002, ¶717 (Chief, Wireless Competition Bureau) *("FCC WorldCom Decision").*
[38] *Id. Citing 47 U.S.C. §252(e)(3).*

to both negotiated and arbitrated agreements and, as the legislative history of the 96 Act shows, was inserted by Congress to "preserve [s]tate authority to enforce state law requirements."[39] ITC DeltaCom further noted that the U.S. Court of Appeals for the Fourth Circuit has recognized that "§252(e)…permits state commissions to impose state law requirements in its review of interconnection agreements."[40] ITC DeltaCom accordingly argued that the Commission's decision to establish the effective date of the *UNE Order* by reference to state law doctrines was plainly justified by §252(e)(3) as well as by §251(d)(3).[41]

ITC DeltaCom also recognized that the 1996 Act permits carriers to voluntarily negotiate agreements that do not fully comport with §§251(b) – (c). ITC DeltaCom pointed out, however, that carriers are nonetheless required to submit such agreements to state commissions pursuant to §252(e). Section 252(e)(2)(a) in turn provides that the state commission may reject a negotiated agreement, or a portion thereof if it "discriminates against a telecommunications carrier not a party to the agreement" or contravenes "the public interest, convenience and necessity." ITC DeltaCom accordingly argued that the Commission's determination that non-uniform effective dates for the new UNE rates would discriminate against nonparty CLECs or undermine the public interest, entitled the Commission to eliminate any inconsistency between

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[39] *Id.* at p. 12, *Citing* H. Conf. Rep. No. 104-458, at 126, reprinted in 1996 U.S.C.C.A.N. 124, 137.
[40] *Id. Citing Bell Atlantic Maryland v. MCI WorldCom,* 240 F.3d 279, 302 (4th Cir. 2001).
[41] *Id.*

negotiated and arbitrated agreements and was not inconsistent with either the requirements or purposes of the 96 Act.[42]

ITC DeltaCom further emphasized that BellSouth had not identified any federal, statutory requirements or FCC policies restricting the effective dates of state regulatory decisions governing UNE rates or other interconnection matters. ITC DeltaCom maintained that to the extent there is any relevant federal policy, it is to avoid unfair discrimination among requesting carriers.[43]

ITC DeltaCom also pointed out that §252(i) entitles requesting carriers to obtain, "any interconnection, service or network element" provided by BellSouth and any interconnection agreement "upon the same terms and conditions as those provided in the agreement."[44] ITC DeltaCom maintained that the aforementioned statutory nondiscrimination policy plainly supported the Commission's decision to establish a nondiscriminatory effective date for all CLECs who obtained UNEs from BellSouth.[45] ITC DeltaCom further pointed out that the Commission's decision establishing the effective date for the new UNE rates was consistent with the views of the FCC, other state commissions and even other ILECs.[46]

ITC DeltaCom further asserted that BellSouth was incorrect in claiming that the Commission abrogated the change-in-law provisions in BellSouth's preexisting interconnection agreements when it established the effective date for the new UNE

[42] *Id.* at p. 13.
[43] *Id.* at pp. 13-14.
[44] *Id.* at p. 14, *Citing 47 U.S.C. §252(i).*
[45] *Id.*
[46] *Id.* at pp. 14-15, *Citing FCC WorldCom Decision* at ¶611*; and In the Matter of the Petition of Verizon Maryland, Inc.* Case No. 8911, Order No. 78030, Maryland Public Service Commission, at 6.

rates. ITC DeltaCom alleged that BellSouth simply chose to ignore the fact that the effective date of the new UNE rates was an integral part of the substantive change in law which resulted from the Commission's *UNE and Enforcement Orders*. ITC DeltaCom argued that the change of law provisions in BellSouth's interconnection agreements do not specify or require any particular effective date. According to ITC DeltaCom, BellSouth's agreements merely contemplate a process by which the parties negotiate an amendment to incorporate actions, such as the Commission's *UNE Order* and *Enforcement Order*, which materially affect the terms of those agreements.[47]

ITC DeltaCom maintained that BellSouth could not seriously dispute that the *UNE Order* and *Enforcement Order* materially affected material terms of the agreement between ITC DeltaCom and BellSouth because those Orders established new UNE rates for certain services provided by BellSouth, as well as the date that those rates were to become effective. ITC DeltaCom maintained that the Commission's *UNE Order* and *Enforcement Order* simply brought the parties to the table to negotiate an amendment to their agreement that incorporated the terms of both Orders, including the new UNE rates and the specified effective date for such rates. According to ITC DeltaCom, the negotiation period contemplated by §16.4 of the agreement afforded both BellSouth and ITC DeltaCom ample opportunity to adjust administratively to the new terms that were required to be incorporated into the agreement as a result of the Commission's action. ITC DeltaCom surmised that the Commission's Orders, therefore, respected the interconnection agreement between ITC DeltaCom and BellSouth and

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[47] *Id.* at p. 16.

allowed the parties adequate time to determine how to fully implement the Commission's *UNE Order* and *Enforcement Order*.[48]

ITC DeltaCom further pointed out that the Commission's *UNE Order* and *Enforcement Order* fully respected the terms of the ITC DeltaCom BellSouth agreement because the parties were still required to amend their agreement to incorporate the new UNE rates and the effective date for such rates. Although the Commission's Orders established a June 18, 2002 effective date for the new UNE rates, ITC DeltaCom maintained that said Orders continued to respect the spirit of the agreement of the parties because the parties were still required to abide by the procedures for effectively amending their agreement.[49]

With respect to BellSouth's argument that the Commission Orders at issue in this cause resulted in an unconstitutional impairment of BellSouth's private contracts, ITC DeltaCom asserted that BellSouth waived its constitutional arguments in that regard by not asserting them in a timely manner. ITC DeltaCom further asserted that even if BellSouth had timely raised its Contract Clause arguments, the Commission's original *UNE Order* and *Enforcement Order* did not violate, or even implicate, the Contract Clause.[50]

ITC DeltaCom maintained that the courts have repeatedly stated that the Contract Clause of the United States Constitution applies only to statutes enacted by state legislatures and is inapplicable to "the acts of the state tribunals or officers under

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[48] *Id.*
[49] *Id.* at p. 17.
[50] *Id.* at p. 18.

statutes in force at the time of the making of the contract, the obligation of which is alleged to have impaired."[51] In this case, ITC DeltaCom asserted that there was no state "law" at issue, but rather orders issued by a state regulatory tribunal pursuant to the 96 Act, the FCC's rules, and applicable state statutes that were in full force and effect at the time BellSouth entered into the interconnection agreements in question.[52]

ITC DeltaCom further argued that even if BellSouth had appropriately invoked the Contract Clause, the Commission's *Enforcement Order* did not violate the provisions of the Contract Clause. ITC DeltaCom pointed out that the Contract Clause cannot be construed to limit a state from exercising its statutory obligations. In this case, ITC DeltaCom argued that the Commission was merely carrying out the statutory mandate set forth in the 96 Act and applicable state laws when it adopted the *UNE Order* and the *Enforcement Order*. According to ITC DeltaCom, BellSouth's overbroad interpretation of the Contract Clause would negate any legitimate exercise of the Commission's authority that affected any material provision of an interconnection agreement.[53]

ITC DeltaCom did not dispute that there was a contract between ITC DeltaCom and BellSouth in the form of an interconnection agreement. ITC DeltaCom argued, however, that the interconnection agreement between ITC DeltaCom and BellSouth was not the type of private contract to which the Contract Clause applies. According to ITC DeltaCom, BellSouth's interconnection agreements, such as the one with ITC DeltaCom, exist only because they are required by the Communications Act, and are

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[51] *Id.* at p. 19, *Citing Hanford v. Davies*, 163 U.S. 273, 278 (1896).
[52] *Id.*
[53] *Id.* at pp. 19-20.

negotiated, approved, interpreted and enforced subject to a complex, federal and state regulatory regime. ITC DeltaCom pointed out that the laws and regulations that the Commission implemented by establishing new UNE rates were the same laws and regulations that gave breath to BellSouth's interconnection agreements in the first place. ITC DeltaCom thus argued that BellSouth's attempt to invoke the Contract Clause in this instance was inappropriate and illogical.[54]

ITC DeltaCom further argued that the Commission's Orders did not impair the parties' rights under the interconnection agreement. According to ITC DeltaCom, BellSouth negotiated its interconnection agreements to include change of law provisions precisely with the expectation that this Commission would issue Orders modifying one or more material terms, including UNE rates. According to ITC DeltaCom, BellSouth could not have had any legitimate expectation that it would be permitted, as a private contracting party, to charge UNE rates higher than the rates established by the state regulator under applicable federal laws and rules. ITC DeltaCom pointed out that the United States Supreme Court has stated that "[l]aws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract."[55] When a contract already has a built in provision designed to accommodate regulatory orders altering the party's respective rights and obligations, the issuance of such anticipated orders cannot constitute an impairment of the contract in question.[56]

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[54] *Id.* at pp. 20-21.
[55] *Id.* at p. 21, *Citing City of El Paso v. Simmons,* 379 U.S. 497, 515 (1965).
[56] *Id.*

To the extent that there was an impairment of BellSouth's contractual rights, ITC DeltaCom asserted that such impairment could not be characterized as "substantial." ITC DeltaCom pointed out that the courts have consistently held that a petitioner raising a Contract Clause claim to challenge a state law affecting a contract between two private parties cannot sustain its burden of proof merely by demonstrating that there has been a change in the respective obligations of the parties under the contract.[57] ITC DeltaCom pointed out that BellSouth knew it was subject to changes in FCC and Commission regulations and entered into its interconnection agreements with its eyes wide open on such matters. ITC DeltaCom accordingly argued that any impairment BellSouth suffered was to be expected and could hardly be described as "substantial."

ITC DeltaCom further pointed out that the Commission had a legitimate interest in promulgating new UNE rates and establishing a uniform effective date for such rates. According to ITC DeltaCom, states are fully empowered to enact regulations for the promotion of the "common weal, or [that] are necessary for the general good of the public" even though such regulations might affect existing contracts.[58] ITC DeltaCom further pointed out that the Alabama Supreme Court has itself held that the Contract Clause does not prevent a state regulatory body from exercising its police power to modify private contracts by changing state water rates.[59]

ITC DeltaCom noted that in determining to modify the UNE rates assessed by BellSouth, the Commission determined that such rates should be made effective as of

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[57] *Id.* at p. 22, *Citing United States Trust Company v. New Jersey*, *431* U.S. 1, 22-23 (1977), *Chrysler v. Kolosso Auto Sales*, 148 F.3d 892 (7th Cir. 1998) and *City of El Paso v. Simmons*.
[58] *Id.* at pp. 22-23, *Citing Home Building and Loan Association v. Blainsdell*, 290 U.S. at 437 (*quoting Manigault v. Springs,* 199 U.S. at 480).

June 18, 2002. ITC DeltaCom maintained that the Commission did so in order to ensure that such rates fully complied with applicable statutory and regulatory requirements regarding the proper rates for UNEs. Since the state and federal statutes and regulations relied upon by the Commission predated the interconnection agreement in question, ITC DeltaCom argued that the Commission had exercised its legitimate duty to protect and promote the public interest. ITC DeltaCom alleged that the Commission's public interest considerations far outweighed any possible "impairment" that BellSouth may have suffered.[60]

D. The BellSouth Reply

On December 9, 2002, BellSouth filed a Reply to ITC DeltaCom's Response. BellSouth asserted therein that it had no issue with allowing any CLEC that chose to amend its interconnection agreement to prospectively incorporate the new UNE rates established by the Commission in such a manner. BellSouth contended, however, that what it objected to was the Commission's automatic and unilateral application of the newly approved unbundled network element rates without regard to the procedures for amending the interconnection agreements in question and without regard to whether individual CLECs and/or BellSouth wanted to make those changes.

Although BellSouth stated that it did not agree with the cases cited by ITC DeltaCom in support of its position that interconnection agreements and tariffs are completely different from each other, BellSouth asserted that the cases cited by ITC DeltaCom actually supported BellSouth's position in other respects. In particular,

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[59] *Id., Citing Alabama Water Co. v. City of Attalla*, 100 So. 490 (1924).

BellSouth maintained that the cases cited by ITC DeltaCom drove home the point that the Alabama Public Service Commission cannot simply issue an order effectively amending every duly approved, pre-existing interconnection agreement BellSouth has entered to create a situation where there is one uniform set of rates in such agreements throughout the State of Alabama.[61] BellSouth maintained that the Commission could not simply unilaterally order a uniform set of rates for all interconnection agreements in Alabama thereby overriding the interconnection agreements that had been agreed to by the parties and approved by the Commission. According to BellSouth, such action by the Commission was not consistent with §251(d)(3)(C) of the Act.[62]

BellSouth further asserted that ITC DeltaCom had abandoned many of its previous arguments that the Commission could, or should, have made the new UNE rates applicable to every CLEC. According to BellSouth, ITC DeltaCom argued in its Reply that, in accord with the terms of its interconnection agreement with BellSouth, ITC DeltaCom had invoked the change-in-law provisions of said agreement and asked BellSouth for an amendment so that it could obtain the benefits of the newly established UNE rates retroactively to June 18, 2002. According to BellSouth, ITC DeltaCom inappropriately ignored the fact that BellSouth's interconnection agreements provide for when an amendment to an interconnection agreement will be effective.[63]

According to BellSouth, Section 16.2 of the BellSouth/ITC DeltaCom interconnection agreement states that "No modification, amendment, supplement to, or

[60] *Id.* at pp. 22-23.
[61] BellSouth Reply at pp. 4-5.
[62] *Id.*

waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties". BellSouth maintained that if an amendment is only effective when reduced to writing and signed by the parties, forcing the parties to make such an agreement effective before such time conflicts with the specific terms of the interconnection agreement. That is, until the amendment is reduced to writing and signed, the rates that ITC DeltaCom is obligated to pay are the rates found in Attachment 11 to its interconnection agreement.[64]

BellSouth maintained that the impact of accepting ITC DeltaCom's arguments in this case would be obvious and serious. If ITC DeltaCom's position were accepted, BellSouth contended that a CLEC could chose, either intentionally or through inadvertence, to wait a year, or perhaps two years, before demanding that BellSouth amend its interconnection agreement. During the interim, BellSouth would have no obligation to provide the CLEC the Commission ordered rates. Upon the execution of a requested amendment, however, BellSouth would immediately owe the CLEC refunds for a year or two years worth of service calculated back to June 18, 2002. BellSouth maintained that such a result was clearly not what was contemplated by the parties when they entered into the interconnection agreements in question and when they agreed to make amendments to those agreements effective when the amendments were reduced to writing and signed.[65]

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[63] *Id.* at p. 8.
[64] *Id.*
[65] *Id.* at p. 9.

BellSouth again argued that the Commission had attempted to graft state regulatory rules onto a process that was created from whole cloth by the 96 Act. According to BellSouth, the Commission's actions in that regard were inconsistent with the 96 Act and inconsistent with the terms of the various interconnection agreements that the parties negotiated and had approved by the Commission.[66]

E. The ITC DeltaCom Sur-Reply

On December 20, 2002, ITC DeltaCom submitted its Sur-Reply to the Response of BellSouth. In that pleading, ITC DeltaCom asserted that it had not made the concessions claimed by BellSouth. ITC DeltaCom particularly pointed out that it had not abandoned its previous positions regarding the applicability of state law and the need to ensure nondiscriminatory UNE rates. ITC DeltaCom represented that it was simply responding in its Reply to the arguments presented by BellSouth in its Motion for Reconsideration.[67]

ITC DeltaCom found noteworthy in its Sur-Reply that BellSouth did not respond to ITC DeltaCom's demonstration that the Commission's reliance upon state law in establishing the effective date of the new UNE rates was consistent with, and indeed authorized by, §251(c)(3) of the 96 Act. ITC DeltaCom also found it noteworthy that BellSouth did not respond to ITC DeltaCom's showing that numerous other provisions in the federal statutes permit the Commission to apply state laws and doctrines when establishing the effective date of the new UNE rates.[68]

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[66] *Id.* at p. 10.
[67] ITC DeltaCom Sur-Reply at p. 1.
[68] *Id.* at pp. 1-2.

ITC DeltaCom again disputed BellSouth's argument that the Commission established effective date of June 18, 2002 for the revised UNE rates was contrary to the existing interconnection agreement between ITC DeltaCom and BellSouth. ITC DeltaCom pointed out that §16.4 of said agreement contemplates that the Commission may issue a decision that "materially affects...material terms" of the agreement, and provides a process for the parties to negotiate change-in-law amendments. According to ITC DeltaCom, the effective date established by the Commission is an integral part of the change in law that the agreement must be modified to reflect. Were the parties to negotiate a different effective date, ITC DeltaCom asserted that they would not be in compliance with the contract language in §16.4 requiring the parties negotiate "new terms as they may be required".[69]

ITC DeltaCom further pointed out that there is nothing in the BellSouth/ITC DeltaCom agreement that requires amendments to become effective on a particular date. According to ITC DeltaCom, the change-in-law provision at §16.4 does not specify any particular effective date for amendments. ITC DeltaCom also pointed out that §16.2 of the ITC DeltaCom/BellSouth agreement simply provides that the agreement is not formally amended absent a writing that is duly signed by both parties. According to ITC DeltaCom, said section does not prevent the parties from negotiating an amendment specifying a change effective on a given date.[70]

ITC DeltaCom also asserted that BellSouth failed in its attempt to turn around the *FCC WorldCom Decision* cited in ITC DeltaCom's Response. ITC DeltaCom noted that

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[69] *Id.*

while it is true that an ILEC may not unilaterally file tariffs to supercede approved or arbitrated interconnection agreements, that does not mean that a state commission may not exercise its authority under §§251 and 252 of the Federal Communications Act to establish new UNE rates governing preexisting interconnection agreements. ITC DeltaCom argued that if BellSouth's position were to be believed, there would be no reason ever to include a change-in-law provision in an interconnection agreement. ITC DeltaCom contended that the fact that BellSouth and other ILECs routinely insert change-in-law provisions in their interconnection agreements is testimony to their belief that state and federal regulators have authority to adopt new rules and policies, such as new UNE rates, that require the parties to negotiate amendments to those agreements.[71]

ITC DeltaCom also disputed BellSouth's claim that the Commission had overstepped its lawful authority by precluding CLECs from voluntarily negotiating UNE rates that are different from those established by the Commission in its May 31, 2002 Order. ITC DeltaCom pointed out that if a CLEC wishes to voluntarily enter into an agreement which adopts rates that differ from those established by the Commission, it is free to do so pursuant to §252(a) of the 96 Act so long as the agreement in question is submitted to the Commission for approval. The Commission at that point has the authority to reject the agreement if the rates are discriminatory or are otherwise inconsistent with the public interest.[72]

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[70] *Id.*
[71] *Id.*
[72] *Id.* at pp. 3-4.

ITC DeltaCom also disputed BellSouth's claim that the Commission's Order would subject it to paying one or two years worth of refunds if CLECs wait to negotiate amendments to incorporate the new UNE rates established by the Commission. ITC DeltaCom pointed out that if BellSouth truly wanted to avoid the accrual of refunds for such hypothetical CLECs, BellSouth could itself initiate the change-of-law provisions in its interconnection agreements. BellSouth could then implement the dispute resolution procedures in its agreement for those CLECs who did not cooperate. ITC DeltaCom accordingly maintained that there was no basis for BellSouth's complaint that the Commission's decision could force it to accrue funds for several years for CLECs who move slowly to take advantage of the new UNE rates.[73]

II. Discussion and Conclusions

A. Summary of the Issues

Despite the rather elaborate legal arguments that have been espoused by the parties to this cause, there are only two primary issues which must be addressed by the Commission in our assessment of BellSouth's Motion for Reconsideration. The first issue which must be considered is BellSouth's claim that the Commission's October 18, 2002 *Enforcement Order* violates federal law by mandating that the revised UNE rates established in the Commission's May 31, 2002 *UNE Order* be effective on June 18, 2002 in all existing interconnection agreements in Alabama between BellSouth and CLECs without regard to whether to whether the affected CLECs in fact want the

[73] *Id.*

revised UNE rates; without regard to the contractual requirements related to implementing such changes; and without regard to the timing of such changes.[74]

The second primary issue for our consideration in this cause is BellSouth's claim that the Commission's October 18, 2002 *Enforcement Order* violates the Contract Clause of the United States Constitution[75] by unlawfully impairing BellSouth's properly executed and duly authorized contracts with CLECs in Alabama. BellSouth contends that the Contract Clause violation results from the Commission's decision to essentially rewrite the agreed upon UNE rates in those contracts without regard to the specific provisions of said contracts which specifically relate to their amendment.[76]

B. BellSouth's Claim that the Commission Improperly and Unilaterally rewrote all of the BellSouth Interconnection Agreements in Alabama

Quite interestingly, BellSouth alleges that the Commission, with a stroke of its pen, unilaterally rewrote every interconnection agreement entered into between BellSouth and CLECs in Alabama, irrespective of whether BellSouth and the affected CLEC wanted their agreement rewritten or not. In doing so, BellSouth claims that the Commission gave no weight or consideration to the federal law that gives rise to the interconnection agreements in question. BellSouth in fact alleges that the Commission improperly predicated its decision on the view that its state law jurisdiction trumps the federal law regarding interconnection agreements.[77]

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[74] BellSouth Motion for Reconsideration at p. 3.
[75] *See* Article I, Section 10.
[76] BellSouth Motion for Reconsideration at p. 15.
[77] *Id.* at pp. 3-4.

BellSouth interprets the Commission's October 18, 2002 *Enforcement Order* as imposing uniform UNE rates in Alabama in lieu of the existing contracted rates the parties to interconnection agreements in Alabama agreed to. BellSouth alleges that in so doing, the Commission acted without authority and failed to recognize that interconnection agreements entered pursuant to the terms of the 96 Act function in all material respects as federal tariffs. As such, BellSouth claims that it is federal, not state law, that determines the authority of state commissions to interpret and enforce such agreements.[78]

BellSouth asserts that there is absolutely no federal law requirement that rates be uniform across all 96 Act interconnection agreements in a particular state or region. BellSouth in fact argues that the federal law is to the contrary since §252 of the 96 Act contemplates that parties may voluntarily negotiate binding interconnection agreements which may, or may not, incorporate all of the substantive obligations imposed under §§251(b) and (c) of the 96 Act and the implementing rules of the FCC. BellSouth asserts that the Commission has indeed acknowledged this principle by approving interconnection agreements that are currently in force in Alabama which have UNE rates that differ from the rates found in other approved interconnection contracts in Alabama.[79]

In sum, BellSouth concludes that the interconnection agreements that CLECs operate under in Alabama must be construed under federal law, not state law as the Commission attempted to do in its October 18, 2002 *Enforcement Order*. BellSouth

[78] *Id.* at pp. 5-6.

contends that the federal law does not require the uniformity of rates that the Commission has sought to impose. Just as importantly, BellSouth contends that when parties have entered into interconnection agreements under federal law, the Commission is not free to amend those contracts at will, just as it cannot amend a federal tariff under which BellSouth is providing service to CLECs. BellSouth also asserts that it is beyond reasonable dispute that the terms of approved interconnection agreements govern the relationship between contracted parties.[80]

Based on the foregoing principles, BellSouth urges the Commission to follow the lead of the Florida Public Service Commission and find that the appropriate effective date for UNE pricing revisions to existing interconnection agreements is the date that amendments incorporating such revisions are approved by the Commission.[81] BellSouth asserts that the decision of the Florida Public Service Commission in this regard comports with the requirements of the 96 Act and the terms of the interconnection agreements entered by BellSouth and the CLECs.

While the aforementioned arguments of BellSouth are intriguing, it is difficult to fathom how BellSouth arrived at an interpretation of the Commission's October 18, 2002 *Enforcement Order* which would prompt the raising of some of the issues BellSouth has put forth. Even more fundamentally, it is difficult to understand how BellSouth misconstrued the Commission's May 31, 2002 *UNE Order* in a manner that led to the

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[79] *Id.* at pp. 6-7. *See* footnote 4.
[80] *Id.* at p. 8, *Citing Law Offices of Curtis V. Trinco, LLP v. Bell Atlantic Corp.,* 294 F.3d 307 (2d Cir. 2002) and *Verizon New Jersey, Inc. v. Ntegrity Telecontent Services, Inc.,* 219 F.Supp. 2d 616 (D.N.J. 2002).
[81] *Id.* at p. 10, *Citing In Re: Investigation Into Pricing of Unbundled Network Elements*, Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP (Florida Public Service Commission, May 25, 2001) and *Final Order on Rates for Unbundled Network Elements Provided by BellSouth Telecommunications, Inc. (120 day filing)*, Docket No. 990649-

initial conflict with ITC DeltaCom which prompted ITC DeltaCom and the other Joint Petitioners to file their Joint Petition for Enforcement.

It seems quite clear from the language of the Commission's May 31, 2002 *UNE Order,* as well as the language of the Commission's October 18, 2002 *Enforcement Order*, that the Commission was fully aware that the promulgation of revised UNE rates would necessitate amendments to existing interconnection agreements between BellSouth and CLECs in Alabama. Nowhere did the Commission's May 31, 2002 *UNE Order,* or the Commission's October 18, 2002 *Enforcement Order*, unilaterally mandate that the revised UNE rates approved by the Commission on May 31, 2002 be made effective in all existing interconnection agreements as of June 18, 2002 without regard to whether the CLECs wanted to revise their UNE rates and without regard to the contractual requirements related to implementing such changes. To the contrary, the Commission's May 31, 2002 *UNE Order* specifically noted that "any amendments required by the language of the existing interconnection agreements should be based on the prices herein as of the effective date noted below."[82]

It is apparent from the foregoing that the Commission clearly understood that amendments incorporating the revised UNE rates would need to be submitted in accordance with the change-in-law provisions of the existing interconnection agreements between BellSouth and the CLECs.[83] The Commission never made any

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TP, Order No. PSC-02-1311-FOF-TP (Florida Public Service Commission, September 27, 2002) at p. 97.

[82] *UNE Order* at p. 91. The originally noted effective date for the revised UNE prices was May 31, 2002. The Commission ultimately determined in the October 18, 2002 *Enforcement Order*, however, that mitigating circumstances associated with BellSouth's modification of its billing systems justified a revised effective date of June 18, 2002. *See* October 18, 2002 *Enforcement Order* at pp. 8-9.

[83] See General Terms and Conditions/Part A, ¶16.4 of the BellSouth/ITC DeltaCom Interconnection Agreement.

attempt to circumvent or abrogate the change-in-law provisions in those interconnection agreements which became applicable as the result of the Commission's May 31, 2002 *UNE Order* and the Commission's October 18, 2002 *Enforcement Order*. The Commission merely exercised its regulatory prerogative to establish that all such amendments would be effective on June 18, 2002.[84]

In arriving at the decision to impose an effective date of June 18, 2002, for the revised UNE rates, the Commission was careful to consider its state and federal statutory obligations. The decision to require UNE rate true-up to June 18, 2002 by requiring the necessary amendments to be effective on that date was viewed as the action which would best ensure a balance between the Commission's state and federal responsibilities. In short, the Commission was attempting to ensure that the revised UNE rates arrived at largely through the application of federally imposed requirements would be made available in a manner which was most consistent with the Commission's state statutory obligation to oversee and promote the continued development of the local exchange telecommunications market in Alabama.[85] Notably, the Commissions duties in that regard extend to the alteration or amendment of "rates, charges, classifications, rules and regulations" of telecommunications carriers where deemed necessary.[86]

With respect to the specific language of the change-in-law provisions of BellSouth's interconnection agreements, the Commission concurs with ITC DeltaCom's

[84] The jurisdictional justification for the Commission's action in this regard is discussed in more detail below.
[85] *See Alabama Code* §37-2-3 (1975).
[86] *Id.*

position that the effective date of the revised UNE rates is clearly an integral part of the change in law that BellSouth's interconnection agreements must be modified to reflect.[87] BellSouth's interconnection agreements specifically state that the parties will negotiate "new terms as may be required."[88] Since the June 18, 2002 effective date for amendments incorporating the revised UNE rates was required by the Commission, BellSouth would be in noncompliance with the language of the change-in-law provisions of its agreements if BellSouth insisted on an effective date other than that required by the Commission in its October 18, 2002 *Enforcement Order* in its negotiations with CLECs merely seeking to take advantage of the revised UNE rates under the terms established therein by the Commission.

We further note that there is nothing in the change-in-law provisions of the BellSouth/ITC DeltaCom interconnection agreement that requires change-in-law amendments to become effective on a particular date. Additionally, Section 16.2 of the BellSouth/ITC DeltaCom interconnection agreement does not prevent the parties from negotiating an amendment specifying that a change is to be effective on a given date. As noted by ITC DeltaCom, that section merely states that the agreement is not formally amended absent a writing that is signed by both parties.[89]

Having again clarified the Commission's intention with respect to the necessity and timing of the amendments required to incorporate the revised UNE rates established by the Commission, we now turn to the jurisdictional authority of the

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[87] *See* ITC DeltaCom Response at p. 16.
[88] *See* General Terms and Conditions/Part A, ¶16.4 of the BellSouth/ITC DeltaCom Interconnection Agreement.
[89] ITC DeltaCom Sur-Reply at p. 3.

Commission to take the action that it did in establishing an effective date of June 18, 2002 for the application of the revised UNE rates. We particularly address BellSouth's claims that the Commission improperly relied on state law to supercede Commission approved interconnection agreements functioning essentially as federal tariffs to impose a uniform UNE rate structure.

At the outset, we note our disagreement with BellSouth's claim that the Commission improperly relied upon state law when establishing the effective date of June 18, 2002 for the revised UNE rates. As noted by ITC DeltaCom, the 96 Act expressly gives the Commission the authority to implement state law in the performance of its duties so long as it does so in manner that is not inconsistent with federal requirements.[90] This authority has been recognized by the federal courts which have noted that state commissions are explicitly permitted to impose requirements to further competition for intrastate services so long as those requirements are consistent with the 96 Act.[91]

The 96 Act clearly establishes the criteria for the exercise of state authority in dealing with interconnection agreement assessments. In particular, the 96 Act authorizes state action such as the Commission established effective date in the May 31, 2002 *UNE Order* and the October 18, 2002 *Enforcement Order* where such state action satisfies the established statutory requirements set forth in §251(d)(3):

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude

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[90] ITC DeltaCom Response at pp. 8-10. Even BellSouth conceded in its Motion for Reconsideration at pp. 9-10 that state commissions can act based on state law requirements so long as they do so in a manner that is not inconsistent with federal law.

[91] *See Michigan Bell Tel. Co. v. Strand*, 26 F.Supp. 2d 993, 1000-1001 (W.D. Mich. 1998).

> the enforcement of any regulation, order, or policy of a State commission that -
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) is consistent with the requirements of this section; and
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part [47 U.S.C.S. §§251 *et seq.*].

In the present case, the Commission was expressly authorized by *Alabama Code* §37-1-100 (1975) to prescribe the effective date for its orders. The Commission exercised that authority in its *UNE Order* and *Enforcement Order* eventually establishing June 18, 2002 as the effective date for the revised UNE rates. The Commission did so in a manner entirely consistent with the 96 Act and the rules and regulations of the FCC.

A further Analysis of the Commission's decision at issue herein pursuant to the three prongs of §251(d)(3) clearly confirms the conclusion reached immediately above. More particularly, the Commission's establishment of June 18, 2002 as the effective date for the revised UNE rates related directly to BellSouth's access and interconnection obligations in the provision of UNEs to ITC DeltaCom and other CLECs thus satisfying the requirements of §251(d)(3)(A). Similarly, the Commission's action was in compliance with §§251(d)(3)(B) and 251(d)(3)(C) because the Commission did not contravene any requirements of §251, nor did it "substantially prevent implementation of the requirements" or purposes of §251. To the contrary, the Commission's decision to establish the June 18, 2002 effective date was an attempt to

further one of the 96 Act's primary goals, the development of competition in the local market.

Other provisions in the 96 Act also support the action taken by the Commission in establishing the June 18, 2002 effective date for its revised UNE rates. In particular, §252(c)(2) of the 96 Act clearly provides state Commissions with the authority to "establish any rates for interconnection, services, or network elements." The United States Supreme Court has interpreted that language to mean that state commissions have the exclusive right to set UNE rates under the statute.[92] If the Commission has the exclusive statutory right to establish UNE rates, it is axiomatic that the Commission also has the requisite authority to establish the effective date of those rates.

As noted by ITC DeltaCom, the Commission's decision to establish the June 18, 2002 effective date for its revised UNE rates is also supported by §252(e)(3) of the 96 Act.[93] That section specifies that "[N]othing in this section shall prohibit a state commission from establishing or enforcing other requirements of state law in its review of an agreement." Said provision applies to both negotiated and arbitrated agreements, and, as the legislative history of the 96 Act demonstrates, was inserted by Congress to "preserve [s]tate authority to enforce state law requirements."[94] The authority of state Commissions to impose state law requirements in their review of interconnection agreements has also been recognized by the federal courts.[95] In conclusion, it is apparent that the Commission's decision to establish the effective date of June 18, 2002

[92] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999).
[93] ITC DeltaCom Response at p. 11-12.
[94] *See H. Conf. Rep. No. 104-458, at 126, reprinted in 1996 U.S.C.C.A.N. 124, 137.*

for the revised UNE rates by reference to state law doctrines is plainly justified by §251(d)(3), §252(c)(2) and §252(e)(3) of the 96 Act, as well as by the federal courts.

It is also noteworthy that the FCC has on numerous occasions recognized that the mere imposition of additional obligations by state Commissions is not necessarily inconsistent with the 96 Act or the FCC's rules.[96] The Commission's decision to impose an effective date of June 18, 2002 for the revised UNE rates in fact appears entirely consistent with previous positions taken by the FCC concerning such matters. The *FCC WorldCom Decision* is particularly applicable to the circumstances under review.[97]

Although the parties in this proceeding have differing interpretations of the *FCC WorldCom Decision*, it appears from a closer reading of that decision that the Commission's action in this case clearly squares with the reasoning set forth therein by the FCC. As BellSouth correctly notes, the *FCC WorldCom Decision* was the result of an arbitration between Verizon and WorldCom which was conducted by the FCC on behalf of the Virginia State Corporation Commission. The portion of the *FCC WorldCom Decision* most applicable to this case involves the FCC's discussion of tariffs versus interconnection agreements.[98]

As discussed in the *FCC WorldCom Decision,* Verizon and WorldCom disagreed about when and how tariffed rates that the parties filed with the Virginia Commission would replace the arbitrated rates set forth in the pricing schedule included in the

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[95] *See Bell Atlantic Maryland v. MCI WorldCom*, 240 F.3d 279, 302 (4th Cir. 2001).
[96] *See e.g. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 15499, at ¶ 1247 (August 8, 1996) and *Implementation of the Telecommunications Act of 1996*, 17 FCC Rcd. 14860, 14892 (2002).
[97] *In the Matter of Petition of WorldCom, Inc.,* CC Docket Nos. 00-218, 00-249, & 00-251, DA 02-1731, rel. July 17, 2002 (Chief, Wireless Competition Bureau).

agreement of the parties. Verizon proposed language under which any applicable tariff rates would automatically supercede the pricing schedule rates. WorldCom proposed language which would permit tariff revisions which “materially and adversely” affected the terms of the agreement to become effective only upon the parties’ written consent or upon “affirmative order” of the Virginia Commission.[99]

The FCC ultimately adopted WorldCom’s proposed language finding that said language was consistent with applicable law and with the statutory construct that provides for federal court review of state commission determinations under §252. The FCC concluded that if a state commission established new rates, such action would constitute a change in law which the parties would be able to incorporate into their agreement pursuant to the change of law provisions of their contract. If the parties disagreed as to the applicability of such new rates, they would be in a position to invoke their contract’s dispute resolution process which would ultimately result in a determination subject to review in federal court under §252(e).[100]

As noted by BellSouth, the FCC indeed rejected Verizon’s proposed language because it would provide for tariffed rates allowed to go into effect by the Virginia Commission to supercede rates arbitrated under the 96 Act.[101] BellSouth failed to mention, however, that the FCC’s conclusions in that regard were based on the premise that Verizon’s proposed language could thwart WorldCom’s statutory right to ensure that the newly applied rates complied with the requirements of §§251 and 252 of the 96

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[98] *See Id.* at ¶¶590-622.
[99] *Id.* at ¶590.
[100] *Id.* at ¶599.

Act.[102] The FCC further reasoned that under Verizon's proposal, the new tariffed rates would not be the subject of a federally reviewable "determination" under §252 and would never be incorporated into the agreement of the parties.[103]

In the present case, there has been no attempt by a carrier to unilaterally file tariffs superceding the rates set forth in negotiated and/or arbitrated agreements approved by the Commission. To the contrary, it is undisputed that this Commission establish the revised UNE rates in question pursuant to all applicable federal guidelines, including §§251 and 252 of the 96 Act. Further, the Commission's action in that regard was certainly subject to federal court review just as the ultimate determination rendered by the Commission herein will be. The Commission has also recognized that the revised UNE rates must be incorporated into the agreements of the various CLECs in Alabama pursuant to amendments to such agreements.

It thus appears that the Commission's actions in the present case have all the attributes the FCC strained to protect and enforce in its *WorldCom Decision*. The FCC has clearly embraced the notion that rates in an existing interconnection agreement can, under the circumstances present in the *FCC WorldCom Decision* and the scenario under review herein, be revised by "affirmative orders" of a state commission. Given the fact that the federal agency responsible for the implementation of the 96 Act has reached such a conclusion, it follows that the Commission's actions in the present case were not undertaken in violation of federal law.

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[101] *Id.* at ¶600.
[102] *Id.* at ¶601.
[103] *Id.* The FCC reached a similar conclusion *In the Matter of Bell-Atlantic Delaware, et al. v. Global NAPs*, File No. E-99-22, 15 FCC Rcd. 12946, FCC 99-318 (December 2, 1999).

The *FCC WorldCom Decision* is also instructive in its specific discussion of the effective date of revised rates in interconnection agreements. In particular, the FCC found in favor of language proposed by WorldCom which stated “that the ‘new rates or discounts shall be effective immediately upon the legal effectiveness’ of the regulatory or court order imposing them, not on the date that those rates are incorporated into the pricing schedule”.[104] The FCC noted its disagreement with the notion “that the ministerial act of revising the pricing schedule to reflect the new rates should delay the effective date of those rates.”[105] This conclusion by the FCC again appears to support the action taken by the Commission in the present case.

Given the above explanation of the Commission’s exercise of its state law authority in manner consistent with the provisions of the 96 Act, we do not here devote substantial discussion to BellSouth’s claim that its interconnection agreements entered pursuant to the terms of the 96 Act function in all material respects as federal tariffs and thus require the Commission to interpret and enforce those agreements pursuant to federal law. The Commission does, however, note its agreement with ITC DeltaCom’s position that there are obvious distinctions between federal tariffs and interconnection agreements.

As noted by ITC DeltaCom, one of the more notable distinctions between federal tariffs and interconnection agreements relates to the fact that federal tariffs are filed with the FCC and can become effective without ever being approved by the FCC. Interconnection agreements, on the other hand, are contracts negotiated between

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[104] *Id.* at ¶611.

incumbent local exchange carriers ("LECs") and requesting carriers which cannot be unilaterally amended by either party. By contrast, federal tariffs are prepared and filed by carriers who have the legal right to unilaterally revise them. Moreover, carriers have a right to request arbitration of any disputed issues in interconnection agreements before they become effective and such agreements typically provide a dispute resolution mechanism that can be invoked by either party. By contrast, carrier customers do not have the right to invoke arbitration for disputed tariff provisions, but are limited to challenging unlawful provisions by filing a petition or complaint with the FCC after the tariff has become effective.[106]

BellSouth also argues that the Commission's decision to establish the June 18, 2002 effective date for the revised UNEs rates falls outside of §251(d)(3) because it conflicts with the federal statute which allows parties to negotiate voluntary agreements that depart from the statutory requirements governing arbitrated agreements. BellSouth in fact claims that the Commission's October 18, 2002 *Enforcement Order* implemented a uniform rate schedule for all elements set out in BellSouth's UNE proceeding and effectively precluded negotiations on those rates in the future.

Although BellSouth's arguments in this regard are again misguided, there is admittedly some justification for the positions taken by BellSouth given the wording of the Commission's October 18, 2002 *Enforcement Order*. The Commission accordingly takes this opportunity to further clarify the intentions of the October 18, 2002

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[105] *Id.*

Enforcement Order and dispense with the "uniform rate schedule" arguments of BellSouth.

As noted by BellSouth, the Commission's October 18, 2002 *Enforcement Order* indeed stated that there "can be only one lawful set of rates with regard to the telecommunications services at issue in this cause – the rates approved by this Commission in its May 31, 2002 *UNE Order*."[107] The case law cited in the *Enforcement Order* in support of that point makes that proposition perfectly clear.[108] That is not to say, however, that different UNE rates cannot be truly "negotiated" by parties and submitted to the Commission for its approval. Such an avenue is recognized in the Commission's Telephone Rule T-12(A)(4) which establishes that "a telephone utility shall not charge, demand, collect or receive a greater or lesser or different compensation for regulated telecommunications services than the rates, fairs and charges specified in the tariffs in affect at the time,…*except where otherwise authorized by a vote of the Commission*." (Emphasis added.)

The Commission's reference to Telephone Rule T-12(A)(4) in the October 18, 2002 *Enforcement Order* was included to recognize that the negotiating flexibility required by §252(a) of the 96 Act is also recognized by state law.[109] There was certainly no intention on the Commission's part to preclude negotiations for different UNE rates by willing parties.

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[106] *Id.*
[107] October 18, 2002 *Enforcement Order* at p. 7.
[108] *Id.* at footnote 9.
[109] October 18, 2002 *Enforcement Order* at p. 8.

BellSouth may also have arrived at its "uniform rate schedule" position based on the statement in the *Enforcement Order* which noted that "there did not then, nor does there now, appear to be any need to subject CLECs to unnecessary 'negotiations' when there should be no negotiation with respect to the rates and terms established in the Commission's May 31, 2002 *UNE Order*."[110] That statement was again not included by the Commission to indicate that parties could not independently negotiate UNE rates and submit those negotiated rates to the Commission for its approval. That particular reference was instead included by the Commission to make it clear that CLECs who merely wanted to adopt the revised UNE rates established by the Commission should not be victimized by unnecessary "negotiation" provisions which would only serve to delay the benefit of the revised UNE rates established by the Commission.[111]

BellSouth also challenges the reference in the Commission's *Enforcement Order* noting that "all rates, charges, classifications, rules and regulations adopted or acted upon by telecommunications carriers which are inconsistent with those prescribed by the Commission when acting within the scope of its authority, or inconsistent with those prescribed by any statute, are unlawful and void."[112] BellSouth is correct in noting that on a stand-alone basis, this Alabama state law provision is inconsistent with the 96 Act. The Commission did not, however, intend for the cited provision to be so construed. The Commission's reference to Telephone Rule T-12(A)(4) in the immediately following paragraph of the *Enforcement Order* was intended to acknowledge that parties may

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[110] *Id.* at p. 7.
[111] That same reasoning led the Commission to include footnote 16 at page 9 of the October 18, 2002 *Enforcement Order*.
[112] October 18, 2002 *Enforcement Order* at p. 7.

negotiate UNE rates so long as those rates are submitted to, and approved by, the Commission.[113]

While it is true that §252(a) permits BellSouth to voluntarily negotiate an agreement that does not fully comport with the requirements of §§251 (b) – (c), it is also true that §252 requires BellSouth to submit such agreements to state commissions for review pursuant to §252(e). The provisions of § 252(e)(2)(a), in turn, provide that the state commission may reject a negotiated agreement, or a portion thereof, if it "discriminates against a telecommunications carrier not a party to the agreement" or contravenes the "public interest, convenience and necessity."

In this instance, the Commission determined that the establishment of the June 18, 2002 effective date for amendments to interconnection agreements adopting the Commission's revised UNE rates was necessary to minimize unnecessary delay and potential discrimination and was, therefore, consistent with the public interest, convenience and necessity. Given that reasoning, the Commission's decision was not inconsistent with the aforementioned requirements or purposes of the 96 Act. To the contrary, the Commission had a compelling state interest in ensuring that CLECs seeking to merely avail themselves of the revised UNE rates established by the Commission were not unnecessarily delayed for 120 days or more in their efforts to take advantage of the revised UNE rates established by the Commission. The Commission felt strongly that the "negotiation" provisions of the change-in-law section of the BellSouth interconnection agreements should not be utilized as a mechanism for delay

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[113] *Id.* at p. 8.

to prevent those carriers who had little or no interest in truly "negotiating" different UNE rates from availing themselves of the revised rates established by the Commission in a timely manner.

With respect to BellSouth's concern regarding CLECs who delay in taking advantage of the revised UNE rates and the inherent liability to BellSouth of such inaction, we note that BellSouth can invoke the change-in-law provisions of its agreements just as easily as the CLECs can.[114] We find it highly unlikely that any CLEC aware of the UNE rate revisions would unnecessarily delay taking advantage of them. In order to minimize the purposeful delay scenario feared by BellSouth, however, all CLECs certified by this Commission will be served with a copy of this Order.

Based on the foregoing, we conclude that BellSouth's claim that the Commission improperly and unilaterally rewrote all of the BellSouth interconnection agreements in Alabama is meritless. Similarly, we find that our reliance on state law principles to establish the June 18, 2002 effective date for amendments incorporating the revised UNE rates established by the Commission was not misplaced given the fact that the Commission exercised its state law authority in a manner consistent with the 96 Act. We further find that our actions herein did not result in a uniform rate schedule for UNE rates which precluded negotiations between parties concerning such rates.

C. BellSouth's Claim that the Commission's October 18, 2002 *Enforcement Order* Improperly Impairs its Contracts with CLECs.

BellSouth maintains that the Commission's October 18, 2002 *Enforcement Order* essentially rewrites the agreed upon UNE rates in existing interconnection agreements

between CLECs and BellSouth. In so doing, BellSouth maintains that said order tramples upon the specific provisions of those interconnection agreements relating to their amendment. BellSouth accordingly alleges that the Commission's *Enforcement Order* has impaired its contracts with CLECs in violation of the Contract Clause found at, Article I, Section 10 of the United States Constitution.[115]

BellSouth asserts that there can be no dispute that there is a contractual relationship between the CLECs and BellSouth where both parties have signed an interconnection agreement and such agreement has been approved by the Commission. BellSouth further contends that the action taken by the Commission in its *Enforcement Order* amounts to a unilateral revision of BellSouth's interconnection agreements with CLECs which deprives BellSouth of the revenues associated with the contracted for UNE rates. BellSouth maintains that it has an enforceable right to receive the UNE rates agreed to by the parties in its contracts until the CLECs properly invoke the change-in-law provisions of those contracts so as to require an amendment regarding UNE rates.

BellSouth further alleges that the Commission's *Enforcement Order* results in a substantial impairment of its contracts by first requiring that BellSouth immediately marshal sufficient resources to change all existing interconnection agreements and immediately modify its billing systems. BellSouth also alleges that the Commission's *Enforcement Order* impairs its contracts substantially by relieving CLECs of their

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[114] BellSouth Reply at p. 9.
[115] BellSouth Motion for Reconsideration at p. 11.

obligation to pay the agreed upon UNE rates and not requiring the CLECs to abide by the provisions of their duly approved contracts regarding the alteration of those rates.[116]

In its Reply, ITC DeltaCom maintains that BellSouth waived its Contract Clause argument by not asserting it in a timely manner. Even if it is assumed that BellSouth did not waive its Contract Clause arguments, ITC DeltaCom argues that the Commission's May 31, 2002 *UNE Order* and the October 18, 2002 *Enforcement Order* do not violate, or even implicate, the Contract Clause.[117]

In support of its position, ITC DeltaCom asserts that the courts have repeatedly stated that the Contract Clause of the United States Constitution applies only to statutes enacted by state legislatures and is inapplicable to "the acts of the state tribunals or officers under statutes in force at the time of the making of the contract the obligation of which is alleged to have impaired."[118] In the present case, ITC DeltaCom maintains that there is no state "law" at issue, but rather orders issued by a state regulatory tribunal pursuant to the 96 Act, the FCC's rules, and applicable state statutes that were in full force and effect at the time BellSouth entered into the interconnection agreements in question.[119]

ITC DeltaCom further contends that the Contract Clause cannot be construed to limit a state from exercising its statutory obligations. In this case, ITC DeltaCom argues that the Commission was merely carrying out the statutory mandates set forth in the 96

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[116] *Id.* at pp. 12-13.
[117] ITC DeltaCom Response at p. 18.
[118] *Id.* at p. 19, *Citing Hanford v. Davies*, 163 U.S. 273, 278 (1896).
[119] *Id.*

Act and applicable state laws when it adopted the May 31, 2002 *UNE Order* and the October 18, 2002 *Enforcement Order*.[120]

Although ITC DeltaCom does not dispute that there was a contract between ITC DeltaCom and BellSouth, ITC DeltaCom argues that said agreement is not the type of private contract to which the Contract Clause applies. ITC DeltaCom instead contends that BellSouth's interconnection agreements exist only because they are required by the 96 Act and were negotiated, approved, interpreted, and enforced subject to a complex federal and state regulatory regime. ITC DeltaCom points out that the laws and regulations that the Commission utilized to establish revised UNE rates were the same laws and regulations that gave breath to BellSouth's interconnection agreements in the first place. ITC DeltaCom thus argues that BellSouth's attempt to invoke the Contract Clause in this instance is inappropriate and illogical.[121]

ITC DeltaCom further argues that the Commission's Orders do not impair the rights of the parties to BellSouth's interconnection agreements. According to ITC DeltaCom, BellSouth could not have had any legitimate expectation that it would be permitted, as a private contracting party, to charge UNE rates higher than the rates established by the state regulator under applicable federal laws and rules. ITC DeltaCom further asserts that when contracts have built in provisions designed to accommodate regulatory orders altering the parties' respective rights and obligations as

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[120] *Id.*
[121] *Id.* at pp. 20-21.

BellSouth's contracts do, the issuance of such anticipated orders cannot constitute an impairment of the contracts in question.[122]

To the extent there was an impairment of BellSouth's contractual rights, ITC DeltaCom asserts that such impairment could not be characterized as "substantial." ITC DeltaCom points out that BellSouth knew that it was subject to changes in FCC and Commission regulations and entered into its interconnection agreements with its eyes wide open with respect to such matters. Hence, ITC DeltaCom maintains that any impairment BellSouth has suffered was to be expected and can hardly be described as "substantial."[123]

ITC DeltaCom further points out that the Commission had a legitimate interest in promulgating new UNE rates and establishing a uniform date for such rates to be effective. According to ITC DeltaCom, states are fully empowered to enact regulations for the promotion of the "common weal, or [that] are necessary for the general good of the public" even though such regulations might affect existing contracts.[124]

ITC DeltaCom also argues that in determining to modify the UNE rates assessed by BellSouth, and to make such rates effective on June 18, 2002, the Commission adhered to state and federal statutes and regulations which predated the interconnection agreements in dispute. ITC DeltaCom maintains that the Commission's action in this regard was undertaken to protect and promote the public interest. ITC

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[122] *Id.* at p. 21.
[123] *Id.* at p. 22.
[124] *Id., Citing United States Trust Company v. New Jersey*, 431 U.S. 1, 22-23 (1977) and *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965) as well as *Chrysler v. Kolosso Auto Sales*, 138 F.3d 892 (7th Cir. 1998). *See also Michigan Bell Tel. Co. v. Strand,* 26 F.Supp. 2d 993, 1000-1001 (W.D. Mich. 1998).

DeltaCom argues that those public interest concerns far outweigh the possibility of any "impairment" BellSouth may have suffered.[125]

Although there is a serious question as to whether BellSouth waived its Contract Clause arguments by not raising them in a more timely manner, we do not herein dismiss BellSouth's Contract Clause claims on that ground. We instead deny BellSouth's Contract Clause arguments on the grounds set forth in more detail below.

We first note that the Contract Clause of the United States Constitution specifies in part that "[n]o state shall…pass any...Law impairing the Obligation of Contracts…"[126] It should be emphasized, however, that the courts have determined that the Contract Clause does not impose an absolute prohibition on the passage of statutes which impact private, contractual obligations. More particularly, the courts have determined that the Contract Clause does not prevent states from "exercising such powers as are vested in them for the protection of the common welfare or as are necessary for the general good of the public."[127] Further, ITC DeltaCom correctly pointed out that the Contract Clause has long been held to be inapplicable to "the acts of state tribunals or officers under statutes in force at the time of the making of the contract the obligation of which is alleged to have impaired."[128]

In the present case, there was no state statute or "law" that was "passed" by the Commission which impacted BellSouth's contracts with the CLECs and thereby implicated the Contract Clause. To the contrary, the Commission, acting in its capacity

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[125] *Id.* at pp. 22-23.
[126] U.S. Const., Art. I, Section 10.
[127] *Citing Home Building and Loan Association v. Blainsdell,* 290 U.S. 398, 437 (1934) and *Manigault v. Springs*, 199 U.S. 473, 480 (1934).

as a state regulatory tribunal, entered orders based on state and federal statutes and regulations that were in full force and effect at the time BellSouth entered into the interconnection agreements at issue. Further, even if it is incorrectly assumed that the Commission's actions constituted the passage of a state law which impacted private contractual arrangements, the Commission would not be in violation of the Contract Clause due to the fact that the Commission took the actions in question in the fulfillment of its preexisting statutory obligation to protect the public welfare and promote the public good where telecommunications matters are concerned.[129]

Despite the foregoing conclusions, we will proceed with an assessment of the merits of BellSouth's Contract Clause claim. As noted by the parties, there are generally three prongs to a Contract Clause inquiry: first, whether there is the necessary contractual relationship; second, whether a change in law impairs that contractual relationship; and third, whether the impairment is substantial.[130]

With respect to the first prong of our Contract Clause inquiry, we note that there is generally no dispute that there is a contract between ITC DeltaCom and BellSouth, as well as between BellSouth and the majority of the other CLECs operating in the State of Alabama. We find merit, however, in ITC DeltaCom's arguments that the application of the Contract Clause to those agreements is illogical and inappropriate due to the fact that the agreements in question exist only because they are required by the 96 Act and are approved, interpreted and enforced subject to a complex federal and state

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[128] *Hanford v. Davies*, 163 U.S. 273, 278 (1896).
[129] *See Alabama Code* §37-2-3 (1975).
[130] *See General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992).

regulatory regime. In fact, the laws and regulations that this Commission implemented in our establishment of new UNE rates originated from the same statute that gave breath to BellSouth's interconnection agreements in the first place.

With regard to the second prong of our Contract Clause inquiry, we must look to determine whether there was a change in law that impaired BellSouth's contractual relationships. We note, however, that laws which only technically alter the obligations of parties to contracts are not necessarily violative of the Contract Clause. More particularly "laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause," notwithstanding that they technically alter an obligation of a contract. [131]

We disagree with BellSouth's conclusion that the Commission's *Enforcement Order* denies BellSouth the revenues associated with the contracted for UNE rates without regard to the change-in-law provisions of the impacted interconnection contracts and thus constitutes an impairment of BellSouth's contractual relationships. While BellSouth's contracts may be impacted by the Commission's *Enforcement Order,* we find that BellSouth did not have a reasonably legitimate expectation to continue to receive UNE rates higher than the revised rates established by this Commission. Our conclusion in this regard is based on the statutes and regulations referred to herein which predated BellSouth's agreements, as well as the built in change-in-law provisions in BellSouth's contracts designed to accommodate regulatory orders altering the parties' respective rights and obligations. We accordingly conclude that BellSouth's contracts

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[131] *El Paso v. Simmons*, 379 U.S. 497, 515 (1965).

were not "impaired" by the Commission's *Enforcement Order* in a manner that invoked the Contract Clause.

Even though we concluded immediately above that there was no impairment of BellSouth's contracts, we will, for the sake of further discussion, proceed with our Contract Clause inquiry as though a finding of impairment had been made. Given that assumption, we must determine in the third prong of our Contract Clause inquiry whether the contractual impairment alleged by BellSouth is "substantial".[132] As noted by BellSouth, a substantial impairment may result even though there is not a total destruction of contractual expectations. Rather, a substantial impairment is one that "alters the terms of the contract by effectively imposing on one of the parties an obligation which it had not reasonably anticipated or relieving a party of a contractual obligation."[133] According to BellSouth, the Commission's *Enforcement Order* does both: first, by requiring that BellSouth immediately marshal sufficient resources to change all existing interconnection agreements and immediately modify its billing system; second, by relieving the CLECs of their obligation to pay the agreed upon rates and not requiring them to abide by the provisions of their duly approved contracts regarding the alteration of those rates.[134]

We note that BellSouth should certainly have "reasonably anticipated" the requirement that it modify its UNE rates since BellSouth is the party that moved the

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[132] Given our previous findings, we note that we are required to make compound assumptions in order to render a determination on this point.
[133] BellSouth Motion for Reconsideration at p. 12, *Citing Bannum v. City of Ashland*, 922 F.2d 197, 202 (4th Cir. 1990).
[134] *Id.*

Commission to revise those rates.[135] Further, BellSouth's claims that it was required to immediately marshal sufficient resources to change all existing interconnections and immediately modify its billing systems appears moot at this juncture given the substantial passage of time since the Commission's October 18, 2002 *Enforcement Order* was entered.

The Commission also finds meritless BellSouth's claims that CLECs were inappropriately alleviated of their obligation to pay the "agreed upon" rates reflected in their interconnection agreements. We note that the vast majority of the interconnection agreements on file between BellSouth and competitive carriers merely adopt the UNE rates established by the Commission and do not reflect truly "negotiated" or bargained for rates. Further, BellSouth clearly understood that it was subject to changes in FCC and Commission regulations and entered into its interconnection agreements with such knowledge. It was that knowledge which prompted BellSouth to include in its contracts, built in provisions designed to accommodate regulatory orders altering the respective rights and obligations of the parties such as the Commission's orders currently under review.

The Commission further finds baseless BellSouth's allegation that the October 18, 2002 *Enforcement Order* relieves CLECs of their obligation to abide by the provisions of their duly approved contracts regarding amendments necessitated by changes in law. As noted previously, the Commission fully anticipated that the revised UNE rates would necessitate amendments to existing interconnection agreements.

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[135] *See May 31, 2002 UNE Order* at pp. 2-3.

There were no provisions in the Commission's October 18, 2002 *Enforcement Order* which allowed the parties to bypass the change-in-law provisions of their contracts. The Commission merely determined the effective date for those amendments in a manner entirely consistent with the state and federal law as well as the terms of the agreements themselves.

We accordingly conclude that the Commission exercised its legitimate duty to promote the public interest with regard to telecommunications matters in promulgating the October 18, 2002 *Enforcement Order* and finding therein that amendments to interconnection agreements incorporating the revised UNE rates would be effective June 18, 2002. It further appears that the Commission's fulfillment of its duty in that regard was necessary to promote the public good and thus was not in violation of the Contract Clause.[136] There was clearly an overriding, legitimate state purpose in promulgating new UNE rates and establishing an effective date of June 18, 2002 for such rates. Further, the Commission's actions in this regard were in full compliance with applicable federal and state statutes and regulations which predated the interconnection agreements in question.

III. <u>ORDERING PARAGRAPHS</u>

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That BellSouth Telecommunications, Inc.'s Motion for Reconsideration of the Commission's

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[136] *See Alabama Water Company v. City of Attalla,* 100 So. 490 (1924) wherein the Alabama Supreme Court held that the Contract Clause does not prevent a state regulatory body from exercising the police power of the state to modify private contracts by changing state water rates.

October 18, 2002 *Enforcement Order* is hereby denied based on the reasoning set forth above.

IT IS FURTHER ORDERED BY THE COMMISSION, That the Commission's December 12, 2002 Order Granting Stay of the Commission's October 18, 2002 *Enforcement Order* is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION, That the parties shall immediately begin efforts to comply with the provisions of the Commission's May 31, 2002 *UNE Order* as well as the October 18, 2002 *Enforcement Order* consistent with the reasoning set forth herein.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 14th day of March, 2003.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

DOCKET 27821 - #65

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary