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Of Counsel

H. LaDon Baltimore

March 31, 2006

Honorable Ron Jones, Chairman
Tennessee Regulatory Authority
ATTN: Sharla Dillon, Dockets
460 James Robertson Parkway
Nashville, TN 37243-5015

Via Hand Delivery

RE: Joint Petition for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended; Tennessee Regulatory Authority Docket No. 04-00046

Dear Chairman Jones:

NuVox Communications, Inc., including the former NewSouth Communications Corp. ("NuVox") and Xspedius Communications, LLC on behalf of its operating subsidiaries (collectively, "Xspedius") (NuVox and Xspedius are herein collectively referred to as "Joint Petitioners") ask the Tennessee Regulatory Authority ("TRA") to take official notice of the attached Kentucky Public Service Commission ("KPSC") Final Arbitration Order in Docket No. 2004-00044, dated March 14, 2006.[1] Although the Joint Petitioners do not agree with each and every conclusion reached by the KPSC in the Final Arbitration Order, the Joint Petitioners note that the KPSC reversed its initial decision with regard to indemnification (Issue 7) and payment due date (Issue 97), finding in both instances in favor of the Joint Petitioners. Notably, the KPSC also found in favor of the Joint Petitioners on issues 26 (rejecting BST's ban on commingling of Section 251 UNEs and Section 271 elements), 36-38 (affirming BST's obligation to perform line conditioning at TELRIC), 65 (rejecting BST's additive transit intermediary charge), 86 (rejecting BST's pull-the-plug provision re CSRs), 100 (rejecting BST's past due payment acceleration and shell game), 101 (rejecting BellSouth's proposed maximum deposit), and 103 (rejecting BST's pull-the-plug provision re: deposits).

Joint Petitioners also request that the TRA take official notice of the attached Georgia Public Service Commission ("GPSC") Order on Remaining Issues in Docket No. 19341-U, dated March 2, 2006 ("GA Generic Order").[2] Although the Joint Petitioners do not agree with each and every conclusion reached by the GPSC in the GA Generic Order, Joint Petitioners note that the GPSC rejected BellSouth's attempt to re-write federal

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1 Exhibit "A" to this filing.

2 Exhibit "B" to this filing.

telecommunications law by affirming Joint Petitioners' positions that BellSouth is obligated to perform line conditioning at TELRIC (issues 36-38 in the Joint Petitioners' TRA arbitration with BellSouth) and must commingle Section 251 UNEs and Section 271 elements (issue 26 in the Joint Petitioners' TRA arbitration with BellSouth).

Finally, Joint Petitioners request that the TRA take official notice of the attached Louisiana Public Service Commission ("LPSC") Recommendation of the Administrative Law Judge in Docket No. U-28356 ("LA Generic ALJ Rec.").[3] Although the Joint Petitioners do not agree with each and every conclusion reached by the judge in the LA Generic ALJ Rec. (Joint Petitioners agree with most), Joint Petitioners note that the judge rejected BellSouth's attempt to re-write federal telecommunications law by affirming Joint Petitioners' positions that BellSouth is obligated to perform line conditioning at TELRIC (issues 36-38 in the Joint Petitioners' TRA arbitration with BellSouth) and must commingle Section 251 UNEs and Section 271 elements (issue 26 in the Joint Petitioners' TRA arbitration with BellSouth). In this same order, the judge also recommends finding in favor of Joint Petitioners on the issue of EEL audits (issue 51 in the Joint Petitioners' TRA arbitration with BellSouth).

Thank you, and if you have any questions with regard to this matter, please call me.

Respectfully submitted,

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Counsel for Joint Petitioners

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[3] Exhibit "C" to this filing.

Certificate of Service

The undersigned hereby certifies that on this the 31st day of March, 2006, a true and correct copy of the foregoing has been forwarded via electronic transmission to the following.

Guy Hicks
BellSouth Telecommunications, Inc.
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H. LaDon Baltimore

EXHIBIT "A"

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED	)	CASE NO. 2004-00044

O R D E R

NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC (collectively, "Joint Petitioners")[1] filed with the Commission a joint petition for arbitration seeking resolution of issues between the Joint Petitioners and BellSouth Telecommunications, Inc. ("BellSouth"). On September 26, 2005, the Commission issued an Order addressing the 19 issues which the parties were unable to resolve through negotiation.

[1] KMC Telecom V, Inc. and KMC Telecom III LLC, originally parties to this proceeding, withdrew their request for arbitration on May 31, 2005.

The Joint Petitioners and BellSouth petitioned the Commission for rehearing. Joint Petitioners asked the Commission to further consider issues 4, 5, 6, 7, 9, 12, 88, 97, and 102. They also asked the Commission to clarify determinations regarding issues 36 and 51. BellSouth asked that the Commission reconsider issues 26, 36, 37, 38, 51, 65, 86, 100, 101, and 103.

The Commission granted the motions and, on November 30, 2005, heard oral arguments regarding the legal issues in this proceeding.

The Commission also granted the parties' request that the interconnection agreement be submitted 30 days after the Commission rules on the parties' petitions for reconsideration. The Commission found this request reasonable, given the parties' prior agreement that they will continue operating under their current interconnection agreements until these matters are finally resolved by the Commission. The Commission herein addresses each of the issues discussed in the September 26, 2005 Order.

ISSUE 4: WHAT SHOULD BE THE LIMITATION ON EACH PARTY'S LIABILITY IN CIRCUMSTANCES OTHER THAN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT?

The Joint Petitioners ask the Commission to reconsider its determination that liability in circumstances other than gross negligence or willful misconduct would be limited to a credit for the actual cost of services or functions performed improperly or not performed at all.

The Commission's decision is based on the principle that BellSouth's liability to its competitor should be the same as BellSouth's liability to its retail customers. BellSouth argues that should the Joint Petitioners prevail, the competitive local

exchange carriers ("CLECs") would have greater rights against BellSouth than either BellSouth or Joint Petitioners furnish to their respective customers.

The Joint Petitioners have raised no new arguments. BellSouth's proposal is reasonable, and its language should be used in the parties' interconnection agreement. Remedies which may be sought through a complaint from a Joint Petitioner against BellSouth remain available to the Joint Petitioners.

ISSUE 5: WHERE A PARTY DOES NOT INCLUDE SPECIFIC LIMITATION OF LIABILITY TERMS IN ITS TARIFFS AND CONTRACTS, SHOULD IT BE OBLIGATED TO INDEMNIFY THE OTHER PARTY FOR LIABILITIES NOT LIMITED?

The Joint Petitioners ask the Commission to reconsider its determination that the provision in the current interconnection agreement that requires limitation of liability from customers should likewise be in the new agreement. The Joint Petitioners, however, present no new arguments as to why they should not be required to limit liability in their relationship with their end-users and, thus, limit the exposure to which BellSouth would be subject. BellSouth asserts that it is merely seeking to have the Joint Petitioners bear the risk of loss arising from their business decisions not to limit the liability of their customers. The Joint Petitioners argue that they should not be so limited in their negotiations with customers over contract language. BellSouth asserts that it does not use the limitation-of-liability term as a negotiation point in dealing with its own end-users, and, therefore, it is not seeking to hold the Joint Petitioners to any higher standard than that to which BellSouth holds itself.

The Commission finds that the interconnection agreement between the parties must contain the same provision as in its current agreement. The Joint Petitioners and BellSouth must both be subject to the same standard. If the Joint Petitioners become

aware that BellSouth is not including this limitation-of-liability language in its agreements with customers, the Joint Petitioners are free to petition this Commission for redress.

ISSUE 6: HOW SHOULD INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES BE DEFINED FOR PURPOSES OF THE AGREEMENT?

The Commission initially found it unnecessary to insert into the agreement the Joint Petitioners' proposed language regarding damages to end-users which result from a party's performance. The Joint Petitioners requested rehearing but pointed to no error.

Neither party may affect the rights of a third-party end-user through this interconnection agreement. Accordingly, interested persons who may be affected by the way in which indirect, incidental, or consequential damages are defined may seek redress in courts of general jurisdiction. The language proposed by BellSouth for inclusion in the interconnection agreement should be adopted.

ISSUE 7: WHAT SHOULD THE INDEMNIFICATION OBLIGATIONS OF THE PARTIES BE UNDER THIS AGREEMENT?

Joint Petitioners ask that the Commission reconsider its decision to adopt BellSouth's language regarding indemnification obligations. After review of all arguments presented on rehearing, the Commission finds that reconsideration should be granted. BellSouth, as the providing party, should indemnify the Joint Petitioners as the receiving parties to the extent they become liable due to BellSouth's negligence, gross negligence, or willful misconduct Thus, the Commission finds that the Joint Petitioners' proposal is a commercially reasonable one to the extent that it covers indemnification for negligence, gross negligence, or willful misconduct. The

Commission accordingly reconsiders its earlier decision and holds that the Joint Petitioners should prevail to the extent described herein.

ISSUE 9: SHOULD A COURT OF LAW BE INCLUDED IN THE VENUES AVAILABLE FOR INITIAL DISPUTE RESOLUTION FOR DISPUTES RELATING TO THE INTERPRETATION OR IMPLEMENTATION OF THE INTERCONNECTION AGREEMENT?

The Joint Petitioners ask the Commission to reconsider its determination that disputes arising under interconnection agreements must be brought to this Commission before they proceed to a court of general jurisdiction. The Commission has primary jurisdiction over issues regarding the interpretation and implementation of interconnection agreements. See Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 642 (U.S.S.C. 2002) and BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F.3d 1270, 1275 (11th Cir. 2003). BellSouth contends that the Commission should not reconsider its determination because the Commission should resolve disputes between parties that relate to matters normally considered to be within the expertise of the state commission. BellSouth asserts that for matters that lie outside of such regulatory expertise, parties may seek redress in courts of general jurisdiction. The Commission certainly has not attempted, in reaching this outcome, to deprive courts of matters within their jurisdiction. Matters over which this Commission has jurisdiction in the first instance should be addressed by this Commission. The Commission herein denies reconsideration of this issue. The parties should include BellSouth's language in their interconnection agreements.

ISSUE 12: SHOULD THE AGREEMENT STATE THAT ALL EXISTING STATE AND FEDERAL LAWS, RULES, REGULATIONS, AND DECISIONS APPLY UNLESS OTHERWISE SPECIFICALLY AGREED TO BY THE PARTIES?

The Joint Petitioners seek reconsideration regarding the inclusion of an "applicable law" provision in the interconnection agreement. The Joint Petitioners ask that their interconnection agreement with BellSouth state specifically that all existing laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the parties. BellSouth counters that such a contract term would result in issues being part of the written contract when there had never been any meeting of the minds regarding their applicability.

Despite agreeing with much of the Commission's initial decision, the Joint Petitioners assert that the Commission erred in adopting BellSouth's language. The Joint Petitioners have not addressed the Commission's concern that adoption of their proposal would result in one party's interpretation of applicable law being deemed incorporated into the contract without the other party having an opportunity to dispute its application. The Commission is not persuaded that it should change its original decision. Since it is paramount that both parties agree that applicable law should be followed, an actual meeting of the minds should occur regarding contract terms. When disputes arise, they may be submitted to the Commission for determination regarding the parties' obligations.

ISSUE 26: SHOULD BELLSOUTH BE REQUIRED TO COMMINGLE UNEs OR COMBINATIONS WITH ANY SERVICE, NETWORK ELEMENT, OR OTHER OFFERING THAT IT IS OBLIGATED TO MAKE AVAILABLE PURSUANT TO SECTION 271 OF THE ACT?

BellSouth seeks rehearing of the Commission's determination that BellSouth is required to "commingle" unbundled network elements ("UNEs") or combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to 47 U.S.C. § 271. The Joint Petitioners oppose reconsideration.

47 C.F.R. §§ 51.309(e) and (f) form the basis of the Commission's decision. Rule 51.309(e) states that "an incumbent LEC [local exchange carrier] shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC." Rule 51.309(f) provides that "upon request an incumbent shall perform the functions necessary to commingle [a UNE or UNE combinations] with one or more facilities or services obtained at wholesale from an incumbent." The question to be decided is whether a Section 271 obligation is a facility or service that is obtained at wholesale from an incumbent.

47 U.S.C. § 271(c)(2) lists the access and interconnection requirements which BellSouth had to fulfill in order to be granted entrance into the in-region interLATA market. The question presented by these parties seeking arbitration is whether those access obligations (i.e., the competitive checklist) constitute an ongoing obligation on BellSouth's part relating to availability of commingled wholesale services. The Joint Petitioners have asserted that BellSouth has an obligation to commingle elements which it is obligated to provide pursuant to Section 271 with other elements.

In the Triennial Review Order,[2] the Federal Communications Commission ("FCC") defined "commingling" as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC ["ILEC"] pursuant to any other method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[3] The Joint Petitioners seek to link UNEs or combinations of UNEs with local switching (checklist item 6). BellSouth asserts that, since local switching is no longer a UNE and is not a wholesale service, it has no obligation to commingle switching with elements otherwise required to be provided.

For reasons delineated herein, the Commission affirms its determination that Section 271 offerings constitute wholesale services within the meaning of the commingling rule. Accordingly, BellSouth remains obligated to make these Section 271 elements available to the Joint Petitioners on a commingled basis with Section 251 UNEs. While the Commission has carefully considered each of the arguments made by BellSouth on reconsideration, none of them are persuasive from a legal or a policy perspective.

BellSouth argues that Section 271 elements are not wholesale services. However, it can produce no law or order which reaches this same conclusion. The FCC has repeatedly framed the issue of commingling as that which "a requesting carrier has

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[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) ("Triennial Review Order" or "TRO").

[3] TRO at ¶ 579.

obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c) (3) of the Act."[4]

BellSouth argues that in the TRO Errata order, the FCC eliminated certain phrases from the TRO. Originally, the FCC required that "incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act."[5] In the TRO Errata order, the FCC changed the sentence to eliminate the phrase "any network element unbundled pursuant to Section 271."[6] Although BellSouth argues that this deletion is dispositive, the Commission disagrees. This portion of the TRO addresses ILECs' resale obligations only. Network element unbundling was irrelevant to resale and thus was eliminated from this paragraph.

The TRO does address unbundling regarding Section 271 obligations. The TRO Errata order also deleted footnote 1990 from the section of the TRO addressing Section 271 issues.[7] The deleted sentence is: "We also decline to apply our commingling rule, set forth in part VII.A. above, to services that must be offered pursuant to these checklist items." The footnote was attached to Paragraph 655 of the TRO, which states, "As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis." The deletion of

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[4] TRO at ¶ 579.

[5] TRO at ¶ 584.

[6] TRO Errata at ¶ 27.

[7] TRO Errata at ¶ 31.

footnote 1990 supports this Commission's determination that the FCC did not specify that Section 271 elements are not to be commingled with Section 251 elements. Without the TRO Errata order, the FCC would have declined to require this commingling obligation, but with the removal of this language, the FCC intended to continue to enforce the requirement that BOCs must commingle Section 251 elements with Section 271 elements.[8]

If the FCC's intent was that commingling obligations for wholesale service only referred to switched and special access tariffed services, it would not have used the language regarding wholesale obligations pursuant to Section 271. The FCC stresses that the commingling definition refers to any service obtained at wholesale by a method other than unbundling under Section 251.

The Commission's initial decision requiring BellSouth to commingle UNEs or combinations of UNEs with any element that competitive carriers receive at wholesale, including Section 271 elements, is affirmed. BellSouth cannot point to any law relieving it of its obligation to provide Section 271 elements at wholesale and commingling them pursuant to 47 C.F.R. § 51.309(e). The FCC nowhere prohibits the commingling of Section 271 elements. The FCC, instead, requires commingling with any element obtained through wholesale. The FCC does list tariffed services as examples of these elements but nowhere states that only tariffed services are available for commingling.

[8] Despite BellSouth's contention that Section 271 elements are not wholesale obligations, the FCC in an Opinion and Order issued December 2, 2005, repeatedly uses the term "Section 271(c) wholesale obligations" and makes reference to "wholesale access to loops, transport and switching" pursuant to checklist items 4-6 as independent and ongoing obligations for BOCs, Qwest Communications International Inc.'s Petition for Forbearance under 47 U.S.C. § 160(c), at ¶¶ 68, 100, 103, and 105.

The very purpose of Section 271, which is to require BellSouth to provide access to local switching, local transport, and local loops, would be undermined by such a prohibition on commingling these elements with UNEs. Section 271 exists to require access to, and facilitate the competitive use of, these elements. Restricting commingling would undermine this competitive policy. Moreover, the network facilities used by BellSouth to provide access to its competitors pursuant to Section 271 are located within this Commonwealth and are used to provide in-state or intra-state service, and, as such, the Commission has jurisdiction over those facilities and services. Nothing in Section 271 or in any FCC order deprives the state commission of jurisdiction over the elements required to have been met as a condition of entry into the in-region long-distance market. The FCC has set pricing standards for Section 271 elements. The standard is just, reasonable, and nondiscriminatory rates.

BellSouth also argues that the matter of federal-only jurisdiction over Section 271 elements has been settled in Kentucky by BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al., Civil Action No. 3:05-CV-16-JMH (Apr. 22, 2005). That opinion states that "the enforcement authority for Section 271 unbundling duties lies with the FCC and must be challenged there first." This language of the Court properly notes that determining whether BellSouth should continue to be in the long-distance market or is acting in a manner such that it should be deprived of access to the long-distance market is squarely with the FCC's jurisdiction. The Court's order does not specify that the state commission has no authority over elements of BellSouth's obligations to its competitors and how those elements are to be priced. The Joint Petitioners are not asking that BellSouth be again excluded from the long-distance

market. If the Joint Petitioners were so asking, then this matter should be presented to the FCC rather than this state commission. The matters requested by the Joint Petitioners are appropriately contained in interconnection agreements and appropriately decided by this Commission.

Accordingly, reconsideration is denied. BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3), including those elements obtained pursuant to Section 271.

ISSUES 36 – 38: HOW SHOULD LINE CONDITIONING BE DEFINED, AND WHAT SHOULD BELLSOUTH'S OBLIGATIONS BE WITH RESPECT TO LINE CONDITIONING? SHOULD THE AGREEMENT CONTAIN SPECIFIC PROVISIONS LIMITING THE AVAILABILITY OF LINE CONDITIONING TO COPPER LOOPS OF 18,000 FEET OR LESS? UNDER WHAT RATES, TERMS, AND CONDITIONS SHOULD BELLSOUTH BE REQUIRED TO PERFORM LINE CONDITIONING TO REMOVE BRIDGED TAPS?

These three issues relate to line conditioning. The parties disagree over how line conditioning should be defined, what BellSouth's obligations are with respect to it, whether line conditioning should be limited to copper loops of 18,000 feet or less, and under what terms and rates BellSouth should be required to perform line conditioning to remove bridged taps. The Joint Petitioners assert that line conditioning should be defined by FCC Rule 51.319(a)(i)(III)(A). According to Joint Petitioners, line conditioning is a 47 U.S.C. § 251(c)(3) obligation which was expanded, not eliminated, by the TRO. The TRO states that "loop conditioning is intrinsically linked to the local loop and included within the definition of loop network element."[9] Moreover, the FCC

[9] TRO at ¶ 643.

indicates that "line conditioning does not constitute the creation of a superior network."[10] Instead, loop conditioning enables a requesting carrier to use the basic loop.[11]

BellSouth, on the other hand, asserts that it is obligated to perform line conditioning only on the same terms and conditions that it performs line conditioning to its own customers. In support of its views, BellSouth quotes the FCC to require "incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves."[12] The Commission found that line conditioning is a routine network modification, not the creation of a superior network. As such, BellSouth was ordered to provide line conditioning when requested by the Joint Petitioners as specified in 47 C.F.R. § 51.319(a).

Similarly, BellSouth asks that the interconnection agreements limit the availability of line conditioning to copper loops of 18,000 feet or less. According to BellSouth, BellSouth has no obligation to remove load coils on loops in excess of 18,000 feet at total element long line incremental cost ("TELRIC") for the Joint Petitioners because BellSouth does not remove load coils on such long loops for its own customers. BellSouth asserts that, if it is requested to remove load coils on loops in excess of 18,000 feet, it would do so pursuant to special construction charges contained in its tariff. Despite indicating it does not remove load coils on loops in excess of 18,000 feet, BellSouth testified that it routinely removed load coils on such loops in order to provide

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[10] Id.

[11] UNE Remand Order, 15 CC Record at 3775, ¶ 173.

[12] TRO at ¶ 643.

T1 circuits.[13] Based on the provision of load coil removal for such long loops for the provision of T1 circuits and based on BellSouth's assertion that it seeks to provide its services at parity, the Commission found that, when requested by the Joint Petitioners, BellSouth should remove load coils on loops in excess of 18,000 feet at the existing TELRIC rates.

Finally, the Joint Petitioners propose that BellSouth perform line conditioning, including the removal of bridged taps at TELRIC rates. The Joint Petitioners, on the other hand, argue that BellSouth's attempt to assess tariffed rates for the removal of bridged taps beyond the combined level of 2,500 feet is contrary to federal law. According to the Joint Petitioners, pursuant to FCC Rule 51.319(a)(1)(III), BellSouth is required to perform line conditioning, including the removal of bridged taps at TELRIC rates. BellSouth contended that the removal of bridged taps is not required to preserve non-discrimination obligations. BellSouth asserts that line conditioning at TELRIC rates, including the removal of bridged taps, is only required to the extent that BellSouth provides such functions to itself. BellSouth does not routinely remove bridged taps that result in a combined level of less than 2,500 feet for its own customers; and, thus, according to BellSouth, such a request results in providing CLECs with a "superior network."

The Commission found that the removal of bridged taps should be performed at TELRIC rates. The fact that BellSouth utilizes loops that contain greater combined levels of bridged tap links is immaterial to the capability being sought by the Joint Petitioners. TELRIC rates, by definition, recover the incremental costs plus a profit for

[13] Transcript of Evidence at 248.

the function being performed. Therefore, BellSouth should be adequately compensated by these rates or these functions. Moreover, BellSouth offered no evidence to support its position that generic special construction rates were appropriate.

BellSouth has sought rehearing of these matters. However, after careful review of the parties' filings and arguments presented, the Commission affirms its earlier decisions. The Commission focused on the parity of the functionality which BellSouth provides to competitors with the functionality that BellSouth provides to itself. The Commission did not focus on the parity of the actual service rendered by BellSouth to its competitors. Thus, whether BellSouth provides line conditioning to copper loops greater than 18,000 feet for itself is not the focus, but rather whether BellSouth appropriately conditions copper loops in order to be able to provide service that its customers request. BellSouth routinely removes load coils and routinely terminates bridged taps for itself. Accordingly, the Commission appropriately determined that BellSouth must provide these functions for competitors as well.

The Commission's decision also focused on whether the modification to the network sought by the Joint Petitioners "is of the sort that the ILEC routinely performs, on demand, for its own customers." United States Telecom Ass'n v. FCC, 359 F.3d 554, 578 (D.C. Cir. 2004). The Commission appropriately focused on the functionality that BellSouth provides to its customers, rather than any specific service or specific condition of that functionality. The line conditioning obligations of BellSouth were not altered by the TRO, nor were the line conditioning rules or the routine network

modification rules altered by the Triennial Review Remand Order.[14] Thus, the Commission will not alter its initial determinations. Language proposed by the Joint Petitioners for these three issues should be incorporated into the parties' interconnection agreements.

ISSUE 51: SHOULD THERE BE A NOTICE REQUIREMENT FOR BELLSOUTH TO CONDUCT AN AUDIT AND WHO SHOULD CONDUCT THE AUDIT?

In its September 26, 2005 decision, the Commission declined to address matters relating to the appropriate notice requirement for BellSouth to conduct an audit of Enhanced Extended Links ("EELs"), who should conduct such an audit, and how it should be conducted. As the Commission noted, NuVox Communications, Inc. ("NuVox") (one of the Joint Petitioners), BellSouth, and the Commission were involved in litigation which was pending at the time of the Commission's Order.[15] However, on November 1, 2005, the Court entered its Memorandum Opinion and Order. The Court upheld the Commission's determination that BellSouth had complied with its interconnection agreement regarding audit conditions, that BellSouth had demonstrated its concern by asserting that BellSouth remained the local service provider for 15 of NuVox's EELs, and that BellSouth had professed by affidavit the independence of its chosen auditor. The Court went on to determine that NuVox could point to no violation

[14] FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005).

[15] NuVox Communications, Inc. v. BellSouth Telecommunications, Inc.; Kentucky Public Service Commission; Mark David Goss, in his official capacity as Chairman of the Kentucky Commission; and W. Gregory Coker, in his official capacity as Commissioner of the Kentucky Commission, Civil Action No. 05-cv-41-JMH, United States District Court, Eastern District of Kentucky.

of its agreement or any FCC order to support its contention that the Commission should have required BellSouth to provide more evidence of its concern and should have undertaken greater efforts to ensure that BellSouth's auditor was independent.

The determinations of the Court guide the Commission's decision herein. BellSouth need only state that it has concern and give reasons why it has concern. It is unnecessary for BellSouth to provide actual documentation of that concern prior to initiating an audit. The CLEC may object to the audit after it has been performed but may not prevent its initiation once BellSouth asserts that it has adequate documentation to support an audit. BellSouth must merely state its cause for conducting the audit, but need not further justify the matter to the CLEC. BellSouth has a right to audit EELs to verify a CLEC's compliance with the significant local usage requirements pursuant to FCC order. Once BellSouth notifies a CLEC of its concern over the appropriate usage of the EELs, the CLEC should not be permitted to interfere with BellSouth's right to conduct the audit before the audit ever occurs. The audit should be limited to those circuits over which BellSouth initially raised concern. The findings of the audit, if disputed, probably will have to be addressed by the Commission. At that point, if the parties cannot agree, the Commission can determine the next appropriate steps to address additional concerns which may surface during the audit. Language incorporating the Commission's determinations should be included in the parties' interconnection agreements.

ISSUE 65: SHOULD BELLSOUTH BE ALLOWED TO CHARGE A CLEC A TRANSIT INTERMEDIARY CHARGE FOR THE TRANSPORT AND TERMINATION OF LOCAL TRANSIT TRAFFIC AND ISP-BOUND TRANSIT TRAFFIC?

BellSouth has sought rehearing of the Commission's determination that the Commission has not been precluded by the FCC from requiring BellSouth to transit traffic under the circumstances requested by the Joint Petitioners. BellSouth contends that it should be authorized to assess Joint Petitioners a transit intermediary charge ("TIC") for transiting traffic in addition to the TELRIC tandem switching and common transport charges that the parties have already agreed will apply. However, BellSouth asserts that it does not have a duty to provide this transit service at TELRIC rates. According to BellSouth, the Joint Petitioners have the option of directly interconnecting with terminating carriers instead of utilizing BellSouth's transit function.[16] BellSouth asserts that it is only obligated to negotiate and arbitrate issues contained in Section 251(b) and (c) and that transit traffic is not so included.

The Joint Petitioners assert that BellSouth has failed to justify the additional TIC rate and, as such, they should be required to pay only amounts previously agreed upon.

The Commission does not find BellSouth's arguments for rehearing to be persuasive. BellSouth has not demonstrated that the Commission is precluded by the FCC from requiring BellSouth to transit traffic. The Commission has previously required third-party transiting by the ILEC based on efficient network use. The Commission will continue to require BellSouth to transit such traffic. Transiting traffic in the

[16] Transcript of Evidence at 141.

circumstances requested by the Joint Petitioners is essential to the provision of service to rural Kentucky.

BellSouth contends that the FCC has recently determined that "Section 251(a)(1) does not address pricing" and, thus, the FCC is seeking comment on appropriate pricing methodologies to apply to transit services.[17] It may be that, during the course of this FCC proceeding, additional light will be shed on appropriate pricing for transit services. However, based on the Commission's previous determinations regarding third-party transiting, and because transiting uses intra-state facilities to provide an intra-state service, the Commission finds that it has jurisdiction over these matters until and unless the FCC specifically preempts the state commission. Accordingly, the Commission's determination is clarified to require BellSouth to provide this transit service at a TELRIC-based rate unless an additional TIC can be justified by BellSouth.

ISSUE 86: HOW SHOULD DISPUTES OVER ALLEGED UNAUTHORIZED ACCESS TO CSR INFORMATION BE HANDLED UNDER THE AGREEMENT?

Regarding how to address disputes over alleged unauthorized access to customer service record ("CSR") information, the Commission determined that BellSouth must seek enforcement of the Joint Petitioners' obligations by filing a complaint with the Commission rather than by discontinuance of access to the CSR information and suspension of service. BellSouth asserts that the Commission misunderstood its position and, thus, did not address this matter correctly. According to BellSouth, the parties agree that disputes regarding unauthorized use of CSR

[17] See In Re Matter of Developing a Unified Intercarrier Compensation Regime, FCC 05-33, CC Docket No. 01-92 at ¶ 132, quoted by BellSouth in a letter filed December 8, 2005.

information must be handled in accordance with the interconnection agreements' dispute resolution provision. However, the Joint Petitioners assert that BellSouth inappropriately fails to include in its agreement the provision that BellSouth will not suspend or terminate service during a dispute regarding access to CSR information. The Commission found that, due to the potential competitive harm which could be realized by discontinuance of access to this CSR information and suspension of service, BellSouth should not be permitted to discontinue without first filing a complaint with the Commission. The Commission affirms this determination and herein requires that BellSouth include language to this effect in its interconnection agreements with the Joint Petitioners. BellSouth has provided no reason why it should be permitted to discontinue access to the CSR information when a legitimate dispute about its use exists between the parties.

ISSUE 88: WHAT RATE SHOULD APPLY FOR SERVICE DATE ADVANCEMENT (A/K/A SERVICE EXPEDITES)?

In addressing what rate should apply for service date advancements (i.e., service expedites), the Commission determined that expedited service was not a Section 251 obligation. The Joint Petitioners contend that expedited service must be provided at TELRIC pricing. BellSouth, on the other hand, argues that the tariffed rate for the service date advancement should apply because BellSouth is not required to expedite service pursuant to the Telecommunications Act. The Joint Petitioners contend that expedited service is part and parcel of UNE provisioning. The Commission disagrees. Standard provisioning intervals for service are required pursuant to Section 251. BellSouth should also provide non-discriminatory access to expedited service, but

expedited service is not a Section 251 obligation. Accordingly, BellSouth's language regarding this issue should be included in the interconnection agreements.

ISSUE 97: WHEN SHOULD PAYMENT OF CHARGES FOR SERVICE BE DUE?

The Joint Petitioners have asked the Commission to reconsider its determination regarding when payment of charges for service should be due. The Joint Petitioners asked for 30 calendar days from receipt of a bill or from the Web posting of a bill, or 30 calendar days from receipt of a corrected or resubmitted bill, before payment would be due. BellSouth counters that payment should be due on or before the next bill date. Though Joint Petitioners have been able to comply with the existing standard,[18] they assert that BellSouth often takes an average of 7 days to deliver bills. BellSouth asserts that the most recently available data shows that it takes 3 or 4 days to deliver its bills.

Given the Joint Petitioners' arguments regarding their difficulties in complying with BellSouth's designated bill due dates, the Commission reconsiders its determination for this issue. In appropriately balancing the issues of timely payment to BellSouth and adequate time to render payment for the Joint Petitioners, the Commission finds that the Joint Petitioners should be permitted 30 calendar days from the issuance of BellSouth's bills before the bills are due. As the Joint Petitioners assert, BellSouth does not dispute that these bills are voluminous and require resources to be dedicated by the Joint Petitioners in order to timely pay them. Accordingly, interconnection agreements between BellSouth and the Joint Petitioners should include language stating that payments for charges for service rendered are due 30 calendar

[18] Transcript of Evidence at 175.

days after BellSouth's issuance of the bills. Issuance should be determined by either the bill's postmark or the Web site posting date.

ISSUE 100: SHOULD CLECS BE REQUIRED TO PAY PAST-DUE AMOUNTS IN ADDITION TO THOSE SPECIFIED IN BELLSOUTH'S NOTICE OF SUSPENSION OR TERMINATION FOR NONPAYMENT IN ORDER TO AVOID SUSPENSION OR TERMINATION?

BellSouth has asked for rehearing of this matter. The dispute between the parties arose from circumstances in which BellSouth calculated a specific past-due amount which it included in an official notice of suspension or termination for non-payment. This same notice also included general language saying that the amount appearing on the notice must be paid and any additional amount that may become past-due on the account in question and all other accounts in order to avoid service termination. The Joint Petitioners argued, and the Commission agreed, that it was inappropriate that the Joint Petitioners' service would be suspended when, in fact, they had paid the exact amount identified in BellSouth's written notice.

BellSouth has presented no new evidence which would cause the Commission to alter its determination. BellSouth must calculate the exact amount due and the date by which the amount must be received in order to avoid suspension of service. If additional past-due amounts accrue, then BellSouth should send a written notice to the CLECs specifying such additional amounts.

ISSUE 101: HOW MANY MONTHS OF BILLING SHOULD BE USED TO DETERMINE THE MAXIMUM AMOUNT OF THE DEPOSIT?

BellSouth has asked for rehearing of the Commission's determination that the maximum deposit should not exceed 1 month's billing for services billed in advance and

2 months' billing for services billed in arrears. BellSouth contends that, even though it had agreed to this maximum deposit amount, it did not dispute the deposit because of other, more stringent terms in that interconnection agreement. However, the basis of the Commission's decision was not merely that BellSouth had agreed to a similar deposit with another carrier. The Commission has looked at the filings of the Joint Petitioners and, weighing the balance, believes that its initial determination for a maximum deposit not to exceed 1 month's billing for services billed in advance and 2 months' billing for services billed in arrears is an appropriate outcome for this arbitration proceeding. The parties have provided, in their petitions for rehearing and responses thereto, differing interpretations of the Commission's determination that BellSouth has a right to request an additional deposit from a Joint Petitioner who fails to meet its payment obligations. Accordingly, the Commission herein clarifies failure to meet payment obligations to mean a failure to timely pay current bills. If the Joint Petitioners fail to timely pay their current bills, BellSouth may recalculate the deposit.

ISSUE 102: SHOULD THE AMOUNT OF THE DEPOSIT BELLSOUTH REQUIRES FROM CLECS BE REDUCED BY PAST-DUE AMOUNTS OWED BY BELLSOUTH TO CLECS?

The Joint Petitioners seek rehearing of the Commission's determination that the issue of the amount owed by a CLEC to BellSouth and the issue of the amount owed by BellSouth to a CLEC are distinct issues. Additionally, the Commission approved BellSouth's proposal that, in the event a deposit is requested of a CLEC, the deposit will be reduced by an amount equal to the undisputed past-due amounts, if any, that BellSouth owes the CLEC. The Joint Petitioners' request for rehearing presents nothing that has not already been considered by the Commission. Accordingly, the original

determination is affirmed. BellSouth's language shall be included in the parties' interconnection agreements.

ISSUE 103: SHOULD BELLSOUTH BE ENTITLED TO TERMINATE SERVICE TO A CLEC IF THE CLEC REFUSES TO REMIT ANY DEPOSIT REQUIRED BY BELLSOUTH WITHIN 30 CALENDAR DAYS?

BellSouth seeks rehearing of the Commission's determination that BellSouth should not be permitted to terminate a CLEC's services when the CLEC has met all of its financial obligations to BellSouth, with the exception of the demand for a deposit. The Commission determined that it is inappropriate for BellSouth to terminate service when a Joint Petitioner has paid all bills except for the request for a deposit. When such disputes arise between BellSouth and a Joint Petitioner, the dispute resolution provision should be invoked.

BellSouth has presented no basis for reconsideration of this decision. If a CLEC refuses to remit any deposit required by BellSouth within 30 calendar days, then either party may seek to resolve the dispute through dispute resolution provisions. The rehearing request presents no new information that has not been previously considered by the Commission. Accordingly, the parties' interconnection agreements shall include the contract language proposed by the Joint Petitioners for this issue.

The Commission HEREBY ORDERS that:

1. The Commission's September 26, 2005 Order is clarified as specified herein.

2. The parties herein shall file their interconnection agreements no later than 30 days from the date of this Order, incorporating the decisions reached herein.

Done at Frankfort, Kentucky, this 14th day of March, 2006.

By the Commission

ATTEST:

Executive Director

EXHIBIT "B"

Georgia Public Service Commission

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Docket No. 19341-U

In Re: **Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc's. Obligations to Provide Unbundled Network Elements**

ORDER ON REMAINING ISSUES

I. Statement of Proceedings

A. Jurisdiction

This proceeding was initiated by the Georgia Public Service Commission ("Commission") to amend parties' interconnection agreements consistent with the Federal Communications Commission's ("FCC") *Triennial Review Order*[1] and *Triennial Review Remand Order*[2]. Under the Federal Telecommunications Act of 1996 (Federal Act), state commissions are also authorized to set terms and conditions for interconnection and access to unbundled elements pursuant to Sections 251 and 252 of the Federal Act. Section 271 compliance is necessary for a regional Bell Operating Company ("BOC") to establish or maintain the right to provide interLATA long distance services. In order to comply with the requirements of Section 271, a BOC must provide access and interconnection pursuant to at least one Section 252 interconnection agreement or be offering access and interconnection pursuant to a Statement of Generally Accepted Terms. 47 U.S.C. § 271(c)(2)(A)(i). In addition, Section 271 requires that the BOC provide access to unbundled network elements ("UNEs") on the competitive checklist set forth within the statute at just and reasonable rates. 47 U.S.C. § 271(c)(2)(B)(i). The Section 271 competitive checklist items (i) and (ii) make explicit reference to compliance with provisions in Sections 251 and 252. Therefore, the Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271. As such, it is logical to

[1] 18 FCC Rcd 16978, 17145, *corrected by Errata,* 18 FCC Rcd 19020, *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"), cert. denied,* 125 S. Ct. 313 (2004) (*"TRO").*

[2] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005) *("TRRO").*

conclude that obligations under Section 271 must be included in a Section 252 interconnection agreement.

In addition to its jurisdiction of this matter pursuant to the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

B. Proceedings

The Commission initiated this docket on August 24, 2004. In its June 30, 2005 Procedural and Scheduling Order, the Commission directed the parties to submit a Joint Issues List. The Commission approved the Joint Issues List submitted by BellSouth Telecommunications, Inc. ("BellSouth") and Competitive Carriers of the South ("CompSouth")[3] along with the issues added by Digital Agent, LLC. (Order on Motion to Move Issues into Generic Proceeding, p. 2).

On July 19, 2005, in accordance with the Procedural and Scheduling Order, direct testimony was pre-filed with the Commission by BellSouth, CompSouth, US LEC of Georgia, Inc., Cbeyond Communications, LLC ("Cbeyond") and Sprint Communications Company LP ("Sprint"). BellSouth, CompSouth, Sprint, Cbeyond, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and XO Communications Services filed rebuttal testimony with the Commission on August 9, 2005. Hearings were held before the Commission on August 30 through September 1, 2005. BellSouth, CompSouth, Sprint and Cbeyond filed briefs with the Commission on October 21, 2005.

In its January 20, 2006 Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271, the Commission concluded that it had jurisdiction to set just and reasonable rates for delisted unbundled network elements under Section 271 of the Federal Telecommunications Act of 1996. However, the Commission held the remaining unresolved issues to be resolved at a subsequent Administrative Session.

The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS AND CONCLUSIONS

A. Summary

The Commission sets forth the following summary of its findings and conclusions on the remaining issues. The analysis for these conclusions, along with the positions advanced by the parties, is detailed in a subsequent section of this order. Given the nature of a summary, it may

[3] CompSouth is an association of Competitive Local Exchange Carriers.

not address each finding and conclusion included in the more detailed discussion. This does not indicate that the finding or conclusion in question is not a determination by this Commission and binding on the parties subject to this Order.

Issue 2: TRRO Transition Plan – What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?

(1) BellSouth has argued that state commissions do not have the authority to require it to offer de-listed UNEs at rates terms and conditions found just and reasonable under Section 271. The Commission has already concluded that it does have such authority.

(2) Competitive Local Exchange Carriers ("CLECs") have until March 11, 2006 to order conversions from BellSouth. To the extent that it takes BellSouth beyond March 11 to process these orders, BellSouth is entitled to a true-up of the difference between the TELRIC[4] rate and the rate BellSouth may charge after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

(3) Parties are required to negotiate appropriate transition mechanisms through the Section 252 process for high-capacity loops for which the FCC found impairment in the *TRRO,* but which may meet the thresholds for non-impairment in the future.

Issue 3: Modification and Implementation of Interconnection Agreement Language – (a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

(1) Parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

(2) The Commission adopts CompSouth's position to limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO.*

(3) The Commission adopts BellSouth's position and finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise.

(4) The Commission adopts BellSouth's position and concludes that the Abeyance Agreement does not excuse Cbeyond from implementing the *TRRO* until the parties have a new interconnection agreement.

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[4] Total Element Long Run Incremental Cost

Issue 4: High Capacity Loops and Dedicated Transport – What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined: (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

(1) Business Line Count: For the counting of business lines, the Commission agrees with BellSouth that the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops. The Commission counts DS1 lines as 24 business lines, provided that those DS1 lines in which all 24 channels are empty shall not be counted at all towards the business line count.

(2) Fiber-Based Collocators: The Commission does not accept CompSouth's proposed language to include planned mergers in the definition of fiber-based collocators. The date certain for counting fiber-based collocators will be the effective date of this Commission's order addressing this issue, and not, as BellSouth proposes, the date the FCC rule became effective.

(3) Building: The Commission adopts CompSouth's "reasonable telecom person" standard for the term "building."

(4) Routes: The Commission adopts BellSouth's definition of route.

Issue 5: TRRO/FINAL RULES:
a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?
b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?
c) What language should be included in agreements to reflect the procedures identified in (b)?

The Commission will allow BellSouth to designate future wire centers on an annual basis. The Commission will monitor how this process works and make necessary and appropriate changes moving forward.

Issue 6: HDSL Capable Copper Loops: -- Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

The Commission adopts BellSouth's position and determines that HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment.

Issue 9 – What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?

Based on the District Court Order granting BellSouth's preliminary injunction, the Commission adopts BellSouth's position and concludes that a CLEC may not use facilities that have already been provided to serve existing customers who move to a new location and that the transition period does not apply to moving, adding or changing orders.

Issue 10 – Transition of Delisted Network Elements To Which No Specified Transition Period Applies – What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

(1) To the extent that resolution of this issue involves other issues in this proceeding, the Commission acts consistently with its positions on those other issues.

(2) The Commission adopts a transition period of 30 days for CLECs to submit orders to convert UNE-Platform ("UNE-P") prior to BellSouth being permitted to disconnect or convert circuits and 60 days for everything else.

(3) The Commission adopts a Subsequent Transition Plan, which applies to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards, of 120 days, which is a compromise between the parties' positions on this issue.

(4) Finally, the Commission adopts CompSouth's position and obligates BellSouth to provide actual written notice to the point of contact in the parties' interconnection agreements. If a party does not have a point of contact identified in the agreement, then posting constructive notice on the website should be deemed acceptable.

Issue 11 - UNEs That Are Not Converted – What rates, terms and condition if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?

(1) In the context of Issue 2, the Commission found that CLECs have until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that are not completed until after March 11, 2006. For conversions that are completed prior to March 10, 2006, the Commission orders BellSouth to true-up the difference.

(2) The Commission has decided to set rates based on the just and reasonable standard in Section 271. Those will be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to convert CLECs' UNE-P arrangements to the resale rate beginning March 11, 2006, unless parties agree to alternative arrangements or are otherwise ordered by the Commission.

(3) The Commission concludes that BellSouth should not take any action with regard to wire centers in dispute until such dispute is resolved by the Commission.

Issue 13 – Performance Plan: -- Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

No. The Commission adopts CompSouth's position and finds that performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251 as opposed to covering only the overlap between Section 271 and Section 251.

Issue 14 – Commingling What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)?

The Commission finds, consistent with CompSouth's position, that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. The FCC has not been clear on this issue. To reach the position advocated by BellSouth appears to require changing the meaning of the plain language of an FCC order; whereas the position advocated by the CLECs does not involve the same obstacle. That is, the FCC has stated that the commingling obligation applies to facilities or services obtained at wholesale. It has not stated that Section 271 facilities or services obtained at wholesale are excluded from this obligation.

This action should not be construed as the recreation of UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that this Commission has concluded that it would be prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P.

Issue 15 – TRO Conversions: Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?

The Commission will remand this issue to a Hearing Officer, or to itself, for evidence on the issue of the appropriate conversion rate. In the interim, the Commission adopts a rate of TELRIC plus fifteen percent based on the Commission's determination of TELRIC.

Issue 16 – Pending Conversion Requests: -- What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?

The Commission finds consistent with CompSouth's position that CLECs that submitted legitimate requests to convert wholesale services to UNEs or UNE combinations prior to the effective date of the *TRO* are entitled to UNE pricing as of the date the *TRO* became effective.

Issue 17- Line Sharing: Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

(1) The issue of whether BellSouth is obligated under Section 271 to provide line sharing breaks down to (1) whether line sharing falls under checklist item 4 and (2) whether, if so, the FCC's Forbearance Order relieved BellSouth of this obligation. As to the first issue, the Commission adopts CompSouth's position and concludes that line sharing is a checklist item 4 item. As to the second, individual FCC commissioners issued conflicting statements as to whether its Forbearance Order addressed line sharing. There is more support for the position that it did not address line sharing, but obviously the conflicting statements create ambiguity. Given the Commission's assertion of Section 271 authority, the Commission maintains the status quo by requiring BellSouth to provide line sharing, until the FCC clarifies that it does not have this responsibility.

(2) The Commission's assertion of Section 271 jurisdiction impacts this issue because it means that the Commission finding that line sharing is a checklist item 4 obligation requires BellSouth to provide line sharing as opposed to the determination being purely consultative.

Issue 18: TRO – Line Sharing – Transition: If the answer to the foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Given the Commission's position on Issue 17, this issue is not applicable.

Issue 19 – Line Splitting: -- What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

(1) For the reasons set forth in the Commission's decision on Issue 14, the Commission finds that line splitting can involve the commingling of Section 251 and Section 271 elements.

(2) Consistent with CompSouth's proposal, the Commission concludes that CLECs should indemnify and defend BellSouth against claims made against BellSouth, but that the indemnification language should relate to specific claims.

(3) The Commission will remand this issue for evidence as to the extent of BellSouth's line splitting obligations.

Issue 22 – Call Related Databases: What is the appropriate ICA language, if any, to address access to call related databases?

The Commission asserted Section 271 jurisdiction to set just and reasonable rates. Therefore, the Commission orders that BellSouth is obligated to offer call related databases at just and reasonable rates.

Issue 23 – Greenfield Areas: a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?

a) Pursuant to the FCC's definition, the MPOE is "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. 68.105(b).

b) Based on the *Broadband Forbearance Order,* and consistent with BellSouth's position, the Commission concludes that BellSouth is under no obligation to provide access to greenfield Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops.

Issue 24: TRO – Hybrid Loops – What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

The Commission adopts BellSouth's proposed language because it tracks the following FCC rule:

When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (*where impairment has been found to exist*) on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop. 47 C.F.R. 51.319(a)(2)(ii) *(emphasis added).*

Issue 26: -- What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

(1) The Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

(2) The Commission should order BellSouth to permit inclusion of the CompSouth proposed language on routine network modifications ("RNMs") that mirrors the FCC rule.

Issue 27 – What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

(1) Because the Commission has found that BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

(2) The Commission finds that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

Issue 28 – Fiber to the Home: -- What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?

a) The Commission adopts BellSouth's proposed language as modified below:

Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and

the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will ~~not~~ apply~~, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval~~.

b) Because the FCC rules on fiber to the home/fiber to the curb do not include an exclusion based on impairment analysis, the Commission finds that the FCC's fiber to the home/fiber to the curb rules apply to all central offices. This conclusion rejects CompSouth's apparent position that the fiber to the home/fiber to the curb rules do not apply where impairment was found without access to DS1s or DS3s.

Issue 29 – Enhanced Extended Link ("EEL") Audits: -- What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

(1) The Commission adopts CompSouth's position and finds that it is consistent with the *TRO* to include a requirement that BellSouth have some cause prior to initiating an audit.

(2) The Commission adopts BellSouth's position and does not require BellSouth to obtain the agreement of a CLEC with regard to the auditor.

(3) The Commission adopts BellSouth's position and finds that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. The reimbursement should not be limited to only those circuits for which non-compliance is found.

Issue 31 – Core Forbearance Order: -- What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?

The Commission orders that agreements be amended to remove "new market" and "growth cap" restrictions in BellSouth's ICA reciprocal compensation provisions. BellSouth has not explained how the distinctions between carrier contracts would render such direction problematic.

Issue 32 – Binding Nature of Commission Order: How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?

(1) Consistent with BellSouth's position, the Commission clarifies that its order applies to all certified competitive local exchange carriers.

(2) In the event that parties entered into separate agreements with BellSouth that may impact the implementation of changes of law, the Commission concludes that the parties be bound by those agreements. This issue is also addressed as part of Issue 3.

B. Discussion

Issue 2: TRRO Transition Plan – What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?

Positions of the Parties

BellSouth

The *TRRO* requires CLECs to work cooperatively for an orderly transition. This is evidenced by the requirement that adequate time be allowed to perform "the tasks necessary to an orderly transition." (*TRRO,* ¶¶ 143, 196, 227). Also, BellSouth argues that it is entitled to time in advance of March 10, 2006 so that it may migrate to alternative fiber arrangements. (BellSouth Brief, p. 58). BellSouth adds that there is no basis for transitioning from UNEs to state regulated Section 271 services. *Id.*

With regards to local switching and UNE-P, BellSouth argues that CLECs should be ordered to identify their embedded base via spreadsheets and submit orders as soon as possible or convert or disconnect their embedded base of UNE-P or standalone local switching. (BellSouth Brief, p. 59). BellSouth will then have adequate time to work with CLECs to ensure base elements are identified. If BellSouth is not given adequate time to convert, BellSouth will convert remaining UNE-P lines to the resale equivalent no later than March 11, 2006. *Id.* Remaining stand-alone switch ports will be disconnected. *Id.*

BellSouth states that the Commission is bound by the FCC's rules on transitional rates. (BellSouth Brief, p. 59). 47 CFR 51.319(d)(2)(iii) requires transitional rates of the higher of the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the *TRRO* for that combination of network elements, plus one dollar. TELRIC rates do not apply. *Id.* at 60.

BellSouth urges the Commission to clarify that CLECs may not add new arrangements after March 11, 2005. (BellSouth Brief, p. 61). Any service added after that date must be subject to the appropriate true up. *Id.*

CompSouth

CLECs should be able to transition to Section 271 checklist elements. (CompSouth Brief, p. 6). In support of this position, CompSouth states that all of the major Section 251 UNEs that were de-listed by the *TRRO* must remain available to CLECs under Section 271. *Id.* CompSouth contends that CLECs are entitled to submit conversion orders through March 11, 2005. (CompSouth Brief, p. 7). If it takes BellSouth longer to fulfill those orders, CLECs have no control over that part of the process. *Id.*

Interconnection agreements must include transition provisions for high capacity loops and transport that BellSouth is currently required to provide under Section 251, but may not have

to provide under this statute in the future as a result of growth in either business line counts or fiber-based collocators. (CompSouth Brief, p. 9). The *TRRO* states that when a high capacity loop for which there is currently impairment meets the standards for non-impairment, the FCC "expect[s] ILECs and CLECs to negotiate appropriate transition mechanisms through the section 252 process." *TRRO* ¶ 196, fn. 519.

CompSouth requests that the Commission declare that "BellSouth is obligated to provide for transition of high capacity loops and transport when in the future it is relieved of the obligation to provide them in and between particular wire centers pursuant to Section 251." (CompSouth Brief, p. 10).

Discussion

The first question within this issue pertains to what terms and conditions CLECs may transition to when they must transition away from UNEs. CompSouth argues that the transition should be to Section 271 checklist elements. The Commission has asserted jurisdiction under Section 271 to set just and reasonable rates for de-listed UNEs. The transition plan set forth in the *TRRO* for switching, high capacity loops and dedicated transport should apply during the transition period. After the transition period, the rates ordered by the Commission shall apply subject to the response of the FCC to the Commission's petition.

The second question within this issue pertains to whether there is some point prior to the end of the transition period beyond which CLECs may no longer order conversions. BellSouth states that conversions must be ordered far enough in advance of March 11, 2006, to enable it to process all orders by that date. CompSouth argues that CLECs are allowed to order conversions for the entire year.

The clearest indication of the FCC's intent is in paragraph 227 of the *TRRO* discussing the transition plan for mass market local switching. The FCC states that "We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of the Order." Given that the FCC set an express deadline for the submission of orders, it is not prudent for this Commission to imply an earlier deadline from the FCC's expressed wish for an orderly transition. The FCC could have specified that CLECs must submit their orders by some earlier date to ensure that all customers would be converted as of March 10, 2006. The FCC declined to take such action. Instead, the FCC stated that CLECs have one year from the effective date to submit the necessary orders. In the context of high capacity loops, the FCC states that "At the end of the twelve-month period, requesting carriers must transition all of their affected high-capacity loops to alternative facilities or arrangements." (*TRRO*, ¶196). Because the above quotation references the obligation of the requesting carriers, it must be assumed that the FCC is referencing any actions that the requesting carriers must take, such as ordering a conversion. The CLEC does not control when an incumbent LEC ("ILEC") would act on its order; therefore, this passage cannot be reasonably construed to obligate the CLECs to submit orders prior to the one year anniversary in anticipation of the time necessary for the ILEC to process the order. The language in paragraph 143 of the *TRRO*, with respect to the transition period for dedicated interoffice transport is the same as that for high-capacity loops.

The three factors that need to be reconciled are (1) that CLECs have until twelve months after the effective date of the *TRRO* to order conversions, (2) that ILECs only have to provide unbundled local switching and dedicated loop and transport for twelve months from the effective date of the *TRRO* (see, 47 C.F.R.§ 51.319(d)(iii) and (3) processing the conversions takes time. During the cross-examination of BellSouth witness, Pamela Tipton, by counsel for Cbeyond Communications Company, John Heitman, the concept of a true up was explored.

> Q. (Mr. Heitman) Well, let me ask this, if a CLEC agreed or the Commission ordered that if a conversion wasn't completed by March 10, 2006, that once it was completed after that date, that BellSouth could true up to the rate for that alternative service back to March 11, 2006, would that be acceptable to BellSouth?
>
> A (Ms. Tipton) I mean certainly the Commission has the -- the right to do that.

(Tr. 773). The Commission orders that CLECs have until March 11, 2006 to order conversions from BellSouth. To the extent that it takes BellSouth beyond March 11 to process these orders, BellSouth is entitled to a true up of the difference between the TELRIC rate and the rate BellSouth may charge after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

An additional question within this issue concerns high-capacity loops for which the FCC found impairment in the *TRRO*, but may in the future meet the thresholds for non-impairment. Consistent with footnote 519 of the *TRRO*, the Commission requires the parties to negotiate appropriate transition mechanisms through the Section 252 process.

Issue 3: Modification and Implementation of Interconnection Agreement Language – (a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

Positions of the Parties

BellSouth

BellSouth's arguments on Issue 3 address generally how change-of-law issues should be addressed in interconnection agreements and specifically the impact of abeyance agreements on this process. *TRRO* ¶233 obligates carriers to execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. Therefore, CLECs should be ordered to implement promptly the changes of law that are the subject of this proceeding. (BellSouth Brief, p. 63). For issues that are currently the subject of arbitrations, BellSouth urged the

Commission to address change-of-law issues in this proceeding and apply its conclusions in those arbitrations. This process is more efficient. *Id.*

The Abeyance Agreement between BellSouth and Cbeyond does not excuse Cbeyond from implementing the *TRRO* until the parties have a new arbitration agreement. *Id.* at 64. The parties agreed to hold the arbitration of their new interconnection agreement in abeyance for 90 days in light of the uncertainty of the FCC's unbundling rules. *Id.* The Abeyance Agreement states that the parties "agreed to avoid a separate/second arbitration process of negotiating/arbitrating change-of-law amendments to the current interconnection agreement to address USTA II and its progeny." Tr. 1073; Hyde Direct testimony, at 4.

The Abeyance Agreement does not mention the *TRRO*, and was limited to changes from *USTA II*. Neither the *TRO* nor the *TRRO* are "progeny" of *USTA II*. "Progeny" means "a line of opinions that succeed a leading case." *Black's Law Dictionary.* The *TRO* was issued prior to *USTA II*; therefore, it is not a progeny. (BellSouth Brief, p. 65). The *TRRO* is not a legal opinion, and it does not reaffirm the Circuit court's opinion so it is not a progeny. *Id.*

South Carolina rejected Cbeyond's argument on this point, stating that it was an unreasonable result for BellSouth to have given up its right to implement the new rules, even before it knew what the rules would contain. *Id.* at 65-66.

CompSouth

CompSouth agrees that parties should act in reasonable time frame to implement changes. (CompSouth Brief, p. 10). However, CompSouth charges that BellSouth's proposed language exceeds scope of the docket. *Id.* at 11. As to the forum for the Commission to decide issues, CompSouth proposes a series of processes depending on the stage of the unresolved dispute. If an unresolved disputed issue is in a pending arbitration, then the Commission ruling in this case should govern. *Id.* If it is not an unresolved disputed issue in an arbitration, and the parties to the arbitration have agreed that they will abide by their negotiated resolutions notwithstanding the results in this case, those resolutions should be honored. *Id.* at 11-12. If there is no such agreement, either party to the arbitration should be able to invoke the change of law provisions of the interconnection agreement once the agreement is approved by the Commission. *Id.* at 12.

Cbeyond

Cbeyond entered into a voluntary Abeyance Agreement filed with the Commission in Docket No. 18995-U. The Abeyance Agreement obligates the parties to implement the *TRO* and the *TRRO* through the replacement interconnection agreement negotiated and arbitrated between Cbeyond and BellSouth.

Discussion

The first component of this issue that parties addressed in briefs pertained to the obligation under the *TRRO* to implement through good faith negotiations changes to interconnection agreements to account for certain elements no longer being Section 251(c)(3) obligations. There does not appear to be any substantive difference in the parties' positions. Instead, it appears they have chosen different wording to characterize the FCC's holding. The Commission orders that the parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

CompSouth has also charged that BellSouth proposed language that exceeds the scope of the docket because it pertains to changes unrelated to the *TRO* and the *TRRO*. The Commission initiated this docket in response to two separate petitions for declaratory rulings. In Docket No. 18943-U, XO Georgia, Inc. and Allegiance Telecom of Georgia, Inc. filed a Joint Petition for Declaratory Ruling requesting that the Commission order BellSouth to continue to honor the terms of its interconnection agreements. In Docket No. 19003-U, CompSouth filed a similar petition. The impetus for these petitions was actions taken by BellSouth in the wake of the *USTA II* decision that vacated and remanded portions of the *TRO* in which the FCC established unbundling requirements for local switching, transport and other UNEs. Based on BellSouth's representations that it would not unilaterally violate the terms of its interconnection agreements, the Commission dismissed the petitions and initiated this generic docket. The purpose of this docket was to examine "(a) whether the vacatur represents a "change in law", (b) whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996, and (c) whether BellSouth is obligated to provide UNEs under Georgia State Law." (Order Initiating Docket, p. 1; *quoting* CompSouth Petition, p. 4). The Commission then directed the parties to develop an Issues List for the Commission's consideration. In doing so, the Commission noted that in light of the *TRRO* the issues that the parties wish to place in front of the Commission may have changed. The Commission adopted the proposed Issues List as part of its Procedural and Scheduling Order in this docket.

Issue 3(a) asks how existing ICAs should be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations. The purpose of this docket was clearly to respond to the *TRO* and the *TRRO*, and not to every change in law that may be the subject of negotiations pursuant to the relevant provisions of the interconnection agreements. The Commission will limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO*. The implementation of other changes of law is not usually the subject of a generic proceeding. This conclusion does not inhibit parties from acting pursuant to the change of law provisions in their interconnection agreements to implement changes in law unrelated to the *TRO* or *TRRO*.

The Commission also finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise. Parties are free to negotiate interconnection agreements that provide for alternative arrangements. In connection with the three scenarios set forth in CompSouth's brief, the Commission agrees with CompSouth on the first two. However, the Commission does not agree with the process set forth by CompSouth for its third scenario. If there is a pending arbitration, and no agreement among the parties to resolve an issue outside of this generic proceeding, then

the parties should incorporate the result of this docket into the interconnection agreement they submit for approval.

Finally, the Commission concludes that Cbeyond is not excused from implementing the *TRRO* until the parties have a new interconnection agreement. The July 23, 2004 Abeyance Agreement included the following language: "Within this framework, Cbeyond and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current Interconnection Agreement to address *USTA II* and its progeny." (Joint Motion, p. 2) (emphasis added). The framework in question appears to include that the abeyance requested by the parties was set to last for ninety (90) days. The parties waived the resolution of the arbitration only through June 2005. It exceeds the scope of the Abeyance Agreement to delay further the implementation of the *TRRO* now that the deadline provided for in the Abeyance Agreement has passed. While individual statements in the Abeyance Agreement state that the parties will continue to operate pursuant to their existing agreement until the new agreement is finalized, such statements were made within the framework of the abeyance being for ninety (90) days.

Issue 4: High Capacity Loops and Dedicated Transport – What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined: (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

Positions of the Parties

BellSouth

A.
Business Line

BellSouth cites to two areas of disagreement on the definition of "business line." The first disagreement is over BellSouth's inclusion of all UNE loops. The second disagreement concerns BellSouth's counting of high capacity loops.

BellSouth includes all UNE loops, rather than a subset of them and cites to the *TRRO* for support. The *TRRO* states that "Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify." (¶ 105). The FCC also states that "The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." *Id.* (footnotes omitted). BellSouth argues that the *TRRO* included all UNE loops because it gauges business opportunities in a wire center. (BellSouth Brief, p. 72).

The second point of disagreement concerns the counting of high capacity loops. BellSouth again argues that the FCC intended to capture opportunity. *Id.* at 73. BellSouth also asserts that limiting the number of lines runs counter to the FCC's revised impairment standard, which considers whether CLECs can compete without access to particular network elements and considers all the revenue opportunity that a competitor can expect to gain over the facilities it uses. *Id.* Excluding lines because they are not "switched" would ignore the competitive opportunity in the UNE loops. *Id.* It would also violate the direction included in *TRRO ¶ 25* not to evaluate impairment with reference to a particular CLEC's business strategy. *Id. at 74.* The Michigan PSC found that the TRRO requires that the line count include each Centrex line as one line, without a factor to reduce the number to one-ninth. *Id.*

A DS1 line is to be counted as 24 business lines for determining the number of business lines, regardless of how many of the 24 channels are activated. *Id.* Contrary to CompSouth's allegations, BellSouth's reporting is not inconsistent with its financial reporting. *Id.* at 75. Beyond that point, CompSouth's information is not in evidence in Georgia. *Id.*

Finally, BellSouth argues that there is nothing in the federal law that would support limiting its right to designate future wire centers on an annual basis. *Id.* at 76.

B.
Fiber-based collocator

BellSouth argues that the Commission should strike CompSouth's proposed addition to the FCC's definition of "fiber-based collocator" that would result in counting carriers that have not finalized mergers as one collocator.[5] (BellSouth Brief, pp. 66-69). The practical impact of CompSouth's proposal is that it would result in counting AT&T and SBC as one fiber-based collocator. BellSouth's states that its position has been adopted by the Rhode Island and Michigan commissions. *Id.* at 69.

BellSouth also urges the Commission to reject CompSouth's proposed language about counting the network of fiber-based collocators separately. BellSouth discusses gaming of the routes as a CLEC connecting links from a Tier 1 or Tier 2 wire center in a Tier 3 wire center. *Id.*

C.
Building

BellSouth does not believe the term "building" needs to be defined, but instead, the Commission should just follow a "reasonable person" standard. *Id.* at 67.

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[5] CompSouth proposes that the term "fiber-based collocator" apply to "carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same, will be treated as affiliates and therefore as one collocator; provided however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement shall not be counted as a Fiber-Based Collocator."

CompSouth

A.
Counting of Business Lines

CompSouth states that BellSouth has improperly read the first sentence of FCC Rule 51.5 out of the definition. The first sentence reads as follows:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC.

This first sentence eliminates any residential lines so there was no need for the FCC to restate throughout the definition that residential lines were not included. (CompSouth Brief, p. 15). BellSouth's reading is internally inconsistent because it does not include UNE-P, while it does include all UNE loops. *Id.* CompSouth argues there is no basis for this distinction. *Id.*

CompSouth disagrees with BellSouth's argument that the maximum number of voice grade lines the facility could support should be counted. The final three sentences of the definition of "business lines" states:

> The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

Empty channels are not switched services so do not meet the definition of business lines. (CompSouth Brief, p. 17).

Also, BellSouth treats its own business switched access lines differently than it is proposing the Commission count business lines for purposes of impairment. ARMIS requires that BellSouth report its lines in voice-equivalents, but limit the voice-equivalent line count to only those circuits actually activated to provide business switched access line service. *Id.* at 18. BellSouth has inflated the number of business lines so that they are misaligned with the thresholds relied upon by the FCC. *Id.* at 19-24.

B.
Fiber-Based Collocation

CompSouth argues that state commissions are not bound to looking only at March 10, 2005. CompSouth emphasizes that BellSouth has not cited to any authority for why the Commission must count fiber-based collocators as of March 10, 2005. (CompSouth Brief, p. 27). Moreover, looking backwards to March 10, 2005 is inconsistent with the FCC's direction to count as one fiber collocator multiple collocations at a single wire center by the same or affiliated carriers. *Id.*

C.
Building

CompSouth's definition of "building" incorporates the concept of BellSouth's "reasonable person" standard, but it adapts it to include a "reasonable telecom person." The purpose of this amendment is "to ensure that the deciding factor in defining a 'building' is that the area is served by a single point of entry for telecom services." *Id.* at 29.

D.
Route

CompSouth states that there is no further dispute on the definition of the term "route."

Discussion

FCC Rule 51.5 defines "business line" as follows:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

For the counting of business lines, the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops. It is not necessary to read the first sentence out of the definition in order to reach this conclusion. The first sentence includes in the definition of "business line" that it serve a "business customer." However, the next sentence of the line instructs on the manner in which such lines shall be calculated. In setting forth what shall be included in the calculation, the rule modifies the sum of all incumbent LEC switched access lines with the word "business." There is no confusion that this part of the addition is limited to business lines. Yet, in the same sentence, when discussing the sum of all UNE loops connected to that wire center, the rule does not similarly use the modifier "business."

If, because of the prior sentence, it would have been duplicative to state that these were business UNE loops, as CompSouth suggests, then the switched access lines need not have been identified as business in the first part of the sentence. That the switched access lines were expressly limited to business lines, and the UNE loops were not so limited, indicates that the limitation does not apply to the UNE loops. In the discussion of business line counts in the *TRRO,* the FCC again refers to "business UNE-P, plus UNE-loops." (¶ 105). This conclusion is consistent with the policy goals expressed by the FCC. That the FCC states it intended to measure business "opportunities" in a wire center provides support for why its method to calculate business lines would potentially include non-business lines. *Id.*

The Commission also concludes that it is appropriate to count DS1 lines as 24 business lines, provided that those DS1 lines in which all 24 channels are empty shall not be counted at all towards the business line count. It is consistent with Commission practice to consider a DS1 line to be an access line. If a DS1 line includes channels that are not empty, then it is an access line that connects end-user customers with incumbent LEC end-offices for switched services. Consistent with 47 C.F.R. § 51.5, such a DS1 line must count as 24 lines. However, if a DS1 line does not connect end-users for switched services, then it does not meet the first requirement set forth in the federal rule, and therefore must be excluded from the tally of business lines.

The issue in defining the term "fiber-based collocator" hinges on the date that the impairment test must be applied. BellSouth cites to language that CompSouth has proposed that would expand the definition of "fiber-based collocator" to address planned mergers. In doing so, CompSouth essentially is seeking to apply the impairment test at a later date because it is accounting for situations in which the number of fiber-based collocators in existence as of the date of the analysis is more than will be available a short while after the analysis is completed. Because the parties agree that a decision to de-list a particular wire center is irrevocable (Tr. 666), the changes to the competitive landscape could not be reflected in the assessment of the wire centers. As the Michigan Public Service Commission observed, however, state commissions are not free to rewrite federal rules with what we may view to be improvements. Therefore, the Commission does not accept CompSouth's proposed language because there is no basis for it in the federal law.

More directly on point is whether the March 11, 2005 effective date of the *TRRO* requires that the Commission consider the number of fiber-based collocators in a wire center as of that date. BellSouth argues that it does so require, but does not cite to any authority for why it could not be some other date. CompSouth emphasizes this shortcoming in BellSouth's position, and argues that the Commission should look at circumstances as they exist, rather than how they existed on March 11, 2005. The Commission agrees with CompSouth. That the FCC rules became effective March 11, 2005 does not mean that the application of the rules must ignore changes that occurred between the effective date of the rule and its application.. Rather, it means that as of March 11, 2005 any application must comply with the new rule. State commissions often must apply federal rules in reaching its decisions. When state commissions do so they typically apply the federal rules to the evidence with which it has been presented. State commissions do not typically ask the parties to go back and present evidence that reflects the effective date of the FCC rule to be applied. The only policy reason that BellSouth offers for its

position is the need for a certain date. The Commission finds that the date of this Commission order is the date certain for the analysis.

It appears contrary to the intent of the *TRRO* essentially to miscount the number of fiber-based collocators currently in existence because the number was different as of the time that the FCC order took effect. For these reasons, the Commission will apply the definition of "fiber-based collocators" set forth in the *TRRO* and federal rules to the circumstances as they exist currently.

The Commission adopts CompSouth's "reasonable telecom person" standard for the term "building." The only difference between CompSouth and BellSouth on this definition is the inclusion of the word "telecom." This difference would allow buildings to be defined by how they are seen for network engineering purposes.

CompSouth represented in its brief that there was no further dispute on routes; therefore, the Commission adopts BellSouth's definition of route.

Issue 5: TRRO/FINAL RULES:
a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?
b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?
c) What language should be included in agreements to reflect the procedures identified in (b)?

Positions of the Parties

BellSouth

BellSouth states that state commissions are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO*. (*TRRO* ¶ 234). The Commission must resolve the parties' disputes concerning the wire centers in Georgia that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition UNEs to alternative arrangements. (BellSouth Brief, p. 70). BellSouth urges the Commission to conclude that CLECs cannot self-certify to obtain Section 251 loops and transport in the future.

CompSouth

State commissions have authority to determine whether BellSouth has followed FCC mandates on how to designate non-impaired wire centers. (*TRRO* ¶100). CompSouth believes that it is most efficient for the Commission to settle disputes on the front end. (CompSouth

Brief, p. 30) An orderly process should be established to determine future changes in the wire center list. The process of reclassifying a wire center would be synchronized with the routine filing of ARMIS 43-08. BellSouth has not offered an alternative. *Id.* at 31.

Discussion

The *TRRO* provides that CLECs will "be able to challenge the incumbent's estimates in the context of section 252 interconnection agreement disputes." (¶100). State commissions have the authority to resolve disputes arising under Section 252 agreements. Therefore, state commissions have the authority to determine whether an ILEC's estimates are accurate. CompSouth's proposed method of having BellSouth file its ARMIS data and allowing time for the CLECs to review it, with a scheduled date for a Commission decision seems reasonable. The Commission will begin by allowing BellSouth to designate future wire centers on an annual basis. The Commission will monitor how this process works and make necessary and appropriate changes moving forward.

BellSouth requests that the Commission confirm that it has applied the appropriate procedures to identify the wire centers. As discussed in Issue 4, the Commission agrees with BellSouth, except on the issue of the effective date of the *TRRO* and the counting of a DS1 that has only empty channels.

Issue 6: HDSL Capable Copper Loops: -- Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

Positions of the Parties

BellSouth

For those wire centers that meet the FCC's impairment thresholds for DS1 loops, BellSouth does not have any obligation to provide CLECs with its UNE HDSL loop product. (BellSouth Brief, p. 87). The FCC defined DS1 loop as including "2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, such as 2-wire and 4-wire HDSL Compatible Loops." 47 C.F.R. §51.319(a)(4). The FCC has therefore removed any obligation to provide these loops in unimpaired wire centers. In addition, there has been very little CLEC interest in BellSouth's UNE HDSL product. (BellSouth Brief, p. 88).

The second position BellSouth takes with respect to Issue 6 is that it can and should count each deployed UNE HDSL loop as 24 voice grade equivalent lines. The *TRO* states as follows:

> We note throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. Carriers frequently use a form of DSL service, i.e. High-bit DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers. We will use DS1 for consistency but note that a DS1 loop and

> a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps. (n. 634).

For calculating business lines, a DS1 corresponds to 24 kbps-equivalents, and therefore to 24 business lines. 47 C.F.R. § 51.5.

BellSouth's argument is that (1) a DS1 is the equivalent of 24 business lines, (2) a DS1 loop and a T1 are equal in speed and capacity, and (3) UNE HDSL loops are used to deliver T1 services; therefore BellSouth's UNE HDSL loops must be counted as 24 business lines.

CompSouth

A.

HDSL-capable copper loops are not the equivalent of DS1 loops for purposes of evaluating impairment. (CompSouth Brief, p. 31). They are just copper loops that are less than 12,000 feet long and are clear of equipment that could block provision of high-bit rate DSL services. *Id.* They do not include the electronics on both ends of the loop that provide the means for the loop to be used to provide DS1-level services. *Id.* In sum, CompSouth's position is that an HDSL-capable copper loop doesn't have everything that a DS1 loop has.

BellSouth has read the first sentence out of the FCC's definition. 47 C.F.R. § 51.319(a)(4)(i) states:

> A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

A DS1 loop must be capable of sending signals at a speed of 1.544 mbps. (CompSouth Brief, p. 32). If a certain type of copper loop is capable of doing so, then it qualifies as a DS1 loop, but the rule does not state that copper loops that are not capable of doing so become DS1 loops. *Id.* BellSouth does not contend that an HDSL-capable copper loop cannot provide a 1.544 mbps service if it doesn't have the associated electronics. *Id.*

The outcome of adopting BellSouth's reading is inconsistent with the apparent intent of the FCC. Adoption of BellSouth's position would prevent CLECs from creating their own DS1 loops. (CompSouth Brief, p. 33). In the *TRRO*, the FCC stated that "[t]he record also suggests that in some cases, competitive LECs might be able to serve customers' needs by combining other elements that remain available as UNEs." (¶ 163, n.454). The FCC went on to state that in place of DS1 UNE loops that were declassified as UNEs, CLECs could us HDSL-capable loops. *Id.* If DS1 and HDSL-capable loops were the same things for impairment purposes, then the FCC would not have considered HDSL-capable loops to be substitutes for DS1.

BellSouth's contention that HDSL-capable copper loops should be counted as DS1 lines for purposes of counting business lines would inflate the business line count. (CompSouth Brief, p. 34). This method would allow BellSouth to convert a lot of residential lines to business lines. *Id.* It is also inconsistent with how HDSL-capable copper loops were counted by another one of BellSouth's witnesses in this case. *Id.* at 34-35.

Sprint

A DS1 loop is not the same as an HDSL-compatible loop because a DS1 loop is provisioned with all the required electronics; whereas an HDSL-compatible loop is a conditioned copper loop without any electronics. (Sprint Brief, p. 3). The FCC's conclusion that requesting carriers are impaired without access to copper loops remains in effect. *Id.* at 3-4. The intent behind the FCC rule upon which BellSouth relies is "to ensure that ILECs could not refuse to provide DS1 loops if ILECs used other technologies such as HDSL in combination with DS1 loops." *Id.* at 5.

Discussion

This issue turns on whether an HDSL copper loop is a DS1 loop by itself, or whether it is only a DS1 loop if provided with the associated electronics necessary for it to provide DS1 services. More specifically, the first issue turns on whether the word "capable" in the context of 47 C.F.R.§ 51.319(a)(4) means capable on its own. After reviewing the pertinent FCC rules and orders on this issue, the Commission finds that the FCC intended for HDSL copper loops to be considered a DS1 loop for purposes of counting lines to determine impairment.

Because there are not any copper loops capable of providing DS1 service without the addition of associated electronics, it is unlikely that by "capable," the FCC meant capable on its own. It would not serve any purpose for the FCC to include within the definition of DS1 loops a type of copper loop that does not exist. It is also of note that there are copper loops that cannot provide DS1 service regardless of the electronics added. This fact supports a reading of the word "capable" to include those loops that are capable if provided the associated electronics. The criterion distinguishes between those loops that are capable of providing DS1 service with the provision of associated electronics and those loops that are not.

In its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* ("*Third Report and Order*"), the FCC states that an "xDSL-capable" loop describes "copper loops from which bridge taps, low-pass filters, range extenders, and similar devices have been removed." (¶ 172). Separately in that order, the FCC explains that that "'xDSL' refers to the various kinds of Digital Subscriber Line service, such as ADSL . . . and HDSL" *Id.* at fn 299. Therefore, the FCC description of an xDSL capable loop would apply to an HDSL-capable loop. The above description of these loops does not include any electronics, but rather refers to simply the copper loop. Construing the rule consistent with the FCC's *Third Report and Order,* DS1 loops would include two and four wire HDSL copper loops without the associated electronics. To reach a different conclusion would necessitate finding that the FCC described HDSL copper loops inconsistently between its rule and its order. The Commission concludes that HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment.

Issue 6 explicitly addresses the narrow question of whether HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment. By phrasing the issue in such a manner, it is apparent that the parties intended for the Commission to address only the question of whether HDSL-capable copper loops should be counted the same as DS1 loops for assessing whether the 60,000 business line threshold set forth in the *TRRO* has been met. The Commission will not address questions that exceed the scope of Issue 6 as agreed upon by the parties and adopted by the Commission.

Issue 9 – What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?

Positions of the Parties

BellSouth

BellSouth relies on the District Court's opinion in the appeal of the Commission's order in this docket. The order states "The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ted]' to place new orders." *BellSouth v. MCIMetro,* Case No. 1:05-CV-0674-CC, (April 5, 2005 Order, p. 4). BellSouth argues that moving a customer's service to a different location would require the placement of a new order for service, and that therefore the transition period would not apply. (BellSouth Brief, p. 77).

BellSouth states that changes to existing orders do not require a new service order. BellSouth will accordingly process orders to modify an existing customer's service by adding or removing vertical features during the transition period. *Id.* Pursuant to the *TRRO,* CLECs may self-certify that they are entitled to unbundled access to a requested element, and BellSouth must process this request. BellSouth may only challenge the order after the fact. BellSouth asserts that at the conclusion of this generic proceeding the Commission should confirm the Georgia wire centers that satisfy the FCC's impairment tests. (BellSouth Brief, p. 77). Doing so would eliminate the situation in which a CLEC would self-certify.

CompSouth

With regard to high capacity loops and dedicated transport, CompSouth identifies the only issue as being whether moves of de-listed UNE loops or dedicated transport on behalf of a customer that was served by the CLEC as of March 11, 2005 should be permitted. (CompSouth Brief, p. 62). The *TRRO* stated that the transition plans shall apply only to the embedded customer base. (¶¶ 0142, 195) It did not state embedded lines or circuits.

With regard to UNE-P, CompSouth argues that BellSouth should be obligated to continue to process adds, changes, and moves for CLECs at the request of customers that were served

through UNE-P arrangements as of March 11, 2005. (CompSouth Brief, p. 63). Again, the transition period applied to the customer base, not to the circuits or lines. (*TRRO,* 227).

Discussion

The Commission concludes that a CLEC may not use facilities that have already been provided to serve existing customers who move to a new location and that the transition period does not apply to moving, adding or changing orders. To do so would require a new order, and the District Court has interpreted the *TRRO* not to allow such action. The Commission is bound by the District Court's interpretation.

Issue 10 – Transition of Delisted Network Elements To Which No Specified Transition Period Applies – What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

Positions of the Parties

BellSouth

BellSouth incorporates its arguments from Issue 2 into its position for rates, terms and conditions for elements de-listed by the *TRRO* and which have a designated transition period. (BellSouth Brief, p. 78). CLECs have had two years notice of the *TRO* decision that certain elements no longer needed to be unbundled. Therefore, with the exception of entrance facilities, BellSouth should be authorized to disconnect or convert such arrangements upon 30 days written notice absent a CLEC order to disconnect or convert such arrangements. (BellSouth Brief, p. 78).

CompSouth

CompSouth incorporates into its position on Issue 10 its positions on both Issues 2 and 8. (CompSouth Brief, pp. 63-64). The FCC did not provide a specific transition plan for every type of UNE. Such UNEs are not covered by the transition plan covered in Issue 2. *Id.* at 64. For example, DS1 "enterprise" unbundled switching and OCN loops and transport are UNEs that BellSouth is no longer obligated to provide pursuant to Section 251(c)(3) of the Federal Act. *Id.* BellSouth has proposed a 30 day period for the submission of orders to convert UNEs or BellSouth may disconnect or convert.

CompSouth argues that although CLECs have known since the *TRO* that certain UNEs were de-listed, no agreement has been reached as to how the transitions or conversions would be

completed. (CompSouth Brief, p. 64). The CLECs argue for at least a 60 day time period. *Id.* at 64-65.

CompSouth incorporates its arguments on Issues 2, 4 and 5 into Issue 10(b). *Id.* at 65. The FCC did not adopt a default transition process for UNEs that are found to meet the non-impairment standard after March 11, 2005. Therefore, the parties have to agree on a transition period. *Id.* The 90 day Subsequent Transition Period proposed by BellSouth is not adequate. *Id.* In order to complete the work necessary to identify and create a spreadsheet to convert the de-listed circuits to alternative circuits, CompSouth proposes a maximum of 12 months and minimum of 180 days for the Subsequent transition period. *Id.*

CompSouth argues that BellSouth should be obligated to provide written notice to the CLECs' point of contacts contained in the notice provision of the interconnection agreement. *Id.*at 66-67. Merely posting the notice on the website is not acceptable. *Id.* at 67.

Discussion

To the extent that resolution of this issue involves other issues in this proceeding, the Commission adopts the conclusions it reached on those other issues. The Commission adopts a 30 day transition period for UNE-P and a 60 day transition period for everything else. While it is true that CLECs have been on notice for two years, there has been no agreement on how the parties would move forward. A 60-day period is reasonable going forward.

The Subsequent Transition Plan applies to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards. The Commission will allow a 120 day Subsequent Transition Period, which is a compromise between the parties' positions on this issue.

Finally, the Commission finds it prudent to obligate BellSouth to provide actual written notice to the point of contact in the parties' interconnection agreements. If a party does not have a point of contact identified in the agreement, then posting constructive notice on the website shall be deemed acceptable.

Issue 11 - UNEs That Are Not Converted – What rates, terms and conditions if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?

Positions of the Parties

BellSouth

BellSouth argues that CLECs must transition their entire embedded base by March 10, 2006. (BellSouth Brief, p. 79). BellSouth needs CLECs to provide it with timely information in order to accomplish this transition. BellSouth requests that CLECs be obligated to provide this information by October 1, 2005 or as soon as possible. *Id.* If CLECs do not submit timely

orders, then BellSouth should be able to convert or disconnect the remaining embedded base lines by March 10, 2006. *Id.*

For high capacity loops, BellSouth is asking that the Commission direct CLECs to submit spreadsheets by December 9, 2005 or as soon as possible to identify and designate transition plans for their embedded base of these de-listed UNEs. *Id.*

CompSouth

CompSouth argues that CLECs have a right to pay no more than the FCC's transition rates for Section 251 network elements subject to non-impairment findings. (CompSouth Brief, p. 67). The process for transitioning should not result in CLECs being denied transition pricing during the FCC's transition period. *Id.*

If a CLEC has not converted a circuit "de-listed" under Section 251 by the end of the transition period, the Section 271 checklist element rate should apply because (1) all *TRRO* de-listed UNEs must be provided by BellSouth pursuant to Section 271, and (2) Section 271 terms and conditions will similar to those of the de-listed UNEs. *Id.*

The ongoing disputes between the parties regarding the proper designation of wire centers where the FCC has authorized non-impairment findings has complicated the transition. CLECs should not be forced off Section 251 UNE arrangements where there is a dispute over the wire center until the Commission decides this case. The Commission should reject BellSouth's contract proposals that would penalize CLECs for not following its transition schedule. (CompSouth Brief, p. 69).

Discussion

This issue is resolved for the most part by other issues the Commission will address in this docket. The Commission has already concluded that the CLECs have until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that are not completed until after the March 11, 2006. For conversions that are completed prior to March 10, 2006, the Commission orders BellSouth to true-up the difference. The Commission decided to set rates based on the just and reasonable standard in Section 271; therefore those shall be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to convert CLECs' UNE-P arrangements to the resale rate beginning March 11, 2006, unless parties agree to alternative arrangements or are otherwise ordered by the Commission.

Finally, the Commission finds that BellSouth shall not take any action with regard to wire centers in dispute until such dispute is resolved by the Commission.

Issue 13 – Performance Plan: -- Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

Positions of the Parties

BellSouth

Elements that are no longer required to be unbundled pursuant to Section 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan. (BellSouth Brief, p. 81). The purpose of the plan was to ensure nondiscriminatory access to elements as required by Section 251(c)(3), after BellSouth gained permission to provide in-region interLATA service. *Id.* In de-listing a UNE, the FCC found CLECs were able to purchase similar services from other providers. *Id.* It is discriminatory to subject BellSouth to penalties and not these other providers. *Id.*

BellSouth has entered into commercial agreements with more than 150 CLECs. *Id.* These CLECs were willing to forgo the plan's penalties for those included within the commercial agreement. *Id.* at 81-82. The Commission adopted the Hearing Officer's recommendation to approve a stipulation to remove certain DS0 wholesale platform circuits from the plan. *Id.* at 82.

CompSouth

CompSouth argues that the plan should still apply to the extent such network elements are still required pursuant to Section 271. (CompSouth Brief, p. 69). CompSouth argues that BellSouth still must provide meaningful, non-discriminatory access to such network elements pursuant to the Section 271 competitive checklist. *Id.*

BellSouth's position is inconsistent with the position it took when it applied for Section 271 approval. BellSouth stated that the performance measurement plans were in place to ensure compliance only with Section 271 obligations. *Id.* at 70. Moreover, it would make no sense for performance measurements designed to ensure there is no Section 271 backsliding to be limited to Section 251. *Id.*

Discussion

The issue is whether the performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251. The record of BellSouth's Section 271 application indicates that the performance plans were intended to ensure Section 271 compliance. BellSouth's position that the Section 271 compliance the parties were referencing was intended only to cover the overlap between Section 271 and Section 251 is not reflected.

The performance plan was adopted as a condition of the approval of BellSouth's Section 271 application. Therefore, regardless of BellSouth's position that state commissions lack jurisdiction under Section 271, BellSouth subjected itself to this degree of state commission involvement in its Section 271 obligations as part of achieving Section 271 approval. The record reflects that the purpose of the performance plan was to ensure that BellSouth continued to meet its Section 271 obligations. (Tr. 112-19).[6] In its Brief in Support of Application for Provision of

[6] The Commission took administrative notice of BellSouth's Brief in Support of Application for Provision of In-Region Inter-Lata Services in Louisiana and Georgia, BellSouth's Supplemental Brief filed with the FCC for 271 authority in Georgia, and the FCC order granting BellSouth authority to sell long distance in Georgia. (Tr. 115-16).

In-Region Inter-Lata Services, BellSouth quoted the FCC's Kansas/Oklahoma Order on SBC's Section 271 application. Quoting the FCC, BellSouth stated that the performance plans constitute probative evidence of continued Section 271 compliance. (Tr. 116-17, BellSouth Brief in Support of Application, p. 5). BellSouth also stated in its brief that a performance plan is designed to prevent against Section 271 backsliding. (Tr. 117, BellSouth Brief in Support of Application, p. 5). In its Supplemental Brief filed with the FCC for 271 authority in Georgia, BellSouth argued that self-effectuating enforcement mechanisms provided assurance of continued Section 271 compliance. (Tr. 117, Supplemental Brief, p. 7). In its order granting BellSouth Section 271 authority in Georgia, the FCC stated that the performance plans were designed to create a financial incentive for post-entry compliance with Section 271. (Tr. 117-18, FCC's Section 271 Order for Georgia, pp. 9, 13). There is no indication that this purpose was limited to those Section 271 obligations that overlapped what was required by Section 251. The reasonable conclusion is that it was the intent for the performance plan to apply even if BellSouth's Section 251 obligations were to change.

Issue 14 – Commingling - What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)?

Positions of the Parties

BellSouth

BellSouth argues that CompSouth's proposed language would improperly assert state commission authority over Section 271 obligations and would resurrect UNE-P. (BellSouth Brief, p. 37). Only the FCC has the authority to regulate the terms of Section 271 compliance; therefore Section 271 services cannot be commingled with other UNEs. *Id.* at 38.

BellSouth also argues that even if the Commission had Section 271 authority, it wouldn't matter because BellSouth is not obligated to commingle Section 251 services with Section 271 services. (BellSouth Brief, p. 38). The FCC only requires commingling of loops or loop transport combinations with tariffed special access services – not with UNE-P. BellSouth relies on the reference in the *Supplemental Order Clarification*[7] to commingling at paragraph 28 in which it only mentions tariffed services. *Id.* BellSouth then cites to paragraph 579 of the *TRO* to support its position that the *TRO* is consistent with the *SOC*.

Paragraph 579 states, in relevant part, as follows:

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of

[7] FCC 00-183, CC Docket No. 96-98 (rel. June 2, 2000) (*"SOC"*)

> the Act, or combining of a UNE or UNE combination with one or more such wholesale services.

While this paragraph on its own would indicate ILECs have the obligation to commingle Section 271 and Section 251 elements, the *TRO Errata* deleted the italicized language from paragraph 584 below:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including *any network elements unbundled pursuant to section 271 and* any services offered for resale pursuant to section 251(c)(4) of the Act.

BellSouth argues that this deletion indicates that the commingling requirement does not pertain to Section 271. (BellSouth Brief, p. 40).

At this same time, the FCC also deleted the following sentence from footnote 1989 (1990 pre-errata): "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to checklist items." BellSouth argues that the two deletions read together make the *TRO* consistent with the *SOC.* (BellSouth Brief, p. 40). Had the FCC intended to clear up any conflict, as the CLECs argue, then it only would have deleted the footnote. *Id.*

BellSouth next describes how wholesale services are repeatedly referred to as tariffed access services. BellSouth points to the *TRO*'s references to wholesale services always being followed by the parenthetical "(e.g., switched and special access services offered pursuant to tariff)." (BellSouth Brief, p. 41). Along with the deletion of the language from paragraph 584, BellSouth says the FCC's clear intent was not to require commingling for Section 271 unbundling obligations. *Id.*

In the *TRRO*, when describing the conversion from wholesale services to UNEs and UNE combinations, the FCC limited its discussion to the conversion of tariffed services to UNEs. ¶229. BellSouth construes this paragraph as further evidence that the FCC is only referring to tariffed services when it discusses commingling. (BellSouth Brief, p. 42). Any other interpretation would undermine the decision in the *TRRO* to eliminate the unbundling of UNE-P. *Id.*

BellSouth also cites to a number of other state commissions that it asserts have agreed with its position on commingling. BellSouth states that both the New York Public Service Commission and the Mississippi Federal District Court indicated an interpretation of the FCC's orders consistent with BellSouth's position. (BellSouth Brief, p. 42). The North Carolina Utilities Commission Panel concluded that the FCC did not intend for ILECs to commingle Section 271 elements with 251 elements. (NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order, p. 24).*

The Florida Public Service Commission was swayed that the removal of language from paragraph 584 indicates FCC intent not to require 271 commingling. FPSC Order No. PSC-05-

0975-FOF-TP at 19 (October 11, 2005). The Kansas Commission also found that commingling Section 271 elements was not a part of interconnection agreements. Kansas Order at ¶¶ 13-14.

BellSouth acknowledged that a number of other states reached a different conclusion, among them Kentucky, Washington and Massachusetts. (BellSouth Brief, fn 81).

CompSouth

CompSouth's presentation of its position on commingling includes (A) a background explanation on the origin and nature of commingling, (B) an analysis of the *TRO*, including the errata and (C) a discussion of the impact of the issue on CLECs.

The FCC authorized commingling in 2003. The *TRO* required that ILECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services. *TRO* ¶584. The difference between commingling and combinations is that while combinations involve both Section 251 elements, commingling involves 251 elements with any other wholesale service.

The legal basis for the FCC's commingling rules is the nondiscrimination requirements set forth in Section 202 of Federal Act.

> Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3).

(*TRO*, ¶ 581).

CompSouth addresses the impact of the errata that amended paragraph 584 of the *TRO*. As stated in the discussion of BellSouth's position, the errata removes the language "any network elements pursuant to Section 271" from a sentence that outlined an ILEC's commingling obligations. CompSouth pointed out that even after the phrase in question is deleted from paragraph 584 BellSouth's unbundling obligations are not limited to exclude Section 271 elements. (CompSouth Brief, p. 75). Wholesale facilities and services include those required by 271. *Id.* The FCC merely removed a redundant clause. *Id.* at 76.

In further support of its position, CompSouth states that the *TRO Errata* also removed the last sentence of footnote 1990. In its entirety footnote 1990 reads as follows (with emphasis added to the last sentence):

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not

> refer back to the combination requirement set forth in section 251(c)(3). *We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.*

CompSouth contends that the deletion of this sentence indicates that the FCC did not mean to exclude Section 271 elements from commingling. (CompSouth Brief, p. 76).

In response to BellSouth's argument that the FCC always refers to tariffed interstate special access services, CompSouth emphasizes that the *TRO* always says "for example" before identifying these services. *Id.* at 77.

CompSouth argues that the practical effect of restricting commingling would be dire for CLECs. BellSouth's proposed language would lead to potential disruption to customers. *Id.*

Discussion

Prior to determining whether the FCC has required BellSouth to commingle Section 251 and 271 elements, the Commission must decide whether the FCC intended state commissions to enforce any such obligation. The *TRO* provides that restricting commingling would be inconsistent with the nondiscrimination requirement in Section 251(c)(3). ¶ 581. State commissions enforce Section 251(c)(3). The *TRO* also states that incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are connected, combined or otherwise attached to wholesale services. State commissions have jurisdiction to consider the unlawful denial of UNEs.

Regardless of any determination of state commission authority under Section 271, it appears that the FCC did intend for the states to require ILECs to permit commingling between UNEs and wholesale services. The question then is whether the FCC intended to include Section 271 requirements within wholesale services. The *TRO* requires ILECs "to perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act." ¶ 579. Section 271 elements obtained at wholesale would fit within this description.

The ambiguity exists over whether the FCC intended for the wholesale facilities or services in question to include Section 271 elements. In describing the types of services for which commingling with Section 251 elements is required, the *TRO* offers by way of example "switched and special access services offered pursuant to tariff." *TRO* ¶ 579. This language differs meaningfully from the FCC's treatment of commingling in the *Supplemental Order Clarification*. In its *SOC*, the FCC modified the term "commingling" with the following parenthetical "(i.e. combining loops or loop-transport combinations with tariffed special access services)." *SOC*, ¶ 28. In the *TRO*, issued three years later, the FCC eliminated the restrictions it placed on commingling in the *SOC*, and apparently adjusted its definition of commingling. Tariffed special access services went from being the only services at issue to an example of the services that could be at issue in commingling.

BellSouth maintains, however, that the clear intent of the FCC was not to include Section 271 elements within the commingling requirement. It cites as evidence of this intent the *TRO Errata* which deleted the phrase "including any network elements unbundled pursuant to section 271" from paragraph 584 of the *TRO*. CompSouth points out that even without this phrase, the sentence, which requires commingling for wholesale facilities and services, would still apply to Section 271 elements. CompSouth also states that BellSouth should not ignore the other step that the FCC took in the *TRO Errata*, which was to delete a sentence from a footnote that expressly declined to apply the commingling rule to Section 271 checklist items.

In sum, the *TRO* included two statements that shed light on whether Section 271 elements were to be included as part of commingling, and these two statements were directly contradictory to each other. That the FCC deleted both statements resolves the conflict but not the ambiguity.

While the focus of the unbundling rules appears to be on special access services, the plain language of the *TRO* would include Section 271 elements provided they were obtained at wholesale. It is unlikely that this result was oversight by the FCC given that the two previously discussed statements expressly mention Section 271, and then were both deleted. BellSouth did not offer any plausible explanation for why the FCC would have deleted the sentence from footnote 1990 that expressly excluded Section 271 elements from the commingling requirement if that was precisely what the FCC wished to do. Granted, it would have been clearer had the FCC not also deleted the phrase from paragraph 584 that specifically included Section 271 elements within the commingling requirement. However, while the specific inclusion was deleted, the general inclusion remains. That is, the sentence as modified still applies the commingling obligation to Section 271 elements obtained at wholesale. The *TRO Errata* removed a redundancy in paragraph 584, but it does not alter the plain meaning of the sentence. In contrast, the meaning of footnote 1990 does change as a result of the *TRO Errata.*

BellSouth also relies on paragraph 229 of the *TRRO,* which states in relevant part that the FCC "determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LECs seeking to convert such services satisfies any applicable eligibility criteria." (*TRRO,* ¶ 229). This language purports neither to modify the plain meaning of the *TRO*, nor to clarify that the commingling obligation in the *TRO* applied exclusively to tariffed services. It cannot be disputed that the *TRO* requires ILECs to commingle Section 251 elements with other wholesale facilities and services. It is also the case that while the FCC used special access services as an example of a wholesale facility or service in the *TRO* it did not exclude other wholesale facilities or services. Finally, it is not disputed that Section 271 elements may be obtained at wholesale. So in the *TRO,* Section 271 elements were included as part of the commingling obligation. Had the FCC in the *TRRO* wished to exclude Section 271 elements from commingling or to clarify that the *TRO* excluded Section 271 elements from the commingling obligation, then it is reasonable to assume it would have stated that it was doing so. It did not make any such statement. Rather, it stated only that the *TRO* allowed CLECs to convert tariffed services to UNEs and UNE combinations, and that this decision was upheld on appeal. (*TRRO,* ¶ 229). Given that the plain language of the *TRO* applies to any facilities or services obtained at wholesale, and that the *TRRO* neither modifies nor clarifies the *TRO* on this issue, BellSouth's reliance on this paragraph is unavailing.

The Commission's interpretation of the *TRO* comports with the 47 C.F.R. § 51.5, which defines commingling as "the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services."

In conclusion, the Commission finds that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. This action should not be construed as recreating UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that the Commission has concluded that it is prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P.

Issue 15 – TRO Conversions: Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?

Positions of the Parties

BellSouth

BellSouth will make the necessary conversions once the language is incorporated into the interconnection agreements. (BellSouth Brief, pp. 82-83). The applicable rates for single element conversions in Georgia should be $25.06 for single element conversions and $26.55 for projects consisting of 15 or more loops submitted on a spreadsheet. *Id.* at 83. The Commission-ordered rate of $5.70 should apply for EEL conversions, until new rates are issued. *Id.* If physical changes to the circuit are required, the activity should not be considered a conversion and the full nonrecurring and installation charges should apply. *Id.*

CompSouth did not file any testimony on this issue; therefore BellSouth's position should be adopted. *Id.*

CompSouth

The *TRO* requires that ILECs provide procedures to convert various wholesale services, including special access service, to the equivalent UNE or combination of network elements. (CompSouth Brief, p. 78). The FCC said that "wasteful and unnecessary" ILEC charges would deter economically efficient conversions. *Id.* at 79, quoting *TRO* ¶ 587. The FCC found that "termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time" may not applied to conversions. (*TRO* ¶ 587). Such charges would violate Section 202 of the Communications Act. *Id.*

The Commission has approved a TELRIC rate of $5.70 for switch-as-is conversions of the loop-transport combination known as an EEL. (CompSouth Brief, p. 80). This rate compensates BellSouth for its costs. *Id.* BellSouth proposes new rates for conversions but did not adequately explain the dramatic increase over TELRIC. *Id.* BellSouth did not file the purported cost study that would justify the increase in this proceeding for review by the Commission. *Id.* The increased rate is BellSouth's attempt to circumvent the FCC's requirements to "switch-as-is." *Id.* at 81.

Discussion

The parties do not appear to differ that ILECs must allow CLECs that meet the eligibility requirements to convert the wholesale service used to serve a customer to UNEs or UNE combinations. This requirement is set forth in paragraph 586 of the *TRO*. The FCC declined to establish procedures and stated that parties are bound by good faith.

On the issue of cost, BellSouth proposes a dramatic increase to the Commission's approved TELRIC rate for EEL conversions. According to the testimony of Ms. Tipton, this increase results from a cost study it recently performed. (Tr. 719). This cost study was not provided as part of this proceeding. The Commission finds, therefore, that it shall not afford it any weight. The rate also appears to include a penalty to CLECs that do not work with BellSouth on the schedule preferred by BellSouth. This penalty would involve BellSouth recovering for costs that it does not actually incur. In fact, BellSouth's witness testified that "It isn't a matter, in our minds, of cost recovery at that point." (Tr. 721).

The Commission will remand this issue to a Hearing Officer or to itself for evidence on the issue of the appropriate conversion rate. In the interim, the Commission orders a rate of the TELRIC rate plus fifteen percent based on the Commission's determination of TELRIC.

Issue 16 – Pending Conversion Requests: -- What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?

Positions of the Parties

BellSouth

There is no retroactivity for conversion requests; the effective date is the date the agreements were amended. (BellSouth Brief, p. 83). The *TRO* does not contemplate retroactivity. (*TRO* ¶ 588). Moreover, that CLECs have not agreed to amended contract language shows that the issue is not vital to them. The Massachusetts Commission found that the rights were not retroactive.

CompSouth

Once conversion language reflecting the *TRO* is included in an interconnection agreement, parties should treat conversions pending as of the effective date of the *TRO*.

(CompSouth Brief, p. 81). The FCC stated that it declined to require retroactive billing to any time before its effective date. The FCC went on to state that "To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order." (*TRO*, ¶ 589).

Discussion

Paragraph 589 of the *TRO* provides as follows:

> As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

In the above paragraph, the FCC distinguishes between the time prior to the effective date of the *TRO* and the time after the effective date of the *TRO*. The FCC is clear that it will not require retroactive billing prior to the effective date of the *TRO*, but that "up to the effective date" ILECs would be required to offer the appropriate pricing for orders that were pending at the time of the *TRO*. So a CLEC that submitted an order for conversion prior to the effective date of the *TRO*, which was still pending as of that date, was entitled to "the appropriate pricing."

In the preceding paragraphs of the section on conversions, the FCC breaks down the situations in which an ILEC may convert UNE or UNE combinations to the equivalent wholesale service and a CLEC may do the reverse. (*TRO* ¶ 586). In addition, the FCC concludes that it is not fair to permit CLECs to supersede existing contracts through a conversion request; however, ILECs should not be entitled to assess on legitimate conversion requests wasteful and unnecessary fees associated with establishing initial service. *Id.* at 587. The "appropriate pricing" referenced in paragraph 589 appears to reference this discussion. That is, if a CLEC submitted a legitimate request to convert a wholesale service to a UNE or UNE combination and that request was pending as of the effective date of the *TRO*, paragraph 589 indicates that the CLEC is entitled to the UNE or UNE combination rate as of the *TRO*'s effective date. However, any request that sought to supersede an existing contractual arrangement would not be a legitimate request.

Issue 17- Line Sharing: Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

Positions of the Parties

BellSouth

packetized functionality of hybrid loops, and packet switching." The FCC then stated that "SBC's petition remains pending to the extent that it requests forbearance from the requirements of section 271(c)(2)(B) with respect to other network elements." By not listing line sharing in the order and by stating that it would address other network elements separately, it can be argued that the FCC did not intend to include line sharing among the obligations from which it was granting forbearance. At the very least, this subsequent order did not support the position that BellSouth is excused from its obligation to provide line sharing under Section 271.

Given the ambiguity, the Commission will maintain the status quo by requiring BellSouth to provide line sharing until the FCC clarifies that it does not have this responsibility.

Issue 18: TRO – Line Sharing – Transition: If the answer to the foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Positions of the Parties

BellSouth

Those CLECs with line sharing customers must amend their interconnection agreements in accordance with the transition plan set out in paragraph 265 of the *TRO*. (BellSouth Brief, pp. 55-56).

CompSouth

CompSouth agrees with the transitional language should the Commission determine that BellSouth does not have a line sharing obligation. (CompSouth Brief, p. 90).

Discussion

Given the Commission action on Issue 17, this issue is not applicable.

Issue 19 – Line Splitting: – What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

Positions of the Parties

BellSouth

Line splitting occurs when one CLEC provides narrowband voice service over the low frequency portion of a loop and a second CLEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter. BellSouth argues that no CLEC provided testimony on line splitting so CompSouth's proposal should not be adopted.

BellSouth has three main points to its position on Issue 17. First, BellSouth argues that state commissions do not have authority over Section 271 unbundling obligations. (BellSouth Brief, p. 47). Second, BellSouth argues that line sharing is not a Section 271 obligation. *Id.* at 45. Third, BellSouth asserts that the FCC has granted it forbearance from any Section 271 line sharing obligation that it may have. *Id.* at 50.

BellSouth cites to paragraphs 199 and 260-62 of the *TRO* for the proposition that it does not have any obligation to provide new line sharing arrangements after October 1, 2004. (BellSouth Brief, p. 45). BellSouth argues that Section 271 does not require, and in fact, does not even mention line sharing. (BellSouth Brief, p. 49). Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services." BellSouth's position is that the high frequency portion of the line ("HFPL") is only part of the loop, and that BellSouth is only obligated to provide the entire loop. (BellSouth Brief, p. 46). 47 CFR 51.319(a) defines the local loop network element as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises. *Id.* at 45. BellSouth argues that it meets its checklist item 4 obligation by offering access to complete loops. *Id.* at 49. CompSouth did not provide testimony in support of its proposed contract language on this issue. *Id.* at 47.

BellSouth charges that CompSouth's position would render the FCC's transitional scheme irrelevant because it would allow CLECs to receive line sharing indefinitely under Section 271 and at rates other than the ones the FCC established as part of the transition plan. *Id.* It would also undermine the *TRO's* plan for CLECs to access facilities that do not have the same anti-competitive effects as line-sharing. *Id.* at 47-48.

BellSouth next discusses the FCC's order in response to its forbearance petition.[8] BellSouth asserted that its petition requested forbearance from any stand-alone unbundling obligations on broadband elements. *Id.* at 50. This requested relief would encompass line sharing. *Id.* at 51. Paragraph 34 of the FCC's *Broadband 271 Forbearance Order* includes the following passage:

> The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.

Because its forbearance petition was granted, BellSouth argues that it is not required to provide line sharing even if otherwise required by Section 271.

BellSouth cites to state commission decisions in Tennessee, Massachusetts, Michigan, Rhode Island and Illinois that support its position. *Id.* at 54. BellSouth also references state

[8] *Memorandum Opinion and Order,* WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 (*"Broadband 271 Forbearance Order"*).

commissions that have reached different conclusions, but argues that to the extent those other decisions were based on state tariffs, they are distinguishable. *Id.* at fn 105.

CompSouth

CompSouth refers to decisions of the Maine, Pennsylvania and Louisiana commissions that have held that line sharing falls under checklist item 4, and that BOCs that are subject to Section 271 must provide access to it. (CompSouth Brief, p. 83). In addition, numerous FCC Orders granting Section 271 access to BOCs discuss line sharing as a component of checklist item 4. *Id.* at 84. Even BellSouth included line sharing as a checklist item 4 element at one point. *Id.* If it was necessary to provide an element in order to satisfy the checklist item, then the element must be included in the checklist item. *Id.* at 85.

CompSouth next addresses the conflicting comments of the FCC commissioners after the issuance of the *Broadband 271 Forbearance Order.* Regardless of their disagreement over the scope of the *Broadband 271 Forbearance Order*, it is clear that each commissioner viewed line sharing to be included as part of checklist item 4. (CompSouth Brief, p. 87). Addressing the scope of the *Broadband 271 Forbearance Order,* CompSouth asserts that it did not apply to line sharing because BellSouth did not request forbearance from line sharing. *Id* The FCC order identifies FTTH loops, FTTC loops, the packetized functionality of hybrid loops and packet switching as the broadband elements for which it is granting forbearance. *Id.* at 88. An FCC order issued subsequent to then-Chairman Powell's statement that line sharing was not addressed again listed the same items mentioned above. Therefore, the FCC excluded line sharing from the list of broadband elements. The FCC issued a subsequent order that similarly did not address forbearance for line sharing.[9]

Discussion

The Commission asserted jurisdiction to set just and reasonable rates under Section 271. The issue of whether line sharing is a Section 271 element is ultimately an issue to be adjudicated by the FCC. As pointed out by CompSouth, both the FCC and BellSouth have in the past referred to line sharing as part of checklist item 4 compliance. The FCC has not taken any action to remove this component from checklist item 4.

With regards to BellSouth's Petition for Forbearance, it is ambiguous as to whether the FCC construed BellSouth's Petition to include line sharing. Individual FCC commissioners have issued separate conflicting statements on this question, although the statement of the Chairman at the time supports the position that the FCC did not grant BellSouth forbearance with respect to line sharing. On November 5, 2004, subsequent to the conflicting statements of FCC Commissioners, the FCC issued its *SBC Order* in which it granted forbearance with respect to broadband network elements "specifically fiber-to-the-home loops, fiber-to the-curb loops, the

[9] See, *In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Section 271;* WC Docket No. 03-235, Order, (Rel. November 5, 2004) ("*SBC Order*").

The Commission should not adopt CompSouth's proposal because it would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271. (BellSouth Brief, p. 89). This issue is covered in the context of Issue 14.

BellSouth should not be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L because splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by using the integrated splitter built into all ADSL platforms. *Id* at 90.

The parties dispute what OSS modifications are necessary. BellSouth sponsored expert testimony that CLECs do not need anything from BellSouth to facilitate line splitting. (Joint Exhibit 2, at 94).

CompSouth

The first question under this issue is whether line splitting can involve the commingling of Section 251 and Section 271 elements. This issue is the same as was addressed in Issue 14. The second issue is whether a CLEC should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLEC involved in the line splitting arrangement. CompSouth agrees that a CLEC should indemnify and defend BellSouth against claims against BellSouth. (CompSouth Brief, p. 91). However, CompSouth argues that the language to be included in the interconnection agreement should refer to specific claims, and not entire actions. *Id.*

The third issue is whether BellSouth must upgrade its OSS to facilitate line splitting. BellSouth has electronic ordering for its Fast Access plan. (Tr. 376). The only electronic ordering scenarios available to CLECs right now involve adding line splitting or data to an existing UNE-P account. (Tr. 377). Because UNE-P is going away as of March 11, 2006, these scenarios will not be of use to CLECs after that point. (Tr. 377-78). The difference in manual orders and electronic orders is about $19 ("in excess of $22 vs. $3.50"). (Tr. 382).

If BellSouth has deployed ADSL 2-plus, and was conditioning loops over 18,000 feet for itself, then it should be obligated to provide this service to CLECs at TELRIC rates. (Tr. 379). If BellSouth has not deployed ADSL 2-plus, then CLECs would pay the special construction rate for this service. (Tr. 379). So a CLEC that is innovative enough to deploy its own ADSL 2-plus has to pay the higher special construction rate for line conditioning. (Tr. 380-81).

Discussion

For the reasons set forth in the Commission's discussion of Issue 14, the Commission finds that line splitting can involve the commingling of Section 251 and Section 271 elements.

BellSouth did not brief the issue of whether the indemnification language should cover the entire action or be limited to specific claims. CompSouth's position appears reasonable. The

Commission concludes that CLECs should indemnify and defend BellSouth against claims made against BellSouth, but that the indemnification language should relate to specific claims.

The Commission remands this issue for a hearing as to the extent of BellSouth's line splitting obligations. In Docket No. 11900-U, the parties dispute how many line splitting scenarios BellSouth must make available. At the time the Commission initially addressed line splitting, the record was not complete on the number of line splitting scenarios. A hearing to determine a fair and reasonable number of line splitting scenarios for BellSouth to provide would be beneficial to the parties, especially in light of the imminent end of the transition period.

Issue 22 – Call Related Databases: What is the appropriate ICA language, if any, to address access to call related databases?

Positions of the Parties

The parties do not dispute that the obligation of BellSouth to provide nondiscriminatory access to call-related databases arises out of Section 271, and not Section 251. The dispute, as it has been on a number of issues discussed in detail above, has to do with whether the Section 271 obligation must be included in a Section 251 interconnection agreement and whether state commissions have the authority to require ILECs to meet this obligation.

Discussion

The Commission asserted Section 271 jurisdiction to set just and reasonable rates. Therefore, the Commission orders that BellSouth is obligated to offer call related databases at just and reasonable rates.

Issue 23 – Greenfield Areas: a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?

Issue 24: TRO – Hybrid Loops – What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

Issue 28 – Fiber to the Home: -- What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?

Positions of Parties

BellSouth

As an initial matter, BellSouth points out that Covad and some other CLECs have moved for reconsideration of the FCC decision to eliminate certain unbundling requirements concerning

certain types of fiber loops. (BellSouth Brief, p. 91 fn 124). BellSouth then identifies a minor difference between the parties relating to the deletion by CompSouth of BellSouth's proposed language that states that it is not obligated to ensure that non-retired copper loops in FTTH/FTTC overbuild areas are capable of transmitting signals prior to receiving a request for access to such loops by a CLEC. (BellSouth Brief, p. 91).

The major difference between the parties relates to the extent of fiber unbundling. CompSouth erroneously claims its limitation is supported by the FCC's use of terms "mass market." (BellSouth Brief, p. 92). With regard to fiber, the FCC provided that there was no impairment on FTTH, except in overbuild situations where the ILEC elects to retire existing copper loops. (*TRO*, ¶273). In that situation, the unbundling requirement only applies for narrowband. *Id.*

The FCC did not use the term "mass market" in explaining the scope of its fiber relief. The FCC stated that the obligations and limitations for such loops do not vary based on the customer to be served. *Id.* at ¶ 210. In its *MDU Reconsideration Order*[10], the FCC determined that fiber loops that serve MDUs that are predominantly residential are governed by the FTTH rules. (¶ 7).

In its *FTTC Reconsideration Order*,[11] the FCC found that the FTTC Loop is a transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises. (¶ 10). The FCC also stated that "requesting carriers are not impaired in Greenfield areas and face only limited impairment without access to FTTC loops where FTTC loops replace pre-existing loops." *Id.* at 11. CompSouth would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. (BellSouth Brief, p. 94).

BellSouth also cites to other state commissions, including Michigan and Massachusetts, that have found in the ILEC's favor on this issue and rejected limitations for the definition of FTTH, FTTC and hybrid loops. *Id.* at 94-95.

With respect to hybrid loops, BellSouth should not be required to provide access to hybrid loops as a Section 271 obligation. *Id.* at 96.

CompSouth

The FCC distinguishes between "mass market" and "enterprise" loops. For instance, paragraph 209 of the *TRO* states as follows:

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[10] *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) (*MDU Reconsideration Order")*

[11] *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-248 (*"FTTC Reconsideration Order")*

> Loops, such as analog loops, DS0 loops or loops using xDSL based technologies are generally provided to small business customers and will be addressed as part of mass market analysis. While high capacity loops (DS1, DS3, OCn capacity) are generally provisioned to larger customers and will be addressed as part of enterprise market analysis.

The FCC did not limit what the customer could order, but rather was conducting the analysis for purposes of impairment. (CompSouth Brief, p. 91).

CompSouth supported its position with numerous references in the *TRO* and *FTTC Order* in which the FCC did not require unbundling for mass market customers. 47 CFR § 51.319(a)(4) also distinguishes between enterprise and mass market loops.

With regard to fiber/copper hybrid loops, the only limitation on BellSouth's unbundling obligation is that BellSouth need not provide access to the packet-based capability in the loop. (*TRO*, ¶ 288). CompSouth argues that this limitation should not affect CLECs' ability to obtain access to DS1 and DS3 loops because the FCC made clear that BellSouth must provide DS1 and DS3 loops on such facilities:

> We stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers. These TDM-based services - which are generally provided to enterprise customers rather than mass market customer – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs. (*TRO*, ¶294).

CompSouth next criticizes BellSouth for relying on the summaries of orders, instead of the text of the orders. (CompSouth Brief, p. 101). That the summaries did not include the distinction between market and enterprise is a result of it being a summary and should not override the text of the orders. *Id.* In the *Broadband Forbearance Order*, the FCC summarized its *TRO* loop impairment findings and stated that "For enterprise customer loops, the Commission required incumbent LECs to offer unbundled access to dark fiber, DS3 and DS1 loops subject to more granular reviews by the state commissions. ¶5, n. 23. The FCC's pleading in the D.C. Circuit Court of Appeals also explained that the *TRO* and the rules coming out of them "make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices." CompSouth Ex. 1. When a CLEC requests a DS1 loop, by definition it is seeking to serve an enterprise customer.

Discussion

Issue 23:

a) The appropriate definition of MPOE is the FCC's definition. The MPOE is "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. 68.105(b).

b) Based on the following language from the *Broadband Forbearance Order,* the Commission concludes that BellSouth is under no obligation to provide access to greenfield Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops.

> [In the TRO] The [FCC] distinguished new fiber networks used to provide broadband services for the purposes of its unbundling analysis. Specifically, the [FCC] determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including FTTH loops in greenfield situations.... (*Broadband Forbearance Order*, ¶ 6).
>
> In the subsequent Triennial Review FTTC Reconsideration Order, the Commission found that the FTTH analysis applied to FTTC loops, as well, and granted the same unbundling relief to FTTC as applied to FTTH. *Id* (footnote omitted).

Issue 24

> The FCC's rules are clear on this issue:
>
> When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (*where impairment has been found to exist*) on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop. 47 C.F.R. 51.319(a)(2)(ii) *(emphasis added)*

BellSouth's language tracks the FCC's rules and should be adopted.

Issue 28

The parties debated the meaning of paragraph 210 of the *TRO.* The Commission construes this paragraph to mean that while the FCC considered the customers served by a particular loop type for purposes of its impairment analysis, its conclusions on impairment track the loop and not the customer served.

Fiber to the Home ("FTTH") is, by definition, fiber facilities extending to a residence. Because FTTH is an extension of Fiber to the Curb ("FTTC"), it follows that FTTC must also describe facilities to a residence. The FCC's rules on FTTH and FTTC provide for one exception to the foregoing definition. That exception is that primarily residential multiple dwelling units ("MDUs") should be treated consistent with traditional residences. Therefore,

FTTH/ FTTC could in fact describe fiber facilities to a business, but only if that business is located in a primarily residential MDU.

In overbuild deployments, the requirement that incumbent LECs provide capacity to competitive LECs, regardless of whether the copper facilities have been retired, applies only to narrowband facilities. *See* 47 C.F.R. 51.319(a)(3)(iii) BellSouth proposes the following language:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval.

The Commission finds that BellSouth's proposal is consistent with the federal rule for the most part and adopts BellSouth's language with one modification. Because the third sentence of BellSouth's language would exclude orders for legacy copper from the SQM/ SEEM plan, the Commission modifies that sentence to require these orders to remain in the SQM/ SEEM plan until the Commission determines the appropriate interval for provisioning such an order. BellSouth may petition the Commission to modify the interval. Therefore, the Commission orders the following language:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will apply.

Finally, CompSouth appears to argue that the FTTH/ FTTC rules do not apply in central offices in which the FCC found that competitive LECs were impaired without access to DS1s and DS3s. However, the FCC rules on FTTC/ FTTH make no mention of any exclusion based on impairment analysis. Presumably, the FCC did not anticipate that competitive LECs would seek to provide high-capacity services to residential customers. The Commission finds that the FCC's FTTH/ FTTC rules apply to all central offices.

Issue 26: -- What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

Positions of the Parties

BellSouth

Routine Network Modifications (RNMs) are "those activities that incumbent LECs regularly undertake for their own customers." (*TRO*, ¶ 632). ILECs are not obligated to alter substantially their networks to provide superior quality interconnection. (*TRO*, at ¶ 630 quoting Iowa Util. Bd. 120 F.3d. 753 (1997)).

Line conditioning is an RNM. (*TRO*, ¶ 643). Therefore, BellSouth's only obligation is to provide line conditioning at parity. *Id.* Paragraph 250 of the *TRO* states that "line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service."

The Florida Public Service Commission did not obligate BellSouth to remove at TELRIC rates load coils on loops greater than 18,000 feet. (BellSouth Brief, pp. 98-99). The Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access. *Id.* at 99.

CompSouth

BellSouth is wrong to "submerge the FCC's pre-existing rules on line conditioning into the rules adopted in the TRO regarding routine network modifications." (CompSouth Brief, p. 106). In its *Local Competition Order,*[12] the FCC established ILECs must modify their facilities to accommodate CLEC access to UNEs. (¶ 209). In the *UNE Remand Order*, the FCC adopted line conditioning rules, which stated that ILECs are required to condition copper loops and subloops "to ensure that the copper loop or subloop is suitable for providing digital subscriber line services . . . whether or not the [ILEC] offers advanced services to the end-user customer on that copper loop or subloop." 51.319(a)(1)(iii).

In the *TRO,* the FCC (1) re-adopted the line conditioning rules, (2) identified the concept of "routine network modification" for the first time, (3) treated line conditioning and RNMs in different sections and (4) included language that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (¶ 643). This dispute has important policy implications because there are emerging DSL technologies, and CLECs need to be able to respond with innovative offers. BellSouth's position is a roadblock. (CompSouth Brief, pp. 109-10).

CompSouth also complains that BellSouth struck language from its proposal that was taken directly from the FCC's rule on RNMs. *Id.* at 110-11).

Discussion

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[12] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, *First Report and Order,* 11 FCC Rcd at 15608 (1996) ("*Local Competition Order*").

The Commission finds that BellSouth is obligated to perform line conditioning in instances in which BellSouth is not providing advanced services to the customers in question. The FCC notes that in the context of the *UNE Remand Order*[13] it concluded that the Eighth Circuit holding stating that an ILEC is not required to construct a network of "superior quality" did not overturn the FCC's rules requiring an ILEC to condition loops regardless of whether it was providing advanced services to those customers. (TRO, fn 1947). The FCC notes that in the *UNE Remand Order* it found that line conditioning enabled the requesting carrier to use the basic loop. (TRO fn 1947, quoting UNE Remand Order, ¶ 173).

The FCC promulgated line conditioning rules provide, in part, as follows:

> The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop.

47 C.F.R. § 319(a)(1)(iii).

The FCC states in the *TRO* that it is re-adopting its line conditioning rules set forth in the UNE Remand Order. (¶ 642).

The language relied upon by BellSouth states that line conditioning does not constitute the creation of a superior network, but rather, should be "seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (*TRO*, ¶ 643). Read in the context of the remainder of the section on line conditioning and the pertinent FCC's rules, this paragraph cannot mean that ILECs are not required to provide line conditioning unless it provides advanced services to the end-user customers. Such a reading would flatly conflict with the remainder of the line conditioning section and 47 C.F.R. § 319(a)(1)(iii). The more consistent reading of the language at issue is that the FCC was explaining why the requirement expressly set forth in its rules does not conflict with the Eighth Circuit holding on the creation of a superior network. At the bottom of paragraph 643, the FCC notes that "Competitors cannot access the loop's inherent 'features,

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[13] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order"), reversed and remanded in part sub.nom. United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *cert denied sub nom. WorldCom v. United States Telecom Ass'n,* 123 S.Ct 1571 (2003 Mem.)

functions, and capabilities' unless it has been stripped of accretive devices." This explanation is properly viewed as an expansion on the policy behind the excerpt from the *UNE Remand Order* set forth in footnote 1947 of the *TRO* that line conditioning enables use of the basic loop. The FCC did not backtrack on the requirement set forth in its earlier orders. Instead, it rebutted once again the claim that the requirement runs afoul of the Eighth Circuit holding.

The FCC emphasizes that ILECs must provide line conditioning to CLECs on a nondiscriminatory basis. (*TRO*, ¶ 643). The FCC states that line conditioning is seen as a routine network modification that an ILEC regularly performs to provide advanced services to its own customers and does not constitute the creation of a superior network. *Id.* Given this direction, the Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

As to the second issue, the Commission directs BellSouth to permit inclusion of the CompSouth proposed language on RNMs that mirrors the FCC rule.

Issue 27 – What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

Positions of the Parties

BellSouth

If BellSouth is not obligated to perform an RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC. The appropriate rate is a commercial or tariffed rate. (BellSouth Brief, p. 99).

CompSouth

BellSouth should not be allowed to impose individual case basis pricing for routine modifications. The rate should be cost-based. (CompSouth Brief, p. 111). Recovery should be allowed if BellSouth's RNM costs are not recovered in loop rates. BellSouth should not be able to double-recover its costs. *Id.* at 112.

Discussion

In its *Line Conditioning Order*, the FCC applied ILECs' line conditioning obligation to loops of any length. 14 FCC Rcd 20912, 20951-53, ¶¶ 81-87. BellSouth's position that a commercial rate is appropriate for removing load coils or bridged tap on loops that exceed 18,000 feet was premised on its argument that it is not obligated to perform these functions on such loops. Based on the FCC's *Line Conditioning Order*, and the reference to such order in the *TRO*, the Commission reaches a different conclusion. Because the Commission has found that

BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

The Commission also agrees with CompSouth that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

Issue 29 – Enhanced Extended Link ("EEL") Audits: -- What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

Position of the Parties

BellSouth

BellSouth proposed language that would enable it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria. BellSouth should not be required to show cause prior to the commencement of an audit. (BellSouth Brief, p. 85). It argues that the requirement is both unnecessary because it is paying for the audit and is used as a delay tactic. *Id.*

The next dispute within this issue relates to the selection of an independent auditor. BellSouth should not be required to incorporate a list of acceptable auditors in interconnection agreements or only use an auditor the other party agrees to use. *Id.* Finally, within this issue, the parties disagree on the cost accountability for the audit. BellSouth maintains that if the auditor determines that a CLEC's noncompliance is material in one area, then the CLEC should be responsible for the cost of the audit. *Id.*

CompSouth

BellSouth's audit rights are limited. The cause requirement is set forth in paragraph 622 of the *TRO*. (CompSouth Brief, p. 113). This requirement could make the process run smoother because if BellSouth identifies circuits, then the internal review conducted by the CLEC may obviate the need for an audit. *Id.* In addition, the identification of circuits would make relevant documentation available earlier in the process. *Id.*

On the selection of an auditor, CompSouth's proposal for a mutual agreement process would resolve problems on the front end and is consistent with the way PIU/PLU audits are performed. *Id.* at 115. The CLECs are not willing to agree to a "pre-approved" list of entities. (CompSouth Brief, p. 114). With respect to costs, CompSouth asserts that CLECs should only have to pay for the costs of the audit concerning those audits where material non-compliance is found. *Id.* at 116.

CompSouth also argues that a notice requirement makes practical sense. While the FCC did not require it, state commissions may because the FCC noted that the states were in a better position to provide for implementation. (*TRO*,¶ 625).

Discussion

The *TRO* provides as follows:

> Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order Clarification, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable.

(*Triennial Review Order*, ¶ 622).

In the above language, the "later verification" refers to the audits discussed in the context of this issue. The FCC specifies that this "later verification" is "based upon cause." There has not been any plausible explanation as to what the "based upon cause" language could be referencing if not that the ILEC have some reason, or concern, to initiate the audit. If the ILEC does not have any concern regarding the veracity of the CLEC's self-certification, then any audit that it would conduct through a third party auditor would not be "based upon cause." It is consistent with the *TRO* to include a requirement that BellSouth have some cause prior to initiating an audit.

The *TRO* requires that the audit be conducted by an independent auditor in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA"). (*TRO*, ¶ 626). It does not require that a CLEC agree to the specific auditor. An objection to an auditor that is unrelated to the standard of independence should not suffice to reject the auditor. If the CLEC has an objection that the auditor does not meet the legal standard, then it may raise that objection with the Commission. CompSouth's argument that it is more efficient to resolve any issues with regard to the auditor on the front end is not persuasive. CLECs would be able to delay the process if agreement was required.

The Commission also finds that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. The *TRO* states that "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." (*TRO*, ¶ 627). The *TRO* does not support CompSouth's position that CLECs should only have to compensate BellSouth related to those circuits for which material non-compliance was found. It states that ILECs are entitled to be reimbursed for the cost of the audit; it does not reference any sub-part of the audit. This conclusion is strengthened by the very next paragraph of the *TRO*, in which the FCC includes the reciprocal position regarding the ILECs compensating the CLECs for their costs in the event the auditor found compliance in "all" material respects. The question then in determining which party has to pay for the other's costs is whether the CLEC complied in "all material respects." And the reimbursement, regardless of who pays who, relates to the audit as a whole. That a CLEC may

have complied in numerous material respects does not answer the question of whether it complied in all material respects. If it did not do so, according to the *TRO*, it must compensate the ILEC for the costs of the audit.

Issue 31 – Core Forbearance Order: -- What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?

Positions of the Parties

BellSouth

The order should be incorporated on a case by case basis because BellSouth has entered into specific carrier settlements implementing the Core Order. (BellSouth Brief, p. 86). ITC^DeltaCom's proposed language would not address all scenarios encountered in the implementation of the Core Order. *Id.* at 86-87.

CompSouth

The *2004 ISP Remand Core Forbearance Order* removed certain restrictions on CLEC's right to receive reciprocal compensation. The Commission should order that interconnection agreements should be amended to remove "new markets" and "growth caps" restrictions in BellSouth ICA reciprocal compensation provisions. (CompSouth Brief, p. 117). CompSouth argues that such a result would not upset the contractual differences between CLECs. *Id.*

BellSouth's position is hypocritical because when a change is to its benefit, it always asserts that the implementation should be completed as promptly as possible. *Id.*

Discussion

The Commission concludes that agreements be amended to remove "new market" and "growth cap" restrictions in BellSouth's Interconnection agreement reciprocal compensation provisions. BellSouth has not explained how the distinctions between carrier contracts would render such direction problematic.

Issue 32 – Binding Nature of Commission Order: How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?

Positions of Parties

BellSouth

BellSouth argues that the Commission should make clear that the order in this case is binding upon all CLECs, including those who chose not to participate in this docket. (BellSouth Brief, p.80). It is important that the deadlines not be extended beyond March 10, 2006. *Id.* The

Commission should give the parties no more than 45 days from the date of the Commission order to execute complaint amendments. *Id.*

CompSouth

CompSouth did not take a position on whether the order should bind non-parties. As to the impact existing agreements, CompSouth argued that the order should not upend existing agreements that address how such changes of law should be incorporated into existing and new section 252 interconnection agreements. (CompSouth Brief, p. 118).

The Commission should not approve language on issues that were not within the scope of this proceeding. *Id.* at 119.

Cbeyond

Cbeyond's position on this issue is set forth within the context of Issue 3.

Discussion

The Commission provided notice of the proceeding and the issues to be addressed in this proceeding to all competitive local exchange carriers. A condition of the certificate of these local exchange carriers is that they comply with orders of the Commission. A carrier may not avoid its obligations by choosing not to participate in a proceeding. The Commission clarifies that its order applies to all certified competitive local exchange carriers.

The Commission concludes that in the event that parties entered into separate agreements with BellSouth that may impact the implementation of changes of law that the parties be bound by those agreements. CompSouth referenced an abeyance agreement between BellSouth and a couple of CLECs in which the parties agreed on a method of implementing *TRO* and *TRRO* changes. This issue was addressed in the context of Issue 3. The Commission also finds that it is appropriate to limit its consideration in this docket to those issues that are within the scope of the proceeding.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues that the parties presented to the Commission should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251, 252 and 271 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995 and O.C.G.A. §§ 46-2-20, 46-2-21 and 46-2-23.

WHEREFORE IT IS ORDERED, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that the Commission hereby remands Issue 15 to a Hearing Officer or to itself for the purpose of taking additional evidence on and determining an appropriate conversion rate. In the interim, the Commission adopts a rate of TELRIC plus fifteen percent based on the Commission's determination of TELRIC.

ORDERED FURTHER, that that the Commission hereby remands Issue 19 to a Hearing Officer or to itself for the purpose of taking additional evidence on and determining the extent of BellSouth's line splitting obligations.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 7th day of February, 2006.

Reece McAlister
Executive Secretary

3-2-06
Date

Stan Wise
Chairman

3-2-06
Date

EXHIBIT "C"

LOUISIANA PUBLIC SERVICE COMMISSION
ADMINISTRATIVE HEARINGS DIVISION

DOCKET NO. U-28131

LOUISIANA PUBLIC SERVICE COMMISSION, EX PARTE

In re: Pursuant to Special Order 48-2004, Establishment of a Monitoring Docket to ensure Telecommunications Service Providers continue to honor their obligations under their approved interconnection agreements and to further ensure the carriers properly effectuate any changes to those interconnection agreements in accordance with the law, including, but not limited to, the change of law provisions in the interconnection agreements.

CONSOLIDATED WITH

DOCKET NO. U-28356

BELLSOUTH TELECOMMUNICATIONS, INC., EX PARTE

In re: Petition to establish generic docket to consider amendments to Interconnection Agreements resulting from changes of law.

RECOMMENDATION
OF THE ADMINISTRATIVE LAW JUDGE

Background

These consolidated dockets were instituted as vehicles through which the Louisiana Public Service Commission could ensure that parties to interconnection agreements in Louisiana continue to honor their obligations under those agreements and properly effectuate changes to those agreements in accordance with changes in the law. In 1996, the United States Congress enacted legislation for the purpose of developing competitive markets in the telecommunications industry.[1] Of critical significance to that goal is Section 251 of the Act, which requires incumbent local exchange carriers (or ILECs) to provide to requesting telecommunications carriers interconnection with and access to elements of the ILEC's network on an unbundled basis at cost-based (as opposed to market-based) rates. The Act, in Section 252, provides for the

[1] The Telecommunications Act of 1996 was enacted at 47 USC251, *et. seq.*

formalizing of these relationships between ILECs and requesting telecommunications carriers through *interconnection agreements* (or "ICAs" or "252 Agreements") and provides for oversight of these interconnection agreements by State Commissions.

The Federal Communications Commission (FCC) is charged with the responsibility for implementing the Telecommunications Act. In recent years, the FCC has altered the list of UNEs - network elements which must be unbundled and made available by ILECs at cost-based rates under Section 251 of the Telecommunications Act. These changes have thrown the telecommunications industry into periods of uncertainty and are at the heart of these consolidated proceedings. Specifically, the Commission is being requested here to address changes wrought by the FCC's 2003 Triennial Review Order ("TRO")[2] and the FCC's 2005 Triennial Review Remand Order ("TRRO")[3] to the obligations of ILEC BellSouth Telecommunications, Inc. ("BellSouth") and competitive local exchange carriers (or CLECs) who have entered into interconnection agreements with BellSouth for the purpose of accessing and utilizing unbundled elements of BellSouth's network.

On May 27, 2004, the Competitive Carriers of the South, Inc. ("CompSouth") filed a petition with the Commission, requesting the issuance of an emergency declaratory ruling that the obligations of parties to interconnection agreements would remain in effect unless and until effectively amended and approved by the Commission. In response to that petition, the Commission issued Special Order 48-2004,[4] which directed that a docket be opened:

> to ensure the parties continue to honor their obligations under the approved interconnection agreements and to further ensure the parties properly effectuate any changes to those interconnection agreements in accordance with the law,

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[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003)

[3] Order on Remand, Unbundled Access to Network Elements; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 20 FCC Rcd. 2533 (2005).

[4] The Commission's Special Order 48-2004 was decided at the Commission's June 9, 2004 Business and Executive Session and issued on August 18, 2004.

including, but not limited to, the change of law provisions in the interconnection agreements.

Accordingly, Docket U-28131 was opened on August 14, 2004, and various telecommunications providers intervened.

Within Docket U-28131, the Commission issued Order U-28131 on April 26, 2005 and superseded that order with Order U-28131A, issued on May 19, 2005. Those orders address requirements of the FCC's TRRO concerning mass market local circuit switching and the obligation of BellSouth to provide access to UNE-P ("unbundled network elements – platform"). Access to UNE-P (the combination of an unbundled loop, unbundled local circuit switching, and shared transport[5]) on an unbundled basis permits the CLEC to provide "end-to-end" service to a customer completely through the use of the ILEC's network.

In the TRRO, the FCC advised of its decision to no longer impose a section 251 unbundling requirement for mass market local circuit switching.[6] The FCC based its decision upon a finding, among others, that competitive local exchange carriers (CLECs) have "deployed a significant, growing number of their own switches" and "similar deployment is possible in other geographic markets." Thus, the FCC determined that a CLEC's ability to provide mass market local switching services in the market was not impaired by its inability to access mass market local switching as an unbundled network element.

In Order U-28131-A, the Louisiana Commission concluded that BellSouth was not required to provide new switching UNEs to CLECs, as a result of the FCC's TRRO, but that BellSouth was required to continue providing UNE-P to those CLECs who were leasing UNE-P

[5] TRRO at §6.
[6] *Id.*; TRRO at §199.

as of the effective date of the TRRO – the "existing base of UNE-P customers" - pending completion, on March 10, 2006, of a 12-month transition period established in the TRRO.[7]

Meanwhile, on November 1, 2004, BellSouth had filed a petition requesting the establishment of a generic docket to consider amendments to interconnection agreements resulting from changes of law. The Commission Staff filed a motion on July 6, 2005 to consolidate the generic docket, U-28356, with Docket U-28131. That motion was granted on July 25, 2005, and a procedural schedule for addressing changes to interconnection agreements resulting from the FCC's TRO and TRRO was established.[8] Although a hearing was scheduled in this proceeding, the procedural schedule was disrupted by Hurricanes Katrina and Rita. The rescheduled hearing date was also canceled, due to the unavailability of a BellSouth witness. Ultimately, and with the consent of all parties, the matter proceeded as a paper proceeding – for consideration on written testimony, exhibits, and briefs.

On February 22, 2006, the Louisiana Commission, at its Business and Executive Session, asserted its primary jurisdiction pursuant to Rules 51 and 57 of the Commission's Rules of Practice and Procedure, with regard to one of the 25 issues identified by the parties to this proceeding. Issue Number 8 is stated by the parties as follows:

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[7] Louisiana Public Service Commission Order Number U-28131-A on Reconsideration, decided April 20, 2005 and issued on May 19, 2005.

[8] Along with the Commission Staff, BellSouth, and CompSouth, other parties who have participated in the consolidated proceedings are Sprint Communications Company L.P. ("Sprint"); AT&T Communications of the South Central States, LLC ("AT&T"); MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLC (collectively "MCI"); US LEC Communications, Inc. ("US LEC"); the Small Company Committee of the Louisiana Telecommunications Association ("SCC"); Cox Louisiana Telecom, LLC ("Cox"); DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"); Gulf Coast Utilities, Inc. ("Gulf Coast"); Image Access, Inc. d/b/a NewPhone ("NewPhone"); NewSouth Communications, Corp. ("NewSouth"); Xspedius Communications, LLC ("Xspedius"); and ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom ("ITC^DeltaCom").

Issue Number 8

(a) Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

(b) If the answer to part (a) is affirmative in any respect, does the Authority have to establish rates for such elements?

(c) If the answer to part (a) or (b) is affirmative in any respect,

(i) what language, if any, should be included in the ICA with regard to the rates for such elements, and

(ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?

With regard to Issue Number 8, the Commission:

- declined to order BellSouth to include Section 271[9] elements in Section 252 agreements;
- declined to set rates for Section 271 elements;
- adopted BellSouth's proposed contract language with respect to Issue 8; and
- directed that any CLEC which files an enforcement action with the FCC regarding 271 elements shall provide a copy of the filing to the Commissioners so that the Commission may intervene and advise the FCC of its recommendation, if deemed necessary.[10]

The remaining 24 issues are addressed herein.

Jurisdiction

The Louisiana Constitution provides that the Public Service Commission "shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law" and "shall adopt and enforce reasonable rules, regulations, and procedures necessary for the

[9] Section 271 of the Telecommunications Act addresses the entry of Bell operating companies into the interLATA market and the requirements which must be met, including a checklist of access and interconnection requirements.
[10] Louisiana Public Service Commission Order U-28131 Consolidated with Order U-28356, issued on March 7, 2006.

discharge of its duties."[11] Pursuant to constitutional and statutory authority, the Commission is given broad power to regulate telephone utilities and may adopt reasonable and just rules, regulations, and orders affecting telecommunications services.[12] The Commission has exercised jurisdiction over many aspects of telecommunications services in the state, including the promulgation and enforcement of rules applicable to local competition among telecommunications providers.[13] Specifically with regard to the issues raised in this proceeding, the Commission also exercises jurisdiction pursuant to a federal delegation of authority. The Telecommunications Act of 1996, in Section 252, specifically delegates oversight authority over interconnection agreements to State Commissions.

Analysis of the Issues

The parties to this proceeding have identified 25 issues to be considered and decided by the Commission. The issues arise from changes in the law effected by the FCC's TRO and TRRO and applicable to interconnection agreements and the unbundling of network elements. Specifically, the FCC announced changes to the unbundling obligations imposed upon ILECs. Noting its intent to encourage innovation and investment through "facilities-based competition," the FCC determined it appropriate to impose unbundling obligations "only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable facilities-based competition."[14]

[11] La. Const. Art. IV Section 21(b).
[12] South Central Bell Telephone Co. v. La. Pub. Serv. Comm., Supp. 1977, 352 So. 2d 999.
[13] Most recently amended by the Commission's General Order dated October 31, 2005.
[14] TRRO at §2.

The parties to the proceeding – BellSouth (the ILEC) and the Intervenors[15] (the CLECs) – have presented their positions regarding the impact and implementation of the changes in the law and have proposed language to be included in interconnection agreements concerning each of the identified issues. The Commission Staff has also submitted its position with regard to the issues identified by the parties.

Issue Number 2

What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's Triennial Review Remand Order ("TRRO"), issued February 4, 2005?

As a result of its reexamination of the unbundling obligations of ILECS, the FCC concluded in its TRRO that ILECs would no longer be required to unbundle local circuit switching, certain high capacity loops, dark fiber loops, and certain dedicated transport. Recognizing the significance of this change to the ILECs' existing CLEC customer base, the FCC established transition periods and transition pricing with regard to the conversion of the "de-listed" elements to alternative arrangements. The transition period for local switching, certain high capacity loops, and certain dedicated transport is 12 months – ending on March 11, 2006. The transition period for dark fiber loops and transport is 18 months – ending on September 10, 2006. Issue 2 concerns the implementation of this transition plan.

The parties do not appear to disagree as to the beginning and ending of the transition periods established by the FCC and there appears to be no disagreement that transitional pricing shall be retroactive to the beginning point of the transition period. The points of disagreement between BellSouth and the CLECs concern (1) whether CLECs may place orders to migrate to

[15] Although numerous CLECs have intervened in this proceeding, the position of the CLECs has been presented, for the most part, through the filings of the Competitive Carriers of the South, Inc. ("CompSouth").

alternative arrangements at any point within the transition period and (2) whether transition pricing ends prior to the end of the transition period upon a CLEC's migration to alternative arrangements.

BellSouth contends that CLECs must place their orders early enough during the transition period to allow for an orderly migration to alternative arrangements by the end of the transition period. BellSouth further contends that once a CLEC has migrated to an alternative arrangement, the rates of that alternative arrangement apply – even if the transition period has not ended. The CLECs assert that the FCC requires only that the orders for migration be submitted within the transition period. Further, the CLECs contend that while they have a strong interest in an orderly transition, they are under no obligation to pay higher than the transition rates at any time during the transition period. Thus, the CLECs assert that transition pricing should continue to apply throughout the transition period, even if they have migrated de-listed elements to alternative arrangements during that period. The Commission Staff takes the position that CLECs may submit conversion orders at any time prior to the end of the transition period, but that, once the transition period ends, BellSouth may charge the CLEC at commercial, market-based rates as opposed to cost-base rates, even if the migration to alternative service arrangements has not been completed.

The CLECs further urge that interconnection agreements should provide for a transition period applicable in the event of future determinations that a wire center has reached a threshold of non-impairment. The TRRO has established thresholds – minimums – of business lines and fiber collocators, which determine whether or not certain high capacity loops and transport must be provided by ILECs on an unbundled and cost-based basis. When it is determined, from a count of business lines and fiber collocators, that a wire center has reached an established threshold, the ILEC's obligations to provide certain high-capacity loops and dedicated transport

change, and CLECs will be forced to migrate to alternative arrangements. Thus, the CLECs seek the establishment of a transition period for such future circumstances. The Commission Staff agrees with the CLECs that a transition period should be established for such future situations. The Staff takes the position that once a wire center has been determined to have met a threshold, BellSouth should be required to provide notice to the CLECs, who will then have a 90-day transition period for converting to alternative service arrangements.

Analysis

Recognizing that its de-listing of certain unbundled network elements marked a significant change in the telecommunications industry, the FCC established transition periods to allow CLECs to migrate to alternative facilities or arrangements. We find that the language of the TRRO suggests an intention and anticipation by the FCC that the transition periods would be used by the CLECs and BellSouth to fully accomplish the conversion to alternative arrangements, with the final transition to alternative arrangements to occur at the end of the applicable transition period. In discussing de-listed dedicated transport, for example, the FCC stated:

> Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. *At the end of the twelve-month period, requesting carriers must transition* the affected DS1 or DS3 dedicated transport UNEs to alternative facilities or arrangements.[16] (Emphasis Supplied.)

The FCC used almost identical language in explaining the transition periods for high capacity loops and local circuit switching.[17]

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[16] TRRO at §143.

[17] See TRRO at §§196 and 227, describing the transition of high capacity loops and local circuit switching.

The FCC further provided for transitional rates to be applied to de-listed unbundled network elements which were being leased by the CLEC as of the effective date of the TRRO. We find that the language of the TRRO suggests an intention by the FCC to apply the transitional rates to de-listed UNEs which a CLEC chooses to continue leasing, throughout the 12-month or 18-month applicable transition period, in order to protect against "rate shock." The TRRO provides, for example, that

> *during the relevant transition period*, any dedicated transport UNEs that a competitive LEC leases as of the effective date of this Order, but for which the Commission determines that no section 251(c) unbundling requirement exists, *shall be available for lease* from the incumbent LEC at [transitional rates]. We believe that the moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition, provide some protection of the interests of incumbent LECs in those situations where unbundling is not required.[18] (Emphasis Supplied.)

The TRRO contains similar provisions concerning the transitional pricing of de-listed high capacity loops and local circuit switching.[19]

Thus, it is our conclusion that de-listed UNEs leased by a CLEC as of the effective date of the TRRO must be made available for lease by the CLEC at the established transitional rates throughout the applicable transition periods of 12 or 18 months. During the transition periods, CLECs and BellSouth are to take the necessary steps to convert all of the de-listed UNEs to alternative arrangements. However, the actual "transition" date, for purposes of the application of transitional rates, shall occur on the last day of the applicable transition period, at which point transitional rates shall no longer apply.

To the extent a CLEC migrates to other services offered by BellSouth, that migration at the end of the transition period may be reflected solely in a price change, which shall become

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[18] TRRO at §145.
[19] TRRO at §198 (high-capacity loops) and §228 (local circuit switching).

applicable at the end of the transition period. If an amended interconnection agreement becomes effective after the transition period ends, the new rates applicable to de-listed UNEs supplied by BellSouth will be made retroactive to the date the transition period ended. No matter what choice a CLEC makes regarding a de-listed UNE – to migrate to other services offered by BellSouth at market-based rates, to obtain comparable services from another telecommunications provider, or to utilize its own facilities - BellSouth's obligation to provide the de-listed UNEs at the transition rates ends upon the end of the applicable transition period but not before.

We agree with the Commission Staff and the CLECs that interconnection agreements should provide for a transition period in the event of future UNE de-listings occurring when a wire center is determined to be unimpaired. We discuss wire center classifications and applicable procedures at Issue Number 5.

Further, with regard to transitional pricing of de-listed UNEs, we note that neither the TRRO nor the rules promulgated to implement the TRRO use "TELRIC rates" in the calculation of transitional rates. Instead, transitional rates are calculated by adding a margin (15% or $1.00) to the higher of whatever rate the requesting carrier paid for the element as of June 15, 2004, or the rate, if any, established by the state commission between June 16, 2004 and the effective date of the TRRO. Accordingly, interconnection agreements must conform to that pricing language.

Issue Number 3

(a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?
(b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

Analysis

The TRRO addresses implementation of the changes in law through use of the procedures outlined in Section 252 of the Telecommunications Act. That Section provides for the negotiation, arbitration, and State Commission approval of interconnection agreements between ILECs and CLECs:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.[20]

Accordingly, ILECs and CLECs whose interconnection agreements are impacted by the changes in law addressed in this proceeding must move promptly, after the effective date of the Order in this proceeding, to execute amendments to those interconnection agreements to effect the Commission's decisions here. It appears that there is no disagreement between BellSouth and the CLECs on that point. The CLECs and BellSouth are directed to initiate that process by submitting to the Commission Staff for approval, within sixty (60) days of the effective date of this Order, language which implements the decisions contained herein.

Similarly, as both BellSouth and the CLECs suggest, it is appropriate that all pending arbitration proceedings shall be bound by the decisions of the Commission in this proceeding, except with regard to issues as to which the parties have negotiated a different treatment.

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[20] TRRO at §233.

Issue Number 4

What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined?

i. **Business Line**
ii. **Fiber-Based Collocation**
iii. **Building**
iv. **Route**

The TRRO establishes "tests" in the TRRO to determine whether or not BellSouth continues to have an obligation to provide high capacity loops and dedicated transport as unbundled network elements at cost-based rates. The tests are designed to indicate whether competitive provision of services is feasible in a wire center service area, based upon the number of business access lines and fiber-based collocators contained in the wire center. The FCC has determined that if a wire center contains threshold numbers of business lines and fiber-based collocators, impairment to CLECs no longer exists, and BellSouth's obligations change. In discussing high-capacity loops, for example, the TRRO advises:

> [W]e find that the presence of fiber-based collocations in a wire center service area is a good indicator of the potential for competitive deployment of fiber rings. We further find . . . that a wire center service area's business line count is indicative of its location in or near a large central business district, which is likely to house multiple competitive fiber rings . . . with laterals to multiple buildings. A high concentration of business lines generally indicates a likely concentration of large, multi-story commercial buildings, which in turn may justify the construction of fiber networks. Thus, high business line counts and the presence of fiber-based collocators, when evaluated in conjunction with one another, are likely to correspond with actual self-deployment of competitive LEC loops or to indicate where deployment would be economic and potential deployment likely.[21]

Accordingly, the TRRO adopts threshold counts of business lines and fiber-based collocators to determine the status of impairment at a wire center. For example, BellSouth is obligated to lease to a CLEC a DS1 loop to a building - as a UNE at cost-based rates - unless the

[21] TRRO at §167.

building is served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center meets that threshold count of business access lines and fiber-based collocators, BellSouth no longer has the obligation to provide that DS1 loop at cost-based UNE rates.[22] Similarly, BellSouth's obligation to provide DS3 loops as UNEs ends when a wire center meets a threshold count of at least 38,000 business lines and at least four fiber-based collocators.[23]

With regard to dedicated transport, the threshold counts apply to the wire centers at either end of a requested transmission route. The wire centers are considered to be impaired – and BellSouth has the obligation to provide the dedicated transport as a cost-based UNE – if the wire center at either end of the route contains fewer than the threshold count of business lines or fiber-based collocators. Upon a determination that a wire center is a "Tier 1" wire center, in that it contains at least 38,000 business lines or four fiber-based collocators or both, BellSouth is no longer obligated to provide DS1 or DS3 dedicated transport as UNEs. Upon a determination that a wire center is a "Tier 2" wire center, in that it contains at least 24,000 business lines or three fiber-based collocators or both, BellSouth is no longer obligated to provide DS3 dedicated transport as a UNE.[24] A wire center determined to be "Tier 3" meets none of these thresholds, and BellSouth remains obligated to provide dedicated transport as a UNE.

A wire center's attainment of these thresholds carries significant impact to BellSouth and the CLECs; thus, the meaning assigned to the terms used to describe these thresholds is critical. In Issue Number 4, the parties request the Commission's definition of the terms "business line," "fiber-based collocation," "building," and "route." Some of these terms are defined in the TRRO

[22] 47 C.F.R. §51.319(a)(4)(i).
[23] 47 C.F.R. §51.319(a)(5)(i).
[24] 47 C.F.R. §51.319(e).

and implementing regulations; however, the parties disagree as to the proper interpretation and application of the terms.

Business Line

A "business line" is defined in FCC regulations as follows:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
> (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
> (2) Shall not include non-switched special access lines,
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines." [25]

The interpretations of this definition by BellSouth and the CLECs lead to different results. BellSouth contends that the definition calls for an inclusion of *all unbundled loops* in the count of business lines. BellSouth points to individual elements of the definition in support of its position that all UNE loops, including unswitched and residential loops, should be counted. For example, as BellSouth points out, the second sentence of the definition states that the count of business lines shall include all ILEC business lines plus "all UNE loops connected to that wire center."

The CLECs urge a reading of the definition as a whole. They claim that BellSouth's emphasis on the individual parts, rather than the totality, of the definition results in an interpretation which is internally inconsistent and irrational. Instead, the CLECs argue, the first sentence provides the core definition of a "business line," from which the remaining phrases provide elaboration.

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[25] 47 C.F.R. §51.5.

Analysis

In the TRRO, the FCC describes the impairment tests and thresholds it is putting into place with regard to the provision of high-capacity loops and dedicated transport, placing particular emphasis upon the presence and significance of numerous "business lines" to the wire center. In the regulations promulgated to implement the TRRO, the FCC provides a definition of the term "business line." That definition starts out by describing a "business line" as an ILEC-owned "switched access line used to serve a business customer." The second sentence of the definition starts: "The number of *business lines* in a wire center shall equal . . . ." And the third sentence refers to requirements of the *business line tallies*.

Clearly, the first sentence establishes the fundamental description of a business line – an *ILEC-owned switched access line used to serve a business customer*. The remainder of the definition provides further particulars of *ILEC-owned switched access business lines* to be included in the count for purposes of establishing impairment at wire centers, but does not expand upon the fundamental description provided in the first sentence. To interpret the definition otherwise, as BellSouth does, placing emphasis on individual provisions without reference back to the first sentence, renders the definition internally inconsistent and completely at odds with the FCC's stated rationale of utilizing the presence of "business lines" as a test of impairment.

Fiber-Based Collocation

The briefs of the parties indicate that there is no dispute currently existing between them concerning the definition of fiber-based collocation.

Building

The term "building" has significance to BellSouth's obligation to provide high-capacity loops as unbundled network elements. The TRRO places "caps" on the number of DS1 and DS3 loops a requesting carrier may obtain from BellSouth to "any single building."[26] The FCC has not provided a definition of the term "building".

BellSouth urges the utilization of a "reasonable person" definition of "building", suggesting that a reasonable person would consider a single structure building, like One Shell Square in New Orleans, one building, regardless of the number of tenants who may be residing in the building. Similarly, according to BellSouth, a complex of two separate high-rise buildings, such as Chase Towers in Baton Rouge, would be considered two buildings.

The CLECs suggest a "reasonable telecom person" standard, suggesting that a reasonable telecom person would view a "building" from the perspective of a network engineer. From this perspective, the CLECs suggest, a high-rise building with a single telecommunications equipment room would be considered a single building, while a strip mall with separate telecom service points for each individual business in the mall would not. Instead, each business in the strip mall would be considered a separate premises even though the businesses share common walls. The deciding factor in defining a "building", the CLECS contend, is that it is served by a single point of entry for telecom services.

Analysis

The FCC provided no indication that the word "building" should be given other than its ordinary meaning; thus, it would appear appropriate to apply BellSouth's suggested "reasonable person" standard in determining what constitutes a "building". However, as the CLECs point

[26] 47 C.F.R. §51.319(a)(4).

out, the perspective of a reasonable person in the telecom industry might take into consideration factors which might be of no significance to someone outside the industry. Because the determination at issue here is of great significance to the telecommunications industry, we believe that it is entirely appropriate to consider the context in which the determination is being made.

Accordingly, we find that a determination of what constitutes a "building" must be made from a "reasonable person" perspective, but within the context of the telecom industry, and must take into account the FCC's purpose and rationale behind the determination. We believe that most *building* determinations will be quite obvious, while others will require consideration of various factors. For that reason, we do not believe it appropriate to announce one "all-purpose" rule applicable to such determinations. Should disputes arise in the future, the parties may petition the Commission for resolution on a case-by-case basis. If it becomes apparent that a more structured approach is necessary, we will initiate a rule-making proceeding for the purpose of analyzing disputed issues in "building" determinations and promulgating appropriate rules to address those issues.

Route

"Route" is a term of significance to BellSouth's provision of dedicated transport to CLECs. "Route" is defined by the FCC regulations as

> a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., wire center or switch "A" and wire center or switch "Z") are the same "route,"

> irrespective of whether they pass through the same intermediate wire centers or switches, if any.[27]

The TRRO requires an ILEC to unbundle dedicated transport between any pair of ILEC wire centers except where both wire centers defining the route are unimpaired wire centers. Thus, an ILEC must unbundle dedicated transport if a wire center at either end of a requested route is impaired.

Both BellSouth and the CLECs voice concern over the possible manipulation of routes in order to accomplish a result that is unfair in the eyes of the other.

Analysis

We decline to anticipate the hypothetical activity complained of by the parties and will defer any comment on the subject until such time as any party asserts an actual instance of an improper manipulation of routes. We defer to the FCC definition, which we believe makes clear that a "route" is defined by its end points, regardless of whether it passes through one or more intermediate wire centers or switches.

Issue Number 5

(a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?

(b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?

(c) What language should be included in agreements to reflect the procedures identified in (b)?

There is no apparent dispute between BellSouth and the CLECs with regard to part (a) of this issue. Both sides agree that the Louisiana Public Service Commission is charged with

[27] 47 C.F.R. §51.319(e).

resolving disputes arising under interconnection agreements and implementing changes to interconnection agreements necessitated by the TRRO. Thus, with regard to Issue Number 5, the Commission is asked only to resolve any disagreement among the parties concerning the appropriate procedures to be used to identify wire centers which satisfy the FCC's non-impairment criteria for high-capacity loops and dedicated transport.

The CLECs propose the establishment of an annual filing procedure, timed coincident with BellSouth's annual filing of ARMIS business line data on April 1 of each year. Automated Reporting Measurement Information System (ARMIS) reports are filed annually with the FCC by all ILECs. The CLECs propose that, coincident with BellSouth's ARMIS filing each year, BellSouth would file with this Commission a proposed list of any new wire centers meeting TRRO non-impairment criteria. BellSouth's filing at this Commission would state the number of business lines and fiber-based collocators in each wire center as of December 31 of the preceding year. CLECs would have until May 1 to file a challenge to any wire center classified as unimpaired by BellSouth, and the Commission would have a hearing one month later to take evidence on the disputed wire center. Under the CLECs' plan, the Commission would issue a decision by June 15, and any changes to the wire center designations would become effective on July 1.

BellSouth takes the position that the Commission need not establish procedures or guidelines for identifying non-impaired wire centers. BellSouth contends that the FCC has provided adequate guidance to allow BellSouth to identify the non-impaired wire centers without the need for intervention by this Commission. Accordingly, BellSouth has determined from 2003 and 2004 data that Louisiana has 5 Tier 1 wire centers and 3 Tier 2 wire centers (relevant to the provision of dedicated transport on an unbundled basis) and that Louisiana has 2 wire centers

in which CLECs are not impaired with regard to DS3 high capacity loops and 1 wire center in which CLECs are not impaired with regard to DS1 loops.

Analysis

The classification of wire centers as impaired or non-impaired is a matter of critical concern to telecommunications providers in Louisiana. Therefore, we believe it important that the classification of wire centers be handled in an open and efficient fashion – in order to instill a sense of fairness and stability in the state's telecommunications market. We find that the annual filing procedure proposed by the CLECs provides, assuming some adjustments,[28] an appropriate framework for a fair and efficient classification of wire centers. Such an annual filing would provide for a regular review of the status of wire centers in Louisiana, but would not preclude BellSouth from filing a request for wire center reclassification at any other time in the year as well.

Accordingly, we direct the Commission Staff to draft, with input from BellSouth and the CLECs, proposed procedural rules applicable to wire center determinations. The rules should provide a procedural framework within which any disputed issues may be reviewed and resolved in a fair and efficient manner. We will consider the proposed rules at our next Business and Executive Session.

Although BellSouth has submitted its own determinations concerning the current impairment status of Louisiana wire centers, we believe that reliance solely on BellSouth's calculations would be inappropriate. Moreover, decisions made within this proceeding may alter BellSouth's calculations. Finally, we are uncertain of the impact of Hurricanes Katrina and Rita

[28] Some adjustments to the CLECs' proposal would be necessary, for example, to comply with the Louisiana Commission's Rules of Practice and Procedure.

on the calculations previously conducted by BellSouth and how such impact should be addressed in the context of wire center classification. Nevertheless, to the extent BellSouth and the CLECs have no dispute with regard to the classification of certain wire centers, they shall jointly file, within sixty (60) of the effective date of this Order, a request for Commission approval of those wire center classifications. Upon the Commission's approval, the new classifications will go into effect.

Issue Number 6

Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

Issue Number 6 poses another definition question. The federal regulations define a DS1 loop as "a digital local loop having a total digital signal speed of 1.544 megabytes per second."[29] The very next sentence states that "DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including TI services."[30]

What qualifies as a DS1 loop is significant, in that BellSouth has no obligation to provide a DS1 loop UNE from a non-impaired wire center.[31] The definition is also significant to the calculation of "business lines" used to determine the classification of a wire center. For purposes of the "business line" count, the federal regulations direct that, with regard to digital access lines, each 64 kbps-equivalent shall be counted as one line. "For example, a DS1 line corresponds to

[29] 47 C.F.R. §51.319(a)(4).
[30] *Id.*
[31] *Id.*

24 64 kbps-equivalents, and therefore to 24 'business lines.'"[32] If an HDSL-capable copper loop is considered the equivalent of a DS1 loop, it will be counted as 24 "business lines."

BellSouth contends that it has no obligation to unbundle HDSL-capable copper loops from wire centers which have been classified as non-impaired for purposes of DS1 loop unbundling, for the reason that HDSL-capable copper lines are considered the equivalent of DS1 loops. In support of this position, BellSouth points to the provision in the federal regulations, quoted above, that DS1 loops *include* two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services.

Similarly, BellSouth argues that HDSL-capable copper loops, because they are the equivalent of DS1 loops, should be counted as DS1 loops for purposes of calculating the number of business lines from a wire center in impairment determinations. Therefore, according to BellSouth, since one DS1 line corresponds to 24 "business lines," under the federal regulations, an HDSL-capable copper loop should also be counted as 24 "business lines."

The CLECs argue that HDSL-capable copper loops are not the equivalent of DS1 loops. They contend that an "HDSL-capable copper loop" is nothing more than a copper loop facility which is *clear of equipment that could block* provision of high-bit rate digital subscriber line services. It should not be considered a DS1 loop for purposes of impairment, the CLECs argue, unless electronics are added that permit the copper loop to provide a service featuring speeds of 1.544 megabytes per second.

The CLECs contend that BellSouth is again focusing on the wrong aspects of the definition of DS1 loops provided in the regulations. According to the CLECs, the definition makes clear that a DS1 loop must be capable of sending signals at a speed of 1.544 mbps; while noting that various types of copper loops can be used to provide such signal speeds, including

[32] 47 C.F.R. §51.5.

HDSL-capable loops, the definition does not convert every copper loop that meets the characteristics of being "HDSL-capable" into a DS1 loop. Only with electronics added, the CLECs contend, does an HDSL-capable copper loop become the equivalent of a DS1 loop.

Thus, the CLECs argue that even if a wire center is classified non-impaired with regard to the unbundled provision of DS1 loops, BellSouth remains obligated to unbundle HDSL-capable loops *without* the electronics needed to facilitate 1.544 mbps services. Further, the CLECs contend that HDSL-capable copper loops to which the necessary electronics have not been added to facilitate 1.544 MBPS services should *not* be counted as "business lines" for purposes of classifying wire centers.

Analysis

We find the CLECs' rationale persuasive. Once again, we look to the basic thrust of the FCC's definition of a DS1 loop: "a digital local loop having a total digital signal speed of 1.544 megabytes per second." The regulation goes on to include, as DS1 loops, "two-wire and four-wire copper loops capable of providing high-bit rated digital subscriber line services." However, in order to make sense in the context of the overall definition of DS1 loops, that second sentence must be interpreted to include as DS1 loops *only* those two-wire or four-wire copper loops to which the necessary electronics have been added to permit the use of those copper loops for 1.544 mbps services.

Issue Number 9

What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?

The TRRO's transition plans provide for 12 and 18-month transition periods during which CLECs may continue leasing de-listed UNEs, while taking steps to migrate from the de-listed UNEs to alternative facilities. The TRRO notes that the transition plans "shall apply only to *the embedded customer base.*"[33] Issue Number 9 concerns the definition of "embedded customer base," to which the transition plans apply and what changes to the embedded base are permissible during the transition periods.

The CLECs emphasize the word "customer" in the phrase "embedded customer base." They take the position that a CLEC should be able to continue servicing its existing end users, or customers, and make "adds" (adding additional lines), "moves" (moving to a customer's new address), or "changes" (adding or deleting a feature) on behalf of those customers during the transition period.

BellSouth argues that the transition period applies only to the *embedded base of UNE arrangements* (as opposed to embedded *customers*) and does not permit CLECs to "add" new local switching, UNE-Ps, high capacity loops, or high capacity transport in unimpaired wire centers or in excess of the caps. BellSouth does, however, agree to make "changes" in features to the embedded base of UNE arrangements.

[33] TRRO at §§142, 195, and 227.

Analysis

Although the TRRO does not specifically define the phrase "embedded customer base," other provisions in the TRRO, as well as the federal regulations implementing the TRRO's transition period instructions, provide insight into the meaning to be assigned to that phrase. For example, the TRRO specifically instructs that the transition periods shall not permit competitive LECs to *add* new de-listed UNEs – including new UNE-P arrangements, new high-capacity loops, and new dedicated transport.[34] Further, the TRRO provides that transition *pricing* is applicable to de-listed dedicated transport and high-capacity loops *that a CLEC was leasing as of the effective date of the Order*, but for which the Commission determines that no section 251(c) unbundling requirement exists.[35] Similarly, the federal regulations implementing the TRRO provide that the transition periods apply to de-listed high-capacity loops and dedicated transport *that a CLEC was leasing as of the effective date of the TRRO.* [36] We conclude from this language that the phrase "embedded customer base" is properly defined as the CLECs' base of leased UNEs as of the effective date of the TRRO. Accordingly, we concur with BellSouth's definition of "embedded customer base."

Addressing BellSouth's obligation to implement "add" orders related to the CLECs' embedded base of UNE arrangements during the transition period, we find that the TRRO clearly prohibits "adds" to the CLECs' base of leased de-listed UNEs during the transition period. We similarly conclude that "move" orders are also prohibited, in that such orders alter the CLECs' embedded UNE arrangements, to which the transition periods apply. Finally, there appears to be no dispute between the parties concerning BellSouth's implementation of "change" orders.

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[34] *Id.*
[35] TRRO at §§145 and 198.
[36] 47 C.F.R. §51.319(a)(4)(iii) and §51.319(e)(2)(ii)(C) and (iii)(C).

Issue Number 10

What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and

(a) what is the proper treatment for such network elements at the end of the transition period; and

(b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

The parties agree that the concerns presented in Issue Number 10 are largely addressed in the discussion of other issues in this proceeding, particularly Issues 2 and 5. The question remaining under Issue Number 10 concerns the process by which UNEs which were de-listed by the 2003 TRO, but for which the FCC has provided no specific transition plan, should be converted to alternative arrangements. It appears that the parties generally concur in a process by which BellSouth shall provide written notice to CLECs who still have rates, terms, and conditions for these de-listed UNEs in their interconnection agreements. The affected CLECs shall then have thirty (30) days to submit orders to disconnect or convert the de-listed UNEs to other arrangements.

We approve of this process, as it provides for fair notification to the CLECs and fair opportunity for the CLECs to submit orders to disconnect or convert. We further concur with the CLECs' proposal that BellSouth be required to provide, in the written notice, specific identification of the service agreements or services which must be disconnected or converted. We also concur with BellSouth's proposal that to the extent the CLEC requests BellSouth to convert the de-listed UNE to alternative arrangements, BellSouth shall be permitted to assess non-recurring charges associated with that conversion. Finally, if a CLEC disputes BellSouth's identification of UNEs which must be disconnected or converted, the CLEC shall send written

notice of its dispute, within thirty (30) days of BellSouth's notice. BellSouth shall not disconnect the disputed UNEs while the dispute is being resolved. If the parties are unable to reach a voluntary resolution of the dispute, they may petition the Commission for assistance.

Issue Number 11

What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms and conditions that apply in such circumstances?

The questions posed in Issue Number 11 are addressed under Issue Number 2.

Issue Number 13

Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

The SQM/PMAP/SEEM performance measurements were instituted to confirm and monitor BellSouth's compliance with its obligations under Section 271 of the Telecommunications Act to provide nondiscriminatory access to network elements in accordance with the requirements of Section 251 of the Act. These performance measurements were established in conjunction with BellSouth's request for entry into the in-region interLATA market pursuant to Section 271. If BellSouth fails to meet the established performance measurements, it must pay a monetary penalty to the CLEC or the State.

Because the FCC has de-listed some of the Section 251 network elements on which BellSouth was required to report, BellSouth contends that reporting on those elements is no longer appropriate or fair. BellSouth points out, for example, that other telecommunications carriers now provide network elements to CLECs without the burden of the performance measurement requirements.

The CLECs contends that the performance measurements were instituted to confirm BellSouth's compliance with Section 271 and that even when certain network elements are no longer available under Section 251, BellSouth must still provide meaningful, non-discriminatory access to them pursuant to the Section 271 checklist. The CLECs argue that the justification for the institution of performance measurement plans in Section 271 proceedings was to ensure that ILECs did not "backslide" on their promises to maintain open local telecommunications markets. The argue that the need to prevent backsliding does not change simply because the items will not be provided pursuant to Section 271 rather than 251.

Analysis

We decline to reach a decision on this issue in this proceeding. We believe that the questions raised here would be more appropriately addressed in Docket U-22252 (Subdocket C) "In Re: BellSouth Telecommunications, Inc. Service Quality Performance Measurements."

Issue Number 14

What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in the Interconnection Agreements to implement commingling (including rates)?

"Commingling" is defined in the federal regulations implementing the FCC's TRO and TRRO as

> the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services. Commingle means the act of commingling.[37]

[37] 47 C.F.R. §51.5.

In this proceeding, BellSouth and the CLECs disagree on whether BellSouth has an obligation to implement at the request of a CLEC the commingling of unbundled Section 251 network elements with unbundled Section 271 network elements. With the FCC's de-listing of certain Section 251 UNEs, this question has become very important to CLECs who hope to continue their provision of services by commingling still available Section 251 UNEs with Section 271 UNEs.

(The administrative law judges wishes to note, at this point, that this Commission's Order U-28131 Consolidated With Order U-28356, issued in this proceeding on March 7, 2006, specifically declined to order BellSouth to include Section 271 elements in Section 252 interconnection agreements. The Order provides that "Section 271 elements are more properly contained in arms-length, commercial agreements, subject to the FCC's enforcement authority." The Commission did not conclude that it lacks the authority to require BellSouth to include Section 271 elements in interconnection agreements, but rather that it declines to do so.

There is no question, however, that this Commission has been delegated authority through the Telecommunications Act to approve or reject the provisions contained in interconnection agreements between BellSouth and CLECs, utilizing applicable law. The very purpose of this proceeding is to consider amendments to interconnection agreements to ensure that they correctly implement changes in the law applicable to interconnection. One such change concerns the scope of BellSouth's obligation to implement commingling arrangements at the request of a CLEC.

The administrative law judge believes that the Commission's authority pursuant to Section 252 necessarily extends to the approval or rejection of language proposed for the purpose of implementing federal interconnection regulations concerning commingling. Accordingly, the discussion to follow rests upon that assumption.)

BellSouth contends that the TRO clearly excludes Section 271 network elements from the CLEC's commingling option. It is BellSouth's position that language in the TRO limits the scope of "wholesale services" available for commingling to "tariffed access services," only, thereby excluding Section 271 network elements. BellSouth also contends that only the FCC has the authority to regulate BellSouth's compliance with its Section 271 obligations. Thus, BellSouth argues, this Commission has no authority over Section 271 obligations. Finally, BellSouth argues that if Section 271 elements are made available for commingling arrangements, the result will be an undermining of the TRRO's findings that required the de-listing of UNE-P due to the investment disincentives the offering of UNE-P created.

The CLECs contend that commingling does not exclude wholesale facilities and services offered pursuant to the Section 271 checklist. According to the CLECs, a complete reading of the TRO and the TRO Errata demonstrates that commingling is available for the connection of Section 251 UNEs with any "wholesale facilities and services" provided by BellSouth. The CLECs assert that because Section 271 checklist services are "wholesale facilities and services," the TRO specifically requires BellSouth to commingle such services to a UNE or UNE combinations.

Analysis

The definition provided for "commingling" in the federal regulations refers to the linking of a UNE or UNE combination to one or more services that a CLEC has obtained "at wholesale" from an ILEC. The federal regulations place an obligation upon ILECs to "perform the functions necessary to commingle" UNEs and UNE combinations with "one or more facilities or services

that a requesting telecommunications carrier has obtained at wholesale" from an ILEC.[38] While there is no dispute among the parties that Section 271 checklist network elements are "wholesale facilities and services," BellSouth suggests that the TRO *excludes* Section 271 network elements from the list of "wholesale" services and facilities which may be commingled.

At Section 584 of the TRO, the FCC provides:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251(c)(4) of the Act.[39]

As reflected in the Errata to the TRO, that provision originally contained an additional phrase, with the full statement reading as follows:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including *any network elements unbundled pursuant to section 271 and* any services offered for resale pursuant to section 251(c)(4) of the Act.[40] (Emphasis supplied to indicate phrase contained in original provision.)

BellSouth contends that the FCC's decision to delete that phrase in the Errata indicates the FCC's intent to exclude Section 271 elements from the "wholesale facilities and services" which are to be made available for commingling. The CLECs respond that the deletion of the phrase simply corrects a redundancy; since Section 271 elements *are* wholesale services and facilities, the inclusion of that phrase would be redundant.

The CLECs contend that its position is strengthened by the fact that the FCC also deleted another sentence from the TRO at footnote 1990. That footnote appears within a discussion concerning the different requirements imposed upon Bell operating companies by Sections 251 and 271. The footnote originally contained the following sentence, which was deleted by the Errata:

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[38] 47 C.F.R. §51.309(f).
[39] TRO at §584, Corrected by Errata, issued on September 17, 2003.
[40] TRO at §584, Corrected by Errata, issued on September 17, 2003.

> We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these (Section 271) checklist items.

The CLECs contend that this deletion confirms the FCC's intent that Section 271 elements *not be excluded* from the commingling requirements. BellSouth disagrees, arguing that if the FCC intended to include Section 271 in the commingling requirements, it would have deleted the language in footnote 1990 and retained the language which it deleted from Section 584.

BellSouth further points out that the TRO refers to "tariffed access services" in describing "wholesale" services which are subject to the commingling requirement. The CLECs respond that the use of "tariffed access services" as an example of a "wholesale" service in no way implies an exclusion of all other "wholesale" services to which the commingling options apply.

From our overall reading of the TRO, Errata, and federal regulations, we discern no intent by the FCC that Section 271 elements are to be excluded from the "wholesale" facilities and services which CLECs are permitted to commingle with UNEs and UNE combinations. The FCC could easily have stated its intent to exclude Section 271 elements, but, in fact, did not. Moreover, the FCC deleted a sentence from the TRO which would have accomplished such an exclusion. Accordingly, we conclude that the "wholesale" facilities and services available for commingling with UNEs and UNE combinations include services available only pursuant to Section 271.

We have declined, in this proceeding, to order BellSouth to include Section 271 elements in interconnection agreements; thus, it is unclear at this time what Section 271 elements will be "available," possibly as a result of FCC action, for commingling purposes. Therefore, we are unable to make any conclusions concerning the nature of commingling arrangements which might be available to CLECs using Section 271 elements.

Issue Number 15

Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?

There appears to be little dispute between the parties on this issue. The TRO provides that a CLEC may convert UNEs and UNE combinations to wholesale services and may convert wholesale services to UNEs and UNE combinations, so long as the CLEC meets the applicable eligibility criteria.[41] BellSouth and the CLECs have apparently reached agreement with regard to applicable terms and conditions for such conversions – but not with regard to conversion rates. The CLECs object to the rates proposed by BellSouth and contend that new conversion rates must be established through a proceeding allowing for discovery and cross-examination. The CLECs propose that the conversion rate currently applicable to EEL conversions should be utilized until new conversion rates have been approved in proceeding initiated for that purpose.

Analysis

As BellSouth and the CLECs have apparently reached agreement with regard to applicable terms and conditions for such conversions – but not with regard to conversion rates, we address only the rate issue. The TRO instructs that any charges assessed by ILECs in connection with these conversions must be just, reasonable, and nondiscriminatory.[42] The record in this proceeding is insufficient for the purposes of determining whether the rates proposed by BellSouth are just, reasonable, and nondiscriminatory. Accordingly, we conclude that if the parties are unable to reach agreement on applicable conversion rates, BellSouth shall file proposed rates with the Commission and initiate a rate proceeding.

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[41] TRO at §586.
[42] TRO at §587.

Issue Number 16

What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?

We find that this issue should more appropriately be addressed in the rate proceeding to be initiated pursuant to our conclusions in Issue Number 15.

Issue Number 17

Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

Analysis

"Line sharing" is defined in the federal regulations as

> the process by which a requesting telecommunications carrier provides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high frequency portion of the loop.[43]

As part of the new unbundling rules announced in the FCC's TRO, ILECs were relieved of the obligation to make available as UNEs the high frequency portion of the loop for line sharing purposes pursuant to Section 251. However, the FCC determined that the requirements of Section 271(c)(2)(B), which are the requirements which a Bell Operating Company must meet in order to provide in-region interLATA (long distance) services, establish an independent obligation for Bell Operating Companies to provide access to network elements, regardless of the unbundling analysis under Section 251.[44]

In Docket U-28027, a petition for arbitration of an interconnection agreement between BellSouth and DIECA Communications, Inc. d/b/a Covad Communications Company, this

[43] 47 C.F.R. §51.319(a)(1)(i).
[44] TRO at §653.

Commission issued an Order on January 13, 2005, finding that BellSouth has a continuing obligation to provide line sharing under Section 271 unless that obligation was removed as a result of a petition for forbearance filed by BellSouth with the FCC.[45] On January 18, 2006, the Commission voted to approve a ruling by the administrative law judge that the FCC Forbearance Order issued in response to BellSouth's petition did not relieve BellSouth of its Section 271 line sharing obligations.[46] Recently, on February 22, 2006, the Commission rejected the administrative law judge's recommendation in U-28027 that the Commission has jurisdiction to set rates for Section 271 line sharing within the context of the arbitration.[47]

Thus, within Docket U-28027, this Commission determined that BellSouth has a continuing Section 271 obligation to provide line sharing. However, the Commission rejected a finding that it had jurisdiction to set rates for Section 271 line sharing for purposes of that arbitration.

When the Commission took up Issue Number 8 in this proceeding at its February 22, 2006 Business and Executive Session, it announced no specific decision concerning its jurisdiction over Section 271 obligations and rates; however, the Commission voted to *decline* to order BellSouth to include Section 271 elements in Section 252 interconnection agreements and voted to *decline* to set rates for Section 271 elements.

Accordingly, as previously concluded in our Order 28027, we answer in the affirmative to Issue Number 17 – that BellSouth does have a continuing Section 271 obligation to provide line sharing. However, in accordance with our decision at the February 22, 2006 Business and Executive Session, we decline to order BellSouth to include Section 271 elements in interconnection agreements and we decline to set rates for such elements.

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[45] Order U-28027, issued January 13, 2005.
[46] See Minute Entry of January 18, 2006 Business and Executive Session.
[47] See Minute Entry of February 22, 2006 Business and Executive Session.

Issue Number 19

What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

The federal regulations define "line splitting" as

> the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.[48]

The regulations require ILECs to provide to CLECs leasing an unbundled copper loop the ability to engage in line splitting arrangements with another CLEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent.[49] ILECs are also required to make all necessary network modifications for loops used in line splitting arrangements.[50]

The dispute between the parties concerns whether line splitting can involve the commingling of 251 and 271 elements and whether BellSouth must provide the CLECs with splitters.

Analysis

With regard to provision of the splitter, we look to the TRO and its discussion of line splitting. The FCC notes in section 251 of the TRO that

> The Commission previously found that existing rules require incumbent LECs to permit competing carriers to engage in line splitting where a competing carrier purchases the whole loop and provides its own splitter to be collocated in the central office. We reaffirm those requirements but, for purposes of clarity and ensuring regulatory certainty, we find that it is appropriate to adopt line splitting-specific rules.

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[48] 47 C.F.R. §51.319(a)(1)(ii).
[49] *Id.*
[50] Id. At (a)(1)(ii)(B).

The TRO goes on to describe some of the line splitting-specific rules being adopted. The TRO makes no mention, however, of any new rule regarding provision of the splitter.

We need not address whether line splitting can involve the commingling of 251 and 271 elements, in light of our February 22, 2006 decision – declining to order BellSouth to include Section 271 elements in Section 252 agreements.

We conclude that, since the TRO refers to existing rules which provide that the CLEC shall provide its own splitter, and since the TRO makes no reference to a change in that rule, the obligation to provide a splitter remains with the CLEC.

Issue Number 22

What is the appropriate ICA language, if any, to address access to call related databases?

This issue arises from the CLECs' contention that BellSouth continues to have a Section 271 obligation to provide access to call related databases, despite changes in BellSouth's unbundling obligations pursuant to Section 251. BellSouth disputes the CLECs' contention.

Analysis

We need not address whether BellSouth continues to have a Section 271 obligation to provide access to call related databases, in light of our February 22, 2006 decision – declining to order BellSouth to include Section 271 elements in Section 252 agreements.

Issue Number 23

(a) What is the appropriate definition of minimum point of entry ("MPOE")?
(b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominately residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?

Issue Number 28

What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?

These two issues concern the FCC's unbundling obligations for fiber loops, including fiber to the home loops ("FTTH") and fiber to the curb loops ("FTTC"). A fiber to the home loop consists entirely of fiber optic cable serving an end user's customer premises or a multiunit premises' minimum point of entry. A fiber to the curb loop consists of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or a multiunit premises' minimum point of entry.[51]

As a result of the TRO's unbundling rules, an ILEC's obligation to provide nondiscriminatory unbundled access to fiber to the home and fiber to the curb loops has been significantly limited. ILECs are no longer required to provide these fiber loops to an end user's customer premises which has not been served by an loop facility (a new build), or when the ILEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility (an overbuild).[52]

BellSouth and the CLECs have only one fundamental disagreement concerning the unbundling of fiber loops, and that disagreement concerns the customer groups to which the rules apply. The CLECs claim that BellSouth was not granted a total exception to its loop

[51] 47 C.F.C. §51.319(a)(3)(i).
[52] Id. At (a)(3)(ii) and (iii).

unbundling obligations for all fiber loops. They contend that these unbundling rules apply only to loops provisioned to mass market customers - not to loops provisioned to enterprise customers.

BellSouth disagrees, arguing that the FCC's unbundling decisions regarding fiber loops are based on technology, not on the customer to be served. Thus, it is BellSouth's position that the unbundling rules promulgated for fiber loops apply to all provision of fiber loops, regardless of the customer being served.

Analysis

We agree with BellSouth. It is true, as the CLECs point out, that the TRO's unbundling rules are organized under two specific market groups – the mass market group and the medium and large business enterprise market[53] – and analyzed under those two market groups:

> Consistent with our statutory mandate and relevant judicial precedent, we focus on specific market and customer characteristics as informed by the various loop types and capacities that typically serve these markets and customers to undertake the granular inquiry necessary to determine where loop impairment exists. In distinguishing among the various types of loop facilities, *i.e.*, DS0 (voice-grade/POTS), DS1, DS3, OCn and dark fiber, we recognize that these facilities, as a practical matter, typically serve distinct classes of customers, resulting in different economic considerations for competitive carriers seeking to self-deploy.[54]

This approach is explained as follows:

> Through this approach we are able to more precisely calibrate our rules to ensure that competitive LECs only gain access to unbundled loops where they are impaired under the standard we adopt above, *i.e.*, where they cannot economically self-provision loops and competitive alternatives do not exist. To that end, we conduct separate loop impairment analyses based on loop types and capacity

[53] TRO footnote 624 describes the mass market as consisting "primarily of residential and similar, very small, business users of analog POTS. The enterprise market is a business customer market of typically medium to large businesses with a high demand for a variety of sophisticated telecommunications services."
[54] TRO at §197.

> levels, which also consider two relevant customer classes – the mass market and the enterprise market.[55]

Thus, because fiber loops are provisioned predominantly to mass market customers, they are addressed in the "mass market" discussion; since DS1 loops are provisioned predominantly to enterprise market customers, they are addressed in the "enterprise market" discussion.

However, the TRO specifically explains that this method of organization and analysis of unbundling does not limit the application of the rules; to the contrary, the rules "apply with equal force to every customer served by a loop type."[56]

> Our loop unbundling analyses takes into account the relevant customer market typically served by the loop capacity involved. However, we recognize that although each loop type and capacity level may be used predominantly to provide service to a particular customer group, that same loop also may be used to provide service across a range of customer categories. For that reason, though our loop unbundling analysis focuses upon the customer classes most likely to be served by a specific type of loop, the unbundling rules we adopt apply with equal force to every customer served by that loop type.[57]

The FCC reiterates, at Section 210 of the TRO that "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served."

Accordingly, we conclude that the unbundling rules for fiber to the home and fiber to the curb loops are applicable to the provisioning of these loops in all customer markets.

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[55] *Id.*
[56] TRO at footnote 623.
[57] *Id.*

Issue Number 24

What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

A *hybrid loop* is defined in the federal regulations as "a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant."[58] Pursuant to the regulations, an ILEC is not required to provide unbundled access to the "packet switched features, functions and capabilities of its hybrid loops."[59]

The parties have raised no concerns with regard to this definition or unbundling rule. However, BellSouth objects to the CLECs proposal of language which would require BellSouth to provide access to hybrid loops as a Section 271 obligation.

Analysis

We will not address proposed language which would require BellSouth to provide access to hybrid loops as a Section 271 obligation in light of our February 22, 2006 decision, declining to order BellSouth to include Section 271 elements in Section 252 interconnection agreements.

[58] 47 C.F.R. §51.319(a)(2).
[59] *Id.*

Issue Number 26

What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

Issue Number 27

What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICA's?

Issues 26 and 27 concern BellSouth's obligation to provide routine network modifications.

A *routine network modification* is defined in the federal regulations as "an activity that the incumbent LEC regularly undertakes for its own customers."[60] ILECs are required by the regulations to make all routine network modifications to unbundled loop facilities used by a CLEC and to unbundled dedicated transport facilities used by a CLEC.[61]

Line conditioning is defined in the federal regulations as "the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service."[62] The federal regulations require ILECs to condition a copper loop at the request of a CLEC, and ILECs may recover their costs for such conditioning under TELRIC prices.

BellSouth and the CLECs disagree on the relationship between routine network maintenance obligations and line conditioning obligations. BellSouth considers line conditioning to be a subset of routine network maintenance obligations, while the CLECs

[60] 47 C.F.R. §51.319 at (a)(7)(ii) and (e)(4)(ii).
[61] *Id.* At (a)(7)(i) and (e)((4)(i).
[62] 47 C.F.R. §51.319(a)(1)(2).

maintain that line conditioning imposes requirements on BellSouth which are separate and distinct from its network maintenance obligations.

The CLECs contend that this distinction is significant in that BellSouth's routine network maintenance obligations require only that BellSouth undertake activities which it regularly undertakes for its own customers, while line conditioning obligations require BellSouth to condition a line at the request of a CLEC, without regard to whether BellSouth undertakes the requested type of activity for its own customers. BellSouth argues that both its line sharing and routine network maintenance obligations require only that it undertake activities that it regularly undertakes for its own customers.

According to the CLECs, this distinction gains in importance as broadband services continue to evolve. They contend that BellSouth could slow a CLEC's deployment of new technology by declining to perform line conditioning, on the basis that it is obligated only to perform routine network maintenance. If the new technology is not one that BellSouth provides to its own customers, and since routine network maintenance is defined as activity that an ILEC undertakes to provide for its own customers, BellSouth could decline to perform the requested line conditioning for the requesting CLEC since it is not an activity which it regularly undertakes for its own customers.

The distinction is also pertinent to the rates BellSouth is allowed to charge. BellSouth contends that if it is obligated to provide line conditioning of a kind that it does not routinely provide for its own customers, it should be permitted to charge a commercial or tarrifed rate rather than TELRIC rates. The CLECs dispute this contention and further argue that BellSouth must obtain approval of any individual case basis pricing it attempts to impose for routine network modifications.

Analysis

Line conditioning and routine network maintenance obligations are addressed separately in the TRO and in the federal regulations and impose separate and distinct obligations on ILECs. Routine network maintenance, which ILECs must provide, is described as "those activities that incumbent LECs regularly undertake for their own customers."[63] Line conditioning is described as "the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service." The limiting language applied to routine network maintenance – "those activities that incumbent LECs regularly undertake for their own customers – is not used to describe the ILEC's line conditioning obligations.

However, in Section 643 of the TRO, the FCC responds to arguments by some ILECs that line conditioning creates a superior network by explaining that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their customers." While this language is interpreted by BellSouth to impose on line conditioning obligations the same limitations imposed upon routine network maintenance obligations, the implications of that section are unclear. We find no language in the TRO which indicates a clear intention by the FCC to alter the description of line conditioning obligations to "match" routine network maintenance obligations" or to subsume the line conditioning obligations under routine network maintenance obligations. The federal regulations implementing the TRO continue to address the two obligations as separate and distinct requirements.

Accordingly, we conclude that line conditioning obligations and routine network maintenance obligations exist as separate ILEC requirements. We concur with the Commission

[63] TRO at §632

Staff's suggestion that interconnection agreements should include the specific language contained in the federal regulations describing line conditioning and routine network maintenance obligations. Disagreements with regard to BellSouth's obligations under either category of obligations may be submitted to the Commission for arbitration.

To the extent BellSouth wishes to assess charges for costs it claims are not already recovered in Commission-approved recurring or non-recurring rates, we concur with the CLECs' position that BellSouth must file a rate application and supporting documentation with the Commission and obtain approval.

Issue Number 29

What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

The FCC permits CLECs to convert special access circuits to unbundled combinations of loop and transport, known as EELs (Extended Enhanced Links) through a self-certification process. The CLECs are pemitted to self-certify that they satisfy the qualifying service eligibility criteria for high-capacity EELs. ILECs must accept the self-certifications, but they have been given limited audit rights, in accordance with which they may audit a CLEC's compliance with qualifying service eligibility criteria. This issue concerns the process by which such audits are to be conducted. The parties here have not reached agreement on implementing language.

Analysis

The TRO is fairly specific concerning the auditing process to be implemented. The provisions permit an ILEC to obtain and pay for an independent auditor to audit a CLEC's compliance with the qualifying service eligibility criteria. The TRO provides for audits to be

conducted on an annual basis and establishes requirements with regard to the standards to be adhered to by the independent auditor. The TRO also provides that the auditor's report will reach a conclusion concerning whether the CLEC complied in all material respects with the applicable service eligibility criteria. If the conclusion is that the CLEC failed to comply, the CLEC must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, make the correct payments on a going forward basis, and reimburse the ILEC for the cost of the auditor. If the conclusion is that the CLEC complied in all material respects with the criteria, the ILEC must reimburse the CLEC for its costs associated with the audit.[64]

In light of the parties' failure to reach agreement as to the language to be used in interconnection agreements, we direct that they utilize the specific wording utilized in the TRO to describe the process – with the following additional instructions. We note, first, the FCC's stated intent, in Section 622 of the TRO, that the auditing process is to be based "upon cause." Accordingly, the audit process shall begin with written notice to the CLEC, at least thirty (30) days prior to the start of the audit, which notice shall contain BellSouth's specific allegations of non compliance, shall include a listing of the particular circuits for which BellSouth alleges noncompliance, and shall be accompanied by all supporting documentation. Second, in order to ensure the independence of the auditor, BellSouth shall also provide in its written notice a list of three auditors from which the CLEC may choose one to conduct the audit.

[64] TRO at §§626 – 628.

Issue Number 31

What language should be used to incorporate the FCC's *ISP Remand Core Forbearance Order* into interconnection agreements?

Analysis

We concur with the CLEC's proposal that the FCC's ISP Remand Core Forbearance Order may be reasonably incorporated into interconnection agreements by deleting all references to "new markets" and "growth cap" restrictions. Such revisions shall be accomplished along with other amendments resulting from our decision in this proceeding.

Issue Number 32

How should the determinations made in this proceeding be incorporated into existing Section 252 interconnection agreements?

As provided in Issue 3, ILECs and CLECs whose interconnection agreements are impacted by the changes in law addressed in this proceeding must move promptly, upon the effective date of the Order in this proceeding, to execute amendments to those interconnection agreements to effect the Commission's decisions here. It appears that there is no disagreement between BellSouth and the CLECs on that point. The CLECs and BellSouth are directed to initiate that process by submitting to the Commission Staff for approval, within sixty (60) days of the effective date of this Order, language which implements the decisions contained herein.

We further direct that all pending arbitration proceedings shall be bound by the decisions of the Commission in this proceeding, except with regard to issues as to which the parties have negotiated a different treatment.

Finally, we direct that the decisions reached herein shall have general applicability to interconnection agreements in Louisiana, except with regard to issues as to which the parties have negotiated a different treatment.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA

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VICE CHAIRMAN JACK "JAY" A. BLOSSMAN

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