BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

In the Matter of	)	
	)	
Joint Petition for Arbitration of NewSouth Communications Corp., *et al.* with BellSouth Telecommunications, Inc.	)	Docket No. 04-00046

PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Tennessee Code Annotated Section 4-5-317(a) and Tennessee Regulatory Authority Rule 1220-1-2-.20(1), NuVox Communications, Inc. ("NuVox") respectfully submits this Petition for Reconsideration and Clarification requesting that the Tennessee Regulatory Authority ("Authority") reconsider or clarify certain portions of its December 5, 2007 Final Order of Arbitration Award ("Final Order") in the above-captioned proceeding.[1] NuVox respectfully requests that the Authority reconsider or clarify, as specified herein, its decisions with regard to Items 26, 36, 37 and 51 because said decisions either (a) create inconsistencies with resolution of other items and run contrary to the laws and rules governing interconnection and unbundling, particularly the Telecommunications Act of 1996 (47 U.S.C. § 151 *et seq.*), as amended, and the implementing rules and orders of the Federal Communications Commission ("FCC"), or (b) address contract language that never was in dispute between the parties and never was an issue in this arbitration.

[1] Xspedius Communications LLC and its operating subsidiaries named in this proceeding, which have been consolidated and renamed Time Warner Telecom of the Mid-South LLC, are not a party to this Petition.

ITEM 26

(ISSUE 2-8): 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?

The Authority's decision on this item, as set forth in the Final Order, is at odds with the plain language of the FCC's commingling rule and related FCC orders. Nowhere has the FCC carved-out an exception to its commingling rule for Section 271 elements. Moreover, the Authority's decision contradicts legal precedent[2] and is contrary to the decisions of the majority of AT&T-Southeast (formerly, "BellSouth") commissions.[3] Thus, the weight of

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2 *See NuVox Communications, Inc. v. Edgar*, 511 F. Supp. 2d 1198 (N.D. Fla. 2007) (reversing the Florida PSC's finding that BellSouth is not required to commingle Section 251 and Section 271 elements).

3 The state commissions in Alabama, Georgia, Kentucky, Louisiana, and North Carolina ruled that BellSouth is required to commingle network elements provided pursuant to Section 251 with those provided pursuant to Section 271 of the Telecommunications Act. *In re Momentum Telecom*, Final Order Resolving Disputed Issues, Docket No. 29543, 2006 WL 1752312, at *3 (Ala. P.S.C.) (Apr. 6, 2006)("BellSouth should be required to perform the functions necessary to commingle § 251(c)(3) UNEs with other wholesale services including § 271 elements."); *In re NewSouth Commc'ns Corp.*, Order on Unresolved Issues, Docket No. 18409-U, 2006 WL 2104354 (Ga. P.S.C.), at *14 (July 7, 2006) ("[T]o 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."); *Generic Proceeding to Examine Issues Related to BellSouth Telecom., Inc.'s Obligations to Provide Unbundled Network Elements*, Order on Remaining Issues, Docket No. 19341-U, 2006 Ga. PUC LEXIS 12, at *13 (Feb. 7, 2006) ("[T]o 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."); *Joint Petition for Arbitration of NewSouth Commcn's Corp et al. of an Interconnection Agreement with BellSouth Telecoms. Inc. pursuant to Section 252(b) of the Communications Act of 1934 as Amended*, Case No. 2004-00044, 2006 Ky. PUC LEXIS 159, at *14-17 (Mar. 14, 2006); *Louisiana Public Svc. Comm'n Ex Parte Consolidated with Bellsouth Telecommunications Ex Parte*, Opinion, Docket No. U-28141, 2006 La. PUC LEXIS 250, at *26 (Jul. 25, 2006) ("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 which CLECs are permitted to commingle with UNEs and UNE combinations."); *In re NewSouth Communications Corp. et al.*, Order Ruling on Objections and Requiring the Filing of the Composite Agreement, Docket No. P-772, Sub 8, Docket No. P-913, Sub 5, Docket No. P-1202, Sub 4, 2006 WL 707683 (N.C.U.C.), at *21 (Feb. 8, 2006) ("[T]he Commission has come to believe on reconsideration that Section 271 services, elements, or offerings constitute 'wholesale services' within the meaning of the commingling rule and therefore that they should be made available on a commingled basis with Section 251 UNEs.");

Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law, Order Ruling on Objections, Docket No. P-55, Sub 1549, 2006 N.C. PUC LEXIS 732, at *8 (July 10, 2006) ("Section 271 offerings can be commingled with Section 251 UNE offerings."). Many other state commissions reached the same conclusion. *Petition of SBC Arkansas for Compulsory Arbitration of Unresolved Issues for Compulsuroy [sic] Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Arkansas 271 Agreement*, Memorandum Opinion and Order, 2005 Ark. PUC LEXIS 432, at *10-11 (Oct. 11, 2005) ("UNE Issue No. 12 is resolved in favor of the CLECs...Paragraph 584 of the TRO requires incumbent LECs to permit commingling UNEs with other wholesale facilities [including section 271 elements].... Further, disallowance of the commingling will appear to violate the nondiscrimination standards contained in Sections 251 and 202 of the Act."); *Petition of Qwest Corp. for Arbitration of an Interconnection Agreement with Covad Commcn's Co. Pursuant to 47 U.S.C. § 252(b)*, Initial Commission Decision, 2004 Colo. PUC LEXIS 963, at *121 (Aug, 19, 2004) aff'd 2004 PUC Lexis 1237, *6-7 (Oct. 27, 2004) ("There can be no dispute that network elements obtained under § 271 are wholesale services. As such, the TRO allows for commingling of UNEs with § 271 elements."); *Petition of Verizon Maryland Inc. for Consolidated Arbitration of an Amendment to Interconnection Agreements of Various CLEC and CMRS Providers Pursuant to Section 252 of the Telecommunications Act of 1996*, Opinion, 2006 Md. PSC LEXIS 15, at *65 (July 31, 2006) ("The CCC's commingling language should be included in the Amendment because it tracks the TRO and is otherwise appropriate as it required Verizon to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including facilities leased under § 271 at a just, reasonable and lawful manner."); *Petition of Navigator Telecoms. LLC for Arbitration Against SBC Oklahoma Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996*, Cause No. PUD 200400499, 2006 Okla. PUC LEXIS 63, *61 (Mar. 24, 2006) ("Pursuant to Paragraphs 573-584 of the TRO, SBC Oklahoma must connect any 251(c)(3) UNE to any non-251(c)(3) network element, including § 271 network elements or any other wholesale facility or services obtained from SBC Oklahoma."); *Petition of Covad Commc'ns Co. for Arbitration of an Interconnection Agreement with Qwest Corp. Pursuant to 47 U.S.C. § 252(b)*, Arbitrator's Report, Minn. P.U.C. Docket No. P-5692, Arbitrator's Report, at 20 (Dec. 15, 2004), *aff'd* Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement, 2005 WL 1214352 (Minn. P.U.C.) (Mar. 14, 2005) ("The TRO used broad language to require commingling of an unbundled network element provided under section 251 with any other ability or service obtained at wholesale pursuant to a method other than unbundling."); *Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996,* Decision Adopting Amendment to Existing Interconnection Agreements, Application 05-07-024, 2006 Cal. PUC LEXIS 33, at *93-95 (July 28, 2005) (requiring SBC to provide 13 different commingling arrangements); *Petition of DIECA Commc'ns, Inc., D/B/A Covad Commc'ns Co., for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corp.*, Order on Reconsideration, Docket No. 04-2277-02, 2005 Utah PUC LEXIS 66, at *5 (Apr. 13, 2005) ("[W]e conclude that Section 251(c)(3) elements must, at Covad's request, be commingled with Section 271 elements[.]"); *Petition for Arbitration of Covad Commc'ns Co. with Qwest Corp.*, Final Order Affirming, in Part, Arbitrator's Report and Decision, Docket No. UT-043045, 2005 Wash. UTC LEXIS 54, at *53 (Feb. 9, 2005) ("We find it appropriate, and consistent with federal law, to include language addressing commingling of Section 251(c)(3) UNEs with Section 271 elements in the agreement[.]").

contrary authority requiring commingling of Section 251 and Section 271 elements certainly suggests that the Authority should reconsider and modify its initial decision on this issue.

The Authority's decision on Item 26 is in error and warrants reconsideration for several specific reasons: (1) the FCC's *Triennial Review Order* provides that AT&T must commingle Section 251 unbundled network elements ("UNEs") with "wholesale services" provided by AT&T; (2) the facilities or services provided by AT&T to satisfy its Section 271 obligations qualify as "wholesale facilities or services" and are subject to commingling requirements; and (3) the consequence of the proper application of the FCC's commingling rules does not result in services that are "the equivalent of UNE-P." In the *Generic Docket*,[4] Competitive Carriers of the South, Inc. ("CompSouth") raised these same reasons as cause for reconsideration of the Authority's decision in that docket not to require commingling of Section 251 and Section 271 elements. NuVox is a member of CompSouth. Thus, for the sake of efficiency, NuVox will not reargue the same bases for reconsideration here, and instead will hereby incorporate by reference CompSouth's pleading and the arguments set forth therein. A copy of CompSouth's pleading is attached hereto for inclusion in the record of this proceeding.

ITEM 36

(ISSUE 2-18): (A) How should line conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to line conditioning?

NuVox consistently has maintained that line conditioning should be defined in the Agreement as set forth in FCC Rule 47 C.F.R. § 51.319(a)(1)(iii)(A). NuVox also consistently has maintained that the language adopted should require that BellSouth perform line conditioning in accordance with 47 C.F.R. § 51.319. Neither the definition nor the rule limits

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4 *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381.

AT&T's obligation to provide line conditioning on UNE loops. The Authority adopted these positions, and NuVox therefore does not request reconsideration of this aspect of the Final Order. However, NuVox does request that the Authority clarify its decision so that it includes an express, affirmative ban on AT&T limiting the provisioning of line conditioning to circumstances in which it regularly performs line conditioning for its own customers. Such a modification would address the concerns of Director Jones, as expressed in his separate opinion.[5] As Director Jones explained in his separate opinion, "the obligation to perform line conditioning is tied to the obligation to provision the line and is not dependant on how or whether the ILEC provides line conditioning to retail customers."[6] In its Final Order, the Authority appears to ban "[a]ny attempt to limit an ILEC's obligation to perform line conditioning".[7] The proposed clarification would merely serve to clarify by rejecting directly the particular limitations that AT&T had proposed.

ITEM 37

(ISSUE 2-19): Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet?

In the last sentence of the Deliberations and Conclusions section for Item 37, the Final Order states that the majority of the Panel voted and that "any provision of service that BellSouth provides for its own customers shall also be made available to CLECs regardless of

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5 *See* Separate Opinion of Director Ron Jones, at 11-12 (Dec. 5, 2007).

6 *Id.* (citing FCC *Triennial Review Order*, ¶ 643); *see also Triennial Review Order*, n.1947 (affirmatively citing the FCC's *UNE Remand Order* and explaining how the line conditioning obligation is part of the "basic loop" unbundling obligation and that it applies to "loops of any length" and "even where the incumbent itself is not providing advanced services"), ¶ 642 (readopting the line conditioning rules adopted in the FCC's *UNE Remand Order* for the same reasons and without limitation), ¶ 644 (concluding that requiring ILECs to perform line conditioning for CLECs furthers the goals of Section 706).

7 Final Order at 31.

length."[8] This sentence is ambiguous and confusing in that it does not establish a clear conclusion as to whether the Authority has adopted a limitation on AT&T's obligation to provide line conditioning – and load coil removal in particular – on copper loops of 18,000 feet or more in length. Such a limitation would be inconsistent with federal law[9] and the Authority's own rulings on Item 36 and Item 38.[10] Indeed, in its deliberations on Item 37, the Authority itself recognized that the FCC sought "to prevent the ILECs from refusing to condition the loop merely because the loop is over 18,000 feet."[11] Accordingly, NuVox requests that the Final Order's decision on Item 37 be modified so that the final sentence of the Deliberations and Conclusions section for this item is deleted and replaced with language affirming AT&T's federal obligation to provide line conditioning on loops regardless of loop length and regardless of whether AT&T performs such line conditioning for its own retail customers.

ITEM 51

(ISSUE 2-33): (B) Should there be a notice requirement for BellSouth to conduct and audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed?

Although NuVox believes that the Authority's decision on this item is in many respects inconsistent with federal law, NuVox seeks reconsideration with respect to only one aspect of the Authority's decision. The Final Order found, among other things, that "(5) reimbursement of audit costs should conform to the provisions of paragraph 627 of the *Triennial*

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8 *Id.* at 33.

9 *See Triennial Review Order,* n.1947 (affirmatively citing the FCC's *UNE Remand Order* and explaining how the line conditioning obligation is part of the "basic loop" unbundling obligation and that it applies to "loops of any length" and "even where the incumbent itself is not providing advanced services".).

10 Director Jones also notes that the majority's decision here is inconsistent with the findings in Item 36. *See* Separate Opinion of Director Jones, at 12.

11 Final Order at 33 (citing FCC *Advanced Services Third Report and Order,* ¶ 36).

Review Order."[12] Because the parties already had agreed to contract language which conforms to both paragraphs 627 and 628 of the *Triennial Review Order*, the reimbursement of audit costs was never at issue in this arbitration proceeding. Accordingly, NuVox respectfully requests that the Authority reconsider its decision and strike part (5) (quoted above) of its Deliberations and Conclusions section for Item 51. There was no controversy for the Authority to resolve with respect to audit reimbursement and NuVox simply fears that the inclusion of such language in the Final Order might create a controversy where none had existed before.

CONCLUSION

For all the foregoing reasons, NuVox respectfully requests that the Authority reconsider and modify its initial findings with regard to Items 26, 36, 37 and 51 as explained herein.

Respectfully submitted this 20th day of December, 2007.

By: H. LaDon Baltimore

John J. Heitmann
Kelley Drye & Warren LLP
3050 K Street N.W.
Suite 400
Washington, D.C. 20007
(202) 342-8544
(202) 342-8451 (fax)
jheitmann@kelleydrye.com

H. LaDon Baltimore
Farrar & Bates, LLP
211 Seventh Ave. N., Suite 500
Nashville, TN 37219
Phone: 615-254-3060
Fax: 615-254-9835
don.baltimore@farrar-bates.com

Counsel for NuVox Communications

[12] Final Order, at 19.

Certificate of Service

The undersigned herby certifies that a true and correct copy of the foregoing has been forwarded via first class U.S. mail, hand delivery, overnight delivery, or facsimile or electronic transmission to the following this 20th day of December, 2007.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201

Charles B. Welch, Esq.
Farris, Mathews, et al.
618 Church Street, Suite 300
Nashville, Tennessee 37219

H. LaDon Baltimore

H. LaDon Baltimore

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

December 13, 2007

Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law	)))	Docket No. 04-00381

COMPSOUTH PETITION FOR RECONSIDERATION

Pursuant to Tennessee Code Annotated Section 4-5-317(a) and Tennessee Regulatory Authority Rule 1220-1-2-.20, Competitive Carriers of the South, Inc. ("CompSouth")[1] submit the following Petition for Reconsideration of one aspect of the Authority's November 28, 2007 Order (the "Order") in the above-captioned proceeding. CompSouth requests the Authority reconsider its decision regarding Issue 14, regarding commingling requirements established by the FCC.[2] Specifically, CompSouth urges the Authority to reconsider the decision of a majority of the panel that BellSouth is not required to commingle network elements provided pursuant to Section 251 with those provided pursuant to Section 271 of the Telecommunications Act of 1996 ("the Act"). The decision of the panel majority is inconsistent with the only federal court decision that is precisely on point,[3] and is also out of step with the decisions of the majority of the state commissions in the BellSouth region.[4]

In the Order, "the majority of the panel found that unbundling and commingling are Section 251 obligations, and when BellSouth provides an element pursuant only to Section 271,

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1 CompSouth's members participating in this docket include the following companies: [TO COME]

2 Issue 14 is addressed at pages 27-33 of the Authority's Order.

3 *See NuVox Communications, Inc. v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007).

4 Only three state commissions (Florida, Mississippi, and South Carolina) have supported the position taken in the Order, and the Florida PSC's decision was reversed by the federal court in the *NuVox* case cited above. The state commissions in Alabama, Georgia, Kentucky, Louisiana, and North Carolina have ruled consistently with position advocated by CompSouth here.

BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element or service."[5] In reaching its conclusion, "the majority of the panel found that the CLECs are relying," in their argument that commingling is required, on a portion of the FCC's *Triennial Review Order* ("*TRO*")[6] that was removed by the FCC in its *Errata* to the *TRO*.[7] The majority held that "[t]hrough the *Errata*, the FCC removed the issue of commingling Section 251 elements with Section 271 independent unbundled elements."[8] In addition, the majority reasoned that requiring commingling involving the switching network element would result in "the equivalent of UNE-P, which is a type of arrangement the FCC has said BellSouth must no longer provide."[9]

The Order notes that "Director Jones did not vote in favor of the prevailing motion," and states that it is Director Jones' opinion that "the commingling obligation includes both resell services provided pursuant to Section 251(c)(4) and wholesale services provided pursuant to Section 271."[10] Director Jones detailed the basis for his views in a separate opinion on the commingling issue filed on December 5, 2007, in Docket No. 04-00046, an arbitration proceeding in which commingling requirements were also in dispute.[11] Since Director Jones'

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5 Order at 30.

6 In re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 03-36, 18 F.C.C.R. 19,020, Report and Order on Remand and Further Notice of Proposed Rulemaking (Aug. 21, 2003) ("TRO").

7 In re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 03-36, Errata (Sept. 17, 2003) ("TRO Errata").

8 *Id.* at 31.

9 *Id.* at 32.

10 *Id.* at 33, n.141.

11 Separate Opinion of Director Ron Jones, Docket No. 04-00046, In Re: 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 and Xspedius Management Co. of Chattanooga, LLC of an Interconnection Agreement with BellSouth (Dec. 5, 2007).

separate opinion was filed in another docket, but is referred to herein, it is attached hereto as Attachment A.

CompSouth respectfully urges that the decision on commingling reached by the majority of the panel is based on an erroneous interpretation of the FCC's *TRO* and the record evidence in this case.[12] The majority's decision is incorrect for three reasons: (a) the *TRO* provides that BellSouth must commingle Section 251 unbundled network elements ("UNEs") with "wholesale services" provided by BellSouth; (b) the facilities or services provided by BellSouth to satisfy its Section 271 checklist obligations qualify as "wholesale facilities or services" and are subject to commingling requirements; and (c) the consequence of the proper application of the FCC's commingling rules does not result in services that are "the equivalent of UNE-P."

A. THE TRO PROVIDES THAT BELLSOUTH MUST COMMINGLE SECTION 251 UNES WITH "WHOLESALE SERVICES" PROVIDED BY BELLSOUTH.

The Order correctly notes that, in the *TRO*, the FCC first included, then deleted in its *Errata*, specific references to commingling and Section 271 checklist elements. The critical question before the Authority, however, is not what the *deleted* provisions said. What matters going forward is the text the FCC left in the *TRO* as its final interpretation of the Act. There is no dispute that, after amendments made by the *Errata*, the FCC found that commingling means:

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

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[12] CompSouth does not propose that it be permitted to present new evidence in support of its request for reconsideration. The issue here is a matter of legal interpretation. *See* TRA Rule 1220-1-2-.20(1) (stating requirements for petitions for reconsideration that base the request for reconsideration on a request to present new evidence).

The FCC held that commingling is available for the connection of Section 251 UNEs with any "wholesale facilities and services" provided by BellSouth. The *Errata* did not change that FCC ruling. In fact, the *Errata* shows that the FCC considered excluding Section 271 wholesale offerings from its commingling rules and decided against it.

The portion of the *TRO Errata* that the panel majority cites to support its position in the Order resulted in the following deletion from the original [deletion in brackets]:

> 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.[13]

Importantly, the editorial deletion does not result in a sentence that diminishes commingling obligations. The cited passage (post-*Errata*) still reads "...we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services."

Moreover, a companion deletion in the *TRO Errata* further undermines Order's rationale. The FCC's *Errata* deleted the following from the initial *TRO* draft [deletion in brackets below]:

> 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.][14]

Had the FCC intended to exempt the § 271 competitive checklist from its commingling rules, it would not have eliminated this express finding. The original pre-*Errata* language in footnote 1990 would have supported the panel majority's finding that "the FCC removed the issue of

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[13] *TRO Errata* ¶ 27 (amending *TRO* ¶ 584).

[14] *TRO Errata* ¶ 31 (amending *TRO* footnote 1990).

commingling Section 251 elements with Section 271 independent unbundled elements."[15] After the *Errata*, however, it is clear that the FCC did not explicitly refuse to apply its commingling rules to Section 271 elements.

Rather, the *TRO* provides that ILECs must commingle Section 251 UNEs with any "wholesale facilities or services" offered to CLECs. The FCC made clear that "combinations" rules apply only to the linking of Section 251 UNEs to one another. Therefore, combinations rules do not require ILECs to combine Section 251 and Section 271. That is the FCC finding that was upheld by the D.C. Circuit in *USTA II*, and cited on page 31 of the Order. The FCC also held that an ILEC must commingle Section 251 UNEs with any other "wholesale facilities or services." The *USTA II* decision did not support the limitation on commingling supported by the panel majority in the Order.[16]

The FCC made clear that in order to qualify for commingling with a Section 251 UNE, the facilities or services must be made available by the ILEC at wholesale; the question of whether the ILEC offering is made pursuant to Section 271 is not the salient question. This was precisely the point made by the federal district court in *NuVox Communications v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007). In *NuVox*, the court reversed a decision of the Florida Public Service Commission that reached the same conclusion regarding commingling as the panel majority here. The court, after reviewing the relevant paragraphs of the *TRO* and *TRO Errata*, held that "the common element of all the above paragraphs is the requirement that commingling

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[15] *Order* at 31.

[16] The panel majority's assertion in the Order that "CLECs are relying on" portions of the *TRO* deleted by the *Errata* as the basis of their argument on commingling is in error. The "Joint CLEC Post-Hearing Brief," filed on October 28, 2005 in this docket, does not assert that pre-*Errata TRO* ¶ 584 provides the basis for commingling Section 251 and Section 271 elements. Rather, the CLECs explicitly rely on the same arguments presented here, namely, that Section 251 UNEs must be commingled with any other wholesale facilities and services, including Section 271 checklist elements. *See* Joint CLEC Post-Hearing Brief, at 69-70, 73-74.

applies to wholesale facilities and services. If § 271 checklist elements are wholesale facilities and services, then the commingling requirement does in fact apply to those elements as well."[17]

The *NuVox* court rejected the argument that the *TRO Errata* deletions change the FCC's fundamental ruling that Section 251 and Section 271 elements must be commingled:

> Reading the relevant paragraphs of the *TRO* in context, it becomes apparent that the *Errata* deletions were made in order to avoid conflating distinct concepts. For example, paragraph 584 addresses BellSouth's resale obligations. The modification to paragraph 584 simply eliminated the irrelevant UNE clause. *Errata* at 3, ¶ 27. Similarly, the last sentence of footnote 1990 was deleted in order to avoid contradicting the paragraph which contained it. *Errata* at 3, ¶ 31. That paragraph, in pertinent part, noted that "BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis." *TRO* ¶ 655. Maintaining consistency required the removal of a footnote declining to apply the commingling rule to "services that must be offered pursuant to these checklist items," i.e., Section 271 elements. ... Thus, the Court finds that the FPSC misinterpreted the *TRO* to prohibit commingling of 251 elements with 271 checklist elements.[18]

The panel majority's focus on the changes made by the FCC in the *TRO Errata* obscure the real question on which the commingling dispute turns in this proceeding: do Section 271 elements qualify as "wholesale facilities or services" eligible for commingling with Section 251 UNEs?

B. THE FACILITIES OR SERVICES PROVIDED BY BELLSOUTH TO SATISFY ITS SECTION 271 CHECKLIST OBLIGATIONS QUALIFY AS "WHOLESALE FACILITIES OR SERVICES" AND ARE SUBJECT TO COMMINGLING REQUIREMENTS.

The Order does not examine whether Section 271 checklist elements qualify as "wholesale facilities or services" because it erroneously concludes that the FCC's *TRO Errata* removed Section 271 elements from commingling requirements. For the reasons discussed above, CompSouth urges the Authority to reconsider its reasoning underlying that determination. If the Authority reviews the *TRO* and *TRO Errata* fully, it is apparent that, as the court in *NuVox*

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17 *NuVox*, 511 F. Supp.2d at 1203 (emphasis supplied).

18 *Id.* at 1204.

held, the next question in the analysis is: do Section 271 checklist elements qualify as "wholesale facilities or services"? In *NuVox*, the court found that Section 271 checklist elements do qualify as wholesale facilities or services for purposes of the FCC's commingling requirements. CompSouth urges the Authority to make the same determination here.[19]

Section 271 checklist elements constitute "wholesale facilities and services" for several reasons. First, in *NuVox*, a reviewing federal court interpreted the FCC's use of the term "wholesale facilities and services" to include Section 271 elements. The *NuVox* court is the only federal court to rule on the specific question of whether Section 271 elements are "wholesale facilities and services." Other courts, as in the *USTA II* decision cited by the panel majority, have held that combinations rules do not apply to elements made available under provisions other than Section 251.[20] Those courts have not, however, held that Section 271 elements may not be commingled with Section 251 UNEs under the FCC's commingling rules. That is not the question before the Authority here; the issue in dispute is the one before the *NuVox* court, where the court held that Section 271 elements are wholesale facilities or services that may be commingled with Section 251 UNEs.

Second, FCC statements demonstrate that the FCC views Section 271 elements as wholesale facilities or services. In *NuVox*, the district court quoted an FCC Order in which it refers to "section 271(c) wholesale obligations."[21] In addition, the court referenced a statement by former FCC Commissioner Abernathy, in which she stated: "Section 271 obligations to

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[19] The separate opinion of Director Jones on commingling issues filed December 5, 2007 in Docket No. 04-00046, cited in full in footnote 9 *supra*, includes an analysis of the status of Section 271 checklist elements as "wholesale facilities and services," and concludes that "a facility or service obtained pursuant to a section 271 is a facility or service obtained at wholesale from BellSouth pursuant to a method other than section 251 unbundling." Separate Opinion of Director Ron Jones, at 7.

[20] *See, e.g., Southwestern Bell v. Missouri Public Service Comm'n*, 461 F. Supp.2d 1055 (E.D. Mo. 2006); *Illinois Bell v. O'Connor-Diaz*, 2006 WL 2796488 (N.D. Ill. 2006 – not reported in F. Supp.2d).

[21] *NuVox*, 511 F. Supp.2d at 1203.

provide wholesale access to local loops, local transport, and local switching at just and reasonable prices."[22] The FCC's statements, according to the court, "would seem to alleviate any doubt about the matter" of whether Section 271 elements constitute wholesale facilities or services.[23]

Third, the services provided by BellSouth pursuant to Section 271 are not appreciably different from the services provided under Section 251 or its tariffs. There is no difference that would make one wholesale and the other not wholesale; they are all services sold to other carriers rather than to retail end users. For example, at hearing, BellSouth witness Ms. Tipton agreed that the transition from a DS1 loop offered as a Section 251 UNE to a tariffed special access service for the same loop primarily involves a "records change" in BellSouth's system.[24] From a network perspective, there is nothing different about the loops, and they are both sold at wholesale (subject to different wholesale prices) to CLECs. In addition, when BellSouth witness Ms. Blake explained what BellSouth sells CLECs to replace UNEs de-listed under Section 251, she testified that "[w]hen a Section 251(c)(3) element is 'de-listed,' the incumbent LEC will most likely provide a wholesale service similar to such element."[25] Clearly, BellSouth views the services it provides to CLECs – regardless of the legal obligation under which they provide it – as "wholesale" services. As Director Jones' stated in his Separate Opinion on this issue: "When the services are provided pursuant to section 251 they are considered wholesale services. The

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22 *Id.*

23 *Id.*

24 Hearing Tr. Vol. III., at 255-56.

25 Docket No. 04-00381, Direct Testimony of Kathy K. Blake on Behalf of BellSouth Telecommunications, Inc., at 12 (July 26, 2005) (emphasis supplied).

fact that the statutory authority obligating BellSouth to provide the service has changed does not alter the nature of the service as being wholesale."[26]

Finally, BellSouth's argument that the FCC limited commingling to its tariffed services has no basis in the FCC's orders or rules. Rather, in the *TRO* the FCC merely provided examples of various services that could be commingled with Section 251 UNEs. The fact that the FCC provided examples does not limit the definition of "wholesale" to the examples the FCC chose to provide. As the *NuVox* court held: "Tariffed services are listed as examples of such wholesale services (see *TRO* ¶¶ 581, 583, 585), but the word 'including' indicates that the item is used as an example and does not denote an exhaustive list."

The FCC meant what it said when it ordered that commingling requires an ILEC to connect a Section 251 UNE to "one or more facilities or services that a requesting carrier has obtained at wholesale form an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act."[27] The commingling rules apply to the wholesale facilities and services sold to CLECs pursuant to Section 271, because Section 271 unbundling constitutes a "method other than unbundling under Section 251(c)(3) of the Act." CompSouth urges the Authority to join the state commissions in Alabama, Georgia, Kentucky, Louisiana, and North Carolina in recognizing that the FCC required commingling of Section 251 and Section 271 elements.

C. THE CONSEQUENCE OF THE PROPER APPLICATION OF THE FCC'S COMMINGLING RULES DOES NOT RESULT IN SERVICES THAT ARE "THE EQUIVALENT OF UNE-P."

The panel majority bases its ruling on Issue 14 in part on a concern that commingling a Section 251 UNE loop with Section 271 switching would create "the equivalent of UNE-P,

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[26] Docket No. 04-00046, Separate Opinion of Director Jones, at 8-9.

[27] *TRO* ¶ 579.

which is the type of arrangement the FCC said BellSouth must no longer provide."[28] CompSouth urges that this concern is misplaced, for two reasons.

First, a commingled arrangement that permits a CLEC to offer a service using BellSouth loops and switching is not "the equivalent of UNE-P." Switching unbundled pursuant to Section 271 is not subject to TELRIC pricing, but rather to the "just and reasonable" standard applicable to Section 271 checklist items. Therefore, BellSouth need no longer make available the TELRIC-priced combination formerly known as UNE-P.

Second, when the FCC adopted commingling rules that permitted commingling of Section 251 UNE loops with unbundled switching "obtained at wholesale form an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act,"[29] it expressly authorized service packages that provided an end-user services using the same network elements that supported UNE-P services. As noted above, the critical difference is that the FCC held that TELRIC-priced switching could not be included in the package – thus barring the re-creation of UNE-P as it existed previously. The FCC would not have written the commingling rules the way it did if it intended to prevent CLECs from obtaining switching not provided pursuant to Section 251(c)(3) (whether via Section 271 or "commercial" agreements with BellSouth) with UNE loops.

In sum, the Authority will not be authorizing a return to TELRIC-priced UNE-P if it reconsiders and revises its determination regarding commingling.

D. CONCLUSION

For all the reasons stated, CompSouth respectfully requests that the Authority reconsider its decision on Issue 14, and revise the Order in this docket to provide that Section 251 UNEs

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[28] Order at 32.

[29] *TRO* ¶ 579.

may be commingled with any wholesale facilities or services, including Section 271 checklist elements, pursuant to the FCC's commingling rules.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, Tennessee 37203
(615) 252-2363

and

Bill Magness
CASEY, GENTZ & MAGNESS, L.L.P.
98 San Jacinto Blvd., Ste. 1400
Austin, Texas 78701
Telephone: 512/480-9900
Facsimile: 512/480-9200
Email: bmagness@phonelaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to:

Guy M. Hicks
BellSouth Telecommunications, Inc.
333 Commerce Street, Ste. 2101
Nashville, TN 37201-3300

James Murphy
Boult, Cummings, Conners & Berry
1600 Division Street, Ste. 700
Nashville, TN 37203

Ed Phillips
Embarq –Southeast
1411 Capitol Blvd.
Wake Forest, NC 27587

H. LaDon Baltimore
Farrar & Bates
211 7th Avenue North, Ste. 320
Nashville, TN 37219-1823

John Heitmann
Kelley, Drye & Warren
1900 19th Street NW, Ste. 500
Washington, DC 20036

Charles B. Welch
Farris, Mathews, et al.
618 Church Street, Ste. 300
Nashville, TN 37219

on this the 13th day of December, 2007.

Henry M. Walker

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESEE

December 5, 2007

IN RE:	)	
	)	**DOCKET NO.**
JOINT PETITION FOR ARBITRATION	)	**04-00046**
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 AND	)	
XSPEDIUS MANAGEMENT CO. OF	)	
CHATTANOOGA, LLC OF AN	)	
INTERCONNECTION AGREEMENT	)	
WITH BELLSOUTH	)	

SEPARATE OPINION OF DIRECTOR RON JONES

This docket came before a panel of the Tennessee Regulatory Authority ("Authority") at Authority Conferences on March 6, 2006, April 17, 2006 and May 15, 2006, for consideration of the *Joint Petition for Arbitration* filed by 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 and Xspedius Management Co. of Chattanooga, LLC (collectively "Joint Petitioners") on February 11, 2004. I respectfully dissent from the majority's decisions on Items 26, 37, and 97 and offer additional comments with regard to Items 36 and 38.

I. ITEM 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?

During the deliberations on March 6, 2006, the majority of the panel voted to "not require BellSouth to commingle [unbundled network elements ("UNEs")] or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act."[1] In support of their decision and consistent with the arguments put forth by BellSouth Telecommunications, Inc. ("BellSouth"), the majority cites the *Errata* to the *Triennial Review Order* and the District of Columbia Circuit Court of Appeals decision in *United States Telecom Association v. Federal Communications Commission*.[2] Because I disagree with the majority's interpretation of and reliance on these authorities as well as the arguments offered by BellSouth, I voted in opposition to the prevailing motion. In support of my position, I first explain my reasons for rejecting BellSouth's arguments and, thereby, the reasoning of the majority. Next, I provide the specific reasoning supporting my conclusion.

A. BELLSOUTH'S ARGUMENTS

In paragraph 579 of the *Triennial Review Order*, the FCC determined that commingling means:

> 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 the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.[3]

The FCC further wrote:

> As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special

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[1] *Final Order of Arbitration Award*, p. 7 (Dec. 5, 2007).
[2] 359 F.3d 554, 589 (D.C. Cir. 2004).
[3] *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36, 18 FCCR 19,020, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, para. 579 (Aug. 21, 2003) (hereinafter *Triennial Review Order*).

> access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.[4]

BellSouth concludes that the FCC's reference to "wholesale services" in paragraph 579 does not include section 271 offerings. BellSouth provides five arguments to justify this conclusion.

The first argument BellSouth asserts is that section 271 offerings are not "wholesale services" because BellSouth "has no obligation to combine 271 elements or to combine elements that are no longer required to be unbundled pursuant to section 251(c)(3) of the Act."[5] In support of this proposition, BellSouth cites footnote 1990 of the *Triennial Review Order* and *United States Telecom Association v. Federal Communications Commission.* I do not disagree with BellSouth's characterization of its obligation, but I do disagree that the characterization supports the conclusion that commingling does not apply to section 271 offerings.

BellSouth accurately states that it is not required to combine section 271 elements or to combine elements that the FCC no longer requires it to unbundle pursuant to section 251(c)(3). However, the current obligations described by this statement are wholly separate and do not touch on the issue before the Authority under Item 26, that is, whether the FCC has required BellSouth to commingle section 271 elements with section 251 elements. Combining section 251 elements, combining section 271 offerings, and commingling section 251 elements and section 271 offerings are three distinct activities. Considering these activities as interchangeable necessarily obscures the subtle characteristics that make each activity unique.

The second argument offered in support of the conclusion that the provisioning of section 271 elements are not "wholesale services" is that "[t]o hold otherwise would require BellSouth to do exactly what the FCC and D.C. Circuit held was impermissible as it would require BellSouth

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[4] *Id.*

[5] *BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 36 (Apr. 15, 2005).

to combine services that are no longer required to be unbundled under section 251(c)(3)."[6] The heart of this argument is that requiring commingling of section 271 offerings and section 251 elements will serve to resurrect UNE-P.[7] This argument too is flawed because it fails to take into consideration the pricing of the elements. Section 251 elements are subject to pricing using the Total Element Long-Run Incremental Cost methodology, a cost-based approach adopted by the FCC to satisfy the requirements of section 252(d)(1).[8] However, the pricing of section 271 elements is subject only to the restrictions that the rates be just, reasonable and not unreasonably discriminatory as required by sections 201 and 202.[9] Thus, while allowing the commingling of section 271 elements and section 251 elements will allow a competing carrier to bring together a loop and switching, the resulting price will be different than if both elements are subject to unbundling pursuant to section 251.

A third argument offered by BellSouth is that the deletion in the *Errata* of the only specific reference to section 271 in the commingling section of the *Triennial Review Order* indicates that section 271 offerings are not "wholesale services." The text of the relevant paragraph as it appeared prior to the *Errata* is 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. Section 251(c)(4) places the duty on incumbent LECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on" the resale of telecommunications services provided at retail to customers who are not telecommunications carriers. Any restriction that prevents commingling of UNEs (or UNE combinations) with resold services constitutes a limitation on both reselling the eligible service and on obtaining access to the UNE or UNE combination. We conclude that a restriction on commingling UNEs and UNE combinations with services eligible for resale is

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[6] *Id.*
[7] *See id.* at 37. UNE-P is an acronym used to describe a combination of a section 251 loop and section 251 switching.
[8] *See* 47 U.S.C. § 252(d)(1); *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, 11 FCCR 15,499, *First Report and Order*, para. 672 (Aug. 1, 1996).
[9] *Triennial Review Order*, *supra* note 3, at para. 656 (referencing 47 U.S.C. §§ 201 and 202).

> inconsistent with the section 251(c)(4) prohibition on "unreasonable ... conditions or limitations" because it would impose additional costs on competitive LECs choosing to compete through multiple entry strategies, and because such a restriction could even require a competitive LEC to forego using efficient strategies for serving different customers and markets. We agree with ALTS that an incumbent LEC's obligations under sections 251(c)(3) and 251(c)(4) are not mutually exclusive. In addition, a restriction on obtaining UNEs and UNE combinations in conjunction with services available for resale would constitute a discriminatory condition on the resale of eligible telecommunications services because incumbent LECs impose no such limitations or restrictions on their ability to combine facilities and services within their network in order to meet customer needs.[10]

In the *Errata*, the FCC deleted the above underlined language, which references section 271. It is this deletion that BellSouth contends indicates that section 271 offerings are not "wholesale services." Certainly, the FCC had a reason for deleting the language. It is my opinion, however, that the reason was not because section 271 offerings are not "wholesale services" and, thereby, not subject to the commingling obligations. Instead, it is my opinion that the language was deleted for the simple reason that the remaining text relates solely to the resale obligation of section 251(c)(4). Thus, the reference to section to 271 in this paragraph was misplaced and appropriately removed.

A fourth argument offered by BellSouth is that "throughout the entire commingling section in the [*Triennial Review Order*], the FCC limits its description of the wholesale services that are subject to commingling to tariffed access services."[11] BellSouth specifically relies on sentences it extracted from paragraphs 579, 580, 581 and 583 of the *Triennial Review Order*.[12] In relying on these sentences, however, BellSouth fails to address the fact that the language of the sentences either applies to a particular service[13] or refers to tariffed access services as merely

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[10] *Id.* at para. 584.
[11] *See BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 38 (Apr. 15, 2005).
[12] *See id.*
[13] *See Id.* (quoting *Triennial Review Order*, *supra* note 3, at paras. 581 and 583).

an example of a wholesale service, not a definition of a wholesale service.[14] The excerpts do not support, either when read independently or in conjunction with BellSouth's other arguments, the conclusion that section 271 offerings are not "wholesale services."

The fifth and final argument offered by BellSouth is that in the *Triennial Review Remand Order*[15] the FCC limited conversion rights described in the *Triennial Review Order* as applicable to wholesale services to only tariffed incumbent services.[16] Thus, it is seemingly BellSouth's conclusion that the FCC has "construed the phrase 'wholesale services' to be limited to tariffed services."[17] It is my opinion that BellSouth has read the referenced language too narrowly. The plain language of paragraph 229 of the *Triennial Review Remand Order* does not state that the FCC limited its holding in the *Triennial Review Order* regarding conversions to tariffed services. This paragraph states:

> We determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LEC seeking to convert such services satisfies any applicable eligibility criteria. The *USTA II* court upheld this determination. The BOCs have nevertheless urged us in this proceeding to prohibit conversions entirely. Given our conclusion above that a carrier's current use of special access does not demonstrate a lack of impairment, we conclude that a bar on conversions would be inappropriate.[18]

I can read no intent in this language to limit the term "wholesale services" to tariffed incumbent LEC services.

Based on the foregoing discussion, it is my opinion that the arguments and resulting conclusion asserted by BellSouth should be rejected. The arguments taken either separately or in

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[14] *See id.* (quoting *Triennial Review Order*, *supra* note 3, at paras. 579 and 580).
[15] *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-290, 20 FCCR 2533, *Order on Remand* (Feb. 4, 2005) (hereinafter *Triennial Review Remand Order*).
[16] *See BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 38 (Apr. 15, 2005) (citing *Triennial Review Order*, *supra* note 3, at para. 585 and *Triennial Review Remand Order*, *supra* note 15, at para. 229).
[17] *Id.* at 39.
[18] *Triennial Review Remand Order*, *supra* note 15, at para. 229.

conjunction with one another do not support a finding that the FCC excluded section 271 offerings from the term "wholesale services."

B. ANALYSIS SUPPORTING DETERMINATION THAT SECTION 271 OFFERINGS SHOULD BE INCLUDED IN THE TERM "WHOLE SALE SERVICES"

It is my determination that federal law obligates BellSouth to perform the functions necessary to commingle a section 251 UNE or UNE combination with facilities or services obtained at wholesale from BellSouth pursuant to a method other than section 251 unbundling. It is further my determination that a facility or service obtained pursuant to section 271 is a facility or service obtained at wholesale from BellSouth pursuant to a method other than section 251 unbundling. These determinations are based primarily on the plain language of 47 C.F.R. section 51.309(e) and (f)[19] and paragraphs 579 through 584[20] and footnote 1990[21] of the *Triennial Review Order* as corrected by the September 17, 2003 *Errata.*

The FCC's purpose for making the changes it made to the *Triennial Review Order* via the *Errata* garnered the lion's share of the arguments on this item. Unfortunately for the panel, the FCC was silent as to the reasons for deleting language referring to section 271 from paragraph

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[19] These rules state:

> (e) Except as provided in § 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.
> (f) Upon request, an incumbent LEC shall perform the functions necessary 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.

Triennial Review Order, *supra* note 3, at Appendix B – Final Rules, 51.309(e) & (f) (codified at 47 C.F.R. § 51.309(e) & (f)).

[20] *Id.* at paras. 579-84.

[21] *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Errata*, para. 31 (Sept. 17, 2003) (hereinafter *Errata*) (deleting the last sentence of footnote 1990).

584 of the *Triennial Review Order* and for deleting language regarding commingling of section 271 elements from footnote 1990 of the *Triennial Review Order*.[22]

Such silence does not foreclose; however, my basic analysis. The rules adopted pursuant to the *Triennial Review Order* require commingling of UNEs and UNE combinations with wholesale services obtained from an incumbent LEC.[23] The text of the *Triennial Review Order* affirms the text of the rule adding only that the wholesale service be one obtained from the incumbent LEC "pursuant to any method other than unbundling under section 251(c)(3) of the Act."[24] The final rules adopted as part of the *Triennial Review Remand Order* did not alter the rules adopted through the *Triennial Review Order*.[25] The text of the *Triennial Review Order* as amended by the *Errata* is silent as to the inclusion or exclusion of section 271 offerings in the term "wholesale services."

In my opinion, it is a reasonable and sound judgment to conclude that section 271 offerings are wholesale services. Generally, the services to be provided pursuant to section 271 are no different than the services BellSouth is required to provide pursuant to section 251. When the services are provided pursuant to section 251 they are considered to be wholesale services.[26]

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[22] The text of paragraph 584 is set forth in the above text. The footnote at issue originally appeared in the *Triennial Review Order* as footnote 1990. The footnote reads:

> 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.

Triennial Review Order, *supra* note 3, at n.1990. The *Errata* deleted the underlined sentence of the above-quoted footnote. *Errata*, *supra* note 21, at para. 31.

[23] *Triennial Review Order*, *supra* note 3, at Appendix B – Final Rules, 51.309(e) & (f) (codified at 47 C.F.R. § 51.309(e) & (f)).

[24] *Id.* at para. 579.

[25] *Triennial Review Remand Order*, *supra* note 15, at Appendix B – Final Rules, p. 146.

[26] This is evidenced by the FCC's language "obtained at wholesale from an incumbent LEC pursuant **to any method other than** unbundling under section 251(c)(3) of the Act." *Triennial Review Order*, *supra* note 3, at para. 579 (emphasis added).

The fact that the statutory authority obligating BellSouth to provide the service has changed does not alter the nature of the service as being wholesale.

To the extent it is necessary to provide meaning to the FCC's decision to remove the section 271 related language, I adopt Joint Petitioners' explanation as it is consistent with the plain language of the *Triennial Review Order* as corrected. Joint Petitioners argue that the removal of the reference to section 271 in paragraph 584 of the *Triennial Review Order* was because the reference was not related to the subject of the paragraph, which was resale services.[27] As I discussed earlier in this opinion, I find this analysis the more reasonable of the two arguments offered by Joint Petitioners and BellSouth.[28] Joint Petitioners also argue that in removing the last sentence of footnote 1990, the FCC "avoided any misunderstanding that Section 271 elements are not eligible for commingling."[29] Once again, I agree with Joint Petitioners as such analysis is consistent with the FCC's rules and the remaining language of the *Triennial Review Order*.

Based on the foregoing analysis, it is my conclusion that this issue should be answered affirmatively. As this conclusion is in direct opposition to the decision of the majority, I dissent from that decision.

II. ITEMS 36, 37, AND 38

In the *Final Order of Arbitration Award*, it is noted that I offered an additional limitation with regard to Item 36 during the April 17, 2006 deliberations in this docket, that I dissented from the decision with regard to Item 37, and that I was in the majority with regard to Item 38.[30]

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[27] *See Joint Petitioners' Post-Hearing Brief*, p. 25 (Apr. 15, 2005).
[28] *See* text *supra* at pp. 4-5.
[29] *See Joint Petitioners' Post-Hearing Brief*, p. 27 (Apr. 15, 2005).
[30] *Final Order of Arbitration Award*, p. 31 n.69, p. 33 n.75 & p. 34 (Dec. 5, 2007).

There is a common thread running through these three issues. I write separately here to ensure that my position with regard to this common thread is clear and consistent.

A. ITEM 36: (A) HOW SHOULD LINE CONDITIONING BE DEFINED IN THE AGREEMENT? (B) WHAT SHOULD BELLSOUTH'S OBLIGATIONS BE WITH RESPECT TO LINE CONDITIONING?

BellSouth maintained with Items 36, 37, and 38 that it is not obligated to perform line conditioning in any manner other than the manner in which it performs line conditioning for its customers.[31] Specifically, BellSouth argues that its obligation is limited because line conditioning is a routine network modification and BellSouth is only obligated to perform routine network modifications for CLECs to the extent it performs such for its own customers.[32] In my opinion, a complete response to Item 36(B) demands that the panel explicitly address BellSouth's argument. Thus, I concluded during the April 17, 2006 deliberations that BellSouth's position should be rejected and, today, I offer two reasons in support of my conclusion.[33]

First, in the *UNE Remand Order*, the FCC required line conditioning because without such conditioning access to the line might not include access to all the features, functions and capabilities of the line.[34] Thus, the FCC determined that line conditioning falls within the definition of the line.[35] In the *Triennial Review Order*, the FCC stated: "we readopt the

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[31] *See BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 41 (Item 36), p. 44 (Item 37) (Apr. 15, 2005). With regard to Item 38, BellSouth suggests that it is not obligated to remove bridge taps because it does not remove bridge taps for its own customers, but agrees to a particular scenario for removing bridge taps for CLECs because of BellSouth's work with the Shared Loop Collaborative. *Id.* at 47.

[32] *See id.* at 41 (quoting *Triennial Review Order*, *supra* note 3, at para. 643).

[33] BellSouth asserted a similar argument in support of its position on Issue 26 presented for consideration in Docket No. 04-00381. *In re: BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381, *BellSouth Telecommunications, Inc.'s Post-Hearing Brief*, pp. 114-15 (Oct. 28, 2005). The panel deliberated the merits of Issue 26 in Docket No. 04-00381 immediately preceding its consideration of Item 36 in this docket. In Docket No. 04-00381, a majority of the panel voted that routine network modifications should not include line conditioning. Transcript of Authority Conference, pp. 75-77 (May 15, 2006). This conclusion is consistent with my conclusion described above.

[34] *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCCR 3696, para. 173 (Nov. 5, 1999) (Third Report and Order and Fourth Further Notice of Rulemaking).

[35] *Id.*

Commission's previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*." The FCC's references in the *Triennial Review Order* and the *UNE Remand Order* to section 251(c)(3) relate to the CLECs' right to nondiscriminatory access to the line, which necessarily includes line conditioning.[36] Thus, it is my conclusion that the obligation to provision line conditioning is tied to the obligation to provision the line and is not dependant on how or whether the ILEC provides line conditioning to its retail customers.

Second, BellSouth argues that the FCC language in paragraph 643 of the *Triennial Review Order* supports the conclusion that line conditioning is nothing more than a particular routine network modification.[37] The relevant language of paragraph 643 reads: "Line conditioning does not constitute the creation of a superior network, as some incumbent LECs argue. Instead, 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."[38] It is my opinion that this language provides only that routine network modifications and line conditioning are similar in that neither activity results in the creation of a superior network, not that line conditioning is a subset of routine network modifications.

Given the above analysis and my determination in Docket No. 04-00381, I am unable to answer Item 36(B) without explicitly recognizing that BellSouth should not be permitted to limit line conditioning as if it were a routine network modification. Thus, although I voted in favor of the prevailing motion, which merely cited to applicable rules, the additional limitation of prohibiting BellSouth from limiting the provisioning of line conditioning to circumstances in

[36] *Id.*; *Triennial Review Order*, *supra* note 3, at para. 643.
[37] *BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 41 (Apr. 15, 2005).
[38] *Triennial Review Order*, *supra* note 3, at para. 643 (footnote omitted).

which it regularly performs line conditioning for its own customers should also apply the parties' agreements.[39]

B. ITEM 37: SHOULD THE AGREEMENT CONTAIN SPECIFIC PROVISIONS LIMITING THE AVAILABILITY OF LOAD COIL REMOVAL TO COPPER LOOPS OF 18,000 FEET OR LESS?

Item 37 relates to a particular function of line conditioning known as load coil removal. The prevailing motion on this item limits BellSouth's obligation to remove load coils to circumstances where BellSouth provides load coil removal for its own customers.[40] Because this limitation is contrary to my conclusion in Docket No. 04-000381 and Item 36(B) of this docket, I dissent from the conclusion of the majority.

C. ITEM 38: UNDER WHAT RATES, TERMS, AND CONDITIONS SHOULD BELLSOUTH BE REQUIRED TO PERFORM LINE CONDITIONING TO REMOVE BRIDGE TAPS?

I offered the prevailing motion for Item 38. I discuss the item here simply to wholly discuss the line conditioning items in this docket. Item 38 relates to the removal of bridge taps, a particular function of line conditioning. Because this item involves line conditioning, which is treated differently than routine network modifications, my motion, which received a second, did not include any limitation as to the length of the loop to be conditioned. The reason being that BellSouth should not be permitted to limit the provisioning of line conditioning based on the activities it performs for its own customers.

III. ITEM 97: WHEN SHOULD PAYMENT OF CHARGES FOR SERVICE BE DUE?

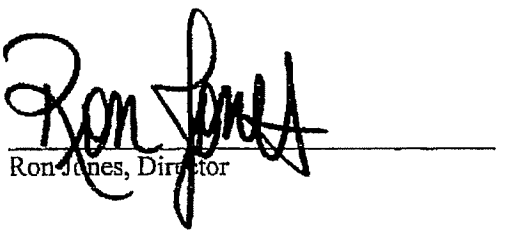
In Docket No. 03-00119, a majority of the panel determined that "25 days from the bill receipt date to the payment due date would give DeltaCom sufficient time to review its bills from

[39] Transcript of Authority Conference, p. 30 (Apr. 17, 2006).
[40] Transcript of Authority Conference, p. 88 (May 15, 2006); *Final Order of Arbitration Award*, 33 (Dec. 5, 2007).

BellSouth, and accordingly determined that the due date of bills should be 25 days from the date of receipt."[41] The underlying reasoning for this determination is that the billing-cycle should be approximately thirty days from the bill date, but that the realization of the thirty-day cycle is dependant on BellSouth getting the bill to the CLECs within five (5) days of the bill date.[42] It is my opinion from the record in this docket that neither party has put forth an argument sufficient to justify a departure from my position in Docket No. 03-00119. Therefore, it is my position that the due date of bills should be twenty-five (25) days from the date of receipt. Because the majority voted that the "payment of bills should be due on or before the next established regular bill date"[43] and because this conclusion is contrary to my conclusion, I dissent from the decision of the majority.

IV. CONCLUSION

Based on the foregoing, I respectfully dissent from the decisions of the majority on Items 26, 37 and 97. Related thereto, I adopt the additional limitation discussed herein with regard to Item 36 and affirm that the same limitation applies to my determination of Item 38.



Ron Jones, Director

[41] *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119, *Order of Arbitration Award*, p. 63 (Oct. 20, 2005).
[42] *See id.*; Transcript of Proceedings, pp. 38-39 (Jan. 12, 2004) (Arbitration Deliberations).
[43] *Final Order of Arbitration Award*, p. 25 (Dec. 5, 2007).