BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

September 3, 2004

IN RE: Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	))))))	*Docket No.* 04-00186

BRIEF OF COVAD COMMUNICATIONS COMPANY

As a preliminary matter in this proceeding, the parties have agreed to submit the following legal question to the Tennessee Regulatory Authority ("TRA") for an answer:

> Issue: Is BellSouth obligated to provide Covad access to line sharing after October 2004?
>
> Covad's Position. Yes Line sharing is a checklist item 4 loop transmission facility, which BellSouth is obligated to provide pursuant to 47 U.S.C. § 271(c)(2)(B)(iv) unless the FCC grants a forbearance petition under 47 U.S.C. § 160 *et seq.* specifically forbearing from enforcement of that obligation.

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), pursuant to the Order of the TRA, dated August 31, 2004, files this Legal Brief setting forth the legal basis for BellSouth's obligation to provide Covad access to line sharing after October 2004. The second half of Covad's Brief responds to BellSouth's arguments, previously made in other proceedings, regarding its obligation to provide line sharing under section 271.

SUMMARY OF ARGUMENT

BellSouth's obligation to provide access to line sharing is grounded in two irrefutable legal facts: 1) Line sharing is a checklist item 4 loop transmission facility; and 2) Regional Bell Operating Companies ("RBOCs"), like BellSouth, offering long distance services pursuant to section 271 authority have an obligation to provide checklist item 4 loop transmission facilities irrespective of unbundling determinations under section 251. To date, BellSouth has never disputed the second of these facts – that if line sharing falls under checklist item 4, then BellSouth has the obligation to provide it irrespective of section 251 determinations. All of BellSouth's previous arguments are directed at clouding the legal fact that line sharing is a checklist item 4 loop transmission facility. Each of BellSouth's arguments misconstrues the law or is otherwise incorrect

The only two state commissions who have addressed the question presented here have both agreed that line sharing falls under checklist item 4, and that Bell Operating Companies ("BOCs") subject to section 271 must provide access to it.[1] No deliberative body anywhere has held otherwise.[2]

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[1] In Maine Examiner's Report, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No 2002-682*, issued July 23, 2004, p 1 (holding that "Verizon must continue to offer line sharing pursuant to Checklist Item No 4 of section 271") (hereinafter "*ME Examiner's Report*") (Approved in relevant part by Maine Commission in Order – Part 1, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No 2002-682*, issued August 17, 2004, p 1), (The Maine Orders are attached hereto as Exhibit 1)

In Pennsylvania Opinion and Order, *Covad Communications Company v Verizon Pennsylvania Inc*, Pennsylvania Public Utility Commission Docket No R-00038871C0001, issued July 8, 2004, pp 19-20 (finding that "it is a reasonable interpretation of Checklist item #4 to also include the HFPL of the local loop . line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing Section 271 obligations") (hereinafter, "*PA Opinion and Order*") (The Pennsylvania Order is attached hereto as Exhibit 2)

[2] It is also worth noting that both the North Carolina and Georgia Commissions determined that BellSouth had a continuing obligation under Section 271 to provide access to line sharing However, both commissions modified their orders – without reversing the determination – upon reconsideration on the ground that reaching the 271 question was unnecessary for the resolution of the dispute at issue

In Georgia Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan, GPSC Docket No 7892-U, issued Jan 14, 2004, p 3 (holding that "Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC and Section 271 checklist item 4 ") (modified by Order on Reconsideration, GPSC Docket No 7892-U, issued February 17, 2004, pp. 3-4 (Modifying its prior order "to remove the ground for denial relating to whether BellSouth has an independent and ongoing access obligation under Section 271 to provide line sharing The reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need

STATEMENT OF THE LAW

I. Line Sharing is a Checklist Item 4 Loop Transmission Facility.

There can be no legitimate debate that line sharing is a checklist item 4 loop transmission facility. In the *Massachusetts 271 Order*, the FCC explicitly held:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[3]

The FCC placed line sharing in both checklist items 2 and 4 because at the time of the *Massachusetts 271 Order*, line sharing was required to be unbundled pursuant to section 251(c)(3) As a consequence, it, along with the other section 251(c)(3) UNEs, was included in checklist item 2 – which requires access to all section 251(c)(3) UNEs. Line sharing was also included in the specific checklist item under which it falls, checklist item 4.[4] While the

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to be resolved to address BellSouth's original motion ") (The Georgia Orders are attached hereto as Exhibit 3), and

In North Carolina Order Denying BellSouth's Motion to Modify the SEEM Plan, NCUC Docket No P-100, 133k, issued February 13, 2004, p 23 (holding that "the Commission believes that BellSouth remains obligated to provide the HFPL under Section 271 of the Act") (modified by Order on Reconsideration of Order Denying BellSouth's Motion to Modify the SEEM Plan, NCUC Docket No P-100, 133k, issued July 13, 2004, p. 27-28 ("the Commission is not convinced that line sharing will no longer be required under Section 271 although it has been removed by the FCC in the TRO as a Section 251 UNE However, due to the fact that the Commission finding in the *February 13, 2004* Order in this docket was not required for the Commission to reach its decision to deny BellSouth's Motion the Commission believes that it is appropriate . . to strike certain language . ") (The North Carolina Orders are attached hereto as Exhibit 4)

[3] *In the Matter of* Application *of Verizon New England, Inc et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 164 (hereinafter "*Massachusetts 271 Order*") (relevant portions of the *Massachusetts 271 Order* are attached hereto as Exhibit 5)

[4] 47 U S C § 271(c)(2)(B)(ii), (iv), (v), (vi) and (x), *see also*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (FCC-03-36) In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al*, CC Docket No 01-338, *et al*, Federal Communications Commission ("FCC") 03-36 (rel Aug 21, 2003) ¶ 654 ("*Triennial Review Order*" or "*TRO*") (relevant portions of the *TRO* are attached hereto as Exhibit 6)

determination in the *TRO*[5] that line sharing was no longer a section 251(c)(3) UNE did remove line sharing from checklist item 2, it did <u>not</u> remove line sharing from checklist item 4.[6]

Importantly, the FCC's statement in the *Massachusetts 271 Order* was not an anomaly: In <u>every</u> FCC 271 Order granting BellSouth long distance authority[7] – indeed, in <u>every</u> FCC order granting any RBOC such authority – the FCC placed line sharing in checklist item 4.[8] For instance, in granting BellSouth 271 authority to sell long distance in Florida and Tennessee, the FCC determined that "BellSouth's provisioning of the line shared loops satisfies checklist item 4."[9] Moreover, before it was in its interest to do otherwise, <u>BellSouth</u> itself placed line sharing and line splitting in <u>every</u> one of its own 271 briefs to the states and to the FCC under checklist item 4.[10] Manifestly then, line sharing is a section 271(c)(2)(B)(iv) (checklist item 4) network element.

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5 *Id*

6 *TRO* at ¶ 652 ("[W]e reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain [checklist 4, 5, 6 and 10] network elements that are no longer subject to unbundling under section 251 . "), *see also, Id* at ¶¶ 654, 659

7 *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331, Released December 19, 2002 at ¶ 144 (hereinafter "*BellSouth FL/TN 271 Order*") (relevant portions of the *BellSouth FL/TN 271 Order* are attached hereto as Exhibit 7), *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, WC Docket No. 02-150, FCC 02-260, Released September 18, 2002, ¶ 248 (relevant portions of the *BellSouth AL, KY, MS, NC and SC 271 Order* are attached hereto as Exhibit 8), *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, WC Docket No 02-35, FCC 02-147, Released May 15, 2002, ¶ 238 (relevant portions of the *BellSouth GA/LA 271 Order* are attached hereto as Exhibit 9).

8 A spreadsheet providing citations and quotations from FCC 271 Orders is attached hereto as Exhibit 10

9 *BellSouth FL/TN 271 Order* ¶ 144

10 *In the Matter* of *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Florida and Tennessee, WC 02-307, filed September 20, 2002 at pp 96-99, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in*

II. Because Line Sharing is a Checklist Item 4 Network Element, BellSouth Remains Obligated to Provide Access to Line Sharing Pursuant to Section 271(c)(2)(B)(iv) Despite the FCC's Unbundling Determination under Section 251.

There appears to be no question that if line sharing is a local loop transmission facility under section 271(c)(2)(B)(iv), then BellSouth is obligated to provide access to it irrespective of any section 251 unbundling determinations by the FCC [11] In apparent recognition that it has an obligation to provide access to checklist item 4 elements, BellSouth does not take issue with that obligation, but, rather, devotes its legal arguments to challenging line sharing's historical placement in checklist item 4. Despite its effort to rewrite history, there can be no legitimate dispute that BellSouth does indeed have an obligation to provide non-discriminatory access to all checklist item 4 elements, including line sharing "regardless of any unbundling analysis under section 251."[12] So long as BellSouth continues to sell long distance service under section 271 authority, it must continue to provide non-discriminatory access to all network elements under checklist items 4, 5, 6 and 10, irrespective of whether they are "de-listed under 251"[13] – including line sharing under checklist item 4 [14]

Alabama, Kentucky, Mississippi, North Carolina and South Carolina, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC 02-150, filed June 20, 2002 at pp 114-116, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Georgia and Louisiana,, CC 01-277, filed October 2, 2001 at pp 112-114. (Relevant portions of BellSouth's 271 Briefs to the FCC are attached hereto as Exhibit 11)

[11] *TRO* at ¶ 653 (providing that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling [checklist items 4, 5, 6, and 10] regardless of any unbundling analysis under section 251"), *see also*, *TRO* at ¶ 659 (providing that "section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251 ")

[12] *TRO* at ¶ 653, 47 U S C § 271(c)(2)(B)(iv)

[13] With the exception of checklist item numbers 1 and 2, as these items are directly tied to section 251 and 252

[14] This obligation can only be removed by the FCC in response to a petition for forbearance pursuant to 47 U S C §160.

In sum, two irrefutable legal facts govern the decision in this matter: 1) Line sharing is a checklist item 4 loop transmission facility and 2) RBOCs offering long distance services pursuant to section 271 authority have an obligation to provide checklist item 4 elements irrespective of unbundling determinations under section 251. As a consequence of those two irrefutable facts, BellSouth has a legal obligation to provide access to line sharing beyond October 2004.[15] This should end the legal analysis However, in contravention of its own prior advocacy – and in an overt attempt to breach its social contract with Congress, codified in the Act, to unbundle its network to competition – BellSouth now tries to avoid its obligation to provide line sharing by obfuscation.

RESPONSE TO BELLSOUTH'S ARGUMENTS

Given the absence of a Response Brief in this case, Covad is obliged to attempt to anticipate BellSouth's arguments and provide some response herein. In that effort, Covad is guided by the arguments BellSouth has previously made regarding line sharing and checklist item 4.[16] BellSouth has previously argued that: 1) Because of section 251 unbundling determinations line sharing is no longer a checklist item 4 element; 2) the High Frequency Portion of the Loop ("HFPL"), used to provide line sharing, is not a "loop transmission facility" under the definition of checklist item 4, and thus, line sharing was never a checklist item 4 element; and 3) in the *TRO* or in prior orders granting section 271 authority, the FCC stealthily indicated that, although it invariably considered line sharing under checklist item 4, line sharing is not really a checklist item 4 facility. These arguments are baseless.

[15] Unless and until the FCC grants a Petition for Forbearance pursuant to 47 U S C §160

[16] The parties previously briefed the issue of line sharing and checklist item 4 in the context of BellSouth's efforts to have line sharing removed from state penalty plans

I. The FCC's Section 251 Unbundling Determination in the *TRO* Did Not Remove Line Sharing From Checklist Item 4.

BellSouth previously argued that "[t]he fact that the FCC addressed line sharing under checklist item 4 when the FCC's rules required the line sharing be unbundled does not mean that line sharing is a checklist item 4 requirement even after the FCC's rules no longer require such unbundling."[17] This argument is demonstrably incorrect BellSouth's argument is directly contrary to the FCC's interpretation of sections 251 and 271.[18] If section 251 unbundling determinations could remove elements from checklist item 4, as BellSouth asserts, then checklist item 4 would *not* be independent of section 251. However, the FCC made it clear in the *TRO* that access requirements under checklist item 4 *are* independent of 251 determinations. In the *TRO*, the FCC explained:

> Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3). Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling without mentioning section 251. **Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2. Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and work of a statute.** [19]

It was precisely to explain the redundancy of the overlapping network access requirements in checklist item 2 and checklist items 4-6 and 10 that the FCC engaged in the *TRO*

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[17] BellSouth Telecommunications, Inc.'s Motion for Reconsideration of the Order Denying BellSouth's Motion to Modify SEEM Plan, NCUC Docket No P-100, Sub 133k, filed March 15, 2004, at 8 (hereinafter "BellSouth's Motion for Reconsideration")

[18] *TRO* at ¶ 652 ("[W]e reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251 "); *see also, Id* at ¶¶ 654, 659

[19] *Id* at ¶ 654 (emphasis added) (internal footnotes omitted)

analysis at paragraphs 649-667.[20] The FCC's interpretation of section 271(c)(2)(B) *reconciles* the overlapping access requirement contained in checklist item 2 with the same access requirements contained in checklist items 4-6 and 10:

> 659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271 (c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. <u>This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.</u>[21]

In short, although the <u>*price*</u> for a "de-listed" UNE may change, if that UNE falls under section 271(c)(2)(B)(iv)-(vi) or (x) (checklist items 4-6 or 10), the obligation to provide non-discriminatory <u>*access*</u> remains [22]

BellSouth previously made a similar argument – that section 251 determinations may remove elements from checklist 4 – when citing to paragraph 665 of the *TRO*.[23] Specifically, BellSouth cites to the portion of *TRO*, paragraph 665, which reads.

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[20] *Id* at ¶ 651 ("In the *Triennial Review NPRM*, the Commission sought comment on how the access requirements specified in the section 271 competitive checklist relate to the unbundling requirements derived from sections 251(c)(3) and 251(d)(2) ")

[21] *TRO* at ¶ 659 (emphasis added)

[22] *TRO* ¶ 658 ("Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2) Rather, the checklist <u>*independently imposes unbundling obligations*</u>, but simply does so with less rigid accompanying conditions ") (emphasis added), *see also, TRO* ¶ 653 ("the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling <u>*regardless of any unbundling analysis under section 251*</u>") (emphasis added), *see also, TRO* ¶ 654

> We conclude that for purposes of Section 271(d)(6), BOCs must continue to comply with any conditions required for approval, consistent with changes in the law. While we believe that Section 271(d)(6) establishes an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that "the conditions required for approval" would not change with time.

BellSouth takes the fact that there will be "changes over time" to a BOC's section 271 obligations and leaps to the conclusion – without further explanation – that section 251 unbundling determinations can remove line sharing from checklist 4.[24] It is a bit bold to make that assertion based on a generally worded paragraph when it follows a specific twelve-paragraph discussion detailing why section 251 determinations do not remove elements from checklist items 4, 5, 6, or 10.[25] Nevertheless, BellSouth attempts to cloud the law by posing "the question of what the FCC could possibly have in mind if, as the CLPs [Competitive Local Providers] contend, the requirements considered under the general rubric of checklist items four, five, six and ten can never change."[26] Of course, the twelve-paragraph discussion preceding paragraph 665, answers that question: among other possible changes (*TRO* ¶¶ 656-664), elements not in checklist item 4, 5, 6, or 10 UNEs which are "de-listed" under section 251(c)(3) may no longer need be offered under section 271 (*TRO* ¶ 654); the price for checklist item 4, 5, 6 and 10 elements will be determined under a different standard (sections 201/202 versus TELRIC) and thus may presumably change (*TRO* ¶ 663); the commingling and combination rules applicable to section 251 UNEs may not apply to section 271 UNEs (*TRO* ¶ 656, fn 1990),

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[23] BellSouth Telecommunications, Inc 's Reply Comments Regarding Motion for Reconsideration of the Order Denying BellSouth's Motion to Modify SEEM Plan, NCUC Docket No P-100, Sub 133k, filed May 17, 2004, at 8 (hereinafter "BellSouth's Reply Comments Regarding Motion for Reconsideration")

[24] *Id*

[25] *Compare TRO* ¶ 665 *with* ¶¶ 653-664

[26] BellSouth's Reply Comments Regarding Motion for Reconsideration at 8

and the FCC may forbear from enforcing 271 obligations pursuant to 47 U.S.C. § 160. In short, the FCC's general discussion in paragraph 665 of a BOC's post-entry obligations did not secretly reverse its immediately preceding analysis that section 251 unbundling determinations do not change a BOC's obligations to provide access to section 271 checklist items 4, 5, 6 and 10 – including line sharing under checklist item 4 Notably, Verizon made these same arguments, and they were rejected by both the Pennsylvania and Maine commissions.[27]

II. The High Frequency Portion of the Loop is a Loop Transmission Facility under Checklist Item 4.

BellSouth has also previously attempted to avoid its obligations under section 271 based on a literal reading of section 271(c)(2)(b)(iv) (checklist item 4) which ignores the FCC's clarifying definition. In previous briefing BellSouth has quoted section 271(c)(2)(b)(iv), which requires access to the "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services", and argued that checklist 4 "is for the provision of a whole loop, nothing more and nothing less."[28] However, BellSouth fails to even reference the FCC's clarifying definition of "loop."[29] The FCC defined the "loop" in section 271(c)(2)(B)(iv), competitive checklist item 4, as a "transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer's premises."[30] In the *TRO*, the FCC defined the High Frequency Portion

[27] *ME Examiner's Report*, pp 25-26, 28-29, *PA Opinion and Order*, pp 9-10, 16-17

[28] BellSouth's Reply Comments Regarding Motion for Reconsideration at 8

[29] *Id*

[30] *In the Matter of Joint Application by SBC Communications, Inc , Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc , and Southwestern Bell Communications Services, Inc for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, Memorandum Opinion and Order, WC Docket No 03-167, FCC 03-243, Released October 15, 2003 at F-26 (explaining the legal background of checklist item 4, including line sharing) ("*SBC Order*") (relevant portions of the *SBC Order* are attached hereto as Exhibit 12)

of the Loop ("HFPL"), used to provide line sharing, as "a complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises."[31] Because the HFPL is "a complete transmission path" over the loop, it constitutes a form of "loop transmission facility" under the FCC's definition for checklist item 4 elements.[32] Indeed, BellSouth routinely uses the HFPL transmission channel to provide xDSL services.[33] The FCC and BellSouth always considered the HFPL under checklist item 4 – local loop transmission facilities – precisely because the HFPL is a type of loop transmission facility. This same argument was also made by Verizon and rejected by both the Pennsylvania and Maine commissions.[34]

III. BellSouth's Argument that the *TRO* Somehow Stealthily Removed Line Sharing From Its Historical Placement in Checklist Item 4 is Demonstrably Incorrect.

In the context of its efforts to remove line sharing from state penalty plans, BellSouth has previously attempted to explain away the historical treatment of line sharing under checklist item 4. BellSouth bases its assertion that line sharing is no longer (or never was) a checklist item 4 element on two facts. First, BellSouth relies on the fact that in the *TRO*, the FCC specifically addressed whether carriers were impaired without access to the HFPL separately from other loop types in its section 251 unbundling analysis, but only referred to "loops" when addressing checklist item 4 in its section 271 analysis Second, BellSouth relies on the fact that in the *SBC Order*, the FCC addressed the HFPL (line sharing) separately from other "loops" in its

[31] *TRO* ¶ 268

[32] *Id*

[33] In other words, Bell customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services over the high frequency portion of their local loop (HFPL)

[34] *ME Examiner's Report*, pp 26, 28-29, *PA Opinion and Order*, pp 9, 17-19

discussion of unbundling requirements pursuant to section 271(c)(2)(B)(ii), competitive checklist item 2.[35] Both of these arguments misconstrue the significance of the treatment of loops and the HFPL.

A. The FCC did not secretly remove line sharing from checklist item 4 in the *TRO*.

BellSouth misconstrues the purposes of the *TRO* sections addressing section 251 unbundling analyses and section 271 statutory interpretation to argue that line sharing is not a checklist item 4 element.[36] BellSouth argues that various "whole loops" and the HFPL (line sharing) are analyzed as separate UNEs under the *TRO* section 251 analysis, and then jumps to the conclusion that they cannot, therefore, both fall under "local loop transmission facilities" in checklist item 4.[37] BellSouth fails, however, to mention that in the *TRO*, all of the checklist items are considered as separate UNEs in the unbundling analysis, but lumped together under their general checklist description in the section 271 analysis.[38] Specifically, "loops" are analyzed from paragraph 197 to paragraph 341 as numerous separate UNEs defined both by capacity and market levels, with differing section 251 unbundling determinations for each. Yet in the discussion of section 271 obligations at paragraphs 649 to 653, the FCC only mentions "loops." Under BellSouth's reasoning, the FCC's failure to list all of the loop types at

[35] BellSouth's Motion for Reconsideration at 5-6

[36] *Id* (arguing that "it makes no sense to conclude that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two together without any distinction ")

[37] *Id*

[38] For instance, in *TRO* paragraphs 197 to 341 under the heading "Loops", the FCC analyzed stand-alone copper loops (¶ 248), line splitting (¶ 251), copper subloops (¶ 253), the HFPL (¶ 255), FTTH loops (¶ 273), hybrid loops (¶ 285), dark fiber (¶ 311), OCn loops (¶ 315), DS3 loops (¶ 320), and DS1 loops (¶ 325) for section 251 unbundling purposes However, in paragraphs 649 to 653 the FCC only generally refers to "local loop transmission" (¶ 650), "loops" or "loop" (¶¶ 652, 653, 654, and 661) BellSouth fails to explain why some or all of the remaining nine loop types discussed in paragraphs 197 to 341 should not also be removed from checklist item 4 based on the FCC's failure to mention them in its 271 discussion

paragraphs 649-653 should imply that not a single one of them is a checklist item 4 loop transmission facility. Of course, this is absurd If the FCC intended to remove a loop type that had historically always been considered under checklist 4, then it would have made that determination explicit.

Similarly, in the *TRO*'s unbundling analysis, switching (checklist item 6) and transport (checklist item 5) are addressed as numerous discrete UNEs based on market type (switching) and capacity (transport), with differing section 251 unbundling determinations for each. In discussing these checklist items in its section 271 analysis, however, the FCC only identified them generically as "switching" and "transport." Does this imply that certain transport or switching UNEs are being surreptitiously removed from their respective 271 checklist? No. Yet this is the very logic BellSouth applies in its argument that "it makes no sense to conclude that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two together without any distinction."[39]

The FCC's "separate analyses" for section 251 unbundling determinations and "lumping together" for the section 271 discussion makes perfect sense when one considers the purpose of the two sections: the section 251 unbundling analysis specifically addressed whether particular network elements met the FCC's impairment standard, whereas the section 271 analysis *generally* addressed the relationship between two statutory sections, 251 and 271.[40] That is why

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[39] BellSouth's Motion for Reconsideration at 5-6

[40] *Compare TRO* at ¶ 197 (describing the FCC's specific loop analyses· "Consistent with our statutory mandate and relevant judicial precedent, we focus on specific market and customer characteristics ***as informed by various loop types and capacities*** that typically serve these markets and customers to undertake the granular inquiry necessary to determine where loop impairment exists ") (emphasis added) *with TRO* at ¶ 651 (describing its general statutory analysis "In the *Triennial Review NPRM*, the Commission sought comment on how the access requirements specified in the section 271 competitive checklist relate to the unbundling requirements derived from sections 251(c)(3) and 251 (d)(2) ")

section 251 loop, transport and switching network elements – some unbundled and others not unbundled – were "lumped together" under their general section 271 checklist titles: "loops, transport and switching." The use of general terms in a general discussion does not constitute a basis to assert that there is a hidden change in the FCC's historical treatment of line sharing under checklist item 4. Accordingly, BellSouth's argument that there is a secret change in the FCC's treatment of line sharing under section 271(c)(2)(B)(iv) is incorrect and must be rejected.

B. The *SBC Order* demonstrates that line sharing is a checklist item 4 element.

In an effort to bolster its *TRO* argument, BellSouth grossly mischaracterizes the FCC's *SBC Order*. BellSouth represents that the *SBC Order* "made clear that line sharing has never been subsumed within the obligation to provide access to unbundled loops pursuant to checklist item 4 of Section 271."[41] To support this bold statement, BellSouth cites paragraphs 10 and 11 of the *SBC Order*. These two paragraphs, however, do not relate to checklist item 4 in any way. In fact, they do not even *mention* checklist item 4 in passing. Instead, paragraphs 10 and 11 address checklist item 2 matters, something that is not even at issue in this proceeding.[42] In its prior arguments, BellSouth fails to mention that SBC's provision of line sharing **is** considered in the section of the *SBC Order* addressing compliance with checklist item 4.[43] It is patently inconsistent for the FCC to place line sharing in checklist item 4 in the same order that BellSouth claims makes it "clear that line sharing has never been subsumed within . . . checklist item 4."

[41] BellSouth's Motion for Reconsideration at 7

[42] *SBC Order* ¶ 10 ("One part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules governing UNEs [fn 35 – "In order to comply with the requirements or checklist item 2, a BOC must show that it is offering '[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) ' 47 U S C § 271 (c)(2)(B)(ii)] In the *UNE Remand* and *Line Sharing Orders*, the Commission established a list of UNEs that incumbent LECs were obliged to provide (1) local loops and subloops, (2) network interface devices, (3) switching capability, (4) interoffice transmission facilities; (5) signaling networks and call-related databases, (6) OSS, and (7) the high frequency portion of the loop ")

[43] *Id* ¶ 145, *see also, SBC Order*, Appendix F at ¶¶ 48-52 (discussing the requirements for compliance with checklist item 4, including the provision of line sharing)

There is no other way to characterize BellSouth's claim that the *SBC Order* "made clear" some change in the historical treatment of line sharing other than to say that it is just plain false.

In a similar argument, BellSouth quotes from the section of the *SBC Order* considering SBC's compliance with checklist 4 (again, the section of the *SBC Order* addressing line sharing) to assert that line sharing actually is not a checklist 4 element. Specifically, BellSouth quotes:

> Based on the evidence in the record, we conclude . that SBC provides unbundled local loops in accordance with the requirements of Section 271 and our rules. Our conclusion is based on our review of SBC's performance for all loop types which include voice grade loops, xDSL capable loops, digital loops and high capacity loops, as well as our review of FCC's processes for hot cut provisioning, and line sharing and line splitting.[44]

BellSouth argues that the reference to "and our rules" in the first sentence <u>excludes</u> "hot cut provisioning, and line sharing and line splitting" from checklist item 4 based on the use of the conjunction "as well as" in the second sentence, arguing:

> Thus, the FCC clearly stated that its analysis was based on the provisioning of loops, as well as other requirements related to the provisioning of hot cuts, line sharing and line splitting that are based, not upon the requirements of checklist four as expressly articulated in the Act, but rather upon FCC's rules. In this specific instance, the rule in question is the FCC's former rule (pre-TRO) that required that line sharing be offered on an unbundled basis pursuant to Section 251.[45]

BellSouth argues that these two sentences from the *SBC Order* demonstrate that the FCC "clearly" (but obliquely) communicated that its consistent and repeated treatment of line sharing as a checklist item 4 element was only convenient treatment of checklist 2 item elements (section

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[44] *SBC Order* ¶ 142

[45] BellSouth's Reply Comments Regarding Motion for Reconsideration at 9

251 UNEs) in checklist 4.[46] This is facially absurd. Having gone through the section 271 application process, BellSouth well knows what the reference to "our rules" means: FCC rules governing the provision of the section 271 network elements in question, such as access to loop make-up information, repair, provisioning, and ordering. The same sentence from the *Massachusetts 271 Order* reads:

> Based on the record before us, we conclude that Verizon has adequately demonstrated that it provides unbundled local loops as required by section 271 and our rules. First, as described above, we find that Verizon provides access to loop make-up information in compliance with the *UNE Remand Order* Second, we find that Verizon provides nondiscriminatory access to stand alone xDSL-capable loops and high-capacity loops. Third, we find that Verizon provides voice grade loops, both as new loops and through hot-cut conversions, in a non-discriminatory manner. Finally, we find that Verizon has demonstrated that it has a line sharing and line-splitting provisioning process that affords competitors nondiscriminatory access to these facilities. In doing so, we acknowledge that the Massachusetts Department also concludes that Verizon complies with this checklist item [47]

The *Massachusetts 271 Order* expressly identifies one source of FCC rules: The *UNE Remand Order* Indeed, the *Massachusetts 271 Order* not only lists line sharing among the loop types required under checklist 4, but expressly identifies line sharing as a checklist item 4 element:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 **and 4** of section 271.[48]

As a consequence, BellSouth's misconstruction of the *SBC Order* should be rejected.

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[46] In BellSouth's own words, "the FCC has considered the requirement of checklist four to provide a loop at the same time it considers the requirements to provide unbundled network elements that are related to the loop" (i e elements that, in BellSouth's interpretation of the Act would only fall under checklist item 2) Reply Comments Regarding Motion for Reconsideration at 9

[47] *Massachusetts 271 Order* ¶ 125

[48] Massachusetts 271 Order ¶ 164

IV. The Transition For Line Sharing Does Not Apply to RBOCs Operating Under Section 271 Authority.

In the *TRO*, the FCC's line sharing transition plan was developed in conjunction with the FCC's section 251 unbundling analysis, and consequently, applies to Incumbent Local Exchange Carriers ("ILECs") for whom the obligation to provide line sharing arises under section 251.[49] BellSouth is both an ILEC <u>and</u> a Bell Operating Company ("BOC"). Section 271 of the Telecommunications Act imposes separate and independent obligations on ILECs who are also BOCs operating under section 271 authority In the words of the FCC:

> [S]ection 271 places specific requirements on BOCs that were not listed in section 251 . . . recognizing an independent obligation on BOCs under section 271 would by no means be inconsistent with the structure of the statute. Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[50]

As a consequence, the FCC's transition plan applies to ILECs for whom the obligation to provide access to line sharing was removed pursuant to the FCC's section 251 unbundling analysis, but not to BOCs, like BellSouth, who have an independent obligation to provide access to line sharing under section 271.[51] Congress crafted a different procedure for the BOCs to seek removal of their independent 271 obligations – a Petition for Forbearance pursuant to 47 U.S.C. §160. Indeed, BellSouth is <u>currently</u> seeking forbearance pursuant to 47 U.S.C. §160 at the

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[49] *TRO* ¶ 264 (Stating the policy objective of the transition plan as providing "carriers adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with **<u>incumbent LECs</u>** to replace line sharing.) (emphasis added)

[50] *TRO* ¶ 655

[51] *Id.*

FCC.[52] In sum, BellSouth is obligated to provide line sharing pursuant to 47 U.S.C. § 271(c)(2)(B)(iv) unless the FCC grants a forbearance petition under 47 U.S.C. § 160 *et seq.*, specifically forbearing from enforcement of that obligation.

CONCLUSION

For the foregoing reasons, Covad respectfully asks that the TRA rule that BellSouth is obliged to provide access to line sharing beyond October 2004 pursuant to 47 U.S.C. §271(c)(2)(B)(iv) and FCC rules.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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[52] Petition for Forbearance, *In the Matter of BellSouth Telecommunications, Inc 's Petition for Forbearance Under 47 U S.C §160(c)*, WC Docket No 04-48, filed March 1, 2004 (BellSouth's Petition for Forbearance is attached hereto as Exhibit 13)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Covad Communications Company has been forwarded electronically and via U.S. Mail, postage prepaid, this 3rd day of September, 2004 to the following:

Guy Hicks
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300

Henry Walker

EXHIBITS
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EXHIBIT	DESCRIPTION
1	Examiner's Report, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No. 2002-682*, issued July 23, 2004; and Maine Commission in: Order – Part 1, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No 2002-682*, issued August 17, 2004
2	Opinion and Order, *Covad Communications Company v Verizon Pennsylvania Inc.*, Pennsylvania Public Utility Commission Docket No. R-00038871C0001, issued July 8, 2004.
3	Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan, GPSC Docket No. 7892-U. issued Jan. 14, 2004; and Order on Reconsideration. GPSC Docket No. 7892-U, issued February 17, 2004.
4	Order Denying BellSouth's Motion to Modify the SEEM Plan, NCUC Docket No. P-100, 133k, issued February 13. 2004; and Order on Reconsideration of Order Denying BellSouth's Motion to Modify the SEEM Plan, NCUC Docket No. P-100, 133k. issued July 13. 2004.
5	*In the Matter of Application of Verizon New England, Inc et al for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, FCC 01-130, Released April 16, 2001, pages 1-2, 68-104.
6	*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (FCC-03-36) In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al*, CC Docket No. 01-338, *et al.*, Federal Communications Commission ("FCC") 03-36, Released Aug. 21, 2003, pp. 1-6, 123-205, 400-409.
7	*In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331, Released December 19, 2002, pp. 1-2, 68-80, D-29-31.
8	*In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, WC Docket No. 02-150, FCC 02-260, Released September 18, 2002, pp. 1-2, 129-146, H-26-28.

9	*In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, WC Docket No. 02-35, FCC 02-147, Released May 15, 2002, pp. 1-2, 127-140.
10	Spreadsheet of FCC 271 Checklist Item 4 Line Sharing Quotations.
11	*In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Florida and Tennessee, WC 02-307, filed September 20, 2002, pp. i-iii, 84-101; *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC 02-150, filed June 20, 2002, pp. i-iii, 101-117; and *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Georgia and Louisiana*. Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Georgia and Louisiana., CC 01-277, filed October 2, 2001, pp. i-iii, 98-114
12	*In the Matter of Joint Application by SBC Communications, Inc, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc, and Southwestern Bell Communications Services, Inc for Authorization to Provide In-Region. InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, Released October 15, 2003, pp. 1-8, 88- 94, F-26-27.
13	Petition for Forbearance, *In the Matter of BellSouth Telecommunications, Inc's Petition for Forbearance Under 47 U.S C. §160(c)*, WC Docket No. 04-48, filed March 1, 2004.

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

July 23, 2004

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **noon on August 6, 2004**. It is expected that the Commission will consider this report at a special deliberative session on **August 12, 2004**.

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), in its state wholesale tariff. We also find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial Case Conference for December 10th. On December 4, 2002, prior to the Case Conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December

[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

[2] The parties include: OPA, ASCENT, WorldCom, Mid-Maine Telecommunications, and Oxford Networks. Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

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[3]At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Great Works Internet, Conversent Communications, and Cornerstone Communications) and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al.*, FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO)*.

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO*. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing unbundled network elements (UNEs) under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial briefs were filed by Verizon-Maine (Verizon), the CLEC Coalition, and the Consolidated Intervenors (Biddeford Internet Company d/b/a Great Works Internet (GWI), the Office of the Public Advocate (OPA) and Cornerstone

Communications (CC)). The same parties filed reply briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II*,[5] the appeal of the *TRO*. Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon. The arguments from all parties in the three rounds of briefs are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I* decision was released, the FCC issued its *TRO*, and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most

[5] *U.S Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II*).

respects[6]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. Applicable Law

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[7] Thus, Checklist Item No. 2 requires an ILEC to meet

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[6]In a recent order in the *Skowhegan Online Proceeding,* we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

[7]In the *TRO,* the FCC retained its earlier definition of "necessary" ("...a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a

all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[8]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271. However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.

In the FCC's Order granting Verizon 271 authority in Maine,[9] the FCC stated:

> *Working in concert with the Maine Commission*, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[10]

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barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[8]*USTA II* vacated the *TRO*'s findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[9]*Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine*, CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (Maine 271 Order).

[10]*Maine 271 Order* at ¶ 65.

(emphasis added). The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order,* for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[11]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order,* which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the New York 271 Order specifically endorsed state commission authority to enforce commitments made by Verizon [then Bell Atlantic] to the New York Public Service Commission. The FCC stated that:

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.[12]

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[11] *Joint Application by SBC Communications Inc , Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order).*

[12] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order)* at ¶ 452.

Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[13]

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[14]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

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[13] *New York 271 Order* at n. 1353.

[14] March 1, 2004 Letter from Commission to Edward Dinan, President, Verizon Maine.

> The MPUC finds, based upon the record before us, Including the commitments made by Verizon in its March 4, 2002 letter to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[15]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[16]

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[15]Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[16]271 Report to FCC at p. 7.

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon.

Verizon's initial brief did not directly respond to the Hearing Examiner's question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon admits that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argues that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC can set rates for these UNEs. Verizon maintains that the pricing standard set by the FCC for 271 network elements, "just and reasonable," is not the same as a total element long run incremental cost methodology (TELRIC) used for section 251 UNEs.

In its reply brief Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the Performance Assurance Plan (PAP) and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon does not specifically address state authority under section 271 in its

Supplemental Brief, Verizon states that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

2. Consolidated Intervenors.

In their initial brief, the Consolidated Intervenors state that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cites paragraphs 653 and 655 of the *TRO*. They also point to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They point to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review as evidence of the Commission's authority. They assert that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors state that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpret the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

3. CLEC Coalition.

In its brief, the CLEC Coalition states that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO*. The CLEC Coalition also concludes that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271. Here, the state should secure compliance by setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argues that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine. In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process.

D. Analysis

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and whether this Commission has authority to require Verizon to file a tariff in Maine reflecting its 271 unbundling obligations, i.e. its obligations under Checklist Items 4, 5, 6, and 9.

First, with regard to the scope of Verizon's commitment to file a wholesale tariff in Maine, we examine the underlying purposes of the condition and find that the same reasons for requiring a wholesale tariff encompassing Verizon's 251 obligations apply equally to Verizon's 271 obligations. Indeed, they apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may come up in an interconnection agreement negotiation. In the Verizon Arbitration proceeding,[17] CLECs complained that Verizon has not responded to requests from CLECs to negotiate amendments to their interconnection agreements. These are the same types of complaints we heard during the 271 process which led us to adopt the wholesale tariff condition in this first place. Finally, Verizon has not argued to us that it did not commit to tariff all of its wholesale obligations. Instead, it focuses on the jurisdictional issues without examining the motivations and intentions behind its 271 commitment. We find that a reasonable interpretation of the condition we placed upon Verizon, and the condition it committed to fulfill, requires Verizon to include both its 251 and 271 unbundling obligations in its wholesale tariff filed in Maine.

We turn now to our authority to enforce that commitment. While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon fails to explain adequately why states have authority over some 271 issues, such as performance assurance plans, and not others. Previously, state commissions did not have authority to approve an ILEC's 271

[17] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

application but were allowed, indeed encouraged, by the FCC to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met 271 standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
>
> . . .
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> 5. We rely heavily in our examination of this application on the work completed by the Maine Commission. . . .

We find that states have a similar role with regard to enforcement of 271 obligations. Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

As indicated above, the FCC has already clearly stated that states may enforce commitments made by ILECs during the 271 process. Here, where the commitment involves filing a wholesale tariff, we believe we also have authority to review that tariff for compliance with the applicable federal and state requirements. If a party believes the Commission has not applied the correct standard, the party may then file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II.*

In addition to the legal basis for our decision, our decision also addresses a significant practical consideration facing the Commission. Specifically, from a Commission resource perspective, it makes much more sense to litigate all of the issues associated with unbundling in one docket and develop a standard offer or Statement of Generally Available Terms (SGAT). A single litigated case ensures that we receive the benefit of briefing on an issue from all interested parties, rather than rely on individual litigants to brief issues that may, or may not, be important to them. Individual litigation diverts Commission resources from addressing matters that impact all carriers to issues that may only affect one or two carriers.

Finally, we note that 35-A M R.S.A. § 304 requires that all utilities file schedules containing the rates, terms, and conditions for any service performed by it within the State. We have previously interpreted this provision to require filing of wholesale rates with the Commission, i.e. services which are resold to other carriers or special contracts made with specific customers. For example, Verizon has on file with the Commission a state access tariff through which it offers many UNE-like services, such as high capacity transport. Thus, subject to the specific finding below, we require Verizon to file both its terms and conditions and rates for all of its 251 and 271 obligations in its Maine wholesale tariff.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Now that we have determined that Verizon must tariff its 271 obligations, we must consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II.*

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost, be nondiscriminatory, and may include a reasonable profit. This standard has been interpreted by the FCC (and upheld by the

Supreme Court[18]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[19] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[20] The FCC noted

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[18]*See AT&T v. Iowa Utilities Bd.*, 525 U.S. 355 (1999)(*Iowa II)*.

[19]*TRO* at ¶ 656.

[20]*TRO* at ¶ 664.

that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[21]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[22] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are jurisdictionally intrastate.[23] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252

[21] *Id.*

[22] *USTA II* at 53.

[23] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

arbitration proceeding.[24] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon.

Verizon argues that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contends that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. Verizon argues that the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also points out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

2. CLECs.

The CLEC Coalition argues that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs over which the Commission would have the authority to review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because

[24] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[25]

D. Analysis

Determination of the scope of the Commission's 271 pricing authority requires both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation.

There are a number of factors which could support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. Finally, both CLECs and the National

[25] It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, that the question needed to be addressed.

Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, that the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[26] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions .... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[27]

These same parties also point to a state commission's authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct as another source of authority to set rates for elements provided pursuant to section 271.

Notwithstanding these arguments in favor of Commission authority to set 271 UNE rates, we decline at this time to exercise that authority. While we do not necessarily agree with the FCC's assertion of exclusive jurisdiction over 271 UNE rates, it is, nonetheless, the current law of the land. Rather than add an additional layer of confusion to an already complex situation, we will allow time for the process envisioned by the FCC to work, i.e., for Verizon to file federal tariffs or for the parties to reach arms-length agreements. While we will not set the rates charged by Verizon, we will exercise our authority to require Verizon to file those rates with us in its wholesale tariff. Indeed, before Verizon may begin charging any CLEC 271 UNE rates which are higher than its current TELRIC rates, Verizon must first obtain the FCC's approval for the specific rates

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[26] *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000).

[27] *Iowa II,* 525 U.S. at 384.

(in whatever form necessary) and then must file the rates here pursuant to our usual tariffing process. We will suspend any rates filed with us which have not been specifically approved by the FCC.

We leave open today the possibility that in the future, perhaps after the FCC has ruled on the BellSouth Emergency Petition or if the Supreme Court takes the *TRO* appeal and reverses the *USTA II* decision, we might revisit the issues decided today. We also leave open the possibility that we will step in and take action if the FCC abdicates its authority, either explicitly or by taking an undue amount of time to exercise its authority. We firmly believe that *all* parties would greatly benefit from increased certainty concerning wholesale pricing and if the FCC does not actively assert its jurisdiction, we will assert ours so as to ensure the continued viability of local competition in Maine.

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[28] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and

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[28] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[29] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.

USTA II at 45. Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.

Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs. In its *Line Sharing Order,*[30] the FCC discussed the necessity of unbundling the HFPL as part of an ILEC's 251 unbundling obligations. In its *Oklahoma/Kansas 271 Order,* the first 271 Order issued after the *Line Sharing Order,*

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[29] *TRO at* ¶ 258.

[30] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order).*

the FCC included its discussion of compliance with the line sharing requirement under its discussion of compliance with Checklist Item No. 4, access to local loops.[31] In the *Massachusetts 271 Order*, the FCC explicitly stated that:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[32]

Thus, the FCC appears to consider line sharing a form of access to the local loop that must be provided pursuant to section 271, regardless of whether it must also be provided pursuant to section 251.

B. Positions of the Parties

1. Verizon.

Verizon argues that in the *TRO*, the FCC determined that CLECs are not impaired without unbundled access to line sharing. Verizon argues that where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, "the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns." Citing section 251(d)(3) and "long-standing federal preemption principles," Verizon asserts that state commissions have no authority to override the FCC's determination that the unbundling of certain network elements is not required under the TelAct.

[31] *Oklahoma/Kansas 271 Order* at ¶ 214.

[32] *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 163 (*Verizon MA 271 Order*).

Verizon contends that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon. This is especially true where the FCC has explicitly declared that line sharing is not required. Verizon points out that the FCC authorized the state to perform "granular" review of specific elements only and that line sharing was not one of them.

Verizon further argues that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argues that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's rulings in its *TRO*." In particular, Verizon disputes the CLECs' claim that the Commission has separate state authority to order line sharing and states that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refutes the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts. Since the FCC has already found no impairment, they conclude, the Commission is not free to order line sharing.

In its Supplemental Brief, Verizon asserts that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[33] Verizon also repeats its belief that

[33] *USTA II* at 12.

the "Commission may not lawfully rely on state law to impose an unbundling obligation for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *Triennial Review Order.*" Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argues that even if the state is authorized to order unbundling (which they insist, it is not), it may not do so in the case of line sharing because *USTA II* affirmed the FCC's decision in the *TRO* not to order line sharing because it discourages investment.

2. CLECs.[34]

In their Brief, the Consolidated Intervenors point to the Commission's reliance upon Verizon's performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine's 271 proceeding. They contend that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission's support and is anti-competitive. The Consolidated Intervenors argue that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They suggest that the Commission follow the Pennsylvania Public Utilities Commission's lead in insisting that Verizon honor its 271 obligations. Finally, they cite 35-A M.R.S. A. § 7101 and argue that Verizon's proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas. The Consolidated Intervenors argue that the Commission should order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

[34]The CLEC Coalition did not brief the line sharing issues but "supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate".

In their Reply Brief, the Consolidated Intervenors again describe how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cite to paragraph 650 of the *TRO* where the FCC states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops…." The Consolidated Intervenors implore the Commission to enforce Verizon's 271 obligations.

In their Supplemental Brief, the Consolidated Intervenors state that the decision in *USTA II* confirms the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argue that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

C. Decision

We find, based upon the language quoted above from the FCC's *Massachusetts 271 Order,* that Verizon must continue to provide CLECs with access to line sharing in order comply with Checklist Item No. 4 of section 271. As discussed above, however, we will not exercise any authority we might have to set rates for 271-based UNEs such as line sharing and will leave those issues to the FCC, which has already stated what it believes to be the fair rate, i.e. three years of transition rates leading to up to the full cost of the loop. While our decision today does not provide the CLECs with all of the relief they requested, it does provide them with the continued opportunity to share lines with Verizon, which retains the majority of local service lines in Maine.

We decline the opportunity to exercise any authority we have under either federal or state law to order line sharing at TELRIC rates at this time. While we do not concede the point as argued by Verizon, the FCC clearly intended to preempt state authority to order line sharing pursuant to section 251 or state law. Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO,* the FCC asserts that its interpretation of the requirements of section 251, i.e., its rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[35] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted. Any party aggrieved by a state decision to require line sharing after the effective date of the *TRO* can seek a declaratory ruling from the FCC

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[36] If the statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[37] Savings

[35] *TRO* at ¶ 191.

[36] *CSX Transp , Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[37] *Id.*

clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[38] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[39]

The FCC's assertion that its rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in *Iowa I*.[40] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[41] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[42] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[43] Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it

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[38]*Id.*

[39]*Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[40]*See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd* , 525 U.S. 366 (1999).

[41]*Id.* at 806.

[42]*Id.* It further held that section 261(c) of the TelAct (which requires state commission decisions to be consistent with the FCC's regulations) applies only to state requirements that are not promulgated pursuant to section 251. *Id.* at 807.

[43]*See TRO* at ¶ 192, fn. 611.

automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

We find that, with respect to line sharing, there has been a clear policy decision at the federal level that line sharing should not be made available at TELRIC pricing. Any decision on our part, whether based upon federal or state law, to require line sharing at TELRIC prices would directly contradict federal policy and would, in fact, substantially prevent implementation of section 251 as interpreted by the FCC.[44] We do not reach the issue of whether the FCC's interpretation of 251 would limit state authority in every instance but instead find that here, with regard to line sharing, and where the federal policy has been so clearly enunciated and upheld by the D.C. Circuit, that the most appropriate action at this time requires denial of the CLECs' request for state-ordered unbundling at TELRIC rates. We leave open the possibility that if, at some future date the Supreme Court overturns the FCC's interpretation of its powers of preemption and/or overturns the FCC's decision concerning line sharing, we might revisit this issue and reach a different result. Until such time, the only line sharing that will be available in Maine will be pursuant to section 271 at "just and reasonable rates" as determined by the FCC.

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[44] *But see, Investigation into Skowhegan Online's Request for UNE Loops*, Docket No. 2002-704, Orders (April 20, 2004 and June 16, 2004) where the Commission asserted its authority under 35-A M.R.S.A. §§ 301, 7101 and ordered Verizon to unbundle certain copper subloops not required under federal law.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs in its state wholesale tariff and to continue to offer line sharing pursuant to Checklist Item No. 4 of section 271.

Respectfully submitted,

Trina M. Bragdon
Hearing Examiner

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

August 17, 2004

ORDER – PART 1

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

For reasons which will be discussed fully in our forthcoming Part II Order, we find that Verizon must include all of its wholesale offerings in its state wholesale tariff, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996. In addition, Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. "Total Element Long Run Incremental Cost" for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. We also find that we are not preempted from considering in this proceeding whether Verizon must continue to offer line sharing pursuant 35-A M.R.S.A. §§ 1306 and 7101.

Dated at Augusta, Maine, this 17th day of August, 2004.

BY ORDER OF THE COMMISSION

____
Raymond Robichaud
Acting Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Public Meeting held July 8, 2004

Commissioners Present:

Terrance J. Fitzpatrick, Chairman
Robert K. Bloom, Vice Chairman
Glen R. Thomas
Kim Pizzingrilli
Wendell F. Holland

Covad Communications Company,
Complainant,

R-00038871C0001

v.

Verizon Pennsylvania Inc.,
Respondent

OPINION AND ORDER

BY THE COMMISSION:

Before this Commission for consideration is the Petition of Verizon Pennsylvania Inc. (Verizon PA) for Interlocutory Commission Review and Answer to a Material Question and a Stay of Proceedings (Petition and Stay) filed on February 25, 2004, in the above-captioned proceeding. *See* 52 Pa. Code § 5.302. The Petition and Stay have been filed in response to a February 13, 2004 Interim Order of Administrative Law Judge (ALJ) John H. Corbett, Jr. (assigned as Motions Judge January 20, 2004). In the Interim Order, ALJ Corbett denied a Verizon PA Motion to Dismiss a Formal Complaint of Covad Communications, Inc. (Covad), which was filed against certain tariff revisions to Verizon PA's Tariff No. 216 (pertaining to Unbundled Network Elements (UNEs)) which are designed to remove and revise terms and conditions for, among other services, line sharing.[1]

By its Petition and Stay, Verizon PA requests interlocutory review of the following two material questions:

> (1) Whether this Commission is preempted by federal law from requiring Verizon to provide "line-sharing" under state tariff under terms, conditions and prices differing from those that the FCC has determined are appropriate under the federal Telecommunications Act ("Act"); and
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> (2) Whether this Commission lacks independent authority under Section 271 of the Act or state law to impose any line-sharing requirement.

Briefs in opposition to Verizon PA's Petition and Stay were filed by the Office of Consumer Advocate (OCA) and Covad. Verizon PA filed a Brief in support of its Petition and Stay.[2] We, thereafter, elected to waive the 30-day period for consideration of the Petition and Stay as set forth in 52 Pa. Code § 5.303. *See* Secretarial Letter of March 18, 2004 citing 52 Pa. Code § 1.2(c); also *C.S. Warthman Funeral Home, et al. v. GTE North, Incorporated*, Docket No. C-00924416 (Order entered June 4, 1993).

Before we evaluate the interlocutory matter before us, we make the following procedural observations. As noted, this proceeding involves tariff revisions filed by Verizon PA to its Services for Other Telephone Companies Tariff – Pa. PUC No. 216, to remove certain UNEs and to revise terms and conditions for line sharing. We

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1 *See* Tariff PA PUC 216, Section 3A, Revised Sheet 5.

2 The Parties were permitted to increase the page length of the briefs to twenty-five pages and also granted an extension of time until March 8, 2004, in which to file.

observe that pursuant to the requirements of Section 1308(b) of the Public Utility Code, 66 Pa. C.S. § 1308(b), this Commission may, at any time before they become effective, suspend the operation of such rates for a statutorily prescribed period, pending decision by the Commission. By Order entered herein on December 4, 2003, the Commission suspended the proposed revisions to Tariff No. 216. However, the period of time for the suspension of the proposed tariff revisions has expired and we are advised that Verizon PA intends to place said tariff revisions in effect. Notwithstanding, there are substantial questions raised by the proposed revisions and we shall continue this Commission's investigation into the lawfulness of said tariff revisions. Final adjudication of the lawfulness of said revisions may require changes to Tariff No. 216.

Background

In the Federal Communications Commission (FCC) *Line Sharing Order,*[3] FCC rules implementing the unbundling requirements of the federal Telecommunications Act of 1996 (Act or TA96) were amended to require incumbent local exchange carriers (LECs) to provide unbundled access to the high frequency portion of the local loop (HFPL).[4] This was mandated to enable competitive LECs to compete with incumbent LECs to provide xDSL-based services through telephone lines that the competitive LECs could "share" with incumbent LECs. Line sharing, therefore, is the process by which a requesting LEC provides DSL 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 LEC using the HFPL.

The *Line Sharing Order* was vacated and remanded. *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied* 538 U.S. 940 (2003). After the D.C. Circuit Court's vacation and remand of the FCC's original line sharing rules, line sharing was again considered in the recently issued FCC *Triennial Review Order* (TRO).[5] Pursuant to

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3 See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order; CC Docket No. 96-98, 14 FCC Rcd 20912. (1999).

4 The HFPL is defined as "... the frequency range on the copper loop above the range that carries analog circuit-switched voice transmissions." 47 C.F.R. § 51.319(a)(1)(i). *See* 47 U.S. C. § 251(c) and 252(d)).

5 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003); corrected by Errata, 18 FCC Rcd 19020 (2003); *vacated, in part, United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases).

the TRO, FCC unbundling rules were further revised and as a result of the TRO, line sharing is no longer classified as a UNE subject to the unbundling requirements of Section 251 of the Act, 47 U.S.C. § 251. *See* TRO para. 255. Except as directed by the FCC on a "grandfathered" basis, and subject to a three-year transition mechanism, paras. 264-266, line sharing is no longer considered by the FCC to be a UNE, the lack of which would "impair" the ability of competitive LECs seeking access to provide the services that they seek to offer to the public. *See* 47 U.S.C. § 251(d)(2)(B).

Most of the self-implementing revisions to FCC rules mandated by the TRO became effective October 2, 2003, after publication in the Federal Register. On October 2, 2003, Verizon PA made the filing at issue here, seeking to revise its tariffs so as to remove line sharing based on its interpretation of the TRO. The TRO was appealed by several Parties.[6] On March 2, 2004, while the Verizon PA Petition and Stay of the Interim Order of ALJ Corbett was pending our consideration, the United States Court of Appeals for the District of Columbia Circuit issued a decision which vacated the TRO, in part. *See USTA v. FCC*, No. 00-1012, __ F.3d ___ (D.C. Cir. 2004) 2004 U.S. App. LEXIS 3960. However, the D.C. Circuit affirmed the FCC rules pertaining to line sharing.

In the case before us, the two material questions presented by Verizon PA, arise from the following procedural history (reprinted from the Initial Decision):

> On October 2, 2003, Verizon Pennsylvania Inc. ("Verizon") filed tariff revisions to its Services for Other Telephone Companies Tariff-Pa. PUC No. 216, to remove certain Unbundled Network Elements ("UNEs") and to revise terms and conditions for line sharing...
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> Verizon proposes to make the following revisions to its Tariff 216:

6 This Commission was an active petitioner in those appeals.

(1) Eliminate OC3 (Optical Carrier level-3) and OC12 (Optical Carrier level-12) interoffice transport from the list of available UNEs.

(2) Eliminate STS-1 (Synchronous Transport Signal-1) interoffice transport from the list of available UNEs.

(3) Discontinue provisioning IOF (Inter-Office Facility) Dark Fiber between a TC (Telephone Company) Collocation arrangement in a Telephone Company Central Office and the TC's central office (Dark Fiber Channel Termination).

(4) Discontinue provisioning new Line Sharing arrangements over copper loops or sub-loops.

On October 28, 2003, Covad Communications Company ("Covad") filed a complaint challenging Verizon's tariff filing. In its complaint, Covad alleges Verizon's proposed Tariff 216 violates the Telecommunications Act of 1996 (the "Act") and the Public Utility Code (the "Code"). Tariff 216 does not correctly implement the FCC's *TRO*. First, Verizon incorrectly interprets the FCC's grandfathering rule for existing line sharing arrangements and unilaterally imposes additional limitations on CLECs not contained in the *TRO*. Second, Verizon cannot cease offering line sharing. Verizon must detail its line sharing obligations in its tariff to include: (1) its obligations under the *TRO*'s § 251 transition plan; and (2) unbundled access to line sharing under § 271 of the Act and under Pennsylvania law. The Act preserves independent state authority, which the *TRO* does not preempt.

For relief, Covad seeks, *inter alia*, a Commission ruling to require Verizon to continue line sharing pursuant to § 271 of the Act. Covad suggests the Commission can determine this threshold question without evidentiary hearings by ruling on the pleadings. 52 Pa. Code §5.102. In addition, it notes in Verizon's pending Network Modernization Plan proceeding, Covad has raised the applicability of §271 to the issue of hybrid copper-fiber loop availability to Verizon's competitors. Thus, Covad suggests the Commission should investigate Verizon's proposed Tariff 216, set the remaining

> issues for hearing and disposition, and consolidate Covad's complaint with that proceeding.
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> On November 7, 2003, Verizon answered the complaint and filed a motion to dismiss it. Verizon declares it filed its Tariff 216 revisions to conform the tariff to the self-executing provisions of the *TRO*. The FCC's *TRO* eliminated "line sharing" as an UNE and phased out its availability. "Line sharing" refers to a requirement to unbundle the high frequency portion of the loop ("HFPL"), so "a competing carrier provides xDSL service over the same line that the incumbent LEC uses to provide voice service to a particular end-user, with the incumbent LEC using the low frequency portion of the loop and the competing carrier using the HFPL." In the *TRO*, the FCC held ILECs will no longer be required to provide line sharing as a UNE, because competitors are not "impaired" without unbundled access to the HFPL. Under new FCC rules set forth in the *TRO*, the high frequency portion of a copper loop is not a UNE under §251, even on a transitional basis.
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> . . . Verizon argues any Commission attempt to impose additional line sharing requirements is preempted by federal law. Its tariff proposals, Verizon claims, are fully consistent with the plain language of the *TRO*. Thus, it contends Covad's complaint is baseless and fails to state a claim on its face.
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> By Order entered December 4, 2003, the Commission, *inter alia*, suspended the tariff filing for a period not to exceed six months or until June 4, 2004 pursuant to 66 Pa. C.S. § 1308(b). In Ordering Paragraph Four of this Order, the Commission also assigned this tariff filing "in conjunction with [Covad's] complaint" to the Office of Administrative Law Judge "for such proceedings as shall be deemed necessary and the issuance of a Recommended Decision." I received the assignment as Motions Judge on January 20, 2004.

(Interim Order, pp. 1-4) (Note omitted).

Discussion

1. Positions of the Parties

The Interim Order provides a succinct summary of the positions of the Parties. We rely on that summary as supplemented by our review of the Briefs filed in support of and in opposition to interlocutory review.

Verizon PA takes the position that this Commission, as a result of the suspension and investigation of its tariff revisions "conforming" its Tariff 216 to the TRO's line sharing requirements, has placed itself in direct conflict with federal law and the FCC's policy articulated in the TRO, to eliminate line sharing as a UNE. (VZ Brief at 3). Verizon PA, repeating the arguments made in its Motion to Dismiss, argues that any attempt to require line sharing beyond what is set forth in the TRO is preempted by federal law. Also, Verizon PA asserts this Commission lacks independent authority to require line sharing under either state law or Section 271 of TA96, 47 U.S.C. § 271. (Brief at 5).[7]

With regard to unbundling under Section 251 of TA96, Verizon PA also takes the position that, notwithstanding any retention by the state commissions of general unbundling authority in areas where the FCC did not specifically adopt a national rule, because the FCC has reached a determination that unbundling the HFPL would be contrary to the goals and requirements of the Act. Consequently, the states may not reverse such a conclusion. (Brief at 7). The FCC, relying on long-standing federal preemption principles, concluded that states may not enact or maintain a regulation or

7 Verizon PA states that this Commission has never imposed a state law line-sharing requirement. It explains that the Commission set prices and other details for line sharing under the FCC's prior line sharing rules. Based on the foregoing, Verizon PA argues the Commission lacks state law authority to now establish a line sharing requirement. (VZ Brief at 6; also I.D. at 6).

law pursuant to state authority that thwarts or frustrates the federal regime adopted in the TRO. (Brief at 8). Verizon PA additionally notes that the FCC rules which previously gave states the discretion to create additional unbundled network elements were eliminated. *See* Brief at 8, n. 12 citing 47 C.F.R. § 51.317. Thus, state authority expressly preserved by 47 U.S.C. § 251(d)(3) is narrow and limited to action that is consistent with the requirement of Section 251 and does not substantially prevent the implementation of the federal regulatory scheme. *Id.* referencing TRO, para. 194.

Verizon PA's position regarding independent authority under Section 271 of the Act is as follows. The FCC alone is authorized to approve or deny a former Bell Regional Operating Company (RBOC) application for in-region intraLATA authority. The role of the state commission is limited to providing "consultation" to the FCC in this regard. Therefore, the state commission does not have any authority concerning line sharing based on Section 271 of TA96. (Brief at 13). Also, Verizon PA argues that after Section 271 authority is granted it is, again, the FCC which has the enforcement authority under the Act to determine, after notice and hearing, whether an RBOC has "ceased to meet" any of its Section 271 conditions. Should such a deficiency be found, the FCC must issue an order correcting the deficiency. (Brief at 15-16).

Verizon PA, thereafter, attacks Covad's basis for asserting that line sharing is a cognizable requirement under Section 271, Checklist item # 4. Verizon PA asserts that Covad is wrong in implying that line sharing is a Section 271 requirement. (Brief at 17). It argues that the plain language of the statute requires it to provide only a loop, and does not encompass some portion or capacity of the loop. *Id.* Verizon PA bolsters its position regarding whether Checklist item # 4 could be read to include line sharing, by making a distinction between the "limited" and "specific" language of Section 271 with the more expansive language of Section 251(c)(3), which requires LECs to provide unbundled access to network elements. And, "network elements" are defined to include their features, functions, and capabilities. *Id.*

Verizon PA discounts the FCC's discussion of line sharing in past Section 271 decisions by observing that the FCC and the courts have recognized that each checklist item draws its content from the evolving nature of the FCC's local competition rule at any given time. (Brief, p. 18). Because Checklist item # 2 requires an RBOC to provide nondiscriminatory access to network elements in accordance with Sections 251(c)(3) and 252(d)(1) of TA96, the FCC, in prior decisions was obligated to consider line sharing because the law prior to TRO was that line sharing was required under Section 251. Now that there is no longer a requirement for line sharing under Section 251, Verizon PA reasons that the elimination from the Checklist #2 item should also result for Checklist item # 4, which requires an RBOC to provide a loop unbundled from switching. (Brief at 18-19).

Verizon PA makes two concluding points. They are: (1) the FCC concluded that Total Element Long Run Incremental Cost (TELRIC) pricing does not apply to elements unbundled pursuant to the authority of Section 271 of TA96; and (2) line sharing was neither established or discussed in the Commission's *Global Order*. Rather, specific findings were made regarding line sharing as a result of the arbitration of interconnection agreements, and not as a state law requirement. (Brief at 20-22).

The essence of Covad's Complaint against Verizon PA's proposed tariff revisions is based on the independent authority of Section 271 of TA96. Covad maintains that Verizion PA must provide line sharing "at the current rates, terms, and conditions set forth in Tariff 216." (Covad Brief at 3). Covad primarily relies on Section 271 of the Act for its position that this section provides an independent source of authority by which a state commission could require unbundled access to the HFPL, notwithstanding a contrary conclusion of the FCC regarding the unbundling of this element pursuant to Section 251 of the Act. (Brief at 4). Covad observes that should the state commission acknowledge this independent authority, this would obviate the need to consider the preemptive effect of the TRO on state commission unbundling determinations and would render questions on this issue moot. *Id.*; 7.

Covad also relies, although to a lesser degree, on its view that there is independent state law authority through Chapter 30 of the Public Utility Code (sunset December 31, 2003), to mandate a line sharing requirement. Covad argues: (1) the FCC TRO has established the independence of Section 271 requirements from any analysis pursuant to Section 251; and (2) the HFPL comes within the definition of unbundling of local loop transmission which is a checklist item (Checklist item # 4) Verizon PA had to satisfy in order to receive authorization for intraLATA authority. This obligation continues. (Brief at 8-9). Covad points out that in the *PA Section 271 Order*, the FCC relied upon access to the HFPL through line sharing and line splitting when it found that Verizon PA had complied with Checklist item # 4. *See* Brief at 9 citing *PA Section 271 Order*, paras. 76; 78.

Covad further observes that since the advent of line sharing, each time the FCC has reviewed an application of a former RBOC's entry into long distance, the FCC has "insisted" on the applicant's demonstration of non-discriminatory access to the HFPL in order to comply with Checklist item # 4. (Brief at 10). To this end, Covad cites a recent FCC decision which required compliance with Checklist item # 4 and line sharing after the TRO was issued. *Id.*, n. 15. Covad, therefore, suggests that the Section 271 proceedings require Verizon PA to provide non-discriminatory access to the HFPL and that these obligations are enforceable in Pennsylvania. (Brief at 10).

Covad additionally points to decisions in the jurisdictions of North Carolina and Georgia and argues that the commissions in these states have adopted decisions which Covad asserts, stand for the proposition that RBOCs have an independent obligation under Section 271 to provide unbundled access to loop transmission, which, necessarily includes line sharing. (Brief at 13) Regarding the rates for line sharing, Covad continues to press for the maintenance of Tariff 216 for line sharing at the rates, terms, and conditions presently contained therein. (Brief at 11).

Covad then criticizes the TRO as an invalid exercise of congressional authority to the extent the TRO purports to preempt states from establishing additional UNEs. (Brief at 17). Covad suggests that the deference given to a federal agency's interpretation of an act which it administers under the doctrine of *Chevron*,[8] has been forfeited as a result of the many D.C. Circuit Court rulings which have vacated various portions of the FCC rules. *Id.*

Although Covad asserts, in the primary sense, that should this Commission find independent authority pursuant to Section 271 of the Act and independent state law authority for the maintenance of a line sharing requirement, there would be no need to engage in a preemption analysis, it also addresses the preemptive effective of the TRO. Covad makes the argument that preservation of line sharing would not frustrate the intent of the FCC TRO, but would complement the goals of Section 251. Covad holds that "unbundling of the HFPL is clearly consistent with the intent of Section 251, which authorizes states to implement additional requirements fostering interconnection and competition." (Brief at 18). The proper preemption analysis, according to Covad, should be that outlined by the United States Court of Appeals for the Sixth Circuit in *Michigan Bell v. MCI Metro*, 323 F. 3d 348 (6th Cir. 2003). *Michigan Bell* is cited for the proposition that the focus of conflict preemption is frustration of purpose. Therefore, state law regulations may be enforced, even where the terms differ from the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services. (Brief at 20).

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8 *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The OCA adopts the arguments set forth by Covad in its Complaint and Motion. The OCA agrees that Section 271 and state law provide an independent source of authority to require line sharing. The OCA, however, does not elect to address pricing issues at this juncture. It emphasizes that the question of Verizon PA eliminating its present line sharing tariff should be considered separately from the question of what pricing should be applied. (*See* OCA Brief at 6)

As noted, ALJ Corbett denied both the Verizon PA Motion to Dismiss and the Covad Motion for Judgment on the Pleadings.[9] Consequently, both Parties filed pleadings indicating a view that there are no genuine issues of material fact to be resolved and that they are each entitled to a favorable determination on their respective positions as a matter of law and without the necessity for a hearing.[10] ALJ Corbett disagreed and found that the Commission has jurisdiction to address the threshold jurisdictional question of preemption in this case. (I.D. at 21). However, in order to do so would require the development of a record in light of the ambiguity of material facts essential to a reasoned decision. (I.D. at 22). ALJ Corbett was further persuaded that the Commission had jurisdiction to make a threshold determination of the propriety of removing line sharing from its tariff in light of the fact that access to the HFPL was integral to the FCC's determination to grant it authority to provide long-distance service in the *Pennsylvania Section 271 Order.*[11]

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9 Covad does not seek interlocutory review of the denial of its motion for judgment on the pleadings.

10 By e-mail communications attached to the Covad Brief as Appendix A, the Office of ALJ has indicated that the question of whether the independent access to the loop requirement of Section 271 approval requires access to the whole loop or access to a select portion of the loop was amenable to resolution by explanation of counsel. (Brief at 3).

11 *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*; 16 FCC Rcd 17419, 2001 FCC LEXIS 5009 (September 19, 2001).

3. Disposition

On consideration of the positions of the Parties, and the Petition and Stay, we shall grant interlocutory review, consistent with the discussion below. The standards for interlocutory review of a material question sought by a participant are set forth at 52 Pa. Code § 5.302(a). The Regulation requires that the petitioning party "state ... the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." Therefore, the principal concern in our determination of whether interlocutory review is appropriate, is whether the alleged error, and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process. *See Joint Application of Bell Atlantic Corporation and GTE Corporation;* Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. P.U.C. v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Pa. P.U.C. v. C.S. Water and Sewer Associates,* 74 Pa. PUC 716 (1991); *Re Knights Limousine Service, Inc.*, 59 Pa. PUC 538 (1985).

Verizon PA raises substantial jurisdictional questions which go the very heart of this Commission's ability to suspend and investigate its proposed tariff revisions for line sharing. We, therefore, conclude that interlocutory review is appropriate. Resolution of the material questions raised by Verizon PA at this stage of the proceeding will remove uncertainty regarding the effect of Commission action on the lawfulness of Verizon PA's revisions to its line sharing rules, will prevent substantial prejudice, and expedite the conduct of the proceeding as it relates to all participants.

On consideration of the first material question, we shall decline to answer it. The TRO's potential to preempt state law is a concern that has been raised as a result of statements at paragraph 195 where the FCC observed that:

> 195. Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission. If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instance for the subject states to amend their rules and to alter their decision to conform to our rules.

The preemption of state law resulting from the TRO was an issue expressly raised by this Commission in the appeal. The D.C. Circuit Court concluded that the state commission challenge to this aspect of the TRO was unripe. *See USTA v. FCC*, slip op. at 61. Notwithstanding the filing of Verizon PA's proposed tariff supplement, this Commission finds that any conclusion regarding the authority of the state commission to require unbundling of the HFPL independent of the analysis engaged in by the FCC, should be deferred at this time. We observe that the course of TRO litigation is uncertain at this time and that FCC initiatives could, perhaps, obviate the need to resolve the preemption. Our decision to decline to answer Verizon PA's first material question at this time is consistent with the conclusions we reach relative to the second material question raised as addressed in the discussion that follows.

On consideration of the positions of the Parties, we shall decline to answer the second material question as presented by Verizon PA, but shall re-phrase the question as follows:

(2) RE-PHRASED: Whether this Commission lacks independent authority under Section 271 of the Act to relieve Verizon PA of a line sharing requirement.

On consideration of the positions of the Parties, we shall answer the material question, as re-phrased, in the affirmative, clarified by our discussion below.

We agree with the positions of Covad and the OCA, which are in accord with the conclusions of ALJ Corbett, that Section 271 of the Act provides an independent source of authority by which Verizon may still be under a requirement to provide non-discriminatory access to the HFPL. At para. 653 of the TRO, the FCC concluded:

> For reasons set forth below, we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

Verizon PA does not dispute the fact that Section 271 obligations are not necessarily relieved based on the FCC's Section 251 unbundling analysis. (*See* VZ Brief at 16; I.D. at 6) Also, the FCC conclusion that Section 271 requirements are distinct from the "impairment" analysis of Section 251 of TA96, has been affirmed by the D.C. Circuit Court:

> The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundled local loops, local transport, local switching, and call-related databases in order to enter the interLATA market. Order ¶ ¶ 653-55.

USTA v. FCC, slip op.

While we agree with the positions of Covad and the OCA concerning the independent basis under Section 271 for non-discriminatory access to the HFPL, we acknowledge that the state commission's role in this regard is consultative and that the ultimate adjudicative authority lies with the FCC. We also note that the TRO and the D.C. Circuit Court have not specifically addressed the extent of loop unbundling.

Notwithstanding the distinction between Verizon PA's possible obligations arising from Section 271 of TA96, Verizon PA raises a substantial question as to whether the unbundling requirement for local loop transmission (Checklist item # 4) would include the HFPL. Verizon PA asserts; in pertinent part, that:

> . . . Covad is wrong in implying that line sharing is a section 271 requirement because a straightforward reading of that section demonstrates that it is not. Covad contends that Verizon is required to provide line sharing because Checklist Item 4 requires "[l]ocal loop transmission from the central office to the customer's premises, unbundled from switching or other services." (Covad Motion at 5). Checklist Item 4, however, requires Verizon to provide **only** a "loop" unbundled from switching, not some portion of the capacity of the loop. The plain language of the statute, therefore, does not require unbundling of the high frequency portion of the loop (*i.e.* line sharing). The limited and specific language of section 271 is in direct contrast to the more expansive language of section 251(c)(3), which requires ILECs to provide unbundled "access" to "network elements," including their "features, functions, and capabilities."

(VZ Brief at 17) (Notes omitted; emphasis original).

While this Commission does not have the authority to ultimately construe the statutory requirements for Checklist item # 4, we need not engage in an extensive analysis. We are able to conclude that we would agree with the position of Covad to the extent that under prior line sharing rules, unbundling of the HFPL of the stand-alone copper loop has been invariably discussed by the FCC in conjunction with that agency's review of RBOC compliance with Checklist item # 4. *See In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*; 16 FCC Rcd 17419 (September 19, 2001) Paras. 76-78; *In the Matter of Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*; 16 FCC Rcd 14147 (July 20, 2001) Para. 10-11; *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina;* 17 FCC Rcd 17595 (September 18, 2002), *In the Matter of Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West* Virginia; 18 FCC Rcd 5212 (March 19, 2003). *In the Matter of Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*; 17 FCC Rcd 18660 (September 25, 2002); and *In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*; 18 FCC Rcd 25504 (December 3, 2003).

Section 271 Checklist item # 4, provides, in pertinent part, as follows:

(B) COMPETITIVE CHECKLIST: Access or inter-connection provided or generally offered by a Bell

> operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> * * * *
>
> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

The language of Checklist item #4 provides for the unbundling of the local loop transmission *from switching or other services*. The FCC TRO has stated:

> 268. In order to implement the line sharing transition plan described above, we find that it is necessary to reinstate certain rules concerning the HFPL. Specifically, we define the HFPL as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions. The features, functions and capabilities of the HFPL network element are those that establish a complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises, and includes any inside wire owned by the incumbent LEC. Incumbent LECs must condition loops to enable requesting carriers to access the HFPL. Finally, incumbent LECs must provide physical loop test access points on a nondiscriminatory basis for the purpose of loop testing, maintenance, and repair activities. (Notes omitted).

In light of the above quoted language and the inclusion of line sharing arrangements in determining RBOC compliance with Checklist item # 4, we find that it is a reasonable interpretation of Checklist item #4 to also include the HFPL of the local loop.

Based on the conclusion that line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing Section 271 obligations, we conclude that there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA's tariff under the present state of FCC orders. We further note that on October 24, 2003, the Verizon telephone companies filed a petition asking the FCC to forebear from § 271 obligations. See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); CC Docket No. 01-338. The matter is pending. Therefore, we conclude that it would be improvident to adjudicate Verizon PA's request to remove line sharing from its PA 216 Tariff until the ambiguity surrounding its obligation to maintain line sharing based on Section 271 has been addressed by the FCC.

If Verizon PA believes that line sharing should no longer be a part of its Section 271 obligations, that issue should be put to the FCC either in conjunction with or separate from, its forbearance request. Our determination to answer the second material question on Section 271 TA96 authority, makes it unnecessary to address state authority or preemption issues at this time. We express no opinion regarding the enforceability of our independent state authority preserved by 47 U.S.C. § 251(d)(3) and any other applicable law. After Verizon obtains a determination from the FCC as to its ongoing obligation to maintain line sharing as part of its 271 commitments, Verizon may then petition the Commission for such further action as may be appropriate.

Conclusion

We decide that Verizon PA's request for interlocutory review is appropriate to a limited extent. Due to pending court litigation, we decline to answer Verizon PA's first material question regarding the preemptive effect of the FCC's TRO at this time. We agree to answer Verizon PA's second material question in part, but rephrase the question to clarify the scope of our jurisdiction based on the unique circumstances of this case. The question answered, as rephrased, is whether this Commission lacks independent authority under 47 U.S.C. § 271 to relive Verizon PA of a line sharing requirement. We answer in the AFFIRMATIVE.

This Commission lacks independent authority under Section 271 of TA96 to relieve Verizon PA of the obligation to provide access to line sharing, which is imposed by the FCC as a condition of Verizon PA's authority to enter the long distance market. Unless or until the FCC affirmatively relieves Verizon PA of this Section 271 access obligation imposed as a condition of Section 271 approval, we will not relieve Verizon PA of its corresponding tariff obligation to provide such access. This proceeding is remanded to the Office of Administrative Law Judge for further proceedings as may be necessary to address any remaining issues; **THEREFORE,**

IT IS ORDERED:

1. That the Petition of Verizon Pennsylvania Inc. for Interlocutory Commission Review and Answer to a Material Question and a Stay of Proceedings is granted.

2. That the Commission declines, at this time, to answer the following material question:

> Whether this Commission is preempted by federal law from requiring Verizon to provide "line-sharing" under state tariff under terms, conditions and prices differing from those that the FCC has determined are appropriate under the federal Telecommunications Act ("Act"); and

3. That the Commission declines to answer the second material question presented in the instant Petition as stated. The Commission re-phrases the second material question, as follows, and answers the question in the AFFIRMATIVE, consistent with our discussion contained in this Opinion and Order:

> RE-PHRASED: Whether this Commission lacks independent authority under Section 271 of the Act to relieve Verizon PA of a line sharing requirement.

4. That the matter shall be returned to the Office of Administrative Law Judge for such proceedings as may be deemed necessary.

BY THE COMMISSION,

James J. McNulty,
Secretary

(SEAL)

ORDER ADOPTED: July 8, 2004

ORDER ENTERED: JUL 0 8 2004

COMMISSIONERS:

ROBERT B. BAKER, JR., CHAIRMAN
DAVID L. BURGESS
H. DOUG EVERETT
ANGELA E. SPEIR
STAN WISE

RECEIVED

JAN 1 4 2004

EXECUTIVE SECRETARY
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DOCKET # 7892

DOCUMENT # 69432

Docket No. 7892-U

In Re: Performance Measures for Telecommunications Interconnection, Unbundling and Resale

ORDER DENYING BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO MODIFY SELF-EFFECTUATING ENFORCEMENT MECHANISM PLAN

BY THE COMMISSION:

I. INTRODUCTION

The Georgia Public Service Commission ("Commission") first held hearings in the above-styled docket in November, 1997. Since that time, the Commission has continued to take input from interested parties and guidance from the Federal Communications Commission ("FCC") in the development of a performance plan for BellSouth Telecommunications, Inc. ("BellSouth"). The Commission has identified the three main components of a comprehensive performance plan: an appropriate set of performance measurements; an appropriate set of benchmarks and retail analogs to apply to those measurements; and, a remedy plan to ensure compliance with the performance goals. (Docket No. 7892-U, Commission Order, p. 2; January 16, 2001). BellSouth's Motion to Modify Self-Effectuating Enforcement Mechanism ("SEEM") Plan ("Motion") addresses the last of these components by seeking to eliminate the penalties associated with line sharing. The term "line sharing" describes when a competitive local exchange company ("CLEC") uses the high frequency portion of the loop ("HFPL") to provide xDSL service, and the incumbent local exchange company ("ILEC") uses the low frequency portion of the same loop to provide voice service.

II. POSITIONS OF THE PARTIES

A. BellSouth's Motion

On October 22, 2003, BellSouth filed with the Commission a Motion to eliminate the penalties associated with line sharing. BellSouth bases its Motion in large part on the Triennial

Review Order[1] issued by the Federal Communications Commission ("FCC"). The FCC concluded that CLECs are no longer impaired without unbundled access to the HFPL. (Triennial Review Order, ¶ 258). The standard for designating unbundled network elements ("UNEs") pursuant to Section 251 of the Telecommunications Act of 1996 ("Federal Act") consists of a finding that CLECs would be impaired without unbundled access. 47 U.S.C. 251(d)(2)(B). BellSouth argues that because line sharing is no longer a UNE the SEEM should be modified to eliminate associated penalties. (BellSouth Motion, p. 1). BellSouth supports this position by arguing that every state in its region has limited the application of automatic payments to Section 251 obligations. *Id.* at 2. BellSouth's Motion includes a request that the Commission act immediately to change the SEEM requirements, as opposed to waiting for the next review process. BellSouth argues that this is appropriate because this requested modification results from a change in applicable law, rather than routine information gathering. *Id.* at 6.

B. Joint CLEC Response

On November 7, 2003, AT&T Communications of the Southern States, LLC, DIECA Communications, Inc. d/b/a Covad Communications and MCI WorldCom ("Joint CLECs") filed with the Commission a Response to BellSouth's Motion to Modify SEEM Plan ("Response"). In their Response, the Joint CLECs argued that the Motion should be denied for three reasons. First, the Joint CLECs stated that "the Commission has jurisdiction over the SEEM Plan to protect Georgia citizens from anti-competitive behavior, including enforcement of BellSouth's Section 271 obligations." (Response, p. 1). The Response cites to Georgia law, specifically O.C.G.A. § 46-5-168(d)(2), to support the position that the Commission retains jurisdiction over the SEEM plan *Id.* at 2. The Joint CLECs argue that BellSouth still must provide line sharing under the Federal Act, and that therefore, discontinuing the SEEM penalties for line sharing would violate the Section 271 of the Federal Act. *Id.* at 3. Second, the Joint CLECs argue that both the Triennial Review Order and Section 271 require BellSouth to provide non-discriminatory access to line sharing. *Id.* Finally, the Joint CLECs argue that granting the relief BellSouth seeks in its Motion would be contrary to public interest. *Id.* at 6.

3. BellSouth's Reply

On December 4, 2003, BellSouth filed with the Commission a Reply in Support of its Motion ("Reply"). In its Reply, BellSouth emphasized that there is no explicit requirement under Georgia law that a performance assessment plan be developed. (Reply, p. 2). BellSouth claims that it does not have an obligation to continue to provide line sharing under Section 271. BellSouth reasons that it would be illogical for the FCC to have expressly stated that line sharing is not required under Section 251, but remains a requirement under Section 271. *Id.* at 7.

III. DISCUSSION

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, FCC 03-36 (rel. Aug. 21, 2003)

The Triennial Review Order states that CLECs are no longer impaired without unbundled access to line sharing. (Triennial Review Order, ¶ 258). In making this determination the FCC recognized that some CLECs have made commitments, such as the building of internal systems to order HFPL from ILECs, based on the existence of line sharing. *Id.* at ¶ 264. To prevent disruption of service and harm to consumers, the FCC ordered a three-year transition period for new line sharing arrangements. *Id.* While the FCC concluded that line sharing should no longer be a UNE, it maintained that CLECs and their consumers would be placed at risk if CLECs were not given an adequate time to adjust to the new rules. BellSouth's Motion to immediately eliminate penalties associated with line sharing is inconsistent with the implementation of a transitional period. BellSouth's Motion, at the very least, is premature.

In addition, the Triennial Review Order makes clear that bell operating companies ("BOCs") have an independent and ongoing access obligation under Section 271. ("Triennial Review Order, ¶ 654). Section 271 checklist items 4, 5, 6, and 10 impose access requirements without reference to Section 251, while checklist item 2 on non-discriminatory access to network elements includes the language "in accordance with the requirements of sections 251(c)(3) and 252(d)(1). 47 U.S.C.271(c)(2)(B). The FCC notes that concluding all of the checklist items are subject to Section 251 would make checklist items 4, 5, 6, and 10 duplicative of item 2. (Triennial Review Order, ¶ 654). The FCC also concluded that because Section 251 applies to all ILECs, whereas Section 271 applies only to BOCs, it is logical to interpret the two sections as operating independently. *Id.* at 655.

Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC and Section 271 checklist item 4. The Commission determines that at this time it is not sound policy to eliminate the penalties associated with line sharing. BellSouth's Motion is therefore denied.

WHEREFORE IT IS ORDERED, that BellSouth's Motion to Modify Self-Effectuating Enforcement Mechanism Plan is hereby denied.

ORDERED FURTHER, 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 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 16th day of December, 2003.

Reece McAlister
Executive Secretary

1-14-04
Date

Robert B. Baker, Jr.
Chairman

Jan. 14, 2004
Date

Docket No. 7892-U

In Re: Performance Measurements for Telecommunications Interconnection, Unbundling, and Resale

ORDER ON RECONSIDERATION

BY THE COMMISSION:

On January 14, 2004, the Georgia Public Service Commission ("Commission") denied the October 22, 2003 Motion by BellSouth Telecommunications, Inc. ("BellSouth") to Modify Self-Effectuating Enforcement Mechanism ("SEEM") Plan. On January 26, 2004, BellSouth filed a Motion for Rehearing and Reconsideration of the Commission order. AT&T Communications of the Southern States, LLC, DIECA Communications, MCI MetroAccess and MCI WORLDCOM (collectively "Joint CLECs") filed their opposition to BellSouth's motion on February 4, 2004. BellSouth responded to the Joint CLEC's pleading on February 6, 2004.

Background

In its original Motion, BellSouth argued that it should be relieved as of October 2, 2003, of the obligation to make line sharing SEEM Plan payments because the FCC's *Triennial Review Order* concluded that line sharing is no longer an unbundled network element ("UNE") under Section 251 of the Telecommunications Act of 1996. (BellSouth Motion, p. 1). AT&T Communications of the Southern States, LLC, DIECA Communications, Inc. d/b/a Covad Communications and MCI WorldCom filed with the Commission a Response urging the Commission to deny BellSouth's October 22, 2003 Motion ("Response") because (1) the Commission has jurisdiction over the SEEM Plan to protect against anti-competitive behavior, (2) BellSouth is obligated to provide non-discriminatory access to line sharing and (3) to remove line sharing from the SEEM Plan would be against the public interest and the purpose of the SEEM Plan. (Response, pp. 1-2).

The Commission stated two grounds for denying BellSouth's Motion to Modify the SEEM Plan. First, the Commission found that given the transitional period for new line sharing arrangements, BellSouth's Motion was at the very least premature. (Order, p. 3) The transition period is to account for the commitments made by some CLECs based on the existence of line sharing, and to prevent disruption of service and harm to consumers. (*Triennial Review Order*, ¶ 264). The Commission concluded that BellSouth's Motion to eliminate the penalties associated with line sharing was inconsistent with the implementation of a transitional period. (Order, p. 3). The second ground for denying BellSouth's Motion related to the Commission's finding that

BellSouth has an independent and ongoing access obligation under Section 271. (Order, p. 3). The Commission based its conclusion primarily on the *Triennial Review Order*.

BellSouth's Motion

BellSouth's Motion for Rehearing and Reconsideration only addresses the ground for denial related to whether it has an independent and ongoing obligation under Section 271 to provide access to line sharing. BellSouth argues, as it did during consideration of its original motion, that the *Triennial Review Order* states that line sharing is no longer required under Section 251. (Motion for Rehearing and Reconsideration, p. 2). BellSouth argues further that the discussion in the *Triennial Review Order* on the checklist items for Section 271 does not mention line sharing. *Id* BellSouth argues that in its *Line Sharing Order*[1] the FCC designated the high frequency portion of the loop as an unbundled network element separate and apart from the loop. *Id.* at 3. BellSouth also argues that line sharing has never been included in checklist item 4 under Section 271. It bases this argument on the FCC's treatment of SBC Communications, Inc.'s application for Section 271 authority in Illinois, Indiana, Ohio, and Wisconsin *Id* at 4. BellSouth argues that the FCC listed "local loops and subloops" separate from "high frequency portion of the loop." *Id* [2]

Joint CLECs' Response to Motion for Rehearing and Reconsideration

The Joint CLECs argued in their Response that both the FCC and BellSouth itself has placed line sharing under checklist item 4 in their respective Section 271 orders and briefs. (Joint CLEC Response, p. 2). The Joint CLEC Response also argues that BellSouth's argument that the Commission lacks jurisdiction over SEEM plans with respect to Section 271 items is incorrect. *Id* at 3. In support of this position, the Joint CLECs state that the *SBC Order* relied upon by BellSouth preceded any grant of Section 271 authority and only stands for the proposition that jurisdiction over applications of Bell Operating Companies for interLATA authorization lies with the FCC. *Id* In addition, the Joint CLECs argue that the FCC has granted states authorization over SEEM plans to prevent against Section 271 backsliding. *Id* at 4.

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[1] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 20912 (1999) *vacated and remanded,* USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied,* 123 S. Ct. 1571 (2003).

[2] BellSouth cites to *Application by SBC Communications, Inc et al, for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin,* Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, issued October 15, 2003. ("SBC Order")

BellSouth's Reply Memorandum in Support of its Motion for Reconsideration

In its Reply Memorandum, BellSouth argues that the Joint CLEC Response did not adequately address the *Triennial Review Order's* treatment of line sharing, including the question of why a transition mechanism would be necessary if checklist item 4 applied to line sharing. (Reply Memorandum, p. 3). BellSouth also argues that the backsliding that the FCC intended for states to prevent against applied to Section 251, not Section 271. *Id* at 4.

Discussion

BellSouth's Motion for Rehearing and Reconsideration does not address the first ground for denial of its original motion. The first ground for denial was that the FCC provided for a three-year transitional period for new line sharing arrangements. (Order, p. 3). This ground is independent from the second ground regarding whether BellSouth has an ongoing Section 271 obligation to provide line sharing. Regardless of whether the Commission granted or denied BellSouth's Motion for Rehearing and Reconsideration, the decision to deny BellSouth's Motion to Modify the SEEM Plan to eliminate penalties for line sharing would stand.

It is therefore not necessary to reach the issue of whether BellSouth has an independent and ongoing obligation under Section 271 to provide line sharing in order to deny BellSouth's Motion to Modify the SEEM Plan. The parties have raised various arguments regarding the FCC's intent with respect to the role of the states with respect to Section 271 obligations and the status of line sharing. Given that the Commission does not need to rule on this issue to deny BellSouth's Motion, it makes more sense to address this question, if and when necessary, at a point when more information on the FCC's intent is available.

In modifying its order to remove this basis for its decision, it must be understood that the Commission is not indicating that it agrees with the arguments in BellSouth's Motion for Rehearing and Reconsideration. Towards that end, the Commission concludes that BellSouth's Motion for Rehearing and Reconsideration should be denied. The Commission on its own motion, however, modifies its January 14, 2004 Order to remove the ground for its decision related to an independent and ongoing access obligation under Section 271. In making this modification, the Commission does not alter the ultimate decision to deny BellSouth's Motion to Modify the SEEM Plan to eliminate penalties for line sharing. The reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original motion.

* * * * *

WHEREFORE IT IS ORDERED, that BellSouth's Motion for Rehearing and Reconsideration is hereby denied.

ORDERED FURTHER, that the Commission on its own motion, hereby modifies its January 14, 2004, order to remove the ground for denial of BellSouth's Motion to Modify the SEEM Plan relating to whether BellSouth has an independent and ongoing access obligation under Section 271 to provide line sharing. The reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original motion. This action should not be construed as constituting agreement with the arguments raised by BellSouth in its Motion for Rehearing and Reconsideration.

ORDERED FURTHER, 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 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 17th day of February, 2004.

Reece McAlister Executive Secretary	H. Doug Everett Chairman
Date	Date

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 133k

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Generic Docket to Address Performance	)	ORDER DENYING
Measurements and Enforcement	)	BELLSOUTH'S MOTION
Mechanisms	)	TO MODIFY SEEM PLAN

BY THE COMMISSION: On August 1, 2003, BellSouth Telecommunications, Inc.'s (BellSouth's) North Carolina Utilities Commission-ordered Self-Effectuating Enforcement Mechanisms (SEEM) Plan and Service Quality Measurement (SQM) Plan went into effect.

On August 21, 2003, the Federal Communications Commission (FCC) released its *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et. al.,* CC Docket No. 01-338, *et. al.,* FCC 03-36 (rel. Aug. 21, 2003) (Triennial Review Order or *TRO*).

On October 27, 2003, BellSouth filed its Motion to Modify SEEM Plan.

By Order dated November 5, 2003, the Commission requested initial and reply comments by interested parties on BellSouth's Motion.

On November 25, 2003, CompSouth[1] filed its comments on BellSouth's Motion. Also, on November 25, 2003, the Public Staff filed its comments on the Motion.

On December 10, 2003, BellSouth filed its reply comments in this regard.

On December 22, 2003, CompSouth filed its Motion to File Supplemental Reply Comments in Response to the Reply Comments filed by BellSouth. In addition, CompSouth filed its Supplemental Reply Comments.

On January 21, 2004, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad) filed a Motion to Take Administrative Notice of the

[1] CompSouth is comprised of. ITC^DeltaCom, MCI, Business Telecom Inc., NewSouth Communications Corporation, AT&T Communications of the Southern States, LLC, NuVox Communications, Inc., Access Integrated Networks, Inc., Birch Telecom, Talk America, Cinergy Communications Company, Z-Tel Communications, Network Telephone Corporation, Momentum Business Solutions, Covad Communications Company, KMC Telecom, IDS Telecom, LLC, Access Point, Inc., and Xspedius Corporation

January 15, 2004 *Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan* issued by the Georgia Public Service Commission (PSC).

BELLSOUTH'S MOTION

In its Motion, BellSouth noted that on August 21, 2003, the FCC released the *TRO*. BellSouth stated that the *TRO* became effective on October 2, 2003 and that among the many rulings in the *TRO* is the decision by the FCC that line sharing is no longer an unbundled network element (UNE) that incumbent local exchange companies (ILECs) are required to offer pursuant to Section 251 of the Telecommunications Act of 1996 (the Act or TA96). BellSouth argued that for this reason, it should be relieved of any further obligation to pay SEEM penalties that relate to the provision of line sharing. BellSouth maintained that although its SEEM Plan is voluntary, it has been approved by an Order of the Commission. Therefore, BellSouth explained that it filed its Motion requesting that the Commission enter an Order authorizing BellSouth to remove the penalties relating to line sharing from the SEEM Plan and to cease the payment of any such penalties as of October 2, 2003.

BellSouth asserted that the North Carolina-ordered BellSouth performance measurement plan – and more specifically, the penalty component of the plan – is not required by any portion of TA96. BellSouth asserted that the FCC clearly made this point in the Order in which it approved BellSouth's 271 application for Georgia and Louisiana (Paragraph 291), as follows:

> In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentive to continue to satisfy the requirements of Section 271 after entering the long distance market. Although it is not a requirement for Section 271 Authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has found that the existence of the satisfactory performance monitoring and enforcement mechanisms is probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority.

Thus, BellSouth maintained, "performance assurance mechanisms," including SEEM penalties, are not required by Section 271. BellSouth argued that to the contrary, a measurement plan is simply a mechanism that can be utilized to ensure that a Regional Bell Operating Company (RBOC) meets its obligations under Section 251. BellSouth noted that consistent with this, every state commission in BellSouth's region, including this Commission, has limited the application of automatic penalties to performance failures relating to offerings that an incumbent must provide to meet its obligations under Section 251, specifically, UNEs, interconnection, and resold services. BellSouth asserted that the current North Carolina SEEM Plan does not include (and has never included) other products that BellSouth may provide to competing local providers (CLPs) that are not encompassed within Section 251. BellSouth commented that at the time the current SEEM Plan was approved by the Commission, line sharing was included in the plan because it had previously been deemed by the FCC to be a UNE. BellSouth argued that with the FCC's above-referenced ruling in the *TRO*, line sharing is no longer a UNE. Therefore, BellSouth opined, it should no longer be subject to penalties under the SEEM Plan.

BellSouth noted that Section 251 places upon ILECs the duty to provide "nondiscriminatory access to network elements on an unbundled basis." (§ 251(c)(3)) More specifically, BellSouth commented, network elements are to be made available on an unbundled basis if "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer." (Section 251(d)(2)(b)) Thus, BellSouth asserted, whether a network element is required to be offered pursuant to Section 251 depends, at least in part, upon whether the lack of this element would impair the CLP's ability to do business.

BellSouth argued that in the *TRO*, the FCC stated in general terms its interpretation of the impairment standard as follows: "We find a requesting carrier to be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic, that are to make entry into the market uneconomic." BellSouth stated that applying this standard, the FCC found that line sharing does not meet this impairment test. Specifically, BellSouth noted, the FCC found in Paragraph 248 of the *TRO* that carriers <u>are</u> "generally impaired on a national basis without unbundled access to an incumbent LEC's local loops." However, BellSouth commented, the FCC also determined "that unbundled access to conditioned stand-alone copper loops . . . is sufficient to overcome such impairment for the provision of broadband services." Accordingly, BellSouth maintained, the FCC further ruled, "that, subject to the grandfather provision and transition period explained below, the incumbent LECs do not have to unbundle the HFPL [High Frequency Portion of the Loop] for requesting telecommunications carriers." Further, BellSouth noted, by way of explaining this decision, the FCC stated that it disagrees "with the Commission's prior finding that competitive LECs are impaired without unbundled access to the HFPL." BellSouth pointed out that the FCC also noted that line splitting <u>is</u> available as a means to obtain the HFPL.

Likewise, BellSouth noted, the FCC specifically rejected earlier findings by it that "line sharing will level the competitive playing field."

Moreover, BellSouth commented, the FCC found in Paragraph 261 of the *TRO* that availability of line sharing as a UNE could have the opposite effect:

> ...[R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage

innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets.

BellSouth argued that, thus, the FCC has clearly ruled that line sharing does not meet the impairment test, and, therefore, need not be offered on an unbundled basis pursuant to Section 251.

BellSouth maintained that the FCC also made the determination that the availability of line sharing will not change immediately. Instead, BellSouth noted, the FCC adopted a transitional mechanism both for new and existing line sharing arrangements. Specifically, BellSouth stated, the FCC decided to grandfather until the next biennial review which will commence in 2004 all existing line sharing arrangements unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user customer. BellSouth commented that the FCC also ruled that new line sharing arrangements would be subject to a three-year transitional period, during which new arrangements could be added in the first year and the price for line sharing would increase next year; at the end of the three year period, "any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with an incumbent LEC to replace line sharing."

BellSouth argued that in outlining the transitional and grandfathering processes, the FCC did nothing to undercut its finding that line sharing does not meet the impairment test, and that it is no longer a UNE. Instead, BellSouth asserted, the FCC adopted this gradual approach because some CLPs currently rely on line sharing to serve their customers. Accordingly, BellSouth stated that the FCC decided to gradually phase out the availability of line sharing "in order to ensure that these carriers have adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with incumbent LECs to replace line sharing."

BellSouth opined that the Commission has always limited the application of SEEM penalties to the offerings that an incumbent must provide under Section 251. Further, BellSouth maintained, failure to continue this long-standing approach by not removing line sharing would likely have a deleterious effect. BellSouth commented that as it previously noted, the FCC specifically found that the continuation of rules to require line sharing "would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." Likewise, BellSouth argued, the continuation of SEEM penalties for line sharing, even though it is no longer a UNE, would likely have the same effect by encouraging CLPs to utilize line sharing rather than other competitive alternatives. Accordingly, BellSouth asserted that the Commission should enter an Order to allow BellSouth to cease making penalty payments effective October 2, 2003, for the portion of any SEEM penalties that apply to line sharing.

BellSouth maintained that under the SEEM Plan currently in place, some measurements specifically identify line sharing as a product and several other measures contain data for line sharing as part of a group of products even though it is not reported separately. BellSouth proposed removing line sharing from the SEEM Plan in both of these cases.

BellSouth acknowledged that, in general, modifications to either the SQM Plan or the SEEM Plan should be limited to the review process outlined in the Commission's Order(s) adopting the SQM and SEEM. BellSouth submitted, however, that the instant circumstances are unique and that they justify immediate modification. BellSouth argued that the Commission-ordered review process is an ongoing process in which information about the plan is gathered, and as this occurs, modifications are made to add necessary measurements, delete measurements or penalties that have proven to be unnecessary, make administrative changes in the plan, or make other appropriate changes on an ongoing basis. BellSouth maintained that it is important to group these types of ongoing changes together and to deal with them as part of a periodic review process to avoid having constant changes to the measurement and penalty plan.

BellSouth submitted, however, that the removal of line sharing from SEEM should be dealt with outside of the periodic review process, due to the unique circumstances that exist. Specifically, BellSouth opined, the FCC's recent decision constitutes a change in the law that has the effect of placing line sharing outside of the fundamental framework of the SEEM Plan. As a result of this, BellSouth argued, line sharing can no longer be included in the SEEM Plan after October 2, 2003.

BellSouth, however, did not propose that line sharing be immediately removed from the measurement plan. BellSouth stated that as it previously noted, the FCC has provided a transitional process whereby the availability of line sharing would change over time. Consistent with this approach, BellSouth stated that it believes that it is appropriate to have some transitional period at the state level, before line sharing is removed from the SQM. Thus, for now, BellSouth stated that it is only requesting removal from the SEEM. BellSouth asserted that its performance related to line sharing would continue to be reported for some period of time. BellSouth noted that it anticipates that the Commission would consider during future periodic reviews the removal of line sharing from the measurement plan.

Finally, as to the timing of the implementation of this change, BellSouth noted that under the SEEM Plan, both Tier I and Tier II penalties are paid 45 days after the end of the month in which the particular performance occurs. Thus, BellSouth stated, any penalties due under the plan for the month of October would normally be payable on December 15, 2003. BellSouth maintained that this means that the Commission would have approximately two months to rule on BellSouth's Motion, prior to the time that penalties would be due. BellSouth asserted that although it believes that the Commission will have ample time to consider its Motion and to rule before December 15, 2003, there is, of course, the possibility that the Commission might not be able to rule by this date. BellSouth proposed that in this event, it would escrow any penalty payments (both Tier I and Tier II) pending a resolution of its Motion by the Commission. BellSouth commented that if the Commission subsequently rules in BellSouth's favor, then the payments would be returned from escrow to BellSouth. BellSouth stated that if it does not obtain the requested relief, then any payments due would be promptly remitted upon the entry of an Order by the Commission.

INITIAL COMMENTS

COMPSOUTH: CompSouth stated in its comments that BellSouth's Motion seeks to modify the SEEM Plan to eliminate the requirement that BellSouth pay penalties relating to line sharing because, allegedly, the FCC's recently released *TRO* eliminated line sharing as a UNE which must be offered by ILECs such as BellSouth.

CompSouth asserted that BellSouth's Motion should be denied for three reasons: 1) the Commission has jurisdiction over the SEEM Plan to protect North Carolina citizens from anticompetitive behavior, including enforcement of BellSouth's Section 271 obligations; 2) BellSouth remains obligated to provide nondiscriminatory access to line sharing both under the *TRO* and TA96; and 3) excusing BellSouth from providing nondiscriminatory access to line sharing under the SEEM Plan is against the public interest and the purpose of the SEEM Plan.

CompSouth maintained that the purpose of the SEEM Plan is to discourage anticompetitive behavior, encourage fair and effective competition, and enforce BellSouth's Section 271 obligations. CompSouth argued that BellSouth's Motion should be denied because under applicable state law there is a mandate to continue line sharing under the SEEM Plan for as long as BellSouth is required to provide line sharing. CompSouth asserted that BellSouth's entire Motion is based on the assertion that the SEEM Plan is narrowly tailored to enforce BellSouth's Section 251 obligations. CompSouth alleged that this is a dramatic misstatement of the law. CompSouth argued that the Commission's jurisdiction over the SEEM Plan is based on North Carolina statutes designed to "provide just and reasonable rates for services without unjust discrimination, undue preferences, or advantages, or unfair or destructive competitive practices." CompSouth maintained that in addition to discouraging anticompetitive behavior and encouraging fair and effective competition, in BellSouth's own words, "the purpose of the enforcement plan is to provide additional assurance that BellSouth will not 'backslide' once it obtains interLATA relief."

CompSouth noted that in contravention of its own previous advocacy, BellSouth now attempts to avoid any relationship to its Section 271 obligations or the jurisdictional basis of the SEEM Plan. CompSouth noted that in its Motion, BellSouth asserted: "a measurement plan is simply a mechanism that can be utilized to ensure that a RBOC meets its obligations under [Section] 251." CompSouth argued that the reason BellSouth feels obligated to divorce the SEEM Plan from enforcement of BellSouth's Section 271 obligations and the Commission's jurisdicti```is because BellSouth r emains obligated to provide nondiscriminatory access to line sharing both under the *TRO* and Section 271 of TA96. CompSouth opined that it would be premature, a violation of

Section 271, and detrimental to North Carolina consumers and competition for the Commission to approve any discontinuance of the SEEM Plan for line sharing when BellSouth remains obligated to provide line sharing under TA96 and the rules and regulations of the FCC.

CompSouth maintained that BellSouth is still obligated to provide nondiscriminatory access to line sharing provisioning, maintenance, and repair. CompSouth noted that the *TRO* requires BellSouth to continue providing access to line sharing. CompSouth asserted that BellSouth *only* provides access to line sharing because it has been and remains obligated to do so. Indeed, CompSouth commented, the FCC expressly outlined the ILECs' continuing line sharing obligations in the *TRO*: "In order to implement the line sharing transition plan described above, we find that it is necessary to reinstate certain rules concerning the HFPL . . . . Incumbent LECs must condition loops to enable requesting carriers to access the HFPL . . . . Incumbent LECs must provide physical loop test access points ***on a nondiscriminatory basis*** for the purpose of loop testing, maintenance, and repair activities." Accordingly, CompSouth maintained, BellSouth remains obligated to provision, maintain, and repair line sharing on a nondiscriminatory basis under the terms of the *TRO*.

CompSouth maintained that BellSouth is also obligated to provide access to line sharing under Section 271 of TA96. CompSouth commented that the FCC stated in the *TRO* that "section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251..." CompSouth noted that the FCC went on to state that "BOCs must continue to comply with any conditions required for approval consistent with changes in the law." CompSouth asserted that there can be no question that Section 271 checklist item number 4 requires the RBOCs to provide access to "local loop transmission from the central office to the customer's premises, *unbundled from local switching or other services*." CompSouth maintained that the HFPL is clearly a form of loop transmission – loop transmission that the RBOCs themselves routinely use to provide xDSL services separately from narrowband voice services. Indeed, CompSouth noted, in describing the HFPL in the *Line Sharing Order*, the FCC stated that "requesting carriers may access unbundled loop functionalities, such as *non-voiceband transmission frequencies, separate from other loop functions*" – distinguishing the high frequency loop transmission path from the narrowband frequencies used for circuit switched voice services. Thus, CompSouth maintained, in light of the clear statutory language in c``cklist item number 4, there is no question that BellSouth and the other RBOCs remain under a statutory obligation to offer unbundled HFPL loop transmission to competitors.

CompSouth asserted that a long line of FCC Section 271 orders confirms the continuing obligation of RBOCs to offer unbundled access to HFPL loop transmission after Section 271 approval. CompSouth noted that since the RBOCs first implemented access to line sharing, the FCC has consistently looked at the nondiscriminatory availability of line sharing as part of its review of RBOC compliance with checklist item number 4. To this day, CompSouth argued, months after its decision to eliminate the line sharing UNE, and even <u>after</u> the rules in the *TRO* have become effective, the FCC continues to look at the nondiscriminatory availability of line sharing as an integral component of its checklist item number 4 analysis in Section 271 proceedings (i.e., Qwest in the state of Minnesota, SBC in Michigan, and SBC in Illinois, Indiana, Ohio, and Wisconsin) – even when the Section 271 application at issue was filed more than a month after the FCC voted to eliminate the line sharing UNE *and* the FCC Order granting the application was issued two weeks after the *TRO* became effective. In the SBC – Illinois, Indiana, Ohio, and Wisconsin Section 271 Order released on October 15, 2003, the FCC continued to consider nondiscriminatory access to line sharing under checklist item number 4:

> ¶ 142: . . . Based on the evidence in the record, we conclude, consistent with the state commissions, that SBC provided unbundled local loops in accordance with the requirements of section 271 and our rules. Our conclusion is based on our review of SBC's performance for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, and high capacity loops, as well as our review of SBC's processes for hot cut provisioning, and ***line sharing*** and line splitting. . .
>
> ¶ 145. ***Line Sharing*** and *Line Splitting.* Based on the evidence in the record, we find that SBC provides nondiscriminatory access to the high frequency portion of the loop (***line sharing***). SBC's performance data for line shared loops demonstrate that it is generally in compliance with the parity and benchmark measures established in the application states.
>
> [footnotes omitted]

Manifestly then, CompSouth declared, nondiscriminatory access to line sharing remains a requisite to Section 271 approval after the *TRO*, and consequently, a requisite to compliance with Section 271 "back-sliding" provisions. CompSouth argued that despite a change in the law relied upon by BellSouth, BellSouth remains under a continuing obligation under Section 271 of TA96 to provide nondiscriminatory access to line sharing.

CompSouth maintained that in accordance with the purposes of the SEEM Plan and the continuing obligation of BellSouth to provide nondiscriminatory access to line sharing, BellSouth's Motion should be denied. CompSouth asserted that it is strongly in the public interest that the customers of AT&T, WorldCom, Covad, and other CLPs are protected from discriminatory treatment by BellSouth. CompSouth argued that what BellSouth is really asking the Commission to do is grant BellSouth unfettered discretion to treat line sharing customers of CLPs in any manner it sees fit. CompSouth maintained that if such discretion were responsibly handled by the RBOCs and other monopolists in the past, the Sherman Act, the Modified Final Judgment, the Act, and the SEEM Plan would all be unnecessary. CompSouth stated that the SEEM Plan is necessary for the very reasons that underlie the Commission's jurisdiction: discouraging anticompetitive behavior and encouraging fair and effective competition.

CompSouth maintained that it is also an integral part of the Section 271 requirements that allow BellSouth to compete in the arena of interLATA telecommunications services. CompSouth opined that as long as BellSouth is obligated to provide parity treatment to its competitors and its competitor's customers, plans like the SEEM Plan are required to enforce that obligation.

CompSouth concluded that for the reasons set-forth in its Comments, BellSouth's Motion to Modify the SEEM Plan to relieve it of any penalties for discriminatory treatment of line sharing customers should be denied.

PUBLIC STAFF: The Public Staff maintained that BellSouth's Motion is premature. The Public Staff commented that in Paragraphs 255 through 263 of the *TRO*, the FCC determined that CLPs were no longer impaired if they did not have unbundled access to the HFPL via line sharing. However, the Public Staff noted, in Paragraphs 264 through 265 of the *TRO*, the FCC continued to require ILECs to offer new line sharing arrangements for the next three years at transitional rates derived from each state's current line sharing rates or contained in the parties' interconnection agreement. The Public Staff stated that the FCC also grandfathered all existing line sharing arrangements until the FCC's next biennial review and set the rate as that charged prior to the effective date of the *TRO*.

The Public Staff pointed out that in Paragraph 27 of the *TRO*, the FCC explained that transitional rates establish a "glide path from one regulatory/pricing regime to another" and encourage either the orderly migration of customers to the whole loop or negotiations between ILECs and CLPs of rates, terms, and conditions for continued access to the high frequency portion of the loop.

The Public Staff stated that it believes that as long as BellSouth is required by the FCC to offer line sharing, the performance measures and SEEM penalties for line sharing should remain in the plans. The Public Staff commented that as the transition period passes, the number of line sharing arrangements should decline, thereby decreasing the potential for BellSouth to incur penalties. However, the Public Staff maintained, to remove the penalties from BellSouth's SEEM Plan for line sharing at this time could disrupt the "glide path from one regulatory/pricing regime to another" envisioned by the FCC. Moreover, the Public Staff noted, as long as BellSouth continues to offer line sharing during this transition period in a nondiscriminatory manner, penalty payments will be unnecessary.

REPLY COMMENTS

BELLSOUTH: BellSouth argued that CompSouth's comments to BellSouth's Motion do not dispute the fact that the FCC has found line sharing does not meet the impairment standard set forth in Section 251(b)(2)(d), and, is, therefore, not subject to the unbundling requirements of Section 251(c)(3). BellSouth opined that it is not surprising that CompSouth would (at least implicitly) concede this point, since the clarity of the FCC's ruling really leaves it no choice. Instead, BellSouth maintained, CompSouth argued that the Commission should require the continued payment of penalties relating to line sharing, even though it is no longer a UNE, based on (1) the jurisdiction of the Commission to prevent anticompetitive behavior, and (2) public policy. BellSouth asserted that these two related arguments both fail for precisely the same reason; they are both premised upon a completely fabricated view of the current competitive market that has no basis in reality.

BellSouth noted that CompSouth made the argument that even as the FCC removed the unbundling requirement for line sharing pursuant to Section 251, it also determined that Section 271 applies to, in effect, counteract that removal. In other words, BellSouth stated, CompSouth argued that the FCC went to great lengths to make the explicit pronouncement that line sharing need not be unbundled, but at the same time, buried within the *TRO* language which should be read, by implication, to achieve precisely the opposite result. BellSouth asserted that although this contention is facially counterintuitive, it will explain in more detail why the language of the *TRO* does not support this contention.

BellSouth maintained that CompSouth's argument that the imposition of penalties for line sharing is required by "applicable state law" draws no support from the actual language of any statutory provision, the Orders of the Commission, or the Orders of the FCC. BellSouth noted that CompSouth cited only to a state statute that is designed to "provide just and reasonable rates for services without unjust discrimination, undue preferences, or advantages, or unfair or destructive competitive practices." BellSouth maintained that there is no explicit requirement in the North Carolina statutes that a performance assessment plan be developed, with or without penalties. BellSouth argued that there is, likewise, no explicit requirement that line sharing be offered on an unbundled basis. In fact, BellSouth asserted, the FCC has made it clear that if there were a state requirement to unbundle UNEs in a way that contradicts the federal scheme, it would be pre-empted. BellSouth noted that the FCC stated the following in Paragraph 187 of the *TRO*:

> Where appropriate, based on the record before us, we adopt uniform rules that specify the network elements that must be unbundled by incumbent LECs in all markets and the network elements that must not be unbundled, in any market, pursuant to Federal Law. In doing so, we exercise our authority pursuant to Sections 201(b) and 251(d) of the Act. As we explain in this Order, we find that setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers including small entities. <u>We find that states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations</u>. (emphasis added)

BellSouth argued that CompSouth has cited no state law that requires either unbundling of line sharing or the imposition of penalties for line sharing. Instead, BellSouth maintained, CompSouth cited general statutory provisions that preclude destructive competitive practices. BellSouth commented that CompSouth made the statement, without citation to any authority, that the SEEM Plan's purpose is to discourage anticompetitive behavior. BellSouth asserted that since there is no support in any state law, statutory or otherwise, for the notion that line sharing must be offered on an unbundled basis or subject to penalties, CompSouth's "Commission jurisdiction' argument and its policy argument are ultimately identical. BellSouth maintained that each is dependent upon the unsupported contention that there will necessarily be an anticompetitive result if penalties are not paid for line sharing.

BellSouth argued that CompSouth's approach is to imply that: (1) BellSouth is a monopolist; (2) BellSouth would not offer line sharing if it were not required to; and (3) CLPs must obtain line sharing from BellSouth on nondiscriminatory terms to compete. BellSouth maintained that this argument proves nothing other than CompSouth's refusal to acknowledge the reality of the current competitive market. BellSouth maintained that the plain fact is that local competition exists. BellSouth asserted that after a process that spanned several years, this Commission recommended that BellSouth receive Section 271 authority, because, among other reasons, the local market is open to competition. BellSouth noted that the FCC specifically endorsed this decision, and also ruled that the local market is, in fact, open to competition.

BellSouth maintained that moreover, perhaps more important in the context of line sharing, is the fact that BellSouth has only a fraction of the data market. BellSouth commented that as the FCC explicitly held, CLPs and other providers can and do compete in the data market, and do not need access to ILEC facilities to do so. Thus, BellSouth asserted, CompSouth's contention that the CLPs need line sharing to compete is not only incorrect, it does not even focus on the data market, which is the more relevant market to line sharing.

Further, BellSouth argued, CompSouth's contention that the removal of penalties for line sharing would have an anticompetitive effect is totally unsupported. BellSouth noted that CompSouth's "public interest" argument consists of little more than a general claim that the SEEM Plan is required to prevent anticompetitive behavior. BellSouth maintained that CompSouth stated that "as long as BellSouth is obligated to provide parity treatment to its competitors and its competitors' customers, plans like the SEEM Plan are required to enforce that obligation." BellSouth argued that the real issue here, however, has nothing to do with whatever general competitive benefits there may be to having a SEEM Plan. BellSouth asserted that the pertinent, specific question is whether line sharing should continue to be a part of the SEEM Plan. BellSouth maintained that the FCC's removal of line sharing from the list of UNEs that must be offered pursuant to Section 251 has clearly answered that question in the negative.

BellSouth commented that the argument that CompSouth now makes, that the CLPs must obtain line sharing from BellSouth to compete in the local market, was made by these very same CLPs to the FCC. BellSouth asserted that the FCC rejected this argument in the *TRO* and found that competitive alternatives exist. In fact, BellSouth noted, the FCC found that there are available alternatives to line sharing based, in part, on the activity of two of the CLPs that filed the instant Comments. Specifically, BellSouth commented, in the *TRO* the FCC stated the following:

> Moreover, we can no longer find that competitive LECs are unable to obtain the HFPL from other competitive LECs through line splitting. For example, the largest nonincumbent LEC provider of xDSL service, Covad, recently announced plans to offer ADSL service to 'more of AT&T's 50 million consumer customers' through line splitting. (¶ 259) (emphasis added)

BellSouth maintained that the FCC also noted in the *TRO* that the above-quoted information was contained in a press release by Covad, which stated "that this agreement will enable more of AT&T's 50 million consumer customers to obtain xDSL service through Covad's network, which itself covers more than 40 million households and businesses nationwide." (footnote 767 of the *TRO*) (emphasis added). Given this, BellSouth commented, the FCC stated that it did "not find credible Covad's argument that the Commission's previous finding, that there are no third party alternatives to the incumbent LEC's HFPL, remains valid."

Moreover, BellSouth stated, the FCC found that a continued unbundling requirement for line sharing could very well have an anticompetitive effect. BellSouth stated that as it noted in its Motion, the FCC specifically found in Paragraph 261 of the *TRO*:

> ...[R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets.

In sum, BellSouth argued, CompSouth's state law and policy arguments are dependent entirely upon its unsupported contention that the application of a SEEM penalty to line sharing is necessary to ensure competition. BellSouth maintained that this contention completely ignores the facts that a competitive market for local services currently exists, that line sharing has been found to be competitively available (based in substantial part, upon the competitive activity of AT&T and Covad), and that the FCC has also found that continuing to require the offering of unbundled line sharing under the standards that apply under Section 251 could well have an anticompetitive effect. Clearly, BellSouth opined, CompSouth's position is at odds with any reasonable assessment of the current competitive reality.

BellSouth asserted that in the only portion of the comments in which CompSouth makes a legal argument, it contended that, even in the wake of the FCC's removal of Section 251 unbundling requirements for line sharing, BellSouth still has precisely the same obligation to provide nondiscriminatory, unbundled access pursuant to Section 271. BellSouth maintained that this argument, however, is misplaced because BellSouth has no obligation to offer line sharing pursuant to Section 271. Further, BellSouth commented, the SQM and SEEM Plans were created to ensure BellSouth's compliance with its obligations under Section 251. Thus, BellSouth asserted, CompSouth is arguing for a dramatic expansion of the Plan beyond its intended purposes, which BellSouth would obviously oppose. BellSouth opined that to rule upon its Motion, however, the Commission does not need to consider the relation of the Plan to Section 271 because there is no requirement in Section 271 to offer unbundled line sharing.

BellSouth maintained that the *TRO* contains no explicit statement that line sharing must be offered on an unbundled, nondiscriminatory basis pursuant to Section 271. However, BellSouth noted, the *TRO* does explicitly state that line sharing is no longer required to be provided on an unbundled basis pursuant to Section 251. Thus, BellSouth stated, CompSouth argued that the FCC has, after a lengthy analysis, explicitly determined that line sharing is no longer subject to the unbundling obligation of Section 251, then reimposed precisely the same unbundling obligation through the unarticulated implication of the *TRO*'s discussion of Section 271. BellSouth opined that it is difficult to understand why the FCC would devote several pages of analysis to the question of whether line sharing should be unbundled, answer the question in the negative, then reverse its decision in another portion of the *TRO*. However, BellSouth noted, the *TRO*'s eighteen-paragraph-long discussion of Section 271 issues never mentions the words "line sharing," "the high frequency portion of the loop" or "HFPL". Nevertheless, BellSouth noted, CompSouth eschewed a common sense reading of the *TRO*, and contended that the Section 271 discussion in the *TRO* reimposes an unbundling obligation.

BellSouth stated that to the contrary, while the *TRO* does discuss Section 271, there is nothing in the discussion from which one could reasonably conclude that the *TRO* ordered the provision of line sharing pursuant to Section 271. BellSouth noted that the *TRO* states in Paragraph 650 that four of the checklist items for Section 271 compliance relate specifically to network elements that have been deemed to be UNEs subject to the standards of Section 251(c)(3); these include local transport, local switching, access to databases and associated signaling and "local loop transmission from the central office to the customer's premise," i.e., checklist items 4, 5, 6 and 10. BellSouth maintained that CompSouth makes the simplistic assertion that since line sharing (i.e., the high frequency portion of the loop) is part of the loop, then the checklist item four requirement to provide loops must apply. BellSouth argued that this contention, however, flies in the face of the entire analytical framework that prevails, both in the *Line Sharing Order* and in the *TRO*.

BellSouth maintained that the FCC decided almost four years ago in the *Line Sharing Order* to designate the high frequency loop spectrum as an unbundled network element, i.e, separate from the loop UNE. Specifically, BellSouth noted, the FCC stated in Paragraph 25 of the *Line Sharing Order* that, "we conclude that access to the high frequency spectrum of a local loop meets the statutory definition of a network element and satisfies the requirements of Sections 251(d)(2) and (c)(3)." BellSouth stated that despite the FCC's designation of the loop and the HFPL as separate UNEs, CompSouth argues that the *TRO*'s discussion of loop unbundling in the context of Section 271 applies equally to the HFPL UNE. BellSouth asserted that CompSouth's argument, however, cannot be reconciled with the FCC's decision to treat the loop and HFPL as separate UNEs. In other words, BellSouth maintained, since the FCC ruled that the loop and the HFPL are separate UNEs, there is no basis for the CLPs to argue that a discussion of loop unbundling in the *TRO* also applies to the separate HFPL UNE, which was not even mentioned in this discussion.

Further, BellSouth stated, there are clear indications of the separate treatment of loops and HFPL throughout the *TRO*. BellSouth commented that the FCC found in Paragraph 248 of the *TRO* that requesting carriers' stand alone copper loops are generally impaired on a national basis, while, at the same time, finding that carriers that request HFPL are not impaired under any circumstances. Again, BellSouth maintained, it makes no sense to conclude, as CompSouth did, that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two separate UNEs together without any distinction. BellSouth asserted that this conclusion makes even less sense when one considers that the FCC specifically found line sharing to be competitive (i.e., not to meet the impairment test), while reaching a different conclusion regarding whole loops.

Finally, BellSouth stated, CompSouth attempted to support its position that the FCC has treated line sharing differently for Section 251 and Section 271 purposes by contending that "a long line of FCC 271 Orders confirms the continuing obligation of BellSouth companies to offer unbundled access to HFPL loop transmission after Section 271 approval." BellSouth noted that in support of this contention, CompSouth cites to four Section 271 applicants, all of which were filed before the current unbundling rules went into effect on October 2, 2003, and three of which were issued before that date.

Paradoxically, BellSouth noted, CompSouth specifically cited the pronouncement in the *TRO* that "BOCs must continue to comply with any conditions required for [271] approval consistent with the changes in the law," but, at the same time, ignored the obvious intent of that language, i.e, that Section 271 requirements are based on the current law at any given point in time. BellSouth maintained that in the portion of the *TRO* that CompSouth quotes, the FCC went on to explain this approach as follows:

> While we believe that Section 271(d)(6) established an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that 'the conditions required for such approval' would not

> change in time. Absent such a reading, the Commission would be in a position where it was imposing different backsliding requirements on BOCs solely based on date of Section 271 entry, rather than based on the law that currently exists. We reject this approach as antithetical to public policy because it would require the enforcement of out-of-date or even vacated rules. (¶ 665) (emphasis added)

Thus, BellSouth argued, the particular standards that the Commission applied for Section 271 purposes prior to the effective date of the *TRO* are different from the standards that will apply with the advent of the *TRO*.

BellSouth noted that although CompSouth cited four Section 271 applications, it based its argument on this point entirely on a single Section 271 application approval that occurred on October 15, 2003, thirteen days after the date that the *TRO* became effective. BellSouth stated that CompSouth quoted from this Order at great length, and argued the references in this Order to line sharing prove definitively that, even in the aftermath of the *TRO*, line sharing continues to be considered as part of the loop for purposes of checklist item number 4 analysis. Unfortunately, BellSouth argued, CompSouth's contention reflects a less than thorough reading of the Order upon which it relies.

BellSouth commented that in the *SBC Section 271 Order*, the FCC acknowledged that it adopted new unbundling rules as part of the Triennial Review on October 2, 2003. BellSouth noted that the FCC then stated that for purposes of the SBC application, it would apply the former rules. Specifically, the FCC stated in Paragraph 11 of the *SBC Section 271 Order*:

> As the Commission found in the *Bell Atlantic New York Order*, we believe that using the network elements identified in the former unbundling rules as a standard in evaluating SBC's application, filed during the interim period between the time the rules were vacated by the DC Circuit and the effective date of the new rules, is a reasonable way to ensure that the application complies with the checklist requirements.

Thus, BellSouth maintained, the FCC applied, based in substantial part on the date the application was filed, the old unbundling rules rather than the new rules. BellSouth argued that this means that, contrary to CompSouth's assertion, the SBC case does not demonstrate that line sharing remains under the umbrella of checklist item 4, even after the *TRO* became effective.

Further, BellSouth maintained, the *SBC Section 271 Order* demonstrates that, even under the old bundling rules, the loop and the HFPL were treated as separate elements. BellSouth noted that in the *SBC Section 271 Order*, the FCC stated specifically that "one part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules concerning UNEs." BellSouth commented that the FCC then listed seven UNEs that ILECs are obliged to provide. BellSouth stated that the first UNE on the list is "local loops and subloops." BellSouth further noted that the seventh UNE on this list is the "high frequency portion of the loop." Thus, BellSouth argued, it is clear that, contrary to CompSouth's contention, the FCC has specifically separated the local loop UNE from the HFPL UNE. BellSouth commented that this separation first appeared in the *Line Sharing Order* and it continues to apply. Thus, BellSouth opined, even if Section 271 could be read to include a loop unbundling obligation, this obligation does not extend to the separate HFPL UNE.

BellSouth concluded that one of the most important aspects of CompSouth's Comments is not what it contends, but rather what it concedes: that the FCC has removed line sharing from the unbundling obligations of Section 251. BellSouth maintained that this removal provides the most compelling reason that the penalty for line sharing should be removed from the SEEM Plan. BellSouth asserted that CompSouth's arguments to the contrary are based on a misreading of the *TRO* that would render the *TRO* patently illogical. BellSouth asserted that beyond this, the CLPs also rely on a state law/policy argument that is only valid if one accepts CompSouth's implication that BellSouth is a monopolist, and the contention that there is no competition in the local market and that line sharing specifically is not competitive. BellSouth argued that both this Commission (in the case of the first two assertions) and the FCC (in the case of all three) have specifically rejected these arguments. Moreover, BellSouth stated, the FCC's finding that line sharing is competitively available was based, in part, upon the market activity of the same CLPs that now contend to the contrary. Given this, BellSouth contended, CompSouth's contention that removing the penalty for line sharing from the SEEM Plan would be anticompetitive must fail.

In response to the Public Staff's comments, BellSouth stated that it respectfully disagrees with the Public Staff's analysis, particularly the conclusion that it would be premature to immediately cease the payment of SEEM payments relating to line sharing. BellSouth argued that the Public Staff's Comments do not contend that there is a continuing legal requirement under the Act to provide line sharing. In fact, BellSouth noted, the Public Staff's Comments specifically acknowledge that in the *TRO*, the FCC determined that CLPs were no longer impaired if they did not have unbundled access to the HFPL via line sharing. BellSouth argued that since there is no continuing legal requirement to offer unbundled access to line sharing pursuant to Section 251, the SEEM payments for line sharing should end immediately.

BellSouth asserted that although the *TRO* extends the time that line sharing must be offered, this extension does not in any way constitute a finding that there is a legal requirement to provide line sharing pursuant to Section 251, Section 271, or any other portion of the Act. BellSouth maintained that both the three-year transitional period and the grandfathering rule set forth in the *TRO* are designed solely to ensure that carriers that have utilized line sharing to provide service have adequate time to implement alternative arrangements and to avoid the disruption of service to end users. BellSouth noted that the FCC specifically stated tha``the grandfathering rule is designed "to prevent consumers who rely on line sharing from losing their broadband service."

BellSouth argued that in keeping with this intent, the "grandfathering" of existing line sharing arrangements pertains only until the next biennial review, which as the FCC noted, "will commence in 2004". Thus, BellSouth asserted, the grandfathering of existing service is clearly contemplated as a short-term arrangement to allow customers to transition to alternative service arrangements as quickly as possible.

Likewise, BellSouth noted, although the transitional period allows CLPs to order new line sharing arrangements for a three year period, the treatment of line sharing as a UNE that must be offered pursuant to Section 251 ends immediately. BellSouth argued that UNEs that must be offered on an unbundled basis pursuant to Section 251 are to be priced at TELRIC rates. In contrast, BellSouth commented, during the transitional period, line sharing will immediately cease to be priced at the TELRIC rate. Instead, BellSouth noted, it will be priced at an amount that equals 25% of the state approved recurring rates for stand alone copper loops and that price will increase throughout the three year transitional period. Thus, BellSouth commented, as the transitional period begins, the *TRO* affects an immediate change in the regulatory treatment of line sharing.

BellSouth argued that as it stated in its Motion, the entire purpose of the performance assessment plan (including the SEEM component) is to ensure compliance with Section 251 obligations after Section 271 authority is granted. Therefore, BellSouth opined, immediate removal of the SEEM penalties for the line sharing UNE that has already been found not to be a required Section 251 offering is the only appropriate result. At the same time, BellSouth maintained, its proposal does allow for a transitional process within the context of the measurement and penalty plan. BellSouth commented that as it noted in its Motion, BellSouth does not propose line sharing measurements be immediately removed from the SQM. Instead, BellSouth noted, its performance in providing line sharing will continue to be reported until the Commission deems in a future periodic review that such reporting is no longer necessary. BellSouth argued that the continuation of reporting without penalties is an appropriate match to the FCC-ordered approach of allowing a transitional period in which customers that utilize line sharing will migrate to other alternatives. BellSouth asserted that it is not appropriate, however, to continue to treat line sharing in precisely the same manner for penalty purposes, even though it is no longer a Section 251 UNE.

BellSouth stated that in the Public Staff's Comments, the Public Staff noted that "the FCC explained that transitional rates establish a 'glide path from one regulatory/pricing regime to another' and encourage either the orderly migration of customers to the whole loop or negotiations between ILECs and CLPs as rates, terms, and conditions for continued access to the high frequency portion of the loop." BellSouth commented that the Public Staff further concluded that BellSouth's approach "could disrupt" this glidepath. BellSouth asserted, however, that the approach advocated by Public Staff would impede "the orderly migration of customers" to other alternatives to line sharing or the negotiations of other arrangements. BellSouth argued that in the *TRO*, the FCC specifically found that, given the fact that line sharing does n't meet the impairment test, continued treatment of line sharing as a UNE would have an anticompetitive affect.

BellSouth noted that the FCC stated the following in this regard in Paragraph 261 of the *TRO*:

> ...[R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets." (emphasis added)

BellSouth maintained that while the FCC contemplated that the removal of Section 251 obligations for line sharing would be handled in a way that would not cause disruption to customer service, the FCC obviously recognized the dangers of continuing to treat line sharing as a UNE even though it no longer meets the impairment test. BellSouth asserted that it only follows from this recognition that alternative arrangements (either functional alternatives to line sharing or alternative line sharing arrangements that would be negotiated with ILECs) should be implemented as quickly as possible in order to avoid a deleterious, anticompetitive effect. Again, BellSouth opined, the entire point of the transition period is to encourage CLPs to find (in an orderly fashion) other alternatives to the current line sharing arrangements. BellSouth stated that if, however, it is required to pay penalties for line sharing throughout the entire transitional period – as if line sharing were still a Section 251 UNE – this requirement will obviously slow the transition and thwart the intent of the FCC.

BellSouth asserted that the FCC clearly intended that a balance be struck between not transitioning current line sharing arrangements to other alternatives too quickly (since this could have an ill effect on customers) and not transitioning too slowly (since this would have an ill effect on competition). BellSouth maintained that it is, in part, for this reason that the FCC ordered that line sharing should be treated differently throughout the transitional period than it was treated when it was a Section 251 UNE. BellSouth argued that if, the FCC's decision notwithstanding, BellSouth is required to continue to pay penalties relating to line sharing as if it were a UNE, then this will only provide an additional incentive for CLPs to continue to utilize line sharing under the present arrangement for as long as possible. In other words, BellSouth stated, this will prevent achievement of the FCC's goal of ensuring that the transition occurs as quickly as possible.

Again, BellSouth maintained, while it may have been appropriate to pay penalties for line sharing when it was categorized as a Section 251 UNE, now that it is not categorized in this matter, and is, therefore, clearly outside of the structure of the plan, the treatment of UNEs under the plan must change. BellSouth commented that the FCC has ordered a transitional process that must begin immediately; this means that the treatment of line sharing must change now, not at some later point. BellSouth asserted that the only ruling by this Commission that would be consistent with this approach is to change the treatment of line sharing under the penalty plan immediately as well.

BellSouth noted that in its Motion to Modify SEEM Plan, it proposed to escrow SEEM payments relating to line sharing until the Commission rules upon the Motion, if such ruling has not occurred by December 15, 2003 (i.e., when the first of the payments are due for performance that occurs after the effective date of the *TRO*). BellSouth restated its request. BellSouth noted that if this requested relief is not granted, then BellSouth will be required to pay both Tier I and Tier II penalties on December 15, 2003 that the Commission could well subsequently determine should not be paid. BellSouth opined that in this event, it would be placed in the untenable position of having to attempt to recoup penalty payments from a number of CLPs. Thus, BellSouth maintained, under the best case scenario, it would have the unnecessary administrative burden of making payments to CLPs only to later expend additional efforts to recover these funds. BellSouth argued that there is, of course, a substantial likelihood that at least some of the CLPs would decline to voluntarily return the penalty payments. BellSouth asserted that if these CLPs do not repay the subject penalties for line sharing, then BellSouth would be unjustly deprived of these payments.

Given the above, BellSouth opined that the better alternative would be for the Commission to allow BellSouth to place into escrow all penalties attributable to line sharing (beginning with those payable on December 15, 2003) until such time as the Commission rules on BellSouth's Motion to Modify the SEEM Plan. BellSouth commented that if the Commission subsequently rules in BellSouth's favor, then the payments would be returned from escrow to BellSouth. BellSouth asserted that although it should prevail in this issue for the reasons set forth in its Motion and Reply Comments, if BellSouth does not obtain the requested relief, any payments due would be promptly remitted to the CLPs upon the entry of an Order by the Commission. Therefore, BellSouth noted, granting its Motion, and allowing these funds to be paid into escrow, would not cause harm to any party.

BellSouth noted that although the immediate entry of an Order allowing BellSouth to pay the above-described funds into escrow is the best approach, BellSouth also purposes an alternative, i.e., that the Commission allow BellSouth to offset any SEEM payments made for line sharing, which the Commission subsequently determines are not required, against subsequent penalty payments due under Tier I and Tier II. In other words, BellSouth commented, if the Commission ultimately rules in BellSouth's favor on the Motion to Modify SEEM Plan, then BellSouth would be allowed to offset all SEEM payments for line sharing, beginning with those due December 15, 2003, against penalties that BellSouth otherwise would owe under the Plan. Thus, BellSouth noted, if at the time the Commission rules, BellSouth owes Tier I payments to a given CLP, it would simply reduce the amount of the payment by the amount of the line sharing penalties that BellSouth had paid to the CLP, beginning with the December 15, 2003 payment. Again, BellSouth stated that it believes that the better alternative is to enter immediately an Order allowing BellSouth the authority to place the subject payments into escrow. BellSouth stated that if the Commission declines to take this action, however, then allowing BellSouth to offset these penalties against others that are due in the future would likely represent the only realistic opportunity that BellSouth would have to recoup these funds.

SUPPLEMENTAL REPLY COMMENTS

COMPSOUTH: CompSouth asserted that it was obliged to file its Response to BellSouth's December 10, 2003 Reply Comments. CompSouth argued that the December 10, 2003 Reply Comments misstate both BellSouth's legal obligations and its prior advocacy to reach the conclusion that "BellSouth has no obligation to offer line sharing pursuant to Section 271." CompSouth maintained that BellSouth's attempt to weaken the SEEM Plan by ignoring line sharing obligations under Section 271 must be rejected by this Commission as it has been by the Georgia PSC and the Alabama PSC.

CompSouth asserted that BellSouth based its argument that BellSouth has no obligation to offer line sharing pursuant to Section 271 on two assertions: 1) line sharing (the HFPL) is not a Section 271 checklist number 4 item (271(c)(2)(B)(iv)); and 2) that it would be "illogical" for the FCC to lift the obligation for an ILEC to provide line sharing as a UNE only to reinstate that obligation under Section 271. CompSouth argued that both of BellSouth's assertions are incorrect.

CompSouth noted that BellSouth argued that line sharing is not a "loop transmission" under checklist item number 4. However, CompSouth maintained, the FCC and BellSouth itself have repeatedly categorized line sharing under checklist item number 4. CompSouth noted that in every FCC Section 271 Order granting BellSouth long distance authority, the FCC placed line sharing and line splitting in the section of the Order considering checklist item number 4. CompSouth asserted that the FCC's treatment of BellSouth is hardly unique. More importantly, CompSouth stated, BellSouth placed line sharing and line splitting in every one of its four briefs to the states and to the FCC under checklist item number 4. CompSouth maintained that having briefed line sharing as a checklist number 4 item, it is a bit disingenuous for BellSouth to now assert that line sharing is *not* a checklist number 4 item. CompSouth argued that BellSouth cannot admit this, of course, because to do so would admit that BellSouth continues to have an obligation to provide access to line sharing under Section 271. Instead, CompSouth stated, BellSouth spends several paragraphs arguing that loops and line sharing are separate UNEs under Section 251, therefore they cannot both fall under "local loop transmission facilities" in checklist item number 4. CompSouth asserted that the HFPL is clearly a form of loop transmission – a loop transmission that the Bells themselves routinely use to provide xDSL services separately from narrowband voice services. Indeed, C`mpSouth maintained, in describing the high frequency portion of the loop in the *Line Sharing Order*, the FCC stated that "requesting carriers may access unbundled loop functionalities, such as *non-voiceband transmission frequencies, separate from other loop functions*" – distinguishing the high frequency loop transmission path from the narrowband frequencies used for circuit switched voice services. CompSouth argued that both BellSouth and the FCC repeatedly categorize the HFPL (line sharing) under checklist item number 4 because the HFPL is a "local loop transmission" facility under Section 271(c)(2)(B)(iv). Accordingly, CompSouth maintained, as long as BellSouth continues to offer long distance, it must provide access to line sharing. Because, CompSouth stated, in BellSouth's own words, "the purpose of the enforcement provisions of the [SEEM] plan is to prevent 'backsliding' after BellSouth obtains authority to provide interLATA service", BellSouth's Motion to Modify the SEEM Plan to remove line sharing should be denied.

CompSouth stated that in lieu of actual legal argument, BellSouth asserted that it is "illogical" for the FCC to lift the obligation of ILECs to provide access to line sharing as a UNE only to maintain an RBOC's obligation to continue access under Section 271. CompSouth argued that despite BellSouth's reasoning, however, the FCC expressly held that "BOC obligations under Section 271 are not necessarily relieved based on any determination we make under Section 251 unbundling analysis." Moreover, CompSouth noted, the FCC expressly addressed the question of the apparent illogic of a statutory scheme in which the FCC could cease the requirement of an RBOC to provide access to a UNE under Section 251, and yet continue the identical requirement under Section 271. In Paragraph 659 of the *TRO*, the FCC stated

> In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be 'impaired' without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

In short, CompSouth argued, although the price for a "de-listed" UNE may change, if that UNE falls under Section 271(c)(2)(B)(iii)-(vi), the obligation to provide nondiscriminatory access remains. CompSouth maintained that BOCs who continue to sell long distance must continue to provide nondiscriminatory access to all checklist items "de-listed under 251", including line sharing under checklist item number 4. CompSouth opined that whether BellSouth thinks that statutory scheme is illogical or not, it is the law.

CompSouth asserted that there is no legitimate debate whether line sharing should be categorized under checklist item number 4 – the FCC and BellSouth have categorized line sharing as such in every pleading on the subject. CompSouth further stated that there is no legitimate debate about whether RBOCs, including BellSouth, must continue to provide nondiscriminatory access to checklist number 4 items, including the HFPL (line sharing). Manifestly then, CompSouth maintained, BellSouth remains obligated to provide nondiscriminatory access to line sharing under both the *TRO* and Section 271. CompSouth maintained that obligation should be enforced, as it always was intended to be, by the SEEM Plan. CompSouth concluded that the Commission should, therefore, reject BellSouth's obfuscatory tactics and deny its Motion to Modify the SEEM Plan.

COVAD'S MOTION

In its Motion to Take Administrative Notice, Covad supplied a copy of the Georgia PSC's January 15, 2004 *Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan.*

The Georgia PSC denied BellSouth's October 22, 2003 Motion to modify its SEEM Plan to eliminate penalties associated with line sharing. The Georgia PSC stated in its Order

> Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC and Section 271 checklist item 4. The Commission determines that at this time it is not sound policy to eliminate the penalties associated with line sharing. BellSouth's Motion is therefore denied.

DISCUSSION

There are two unresolved procedural matters which need to be addressed by the Commission. First, the Commission finds it appropriate to grant CompSouth's Motion to File Supplemental Reply Comments, thereby allowing CompSouth's Supplemental Reply Comments to be recognized as filed in the docket. Second, the Commission finds it appropriate to grant Covad's Motion to Take Administrative Notice of the Georgia PSC's *January 15, 2004 Order.*

The Commission believes that it is undisputed that under the *TRO*, line sharing is no longer required to be unbundled under Section 251 of TA96 (See Paragraph 255 of the *TRO*). Further, the Commission believes that it is undisputed that the FCC: (1) allowed for a transition period for carriers that have relied on line sharing to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with ILECs; and (2) grandfathered all existing line sharing arrangements unless the respective CLP, or its successor or assign, discontinues providing xDSL service to a particular end-user customer until the FCC's next biennial review which will commence in 2004 (See Paragraph 264 of the *TRO*). Therefore, the Commission agrees with the Public Staff that since BellSouth is still currently obligated to provide line sharing during this transitional period and on a grandfathered basis, it is premature to remove line sharing from the SEEM Plan. The Commission believes that as long as BellSouth is required to provide line sharing, whether as a Section 251 UNE (which it no longer is) or during a transition period or on a grandfathered basis, BellSouth should provide such line sharing in accordance with previously-established measurements and penalties.

In addition, the Commission agrees with CompSouth's argument that BellSouth is still obligated to provide line sharing under Section 271 of the Act. Although BellSouth argues that it is illogical for the FCC to remove line sharing from the national UNE list in the *TRO* but still require line sharing under Section 271 of the Act, the Commission believes that the FCC did address this issue in Paragraph 659 of the *TRO*, as CompSouth noted, wherein the FCC stated

> In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be 'impaired' without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

Therefore, the Commission believes that CompSouth is correct in its assertion that the FCC found in the *TRO* that Section 271 of the Act requires BellSouth to provide unbundled access to the HFPL although the HFPL is no longer required to be unbundled under Section 251 of the Act. The Commission notes that the FCC simply clarified that such an element (one required under Section 271 but not under Section 251) does not have to be priced based on TELRIC. Therefore, the Commission believes that BellSouth remains obligated to provide the HFPL under Section 271 of the Act, although the pricing for the HFPL no longer is required to be TELRIC-based. The Commission believes that since BellSouth is still obligated to provide the HFPL under Section 271 of the Act, it is inappropriate to remove line sharing from the North Carolina SEEM Plan.

CONCLUSIONS

Based on the record of evidence on this matter, the Commission finds it appropriate to deny BellSouth's Motion to Modify SEEM Plan to remove penalties associated with the provisioning of line sharing. To the extent BellSouth has not paid any penalties associated with line sharing in its December 15, 2003 penalty payments, the Commission hereby orders BellSouth to immediately remit said penalties.

Further, the Commission finds it appropriate to: (1) grant CompSouth's Motion to File Supplemental Reply Comments, thereby allowing CompSouth's Supplemental Reply Comments to be recognized as filed in the docket; and (2) grant Covad's Motion to Take Administrative Notice of the Georgia PSC's *January 15, 2004 Order*.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth's Motion to Modify SEEM Plan is hereby denied.

2. That to the extent BellSouth has not paid any penalties associated with line sharing in its December 15, 2003 penalty payments, BellSouth shall immediately remit said penalties.

3. That CompSouth's Motion to File Supplemental Reply Comments is hereby granted.

4. That Covad's Motion to Take Administrative Notice of the Georgia PSC's *January 15, 2004 Order* is hereby granted.

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of February, 2004.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

bp021204 01

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 133k

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Generic Docket to Address Performance	)	
Measurements and Enforcement	)	ORDER ON RECONSIDERATION
Mechanisms	)	

BY THE COMMISSION: On August 1, 2003, BellSouth Telecommunications, Inc.'s (BellSouth's) North Carolina Utilities Commission-ordered Self-Effectuating Enforcement Mechanisms (SEEM) Plan and Service Quality Measurement (SQM) Plan went into effect.

On August 21, 2003, the Federal Communications Commission (FCC) released its *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et. al* (*Triennial Review Order* or *TRO*).

On October 27, 2003, BellSouth filed its Motion to Modify SEEM Plan

By Order dated November 5, 2003, the Commission requested initial and reply comments by interested parties on BellSouth's Motion. On November 25, 2003, CompSouth[1] filed its comments on BellSouth's Motion. Also, on November 25, 2003, the Public Staff filed its comments on the Motion. On December 10, 2003, BellSouth filed its reply comments in this regard On December 22, 2003, CompSouth filed its Motion to File Supplemental Reply Comments in Response to the Reply Comments filed by BellSouth In addition, CompSouth filed its Supplemental Reply Comments.

On January 21, 2004, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad) filed a Motion to Take Administrative Notice of the January 15, 2004 *Order Denying BellSouth Telecommunications, Inc's Motion to*

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[1] CompSouth is comprised of. ITC^DeltaCom, MCI, Business Telecom, Inc., NewSouth Communications Corporation, AT&T Communications of the Southern States, LLC, NuVox Communications, Inc, Access Integrated Networks, Inc., Birch Telecom, Talk America, Cinergy Communications Company, Z-Tel Communications, Network Telephone Corporation, Momentum Business Solutions, Covad Communications Company, KMC Telecom, IDS Telecom, LLC, Access Point, Inc, and Xspedius Corporation.

Modify Self-Effectuating Enforcement Mechanism Plan issued by the Georgia Public Service Commission (PSC).[2]

On February 13, 2004, the Commission issued its *Order Denying BellSouth's Motion to Modify SEEM Plan*. In its Order, the Commission found it appropriate to deny BellSouth's Motion to Modify SEEM Plan to remove penalties associated with the provisioning of line sharing. The Commission stated in its Order that to the extent BellSouth had not paid any penalties associated with line sharing in its December 15, 2003 penalty payments, BellSouth was to immediately remit said penalties

Further, the Commission found it appropriate to: (1) grant CompSouth's Motion to File Supplemental Reply Comments, thereby allowing CompSouth's Supplemental Reply Comments to be recognized as filed in the docket; and (2) grant Covad's Motion to Take Administrative Notice of the Georgia PSC's *January 14, 2004 Order*

On March 15, 2004, BellSouth filed its Motion for Reconsideration of the Commission's *February 13, 2004 Order*

By Order dated March 23, 2004, the Commission requested initial and reply comments on BellSouth's Motion After Motions for Extension of Time were granted, Initial Comments were filed on April 26, 2004 by CompSouth and the Public Staff, and Reply Comments were filed on May 17, 2004 by BellSouth and CompSouth.

BELLSOUTH'S MOTION FOR RECONSIDERATION

BellSouth specifically requested that the Commission reconsider its conclusion that BellSouth has an independent obligation to provide line sharing under Section 271(c)(2)(B)(4) of the Telecommunications Act of 1996 (TA96 or the Act). BellSouth noted that in the *TRO*, the FCC found that line sharing does not meet the impairment standard set forth in Section 251(b)(2)(d) and is, therefore, not subject to the unbundling requirements of Section 251(c)(3). BellSouth stated that the Commission's *February 13, 2004 Order* not only acknowledges this, but further states specifically that "it is undisputed that under the *TRO*, line sharing is no longer required to be unbundled under Section 251 of TA96 (See Paragraph 255 of the *TRO*)." Nevertheless, BellSouth maintained, the Commission held that line sharing should continue as a part of the SEEM plan because: (1) BellSouth must continue to provide line sharing during the *TRO*'s transitional period; and (2) BellSouth is obligated to provide line sharing under Section 271 of the Act. BellSouth stated that it is this latter point upon which BellSouth seeks reconsideration.

First, BellSouth argued, the Commission should reconsider its interpretation of Section 271 to the extent it was predicated upon the *TRO*. BellSouth noted that on March 2, 2004, the United States Court of Appeals, District of Columbia remanded

[2] Covad incorrectly stated in its Motion to Take Administrative Notice that the Georgia PSC's Order was issued on January 15, 2004. The Georgia PSC's Order was issued on January 14, 2004.

certain aspects of the *TRO* to the FCC for further proceedings and vacated other portions of the *TRO*. BellSouth commented that although the Court temporarily stayed its mandate, whether the FCC will seek an additional stay of and/or petition for Supreme Court review of the D.C. Circuit's Order remains to be seen. BellSouth asserted that under such circumstances, which did not exist at the time the Commission entered its *February 13, 2004 Order*, the Commission should reconsider its interpretation of the language in the *TRO* to reach its conclusion as to the requirements of Section 271.

Second, BellSouth argued, given the Commission's conclusion in the *February 13, 2004 Order* regarding Section 271, it would appear that the Commission was, to some extent, misled by the Supplemental Reply Comments of CompSouth. Specifically, BellSouth asserted, the Commission quoted the CLPs on Page 20 of the *February 13, 2004 Order*, in pertinent part, as follows.

> CompSouth maintained [in its Reply Comments] that BellSouth's attempt to weaken the SEEM Plan by ignoring line sharing obligations under Section 271 must be rejected by this Commission as it has been by the Georgia PSC and the Alabama PSC.

BellSouth argued that this quotation from the *February 13, 2004 Order* reflects almost exactly the representation by the CLPs in their Supplemental Reply Comments BellSouth maintained that the truth of the matter, however, is that neither of these state commissions ultimately ruled that Section 271 applies as the CLPs contended BellSouth noted that at the time the CLPs filed their Supplemental Reply Comments, the Alabama PSC had voted, but an Order had not been issued. BellSouth asserted that it does not believe that there was anything in the Alabama PSC's vote that would give the CLPs the impression that the Alabama PSC had utilized Section 271 as the basis of its decision. However, BellSouth stated, even if there once was a basis for this belief, there is none now. BellSouth noted that the Alabama PSC entered its Order (a copy of which was attached as Exhibit A to BellSouth's Motion) on February 14, 2004. BellSouth commented that the Order expressly stated that it was not based on an interpretation of the requirements of Section 271 Specifically, BellSouth stated, the Alabama PSC Order stated on Page 4 the following.

> We further note that nothing in our decision herein should be construed as an adoption or rejection of the CLEC argument that regardless of the FCC's *TRO Order*, BellSouth has an independent obligation under Section 271 to continue to provide line sharing. We will address that issue in future proceedings as necessary. Our decision herein to deny BellSouth's request to eliminate the penalties associated with line sharing from the SEEM Plan is, at this juncture, based exclusively on the requirement in the *TRO* that BellSouth continue to provide line sharing on a transitional/grandfathered basis.

BellSouth maintained that the CLPs were, at least initially, more accurate in their information concerning the Georgia PSC. BellSouth noted that the Georgia PSC did initially rule that BellSouth's obligation to provide line sharing was not only pursuant to the traditional mechanism created by the *TRO*, but pursuant to Section 271 as well. BellSouth stated that since that ruling was issued, however, in response to a Motion for Reconsideration filed by BellSouth in Georgia, the Georgia PSC has clarified its Order to remove any reference to Section 271 as the basis for its decision. BellSouth commented that although the Georgia PSC had not yet entered a written Order, BellSouth attached to its Motion, as Exhibit B, a copy of the transcript of the Georgia PSC's vote taken on February 17, 2004, during which the Georgia PSC indicated that it was no longer relying upon the requirements of Section 271 to support its conclusion that BellSouth should continue to be required to make penalty payments on measurements that involve line sharing.

Thus, BellSouth asserted, the representations of the CLPs notwithstanding, the fact is that, currently, the North Carolina Commission is the only Commission in BellSouth's region (and, to the best of BellSouth's knowledge, the only Commission in the country) that has ruled that line sharing is a continuing requirement under Section 271

BellSouth further submitted that the Commission also appears to have been misled by the CLPs' mischaracterization of BellSouth's position. Specifically, BellSouth noted, the CLPs made the argument in their Supplemental Reply Comments that, in effect, BellSouth was urging the Commission to reject a ruling of the FCC set forth in the *TRO* simply because BellSouth believed it to be "illogical." Specifically, BellSouth stated, the *February 13, 2004 Order* noted on Page 21 that, "CompSouth stated that in lieu of actual legal argument, BellSouth asserted that it is 'illogical' for the FCC to lift the obligation of ILECs to provide access to line sharing as a UNE only to maintain an RBOC's [Regional Bell Operating Company's] obligation to continue access under Section 271."

BellSouth stated that, building upon this mischaracterization by the CLPs, the Commission then cited at some length to Paragraph 659 of the *TRO*, which contains a discussion of how Section 251 obligations relate to Section 271 obligations. BellSouth noted that based on this Paragraph, the Commission determined that the *TRO* did take a logical approach, and it rejected BellSouth's argument to the contrary. BellSouth maintained that the problem with this conclusion is that BellSouth has never argued that the FCC's decision in this portion of the *TRO* is illogical.

Instead, BellSouth noted, its position was based on one of the fundamental principles of legal interpretation, that a decision should not be interpreted in a manner that would render it illogical. BellSouth urged an interpretation of the *TRO* that was logical and consistent BellSouth stated that the CLPs argued for an interpretation of the *TRO* that, if accepted, would render it patently illogical and internally inconsistent. BellSouth maintained that a routinely accepted principle of legal interpretation is that a decision, whether by the FCC, by this Commission, or by a Court, should not read in a way that would make it internally inconsistent or illogical. BellSouth commented that as the United States Supreme Court observed in the context of statutory interpretation, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative intent are available." *Griffin v. Oceanic Contractors, Inc.* 73 L Ed 2d 973, 982 (1982). Thus, BellSouth stated, far from taking the position the CLPs claimed, actually argued that because its interpretation of the *TRO* is clearly the more logical one, it is also the more likely.

BellSouth asserted that the conclusion that the *TRO* requires line sharing to be offered pursuant to Section 271 is unsupportable for three reasons: (1) the *TRO* does not state that line sharing is a Section 271 obligation, either pursuant to checklist 4 or otherwise; (2) the pertinent discussion in the *TRO* of continuing Section 271 obligations refers to the loop-UNE, not line sharing; and (3) line sharing is consistently treated in the *TRO* in a way that distinguishes it from the loop.

BellSouth maintained that the *February 13, 2004 Order* relies exclusively upon Paragraph 659 of the *TRO* for the conclusion that line sharing is a continuing Section 271 obligation BellSouth argued that that paragraph, however, even if read to mean that Section 271 obligations exist independent of Section 251 obligations, contains nothing to suggest that such a Section 271 obligation exists for line sharing. BellSouth noted that in the discussion of Section 271 in the *TRO*, the FCC stated that four of the checklist items for Section 271 compliance relate specifically to network elements that have been deemed to be UNEs subject to Section 251(c)(3) BellSouth stated that these include local transport, local switching, access to databases and associated signaling, and local loop transmission from the central office to the customer's premise, i.e , checklist items 4, 5, 6, and 10. Importantly, BellSouth argued, line sharing is never mentioned.

BellSouth stated that in the *February 13, 2004 Order*, the Commission observed that Section 251 and Section 271 operate independently. BellSouth noted that the *February 13, 2004 Order*, however, contains no indication of why the Commission concluded that line sharing is a continuing Section 271 obligation. BellSouth noted that if the Commission tacitly accepted the CLPs' argument that line sharing is required pursuant to checklist item 4, then the Commission overlooked the FCC's language in Paragraph 654 of the *TRO* making clear that checklist items 4, 5, 6, and 10 "impose access requirements regarding loop, transport, switching, and signaling . . .". Again, BellSouth maintained, line sharing is never mentioned by the FCC as a requirement of any checklist item.

BellSouth commented that if the *February 13, 2004 Order* reflects a conclusion by the Commission that line sharing is a requirement of checklist item 4 because line sharing involves part of the loop (i e , the high frequency portion of the loop or HFPL), such a conclusion cannot be reconciled with the FCC's analytical framework, both in its *Line Sharing Order* and in the *TRO* BellSouth argued that the FCC decided almost four years ago in the *Line Sharing Order* to designate the HFPL as an unbundled network element, separate and apart from the loop itself. Specifically, BellSouth noted, as the

FCC stated in the *Line Sharing Order*, "we conclude that access to the high frequency spectrum of a local loop meets the statutory definition of a network element and satisfies the requirements of Sections 251(d)(2) and (c)(3)."

BellSouth maintained that the FCC's treatment of HFPL and the loop as separate unbundled network elements appears throughout the *TRO*. BellSouth noted that the FCC found that requesting carriers of stand alone copper loops are generally impaired on a national basis, while, at the same time, finding that carriers that request the HFPL are not impaired under any circumstances. Again, BellSouth argued, it makes no sense to conclude that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two together without any distinction. BellSouth asserted that this conclusion makes even less sense when one considers that the FCC specifically found line sharing to be competitive (i.e., not to meet the impairment test), while reaching a different conclusion regarding whole loops.

More recently, BellSouth noted, the FCC made clear that line sharing has never been subsumed within the obligation to provide access to unbundled loops pursuant to checklist item 4 of Section 271 BellSouth commented that the case involved SBC Communications, Inc.'s application for Section 271 authority in Illinois, Indiana, Ohio, and Wisconsin, which was granted by Order issued on October 15, 2003, thirteen days after the date the *TRO* became effective (*Memorandum Opinion and Order*, FCC 03-243, In the Matter of Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin, WC Docket No. 03-167 – *SBC Order*). BellSouth noted that in the *SBC Order*, the FCC stated specifically that "one part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules concerning UNEs." BellSouth noted that the FCC then listed seven UNEs that incumbent LECs are obligated to provide. BellSouth stated the first UNE on the list is "local loops and subloops." BellSouth commented that the seventh UNE on this list is the "high frequency portion of the loop."

BellSouth argued that the *SBC Order* demonstrates that, even under the FCC's old unbundling rules, the loop and the HFPL were treated as separate elements. BellSouth noted that the FCC's delineation of the loop and HFPL as separate elements began in the *Line Sharing Order* and has continued to this day in the *TRO*. Thus, BellSouth commented, while checklist item 4 of Section 271 may obligate BellSouth to provide access to loops, this obligation does not extend to providing line sharing, as the Commission's *February 13, 2004 Order* erroneously concluded.

Furthermore, BellSouth stated, the historical location of the line sharing discussion in the Section 271 context has been a matter of convenience than legal necessity BellSouth noted that this fact is clear from the SBC decision discussed above. BellSouth commented that in the *SBC Order*, the FCC analyzed SBC's compliance with checklist 4 by considering the extent to which SBC was providing "unbundled local loops in accordance with the requirements of section 271 and our rules". BellSouth noted that because at the time the FCC's rules required that line sharing be unbundled, the FCC reviewed under checklist item 4 SBC's performance "for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, high-capacity loops," as well as SBC's "processes for hot cut provisioning, and line sharing and line splitting." BellSouth argued that the fact that the FCC addressed line sharing under checklist item 4 when the FCC's rules required that line sharing be unbundled does not mean that line sharing is a checklist item 4 requirement even after the FCC's rules no longer require such unbundling.

Finally, BellSouth maintained, even assuming line sharing were a requirement of Section 271 (which is not the case), the Commission lacks authority to mandate the payment of self-effectuating penalties to enforce compliance with any such requirement. First, BellSouth noted, enforcement authority for ensuring Section 271 compliance rests with the FCC, not this Commission. Second, BellSouth asserted, while the Commission may have authority to order self-effectuating penalties in connection with BellSouth's Section 251 obligations, the Commission's authority to order such penalties in other contexts is considerably more circumscribed. BellSouth argued that the lack of any legal authority by this Commission to impose self-effectuating penalties to enforce compliance with Section 271 constitutes a separate ground for granting reconsideration.

INITIAL COMMENTS

COMPSOUTH: CompSouth asserted that BellSouth's Motion for Reconsideration should be denied for two reasons: (1) The Commission's determination is correct; and (2) BellSouth has failed to identify any new law or fact warranting reconsideration

CompSouth maintained that BellSouth's Motion for Reconsideration should be denied because the Commission's determination that BellSouth has an obligation to provide access to line sharing under Section 271(c)(2)(B)(iv) is unassailable: (1) line sharing has always been and remains a checklist item 4 loop transmission facility, and (2) RBOCs offering long distance services pursuant to Section 271 authority have an obligation to provide checklist item 4 elements irrespective of unbundling determinations under Section 251, albeit under a different pricing standard

CompSouth argued that there can be no legitimate debate about whether or not line sharing is a checklist item 4 loop transmission facility: it is. In fact, CompSouth noted, even BellSouth itself has always asserted that line sharing is a checklist item 4 loop transmission facility. CompSouth noted that the FCC defined the "loop" in Section 271(c)(2)(B)(iv), competitive checklist item 4, as a "transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer's premises." CompSouth noted that the HFPL, used to provide line sharing, is clearly a form of loop transmission facility Indeed, CompSouth asserted, BellSouth routinely uses the HFPL transmission channel to provide xDSL services. As a consequence, CompSouth stated, it is not surprising that the FCC and BellSouth always considered the HFPL under checklist item 4 – local loop transmission facilities.

CompSouth maintained that the FCC and BellSouth repeatedly placed line sharing in checklist item 4. CompSouth noted that in every FCC Section 271 Order granting BellSouth long distance authority – indeed, in every FCC Order granting any RBOC such authority – the FCC placed line sharing in checklist item 4. CompSouth stated that BellSouth does not dispute this fact. Indeed, CompSouth asserted, BellSouth itself placed line sharing and line splitting in every one of its own briefs to the states and to the FCC under checklist item 4 Manifestly then, CompSouth argued, the Commission was correct that line sharing is a Section 271(c)(2)(B)(iv) network element, which BellSouth remains obligated to provide so long as it offers long distance under Section 271 authority.

CompSouth argued that BellSouth now offers-up three arguments in its Motion for Reconsideration to explain-away the historical treatment of line sharing under checklist item 4 First, CompSouth asserted, BellSouth argued that line sharing never really was a checklist number 4 item. Then, CompSouth stated, in apparent recognition that line sharing really was always considered under checklist item 4, BellSouth argued that "the historical location [under checklist item 4] of the line sharing discussion in the 271 context has been more a matter of convenience than legal necessity". And finally, CompSouth noted, BellSouth concluded (without citation) that "[t]he fact that the FCC addressed line sharing under checklist item 4 when the FCC's rules required that line sharing be unbundled does not mean that line sharing is a checklist item 4 requirement even after the FCC's rules no longer require such unbundling." CompSouth argued that each of these arguments is demonstrably incorrect

CompSouth asserted that BellSouth's arguments that line sharing is really not a checklist item 4 element are incorrect. CompSouth noted that BellSouth based its assertion that line sharing is no longer (or never was) a checklist item 4 element on two facts: (1) that in the *TRO*, the FCC specifically addressed whether carriers were impaired without access to the HFPL separately from other loop types in its Section 251 unbundling analysis, but only referred to "loops" when addressing checklist item 4 in its Section 271 analysis; and (2) that in the *SBC Order*, the FCC addressed the HFPL (line sharing) separately from other "loops" in its discussion of unbundling requirements pursuant to Section 271(c)(2)(B)(ii), competitive checklist item 2. CompSouth argued that both of these arguments misconstrue the significance of the treatment of loops and the HFPL.

CompSouth maintained that the FCC did not secretly remove line sharing from checklist item 4 in the *TRO*. CompSouth argued that BellSouth misconstrued the purposes of the *TRO* sections addressing Section 251 unbundling analyses and Section 271 statutory interpretation to argue that line sharing is not a checklist item 4 element. CompSouth asserted that BellSouth spent several paragraphs arguing that various "whole loops" and the HFPL (line sharing) are analyzed as separate UNEs under the *TRO* Section 251 analysis, and then leapt to the conclusion that they cannot, therefore, both fall under "local loop transmission facilities" in checklist item 4. CompSouth argued that the Commission should not be fooled by this chicanery: in the *TRO*, all of the checklist items are considered as separate UNEs in the unbundling analysis, but lumped together under their general checklist description in the Section 271 analysis. In fact, CompSouth maintained, a passing glance at the Table of Contents in the *TRO* reveals the fallacy of BellSouth's argument. CompSouth noted that as the Table of Contents reveals quite clearly, "loops" are analyzed from Paragraph 197 to Paragraph 341 as numerous separate UNEs defined both by capacity and market levels, with differing unbundling determinations for each. CompSouth noted that yet in the discussion of Section 271 obligations at Paragraphs 649 to 653, the FCC only mentions "loops". CompSouth maintained that under BellSouth's reasoning, the FCC's failure to list all of the loop types at Paragraphs 649 through 653 should imply that not a single one of them is a checklist item 4 loop transmission facility. CompSouth argued that this is absurd CompSouth maintained that if the FCC intended to remove a loop type that had historically always been considered under checklist 4, then it would have made that determination explicit

Similarly, CompSouth argued, in the *TRO*'s unbundling analysis, switching (checklist item 6) and transport (checklist item 5) are addressed as numerous discrete UNEs based on market type (switching) and capacity (transport), with differing unbundling determinations for each. CompSouth noted that in discussing these checklist items in its Section 271 analysis, however, the FCC only identified them generically as "switching" and "transport." CompSouth asserted that this does not imply that certain transport or switching UNEs were being surreptitiously removed from their respective Section 271 checklist. Yet, CompSouth asserted, this is the very logic BellSouth applies in its argument that "it makes no sense to conclude that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two together without any distinction."

CompSouth noted that the FCC's "separate analyses" for Section 251 unbundling determinations and "lumping together" for the Section 271 discussion makes perfect sense when one considers the purpose of the two sections: the Section 251 unbundling analysis specifically addressed whether particular network elements met the FCC's impairment standard, whereas the Section 271 analysis *generally* addressed the relationship between two statutory Sections, 251 and 271. CompSouth argued that that is why Section 251 loop, transport, and switching network elements – some unbundled and others not unbundled – were "lumped together" under their general Section 271 checklist titles: "loops, transport, and switching." The use of general terms in a general discussion does not constitute a basis to assert that there is a hidden change in the FCC's historical treatment of line sharing under checklist item 4. Accordingly, CompSouth asserted, BellSouth's argument that there is a secret change in the FCC's treatment of line sharing under Section 271(c)(2)(B)(iv) is incorrect

CompSouth noted that in an effort to bolster its *TRO* argument, BellSouth mischaracterized the FCC's *SBC Order*. CompSouth maintained that BellSouth represented that the *SBC Order* "made clear that line sharing has never been subsumed within the obligation to provide access to unbundled loops pursuant to checklist item 4 of Section 271." CompSouth commented that to support this statement, BellSouth cited Paragraphs 10 and 11 of the *SBC Order*. CompSouth maintained that these paragraphs do not relate to checklist item 4 in any way. In fact, CompSouth noted, they do not even mention checklist item 4 in passing, instead, Paragraphs 10 and 11 address checklist item 2 matters, something that is not even at issue in this proceeding. CompSouth asserted that not surprisingly, then, BellSouth's briefing to the Commission failed to mention that SBC's provision of line sharing is considered in the section of the *SBC Order* addressing compliance with checklist item 4. CompSouth maintained that it is inconsistent for the FCC to place line sharing in checklist item 4 in the same Order that BellSouth claimed made clear that line sharing has never been subsumed within checklist item 4.

CompSouth argued that BellSouth's claims regarding the *SBC Order* and the *TRO* also seem to confuse the provision of network elements as UNEs under checklist item 2 and the provision of "local loop transmission facilities" under checklist item 4. CompSouth argued that the FCC made it clear in the *TRO* that checklist item 2 and checklist item 4 are independent of each other. CompSouth maintained that the fact that the FCC addresses separate UNEs under checklist 2 does not foreclose those *same* UNEs being considered under the independent checklist item 4. CompSouth stated that in addition to local loops and line sharing being considered under both checklist items 2 and 4, the FCC requires the demonstration of nondiscriminatory access to operations support systems (OSS) under both checklist items 2 and 4. Indeed, CompSouth maintained, OSS is in the same list identified by BellSouth as "clear" evidence that separate elements listed in checklist item 2 cannot be considered under checklist item 4 However, CompSouth argued, like line sharing, the FCC considers OSS under both checklist item 2 and checklist item 4. In short, CompSouth maintained, checklist item 4 is independent of checklist item 2, and the two checklist items contain whole loops as well as the HFPL. CompSouth asserted that the *SBC Order* does not remove line sharing from its historical treatment under checklist item 4. Indeed, CompSouth maintained, because the *SBC Order* continues to consider line sharing under checklist item 4, BellSouth's assertion that the *SBC Order* supports its position that line sharing is not really a checklist item 4 element is manifestly incorrect.

CompSouth stated that BellSouth's argument that the fact that the FCC addressed line sharing under checklist item 4 when the FCC's rules required that line sharing be unbundled does not mean that line sharing is a checklist item 4 requirement even after the FCC's rules no longer require such unbundling is also demonstrably incorrect CompSouth maintained that BellSouth's argument is directly contrary to the FCC's interpretation of Sections 251 and 271. CompSouth asserted that if Section 251 unbundling determinations could remove elements from checklist item 4, as BellSouth asserted, then checklist item 4 would not be independent of Section 251 However, CompSouth argued, the FCC made it clear in the *TRO* that access requirements under checklist item 4 are independent of Section 251 determinations

CompSouth stated that the FCC engaged in the *TRO* analysis at Paragraphs 649 through 667 to explain the redundancy of the overlapping network access requirements in checklist item 2 and checklist items 4 through 6 and 10. CompSouth argued that far from rendering the statute illogical, as BellSouth asserted, the FCC's interpretation of Section 271(c)(2)(B) reconciles the access requirements contained in checklist item 2 and checklist items 4 through 6 and 10 CompSouth noted that the FCC stated in Paragraph 659 of the *TRO*.

> In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be 'impaired' without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi) In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated

In short, CompSouth maintained, although the price for a "de-listed" UNE may change, if that UNE falls under Section 271(c)(2)(B)(iv)-(vi) or (x), the obligation to provide nondiscriminatory access remains CompSouth asserted that if BellSouth wants to continue to sell long distance service under Section 271 authority, it must continue to provide nondiscriminatory access to any network elements under checklist items 4, 5, 6, and 10, irrespective of whether they are "de-listed under Section 251", including line sharing under checklist item 4. Accordingly, CompSouth argued, line sharing has been and remains a checklist item 4 network element

CompSouth asserted that there appears to be no question that if line sharing is a local loop transmission facility under Section 271(c)(2)(B)(iv), then BellSouth is obligated to provide access irrespective of any Section 251 unbundling determinations by the FCC CompSouth noted that in apparent recognition that it has an obligation to provide access to checklist item 4 elements, BellSouth does not take issue with that obligation, but, rather, devotes its Motion for Reconsideration to challenging line sharing's historical placement in checklist item 4. CompSouth argued that it needs to be made clear that BellSouth does indeed have an obligation to provide nondiscriminatory access to all checklist item 4 elements, including line sharing regardless of any unbundling analysis under Section 251.

CompSouth asserted that BellSouth's Motion for Reconsideration should be denied because it fails to raise any new law or fact warranting reconsideration CompSouth stated that BellSouth's Motion for Reconsideration is largely a rehash of the arguments it made in its Reply Comments regarding its Motion to Modify the SEEM Plan.

CompSouth maintained that BellSouth does, however, raise two new issues: (1) the recent decision of the United States Court of Appeals, District of Columbia; and (2) the recent decision of the Georgia PSC to remove, on its own motion, the portion of its prior order finding that BellSouth had an obligation under Section 271 to provide access to line sharing. CompSouth noted that neither of the recent decisions warrant a reconsideration of the Commission's determination.

CompSouth argued that BellSouth's assertion that "the Commission should reconsider its interpretation of the language in the *TRO* to reach its conclusion as to the requirements of 271" is not supported by the *USTA II* decision itself. CompSouth stated that the D.C. Circuit affirmed the FCC's interpretation of the relationship between Sections 251 and 271, finding that "[t]he FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52." Accordingly, CompSouth noted, the *USTA II* decision did not change the law at issue in BellSouth's Motion for Reconsideration and cannot support reconsideration

CompSouth argued that the Georgia PSC's Order does not support the grounds upon which BellSouth seeks reconsideration of the Commission's Order CompSouth noted that the transcript from the administrative session of the Georgia PSC, attached to BellSouth's Motion for Reconsideration, as well as the Georgia PSC's Order itself, make it clear that the Georgia PSC did not agree with the arguments made by BellSouth in its Georgia Motion for Reconsideration. CompSouth stated that, in fact, the Georgia PSC's Order flatly states that "[t]his action should not be construed as constituting agreement with the arguments raised by BellSouth in its Motion for Reconsideration."

CompSouth noted that the arguments made by BellSouth in Georgia are the same arguments made by BellSouth here Indeed, CompSouth maintained, the Georgia PSC expressly denied BellSouth's Motion for Reconsideration. CompSouth explained that without reversing its prior decision regarding BellSouth's obligation to provide line sharing under Section 271, the Georgia PSC modified its prior Order on its own motion by removing its Section 271 determination as a basis to deny BellSouth's Motion to Modify the SEEM Plan. Importantly, CompSouth maintained, the Georgia PSC did not repudiate its Section 271 conclusions. CompSouth asserted that far from supporting reconsideration, the Georgia PSC's decision supports denial of BellSouth's Motion for Reconsideration CompSouth argued that this Commission, like the Georgia PSC, should deny BellSouth's Motion for Reconsideration.

CompSouth maintained that BellSouth's last basis for reconsideration, that the Commission is somehow without subject matter jurisdiction, is equally without merit CompSouth noted that BellSouth conceded the subject matter jurisdiction of the Commission when it brought its Motion to Modify the SEEM Plan. CompSouth asserted that having now lost the Motion, BellSouth cannot assert that the Commission to which it originally submitted its Motion lacks jurisdiction over the matter.

CompSouth argued that apart from this obvious problem with BellSouth's jurisdictional challenge, BellSouth relies on a demonstrably incorrect legal assertion regarding the Commission's general subject matter jurisdiction CompSouth maintained that BellSouth's assertion that the Commission lacks authority over the SEEM Plan in the context of Section 271 enforcement is incorrect. CompSouth noted that BellSouth cited to *SBC Communication v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998) for the proposition that "enforcement authority for ensuring Section 271 compliance rests with the FCC, not this Commission" CompSouth asserted that *SBC Communications* is, however, inapposite to the Commission's Section 271 enforcement authority. Indeed, CompSouth argued, *SBC Communications* preceded any grant of Section 271 authority. CompSouth stated that *SBC Communications* does not address enforcement of Section 271 obligations.

Moreover, CompSouth maintained, the FCC has expressly recognized state commission jurisdiction over SEEM plans in the context of Section 271 back-sliding complaints. CompSouth noted that in granting Bell Atlantic Section 271 authority for the State of New York, the FCC ordered that "[c]omplaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC." CompSouth maintained that given the FCC's express order that Section 271 back-sliding complaints regarding enforcement mechanisms be brought before the state commissions, BellSouth's statement that "enforcement authority for ensuring Section 271 compliance rests with the FCC, not this Commission" is manifestly incorrect. CompSouth asserted that while Section 271(d)(6) does provide the FCC with enforcement powers, it does not preempt the states from acting under state law nor preclude the FCC from delegating authority to the states. CompSouth argued that it is axiomatic that if the state commissions lack the jurisdiction under Section 271 to enforce back-sliding, the FCC would not order that Section 271 back-sliding complaints be filed with the state commissions. Accordingly, CompSouth maintained, BellSouth's unsupported and vague jurisdictional challenge does not warrant reconsideration.

CompSouth recommended that BellSouth's Motion for Reconsideration should be denied because the Commission's initial determination is correct, and BellSouth has failed to identify any new factual or legal issues warranting reconsideration CompSouth asserted that the Commission has never hesitated to answer regulatory questions put to it by companies within its jurisdiction. CompSouth maintained that in this case, BellSouth placed this question before the Commission. CompSouth asserted that the parties, including BellSouth, fully briefed it, and the Commission correctly answered it CompSouth noted that whether the answer is the first in the country, the twenty-fifth, or the last, when the Commission's determination is correct, the Commission should stand by it. Accordingly, CompSouth asked that the Commission deny BellSouth's Motion for Reconsideration.

PUBLIC STAFF: The Public Staff noted that in the Commission's *February 13, 2004 Order*, the Commission held that BellSouth should continue to provide line sharing in accordance with previously-established measurements and penalties during the transition period or on a grandfathered basis as established in the *TRO*. The Public Staff stated that the Commission also found that BellSouth is still obligated to provide line sharing pursuant to Section 271 of TA96.

The Public Staff maintained that BellSouth's Motion for Reconsideration challenges only the Commission's determination that line sharing is required by Section 271 of the Act The Public Staff noted that in support of its Motion, BellSouth cited Orders from the Georgia and Alabama PSCs that denied similar Motions by BellSouth to modify the SEEM plans on the basis that the measurements and penalties were necessary during the transition period. The Public Staff stated that neither PSC used Section 271 of the Act as the basis for its decision. The Public Staff commented that the Alabama PSC expressly refused to rule on the issue of whether BellSouth has an independent obligation under Section 271 to provide line sharing, and the Georgia PSC removed any reference to Section 271 from its decision on reconsideration.

The Public Staff stated that as suggested in its initial comments, it believes that the transition period required by the FCC in the *TRO* is sufficient to justify the denial of BellSouth's motion to modify the SEEM plan at this time The Public Staff asserted that it is unnecessary to base such a decision on Section 271 of the Act. The Public Staff commented that a state commission's authority under Section 271 requiring unbundling of a network element in the face of a decision by the FCC delisting an unbundled network element under Section 251 is a disputed issue at this time. The Public Staff stated that it believes it merits further consideration and study. As such, the Public Staff recommended that the Commission adopt the approaches of the Georgia and Alabama PSCs and refrain from basing a decision to deny BellSouth's Motion on the basis of Section 271 of the Act.

REPLY COMMENTS

BELLSOUTH: BellSouth argued that its Motion for Reconsideration of the *February 13, 2004 Order* does not impact the Commission's ultimate conclusion to retain SEEM penalties for line sharing during the three-year transitional period described in the *TRO*. Instead, BellSouth stated that it simply asked that the Commission reconsider its reliance on Section 271 as the secondary basis for the result it reached BellSouth stated that its position is based on the following (1) the *February 13, 2004 Order* appears to reach (without analysis) a legal conclusion that can not be sustained; (2) the *February 13, 2004 Order* appears to have been influenced greatly by misrepresentations made by the CLPs in their filings, and (3) the erroneous legal conclusion that line sharing is required by Section 271 need not be reached for the purpose of resolving BellSouth's original Motion to remove SEEM penalties

BellSouth stated that the CLPs have responded to BellSouth's Motion with a disingenuous attempt to convert the Commission's limited decision into a far-reaching, unsupportable, and likely unintended result. BellSouth submitted that this attempt should be rejected Instead, BellSouth asserted, the Commission should grant

BellSouth's Motion. BellSouth stated that given the structure of the *February 13, 2004 Order*, the Commission's determination that the payment of penalties for line sharing is required by Section 271 is not necessary to reach the conclusion that SEEM penalties should apply for line sharing during the transitional period. BellSouth stated that the Commission exercised its discretion to require that line sharing penalties stay in place during the transitional period. BellSouth noted that although it had requested that the Commission exercise its discretion differently on this matter, it does not contest this aspect of the Order. Instead, BellSouth stated that its Motion for Reconsideration only seeks removal from the Order of the citation to Section 271 as a secondary basis for its decision (i.e., the same action taken by the Georgia PSC). BellSouth argued that by doing this, the Commission would bring itself in line with every other Commission in BellSouth's region that has considered this issue.

BellSouth commented that it raised in its Motion the fact that the Commission appeared to have relied on misinformation provided by the CLPs as to actions taken by the Alabama and Georgia PSCs BellSouth also noted that the Commission appeared to have been misled by the CLPs' mischaracterization of BellSouth's argument as being that the FCC had acted illogically in the *TRO*. Consistent with this, BellSouth commented, the Commission cited as the sole substantive support for its decision the language of Paragraph 659 of the *TRO* to show that the *TRO* is not structured illogically BellSouth maintained that Paragraph 659 describes how a requirement to provide a UNE pursuant to Section 271 can be reconciled with the fact that the UNE is no longer required under Section 251. BellSouth asserted that there is nothing in this Paragraph, or anywhere in the *TRO*, however, to support the conclusion that line sharing is a Section 271 obligation. Thus, BellSouth maintained, the *February 13, 2004 Order* appeared to offer Paragraph 659 of the *TRO* as a response to an argument that BellSouth actually never made However, BellSouth stated, the *February 13, 2004 Order* never really reached the fundamental issue that is at the heart of BellSouth's true position: the fact that there is no support for the CLPs' contention, either in the *TRO* or otherwise, that line sharing is a Section 271 obligation Further, BellSouth asserted, there is no legally sustainable basis for reaching this conclusion.

BellSouth noted that in response to its Motion, the Public Staff filed Comments supporting BellSouth's request. BellSouth stated that the CLPs, on the other hand, responded that. (1) line sharing is a Section 271 requirement; and (2) the Commission has jurisdiction to create mechanisms to enforce the substantive requirements of Section 271 (specifically checklist item four). BellSouth argued that both contentions are wrong.

Moreover, BellSouth opined, the CLPs' strident argument on this point begs the question of why they care so much about a portion of the Commission's *February 13, 2004 Order* that only provides a secondary basis for the decision to keep line sharing in place. BellSouth asserted that the answer is that the CLPs recognize that in two short paragraphs of the *February 13, 2004 Order*, this Commission made two rulings that have not been made by any other state commission in the country, and that are extremely significant: (1) that line sharing is a Section 271 obligation, and (2) that

SEEM penalties should be available to enforce Section 271 checklist compliance, even in the absence of a continuing Section 251 requirement. BellSouth argued that neither of these legal determinations is necessary to resolve BellSouth's Motion to remove SEEM penalties, and both obviously have far-reaching implications. Moreover, BellSouth commented, neither issue was given more than minimal consideration in the *February 13, 2004 Order*. Again, BellSouth stated, the first conclusion was apparently based only on a paragraph of the *TRO* that does not address the issue of whether line sharing is a Section 271 obligation. The second issue, BellSouth noted, although implicated in the Commission's decision, was never directly addressed at all.

BellSouth argued that issues of this magnitude deserve more thorough analysis, and the Commission may undertake this analysis if another factual scenario requires such analysis. BellSouth maintained that the Commission should not take the unprecedented step of making such far-reaching determinations based on a two paragraph analysis of a secondary basis for ruling on a Motion that did not even raise these issues BellSouth noted that every other state commission in BellSouth's region has reached this conclusion, and this Commission should do the same.

BellSouth asserted that this Commission is the only state commission in the country that has ruled that line sharing must necessarily be subject to a SEEM penalty as a result of a Section 271 obligation. BellSouth noted that in the *February 13, 2004 Order*, the Commission, before reaching this result, cited the representation of the CLPs that both the Alabama and Georgia PSCs have ruled that SEEM penalties apply to line sharing because it continues to be a Section 271 obligation BellSouth noted that in its Motion for Reconsideration, it stated that the CLPs had misinformed this Commission, and that the Alabama Order specifically stated that, "nothing in [that] decision . . . should be construed as an adoption or rejection of the CLEC argument that, regardless of the FCC's *TRO Order*, BellSouth has an independent obligation under Section 271 to continue to provide line sharing." BellSouth commented that in the sixteen pages of Comments the CLPs filed in response to BellSouth's Motion, there was no mention whatsoever of the Alabama Order. Thus, BellSouth stated, it would appear that the CLPs concede, at least implicitly, that they misinformed this Commission on this point, but have adopted the approach of ignoring their past misstatement.

BellSouth noted that in regard to the Georgia Order, the CLPs have taken the tact of trying to mischaracterize the Georgia Order as meaning precisely the opposite of what it really means. Specifically, BellSouth stated, the CLPs make the bizarre pronouncement that "the Georgia PSC's decision supports denial of BellSouth's Motion for Reconsideration," even though the Georgia PSC granted the relief BellSouth requested. BellSouth noted that it requested that the Georgia PSC remove from its Order the finding that SEEM penalties are required for line sharing because line sharing is a Section 271 obligation BellSouth stated that the Georgia PSC declined to grant BellSouth's Motion, and instead decided on its own Motion to grant the exact relief requested by BellSouth.

BellSouth argued that the CLPs make much of the fact that the Georgia PSC took this approach because it did not want the Order to be construed as an indication "that it agree[d] with the arguments in BellSouth's Motion for Rehearing and Reconsideration " Still, BellSouth asserted, the Georgia PSC ultimately determined that whether SEEM penalties should apply to line sharing as a function of Section 271 is the subject of some future debate. BellSouth noted that the Georgia PSC stated on page 11 of its ruling as follows:

> It is . . not necessary to reach the issue of whether BellSouth has an independent and ongoing obligation under Section 271 to provide line sharing in order to deny BellSouth's Motion to Modify the SEEM Plan. The parties have raised various arguments regarding the FCC's intent with respect to the role of the states with the respect to Section 271 obligations and the status of line sharing. <u>Given that the Commission does not need to rule on this issue to deny BellSouth's Motion, it makes more sense to address this question, if and when necessary, at a point when more information on the FCC's intent is available</u>. [emphasis added by BellSouth]

Further, BellSouth commented, the Georgia PSC stated in the Ordering clause that "the reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original Motion." Thus, BellSouth asserted, the Georgia PSC made exactly the decision that BellSouth requests this Commission to make· the deferral of a decision on line sharing under Section 271 to a future time if such a determination even becomes necessary.

BellSouth argued that it is extremely telling that, while the CLPs make the specious argument that the Georgia PSC's Order undercuts BellSouth's position, they obviously do not advocate that this Commission reach the same result as the Georgia PSC Again, BellSouth noted that it is only requesting that the Commission not make a ruling that will be subsequently used by the CLPs to argue for broad (and likely unintended) consequences regarding Section 271 and SEEM penalties BellSouth asserted that there is no state commission in the country, to BellSouth's knowledge (and the CLPs cite to none in their Comments), that has ruled that line sharing is a Section 271 obligation, that the SEEM Plan is designed to enforce substantive Section 271 obligations, or that penalties should be paid for measurements relating to line sharing for this reason BellSouth opined that there is no reason for this Commission to take this extraordinarily significant step at this time.

BellSouth argued that the most prudent course of action by this Commission would be to do as every other Commission in BellSouth's region has done, that is, to decline to consider at this point the Section 271/line sharing issue that is presently included in the *February 13, 2004 Order* as a secondary basis for perpetuating penalties relating to line sharing during the transitional period. BellSouth stated that the CLPs ignored in their Comments the fact that there is no need for the Commission to reach this issue at this point and continue to argue the underlying issue of whether line sharing is, or is not, a Section 271 obligation. However, BellSouth noted, even if the Commission decides for some reason that it needs to resolve this issue at this juncture, the CLPs' position must be rejected for three separate and independent reasons:

(1) Line sharing is not a Section 271 requirement;

(2) Even if line sharing were a Section 271 requirement, this Commission lacks jurisdiction to create substantive remedies for Section 271 violations; and

(3) Even if line sharing were a Section 271 obligation, and even if this Commission had jurisdiction, the Commission should not extend the SEEM Plan to enforce Section 271 checklist items.

BellSouth argued that Paragraph 659 of the *TRO* explains the relationship of Section 251 to Section 271. BellSouth noted that Paragraph 654 of the *TRO* states that whatever Section 271 obligations that exist independent of Section 251 relate to "checklist items 4, 5, 6 and 10 [which] separately impose access requirements regarding loop, transport, switching, and signaling" However, BellSouth stated, there is no mention of line sharing in either of these Paragraphs, or at any point in the fifteen-paragraph discussion in the *TRO* of Section 271 obligations. Thus, BellSouth commented, as it stated in its Motion for Reconsideration, the CLPs' entire argument is that the FCC intended the term "loop" to include line sharing, even though the FCC never states this intention Further, BellSouth stated, the CLPs offer this strained interpretation despite the fact that the FCC went to such obvious pains in the *TRO* to distinguish the UNE - loop from the UNE - line sharing. BellSouth noted that it detailed in its Motion the FCC's extensive efforts to distinguish the loop from the HFPL. BellSouth stated that in response to the common sense interpretation of the *TRO* offered by BellSouth, the CLPs' Comments include an unlikely argument based, not on the language of the *TRO*, but rather on its structure Specifically, BellSouth noted, the CLPs argue that, because the *TRO* contains a more granular analysis of network elements in the context of Section 251 than within the fifteen paragraph discussion of Section 271, this must mean that the term "loop" is intended to include line sharing by implication wherever it appears. Finally, BellSouth maintained, finding no language in the *TRO* to support their position, the CLPs are reduced to making an argument based on the Table of Contents of the *TRO*

BellSouth asserted that when one parses through the convoluted arguments of the CLPs, they all come down to one fundamental premise: that line sharing is immutably in checklist four no matter what the FCC does. BellSouth argued that the difficulty with this position is that this is belied by the language of the Act, the *TRO*, and by other Orders by the FCC. First, BellSouth noted that, in the general context of the discussion of Section 271 in the *TRO*, the FCC stated the following

> We conclude that for purposes of Section 271(d)(6), BOCs must continue to comply with any conditions required for approval, consistent with changes in the law. While we believe that Section 271(d)(6) establishes an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that 'the conditions required for such approval' would not change with time.

Thus, BellSouth maintained, the FCC first discusses the ongoing requirements of Section 271, then discusses the fact that these requirements will change. BellSouth noted that this discussion, of course, begs the question of what the FCC could possibly have in mind if, as the CLPs contend, the requirements considered under the general rubric of checklist items four, five, six and ten can never change. Thus, BellSouth stated, the CLPs' position would render one more portion of the *TRO* inexplicable.

Moreover, BellSouth stated, the CLPs' contention that the requirement to provide line sharing is necessarily a part of checklist four is contradicted by the simple language of checklist item four. BellSouth noted that this item, of course, appears in Section 271, and requires access or interconnection that includes

> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services (Section 271(c)(2)(B)(iv))

Thus, BellSouth commented, the literal language of checklist four requires the provision of a loop -- not subloops, or portions of the loop (high frequency or otherwise), or isolated functionalities of the loop. BellSouth noted that the requirement is for the provision of a whole loop, nothing more and nothing less. Given this, BellSouth stated, one must ask why, under the general topic of checklist four analysis, the FCC has considered subloops and loop functionalities that are different than the whole loop. BellSouth opined that the simple answer is that, historically, the FCC has considered the requirement of checklist four to provide a loop at the same time that it considers the requirements to provide unbundled network elements that are related to the loop.

BellSouth maintained that in its Motion, it cited to the portion of the *SBC Order* that made clear the FCC's analytical approach. BellSouth stated that given the clarity of this provision, it bears repeating. Specifically, BellSouth noted, in the context of considering SBC's compliance with checklist item 4, the FCC stated the following:

> Based on the evidence in the record, we conclude . . . that SBC provides unbundled local loops in accordance with the requirements of Section 271 <u>and our rules</u> Our conclusion is based on our review of SBC's performance for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, and high-capacity loops, <u>as</u> <u>well</u> <u>as</u> our review of SBC's processes for hot cut provisioning, and line sharing and line splitting. (¶ 142 with footnotes omitted) (emphasis added by BellSouth)

Thus, BellSouth opined, the FCC clearly stated that its analysis was based on the provisioning of loops, as well as other requirements related to the provisioning of hot cuts, line sharing, and line splitting that are based not upon the requirements of checklist four as expressly articulated in the Act, but rather upon the FCC's rules. BellSouth argued that in this specific instance, the rule in question is the FCC's former rule (pre-*TRO*) that required that line sharing be offered on an unbundled basis pursuant to Section 251.

BellSouth opined that if, as the CLPs contend, line sharing necessarily inheres in checklist item four (despite the actual language of checklist item 4), then it is impossible to make sense of the reference in the above-quoted language to the requirements of the FCC's rules; if a requirement to provide line sharing (and line splitting and hot cut provisioning) resides in checklist four, rather than the Commission's unbundling rules, then there is nothing left to be considered as part of the checklist item 4 analysis that does arise from the FCC's rules. Therefore, BellSouth noted, the above-quoted reference by the FCC to its rules would make no sense. BellSouth commented that it is noteworthy that, although BellSouth made precisely the same point in its Motion for Reconsideration, the CLPs neglected entirely to address this portion of the *SBC Order* in their Comments

BellSouth argued that the CLPs did address the *SBC Order*, but only for the purpose of making a circular argument that requires one to accept the CLPs' conclusion as a starting premise. BellSouth pointed out that the *SBC Order* clearly treats the line sharing-UNE as separate from the loop-UNE BellSouth stated that the CLPs attacked BellSouth by arguing that the FCC made this distinction in the context of the unbundling required under checklist item 2, not under checklist item 4. However, BellSouth maintained, the language of the *SBC Order* quoted above makes clear that the FCC's checklist four analysis included both the actual checklist item 4 requirement for the provision of the loop and the related requirements (such as line sharing) that arise from the FCC's unbundling rules (i.e , the same unbundling that is the topic of checklist item 2) Thus, BellSouth opined, the discussion of unbundling in the *SBC Order* is only irrelevant (as the CLPs claim) if one accepts the CLPs' conclusion that line sharing obligations reside in checklist item four, i.e., if one joins the CLPs in ignoring the above-quoted language of Paragraph 142 of the FCC's *SBC Order*.

Finally, BellSouth stated, the CLPs argue that line sharing must be an inherent part of checklist item four because the FCC's checklist four analysis in the *SBC Order* included a consideration of line sharing. In other words, BellSouth noted, the CLPs argued that since the SBC case came out after the *TRO*, the fact that line sharing was still considered must mean that the line sharing requirement does not arise from the unbundling rules, which were changed by the *TRO*. However, BellSouth opined, the reason that line sharing was considered in the SBC case was explained in BellSouth's Motion for Reconsideration. "In the *SBC Order*, the Commission [FCC] acknowledged that it had adopted new unbundling rules as part of the *Triennial Review Order* on October 2, 2003, but stated that for purposes of this application, it would apply the *former rules* because of the date SBC's application had been filed (*SBC Order*,

¶¶ 10-11)." Thus, BellSouth argued, when the FCC considered both the actual checklist item four requirements and the loop-related requirements of the FCC's rules, it applied for the purpose of this consideration the old unbundling rules (under which line sharing was required to be provided as a UNE) Again, BellSouth asserted, although it made this point in its Motion for Reconsideration, the CLPs elected to simply ignore any portion of the *SBC Order* that they cannot align with their unlikely position.

BellSouth commented that as it noted in its Motion, this Commission has no jurisdiction to enforce compliance with the requirements of Section 271. BellSouth argued that the CLPs have responded to BellSouth's position with: (1) a spurious waiver argument; and (2) a blatant attempt to misconstrue applicable federal law.

BellSouth asserted that the CLPs' waiver argument is that by filing a Motion to remove line sharing from the SEEM Plan because it is no longer a Section 251 requirement, BellSouth waived any jurisdictional objection to the Commission imposing penalties pursuant to Section 271 BellSouth maintained that the CLPs cite no legal authority to support this proposition, and in fact, there is none. Apparently, BellSouth argued, what the CLPs have in mind is the principle that in some contexts (e g., admissibility of evidence), a party may, by its actions, waive an objection that it might otherwise have BellSouth asserted that this principle, however, has absolutely no application in this situation. First, BellSouth stated, it is a well-settled principle of law that a party cannot create subject matter jurisdiction by its actions. BellSouth maintained that if it were otherwise, then a party could, for example, vest the Commission with the authority to consider any type of legal matter, even one that is clearly outside of the Commission's jurisdiction, e.g., criminal complaints or bankruptcy petitions However, BellSouth opined, this is simply not possible from a legal standpoint

Moreover, BellSouth noted, even if jurisdiction could be created by waiver, there can be no waiver in this case because BellSouth has taken no action that could form the basis for the waiver. BellSouth stated that its original Motion recited that SEEM penalties are in place to enforce Section 251 obligations, and requested that, since this obligation no longer applies to line sharing, the penalty should be removed BellSouth stated that the CLPs raised for the first time the contention that Section 271 applies. Thus, BellSouth argued, the CLPs appear to advance the proposition that they can waive BellSouth's rights by their actions. BellSouth commented that this would be tantamount to the CLPs filing a Complaint (or a set of Comments) so spurious that their opponent was forced to reply that their mischaracterizations should be considered criminal. BellSouth argued that under the CLPs' analysis, this would create some sort of waiver by the CLPs, and the Commission would then be entitled to impose criminal penalties against the CLPs for their prevarication; action by the CLPs cannot constitute a wavier by BellSouth.

BellSouth noted that beyond their specious waiver argument, the CLPs contended that this Commission has jurisdiction over Section 271 enforcement, but they do so without any legal support. Instead, BellSouth maintained, the CLPs offer an obvious misconstruction of the authority cited by BellSouth in its Motion BellSouth cited in its Motion to the D.C Circuit decision for the proposition that Section 271 enforcement authority resides with the FCC, not state commissions BellSouth stated that the CLPs' claim that this case is inapplicable because it occurred before Section 271 authority was granted. BellSouth stated that when one considers the actual language of the decision, however, it is obvious that the decision applies equally before and after the grant of Section 271 authority. Specifically, BellSouth maintained, the Court considered the question of how the FCC should utilize state commission determinations as to whether the Track A requirements of Section 271 have been met. BellSouth noted that the Court stated as follows:

> Congress has clearly charged the FCC, and not the State commissions with deciding the merits of the BOCs' request for intraLATA authorization and interLATA service is typically interstate.

Thus, BellSouth maintained, the gravamen of this decision is that the FCC has the authority to resolve Section 271 issues because Section 271 deals with interstate services. Clearly, BellSouth argued, the services at issue remain interstate whether the specific question to be resolved arises pre-authorization Section 271 or post-authorization Section 271.

Further, BellSouth stated, the provisions of Section 271(d)(6), entitled "Enforcement of Conditions," state the remedial steps that the FCC may take if it "determines that a Bell operating company has ceased to meet any of the conditions required . . [271] . . for approval." BellSouth argued that there is nothing in Section 271 from which one could conclude that this Commission has jurisdiction for Section 271 enforcement.

Beyond this, BellSouth noted, the CLPs' attempted to support their position with the contention that "while 271(d)(6) does provide the FCC with enforcement powers, it does not preempt the states from acting under state law nor preclude the FCC from delegating authority to states." BellSouth stated that other than the single cryptic reference to state law quoted above, the CLPs provide no indication of how state law could empower this Commission to enforce federal statutory requirements. BellSouth maintained that suffice it to say, the CLPs "state law" argument is worth no more than the few scant words that the CLPs devote to it.

BellSouth maintained that as to the CLPs' delegation argument, they have drastically overstated the ruling of the FCC in the Bell Atlantic case in which they cite [*In the Matter of: Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-404, released December 22, 1999 – the *Bell Atlantic Order*). BellSouth maintained that in the Bell Atlantic case, the FCC first discussed its powers pursuant to Section 271(d)(6)(a). BellSouth noted that the FCC then stated the manner in which it planned to handle complaints alleging that Section 271 requirements were not being met BellSouth commented that the FCC noted both the broad role that it would have and the extremely more limited role of the state commissions BellSouth opined that it is instructive to consider this entire paragraph, as opposed to the limited language from the paragraph that the CLPs have quoted out of context:

> *Complaints.* In addition to FCC-initiated enforcement actions (such as forfeitures, suspensions, and revocations), Congress provided for the expeditious review of complaints concerning failure by a BOC to meet the conditions required for section 271 approval. Such complaints may include requests for damages. The Commission will consider and resolve those complaints alleging violations of section 271 as well as the Commission's rules and orders implementing the statute. Complaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC. (Paragraph 447 of FCC's *Bell Atlantic Order* - Footnotes Omitted)

Thus, BellSouth argued, if you consider the entire paragraph, not merely the section the CLPs quoted in their Comments, you can see that the FCC clearly reserved to itself the jurisdiction to "consider and resolve those complaints alleging violations of section 271 " Beyond this, BellSouth noted, the FCC simply observed that to the extent a state commission has ordered a RBOC to do particular things, then it has the ability to enforce its own orders. BellSouth commented that the delegation of authority described in the Bell Atlantic case is extremely narrow, and in no way supports the CLPs' argument for a dramatic expansion of this Commission's ability to enforce Section 271 BellSouth asserted that the language quoted above obviously contemplates a situation in which a state commission is enforcing its prior Orders. Thus, for example, BellSouth stated, if a CLP filed a complaint alleging that BellSouth had failed to properly apply a measurement of service order intervals, or failed to pay penalties arising from that measurement, then the Commission could consider the request that it enforce its own Order BellSouth stated that in marked contrast, the CLPs are, in effect, arguing for a dramatic expansion of the SEEM plan to enforce Section 271 obligations that are independent of Section 251 obligations. BellSouth opined that the case law cited by the CLPs provides no basis to conclude that this Commission has this enforcement power.

BellSouth stated that the purpose of both the SQM and the SEEM Plans is to ensure that BellSouth continues to meet the requirements of Section 251 after it is granted entry into the distance market pursuant to Section 271. BellSouth asserted that the fundamental structure of the SQM and SEEM Plans is designed to implement Section 251 requirements. BellSouth noted that the fact that these plans address the provision of resale service, the full panoply of available UNEs, and interconnection is a direct reflection of the fact that the plans are based on the requirements of Section 251. BellSouth argued that there is nothing in the structure of either plan to suggest that it was ever intended to enforce whatever independent checklist obligations there may be under Section 271. Further, BellSouth maintained, there is nothing in the Order originally entered by this Commission to suggest that the SQM and SEEM Plans were created to enforce specific Section 271 obligations.

BellSouth noted that the CLPs have argued previously that the SEEM Plan functions to enforce both Sections 251 and 271 obligations. BellSouth asserted that this position, however, finds no support in the plan itself or in the Commission's Orders. Moreover, BellSouth argued, a consideration of the context in which the plans were developed undercuts this contention. BellSouth asserted that Section 251 obligations were initially broader than Section 271 obligations; that is, if all UNEs that were originally unbundled were the subject of the measurement plan, then the plan would also cover the more limited offerings required by checklist items 4, 5, 6, and 10. Thus, BellSouth stated, by developing a plan to ensure Section 251 compliance after Section 271 approval, the checklist items were also necessarily addressed. BellSouth opined that this does not mean that the plan was created to enforce the checklist requirements, and it certainly does not mean that penalties should remain in place for this purpose as the Section 251 obligations cease to apply.

BellSouth asserted that all of the above brings us full circle back to the original, fundamental question that the Commission must consider: Why make a far reaching determination regarding the application of Section 271 when it is not necessary to resolve the limited issue that was originally before the Commission? BellSouth commented that as set forth above, line sharing is not a Section 271 obligation, and even if it were, the Commission has no jurisdiction to enforce this obligation BellSouth noted that beyond this, however, is the question that the CLPs largely ignore: Even if the Commission could expand the plan to require the payment penalties for the violation of Section 271 obligations that are independent from Section 251, why would it want to do so? BellSouth noted that this is, of course, a question that the Commission has never considered Further, BellSouth maintained, it is one that bears thorough consideration before the Commission makes a determination. BellSouth asserted that this expansion should not occur on the basis of an inference that the CLPs will draw from an Order that the Commission entered for an entirely different, more limited, purpose, that is, to resolve BellSouth's original Motion.

BellSouth noted that in the future, network elements will obviously be removed from the list of what must be offered on an unbundled basis pursuant to Section 251. BellSouth stated that as this occurs, the CLPs will no doubt argue that these UNEs should remain subject to the SEEM Plan because, they will contend, they are subject to Section 271 obligations. Thus, BellSouth maintained, the question of whether the plan should be expanded to cover Section 271 obligations independent of Section 251 will undoubtedly come up in the future. BellSouth opined that this Commission will have ample opportunity to consider this question at that time, as well as the related jurisdictional questions. BellSouth asserted that when this issue does arise, and it is ripe for consideration, it deserves thorough consideration. BellSouth argued that there is absolutely no reason to pre-decide this issue at this juncture in the context of resolving a more limited issue that the Commission has already resolved on a different, independent basis

BellSouth concluded that through the *February 13, 2004 Order;* the Commission became the only state commission in BellSouth's region (and, to BellSouth's knowledge, the only commission in the country) to rule that line sharing is a Section 271 obligation and that this obligation should be enforced by SEEM penalties. BellSouth argued that this conclusion should be reconsidered and removed as a basis for the *February 13, 2004 Order* for the following reasons: (1) it is based on an apparent (CLP-created) misunderstanding of the actions other state commissions have taken; (2) it misconstrues BellSouth's position; (3) it entails a decision that need not, and should not, be made at this time; (4) it is based on a conclusion regarding line sharing and Section 271 that is legally erroneous; and (5) it entails a ruling on a Section 271 enforcement issue that goes beyond the Commission's jurisdiction and is legally unsupportable for this additional reason. For all of these reasons, BellSouth argued that its Motion for Reconsideration should be granted.

COMPSOUTH: CompSouth stated that it opposes the Public Staff's recommendation that the Commission adopt the approaches of the Georgia and Alabama PSCs and refrain from basing a decision to deny BellSouth's Motion on the basis of Section 271 of the Act for two reasons: (1) the Commission has already based its decision on that determination, and (2) the Commission's determination is correct under existing law

CompSouth argued that the Commission should deny BellSouth's Motion for Reconsideration because of a simple principle. the Commission's legal determinations should not be modified until the legal basis for the Commission's determination changes CompSouth maintained that this core principle forms the basis for a consistent and predictable regulatory environment CompSouth noted that when applied to BellSouth's Motion for Reconsideration this principle compels denial of the Motion for Reconsideration. CompSouth stated that here, BellSouth is not arguing that the Commission's determination regarding its Section 271 obligations was unnecessary – the basis for the Georgia PSC's Motion to Modify its prior order. CompSouth asserted that BellSouth is arguing that the Commission's determination was incorrect CompSouth stated that the Public Staff's recommendation is not based on an agreement with BellSouth's arguments for reconsideration, but rather, is based on the idea that the Commission's determination was unnecessary. However, CompSouth noted, whether necessary or not, the Commission did make a legal determination based on a proper record.

CompSouth asserted that under these circumstances, the Commission should adhere to its determination until circumstances change. CompSouth stated that to do otherwise, as the Public Staff recommends, creates several problems First, CompSouth maintained, the Commission's prior order becomes essentially an advisory opinion CompSouth stated that though the Commission's prior order is no longer a legally binding order, the Commission has stated the manner in which it will rule if presented with a similar fact pattern CompSouth noted that as a consequence, the parties are left to debate the quasi-legal status of the regulations governing their relationship. CompSouth commented that BellSouth will take the position that it has no Section 271 obligation (as there is no binding determination), and CompSouth will take the position that BellSouth does have a Section 271 obligation (as there is an advisory opinion). Thus, CompSouth opined, the very reason courts avoid advisory opinions (quasi-legal orders with no clear application) is the reason the Commission should deny BellSouth's Motion for Reconsideration. CompSouth asserted that creating an unclear regulatory environment only encourages unnecessary litigation.

Moreover, CompSouth noted, as set-forth in its Initial Comments, under existing law the Commission's determination is correct. CompSouth stated that nothing in BellSouth's Motion for Reconsideration nor in Public Staff's Initial Comments changes that fact. CompSouth commented that if future FCC orders render the Commission's Section 271 determination incorrect or moot, then the Commission is free to modify its *February 13, 2004 Order* at that time. CompSouth opined that to modify the Commission's *February 13, 2004 Order* now will only create confusion. Accordingly, CompSouth respectfully asked that the Commission deny BellSouth's Motion for Reconsideration

DISCUSSION

In the *February 13, 2004 Order,* the Commission found it appropriate to deny BellSouth's Motion to Modify SEEM Plan to remove penalties associated with the provisioning of line sharing. The Commission found that as long as BellSouth is required to provide line sharing, whether as a Section 251 UNE (which it no longer is) or during a transition period or on a grandfathered basis, BellSouth should provide such line sharing in accordance with previously-established measurements and penalties In addition, the Commission stated that it agreed with CompSouth's argument that BellSouth is still obligated to provide line sharing under Section 271 of the Act. The Commission noted that although BellSouth argued that it was illogical for the FCC to remove line sharing from the national UNE list in the *TRO* but still require line sharing under Section 271 of the Act, the Commission believed that the FCC addressed the issue in Paragraph 659 of the *TRO*. BellSouth's Motion for Reconsideration specifically requests reconsideration of the Commission's decision that BellSouth has an independent obligation under Section 271 to provide line sharing.

The Commission further notes that at the time of the *February 13, 2004 Order*, the Georgia PSC had only issued its January 14, 2004 *Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan*. In its *January 14, 2004 Order*, the Georgia PSC stated:

> Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC <u>and Section 271 checklist item 4</u>. The Commission determines that at this time it is not sound policy to eliminate the penalties associated with line sharing. BellSouth's Motion is therefore denied [emphasis added]

On January 26, 2004, BellSouth filed a Motion for Rehearing and Reconsideration of the Georgia PSC's *January 14, 2004 Order*. By Order released on

March 24, 2004, the Georgia PSC denied BellSouth's Motion for Rehearing and Reconsideration However, the Georgia PSC determined that it was ". . . not necessary to reach the issue of whether BellSouth has an independent and ongoing obligation under Section 271 to provide line sharing in order to deny BellSouth's Motion to Modify the SEEM Plan." (Page 3 of Georgia PSC's *March 24, 2004 Order*) The Georgia PSC further noted on Page 3 of its *Order* that:

> In modifying its order to remove this basis [the Section 271 basis] for its decision, it must be understood that the Commission is not indicating that it agrees with the arguments in BellSouth's Motion for Rehearing and Reconsideration. Towards that end, the Commission concludes that BellSouth's Motion for Rehearing and Reconsideration should be denied The Commission on its own motion, however, modifies its January 14, 2004 Order to remove the ground for its decision related to an independent and ongoing access obligation under Section 271. In making this modification, the Commission does not alter the ultimate decision to deny BellSouth's Motion to Modify the SEEM Plan to eliminate penalties for line sharing. The reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original motion

The Commission further notes that in the Commission's July 9, 2002 *Order and Advisory Opinion Regarding Section 271 Requirements* in Docket No. P-55, Sub 1022 which addressed BellSouth's Section 271 application, the Commission discussed line sharing under checklist item 4. The Commission noted that BellSouth had produced evidence showing that it provided access to the HFPL as a UNE. However, since the FCC has found in the *TRO* that the HFPL is no longer a Section 251 UNE, there is uncertainty about whether a RBOC is required under Section 271 obligations to make line sharing available.

In addition, the Commission agrees with BellSouth that the FCC explicitly stated in its October 15, 2003 *SBC Order* in Paragraph 11 that it would apply the old unbundling rules to SBC's application instead of the new unbundling rules under the *TRO*. In the discussion of SBC's compliance with checklist item 4, the FCC stated at Paragraph 145, "Based on the evidence in the record, we find that SBC provides nondiscriminatory access to the high frequency portion of the loop (line sharing) . ." However, since the old unbundling rules were applied, the FCC's discussion in checklist item 4 does not provide an analysis of a Section 271 application with the *TRO* rules in place

Based on the foregoing and the filings made on this matter, the Commission is not convinced that line sharing will no longer be required under Section 271 although it has been removed by the FCC in the *TRO* as a Section 251 UNE. However, due to the fact that the Commission's Section 271 finding in the *February 13, 2004 Order* in this docket was not required for the Commission to reach its decision to deny BellSouth's Motion to Modify the SEEM Plan to remove line sharing, the Commission believes that it is appropriate to reconsider the *February 13, 2004 Order* in this regard. The Commission finds it appropriate to strike certain language as set forth below from the Commission's *February 13, 2004 Order.*

Finally, the Commission notes that the issue of whether line sharing is required under Section 271 will be directly before the Commission in the near future. On June 24, 2004, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad) filed a Petition for Arbitration with BellSouth in Docket No. P-775, Sub 8. Issue No. 1 of that Arbitration is: "Is BellSouth obligated to provide Covad access to line sharing after October 2004?"

CONCLUSIONS

The Commission finds it appropriate on reconsideration to <u>strike</u> the following language from the Commission's *February 13, 2004 Order*

> In addition, the Commission agrees with CompSouth's argument that BellSouth is still obligated to provide line sharing under Section 271 of the Act. Although BellSouth argues that it is illogical for the FCC to remove line sharing from the national UNE list in the *TRO* but still require line sharing under Section 271 of the Act, the Commission believes that the FCC did address this issue in Paragraph 659 of the *TRO*, as CompSouth noted, wherein the FCC stated
>
> > In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be 'impaired' without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi) In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.
>
> Therefore, the Commission believes that CompSouth is correct in its assertion that the FCC found in the *TRO* that Section 271 of the Act requires BellSouth to provide unbundled access to the HFPL although the HFPL is no longer required to be unbundled under Section 251 of the Act.

The Commission notes that the FCC simply clarified that such an element (one required under Section 271 but not under Section 251) does not have to be priced based on TELRIC Therefore, the Commission believes that BellSouth remains obligated to provide the HFPL under Section 271 of the Act, although the pricing for the HFPL no longer is required to be TELRIC-based. The Commission believes that since BellSouth is still obligated to provide the HFPL under Section 271 of the Act, it is inappropriate to remove line sharing from the North Carolina SEEM Plan.

IT IS, THEREFORE, SO ORDERED

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of July, 2004

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L Mount, Deputy Clerk

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Verizon New England Inc.,	)	
Bell Atlantic Communications, Inc. (d/b/a	)	
Verizon Long Distance), NYNEX Long	)	CC Docket No. 01-9
Distance Company (d/b/a Verizon Enterprise	)	
Solutions) And Verizon Global Networks Inc.,	)	
For Authorization to Provide In-Region,	)	
InterLATA Services in Massachusetts	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 2001 **Released:** April 16, 2001

By the Commission: Chairman Powell and Commissioner Ness issuing separate statements; Commissioner Furchtgott-Roth concurring and issuing a statement; and Commissioner Tristani dissenting and issuing a statement.

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Paragraph

I. INTRODUCTION

1. On January 16, 2001, Verizon New England Inc , Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc. (Verizon) filed this application pursuant to section

This argument does not suggest that Verizon is not in compliance with current UNE requirements, and therefore is not relevant to our inquiry.

B. Checklist Item 4 – Unbundled Local Loops

1. Background

122. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[393] A BOC has an obligation to provision different types of loops, including "two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals."[394]

123. In evaluating Verizon's overall performance in providing unbundled local loops in Massachusetts, we examine Verizon's performance in the aggregate (*i e* , by all loop types) as well as its performance for specific loop types (*i e* , by voice grade, xDSL-capable, line-shared and DS-1 types).[395] In doing so, we are looking for patterns of systemic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete.[396] As the Commission has noted in previous section 271 orders, we

(Continued from previous page)

Dkt Nos 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4-P Order at 6 (Jan 10, 2000) <http //www state ma us/dpu/telecom/96-73/UneProvi htm>) (emphasis omitted)

[393] 47 U S.C § 271(c)(2)(B)(iv) The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises *See Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380, *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-167, n 301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop)

[394] *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para 380, *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras 166-67.

[395] Competing carriers in Massachusetts rely principally on three types of unbundled stand-alone loops that support high-speed services. the xDSL loop, the Digital loop and the high-capacity or DS-1 loop The Massachusetts Department has adopted the New York Commission's separate loop-type performance measurement categories for xDSL loops (including, but not limited to, loops provisioned for ADSL, HDSL, and SDSL services); Digital loops, which are used by competing carriers to provide xDSL, IDSL or ISDN-like services and high-capacity or DS-1 loops Commenters in this proceeding do not specifically criticize Verizon's performance with regard to Digital loops which are a decreasing proportion of all xDSL-capable loops requested by competing LECs. For example, in November of 2000, the measure of missed installation appointments, PR 4-04, captured 1292 xDSL loops compared to 276 Digital loops. The carrier-to-carrier reports also suggest that Verizon's performance for xDSL loops is similar to its performance for Digital loops. We analyze high-capacity or DS-1 loops separately at the end of this section

[396] *See* Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, *Public Notice*, DA 01-734, (rel March 23, 2001) at 6 (encouraging BOC-applicants to explain why factual anomalies may have no meaningful adverse impact on a competing carrier's ability to obtain and serve customers)

examine the data for all the various loop performance measurements, as well as the factors surrounding the development of these measures. Verizon demonstrates that for xDSL loops, it is performing at acceptable levels for all of the measures the Commission has considered in previous section 271 orders. Isolated cases of performance disparity, especially when the margin of disparity or the number of instances measured is small, will generally not result in findings of checklist noncompliance. Finally, we evaluate the information Verizon provided describing its processes for installing and maintaining loops, the capabilities of its workforce, and employee training to show that it provisions and maintains unbundled loops.

124. We focus our analysis in this section on the issues in controversy under this checklist item, beginning with the pre-ordering, ordering, provisioning and maintenance and repair of stand-alone xDSL-capable loops. We also address voice-grade loops provisioned as new loops and hot cut loops as well as Verizon's subloop unbundling offering. Finally, we address line sharing and line splitting at the end of this discussion.

2. Discussion

125. Based on the record before us, we conclude that Verizon has adequately demonstrated that it provides unbundled local loops as required by section 271 and our rules. First, as described above, we find that Verizon provides access to loop make-up information in compliance with the *UNE Remand Order*. Second, we find that Verizon provides nondiscriminatory access to stand alone xDSL-capable loops and high-capacity loops. Third, we find that Verizon provides voice grade loops, both as new loops and through hot-cut conversions, in a nondiscriminatory manner. Finally, we find that Verizon has demonstrated that it has a line-sharing and line-splitting provisioning process that affords competitors nondiscriminatory access to these facilities. In so doing, we acknowledge that the Massachusetts Department also concludes that Verizon complies with this checklist item.[397]

126. When all types of loops are considered, Verizon shows that it performs at an acceptable level, generally meeting the parity standards in the four month period leading up to its application. Verizon demonstrates that it has put in place a process to deliver xDSL-capable loops in a timely manner and at acceptable levels of quality to allow competitors to meet the significant demand for high-speed services in Massachusetts. Furthermore, Verizon demonstrates that it has adapted its provisioning methods and procedures to accommodate competitive carrier requests for line-shared loops – loops that are recognized as an important element in providing high-speed service to residential subscribers. One commenter, Rhythms, initially opposed Verizon's application on the basis of its xDSL loop performance, but now states that Verizon has taken steps to resolve its difficulties and has withdrawn its opposition.[398] We find that Verizon's overall performance meets the checklist requirements, even though some performance measurements indicate isolated and marginal problems. As explained below, we

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[397] *See* Massachusetts Department Massachusetts II Comments at 24

[398] *See* Letter from Kimberly Scardino, Assistant General Counsel, Rhythms, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-9 (filed March 14, 2001).

believe that the marginal disparities in some measurements are not competitively significant and do not show signs of systemic discrimination.

127. As described above, the New York Commission developed Verizon's performance measurements, business rules and standards in a collaborative state proceeding with input from competing carriers.[399] The Massachusetts Department has adopted these performance measures, business rules and standards. When possible, the New York Commission elected to compare Verizon's service to competing carriers using unbundled loops directly to the level of service provided to Verizon's retail operations.[400] Where, however, the New York Commission determined that no comparable retail function exists, the level of service Verizon provided to competing carriers in Massachusetts is tested against benchmarks developed in New York.[401] Because the New York Commission adopted the performance measures through an open and collaborative process, and no commenter specifically criticizes the New York Commission's process, we defer to the reasonable standards it set for these measurements as a basis for analyzing Verizon's Massachusetts application.[402]

a. Overview of Performance Data

128. In our analysis we rely primarily on Massachusetts performance data collected and submitted by Verizon under the state-adopted carrier-to-carrier standards. Where the data displays facial disparities in performance between the manner in which Verizon provisions loops for itself vis-à-vis its competitors, Verizon proposes explanations for statistical disparities and offers studies that recalculate measures according to various exclusions which are discussed below. In such instances, we look to the availability of data reconciled under the auspices of the Massachusetts Department and specific evidence presented by commenters to determine the appropriate weight to accord the challenged data. In evaluating the probity of Verizon's explanations and studies, we consider among other things, whether third parties had access to the underlying data and whether the challenged data were reconciled by the Massachusetts Department.

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[399] *See* Massachusetts Department Massachusetts I Comments at 7.

[400] Where the New York Commission determined that a retail analogue is appropriate and the Massachusetts Department uses this analogue in its evaluation, we examine Verizon's Massachusetts performance by determining whether it provides unbundled local loops to competing carriers in substantially the same time and manner as it does to its retail customers *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20655, para 87; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4098, para 279

[401] In these instances, we examine Verizon's service to competing carriers in terms of whether its performance affords competitors a meaningful opportunity to compete. *See generally Bell Atlantic New York Order*, 15 FCC Rcd at 4098, para. 279.

[402] *See Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Order Amending Performance Assurance Plan, Case 97-C-0271 (NY PSC Mar 9, 2000), *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3974-76, paras. 54-60

129. Although KPMG conducted a review of other Verizon performance metrics in Massachusetts, it did not separately evaluate the xDSL metrics because they were implemented by Verizon after the initial testing period.[403] In its supplemental filing, however, Verizon describes its engagement of PwC to "validate its DSL and line sharing measures" and notes that PwC performed its work under the same standards as KPMG did during its third party OSS testing.[404] PwC replicated a total of 159 measures and matched Verizon's calculations for 136 of 159 measures. Verizon asserts that for the remaining 23, the number of observations were identical and the reported performance was within one percent of the results replicated by PwC.[405] In addition to replicating the carrier-to-carrier data, PwC examined the additional special studies Verizon performed with respect to certain DSL measures.[406]

130. Several commenters challenge the validity of Verizon's adjustment to official carrier-to-carrier performance data.[407] Where commenters challenge the comprehensiveness of a third-party evaluation of underlying data or a BOC-applicant's adjustment to carrier-to-carrier measures, carrier-specific carrier-to-carrier data become an important tool for the Commission to evaluate a BOC's compliance with section 271. Carrier-specific data underlying the carrier-to-carrier reports are important to this Commission's section 271 process because they allow competing carriers to compare carrier-to-carrier results or BOC-applicants' explanations to their own experiences and thus provide us with as complete a record as possible on which to make our decision.[408] Likewise, where there is no comprehensive third-party evaluation of particular metrics, we strongly suggest that state commissions and applicants enable all parties to have access to the data used to calculate special studies of the BOC's performance. We find evidence that has been scrutinized in this manner is most persuasive. Accordingly, BOC-applicants may facilitate the development of a full record upon which they may rely to demonstrate compliance with section 271.[409] In this case, Verizon has provided carrier-specific data underlying carrier-to-

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403 *See* Department of Justice Massachusetts I Evaluation at 15, Rhythms Massachusetts I Comments at 29-30 (quoting KPMG Technical Session Tr 5185-89). As part of its more general process evaluation, Covad suggests that KPMG observed the installation of 45 xDSL loops *See* Covad Massachusetts I Comments at 35.

404 Verizon Massachusetts II Ruesterholz/Lacouture Decl at para 20, *see also supra* at para 47

405 *See* Verizon Massachusetts II Ruesterholz/Lacouture Decl at para 20

406 PwC used the carrier-to-carrier guidelines and Verizon's raw data to replicate Verizon's DSL performance results in Massachusetts for October. PwC undertook a similar process with Verizon's October line sharing performance results for New York and Massachusetts based on the January 16th corrected guidelines filed with the New York Commission in compliance with its December 15 order approving the new carrier-to-carrier working group consensus

407 *See* Rhythms Massachusetts II Comments at 7, Covad Massachusetts II Comments at 7-8; Rhythms Massachusetts I Comments at 29, Covad Massachusetts I Comments at 13, ALTS Massachusetts I Comments at 32; NAS Massachusetts I Comments at 5.

408 During the Massachusetts I application, Verizon began the process of submitting carrier-specific data to the Commission

409 In addition, we note that carrier-specific data aided the Massachusetts Department in concluding that Verizon provides nondiscriminatory access to hot cut loops. *See* Massachusetts Department Massachusetts I Comments at (continued. .)

carrier measures and the underlying data used to generate reformulated measures of performance.[410] We discuss competitor challenges to Verizon's performance based on carrier-specific data where relevant below.

b. xDSL-Capable Loops

131. We find that Verizon demonstrates that it is providing xDSL-capable loops in accordance with the requirements of checklist item 4. In analyzing Verizon's showing, we rely primarily on the performance measures and performance data described in prior section 271 orders. We review Verizon's xDSL-capable loop order processing timeliness, the timeliness of Verizon's xDSL-capable loop installation and percentage of Verizon-caused missed installation appointments, the quality of the xDSL-capable loops Verizon installs, and the timeliness and quality of the maintenance and repair functions Verizon provides to competing carrier xDSL-capable loops. We note, however, that we do not rely on data reflecting Verizon's provision of xDSL loops to its separate affiliate to reach our conclusions because Verizon demonstrates checklist compliance with an evidentiary showing of performance to its wholesale xDSL customers.[411]

132. Verizon has a concrete and specific legal obligation to provide unbundled xDSL-capable loops to competing carriers.[412] Verizon makes available unbundled xDSL-capable loops (including all technically feasible features, functions and capabilities) in Massachusetts through interconnection agreements and pursuant to tariffs approved by the Massachusetts Department [413]

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290. The availability of carrier-specific data was an important factor in the Commission's prior section 271 approvals In New York, the Commission relied upon carrier-specific data to find that Bell Atlantic provided nondiscriminatory access to OSS *See Bell Atlantic New York Order*, 15 FCC Rcd at paras 166, 175, 181

[410] Verizon states that it has provided carrier-specific reports beginning in May 2000 to competitors operating in Massachusetts that have requested them *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 17 Verizon has included carrier-specific reports for September, October and November 2000 in its application. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl App C Going forward Verizon has represented that it will provide carrier-specific reports to those competitors that have requested them by the 25th day of the following month Further, Verizon is in the process of establishing a secure Website through which competitors will be able to obtain the aggregate performance results and their own individual reports and their Performance Plan reports, along with the underlying data in the first half of 2001 *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 17

[411] Verizon's separate affiliate has not been purchasing the same inputs to provide advanced services as unaffiliated competing carriers Specifically, Verizon's separate affiliate purchases line sharing to provide ADSL service while competing carriers in Massachusetts continue to purchase stand alone, xDSL-capable loops and have only recently begun purchasing line sharing As a result, Verizon's advanced services separate affiliate is not useful in making a presumption of nondiscriminatory performance

[412] *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl at paras 63, 114

[413] *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl at Exh B (citing D T E. Tariff No. 17, Part B, Section 5)

(i) Order Processing Timeliness

133. To determine whether Verizon is processing orders in a timely fashion, we examine whether it provides competitors with nondiscriminatory access to loop information in a timely manner and whether it returns timely firm order confirmations (FOCs) to competitors.[414]

134. *Timely Access to Loop Information.* As described above, we find that Verizon has demonstrated that its pre-ordering OSS provides competitors with access to the same underlying loop information available to Verizon's retail and back office personnel.[415] We also find that Verizon appears to be providing that information within the required time frames.

135. Verizon's performance data reflect that it provides responses to competing carrier requests for loop information in substantially the same time and manner as for itself.[416] The carrier-to-carrier reports contain four pre-ordering metrics that measure Verizon's performance in providing competitors with pre-order access to loop information.[417] Under two of these metrics, Verizon provides performance data for September through December 2000 showing that Verizon is providing timely responses to competitors' pre-order mechanized loop database queries submitted via Verizon's EDI and CORBA interfaces.[418] Verizon, however, has not reported carrier-to-carrier performance data measuring its average response times in conducting pre-order manual loop qualifications and engineering record requests.[419] Instead, Verizon provides data for manual loop qualifications conducted from September through November 2000 under Verizon's existing process through its ordering OSS, showing that between 97 percent and 99 percent of manual loop qualifications were completed within 48 hours.[420] Although these data have not

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414 *See SWBT Texas Order*, 15 FCC Rcd at 18499-18501, paras 286-90

415 *See supra* Part V A 2 c(ii).

416 *See* PO-1-06 (Facility Availability, Loop Qualification, EDI and CORBA)

417 The first two metrics are "PO-1-06 Facility Availability (Loop Qualification) – EDI" and "PO-1-06 Facility Availability (Loop Qualification) – CORBA," both of which measure the timeliness of Verizon's responses to mechanized loop database queries The second two metrics are "PO-8-01 Average Response Time – Manual Loop Qualification" and "PO-8-02 Average Response Time – Engineering Record Request," which measure the timeliness of Verizon's responses to manual loop qualification and engineering record requests. *See* Verizon Massachusetts I Guerard/Canny Decl. Tab B at 9, 18.

418 *See* PO-1-06 for EDI. The performance data for these months show that Verizon consistently responds faster to queries for loop qualification information from the mechanized LiveWire database placed from competitors' application-to-application interfaces than to similar queries placed from VADI's retail pre-ordering interfaces From October through December 2000, competitors received mechanized loop qualification responses on average within 3.11, 2.92, and 3 02 seconds respectively, as compared to 4 72, 17 26, 11 85 seconds for VADI's retail personnel

419 In its reply comments, Verizon explains that it has not reported data for the PO-8-01 and PO-8-02 metrics measuring the timeliness of its responses to pre-order manual loop qualification and engineering record requests, because there are currently no electronic pre-ordering OSS functions for manual loop qualification and engineering record requests *See* Verizon Massachusetts I Guerard/Canny Reply Decl at 13

420 *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl Tab J As discussed below, Verizon's performance data also show that it returns to competitors ordering xDSL loops timely firm order confirmations and rejects, which (continued ..)

been submitted under the auspices of the Massachusetts carrier-to-carrier reports prepared in accordance with business rules developed collaboratively by Verizon and competitive carriers, we accept them here because they have not been challenged.[421] Finally, Verizon provides evidence that it is consistently meeting its target of returning loop make-up information to competitors within 24 hours under its interim LFACS process.[422] Verizon also states that competitors generally receive this information within 2 hours.[423]

136. *Timely Return of Firm Order Confirmations.* We conclude that Verizon's reported performance metrics indicate that it consistently provides timely confirmation notices to competing LECs in Massachusetts for xDSL unbundled loop orders.[424] We encourage Verizon to work in the collaborative process to adopt disaggregated performance metrics for xDSL and digital loops, whether pre-qualified or manually qualified.[425] As the Commission explained in the

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under Verizon's current manual loop qualification process contain the results of manual loop qualifications. *See id* at Tab K and Tab L (summarizing Verizon's performance data for September through November 2000 for DSL order confirmation and reject timeliness); *see also infra* at para 136

[421] We note that Verizon has been ordered to begin reporting on these two pre-ordering metrics, in accordance with the guidelines adopted in the carrier-to-carrier working group As stated above, the availability of carrier-to-carrier reports permits competitors to fully analyze Verizon's performance and evaluate it against the performance data they have collected themselves.

[422] *See* Verizon Massachusetts II Reply, App A, Tab 1, Attach C (showing 100 percent of LFACS queries receiving responses within 24 hours for February 2001)

[423] *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-9 (filed April 3, 2001)

[424] As the Massachusetts Department concluded, "although [Verizon] includes xDSL orders with other loop orders in the denominator of the relevant metric, based upon our review of [Verizon's] performance data, it appears that [Verizon] returns [xDSL confirmation notices] within the stated interval almost all of the time " Massachusetts Department Massachusetts I Comments at 298. For example, from September through December 2000, respectively, for "Loop/Pre-qualified Complex/LNP" orders, Verizon timely returned 99 68, 99 82, 99 48, and 99.79 percent of confirmation notices for flow-through orders within 2 hours; 97 35, 97 35, 97 27, and 97.88 percent of confirmation notices for orders of less than 10 lines within 24 hours; and 96 90, 99 73, 100 00, and 99 74 percent of confirmation notices for orders equal to or more than 10 lines within 72 hours Verizon likewise exceeded the 95 percent benchmark for timely return of reject notices during this period. *See* OR-1-02, OR-1-04, OR-1-06, OR-2-02, OR-2-04, OR-2-06. "Pre-qualified Complex" orders encompass orders for pre-qualified xDSL-capable loops, and include specifically orders for pre-qualified 2-wire xDSL and 2-wire digital loops *See* Verizon Massachusetts I Guerard/Canny Decl Attach B at 100. Verizon also appears to have exceeded the 95 percent benchmark for timely return of confirmation and reject notices with respect to manually qualified, 2-wire xDSL loop orders For example, from September through December 2000, respectively, for "2 Wire xDSL Service" orders, Verizon timely returned 98 75, 98.67, 99 25, and 96.77 percent of confirmation notices, and 98.80, 98 92, 99 38, 97 75 percent of reject notices, for orders of less than 10 lines within 72 hours. *See* OR-1-04 and OR-2-04

[425] In Texas, for example, SBC disaggregated its order confirmation timeliness performance data into separate categories for stand-alone loops, loops ordered with a ported number, digital loops, and xDSL loops. *See id* at paras 172, 288 SBC's disaggregated data arose from a Texas Commission proceeding and involved joint efforts by SBC, interested competitive LECs, and the Texas Commission. *See id* at paras 286-90. In Massachusetts, beginning with its August 2000 carrier-to-carrier metrics, Verizon has disaggregated manually-qualified, 2-wire xDSL loop ordering performance measures from manually qualified, 2-wire digital loop ordering performance (continued...)

Bell Atlantic New York Order, the "need for unambiguous [xDSL] performance standards and measures has been reinforced by the disputes in [that] record regarding . . . what performance is being measured."[426]

(ii) Provisioning Timeliness

137. We find that Verizon demonstrates that it provisions xDSL-capable loops for competing carriers in substantially the same time and manner that it installs xDSL-capable loops for its own retail operations. In analyzing Verizon's provisioning performance for checklist compliance, we continue to rely primarily upon the performance measurements identified in the *Bell Atlantic New York Order* and *SWBT Texas Order*, *i.e.*, missed installation appointments and average completion intervals.[427]

138. *Percent Missed Installation Appointments* Recent performance data show that Verizon's missed appointment measure demonstrates parity performance for competitive LECs.[428] Although past performance indicates some statistically significant disparities, the trend

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measures *See* Verizon Massachusetts I Guerard/Canny Reply Decl. Attach D at 7, 22 (metrics OR-1-03-06 and OR-2-03-06). Furthermore, one of the "consensus items" from the New York carrier-to-carrier working group, whose results are likewise to be implemented in Massachusetts shortly, *see, e g* , Verizon Guerard/Canny Decl at para 15, calls for Verizon to disaggregate further its 2-wire xDSL services ordering metrics into separate measures pertaining to 2-wire xDSL loops and DSL line sharing. *See* Verizon Guerard/Canny Decl Attach. A at 2, 7-8 (discussing further disaggregation to line sharing order confirmation and reject timeliness metrics, specifically OR-1-03-06 and OR-2-03-06) Such disaggregation likewise should apply to performance data on reject notice timeliness, as captured in the OR-2 metrics.

426 *Bell Atlantic New York Order*, 15 FCC Rcd at 4123, para 334

427 The New York Commission and Massachusetts Department established Verizon's provisioning of 2-Wire xDSL services as the appropriate retail analogue for competing carrier xDSL loops in the performance measurement for missed installation appointments. Verizon notes, however, that, for purposes of one xDSL measure, the Percent Completed in 6 Days measure, PR 3-10, the retail analogue has been changed to Verizon's installation of POTS second lines *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 94

428 This performance metric is disaggregated to divide Verizon's missed installation appointments between those requiring dispatch of a technician and those not requiring dispatch A "dispatch" typically involves sending a Verizon technician "in" to a Verizon central office to provision a particular UNE or "out" into the field to work in the outside plant To date, competing carriers generally request stand-alone xDSL-capable loops and thus request "dispatch" xDSL loops which require a Verizon technician to perform field work to provision an xDSL-capable loop Verizon's retail xDSL provisioning is overwhelmingly "no-dispatch" because its ADSL services are provided through line sharing arrangements. Since filing its original application, Verizon has amended its carrier-to-carrier performance reports to include both dispatch and no-dispatch information in the missed appointments measure. During the initial phase of this proceeding, Verizon was unable to resolve the discrepancy between the average completion interval and percent missed appointments measures for competing carrier no dispatch orders On December 3, 2000, Verizon offered an explanation for this discrepancy Verizon "discovered that performance for all unbundled xDSL loops was aggregated in the reported results for PR 4-04, whether or not the orders required a dispatch " *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon to Eric Einhorn, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, CC Docket No 00-176 (filed Dec 3, 2000). Since then, Verizon has reported both dispatch and no-dispatch volumes in the percent missed appointment measure for the months of September, October, November and December Accordingly, the Commission can now rely upon competing carrier carrier-to-carrier data when examining the percent missed (continued. ..)

in Massachusetts has improved significantly and, in the months of September, October, November and December, Verizon's performance moved to within approximately two percentage points of Verizon's retail missed appointment rate.[429] Thus, the record shows that whatever performance disparities may have existed in the past, they have been narrowed to a small margin.[430]

139. We find no basis in the record to support NAS' contention that Verizon grants preferential installation appointments to its retail affiliate.[431] Verizon states that it offers nondiscriminatory access to shorter appointment windows for competitive LECs and Verizon alike.[432] Given Verizon's representation that it offers identical installation appointment windows to customers of both competitors and its retail affiliate that have "extenuating circumstances," we emphasize that Verizon is required to apply this policy consistently.[433]

140. *Average Completion Interval.* We find that Verizon's average completion interval data for the period September through December show nondiscriminatory treatment. During this period, the average completion interval for orders requiring a dispatch, which captures the vast majority of competing carrier orders, indicates a trend of improving performance and shows that retail performance is, on average, within approximately one-half a day of Verizon's retail affiliate

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appointments metrics to obtain a more accurate dispatch-to-dispatch comparison and therefore a more reliable picture of Verizon's performance

[429] The four month average (September – December) for competing carrier missed appointment rates, for dispatch services was 6 4 percent compared to 4 6 percent for Verizon Indeed, in November, Verizon provided better service to competitors than its retail affiliate In the months of October, November and December, the missed appointment rate for dispatch xDSL services for competitors was 3 67, 2 40 and 4 19 percent and the retail rate was 3 18, 4.21 and 2 13 percent, respectively Verizon's performance in September showed some disparities, which Verizon attributes to the lingering effect of a strike it experienced in August For September, Verizon missed 12.75 percent of its dispatch installation appointments for competitors compared to 7 13 percent for itself *See* PR 4-04 (Provisioning , Two Wire xDSL Services, percent Missed Appointment, Verizon, Dispatch). Verizon responds that its September results were adversely affected by the work stoppage, because orders missed in August but completed in September were recorded as missed appointments in the September performance reports. Verizon performed a study which excludes orders not originally due during the strike, which shows that the adjusted missed appointment rate of 3.79 percent for September is comparable to its October and November results *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 72 and Attach V

[430] While the Department of Justice takes issue with isolated xDSL performance measures and the manner in which those measures report Verizon's wholesale performance, it does not specifically criticize the percent missed appointments measure for stand-alone xDSL loops. *See generally* Department of Justice Massachusetts I Evaluation at 8

[431] *See* NAS Massachusetts II Comments at 5, *but see* Massachusetts Department Massachusetts I Reply at 86

[432] Verizon states that if a retail customer has "extenuating circumstances and requests a shorter installation appointment window, Verizon will schedule either a morning or afternoon appointment window Verizon will also schedule a morning or afternoon appointment for a competing LEC customer with extenuating circumstances " Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para. 38

[433] Failure to provide nondiscriminatory access to installation appointments at identical windows could subject Verizon to a targeted enforcement action or carrier-initiated complaint *See infra* Part IX

and approximately one and one-half days longer than the standard six-day interval established by the Massachusetts Department.[434] The average completion interval for Verizon retail during the period September through December is also approximately one day longer than the standard interval.[435] Verizon argues that these results show nondiscriminatory treatment and any average completion interval disparities that remain should be discounted because these results are skewed by competing carrier behavior. Specifically, Verizon asserts that orders which were not prequalified (which have a 9-day interval) and orders which request installation dates outside of the standard interval skew the carrier-to-carrier results.[436]

141. Although we recognize that the average completion interval as reported by the carrier-to-carrier measure slightly exceeds the standard interval adopted by the Massachusetts Department, we note that Verizon's performance has improved over the period September through December while the number of competitor orders has remained consistent.[437] This

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[434] The 4 month (September – December) average for competing carrier dispatch orders was 7 3 days compared to 6 94 days for Verizon In the months of September, October, November and December Verizon completed no-dispatch competing carrier orders in 9 7, 7 75, 7.3 and 6 7 days compared to 11 4, 7 63, 5 2 and 6 3 days for Verizon *See* PR 2-02 (Provisioning , Two Wire xDSL Services, Average Interval Completed, Total Dispatch) While the September results for this measure appear to be affected by the strike, Verizon states that during the period September through November 2000, the average completion interval to provision DSL loops for competitors where a dispatch was required averaged 8.32 days, while Verizon's retail ADSL orders that likewise required a dispatch were provisioned within an average of 8 48 days Verizon avers that consistent with the relevant business rules, this measure reports the time from Verizon's receipt of a valid service order to actual work completion, and uses the same measurement points for both retail and wholesale orders *See* Verizon Massachusetts II Guerard/Canny Decl Attach B, at para 42, Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para 75

[435] *See* PR 2-02 (Provisioning, Two Wire xDSL Services, Average Interval Completed, Total Dispatch)

[436] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 75 In its original application, Verizon argued that its recalculated results - which exclude manually qualified loops - for average completion interval also show parity *See* Verizon Massachusetts I Guerard/Canny Decl at para 79 and Attach K Approximately half of the orders, according to Verizon, were pre-qualified, while the remainder required manual loop qualification The results of this study show that "[t]he average interval completed for pre-qualified xDSL loops was 6 46 days compared to 6.69 days for retail in June and 5 40 days compared to 5 93 days for retail in July " *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl at para. 101. Covad responded to Verizon's study questioning its methodology and results *See* Letter from Jason Oxman, Senior Governmental Affairs Counsel to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 (filed November 7, 2000) (Covad Nov 7 *Ex Parte* Letter).

[437] Competitor order volumes captured in the average completion interval, PR 2-01/2-02 peaked in October 2000 with 934 orders and have remained well-above 600 orders per month for the last four months *See* PR 2-01/2-02 (Provisioning, 2-Wire xDSL Services, Average Interval Completed, Total Dispatch, Total No-Dispatch) Rhythms argues that Verizon's contention that VADI also receives service outside the standard interval is no response to Verizon's late wholesale performance for unaffiliated competitive LECs Rhythms states that "it makes no difference to Rhythms that it received "parity" with Verizon's retail service when "parity" means that Rhythms received its loops two days later than the standard interval, an interval Rhythms notes is already an unnecessarily long period of time *See* Rhythms Massachusetts II Comments at 11-12 and Williams Supplemental Declaration at para 21 CIX argues that the Massachusetts Department's six-day interval was defined through a "long and thorough regulatory process" and Verizon should be accountable for failing to meet that interval for competitive LEC orders CIX Massachusetts II Comments at 22

improving trend and the competitively insignificant disparity between competitor and Verizon completion intervals persuades us that Verizon's technicians have gained sufficient expertise and operational readiness to adjust to the growth of competition in Massachusetts.[438] To evaluate Verizon's provisioning timeliness, we look to the totality of the evidence presented to us. It is based on this totality and specifically, the measures the Commission has relied upon in the past, that we conclude that Verizon's provisioning timeliness performance offers competitors a meaningful opportunity to compete.

142. Although Verizon and some commenters urge us to rely on other measures, we need not do so in this case because Verizon has demonstrated compliance with this aspect of our loops analysis on the basis of the measures the Commission has relied upon in previous section 271 orders. We decline to rely upon the percent on-time measure supplied by Verizon[439] or percent completed within 6 days measures supplied by competitors,[440] because we do not have

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[438] The Department of Justice recognizes that Verizon's on-time performance is "improving" but notes that it falls short of the 95 percent on-time benchmark Department of Justice Massachusetts II Evaluation at 9

[439] Verizon supplements its affirmative showing by arguing that it provides xDSL loops when competing carriers request them and asks us to consider, in addition to the average completion interval, Verizon's performance under a different metric which measures percent "on-time" installation *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 66 Verizon claims that when facility misses are included in the results, Verizon's performance, when adjusted to remove the impact of the strike, is approximately 85 percent on-time in October and in November it is approximately 90 percent on-time. Verizon's removal of strike-affected orders from these measures for September and October 2000 improves Verizon's reported performance somewhat (from 75 7 to 86 6 percent) *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 69 and Attach. S. Verizon's final data presentation of the revised on-time measure, which excludes orders for which Verizon cannot provide a loop and adjusts for strike-affected orders, shows on-time performance that exceeds the 95 percent standard in November 2000 *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 66 and Attach R

[440] Competing carriers contest Verizon's claim that it provides xDSL-capable loops on time and point to yet another measure of on-time performance, the percentage of xDSL loops completed within the standard interval of 6 days *See* PR 3-10 (Provisioning, 2-Wire xDSL Services, percent Completed in 6 Days) In September, October, November and December Verizon completed 62.1, 64 6, 63.4 and 72.9 percent of competing carrier xDSL loops within 6 days. In the same months, Verizon completed 65 5, 82.3, 87 8, and 87.2 percent of xDSL loops within 6 days for itself *See* Rhythms Massachusetts I Comments at 28; Department of Justice Massachusetts II Evaluation at 9 n 2, CIX Massachusetts II Comments at 22. USIAPA argues that the real provisioning interval is, on average, 25 days between the first FOC and actual installation because some 24 percent of orders in Massachusetts receive sliding FOCs. *See* USISPA Massachusetts II Reply at 8. During Verizon's original proceeding, Verizon and competing carriers reached consensus to eliminate the retail analogue and instead set a 95 percent benchmark standard for the percent completed within 6 days measure Consensus was also reached to exclude orders that were not pre-qualified, orders requesting intervals outside of the standard interval and orders missed for lack of facilities. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at paras 77-80. Verizon engaged a consultant, Lexecon, to recalculate the reported results for this measure consistent with the exclusions discussed above and to adjust this measure for orders affected by the strike When Verizon's performance for this measure is calculated in accordance with the new business rules, Verizon argues it provides 84 percent of xDSL loops between September and November with six days. This study shows that during the September through November period, 95 percent of the competitor orders not completed within the standard six day installation interval are completed within 7 days The Lexecon study shows that under the revised PR 3-10 measure, in September, 89 12 percent of competitive LEC orders were completed within 6 days, 80 00 percent were completed within 6 days in October and 82 24 percent were completed within 6 days in November. Reply Appendix, Tab 4, Joint Reply Declaration of Robert H. Gertner and Gustavo E Bamberger. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 82. Competitors (continued .)

enough data or experience with them for determining a BOC's compliance with section 271.[441] Moreover, commenters have offered no persuasive reason to depart from Commission practice of placing primary reliance upon the percent missed appointment or the average completion interval measures. Accordingly, we view the on-time measures cited by Verizon and the percent completed within 6 days measure cited by competitors as additional diagnostic data to evaluate Verizon's contention that it provides xDSL-capable loops in a timely manner.[442] We find that these measures support rather than refute the measures the Commission relied upon in the past and confirm our view that the missed appointment and average completion interval measures provide an accurate description of Verizon's performance for competitors.

(iii) Provisioning Quality

143. We conclude that Verizon provides xDSL loops to competing carriers at a level of loop installation quality that meets the requirements of checklist item 4. In analyzing installation quality we continue to rely primarily upon the measure identified in the *Bell Atlantic New York Order* and *SWBT Texas Order* – percent installation troubles within 30 days.[443] Assessing the quality of loop installation is important because advanced services customers that experience substantial troubles in the period following installation of an xDSL-capable loop are unlikely to remain with a competing carrier.[444]

144. As an initial matter, we reject Verizon's request that we depart from relying upon certain metrics the Commission has relied upon in the past. We conclude that Verizon's use of the total DSL trouble report rate as a substitute for the percent trouble within 30 days does not measure the quality of Verizon's installation performance.[445] In fact, it is not even classified in the carrier-to-carrier reports or the Commission's past orders as a provisioning metric, but rather, as a measure of maintenance and repair activities. Verizon has not persuaded us that the metric

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respond that even Verizon's recalculated results show that that a substantial number of orders are completed outside the standard interval. Rhythms Massachusetts II Comments at 11-12; CIX Massachusetts II Comments at 22.

441 Furthermore, by some estimates, 83 77 percent of all DSL orders are excluded from the percent completed within 6 days measure. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para 84. We note that the Commission has not previously relied upon either the on-time measure cited by Verizon nor the percent completed within 6 days metric cited by competing carriers Data supporting the 6-day measure became available for the first time in July 2000 and data supporting the on-time measure became available in June The Massachusetts Department did not initially evaluate the percent completed on time measure relied upon by Verizon and also did not evaluate the percent completed with 6 day measure cited by competing carriers

442 For example, when the percent completed within 6 days results are examined in conjunction with the average completion interval, it is not surprising that approximately 80 percent of orders are completed within six days because the average completion interval is slightly more than 6 days.

443 The Commission stated in the *SWBT Texas Order*, that we consider trouble reports within 30 days as "indicative of the quality of network components supplied by the incumbent LEC " *SWBT Texas Order*, 15 FCC Rcd at 18504-05, para 299

444 *SWBT Texas Order*, 15 FCC Rcd at 18504-05, para 299.

445 *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para 86.

for trouble reports within 30 days of installation is any less probative of installation quality in the factual context of this application than it was in the previous applications wherein the Commission relied on this metric. Specifically, we find that the percent troubles within 30 days measure is more probative of installation quality than the total trouble report rate which measures all xDSL-lines in service throughout Verizon's network, not lines recently installed.[446]

145. During this proceeding, the New York Commission and the Massachusetts Department accepted a consensus revision to the trouble report within 30 days measure to control for certain carrier business practices.[447] Under the new consensus measure, the metric will include only trouble reports that are submitted within 30 days of installation by competitors that participate in acceptance testing.[448] The revised definition reflects the fact that properly conducted acceptance testing could identify some installation quality problems that could be resolved at the time the competitive LEC and Verizon conduct the acceptance test. When Verizon presents data that control for the exclusions adopted by the consensus revision, the performance dissimilarities are reduced or eliminated entirely.[449] Competitive LECs question

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[446] *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 00-176 (filed Nov 14, 2000); *see also* Letter from Edward D Young, III, Verizon, to William E Kennard, Chairman, Federal Communications Commission, CC Docket No 00-176 (filed Dec 1, 2000)

[447] The New York Commission adjusted the retail analogue to compare Verizon's performance for competitors with Verizon's own retail POTS service rather than its DSL service because Verizon's DSL service is almost always provided over a loop that is already working and delivering dial tone, whereas retail POTS will involve providing service over a loop that is not already working. Thus, because stand-alone loops better approximate the manner in which Verizon provisions stand alone xDSL-capable loops to competitors, it was selected as the appropriate retail analogue

[448] Acceptance testing is a joint project whereby after installation, Verizon contacts competitors so the loop can be tested for improper voltages, or other impediments to xDSL service, such as ringers and load coils. Under established acceptance testing procedures, Verizon "shorts" a loop enabling competitors to verify continuity length and to ensure that the loop meets a competitor's requirements Competitors then provide to Verizon a confirmation indicating a loop is in working order, or, in the alternative, reject the loop as non-working.

[449] Verizon engaged Lexecon to recompute the I-code rate (trouble reports within 30 days) presented in the official carrier-to-carrier data, for September through November 2000 using the new consensus method. Lexecon found that the performance disparity between competitive LEC and retail I-code rate was eliminated in September and substantially reduced – by 51 percent in October (from 8.2 to 4.34 percentage points); and by 74 percent in November (from 4 96 to 1 29 percentage points). Verizon contends that the "weighted average I-code rate under the new consensus rules for September through November 2000 was 4.78 for [competing carriers] and 3.3 for Verizon's retail customers " Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 94 Verizon goes on to adjust its performance results to include troubles that could have been discovered by a properly conducted acceptance test Under this adjustment the competitive LEC I-code rate was 3.12 percent in September 2000; 6 08 percent for October 2000, and 4 19 percent for November 2000. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 95 Attach Z The weighted average for this period is 4.28 percent for competitive LECs and 3 30 percent for Verizon retail *Id* Verizon performs a third level of analysis. after quantifying the I-code rate under the revised measure recently approved by the New York Commission, and then excluding those I-codes that could have been discovered by a properly conducted acceptance test, Verizon shows that the gap between competitive LECs and retail I-code rate in September and November 2000 is eliminated and reduced to less than one percent in October 2000 The adjusted rate is 1.43 percent for September 2000, 4.04 percent for October 2000 and 1 94 percent for (continued)

whether Verizon may appropriately exclude some of these trouble reports and have used carrier-specific data supplied by Verizon to argue that Verizon does not provide loops at an acceptable level of quality.[450]

146. We agree with the Department of Justice that Verizon's adjustments to the data are justified if an inference could reliably be made when the type of trouble reported: (1) could not occur post-acceptance, but rather must have existed at acceptance; and (2) would consistently be detected by the joint testing methods employed.[451] The issue of whether competing carriers can consistently detect loop quality problems is disputed by Covad, Rhythms and NAS.[452] Covad argues that carrier-specific data show that it experiences installation quality troubles which are over four times higher for its orders compared to Verizon retail.[453] Verizon responds that when

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November 2000 compared to the weighted average during this period of 2 36 percent for competitive LECs and 3 30 percent for Verizon *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 96 and Attach. AA

[450] *See* Rhythms Massachusetts II Williams Decl. para 26, Covad Clancy Decl para 10-23, *see also* USISPA Massachusetts II Reply at 8 The Department of Justice questions the validity of the performance data and contends that Verizon's exclusion methodology infers improper acceptance testing from the nature of the trouble reported *See* Department of Justice Massachusetts II Evaluation at 10 n 39 The Massachusetts Department discounts this measure entirely and questions whether the measure accurately captures Verizon's ability to provision quality loops Massachusetts Department Massachusetts II Evaluation at 30 We agree with the Department of Justice that the calculation of the revised measure appears to be flawed While trouble reports from carriers that do not conduct acceptance tests are excluded from the numerator of this measure, orders from such carriers are not excluded from the denominator The result is to inappropriately skew the trouble report rate When these orders are excluded from the denominator, the reported trouble rate is higher for October and November 2000 under the revised measure than as reported under the original carrier-to-carrier measure The Department of Justice has recalculated PR 6-01 to control for this anomaly Pursuant to this recalculation, for the period September to November, competitive LECs experienced 6 99 percent troubles within 30 days *See* Department of Justice Evaluation at 10-11, Exh 1.

[451] *See* Department of Justice Massachusetts II Evaluation at 11 n 39 Verizon responds that "while it is possible for a DSL loop to break after the loop is installed, that is a rare occurrence " Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 100.

[452] *See* Covad Massachusetts II Comments at 11; NAS Massachusetts II Comments at 11; Rhythms Massachusetts II Comments at 18.

[453] In its comments, Covad reviewed 8 trouble tickets in the month of November to refute Verizon's argument that Covad knowingly accepted non-working loops. Covad contends that these loops were accepted because: (1) the Verizon technician was not at the NID when the test was performed, (2) Verizon failed to provision the loop to the appropriate NID, or (3) the loops became non-working after Covad accepted it *See* Covad Massachusetts II Reply at 9 On reply Covad surveyed its acceptance testing logs for all of the I-codes reported in November. This survey showed that of the 25 I-codes which Verizon excluded from its adjusted performance measure, none of the installation quality troubles could have been discovered at the time of acceptance and all of these installation quality troubles were properly addressed as maintenance and repair issues Covad argues that in many cases its records show that loops were much shorter at the time of acceptance testing than when repaired by Verizon, demonstrating that Verizon did not test the full loop length during acceptance testing *See* Covad Massachusetts II Reply at 10 Verizon responds to Covad's initial survey of I-codes by showing that in two cases, Covad's test equipment was not available to perform an acceptance test and in two other instances, Covad's acceptance test failed to identify the presence of a load coil and half ringer. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 91 In three other instances, Verizon states that Covad tested and accepted a loop that Verizon identified as defective,

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an adjustment is made for Covad's failure to properly conduct acceptance testing its I-code rate falls to below retail.[454] Verizon forwards similar carrier-specific responses to Rhythms and NAS.[455]

147. We find that Verizon is making loops available at substantially the same level of quality as Verizon provides to itself. In reaching this conclusion we rely upon data that are adjusted to comply with the recently-adopted consensus revision to the troubles with 30 days measure.[456] During the period September through November 2000, competitive LECs experienced installation quality troubles at a rate of 7.0 percent compared to 2.3 percent for Verizon retail.[457] Thus, the adjusted data narrow the facial disparity between Verizon's performance to its competitors compared to itself. Moreover, we also note that recent performance shows that Verizon has improved its ability to provide competitors with xDSL-capable loops at acceptable levels of quality.[458] We find, therefore, that the adjusted data coupled

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Covad's technician went to the wrong demarcation point and finally, Covad could not locate the acceptance testing data on the loop in question in its database *See id*

454 When Verizon controls for installation quality issues that could have been discovered during acceptance testing Covad's rate is at parity for the period September through November *Id* at para 83

455 Rhythms claims that it reviewed the list of I-codes excluded by Verizon for acceptance testing reasons and states that "its records did not match Verizon's" Rhythms Massachusetts II Comments at 18. Verizon states that Rhythms did not provide any information for a number of the Rhythms I-codes excluded by Verizon. Verizon shows that some of the I-codes contested by Rhythms were not excluded by Verizon, therefore no downward adjustment to the competitive LEC I-code rate was taken Finally, of the remaining I-codes submitted by Rhythms, Verizon's records show that these loops had ringers on the lines and should have been discovered during acceptance testing, these records contain inconclusive information or contained no relevant data or finally, the I-code was not related to Rhythms' failure to properly perform acceptance testing See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 94 Verizon performed a similar analysis for NAS adjusting its I-code rate to below retail in the period September through November. *See id* at paras 84-85

456 We also agree with the Department of Justice that Verizon's practice of excluding trouble reports from carriers that do not conduct acceptance testing from the numerator but not the denominator is inappropriate and will result in inappropriately low trouble report rates. *See* Department of Justice Evaluation at 10. In this circumstance, where the carriers have agreed to revise a measure going forward, we believe it is reasonable to include the results of the revised measure to adjust Verizon's performance as officially reported.

457 *See* Department of Justice Massachusetts II Evaluation at 10, Attach 1

458 The individual results for competitive LECs performing acceptance testing for September, October and November were 4 13 percent, 11.18 and 8 22 percent compared to 1 93 percent, 2 09 percent and 2.81 percent for Verizon retail over the same period *See id* The unrevised carrier-to-carrier data confirm this positive trend Even as volumes have remained substantial, the percent trouble within 30 days measure as originally reported moved from a high in October 2000 of 11 1 percent to 7 8 percent in November and 5 8 percent in December, reducing the disparity to approximately 3 percent in the most recent month we consider. In September, competitive LEC trouble reports within 30 days were 5 4 percent The comparable numbers for Verizon retail were 1 93, 2.09, 2 81 and 2 79 percent in September, October, November and December respectively. *See* PR 6-01 (Provisioning, 2-Wire xDSL Services, percent Installation Troubles Reported Within 30 Days) The four month (September – December) average for competitive LEC trouble reports within 30 days, according to the unrevised carrier-to-carrier reports filed with the application, was 7 3 percent compared to 2.4 percent for Verizon

with the improving trend in Verizon's performance are sufficient for us to conclude that Verizon is installing loops in a nondiscriminatory manner.

148. We are unable to quantify exactly the effect of Verizon and competitor adjustments to the data because of limited factual disputes.[459] We note however, that the Massachusetts Department has conducted a comprehensive and detailed factual reconciliation of I-codes for the month of November 2000 with the participation of Covad and Verizon.[460] This inquiry has yielded several process improvements that are designed to improve Verizon's installation quality results.[461] We welcome the Massachusetts Department's participation in addressing Verizon's acceptance testing process and are encouraged by the improvements to this process.[462] We encourage carriers to bring issues such as these to the attention of state commissions so that factual disputes can be resolved before a BOC applicant files a section 271 application with this Commission.

149. We find that recent carrier-to-carrier installation quality measures show that Verizon has improved significantly its ability to provide competitors with xDSL-capable loops at

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[459] We note that Verizon's adjustment to the data lower the I-code rate to less than 7 percent and competitive LEC challenges to Verizon's adjustment raise the I-code rate but in no case do competitor challenges to Verizon's adjustment raise the I-code rate above the 7 percent level presented by the revised carrier-to-carrier measure as calculated by the Department of Justice See Letter from Paul Afonso, General Counsel, Massachusetts Department of Telecommunications and Energy to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-9 (filed March 21, 2001) (*Massachusetts Department Reconciliation Letter*)

[460] On March 15 2001, at the request of the Commission's staff, the Massachusetts Department, together with Covad and Verizon, undertook a review of the disputed Covad orders After conducting its review, the Massachusetts Department submitted a list of process improvements developed by Verizon and Covad during this review.

[461] Under the auspices of the Massachusetts Department, Covad and Verizon have agreed to several modifications or additions to the existing acceptance testing process Verizon has agreed to implement a process requirement that its technicians will "cut down" xDSL loops at the NID before the final cooperative test is performed. Additionally, Covad has agreed to insert into its acceptance testing script a question to determine whether the Verizon technician is testing through the network interface device. Second, to reduce technician confusion about where in Verizon's outside plant the cooperative test was performed, the carriers have agreed to enhance the demarcation point information procedures by establishing a three-fold process whereby the Covad technician can (1) verify before dispatch, that the loop was located and tagged by the Verizon technician during cooperative testing; (2) access Verizon's demarcation information electronically before dispatching to the filed; and (3) call Verizon from the field if the technician cannot locate the demarcation point Third, Verizon has committed to make it clear to its technicians that they should remove all half ringers on stand-alone xDSL loops Fourth, Covad and Verizon have agreed to implement a process for obtaining a final acceptance test when an earlier acceptance test has failed and to educate their technicians about interim loop testing versus final acceptance testing *See* Massachusetts Department Reconciliation Letter at 8.

[462] We note that the Department of Justice did not have the benefit of the Massachusetts Department's reconciliation of Verizon's I-codes *See* Department of Justice Massachusetts II Evaluation at 15 n 61 (noting that the Department of Justice's evaluation is "necessarily based solely on the evidence in Verizon's application" and stating that "[r]eply comments and *ex parte* submissions undoubtedly will provide additional evidence concerning the questions that have been raised about Verizon's pre-application DSL performance ").

acceptable levels of quality.[463] Moreover, we find that Verizon's remedial efforts to improve the stand-alone xDSL loop provisioning and acceptance testing process, in addition to those agreed to in the context of the Massachusetts Department's reconciliation proceeding, are likely to reduce competitive LEC installation quality impairments in the future. Starting in January 2001, Verizon will tag DSL loops at both the NID and the cross-connection box with special services markers to indicate to Verizon technicians that the loop is in use for data services and should not be used to serve another customer.[464] Verizon is also engaged in on-site visits to competitive LEC testing centers to discover ways to improve the acceptance testing process.[465] Verizon has committed to providing competitive LECs with detailed information on their I-codes to diagnose acceptance testing issues and reconcile data.[466] Verizon has also agreed to a trial of "sync" testing to enable Verizon technicians, at the time of testing, to determine whether the competitive LEC can synchronize its DSLAM with customer premises modems.[467] Finally, Verizon is working with a competitive LEC to make access to its testing equipment available to Verizon through a voice response unit.[468] We emphasize that Verizon's installation quality performance is minimally acceptable -- even under our flexible approach of reviewing Verizon's performance in light of the totality of the circumstances.[469]

(iv) Maintenance and Repair

150. We agree with the Massachusetts Department that Verizon demonstrates that it provides maintenance and repair functions for competing carrier xDSL-capable loops in a manner sufficient to meet the requirements of checklist item 4.[470] In analyzing Verizon's maintenance and repair functions we continue to rely primarily upon the mean time to repair and repeat trouble rate measures identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.

151. *Mean Time to Repair* Like the Massachusetts Department, we find that Verizon offers nondiscriminatory access to maintenance and repair functions. During the period from

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[463] We therefore rely upon the Massachusetts Department's conclusion that "the information contained in VZ-MA's supplemental application only affirms our earlier conclusion that VZ-MA provides [competing carriers] an installation quality sufficient to afford them a meaningful opportunity to compete " Massachusetts Department Massachusetts II Comments at 29-30, *see also SWBT Kansas/Oklahoma Order* at para. 191 (finding that SWBT generally met 6 percent installation quality benchmark and noting improved performance trend)

[464] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 110

[465] *See id* at para 110

[466] *See id* at para 109

[467] *See id.* at para 118.

[468] *See id* at para 109.

[469] Any future evidence of significant and sustained deterioration may result in a targeted enforcement action or carrier-initiated complaint under the Act *See also infra* Part IX

[470] *See* Massachusetts Department Massachusetts II Comments at 31

September through December, the mean time to repair competing carrier troubles on xDSL loops was 29.4 hours while the comparable number for Verizon was 21.59 hours, an approximately 8 hour difference. Although this disparity is statistically significant, we note that, in December, Verizon repaired competitive LEC lines in 19.1 hours compared to 17.8 hours for its retail affiliate, bringing Verizon into near facial parity with its retail operation.[471] Accordingly, the most recent month we consider indicates that Verizon has virtually eliminated this performance disparity.[472] We do not find, therefore, any systematic discrimination in Verizon's maintenance and repair functions offered to competitors.[473]

152. Verizon contends that the data reflecting the measurement of mean time to repair for xDSL loops provide a misleading indication of its performance and thus the Commission should look behind the measures for additional evidence of nondiscrimination. Verizon claims that it is much more likely to be unable to access competing carriers customers' premises to repair xDSL loops than access to the premises of its own retail customers[474] and that competing carriers are less willing to schedule weekend appointments than are Verizon's retail customers.[475] Both of these factors, Verizon claims, lengthens the time needed to repair competing carrier

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[471] Verizon's missed repair appointment performance is likewise at parity During September through November 2000, Verizon met approximately 85 percent of repair appointments for competitive LECs compared to approximately 86 percent for retail. MR 3-01 (Maintenance and Repair, 2-wire xDSL Services, percent Missed Repair Appointment – Loop), *see also* Verizon Massachusetts II Lacouture/Ruesterholz Decl. Attach EE Verizon concludes that during September through November 2000, nearly 58 percent of troubles reported within 30 days of the installation of a DSL loop were closed with no trouble found *See id* at para 105 and Attach BB This number is consistent with Verizon's analysis for the period May through July *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl at para 78, 104 & Attach. I (discussing the effect of failure to isolate troubles on UNE POTS repair metrics)

[472] Indeed, we take additional comfort in Verizon's January performance which indicates that this trend has continued In fact, Verizon performs better for competitive LECs than for itself in January The January mean time to repair competitive LEC xDSL loops was 20 82 hrs compared to 23 80 hrs for Verizon. *See* MR 4-02 (Maintenance, 2-Wire xDSL Services, Mean Time to Repair – Loop Trouble)

[473] Should Verizon's future performance reverse this positive trend, Verizon risks a targeted enforcement action or carrier-initiated complaint under the Act *See infra* Part IX

[474] Verizon Massachusetts II Application at 25, Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 106. During April, May, June and July 2000, Verizon claims that competing carriers provided only "limited access' to end users for 58 9 percent of competing carrier Complex loop repair requests, compared to 3 4 percent on Verizon's Complex loop retail repair requests *Id* at para 106 & Attach N

[475] Verizon contends that a relatively small disparity in the mean time to repair measure exists during September, October and November and that there is some variation among competitive LECs regarding the rate at which they accept weekend repair appointments *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 119 Attach GG Verizon performed an analysis of the weekend repair appointment exclusion and concluded that the rejection of weekend repair appointments added approximately 4 35 hours to the average repair interval for competitive LEC loops, reducing the 9 hour difference to approximately 4-5 hours of disparity, an amount Verizon contends, that is not competitively significant, *See also* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 119 Attach GG. *See also* Verizon Massachusetts I Lacouture/Ruesterholz Decl at 73-74 & Attach G (discussing the effect of not accepting weekend repair appointments on the UNE POTS repair metrics.)

xDSL loops. Covad and Rhythms specifically deny that they avoid weekend repair appointments and otherwise criticize Verizon's maintenance and repair functions.[476]

153. We exercise our discretion to afford Verizon's adjusted mean time to repair data little weight.[477] Because the official carrier-to-carrier data provide sufficient evidence for the Commission to conclude that Verizon provides nondiscriminatory access to maintenance and repair functions, we need not resolve the factual dispute presented by commenters regarding refused weekend repair appointments. We recognize and encourage BOCs to conduct root cause analysis of their performance and will appropriately credit explanations of disparities in the performance measures. We believe, however, that such explanations are best used to improve processes and carrier-to-carrier reporting and that they are most useful when surfaced in state proceedings. We note that the development of performance measures is an iterative process and we encourage competitive LECs and Verizon to continue to specifically improve the mean time to repair measure to provide a more accurate indicator of performance.[478]

154. *Repeat Trouble Rate* We conclude that Verizon provides competitors with maintenance and repair services at an acceptable level of quality. Verizon's repeat trouble report data show that competing carriers infrequently experience problems after a repair visit for a trouble on DSL loops. This measure shows that competing carriers experience fewer repeat troubles than Verizon's retail affiliate.[479] For the period September through December, competing carriers experienced 16.3 percent repeat trouble report rates compared to 21.5 percent

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[476] *See* Rhythms Massachusetts I Comments at 31-32, *See* Letter from Dhruv Khana, Executive Vice President and General Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 00-176, at 8 (filed Dec 5, 2000); *see also* Covad Massachusetts I Comments at 20-22 (stating that Verizon adds to the "no access" problem by assigning "all day" appointment windows), Network Access Solutions Massachusetts I Comments at 3-4 (same). Rhythms Massachusetts I Comments at 32. Covad specifically notes that an apparent increase in competing carrier "no access" situations is explained by the fact that Verizon's schedules retail repair appointments in smaller windows than for competing carriers. The Massachusetts Department was unable to comment on Covad's alleged unsuccessful attempt to shorten repair windows offered by Verizon to competing carriers *See* Massachusetts Department Massachusetts I Reply at 86 On reply, Verizon states that it will grant morning or afternoon appointments for retail customers if they have extenuating circumstances and it will do the same for competing carriers. Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl at 33 (emphasis added)

[477] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 119 Attach GG

[478] The Department of Justice notes that the mean time to repair measure is likely to be disputed in the future and, if the measure is left unrevised, it may create an analysis that is biased toward finding parity. "Excluding observations involving competitive LEC refusals of weekend appointments makes Verizon's performance for competitive LECs look stronger, moving the apparent balance toward parity Excluding observations involving refused weekday appointments – an adjustment Verizon did not make – could make Verizon's performance as to its retail unit or separate affiliate look better, moving the apparent balance away from parity." Department of Justice Massachusetts II Evaluation at 12.

[479] The Percent Repeat Trouble Reports metric, MR 5-01 shows that the 4-month (September – December) average for competing carriers is 16.3 percent and 21 5 percent for Verizon For the months of September, October, November and December, competing carrier repeat trouble rates were 19 3, 15 4, 16 1 and 13 4 percent For the same months, Verizon repeat trouble rate was 22.7, 20 3, 22 6 and 16 5 percent *See* MR 5-01 (Maintenance, 2-Wire DSL Services, percent Repeat Trouble Reports within 30 Days)

for Verizon.[480] Thus, during the four recent months we consider, Verizon provides better service to competitors in this area than it does for its retail affiliate.[481]

c. Subloops

155. We find that Verizon provides nondiscriminatory access to subloops consistent with the requirements of section 271 and the *UNE Remand Order*.[482] The Commission's *UNE Remand Order* requires incumbent LECs to provide competitors access to subloop elements at any technically feasible point to ensure that "requesting carriers [have] maximum flexibility to interconnect their own facilities" with those of the incumbent LEC.[483] Competitors take issue with Verizon's subloop offering claiming that Verizon limits subloops to "metallic distribution pairs/facilities;" restricts competitor subloop access to interconnection at the feeder distribution interface (FDI); and refuses to allow competitors to collocate equipment inside remote terminals for purposes of accessing subloops.[484]

156. We find that, consistent with our rules, Verizon allows collocation inside remote terminals on a space-available basis.[485] Where space is unavailable, competitive LECs may deploy an adjacent cabinet to access subloops through an interconnecting cable.[486] Furthermore, Verizon does not limit competitive LEC access to subloops to only metallic distribution facilities. Rather, Verizon allows requesting carrier to obtain access to subloop facilities regardless of the transmission medium.[487] Finally, Verizon has demonstrated that competitive

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480 *See id*

481 The average repeat trouble report rate for the period September through December is 16 3 for competing LECs compared to 21 5 for Verizon retail *See* MR 5-01 (Maintenance, 2-Wire DSL Services, percent Repeat Trouble Reports within 30 Days). We take additional comfort in Verizon's network trouble report rates for DSL loops in Massachusetts These results further support our conclusion that Verizon provides competing carriers with maintenance and repair service in substantially the same time and manner as Verizon's own retail operations Competing carriers experienced a trouble report rate of 1.9 percent for the months of September through December 2000 while Verizon experienced trouble report rates at a comparable 1 3 percent rate. *See* MR 2-02/2-03 (Maintenance, 2-Wire xDSL Services, Network Trouble Report Rate, Loop, Network Trouble Report Rate, Central Office).

482 Although nondiscriminatory access to subloops technically falls under checklist item 2, we treat subloops in this section because it is logically related to the provision of unbundled loops

483 *UNE Remand Order* at para 206 The Commission held that technically feasible points of interconnection near a customer premises could include poles or pedestals, the NID or the minimum point of entry (MPOE), the feeder distribution interface (FDI) or a remote terminal or environmentally controlled vault *Id*

484 Rhythms Massachusetts I Comments at 12, ALTS Massachusetts I Comments at 16-17; Covad Massachusetts I Comments at 25-28

485 *See* Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl at para. 44

486 *Id*

487 Verizon offers "feeder subloops over DS1 or DS3 transmission paths which may be either fiber or copper depending upon facilities availability " *See* Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl at para. (continued)

LECs may gain access to subloops at technically feasible points of interconnection other than the FDI.[488] For these reasons, we cannot agree with the commenters' claims that Verizon limits access to subloop unbundled network elements in violation of the requirements of section 271.

d. High Capacity Loop Performance

157. We find that Verizon's performance for high capacity loops does not result in a finding of noncompliance with checklist item four. We look to the totality of the circumstances in evaluating Verizon's performance in providing loops in accordance with the checklist requirements.[489] During the period September through November, although volumes are low, carrier-to-carrier data show that Verizon misses a comparable number of installation appointments for competitors and retail alike.[490] Verizon's performance data for its maintenance and repair functions for high capacity loops show parity.[491] Like other types of loops we consider, Verizon states that competing carrier behavior skews its high capacity loop performance.[492] We recognize that Verizon's performance on other measures with respect to

(Continued from previous page)

137 *Id* at Attach P (stating that a 'Feeder Sub-Loop' means a DS1-DS3 transmission path over a feeder facility in Verizon's network)

[488] Verizon specifically identifies the NID and the MPOE as possible alternative points for competing LECs to obtain access to subloops *See* Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl at para 138

[489] In so doing, we do not consider Verizon's special access services performance OnSite Access specifically criticizes Verizon's performance in provisioning high capacity "loops" in New York and Massachusetts *See also* On Site Access Massachusetts I Comments at 20-21 (citing Leonard Kriss Decl at 2-6) CompTel lodges a related complaint alleging that Verizon has not demonstrated that it can comply with the competitive checklist at the same time it meets its obligation to provision access services and operate its long distance affiliate consistent with section 272's nondiscrimination requirements. *See* CompTel Massachusetts II Comments at 1-3 Criticisms of Verizon's provisioning of special access service are not relevant to compliance with checklist item four As we held in the *SWBT Texas* and *Bell Atlantic New York Orders*, we do not consider the provision of special access services pursuant to tariffs for purposes of determining checklist compliance *SWBT Texas Order*, 15 FCC Rcd at 18504, para. 335, *Bell Atlantic New York Order*, 15 FCC Rcd at 4126-27, para 340 Checklist item 4 does not address itself to retail services Verizon provides to competitors such as special access services.

[490] *See* PR 4-01 (UNE POTS/Special Services, percent Missed Appointments – Verizon – Total). In September and October, Verizon did not miss any installation appointments for high-capacity loops and missed 18 39 percent of its installation appointments in November. In November, the number of observations in this metric is 310 competitive LEC installations. However, this measure aggregates EEL and interoffice facilities installations The comparable numbers over the same period for Verizon retail were 2 78, 1.90 and 1 43 percent *See id*

[491] For the period September through January, the Mean Time to Repair measure shows that Verizon troubles are resolved in 8 38 hours compared to 8 40 hours for competitive LECs during the same period *See* MR 4-01 (Maintenance, UNE POTS, Special Services, Mean Time to Repair, Total).

[492] Verizon examined a sample of the January orders that were included in the Average Interval Offered measure (PR 1-07) and discovered that the vast majority of the orders should have been "X" coded because the competitive LEC asked for an interval longer than the standard interval. Because the orders were incorrectly "W" coded, Verizon states that they were included in the results and skewed the reported results. *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-09 (filed February 28, 2001) (*Verizon Feb 28 Ex Parte Letter*).

provisioning high capacity loops has been poor in Massachusetts.[493] High capacity loops in Massachusetts represent only approximately 0.8 percent of all unbundled loops provisioned to competitors.[494] Verizon performs at an acceptable level for most types of unbundled local loops. Given the low volumes of orders for high capacity loops in Massachusetts we cannot find that Verizon's performance for high capacity loops results in a finding of noncompliance for all loop types.[495]

e. Voice Grade Loops

158. We agree with the Massachusetts Department that Verizon demonstrates that it provides voice grade unbundled loops in a nondiscriminatory manner.[496] This category includes hot cut loops and new stand-alone loops. We discuss each of these categories separately below.

(i) Hot Cut Loop Provisioning

159. *Hot Cut Process* Verizon's hot cut process is designed to move a loop that is in service from Verizon's switch to a competitor's switch. Competitors can request that Verizon complete the hot cut within a specific appointment window and Verizon has committed to ensuring that the customer will not be out of service for more than five minutes during the hot cut.[497] Verizon's hot cut process includes a number of steps that Verizon and competitors must take during the days preceding the hot cut. These steps include pre-wiring a cross-connection from the competitor's collocation arrangement to Verizon's main distribution frame prior to the committed date and time of the hot cut, setting the appropriate Local Number Portability triggers and confirming with the competitor that the loop is to be cut over to a competitor's switch.[498]

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[493] *See e g* , PR 2-07 (Special Services – Provisioning, Av. Interval Completed – DS-1), PR 6-01 (Special Services – Provisioning, percent Installation Troubles reported within 30 Days)

[494] Verizon states that during the period September through January, observations for PR 2-07 totaled 176 loops Verizon notes that the high-capacity loop volumes the Commission considered in the *SWBT Kansas/Oklahoma Order* was even higher over the four month period the Commission considered in that proceeding *See Verizon Feb 28 Ex Parte Letter* Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-09 (filed February 28, 2001) In the period July through October, SWBT received 210 orders for DS-1 loops in Oklahoma *SWBT Kansas/Oklahoma Order* at para. 213 n 616

[495] Although we recognize specific performance problems for high capacity loops, we do not find that these disparities in and of themselves are enough to render a finding of checklist noncompliance because of the small numbers of DS-1 loops requested by competing carriers We stress, however, that we will be actively monitoring Verizon's performance in this area and we will take swift and appropriate enforcement action in the event that Verizon's provisioning performance for high capacity loops deteriorates *See infra* Part IX

[496] *See* Massachusetts Department Massachusetts I Comments at 279.

[497] *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl at para. 81.

[498] *Id.* at Attach J

160. *Hot Cut Timeliness and Quality* We find that Verizon demonstrates that it provides hot cuts in Massachusetts in accordance with checklist item 4 because it provides hot cuts in a timely manner, at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.[499] Verizon reports data on the percentage of hot cut orders completed within the cut-over window specified by the requesting competing carriers on an LSR.

161. In the instant application, Verizon demonstrates that its hot cut performance has returned to acceptable pre-strike levels which afford a competitor a meaningful opportunity to compete.[500] During October and November 2000, Verizon completed on average 96 percent of hot cut orders on time. During the same time period, less than 0.8 of the hot cut lines experienced installation troubles within 7 days.[501] The Massachusetts Department engaged in a reconciliation of various Verizon self-reported hot cut performance measurement data in the context of the state section 271 proceeding.[502] Relying upon the results of its carrier-specific data reconciliation, the Massachusetts Department concluded that "there is no need for further data reconciliation" and concluded that Verizon provides sufficient on-time hot cut performance to meet the requirements of checklist item 4.[503] Because the Massachusetts Department performed a searching and specific data reconciliation of Verizon's hot cut performance, we accord its resolution of this issue substantial weight. We note that no commenter challenges Verizon's hot-cut conversion performance in this phase of the proceeding. We thus conclude that the record demonstrates that the hot cut performance Verizon makes available to competing carriers in Massachusetts minimizes service disruptions and affords a competitor a meaningful opportunity to compete.

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[499] We evaluate the PR 9-01 (Provisioning, POTS, percent On-Time Performance – Hot Cut), PR 6-02 (Provisioning, POTS, percent Installation Troubles reported within 7 Days – Hot Cut Loop) measures in Massachusetts

[500] *See* Verizon Massachusetts I Guerard/Canny Decl at Attach E, PR 9-01 (Provisioning POTS, percent On Time Performance – Hot Cuts) For May, PR 9-01 showed 98 45 percent on time performance, for June, PR 9-01 showed 99 63 percent on time performance and for July, PR 9-01 showed 99 19 percent on time performance. KPMG reviewed Verizon's hot cut performance between October 1999 and January 2000 and found that 98 percent of hot cuts were completed on-time. *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para 83 (citing KPMG Report at 198-99 (POP-6-2-6) The Massachusetts Department characterizes Verizon's hot cut timeliness performance as "excellent" and notes that unlike Verizon's performance in New York prior to filing its application with this Commission, Verizon bettered the 95 percent "on time" benchmark in Massachusetts every month from January through July 2000. *See* Massachusetts Department Comments at 284-85.

[501] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 5

[502] In response to criticism from one carrier, AT&T, regarding the accuracy of Verizon's hot cut data, the Massachusetts Department engaged in a reconciliation of various Verizon self-reported hot cut performance measurement data in the context of the state section 271 proceeding Massachusetts Department Massachusetts I Comments at 288. AT&T does not criticize Verizon's hot cut performance in this proceeding

[503] Massachusetts Department Massachusetts I Comments at 288

(ii) New Stand-Alone Loop Provisioning

162. We agree with the Massachusetts Department that Verizon demonstrates that it provisions new unbundled stand-alone voice grade loops in accordance with the requirements of checklist item 4.[504] When Verizon does not presently service the customer on the line in question, a hot cut loop is not required. In such instances, a competing carrier obtains a new stand-alone loop from Verizon which dispatches a technician to the customer's premises to complete the installation. We find that Verizon demonstrates that it provisions and maintains new stand-alone voice grade loops for competing carriers in substantially the same time and manner that it installs new voice grade loops for its own retail operations.

163. *Provisioning Timeliness and Quality, Maintenance and Repair.* Verizon demonstrates that it delivers new voice grade loops in a timely manner and at acceptable levels of quality. Verizon also demonstrates that it provides maintenance and repair functions for such loops in a nondiscriminatory manner. No party specifically criticizes Verizon's new, stand-alone loop provisioning performance. As in previous section 271 orders, in reviewing Verizon's performance we examine the average completion interval, missed installation appointments, trouble reports within 7 days and mean time to repair measures. Specifically, Verizon's performance results for the months of September, October, November and December 2000 also demonstrate parity for the average completion interval for new loop orders of 1-5 lines measure.[505] During the same period, Verizon's missed installation appointment rate for new voice loops also demonstrated parity.[506] Furthermore, Verizon appears to be providing new voice grade loops to competitors at an acceptable level of quality. Based on the trouble report within 7 days measure, Verizon provided installation at the same level of quality for competitive LECs compared to retail during the months of September, October, November and December 2000.[507] Verizon's mean time to repair measures show that it is providing maintenance and repair functions for new loops to competitors in a nondiscriminatory manner.[508]

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[504] *See id* at 256

[505] In September, Verizon completed POTS loop orders of 1-5 lines in 8.82 for Verizon retail and 8.53 for competitors The comparable numbers for October were 5 81 for Verizon retail affiliate and 9 22 and 5.45 for Verizon retail and 4 86 for competitors in December *See* PR 2-03 (Provisioning, Average Completed Interval, Dispatch 1-5 lines – Loop).

[506] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at Attach. A The September to November missed appointment rate, PR 4-04, is 8 13 percent for Verizon and 7 09 percent for [competing carriers]. The December rate was 6 96 for Verizon and 10 31 for competing LECs. *See* PR 4-04 (Provisioning, POTS, percent Missed Appointments, Verizon, Dispatch, Loop – New)

[507] The percentage of installation troubles reported on voice grade loops for competitors were 1 13 percent in September, 98 percent in October, 80 percent in November and 74 in December The comparable numbers for Verizon were 2.39 in September, 1 87 in October, 1 77 in November and 1 60 in December *See* PR 6-02 (Provisioning, POTS, percent Installation Troubles reported within 7 Days – Loop)

[508] Results for the mean time to repair measure, Mean Time to Repair – Total, in the months of September, October, November and December show parity Competitor troubles were repaired in 19 77 hours in September, 18 52 hours in October, 19 00 hours in November and 15.38 hrs in December Verizon's troubles were repaired in (continued .)

f. Line Sharing

(i) Background

164. On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[509] In the *Line Sharing Order* the Commission acknowledged that it could take as long as 180 days from the release date for incumbent LECs to develop and deploy the modifications necessary to implement this new requirement. This 180 day period concluded on June 6, 2000, approximately six months before Verizon filed its Massachusetts II application. In the *SWBT Kansas/Oklahoma Order*, the Commission provided BOC-applicants guidance concerning the required section 271 line sharing showing necessary to meet a BOC's burden of proof. Specifically, the Commission stated that "a successful BOC-applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases."[510] The Commission also held that "to the extent that a BOC applicant relies upon commercial data from another state to establish that it is providing nondiscriminatory access to line shared loops in a state where it requests section 271 authority, it should provide evidence that the OSS and provisioning processes are identical.[511] Verizon must demonstrate, therefore, that it provides nondiscriminatory access to the unbundled high-frequency portion of the loop to gain section 271 approval in Massachusetts.

165. Verizon proposes to demonstrate compliance with its line sharing obligation with evidence that it has signed nine interconnection agreements in Massachusetts with line sharing provisions. Verizon also notes that the Massachusetts Department recently approved its line sharing tariffs, with only minor amendments.[512] It further states that it is able to handle

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21.63 hours in September, 17 68 hours in October, 17 95 hours in November and 16 98 hrs in December *See* MR 4-01 (Maintenance, POTS Loop, Mean Time to Repair – Total)

[509] *See Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of1996*, Third Report and Order, CC Docket No 98-147, Fourth Report and Order, CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*) (*pet for rehearing pending sub nom. USTA v FCC*, DC Cir No 00-102 (filed Jan 18, 2000)).

[510] *SWBT Kansas/Oklahoma Order* at para 215

[511] *SWBT Kansas/Oklahoma Order* at para 215 The Commission further stated that to "the extent its OSS provisioning processes are not identical, a BOC applicant bears the burden of showing that whatever differences are present are not material." *Id*

[512] Verizon offers competing carriers two arrangements for line sharing pursuant to its interconnection agreements and line sharing tariff The first arrangement provides a competing carrier with the ability to install, own and maintain the splitter in the competing carrier's own collocation arrangement In the second arrangement, a competitive LEC-owned splitter is located in Verizon's central office space and is maintained by Verizon *See* Verizon Massachusetts I Ruesterholz/Lacouture Decl. at para 118. As part of its *Phase III* proceeding, the (continued .)

"considerable volumes of line sharing orders" by utilizing its successful New York provisioning methods and procedures in Massachusetts.[513] Finally, through the New York DSL collaborative, it has worked with competing carriers to identify and resolve various technical and operational issues associated with line sharing in Massachusetts.[514] Competing carriers contest Verizon's operational readiness to offer line sharing and Verizon's ability to offer line sharing on a nondiscriminatory basis.[515]

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Massachusetts Department has directed Verizon to implement OSS enhancements to support line sharing by April 1, 2001. The Massachusetts Department, however, found that the fact that line sharing orders currently require manual processing does not prevent it from finding that Verizon satisfies its nondiscrimination obligation. *See* Massachusetts Department Massachusetts I Comments at 328 Covad contests Verizon's showing that it offers line sharing capability over fiber-fed loops. Covad Massachusetts II Comments at 35. Verizon responds that it satisfies the Commission's requirements through remote terminal collocation and unbundled subloop offerings *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at paras 160-65 We note that the issue of line sharing over fiber-fed loops is the subject of a *Further Notice of Proposed Rulemaking* at the Commission *See* Line Sharing Reconsideration Order at para 12, *see also accompanying*, Third Further Notice of Proposed Rulemaking in CC Docket No 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98.

513 Verizon Massachusetts I Ruesterholz/Lacouture Decl at para 114 In its initial application Verizon stated that it has provisioned over 7,000 line sharing orders in New York, the majority of which were for its own data affiliate *See id* Verizon's Massachusetts II application shows that Verizon has processed roughly 10 times the number of line sharing orders for its retail affiliate compared to line sharing orders processed for unaffiliated competing LECs

514 Verizon Massachusetts I Ruesterholz/Lacouture Decl at para 115 For example, Verizon asked competing carriers to identify their priority wire centers throughout Massachusetts by March 13, 2000 so that Verizon could prioritize the central office wiring work necessary to accommodate line sharing requests *Id* at 127

515 *See* Covad Massachusetts II Comments at 7-8, Rhythms Massachusetts II Comments at 6, CIX Massachusetts II Comments at 7, USISPA Massachusetts II Reply at 9; AT&T Massachusetts II Reply at 25, Covad Massachusetts I Comments at 28; WorldCom Massachusetts I Comments at 62, Rhythms Massachusetts I Reply at 18, ALTS Massachusetts I Reply at 36 On March 14, 2001, Verizon filed an *ex parte* letter in this proceeding stating that Verizon has "taken steps to address the outstanding issues" between Rhythms and Verizon and accordingly, Rhythms "no longer opposes Verizon's Application for section 271 authority in Massachusetts " Letter from Kimberly A Scardino, Assistant General Counsel, Rhythms to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 14, 2001). Rhythms had argued that where Verizon completed pre-wiring collocation work, in some instances it was wired incorrectly or the cable and pair assignment were not entered into Verizon's inventory system *See* Rhythms Massachusetts II Comments, Williams Decl at para. 39. Covad claims that Verizon cannot "provision a single line shared order in a central office while at the same time Verizon was shutting off line-sharing ready central offices for its own retail service because orders are flowing through beyond capacity." Letter from Jason D. Oxman, Senior Government Affairs Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 00-176 at 1 (filed Feb 21, 2000), *see also* Letter from Jason D. Oxman, Senior Government Affairs Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 at 1 (filed Nov. 28, 2000) (arguing that walkthroughs of Verizon central offices showed incomplete splitter installations as of the week of November 20, 2000) Verizon responds that Covad and Rhythms are the only competing carriers that submitted their line sharing plans to Verizon's project management plan and that installation of splitters was performed on a timely basis Verizon Massachusetts I Lacouture/Ruesterholz Decl at paras. 112-13. The Massachusetts Department found that whatever delays resulted from splitter installation were attributable to competing carriers, specifically Covad Massachusetts Department Massachusetts I Comments at 327

(ii) Discussion

166. We find that Verizon demonstrates that it provides nondiscriminatory access to the high-frequency portion of the loop. Specifically, the most probative evidence that Verizon submits to support this point is actual commercial usage.[516] The Commission stated in the *SWBT Kansas/Oklahoma Order* that "a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates."[517] Our approach in this case is to rely primarily on the limited commercial data Verizon has submitted from its Massachusetts operations. Because line sharing volumes in Massachusetts have escalated only recently, however, we look to Verizon's line sharing performance in New York as well, where line sharing volumes are larger for additional evidence that Verizon is providing nondiscriminatory access to line sharing.[518] As discussed above, we conclude that Verizon's line sharing OSS in New York and Massachusetts uses the same systems and offers the same functionality.[519] Accordingly, we shall consider Verizon's commercial line sharing performance in New York as a supplement to Verizon's limited commercial line sharing performance in Massachusetts.

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[516] *See supra* Part II A

[517] *See SWBT Kansas/Oklahoma Order* at para 215

[518] From September 2000 through January 2001, Verizon has provided a total of approximately 51,000 line shared loops in Massachusetts including those for VADI. During December and January, Verizon completed nearly 500 line shared loops for competitors in Massachusetts *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 103 In New York, Verizon has processed 110,000 line shared orders including those provided to VADI. *See id* at para 28

[519] *See supra* Part IV A 2 b. The Massachusetts Department concluded that the "systems and processes in Massachusetts are comparable to, indeed the very same as, those found in New York " Massachusetts Department Massachusetts II Comments at 35; *see also* Verizon Massachusetts II Sapienza/Mulcahy Decl App A, Attach B. PwC also investigated whether VADI has the same interface options as unaffiliated competitive LECs and whether Verizon treats transactions it receives from VADI the same as transactions it receives from unaffiliated competitive LECs PwC confirmed that VADI offers DSL service using line sharing purchased from Verizon using the same interfaces that are available to other unaffiliated competitive LECs VADI generally uses CORBA for pre-ordering, EDI for ordering and the Web GUI for maintenance and repair In addition, PwC confirmed that once Verizon receives the orders over the interface, it provisions a VADI order using the same systems and processes as it uses to provision an order for any other competitive LEC Likewise, PwC reports that VADI's maintenance and repair requests are handled by Verizon in the same manner as a request from an unaffiliated competitive LEC. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 143. Verizon does, however, reveal that a "small percentage" of VADI's New York line sharing orders are distributed by a team leader in the Boston xDSL/Line Sharing Center to a group of approximately 35 temporary service order representatives located in New York Verizon contends that it retained these temporary representatives to clear a backlog of retail DSL orders in New York that existed before VADI was operational Verizon Massachusetts II Lacouture/Ruesterholz Supp. Decl. at para. 154. This slight difference in OSS functionality does not alter our conclusion that the OSS in New York and Massachusetts are identical for purposes of the Commission's consideration of New York line sharing commercial data.

167. *Operational Readiness.* Competitive LECs take issue with Verizon's ability to wire adequately central offices to offer line sharing.[520] Covad specifically contests Verizon's representation that it was operationally ready to provision line sharing for all splitter collocation arrangements in place as of December 1, 2000.[521] In response, Verizon states that it recognized central office wiring problems that delayed the readiness of certain offices and committed to reinspections of all line-sharing related central office work beginning in December 2000.[522] The Department of Justice recognizes that "Verizon is making efforts to resolve its line sharing implementation difficulties" and the Massachusetts Department urges us to find that Verizon provides nondiscriminatory access to the high frequency portion of the loop.[523]

168. Verizon has now completed all the quality inspections and has "taken the necessary corrective action for all of the line sharing-related collocation arrangements that were in place as of December 1, 2000 . . . in both Massachusetts and New York."[524] Verizon has also agreed to implement the elements of its quality inspection process into the normal collocation inspection process and thus, new line sharing-related collocation arrangements will be subject to

520 *See* Covad Massachusetts II Comments at 6, Rhythms Massachusetts II Comments at 8 Rhythms contends that Verizon's explanation of defective splitter installation could not apply to it because Rhythms has elected to place splitter in Rhythms collocation spaces and the only remaining central office wiring work to be done is the re-termination of existing 200 cable and pair, a process that Rhythms claims is simple and accomplished quickly Rhythms Massachusetts II Comments at 8

521 Covad argues that it requested that 55 central offices in Massachusetts offer line sharing capability As of February 21, 2000, Covad has successfully provisioned line sharing in 44 of those 55 offices and it has provided the CLLI codes for those offices where Covad has pending orders *See* Covad Massachusetts II Reply at 19, *see also* Rhythms Massachusetts II Comments at 8 Verizon responds that only two of the offices Covad initially complained of are in Massachusetts and of these two, it has provisioned Covad orders in a number of the central offices which are relevant to this application *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para 131 As to the status of contested offices in New York, Verizon responds that Covad's claim that its "Failed Dispatch Report" shows discrimination is misplaced because joint investigations at these central offices show that the orders have failed due to operational and other problems on Covad's part *Id* at 133-35 Covad concedes that for some of its collocation arrangements, it is possible that "Covad has not yet installed DSLAM cards in a particular office to support line sharing capability" to conserve scarce resources but nonetheless argues that regardless of whether such equipment is installed, Verizon has an obligation to ensure that the office is line-sharing ready Covad Massachusetts II Reply at 20 n 35 Verizon offers a similar response to Rhythm's allegations that several Massachusetts central offices are not line sharing ready. Verizon contends that the central offices in question have been re-examined and it has not found any wiring problems. Verizon further responds that its records show that of the LSRs submitted by Rhythms only a small proportion of the central offices in Massachusetts are at issue. Of these offices, Verizon claims that it has completed line sharing orders for Rhythms in nearly all of the central offices at issue in Massachusetts *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at paras 143-145.

522 Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 138

523 Massachusetts Department Massachusetts II Comments at 36-38, Department of Justice Massachusetts II Evaluation at 14.

524 *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 126, *see also* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-9 (filed February 23, 2001) Covad represents that it submitted "every single one of its linesharing collocation applications in Massachusetts in April 2000." Covad Massachusetts II Reply at 22.

this inspection process as well.[525] It therefore appears that Verizon instituted its quality inspection process and completed any necessary corrective action as it became aware of central office wiring issues described by competitive LECs.[526]

169. *Line Sharing Performance Data.* Verizon has supplied a limited amount of Massachusetts commercial data for the period September through November 2000 in support of its line sharing showing.[527] To show that the data are reliable, Verizon engaged PwC to replicate its carrier-to-carrier results and 34 line sharing measures for the period September through November, the results of which, according to PwC, largely confirm the results presented by Verizon.[528] We recognize the Department of Justice's concerns that some of the line sharing completion interval data may be inaccurate.[529] Like the Massachusetts Department, however, we conclude that the data adequately show that Verizon has met its line sharing obligation.[530] The

[525] *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed February 22, 2001) Rhythms argues that Verizon did not institute its quality inspection audit process soon enough *See* Rhythms Massachusetts II Comments at 8 Verizon responds that its "implemented the inspection process as soon as it became aware of the start-up issues" Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 37

[526] *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 137 Verizon has continued to address these issues, particularly with Covad Recent reports suggest that Verizon has largely, if not completely, resolved central office wiring issues that have affected the deployment of line-shared services by competing carriers *See* Letter from Jason Oxman, Senior Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-9, (filed April 6, 2001) (stating that "Covad verified, in Massachusetts, that Verizon honored its commitment to clear all infrastructure related troubles, throughout the former Bell Atlantic footprint, by February 15, 2001")

[527] *See* Verizon Massachusetts II Sapienza/Mulcahy Decl. at para. 13

[528] *See id* (finding that for the majority of the line sharing measurements, PwC's numbers matched Verizon's and that for the remaining measurements, the number of observations was consistent and Verizon's reported performance was within one percent)

[529] While PwC confirmed that Verizon accurately calculated the missed appointment rates under the terms of the new consensus measurements, the reported results may overstate Verizon's performance Verizon's technicians may have marked some competitive LEC orders as completed after they had tested the line and received a working dialtone, even though the splitter to enable DSL serve on that line may not initially have been installed correctly Verizon however has committed to adopt additional testing procedures to ensure that line sharing orders are not marked completed unless working splitters are in place. *See* Verizon Massachusetts II Application at 30 n 25. The Department of Justice states that this problem "affected those performance measures calculated using the provisioning completion date· PR-2 (average interval completed), PR 3-10 (percent completed within x days), and PR-4 (missed appointments)." Department of Justice Massachusetts II Evaluation at 13 n 54 Competing carriers also contest Verizon's line sharing showing and argue that the current record is insufficient to support a finding of nondiscrimination. *See* Covad Massachusetts II Comments at 8, Rhythms Massachusetts II Comments at 6, CIX Massachusetts II Comments at 24

[530] The Massachusetts Department notes that Verizon states that for the percent missed appointments – dispatch measure, PR 4-05, "Verizon may not have included those instances where Verizon's technician performed the central office work typically required for xDSL loops but failed to confirm that a splitter . was functioning on the line" Massachusetts Department Massachusetts II Comments at 37 The Massachusetts Department found that Verizon's manual processing of line sharing orders "will be short-lived and, even absent complete line sharing order flow-
(continued .)

New York Commission only recently directed Verizon to capture its xDSL performance in disaggregated line sharing measures. In this case, we decline to hold isolated inaccuracies against Verizon where the method of reporting and collecting data is new and the underlying cause of the distortion has been addressed by Verizon.[531]. In this context, we believe it is appropriate to credit Verizon's submission of Massachusetts commercial line sharing data, supplemented by data from New York, when making our determination that Verizon provides nondiscriminatory access to the high-frequency portion of the loop. Specifically, we are convinced that the flawed timeliness measures provide evidence of the time it takes Verizon to provision line shared loops.

170. *Provisioning Timeliness* Overall, Verizon adequately demonstrates that it provisions line sharing to competitors in substantially the same time as it does for itself. We note at the outset that we give no decisional weight to Verizon's missed appointment data for line sharing in New York and Massachusetts. Although the data on their face show that Verizon meets the parity standard[532] we agree with the Department of Justice, the Massachusetts Department and even Verizon itself, that the measure may be flawed.[533] Specifically, Verizon states that this measure may not have captured those instances where a Verizon technician performed the central office work typically required for xDSL loops but failed to confirm that a splitter was functioning on the line.[534] Parties criticizing the completion measures appear to argue that because a Verizon technician did not test for a functioning splitter, the quality – rather than the timeliness – of Verizon's installation work is unacceptable.[535] While we recognize that performing the additional work required to test whether a splitter was functioning on the line could have an impact on the completion measures, we find that the data provided by Verizon are probative of the time it takes Verizon's technicians to install line-shared service.[536] We are

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through" Verizon can meet foreseeable demand for line sharing Massachusetts Department Massachusetts I Comments at 327

531 Verizon now performs a "splitter signature test" which is used "to determine whether the splitter, which is necessary for line sharing, is functioning on the line." Verizon Massachusetts II Reply at 23.

532 In September, October, and November in Massachusetts, Verizon did not miss any competitive LEC line sharing appointments. In December, Verizon missed approximately one percent of competitive LEC appointments Verizon has supplied provisioning information for its separate data affiliate, VADI, only for the month of November In November, these results demonstrate parity. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at Attach JJ

533 Verizon Massachusetts II Application at 30 n 25. The Massachusetts Department believes that the measure is sufficiently flawed to merit exclusion of this information as evidence that Verizon is providing nondiscriminatory access to line sharing Massachusetts Department Massachusetts II Comments at 37 The Department of Justice agrees and characterizes the measure as "substantially undermined" by the inaccuracies captured in the measure *Id.* at 13

534 Verizon Massachusetts II Brief at 30 n 25. Without such testing, even though technicians have confirmed dial-tone to and from the splitter, Verizon is unable to confirm that a splitter is properly functioning on a line.

535 *See* Covad Massachusetts II Comments at 8, *see also* Department of Justice Massachusetts II Evaluation at 13

536 Even with the miscoding, the measures describe accurately the amount of time Verizon technicians required to install line-shared service without the added task of performing a splitter signature test Because failure to install a (continued)

therefore not prepared to dismiss all of the evidence of commercial usage as USISPA suggests because the inaccuracies appear to be limited to the completion measures and are not so pervasive as to render Verizon's line sharing data completely untrustworthy.[537] Furthermore, as Verizon became aware of this problem, it addressed this data integrity issue by properly instructing its installation personnel to code orders as complete after properly functioning splitters are working on a given line, implementing its quality inspections for line sharing-related collocation work and performing a splitter signature test to ensure that the quality of its installation work was acceptable. Indeed, the record shows that during the period of time not affected by the distortion, Verizon's timeliness performance demonstrates parity.[538]

171. The average completion interval data for line sharing show parity.[539] While Verizon has supplied no retail information as a basis for comparison during the months of September and October for Massachusetts data, the average completion interval measure in November shows that Verizon required slightly more than six days to provision line-shared loops to competitors compared to over seven days for itself.[540] In New York, for the months of September and November, performance for competitive LECs is superior to that provided to VADI.[541] Although these data show that Verizon is performing at parity we note that Verizon's

(Continued from previous page)

functioning splitter on a line could prevent line-shared service, the lack of a splitter test suggests that the quality of the work, rather than its timeliness, was affected

[537] We disagree with USISPA that the line sharing "measurements simply do not exist" USISPA Massachusetts II Reply at 6

[538] Verizon remedied this miscoding problem by December 15, 2000 In Massachusetts, the missed appointment measure in January shows that Verizon missed only one percent of competitive LEC line sharing installation appointments Verizon argues that the January results show that "the impact on the performance measures caused by the lack of the splitter signature test was minimal" Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-9 (filed March 19, 2001) The December results also show that Verizon misses less than one percent of installation appointments for competing carrier line sharing orders. *See id.*

[539] We acknowledge that the failure of Verizon's technicians to test whether a splitter was functioning on the line may also have affected the average completion interval As discussed above, Verizon has addressed this data integrity issue going forward and has instituted a quality inspection program to ensure that competitive LECs receive acceptable installation quality performance.

[540] The Massachusetts average completion interval in November was 6 37 days for competitive LECs compared to 7 53 days for VADI. In September, Verizon completed competitive LEC line sharing orders in 6 47 days and 6 29 days in October. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 159 & Attach NN Verizon has also presented data for another interval measure, the percent completed within 6 days measure In New York, from September through November, Verizon completed 74 87 percent of competitive LEC orders and 71.60 percent of VADI orders within six days, where a six day interval was requested *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 159 & Attach OO. Verizon contends that a majority of the competitive LEC orders not completed within six days are completed within seven days In Massachusetts, over 93 percent of the competitive LEC line sharing orders in the period September through November were completed within seven days *See id*

[541] For the months of September, October and November, the average completion interval for competitive LECs in New York was 5 59, 6 4, and 6 42 days compared to 9 15, 6 2, 6 02 days for VADI. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at 159, Attach MM

performance is generally above the 5-day interval established by the Massachusetts Department even as the current interval is scheduled to be reduced to four days in the near future.[542] It is encouraging that Verizon is moving toward meeting this state-approved provisioning interval while it gains additional experience provisioning commercial volumes of line shared orders.

172. *Installation Quality & Maintenance and Repair.* Based on the commercial data presented in Massachusetts, Verizon appears to be providing line shared loops at acceptable levels of quality. Although VADI did not submit any trouble reports within thirty days of installation in the month of November, the competitive LEC rate was 1 percent and in September and October 2000, competitive LECs did not report any troubles on line-shared loops captured by the measures.[543] In New York, from September through November, the weighted average of installation troubles for competitive LECs was 1.70 percent compared to less than one percent for VADI.[544]

173. With respect to maintenance and repair, Verizon repairs loops for competitors in less time than it takes to repair retail line-shared loops. In November, the only month for which Verizon provided such data in Massachusetts, Verizon repaired competing carrier line-shared loops in just over three hours.[545] Verizon represents that it took significantly longer to repair loops for VADI – over 25 hours.[546] In New York, Verizon shows that the mean time to repair is

[542] Verizon has introduced flow through capability for line-shared ADSL orders and will accomplish line sharing provisioning for most orders without the time necessary to dispatch a technician to install service Given the fact that line sharing provisioning is largely accomplished without manual intervention, the Massachusetts Department ordered Verizon to reduce its line sharing interval from 6 days to five days effective November 27, 2000. Massachusetts Department Massachusetts I Comments at 36 n 110; *see also* CIX Massachusetts I Comments at 25 Verizon states that its 5-day interval tariff for line sharing orders of 1-9 lines went into effect on November 27, 2000 and Verizon "is now complying with the new interval " *See* D T E. Tariff No 17, Part A, Section 3 2 10 Additionally, Verizon has committed to file, as required by the Massachusetts Department, a tariff reducing the provisioning interval by an additional business day after the April 1st deadline for fully implementing certain OSS upgrades *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl at para. 164.

[543] Massachusetts Department Massachusetts II Comments at 36. We are mindful that, because Verizon has committed to resolving line sharing troubles through a coordinated process, it addresses some number of line sharing troubles "without the receipt of a trouble ticket" and concedes that the "small number of maintenance and repair requests reported is likely attributable to that interim process." *See* Verizon Massachusetts II Lacouture/Ruesterholz Supp Decl at para 156

[544] Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para 166 & Attach SS Covad argues that Verizon's line sharing I-code data are skewed because Verizon classifies troubles associated with splitter wiring as "CPE troubles" which show up in the performance measure as competitive LEC-caused troubles Covad Massachusetts II Reply at 15 Verizon responds that Covad mistakenly assumes that Verizon's trouble designation codes are designed to assign blame for a trouble ticket to Verizon or a competitive LEC *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 119 The codes at issue are designed to indicate whether the trouble is caused by an item in the Verizon or competitive LEC network Because splitters are not part of Verizon's network Verizon codes splitter troubles accordingly

[545] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 71.

[546] *Id*

comparable to stand-alone xDSL loop repair times and offers competitors nondiscriminatory access to maintenance and repair functions.[547] Verizon also shows that its repair services are performed at acceptable levels of quality.[548] Thus we find that the data suggest that Verizon is providing line-shared loops at an acceptable level of quality and repairing these facilities in a nondiscriminatory manner.

174. Although we have some concerns with the accuracy of Verizon's performance results and the limited volume of competitive LEC orders captured by the measures, we base our decision on measures not affected by such inaccuracies, the replication of other measures by PwC and Verizon's efforts in addressing the central office wiring issues that have impaired the ability of competitive LECs to submit commercial volumes of line sharing orders. Recent efforts by Verizon have substantially, if not completely, addressed the initial central office wiring implementation issues experienced by competitive LECs in Massachusetts.[549] Furthermore, we also note that Verizon has designed a process to address line sharing implementation difficulties going forward.[550]

g. Line Splitting

(i) Background

175 In the *Line Sharing Order on Reconsideration*, the Commission made clear that line splitting is an existing legal obligation and that incumbent LECs must allow competitors to order line splitting immediately, whether or not a fully electronic interface is in place.[551] The Commission further stated that "we expect Bell Operating Companies to demonstrate, in the

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[547] During September through November, the mean time to repair for competitive LECs was 16 hours compared to slightly longer than 10 hours for VADI. Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 172 In New York, from September through November, Verizon met more than 92 percent of the repair appointments that did not require a dispatch for both VADI and competitors. Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 170 & Attach TT

[548] Verizon also provided the percentage of repeat trouble reports for both competitors and VADI These data demonstrate that Verizon provides superior service to competitors compared to itself *See* MR 5-01 (Line Sharing, percent Repeat Troubles w/30 Days)

[549] *See* Letter from Kimberly A. Scardino, Rhythms to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-09 (filed March 2, 2001).

[550] Verizon has designated a single point of contact for each competitive LEC to address line sharing ordering or provisioning processes regardless of whether they arise in Verizon's TISOC, CLPC or RCMC Verizon is participating in the Commission's "Line Sharing Summit" and is engaged in a dialogue with competitive LECs to further improve the line sharing process Verizon has also introduced flow through capability on line sharing orders for connections requiring less than three lines Verizon has also accompanied Covad on site visits of several Massachusetts central offices to address what it terms are several "minor collocation-related issues " *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para 139.

[551] Third Report and Order and Order on Reconsideration, CC Docket No 98-147; Fourth Report and Order on Reconsideration, CC Docket No 96-98; Third Further Notice of Proposed Rulemaking, CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking, CC Docket No 96-98 (rel Jan 19, 2001) at para 20 n 36.

context of section 271 applications, that they permit line splitting, by providing access to network elements necessary for competing carriers to provide line-split services."[552] We discuss below the steps Verizon has taken to offer line splitting capabilities consistent with the *Line Sharing Order on Reconsideration*.[553]

176. Verizon states that it currently offers the unbundled network elements that would allow line-split services.[554] On February 14, 2001, Verizon issued a statement of policy to accommodate line splitting.[555] Additionally, Verizon has incorporated line splitting contract language reflecting this policy into its Model Interconnection Agreement which it will make immediately available to any carrier who wishes to offer line-split services.[556] Verizon has also demonstrated that it offers competitors nondiscriminatory access to the individual network elements necessary to provide line-split services and that nothing prevent competitors from offering voice and data services over a single unbundled loop.[557] Several competitors contest the adequacy of this language and argue that Verizon is currently not in compliance with the Commission's line sharing and line splitting requirements.[558] These carriers further contend that Verizon has engaged in a pattern of recalcitrant behavior with regard to implementing line sharing and line splitting requirements and the Commission should not credit its promises of future compliance.[559]

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552 *Id*

553 The Massachusetts Department recognizes that Verizon is required to offer line splitting but requests that the Commission "take into account the recent nature of both its and the Department's clarifying Orders on line splitting when reviewing" Verizon's section 271 application Massachusetts Department Massachusetts II Comments at 41

554 *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at 149

555 Verizon issued its statement of policy on February 14, 2001, approximately three weeks after this Commission issued the *Line Sharing Reconsideration Order*. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply. Decl at 154. AT&T argues that Verizon must at least demonstrate it has a nondiscriminatory process in place to support line-split services AT&T Massachusetts II Reply at 24, *see also* USISPA Massachusetts II Reply at 5, CompTel Massachusetts II Comments at 3-5.

556 In its line splitting amendment, Verizon commits to offer line splitting consistent with the Commission's *Line Sharing Reconsideration Order* by utilizing Verizon's OSS to order the unbundled network elements necessary to provide line-split services With regard to migrations of UNE-P customers to line splitting, Verizon commits to follow the implementation schedules, terms, conditions and guidelines established in the ongoing DSL collaborative at the New York Public Service Commission Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at 154, Attach. Q

557 *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 149-58 Verizon further argues that the Commission has already held that Verizon can provide unbundled network elements in combination, and line splitting can be achieved through the combination of unbundled network elements. *See id* at para. 158

558 *See* AT&T Massachusetts II Reply 24, WorldCom Massachusetts II Reply at 12-13, Covad Massachusetts II Reply at 5-6.

559 AT&T Massachusetts II Reply 24, WorldCom Massachusetts II Reply at 12-13; Covad Massachusetts II Reply at 5-6

(ii) Discussion

177. Verizon demonstrates that it makes it possible for competing carriers to provide voice and data service over a single loop – *i.e.*, to engage in "line splitting."[560] Specifically, Verizon demonstrates that it has concrete and specific legal obligation to provide line splitting through rates, terms and conditions in interconnection agreements. As a result, a competing carrier may, for instance, provide voice service using UNE-P and, either alone or in conjunction with another carrier, provide xDSL service on that same line.

178. Our recent *Line Sharing Reconsideration Order* is clear: Verizon must permit competing LECs to offer both voice and data services over a single unbundled loop in a line splitting configuration.[561] The Commission also stated that incumbents must make necessary network modifications including access to OSS necessary for the "pre-ordering, ordering, provisioning, maintenance and repair and billing for loops used in line splitting arrangements."[562] As carriers identify operational issues associated with line splitting, the Commission recognized that state collaboratives and change management processes could be used by "incumbent LECs and competing carriers to work together to develop processes and systems to support competing carrier ordering and provisioning of unbundled loops and switching necessary for line splitting."[563]

179. We disagree with WorldCom's contention that Verizon's line-splitting interconnection agreement language limits line splitting to carriers who are collocated in Verizon central offices or that Verizon is taking the position that the UNE-P providers may not line split unless they are collocated.[564] Verizon's contract language, which includes a reference to "collocator to collocator" connections, does not require UNE-P providers to be collocated in Verizon central offices to offer line split services.[565] Rather, UNE-P providers need not obtain collocation in Verizon central offices to offer the voice component of line-split services.

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560 *Line Sharing Reconsideration Order* at para. 14-25, *SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C F.R § 51 703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers "to provide any telecommunications service that can be offered by means of that network element")

561 *Line Sharing Reconsideration Order* at para 18

562 *Id* at paras 18-20

563 *Id* at para 21

564 *See* WorldCom Massachusetts II Reply at 13

565 *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No 01-9 (filed March 23, 2001) (clarifying that voice providers in line splitting arrangements are not required to be collocated) We note that where a competitive LEC purchases an unbundled xDSL-capable loop terminated to its collocation arrangement to provide data service, it may partner with another competitive LEC to provide voice service In this situation, the data provider may require a connection to the voice provider's collocation arrangement

180. Verizon's interconnection agreement amendment is also consistent with our *Line Sharing Reconsideration Order*, which requires that incumbent LECs minimize service disruptions to existing voice customers undergoing a transition to line-splitting.[566] For example, where competitive LECs provide data service to existing end user customers and Verizon provides voice service to that customer there is no need to "rearrange" network facilities to provide line-split services.[567] Because no central office wiring changes are necessary in such a conversion from line sharing to line splitting, Verizon is required under our *Line Sharing Reconsideration Order* to develop a streamlined ordering processes for formerly line sharing competitive LECs to enable migrations between line sharing and line splitting that avoid voice and data service disruption and make use of the existing xDSL-capable loop.[568] Such a transition from line sharing to line splitting should occur subject only to charges consistent with the Commission's cost methodology as articulated in the *Local Competition First Report and Order*.[569]

181. We disagree with WorldCom's claim that Verizon's OSS does not comply with our *Line Sharing Reconsideration Order* in other respects.[570] The *Line Sharing Reconsideration Order* does not require Verizon to have implemented an electronic OSS functionality to permit line splitting. Rather, the Commission's *Line Sharing Reconsideration Order* recognizes that a state-sponsored xDSL collaboratives is the appropriate place for Verizon to evaluate how best to

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566 Verizon's line splitting amendment refers to "existing supporting OSS to order and combine" unbundled network elements necessary for line-split services. *Line Sharing Reconsideration Order* at para 22 WorldCom likewise asserts that Verizon's contract language suggests that it intends to charge a series of non-recurring charges associated with each unbundled network element to its line-splitting customers that it does not charge to its UNE-P customers *See* WorldCom Massachusetts II Reply at 13

567 In the *Line Sharing Reconsideration Order*, the Commission held that "no central office wiring changes are necessary in a conversion from line sharing to line splitting." *Line Sharing Reconsideration Order* at para 22 Verizon suggests that when competitive LEC serve customers with existing voice service, they may order new unbundled xDSL-capable loops and UNE-P arrangements and then issue a disconnect of the existing voice service to provide line split services *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 157. Disconnecting a customer's currently-established voice service to enable the transition from line sharing to line splitting would require some disruption of dial tone and may require a change in the voice customers telephone number, a result that is inconsistent with our *Line Sharing Reconsideration Order* *See Line Sharing Reconsideration Order* at para. 22.

568 *Line Sharing Reconsideration Order* at para 22

569 *See Local Competition First Report and Order*, 11 FCC Rcd at 15814-84, paras. 625-771 For example, we would expect Verizon to demonstrate why non-recurring charges in addition to those assessed when a competitive LEC orders a UNE-P arrangement are necessary We cannot agree with Verizon when it states that "if Covad wants to engage in a line splitting arrangement with a voice [competing carrier], it may do so by working with the voice [competing carrier] to order the individual network elements" if such a process would impose unnecessary charges that are not cost-based or would otherwise require disruption of an end user's voice service in the context of a migration from line sharing to line splitting. Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at para 159

570 WorldCom Massachusetts II Comments at 27.

develop this functionality.[571] For example, Verizon has represented that it is actively working on developing the OSS upgrades necessary to provide for electronic ordering of line-split services in the context of the New York Commission's xDSL collaborative.[572] We recognize that Verizon has not, to date, implemented the OSS upgrades necessary to electronically process line-splitting orders in a manner that is minimally disruptive to existing voice customers; but that such functionality may require significant software upgrades and testing. It is undisputed that the parties in the New York DSL collaborative commenced discussion of line splitting over a year ago; that in April 2000 Verizon formally posed numerous questions to competitors concerning their business rules for line splitting; and that in August 2000, competitive LECs submitted their initial detailed business rules to Verizon.[573] Thus it appears that Verizon has the necessary information to implement the necessary OSS upgrades. Verizon has been able to provide its customers line-shared DSL service for approximately two years. Our *Line Sharing Reconsideration Order* is fulfilled by Verizon's adoption of an implementation schedule for line splitting as directed by the New York Commission that will afford competitors the same opportunities.

182. We note that in response to WorldCom's concerns, Verizon has agreed upon an implementation schedule to offer line splitting-specific OSS capabilities under the supervision of the New York Commission.[574] In June of this year we expect that Verizon will conduct a preliminary OSS implementation in New York using new OSS functionality to add data service to an existing UNE-P customer. In October, Verizon has committed to implement, in the Verizon East territory including Massachusetts, the new OSS capability necessary to support migrations from line sharing to line splitting arrangements consistent with the business processes defined in the New York DSL collaborative.[575] Consistent with their plans and with the guidance of the New York DSL collaborative, Verizon plans to offer OSS capability necessary to support UNE-P migrations to line splitting by October 2001.

V. OTHER CHECKLIST ITEMS

A. Checklist Item 1 – Interconnection

183. We conclude, as described below, that Verizon demonstrates that it provides equal-in-quality interconnection on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of sections 251(c)(2) and as specified in

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571 *Line Sharing Reconsideration Order* at para 22 n 41 ("We also encourage participants in state collaboratives and change management processes to develop specific ordering procedures associated with a variety" of line splitting scenarios.)

572 Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 157

573 *See* New York PSC, Order Granting Clarification, Granting Reconsideration in Part and Denying Reconsideration in Part and Adopting Schedule, Case 00-C-0127 (Issued and Effective January 29, 2001)

574 *See* Verizon Massachusetts II Reply at 30

575 *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl at paras 157.