BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

July 1, 2005

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

JOINT CLECS' RESPONSE TO BELLSOUTH'S MOTIONS FOR SUMMARY JUDGMENT OR DECLARATORY RULING

Competitive Carriers of the South, Inc. ("CompSouth"), on behalf of it membership,[1] the Southeastern Competitive Carriers' Association ("SECCA"), and XO Communications Services, Inc. ("Joint CLECs") jointly file the following Response to "BellSouth Telecommunications, Inc.'s Motion for Summary Judgment, Or In The Alternative, Motion for Declaratory Ruling" (hereinafter, the "BellSouth Motion").

INTRODUCTION

In this proceeding, the Authority will consider a number of major issues that will directly impact the ability of CLECs to provide competitive services to residential and business customers. This proceeding ultimately will result in the approval of interconnection agreement ("ICA") contract language governing BellSouth's provision of loops, transport, switching and other unbundled network elements that are the fundamental building blocks of CLEC services. The Authority's decisions will resolve disputes between BellSouth and CLECs regarding the

[1] CompSouth's members include the following companies: ACCESS Integrated Networks, Inc., Access Point Inc , AT&T, Birch Telecom, Cinergy Communications Company, DIECA Communications, Inc., d/b/a Covad Communications Company, IDS Telcom, LLC, InLine, ITC^DeltaCom, KMC Telecom, LecStar Telecom, Inc., MCI, Momentum Telecom, Inc., Network Telephone Corp., Nuvox Communications, Inc, Supra Telecom, Talk America, Trinsic Communications, Inc., and Xspedius Communications, LLC., Dialog Telecommunications, and Navigator Telecommunications,LLC.

implementation of two massive Federal Communications Commission ("FCC") orders, the 2003 *Triennial Review Order*[2] and the *Triennial Review Remand Order*[3] issued in February 2005.

For the most part, the parties have agreed to how these generic *TRO/TRRO* dockets should proceed. The parties have worked together on and filed Issues Lists defining the disputed issues, and have agreed to a schedule for pre-filed testimony, hearings, and briefs. In addition, the Joint CLECs continue to negotiate with BellSouth to resolve ICA contract language disputes on *TRO/TRRO* issues.[4] It is the ICA contract language that ultimately is at issue here, and the Joint CLECs believe the Authority will find that it is the resolution of specific disputes between the parties on that contract language that will drive this case much more than broad policy determinations. The actual contract language is where the "rubber meets the road" on the details of *TRO/TRRO* implementation.

In its Motion, BellSouth explicitly states that it "is not asking the Authority to adopt specific contractual language."[5] BellSouth urges that the Authority rule on "the legal question underlying" the disputed issue first, "after which the parties can implement the Authority's

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[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the 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 Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("TRO"), corrected by errata filing, 18 FCC Rcd 19020 (2003) ("TRO Errata").

[3] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("TRRO").

[4] In some instances, Joint CLECs have had difficulty getting BellSouth to meaningfully negotiate contract amendments incorporating provisions complying with the *TRO* and *TRRO*. In general, BellSouth has been either unwilling to negotiate or slow to move on implementing the *TRO* provisions on commingling, EELs, and routine network modifications that are critical to CLECs. The history of the parties' negotiations are not the subject of this Response and Cross-Motion and any further discussion of the negotiation process will be reserved for other pleadings or other forums.

[5] BellSouth Motion at 2

decision."[6] BellSouth would have the Authority rule on the complex legal and policy issues raised by the *TRO/TRRO* in a vacuum – without consideration of the actual contractual disputes that give those issues substance in the real world. After such a ruling, and in the midst of defending possible interlocutory appeals of its decision, the Authority would still be required to resolve disputes over the specific contract language implementing the Authority's decision on the overarching legal or policy issue. The "clear statement of the law"[7] BellSouth claims that it seeks by filing its Motion will not necessarily – or even probably – resolve the particular contract language disputes that are keeping the parties from resolving *TRO/TRRO* issues on a negotiated basis.

Therefore, BellSouth's Motion essentially is an invitation to the Authority to do its work twice.[8] As with most disputes, the Authority's decisions will be best informed if the Authority and its Staff have the opportunity to review the testimony of witnesses, consider responses to cross-examination, and ask questions of witnesses and counsel at hearing. Moreover, meaningful decisions on exactly what contract language should be accepted must await the development of such contract language through negotiations.

BellSouth's Motion seeks to short-circuit that process by demanding a ruling on complex issues regarding the interpretation of the *TRO/TRRO*. These issues will, as is inevitable in the telecommunications world, involve mixed questions of policy, law, and fact. At a minimum, the Authority will face the prospect of addressing most issues at a "high level" in the context of the BellSouth Motion, then again reviewing the issue on a more detailed level in the contract language "implementation" phase of the proceeding.

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6 *Id.*

7 *Id*

8 Or perhaps even more than twice, given the possibility of appeals of any Order issued on BellSouth's Motions.

The Joint CLECs suggest that the most efficient way to proceed is for the Authority to refrain from ruling on BellSouth's Motion until after a full legal and factual record has been developed. The parties have already filed issues lists, and have agreed to a procedural schedule for putting on their cases at hearing and in post-hearing briefs. This approach will result in final resolution of all disputed issues that is fully informed and is associated with actual working contract language the parties can implement in their ICAs. The Authority should simply reject BellSouth's Motion and proceed with the other important matters before it in this docket.

DISCUSSION

The Joint CLECs do not agree with the categorization of issues BellSouth uses to organize its Motion. BellSouth declares certain issues should be resolved "in their entirety, as a matter of law," while it deems other issues as including "both questions of law and questions of fact" that should be subject to "partial summary judgment."[9] As discussed above, the Joint CLECs view the mixture of policy, law, and facts inherent in the parties' efforts to implement new rules in ICAs much differently than does BellSouth. Nevertheless, for simplicity of following the arguments, the Joint CLECs have organized their Response to track the structure of the BellSouth Motion. The Joint CLECs note that they have not responded to BellSouth's Motion on Issues numbered 7 ("High Capacity Loops and Transport – Changed Circumstances") and 21 ("Packet Switching"). There is no live dispute between the parties that requires resolution on these issues (at least none the Joint CLECs are aware of) and the Joint CLECs agree to removing Issues 7 and 21 from the Issues List prior to the filing of testimony.

I. ISSUES THAT BELLSOUTH ERRONEOUSLY CLAIMS SHOULD BE RESOLVED, IN THEIR ENTIRETY, AS A MATTER OF LAW

[9] BellSouth Motion, at 8, 47.

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

The first issue BellSouth identifies for summary judgment provides the best example of the problems associated with ruling on the issues in this docket prior to hearing. BellSouth asks the Authority to decide "*as a matter of law*" that an "HDSL-capable copper loop" is the equivalent of a "DS1 loop." This is an issue where it certainly would be helpful for the Authority to receive sworn testimony from witnesses who have a working knowledge of what constitutes HDSL-capable copper loops and DS1 loops.

In the case of this particular dispute, it would be not only helpful, but completely necessary: the FCC did not conclusively hold that HDSL-capable copper loops are the same thing, for purposes of impairment analysis, as DS1 loops. The issue is important because it affects how BellSouth counts "business lines" for purposes of determining whether particular wire centers meet the standards for determining "non-impairment" under the *TRRO*. The term "business line" is defined by the FCC in the *TRRO*, and the definition does refer to "DS1 lines."[10] The definition *does not*, however, make any assertions about HDSL-capable copper loops. BellSouth cites to nothing in the *TRRO* – where the FCC established its "business line" definition for the first time – that supports its assertion that HDSL-capable copper loops should be counted the same way as DS1 lines under the "business line" definition. In fact, the FCC indicated otherwise in the *TRRO*. In *TRRO* paragraph 163, footnote 454 the FCC discussed alternatives that CLECs would have if DS1 loops were declassified in particular circumstances. The FCC stated that "2-wire or 4-wire High Bit Rate Digital Subscriber Line (HDSL) compatible loops" could serve CLECs' need *in the place of* DS1 UNE loops that were declassified as UNEs.

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[10] The definition is codified at 47 C.F.R. § 51.5. The last sentence of the "business line" definition states: "For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'"

It is inconceivable that the FCC would have both considered HDSL-capable loops to be "DS1 loops" for impaiment analysis purposes (and thus subject to declassification) *and simultaneously* considered them to be substitutes for the very same "DS1 loops."

All that BellSouth can point to in support of resolving this issue "in its entirety, as a matter of law," is a footnote in the *TRO* (as opposed to the *TRRO*) where the FCC noted that it would use the terms "T1" and "DS1" interchangeably in the text of the order.[11] The footnote observed that carriers sometimes provide DS1 level services using "two-wire or four-wire HDSL." The footnote did not opine that all copper loops that could be used to provide HDSL are the equivalent to a DS1 line. Moreover, this *TRO* footnote could not have made any assessment of how HDSL-capable loops would be counted under a "business line" definition the FCC did not formulate until the *TRRO* was issued in February 2005.

The ramifications of BellSouth's position are tremendous. If any "two-wire or four-wire" copper loop that is *capable* of supporting HDSL service is counted as a "business line," BellSouth will have converted nearly all its copper loop plant – much of which is used to provide residential service – into "DS1 lines" that can be counted as "business lines" for purposes of declassifying UNEs under § 251. Such an approach could result in counting thousands of residential lines in each wire center as DS1 lines. The FCC clearly did not anticipate that copper loops actually being used to provide single line residential service would be counted as twenty-four business lines each. This outcome would permit BellSouth to declassify UNEs in numerous circumstances never contemplated by the FCC in the *TRRO*.

BellSouth's position on this issue highlights the dangers that state commissions always face in making "legal determinations" without evidence related to the technical terms involved in

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the issue. The Authority should refrain from ruling on this issue until it can hear from witnesses who are qualified to describe the characteristics of HDSL-capable copper loops, DS1 lines, and how those terms relate to the technical definitions adopted by the FCC in the *TRRO*.

Issue 8(a): Section 271 and State Law: Does the Authority have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

The appropriate theory the Authority should use to resolve this issue is not "summary judgment" but rather "res judicata": the Authority has already ruled on the in the issue in the 2004 BellSouth/ITC^Deltacom arbitration, where it properly rejected BellSouth's theory that Section 271 checklist elements should be excluded from ICAs.[12] The Authority's ruled that it had statutory authority under §§ 252 and 271 to adopt "non-§ 251" rates, at least on an interim basis. As the Authority is aware, its vote to adopt a § 271 interim rate was significant enough to prompt BellSouth to file an "emergency" preemption petition at the FCC. The FCC has had the petition on its docket for 11 months, but has taken no action. Comments and reply comments in the BellSouth "emergency" docket were all due by August 16, 2004. Nothing the FCC has done on the BellSouth petition indicates the FCC is troubled by the Authority's assertion of authority to establish rates, terms and conditions for § 271 checklist items. The Authority should maintain the determination it has already made regarding inclusion of § 271 checklist elements in the parties' ICAs. The Authority's position is similar to that adopted by the Illinois Commerce Commission, and by pending decisions in arbitrations in Missouri and Oklahoma. Those decisions and others are discussed herein. Due to the obvious importance of this issue to CLECs operating in Tennessee, the Joint CLECs have set forth in detail the legal arguments supporting

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[12] Docket No. 03-00119, Petition for Arbitration of ITC^Deltacom, Inc. with BellSouth Telecommunications, Inc., Hearing Transcript (June 21, 2004).

their position that the Authority was and remains correct in its holding in the *ITC^Deltacom* arbitration.

The FCC ruled in the *TRO* that the BOCs' unbundling obligation under § 271 exists *independently* of the unbundling obligations the FCC establishes for all ILECs under § 251, a conclusion it reached because to find otherwise would mean that § 271 has no legal import whatsoever.[13] BellSouth wishes that an FCC decision to eliminate unbundling of a network element under § 251(c) would automatically translate into eliminating § 271 unbundling for that element, but that is not the law. The FCC's determination that § 271 establishes a separate unbundling obligation was affirmed by the D.C. Circuit in *USTA II.*[14] BellSouth petitioned the FCC to remove the § 271 unbundling requirement – through forbearance – with respect to all network elements that were "declassified" by the FCC, but the FCC did not grant BellSouth's petition. Thus, except for the four elements specified in the FCC's forbearance ruling,[15] all other unbundling requirements contained in § 271 remain in effect.

As discussed herein, the statutory interplay between § 252 and § 271 dictates that BellSouth incorporate the items in the § 271 "checklist" in ICAs approved by the Authority pursuant to § 252. ICAs constitute the agreements negotiated or arbitrated under § 252. Section 251 obligations must be reflected in ICAs, based on the cross-references to § 252 included in § 251. Similarly, § 271 checklist obligations must be reflected in ICAs based on cross-references to § 252 contained in § 271. It is immaterial that § 252 does not refer to § 271; one cannot ignore the explicit cross-reference that § 271 itself makes to § 252. A complete

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13 *TRO* ¶¶ 649-667.

14 *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*")

15 *In the Matter of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U S C § 160(c)*, WC Docket 01-338 et al., Memorandum Opinion and Order at ¶ 7 (rel. Oct. 27, 2004) ("Broadband Forbearance Order") (footnotes omitted).

examination of the relevant court cases and FCC orders leads ultimately back to the text of the statute itself, which is the inescapable source of the obligation to include § 271 obligations in ICAs approved under § 252.

The source of the Authority's jurisdiction to act under § 252 to approve terms and conditions for checklist items comes directly from the text of § 271, just as the authority to approve other terms and conditions (*e.g.*, UNEs, interconnection, reciprocal compensation) comes from § 251. The language of § 271 expressly states that BOCs must have checklist items reflected in agreements approved under § 252. The Act points to the § 252 state commission arbitration and approval process in *both* §§ 251 and 271. The Authority is not being asked and does not have to assert authority under § 271 in order to fulfill its mandate to arbitrate and resolve disputed issues in § 252 ICAs.

BellSouth has raised several objections to including § 271 checklist items in interconnection agreements. BellSouth asserts that it is not and cannot be required to include the terms and conditions for checklist items in an interconnection agreement that is approved by state commissions under § 252. Second, BellSouth contends that an Authority decision to include § 271 unbundling obligations in an interconnection agreement that is arbitrated under § 251 constitutes "enforcement" of BellSouth's § 271 obligations and the power to enforce lies exclusively with the FCC. Third, BellSouth argues that putting terms and conditions for the § 271 network items into an interconnection agreement is contrary to the FCC's decision that CLECs are not impaired without access to those elements under § 251. Last, BellSouth contends that requiring it to provide unbundled local switching in an interconnection agreement will force BellSouth to continue providing UNE-P, contrary to the FCC's decision in the *TRRO*. Each of these arguments is false, and, as explained below, each argument would have the Authority

improperly ignore Congress' requirement that § 271 checklist items be included in interconnection agreements.

A. Issue 8(A): The Federal Act Mandates That State Commission Compel The Inclusion Of Section 271 Network Elements In A Section 252 Interconnection Agreement

1. Section 271 explicitly states that the checklist items the BOCs are required to unbundle are to be part of interconnection agreements.

Section 271 of the Act requires the BOCs to provide the following as part of the competitive checklist:

> *Local loop* transmission from the central office to the customer's premises, unbundled from local switching or other services.
>
> *Local transport* from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
>
> *Local switching* unbundled from transport, local loop transmission, or other services.[16]

Further, the FCC has found that the BOCs' obligation to make § 271 checklist items available to CLECs is *independent* of the obligation to provide access to network elements under § 251. As the FCC held in ¶ 659 of the *TRO*:

> [I]f, 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.

The D.C. Circuit in *USTA II* considered and affirmed the FCC's treatment of these issues in the *TRO*.[17] Thus BellSouth must make loops, transport and switching available as checklist

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16 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) (emphasis supplied).

17 *USTA II*, 359 F.3rd at 561.

items even after the FCC finds those network elements are no longer available under the standards established in § 251.

BellSouth contends that it is not required to offer these checklist items as part of interconnection agreements approved under § 252 but, instead, can offer them exclusively pursuant to a tariff or under a commercial agreement or some other means. However, that position is contrary to the language of the FTA itself and to judicial interpretation of that language.

Congress did not grant the BOCs sole control over the terms and conditions that apply to the § 271 checklist items. Rather, Congress required that the checklist items be incorporated into the interconnection agreements that result from the § 252 negotiation and arbitration process. Section 271(c)(2)(A) of the Act clearly links the duty of a Bell Operating Company ("BOC") to satisfy its obligations under the competitive checklist to the BOC providing that access through an interconnection agreement (or a statement of generally available terms ("SGAT")) approved by a state commission pursuant to § 252, stating:

> (A) AGREEMENT REQUIRED - A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—
>
> (i) (I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [Interconnection Agreement], or
>
> (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and
>
> (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the competitive checklist].[18]

As the above-quoted statutory language makes clear, the specific interconnection obligations of § 271's competitive checklist (item ii above) must be provided pursuant to the "agreements"

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[18] 47 U.S.C. § 271(c)(2)(A).

described in § 271(c)(1)(A) or the SGATs described in § 271(c)(1)(B). By directly referencing § 271(c)(1)(A) and (B), the Act ties compliance with the competitive checklist to the review process described in § 252. As § 271(c)(1) states:

> (1) AGREEMENT OR STATEMENT.—A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
>
> > (A) PRESENCE OF A FACILITIES-BASED COMPETITOR.—A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.[19]

Thus, the terms and conditions for the checklist items in § 271 must be in an approved interconnection agreement. The inclusion of the word "approved" in the statutory language means that those interconnection agreements are subject to the § 252 state commission arbitration process if the parties do not reach agreement, as well as subject to state commission review and approval if negotiated by the parties. Under § 252, the state commission's authority to approve is part and parcel of its authority to arbitrate. It is through § 252 that the new unbundling rules described in the *TRRO* are to be implemented;[20] this is the procedural vehicle that must be used to establish the contract terms, conditions and prices for the § 271 checklist. Section 271 references back to the § 252 state commission review and approval process, and it invokes that process when it describes how the competitive checklist is to be implemented.

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19 47 U.S.C. § 271(c)(1)(emphasis added).

20 *See TRRO* ¶ 233.

BellSouth's arguments seek to read out of § 271 the explicit references back to § 252. The statutory language, however, contemplates a linkage between agreements over which state commissions have authority under § 252 and the terms and conditions for competitive checklist items in § 271. This linkage not only comports with the way the federal Act is structured, but is also consistent with the way the FCC has treated § 271 checklist items. In the *TRO*, the FCC held that § 271 checklist network elements that BOCs no longer are required to provide under § 251 do not have to be priced at TELRIC rates. The FCC did not, however, provide for a flash cut deregulation of the prices of § 271 checklist items. Rather, the FCC found that the § 271 checklist items are to be priced at "just and reasonable" rates.[21] This determination in the *TRO* is different from the FCC's earlier statement in the 1999 *UNE Remand Order*[22] that rates for § 271 checklist items may be at "market rates."[23] TELRIC rates for § 251 network elements have been determined in § 252 proceedings (based on standards established by the FCC) since the Act became law in 1996, and those rates have been incorporated in state commission-approved ICAs. Congress also required § 271 checklist items to be incorporated in § 252 agreements. Like the rates, terms, and conditions of § 251 UNEs, the rates, terms and conditions of § 271 checklist items should be established using the state commission § 252 negotiation and arbitration process.

The statutory requirement that § 271 checklist items be included in § 252 interconnection agreements was recognized in the August 2004 federal district court decision in *Qwest*

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[21] *TRO* ¶ 663: "Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has been historically applied under most federal and state statutes, including (for interstate services) the Communications Act." The "just and reasonable" rate standard set forth in the *TRO* was upheld by the *USTA II* court and provides the governing standard for establishing rates for § 271 checklist items.

[22] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*).

[23] *Id* at 5906 ¶ 473.

Corporation v. Minnesota Public Utilities Commission.[24] In that case, Qwest claimed it should not be penalized by the Minnesota Commission for failing to file several ICAs because it did not know the ICAs were subject to FTA § 252 filing requirements. The federal court found Qwest's argument "unavailing," and held that despite the absence of a specific statutory definition of the term "interconnection agreement," the language of the FTA itself "outlined the scope of § 252 and provided notice" of what ICAs must be filed. As an example of the "other sources" in the FTA that outlined the scope of § 252 obligations, the court referenced § 271:

> [Section] 271 includes a comprehensive checklist of items that must be included in ICAs before an ILEC may receive authority to provide regional long distance service. *See* 47 U.S.C. § 271(c)(2). This list reveals that any agreement containing a checklist term must be filed as an ICA under the Act. *Id.* While the checklist does not include every possible term that may arise in an agreement, its exhaustive recitation shows the Congress adopted a broad view of ICAs.[25]

Without question, the federal court in *Qwest* read the federal Act to require that § 271 checklist items must be included in § 252 agreements. The *Qwest* court's decision remains effective, and other federal court decisions touching on § 271 do not question its interpretation of the need for § 271 checklist items to be incorporated in § 252 ICAs.

Recent federal court decisions regarding state commission interpretations of the "self-effectuating" nature of the *TRRO* do not analyze or sometimes even address the question of whether § 271 checklist items must be incorporated in ICAs. A close reading of such decisions shows they shed little light on the issues here. For example, the decisions issued by federal courts in Mississippi and Kentucky arise from disputes between BellSouth and CLECs over whether the *TRRO* became effective on March 11, 2005, without regard to contractual "change

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24 2004 WL 1920970 (D. Minn. 2004).

25 *Id* at 6.

of law" provisions in ICAs.[26] Each of these courts concluded that language in the *TRRO* shows that the FCC intended for its Order to be self-effectuating for new UNE orders. The courts thus granted BellSouth injunctions against state commission decisions that had required the parties to work through contractual change of law provisions before amending ICAs to implement the *TRRO*. As the Kentucky federal court ruling on the BellSouth issue recognized, two other federal courts – in Michigan and Illinois – came to contrary conclusions regarding the relationship between contractual "change of law" provisions and *TRRO* "self-effectuation."[27]

Neither of these decisions, however, thoroughly analyze the question of whether § 271 checklist items must be included in § 252 agreements. They only make passing reference to CLEC arguments referencing BellSouth's independent obligation to provide § 271 checklist items. The Kentucky court stated that "enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first" and that "this Court is not the proper forum to address this issue in the first instance."[28] The court obviously saw the CLEC request before it as a question of *enforcing* § 271 rather than determining the scope of § 252 ICA obligations. In fact, the question of incorporation of specific § 271 checklist obligations into ICAs was not before the Mississippi or Kentucky federal courts; rather, the issue before these courts was simply whether § 271 required continued provisioning of certain UNEs. Unlike the *Qwest* court, the Kentucky and Mississippi courts were not focused on the scope of what must be included in an ICA, but rather on particular CLEC arguments regarding "enforcement" of § 271 obligations

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[26] *BellSouth Telecomms, Inc. v Cinergy Communications Co.*, No. 3:05-CV-16-JMH (E.D. Ky. April 22 2005) ("Kentucky Order"); *BellSouth Telecomms, Inc v Mississippi Public Service Comm'n*, No. 3:05-CV-173 (S.D. Miss. April 13, 2005) ("Mississippi Order").

[27] See *MCImetro Access Transmission Services, LLC v. Michigan Bell Co.*, No 05-CV-709885 (E.D. Mich. March 11, 2005) and *Illinois Bell Telephone Co v. Hurley*, No. 05-C-1149 (E.D. Ill. March 29, 2005).

[28] Kentucky Order, at 12.

by the federal court itself.[29] As discussed further herein, these decisions are not on point and provide little guidance on the issue presented in this arbitration.

Most state commissions have begun to consider the necessity of including § 271 checklist items into § 252 agreements only recently, primarily because it is only since the *TRO* (and more pointedly, the *TRRO*) that there has been a prospect of the § 271 checklist items being "declassified" as § 251 UNEs. Most states have not ruled on the issue definitively yet, and the Joint CLECs acknowledge that some state commissions have declined to exert authority to include § 271 checklist items in § 252 arbitrated agreements.[30] On the other hand, the Authority approved interim rates for network elements being offered under § 271 rather than § 251, and other states have affirmed the need to include § 271 checklist items in ICAs.

On June 2, 2005, the Illinois Commerce Commission ("ICC") issued an Order in that commission's proceeding regarding various *TRRO*-related issues.[31] The ICC concluded that SBC was incorrect to argue that CLECs are attempting to "enforce" § 271 rights when they seek to validate the competitive checklist through § 252 ICAs. Rather, the ICC found, CLECs are properly asking the state commission to enforce rights under ICAs – invoking authority the state commissions undoubtedly retain.[32] The ICC reviewed various Illinois SBC ICAs, finding that some existing agreements did include specific reference to § 271 checklist item rights, while others did not. The ICC concluded that, even where § 271 checklist items are not included in

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[29] The same can be said of the Illinois and Michigan courts which disagreed with the BellSouth position on *TRRO* "self-effectuation" that was similar to the position advanced by BellSouth. The specific question of whether § 271 obligations are to be included in ICAs simply was not the subject of the recent *TRRO*-related litigation.

[30] BellSouth's Motion includes reference to such state commission decisions. State commissions in Kansas and Texas have also declined to include § 271 checklist items in § 252 ICAs.

[31] *Cbeyond Communications, LLP, et al. v SBC Illinois*, Illinois Commerce Commission, Docket No. 05-0154, Order (June 2, 2005) ("ICC Decision").

[32] ICC Decision at 24.

current agreements, CLECs have the right to "request negotiations to incorporate 271 rights in their ICAs."[33] Moreover, the ICC concluded that since existing ICAs include reference only to TELRIC rates for § 251 UNEs, the ICAs "will need to be amended – to the extent SBC has been relieved of the Section 251 pricing obligation – to provide for Section 271 pricing."[34] The Illinois Commission clearly saw the need to incorporate terms related to § 271 obligations into § 252 ICAs – just as the Act itself contemplates.

In April 2005, the Arbitrator's Report in an industry-wide Oklahoma arbitration also addressed § 271 checklist items. The Arbitrator recommended that § 271 checklist items be included in § 252 interconnection agreements. The Arbitrator also recommended that § 271 checklist items be subject to commingling requirements under the *TRO*.[35] The Oklahoma Arbitrator's report has not yet been approved by the Oklahoma Corporation Commission; a decision on the parties' exceptions to the Arbitrator's Report is expected in July 2005. On June 21, 2005, the Arbitrator in a Missouri arbitration also held that Section 271 checklist items must be included in ICAs.[36] A final decision on the Missouri ruling is expected later in July 2005.

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33 *Id* at 27.

34 *Id* at 28.

35 Oklahoma Corporation Commission, Cause No. PUD 200400497, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma Under Section 252(b)(1) of the Telecommunications Act of 1996*, Written Report of the Arbitrator, at 199 (April 7, 2005).

36 Missouri Public Service Commission, Case No TO-2005-0336, *Southwestern Bell Telephone, L P d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for A Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Final Arbitrator's Report, Section III – pp. 5-6 (June 21, 2005). The Missouri Arbitrator's holding was straightforward: ICAs "shall include both § 251(c)(3) and § 271 network elements. To the extent SBC Missouri remains obligated to offer pursuant to § 251(c)(3), then prices must be TELRIC. To the exent it must offer pursuant to § 271, then prices must be just and reasonable." *Id.* at 6.

2. The FCC's unbundling decisions in the *TRO* and the *TRRO* eliminate BellSouth's unbundling obligations only under § 251, not under § 271.

The unbundling of network elements under § 251 is not the same as the unbundling required under § 271. Impairment is a legal concept that applies solely to § 251. Where CLECs are impaired, § 251 requires TELRIC pricing for network elements that all ILECs must make available. What is at issue here are local loops, transport, and switching, which the BOCs (as opposed to all ILECs) must unbundle under § 271.

BellSouth would like to persuade this Authority that if the FCC eliminates a network element from unbundling under § 251, the FCC also has eliminated it from § 271. That simply is not the law. Perhaps BellSouth hopes that because the three types of § 271 checklist items in issue—local switching, local loops and local transport—are also types of elements that have been subject to unbundling under § 251, the Authority will assume § 251 duplicates or trumps the requirements of § 271. But that is not the law either. If it were, the FCC would not have conducted the separate analysis contained in the *Broadband Forbearance Order.*

BellSouth sought from the FCC precisely the relief it is attempting to obtain here, when it petitioned the FCC to forbear from requiring it to unbundle under § 271 any network element no longer required to be unbundled under § 251. The FCC did not grant that request and unless and until it does, BellSouth's § 271 obligations remain.

The BOCs' obligation to comply with § 271's requirements exists irrespective of the FCC's determinations regarding "impairment" and the obligation § 251 imposes on all ILECs to provide unbundled elements at TELRIC rates where impairment is found. The FCC recognized this and stated very clearly in the *TRO* that the two sections of the Act impose distinct obligations for local switching, loops, transport, databases and signaling. The FCC subsequently summarized its decision in the *TRO* as follows when ruling on BOCs' petitions for forbearance:

> Specifically, the Commission considered [in the *TRO*] the relationship between checklist item two (which references section 251) and checklist items four through six and ten (which do not). The Commission concluded that checklist items four through six and ten constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements that does not necessarily hinge on whether those elements are included among those subject to section 251(c)(3)'s unbundling requirements. Accordingly, the Commission stated that even if it concluded that requesting telecommunications carriers are not "impaired" without access to one of those elements under section 251, section 271 would still require the BOC to provide access.[37]

The FCC's conclusions regarding the separate and additional obligations of § 271 were affirmed by the D.C. Circuit in *USTA II*.[38]

Unless and until the FCC exercises the authority granted to it to "forbear" from requiring the BOCs to meet § 271 obligations with respect to local loops, local switching and local transport, BellSouth must continue to provide them, albeit at different rates. The question of forbearance was put before the FCC by Verizon at the same time that the triennial review process was underway. In a separate petition filed with the FCC following issuance of the *TRO*, BellSouth asked the FCC to forbear from requiring it to provide on an unbundled basis under § 271 *all* network elements no longer required to be unbundled under § 251. The FCC did not grant BellSouth's request when it issued its *Broadband Forbearance Order*, nor at any other time. What the FCC decided in that Order is that it would "forbear" from requiring the BOCs to unbundle FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching – all of which are broadband elements. The FCC stated that it was exercising its forbearance authority with respect to these four items, because it determined that CLECs were not impaired without access to them under § 251 and because doing so furthered broadband deployment and the statutory objectives of § 706 of the Act.

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37 *Broadband Forbearance Order* at ¶ 7.

38 *USTA II* at 588-590.

In the *Broadband Forbearance Order* the FCC described the findings it is required to make under § 10 of the Communications Act in order to exercise the forbearance authority granted to it by Congress. In particular, the FCC addressed the requirement that under § 10(d) of the Act it must first find, as a threshold matter, that the checklist items of § 271 have been "fully implemented." As a review of the *Broadband Forbearance Order* itself makes plain, that finding alone does not justify forbearance, for the FCC in that same Order reiterated the distinction it acknowledged in the *TRO* between § 251 and § 271 as separate bases for unbundling, and observed that that distinction had been affirmed by the D.C. Circuit in *USTA II*.[39]

It is important to note that only the FCC has forbearance authority. The state commissions are bound to follow the Act's requirements and the FCC's rulings that require § 271 network items to be made available, and to have their terms and conditions established through the § 252 process. Contrary to BellSouth's assertions, the law requires that § 271 network items be provided and that the terms and conditions under which they will be made available must be contained in interconnection agreements.

In assessing the implications of the FCC's reasoning in the *Broadband Forbearance Order*, it is critical to recall that the FCC had before it the BellSouth petition to forbear from § 271 unbundling of loops, transport, and switching. The FCC could have extended its reasoning to those network elements if it believed the record before it supported such a decision, but it did not. Nor has the FCC picked up the forbearance issue since its delisting of § 251 switching and some loop and transport UNEs in the *TRRO*.

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[39] *Broadband Forbearance Order* at ¶¶ 7-9.

The FCC will likely speak again about the rates, terms, and conditions applicable to § 271 checklist items. Until it does so, however, the Authority and the parties must work within the statutory framework – a framework that requires § 271 network items be included in § 252 ICAs.

3. An decision by the Authority to require BellSouth to include § 271 checklist items in the ICA is not a decision ordering BellSouth to "recreate" UNE-P.

BellSouth also argues that including § 271 network items in the parties' interconnection agreement illegally imposes a requirement that BellSouth must continue to provide UNE-P. Put simply, that is not true. UNE-P is a combination of § 251 network elements priced at TELRIC. It is a combination of UNEs that was eliminated when the FCC in the *TRRO* eliminated the obligation for ILECs to provide mass market unbundled switching (and therefore switch ports) under § 251.

The Joint CLECs agree that UNE-P, as it existed prior to the *TRRO*, will no longer be available after the transition contemplated in the *TRRO* is complete in 2006. At the same time, a CLEC's ability to use BellSouth switching with a BellSouth loop not only continues to exist, but is recognized by BellSouth as being perfectly legitimate in BellSouth's own offerings of so-called "commercial agreements." Clearly, there is nothing nefarious about putting local switching together with a loop. What BellSouth objects to – and has always objected to – is TELRIC pricing for the loop-switch combination. The argument that the CLECs' position is just a way to re-create UNE-P is nothing more than a rhetorical flourish backed by no substantive support. The Joint CLECs understand that TELRIC-priced UNE-P was "declassified" under § 251. They also recognize that it is up to this Authority ultimately to determine what the "just and reasonable" rates for § 271 checklist items will be.

B. Issue 8(A): There is a legal basis for a state commission to force BellSouth to Include Delisted Network Elements in a Section 252 Interconnection Agreement Based on State Law Authority.

BellSouth argues, in effect, that the FCC has preemptive jurisdiction over all § 271 matters, including rates for § 271 network elements. While the Joint CLECs agree that the FCC has jurisdiction over § 271 matters, there is a strong presumption against federal preemption on a matter such as this. *Rice v Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Federal law preempts state causes of action in three circumstances. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). First, federal preemption exists when the law contains explicit statutory language manifesting congressional intent to preempt state law. *Id.* Second, state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively. *Id.* at 79. Such an intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. Finally, state law is preempted to the extent that it actually conflicts with federal law. *English v. General Electric Co.*, 496 U.S. at 79. Federal regulations have no less preemptive effect than federal statutes, *Fidelity Federal Savings and Loan Ass'n v. Cuesta*, 458 U.S. 141, 153 (1982), and can therefore be analyzed in the same manner.

In this case, neither the federal Act nor the FCC's regulations explicitly state that they are preempting state law. When the FCC actually intends to exercise its preemptive authority, it knows how to make that intent clear. *See, e g , City of New York v. FCC*, 486 U.S. 57, 65 (1988) ("In this case, there is no room for doubting that the [FCC] intended to pre-empt state technical

standards governing the quality of cable television signals. ... since the [FCC] has explicitly stated its intent to exercise exclusive authority in this area and to pre-empt state and local regulation....").

Under the second criteria, preemption cannot simply be implied here because Congress clearly did not intend to occupy the entire field of telecommunications regulation. The same subsection of the Act that provides for the unbundling "impairment" standard, FTA § 251(d), also includes the following subsection 251(d)(3) entitled "Preservation of State Access Regulations":

> In prescribing and enforcing regulations to implement the requirements of this section [251], the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Not only did Congress not preempt state authority over access to unbundled network elements, it provided explicitly that enforcement of such state requirements may not be precluded by FCC action absent a direct and actual conflict.

In determining, for purposes of § 251(d)(3), whether state requirements are "consistent" with and do not "substantially prevent implementation" of federal requirements, consistency with the Act does not require conformity with the FCC's regulations. In *Iowa Utilities Board v. FCC*, the Eighth Circuit Court of Appeals held (in a portion of its opinion that was not appealed to the Supreme Court by the FCC and has not been questioned since it was issued):

> The FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this circumstance,

> subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.[40]

In addition to subsection 251(d)(3), three other subsections of the FTA also explicitly preserve state authority. Subsection 252(e)(3) provides:

> [N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Subsections (b) and (c) of FTA § 261 preserve state regulations existing at the time the FTA passed as well as future regulations consistent with the FTA:

> (b) EXISTING STATE REGULATIONS- Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.
>
> (c) ADDITIONAL STATE REQUIREMENTS- Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission 's regulations to implement this part.

In the *TRO*, the FCC recognized the importance of the FTA's numerous separate statutory provisions preserving state authority. For example, in *TRO* ¶ 192, the FCC ruled: "We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. *If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act*" (emphasis supplied).

Since Congress did not "preempt the field" regarding unbundling requirements, reliance on state law certainly is not preempted as a matter of law. Moreover, none of the pronouncements of the FCC in the *TRRO* or the *TRO* demonstrate the federal agency's intent to preempt state law, or its belief that this Authority's actions have violated federal law. While the

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[40] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997),

TRO contained what the D.C. Circuit dubbed the FCC's "general prediction" about when state agency actions regarding unbundling might be preempted, the *USTA II* court held that the "general prediction voiced in ¶ 195 does not constitute final agency action, as the [FCC] *has not taken any view on any attempted state unbundling order.*"[41] The court therefore found claims of preemption based on the *TRO* "unripe," and upheld the FCC's actions against such claims.[42] In the *TRRO*, the FCC addressed "those issues that were remanded to us" by *USTA II*. Because the court found no preemption had been attempted in the *TRO*, preemption was not one of the issues remanded to the FCC for consideration in the *TRRO*. A review of the text of the *TRRO* confirms the FCC did not address the issue: in the *TRRO*, "preempt" is not among the 61,891 words the FCC included in its Order, and "preemption" appears only in references that include citations to the FCC's *Virginia Arbitration* proceeding.

Hence, the only possible basis on which preemption could lie is if the state regulation or decision is inconsistent with federal law. The FCC recognized that such inconsistency was the only possible basis for preemption when it discussed the possible preemption of a state's determination of unbundling requirements in the *TRO*, but only on the basis that such unbundling might conflict with the FCC's pronouncements on unbundling under § 251 and hence might "substantially prevent" the implementation of the federal regulatory scheme. *TRO* ¶¶ 191-196.[43] There was no such express discussion on preemption in the *TRO* or in the *TRRO* concerning any preemption possibilities for § 271.

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41 *USTA II*, 359 F.3d at 594 (emphasis supplied).

42 *Id.*

43 Certain state parties appealed this portion of the *TRO* in the *USTA II* case. The D.C. Circuit, however, declined to rule on this particular preemption issue because it was not ripe. *USTA II*, 359 F.3d at 594.

In a June 2, 2005 decision, the Supreme Court of Maine upheld the Maine Public Utilities Commission's authority to invoke state law unbundling authority against claims by Verizon that the federal Act had preempted the state commission's ability to act. In *Verizon New England, Inc. v. Public Utilities Commission*,[44] Maine's Supreme Judicial Court reviewed the preemption landscape applicable to unbundling in light of the FCC's rulings in the *TRO* and *TRRO*, as well as the D.C. Circuit's *USTA II* decision. The Court held that the Maine Commission was not preempted from authorizing unbundling pursuant to state law, as long as the state law unbundling was not directly prohibited by federal law or FCC regulations.[45]

Neither Congress nor the FCC has explicitly or implicitly preempted states from including determinations on § 271 network elements in interconnection agreements arbitrated under § 252. Summary judgment in favor of BellSouth cannot stand on this basis.

Issue 8(b): Section 271 and State Law: If the answer to part (a) is affirmative in any respect, does the Authority have the authority to establish rates for such elements?

BellSouth argues that an Authority decision to include terms and conditions for § 271 network items in this ICA would conflict with the FCC's exclusive jurisdiction to enforce § 271 of the Act. BellSouth states that the FCC alone is authorized to grant or deny a BOC's petition to enter the long distance market and it alone can revoke such authority. BellSouth's entry into and its authority to remain in the long distance market in Tennessee, however, are only one aspect of § 271 – and that aspect of § 271 is not at issue here. The Joint CLECs do not contend that if the § 271 checklist items are not in the ICA that the Authority has the enforcement authority to revoke BellSouth's long distance entry or otherwise sanction BellSouth.

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[44] 2005 WL 1290642, __ A.2d __ (Maine Supreme Judicial Court, June 2, 2005) ("*Verizon New England*").

[45] *Verizon New England*, 2005 WL 1290642, at *7.

The FCC's enforcement authority is set out in § 271(d) Administrative Provisions, subsection (6) as follows:

> (6) ENFORCEMENT OF CONDITIONS.—
>
> (A) COMMISSION AUTHORITY.—If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—
>
> (i) issue an order to such company to correct the deficiency;
>
> (ii) impose a penalty on such company pursuant to title V; or
>
> (iii) suspend or revoke such approval.

The Joint CLECs are not asking the Authority to "determine whether BellSouth has ceased to meet" any of the prerequisites set out in the checklist. Nor are they asking the Authority to take any of the three types of enforcement actions set forth above. The issue here is whether terms and conditions for unbundled local loops, local transport, and local switching should be included in the ICAs approved in this arbitration. This is the same issue – should a term be in an agreement – that state commissions routinely resolve when arbitrating ICAs under § 252. A decision by the Authority to include these § 271 network items in no way impinges on the enforcement power held by the FCC. As the Illinois Commission in the recent decision discussed above concluded, enforcement of § 271 obligations by the FCC (leading to a determination of sanctions or withdrawal of long distance authority) is a completely different animal from implementation of § 271 obligations in § 252 ICAs (which is the province of state commissions under § 252).

What BellSouth does not recognize is that the "Administrative Provisions" in § 271(d) are only part of the content of § 271. It is Subsection (c) of § 271 that sets out the requirements the BOC must meet and it is here that Congress imposes on the state commissions the obligation to fulfill the role lawfully placed upon them—the obligation to approve § 252 interconnection agreements. Nothing in § 271 changes a BOC's obligation to incorporate checklist items in

§ 252 agreements once long distance entry is approved. Even after the § 271 checklist is "fully implemented," the statute still provides an ongoing duty to include the checklist items in § 252 agreements.

If the ICAs do not include § 271 checklist items, the Joint CLECs do not contend that CLECs could then ask the Authority to revoke BellSouth's interLATA long distance authority pursuant to § 271. There is no dispute that any such action would have to be brought to the FCC. As discussed below, the FCC could determine that the absence of a Tennessee ICA incorporating § 271 checklist items constitutes a violation of § 271 requirements, or the FCC could (if the evidence supported it) use its forbearance authority to excuse BellSouth from its § 271 obligations. In any event, such determinations are not what is at stake here. Rather, in this arbitration the Authority should incorporate § 271 checklist items into the new § 252 ICA based on the FTA's directive that § 252 agreements are the proper place for § 271 checklist obligations to be.

The incorporation of § 271 checklist items in § 252 agreements is completely consistent with the overall statutory scheme by which obstacles to local competition are to be removed and nondiscriminatory access to specified network elements and services assured. In the federal Act, Congress relied on ICAs as the day-to-day operational vehicle through which its statutory objectives would be achieved. In both §§ 251 and 271, Congress pointed to the § 252 negotiation and arbitration process as the mechanism and forum for implementation of its market-opening competitive requirements. By virtue of their authority to approve or reject ICAs under § 252, state commissions have the "front line" implementation role under the federal Act even where – as in § 271 – the FCC also retains other forms of authority to ensure that local competition is furthered as Congress contemplated in the Act.

For example, it was the state commissions that were charged with implementing TELRIC standards promulgated by the FCC regarding § 251 UNE pricing. States necessarily were responsible because ultimately the prices for UNEs had to be reflected in the BOC's ICAs approved by state commissions pursuant to § 252. A failure to have TELRIC rates in place for § 251 UNEs would constitute a violation of the § 271 checklist.[46] State commissions do not have authority to find a BOC out of compliance with § 271 and revoke its interLATA authority if such a checklist violation occurred; as discussed above, that authority rests with the FCC. But, a state commission's lack of "enforcement authority" does not and cannot excuse it from meeting its statutory obligation to approve a § 252 ICA including TELRIC pricing for § 251 UNEs. The obligation to fulfill its role in approving ICAs and setting rates coexists with the FCC's separate authority to approve, or eliminate, a BOC's interLATA authority.

Similarly, state commissions have both the authority and obligation to approve rates, terms, and conditions for § 271 checklist items required in § 252 ICAs. It is the § 252 authority (which is directly referenced in § 271) and not any independent § 271 enforcement authority, that requires state commissions to include § 271 rates, terms, and conditions in ICAs. The question of whether the state commission's arbitration rulings on § 271 checklist element terms comply with § 271 (*e.g.*, are the established rates "just and reasonable"?) is a question for the courts and the FCC – just as the question of whether the TELRIC rates established by a state commission for § 251 UNEs are "checklist compliant" has always been one for the courts and the FCC. The question of enforcement authority has always been separate from the obligation to establish necessary terms required in ICAs. The federal Act provides that the terms for § 271 checklist

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[46] *See* 47 U.S.C. § 271(c)(2)(B)(ii). The competitive checklist requires BOCs provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," *i e*, in accordance with TELRIC pricing standards when the UNE is required under § 251.

items are part of those necessary terms that are to be reviewed and approved by state commissions.

As the federal court in *Sage Telecom, L.P. v. Public Utility Comm'n*, 2004 WL 2428672 (W.D. Tex. 2004) held last year, the § 252 filing and approval process for ICAs serves several important purposes. State commission review and approval of ICAs under § 252 prevents discrimination, and is part of the Act's requirement that all CLECs be given the opportunity to utilize the business terms agreed to by BellSouth and other carriers. In the federal district court Order upholding the Texas PUC's rulings in *Sage*, the Court recognized these important statutory purposes served by the state commission ICA review and approval process[47] (as did the district court in the *Qwest* case discussed above).

The FCC did not alter this division of authority in the *TRO* provisions on § 271 pricing. The FCC discussed the pricing of § 271 checklist items at ¶¶ 656-664 of the *TRO*. The FCC made clear that TELRIC pricing does not apply to unbundled elements offered only pursuant to § 271; rather, the standard is that the rates must be "just and reasonable." The establishment of a *pricing standard*, however, does not answer the question of *who* establishes the rates.

Under § 251, FCC rate standards have been implemented in state commission § 252 proceedings. In the *TRO*, the FCC discussed how it would exercise its § 271 authority to review the adequacy of § 271 checklist element rates in the context of § 271(d)(6) enforcement proceedings.[48] The FCC did not, however, "reserve to itself" the authority to set such § 271-compliant rates. Rather, the FCC spoke directly only of its authority to review such rates in § 271 enforcement proceedings to ensure they met the "just and reasonable" standard.

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47 *See Sage Telecom*, 2004 WL 2428672, at *5-8.

48 *TRO* ¶ 664.

In fact, when addressing the pricing standard, the FCC made direct reference not only to its own governing statute, but to state law "just and reasonable" rate standards used for pricing intrastate services:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation *that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act.*[49]

If the FCC was reserving the pricing of § 271 checklist items to itself, it would make little sense for the FCC to refer to state "just and reasonable" standards when it provided guidance regarding its view of the content of the rate standard it was establishing in the *TRO*. In addition, the FCC notes that the federal Communications Act version of the "just and reasonable" standard is the one historically applied "*for interstate services*." The FCC does not declare that local loops, local transport, and switching provided under the § 271 checklist are suddenly purely "interstate" services subject to the Communications Act. Rather, the FCC acknowledges that it is the Communications Act standard that provides guidance for "just and reasonable" determinations for interstate services; for other services, traditional state "just and reasonable" standards may also provide guidance.

The FCC spoke in detail of its role as the regulator in charge of reviewing BOC § 271 rates for compliance with the "just and reasonable" standard. It did not, however, establish itself as the agency in charge of arbitrating the rate levels when they are in dispute. Nor did the FCC determine that the § 252 agreements in which § 271 checklist items are to be incorporated are now subject to rate-setting by the FCC. Nothing in the *TRO* eliminates the state commission's

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[49] *TRO* ¶ 663 (emphasis supplied).

role as arbiter of the rates that must be set using the "just and reasonable" rate standard that replaces TELRIC for § 271 checklist items.

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

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) BOCs who, like BellSouth, offer long distance services pursuant to § 271 authority have an obligation to provide checklist item 4 loop transmission facilities irrespective of unbundling determinations under § 251.[50] 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 § 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.

Three state commissions who have addressed the question presented here, Maine, Pennsylvania and Louisiana, have agreed that line sharing falls under checklist item 4, and that BOCs subject to section 271 must provide access to it.[51] The Rhode Island decision referenced

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[50] In addition to having the jurisdiction to regulate the terms of access under § 271, it is well settled law that state commissions *also* have jurisdiction to arbitrate disputes over all non-251 issues when the parties voluntarily enter into negotiations over them. *Coserv v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5th Cir. 2003). That is precisely what happened in the context of Covad Communications' negotiations with BellSouth over line sharing. BellSouth undoubtedly denies this fact. There is, consequently, an open question of fact with regard to Covad's line sharing arbitration with BellSouth, and BellSouth's Motion must be denied on this basis alone, at least as to Covad.

[51] 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

by BellSouth in its Motion is inconclusive: that Commission declined to address the question of whether line sharing is a § 271 checklist item when the issue was put before it.[52]

A. Statement of the Law.

1. Line Sharing is a § 271 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.[53]

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.[54] While the

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(PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No. 2002-682, issued August 17, 2004, p. 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").

In Louisiana: Order No. U-28027, *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,* Louisiana Public Service Commission, Docket No. U-28027, January 13, 2005.

[52] Rhode Island Public Utilities Commission, Docket No. 3556, *In Re Verizon-Rhode Island's Filing Of October 2, 2003 To Amend Tariff No 18*, Report and Order (October 12, 2004).

[53] *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*").

[54] 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi) and (x); *see also TRO* ¶ 654

determination in the *TRO*[55] that line sharing was no longer a section 251(c)(3) UNE did remove line sharing from checklist item 2, it did not remove line sharing from checklist item 4.[56]

Importantly, the FCC's statement in the *Massachusetts 271 Order* was not an anomaly: In every FCC 271 Order granting BellSouth long distance authority[57] – indeed, in every FCC order granting any RBOC such authority – the FCC placed line sharing in checklist item 4. 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."[58] Moreover, before it was in its interest to do otherwise, BellSouth itself placed line sharing and line splitting in every one of its own 271 briefs to the states and to the FCC under checklist item 4.[59] Manifestly then, line sharing is a section 271(c)(2)(B)(iv) (checklist item 4) network element.

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55 *Id*

56 *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.

57 *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"); *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; *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

58 BellSouth FL/TN 271 Order ¶144.

59 *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 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*

2. 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.[60] 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."[61] 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"[62] – including line sharing under checklist item 4.[63]

B. Response to BellSouth's Arguments

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.

[60] *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 . . .").

[61] *TRO* at ¶ 653; 47 U.S.C. § 271(c)(2)(B)(iv).

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

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

BellSouth has 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 without merit and provide no legal basis for BellSouth's Motion for summary judgment.

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

BellSouth argues that it is "illogical" for the FCC to eliminate a line sharing obligation for ILECs under section 251(c)(3) and yet maintain the very same obligation for RBOCs under section 271[64] This argument is demonstrably incorrect. BellSouth's argument is directly contrary to the FCC's interpretation of sections 251 and 271.[65] 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

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64 BellSouth's Motion at 29-31.

65 *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.

> 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.[66]

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* analysis at paragraphs 649-667.[67] 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:

> 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.[68]

In short, although the *price* 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 *access* remains.[69]

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66 *Id.* at ¶ 654 (emphasis added) (internal footnotes omitted).

67 *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).").

68 *TRO* at ¶ 659 (emphasis added).

69 *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 *independently imposes unbundling obligations*, 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 *regardless of any unbundling analysis under section 251*") (emphasis added); *see also, TRO* ¶ 654.

BellSouth previously made a similar argument – that section 251 determinations may remove elements from checklist 4 – when citing to paragraph 665 of the *TRO*.[70] Specifically, BellSouth cited portions of *TRO* paragraph 665, which reads:

> 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.[71] 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.[72] Nevertheless, BellSouth attempts to cloud the law by posing "the rhetorical question of what the FCC could have in mind if the requirements considered under the general rubric of checklist items four, five, six and ten can never change." 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); and the FCC may forbear from enforcing 271 obligations pursuant to 47 U.S.C. §160. In short, the FCC's

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70 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").

71 *Id.*

72 *Compare TRO* ¶ 665 *with* ¶¶ 653-664.

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.[73]

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

BellSouth also attempts 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 its Motion BellSouth 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." However, BellSouth fails to even reference the FCC's clarifying definition of "loop." 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."[74] In the *TRO*, the FCC defined the High Frequency Portion 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

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

[74] *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")

customer's premises."[75] 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.[76] Indeed, BellSouth routinely uses the HFPL transmission channel to provide xDSL services.[77] 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.[78]

3. The Transition For Line Sharing Does Not Apply to BOCs 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 *solely* arises under section 251.[79] BellSouth is both an ILEC and a BOC. Section 271 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

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75 *TRO* ¶268.

76 *Id*

77 In other words, BellSouth's 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).

78 ME Examiner's Report, pp. 26, 28-29, PA Opinion and Order, pp. 9, 17-19.

79 *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 **incumbent LECs** to replace line sharing. . . .) (emphasis added).

> section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[80]

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.[81] 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. 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.

4. The Statements of Chairman Powell and Commissioner Martin Make it Clear that Line Sharing is a 271 Element.

The warring statements of Commissioner Martin and Chairman Powell did make one thing clear: Line sharing is a 271 obligation. Chairman Powell's statement says the FCC did ***not*** remove 271 obligations for line sharing.[82] Commissioner Martin's statement—though manifestly incorrect as will be shown below—does get at least one thing right: it is based upon the clear premise that line sharing is a 271 obligation of ongoing force unless and until the FCC grants a petition for forbearance should one ever be filed. If, as BellSouth asserts, line sharing never was a 271 element, there would be no 271 obligation to forbear from nor any need to clarify that the FCC was not "removing 271 unbundling obligations" for line sharing.

Far from supporting BellSouth's position in this docket, the statements of Chairman Powell and Commissioner Martin demonstrate that BellSouth's position is—and has always

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80 *TRO* ¶ 655.

81 *Id.*

82 *Broadband Forebearance Order,* Chairman Powell's Statement.

been—wrong: there is indeed a continuing RBOC obligation to provide CLECs with line sharing in accordance with Section 271 of the Act.

It is important to note that having now had the fallacy of its arguments revealed, BellSouth still tries to cover its tracks by engaging in double-talk: While relying on Commissioner Martin's statement in support of its argument that the FCC granted forbearance from line sharing, BellSouth still argues that line sharing is not a 271 obligation (from which there would be no need to forbear).[83] *BellSouth's arguments are completely inconsistent.* Either line sharing is a 271 obligation, and the FCC may grant forbearance from that obligation, or, alternately, line sharing is not a 271 obligation, and there is no need for the FCC to forbear. Both cannot be true.

The truth is that line sharing is a 271 obligation from which the FCC may forbear, and the Chairman of the FCC made it abundantly clear that the FCC did not forbear from enforcing BellSouth's obligation to provide access to line sharing.

5. The FCC Did Not Grant Forbearance from BellSouth's 271 Obligation to Provide Access to Line Sharing.

The FCC did not grant – by implication or otherwise – forbearance from line sharing because forbearance from line sharing was **never** requested. BellSouth represents that it included line sharing in its Petition for Forbearance filed with the FCC, and the relief granted also included line sharing.[84] Both representations are false. The FCC Order repeatedly provides a list of the elements from which the FCC is forbearing and line sharing is ***not*** on the list:

> In this Order, we forbear from enforcing the requirements of section 271, for all four petitioners (the Bell Operating Companies (BOCs)), with regard to the broadband elements that the Commission, on a national basis, relieved from

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[83] BellSouth Motion at 32 ("even if section 271 did require line-sharing, the FCC's recent forbearance decision would have removed any such obligation").

[84] BellSouth Motion at 32-33.

> unbundling in the Triennial Review Order and subsequent reconsideration orders (collectively, the 'Triennial Review' proceeding'). These elements are fiber –to-the home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops), the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements).
>
> * * *
>
> For the reasons described below, we grant all BOCs forbearance from section 271's independent access obligations with regard to the broadband elements the Commission, on a national basis, relived from unbundling under section 251: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching.
>
> * * * .
>
> As discussed below, we find that the BOCs have demonstrated that they satisfy the criteria set forth in section 10 with respect to the broadband elements for which the Commission provided unbundling relief on a national basis in the Triennial Review proceeding: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching.
>
> * * *
>
> Moreover, we find that section 10(a)'s three-pronged test for forbearance has been met with respect to section 271(c)(1)(B)'s independent access obligation for FTTH loops, FTTC loops, the packtized functionality of hybrid loops, and packet switching for all of the affected BOCs to the extent such broadband elements were relived of unbundling on a national basis under section 251(c).[85]

Moreover, the FCC repeatedly explains – as it is statutorily obliged[86] to do – that it is granting forbearance to encourage the RBOCs to build next-generation fiber facilities.[87] There is no mention in the Order of any considerations related to legacy copper networks carrying line sharing. Thus the Chairman's Statement: "By removing 271 unbundling obligations for fiber-based technologies – and not copper based technologies such as line sharing . . . ".[88] Additionally, on November 5 – more than one week after Commissioner Martin expressed his

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85 *Broadband Forebearance Order,*, ¶¶ 1, 12, 19, and 37.

86 47 U.S.C. § 160 (c) ("The Commission . . . shall explain its decision in writing.").

87 *Broadband Forebearance Order*, ¶¶ 6, 12, 20, 21, 24, 25, 27, 31 and 34.

88 *Broadband Forebearance Order,* Statement of Michael K. Powell.

"belief" that the FCC granted forbearance from line sharing – the FCC released an Order *again stating* that "On October 27, 2004, the Commission released an order granting SBC's petition to the extent that it requested forbearance with respect to broadband network elements, specifically fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, and packet switching."[89] Once again, line sharing is not on the list of "broadband elements" for which the FCC granted forbearance. Accordingly, the express language of the Order, the substance of the Order, a follow-on Order, and the Chairman himself, all make it clear that the Forbearance Order only addresses fiber based technologies – and not line sharing. As absurd as it is in the face of a clear order, and in the face of a statement from the Chairman of the FCC to the contrary, BellSouth, nevertheless, insists that the FCC granted forbearance from line sharing by omission, rather than commission.

6. BellSouth's Assertion that the FCC Accidentally Granted Forbearance for Line Sharing is Preposterous.

BellSouth never asked the FCC to forbear from line sharing and cannot now claim that the grant of its Petition for Forbearance implicitly granted an implied request. Both BellSouth and Commissioner Martin base their claim that the FCC implicitly granted forbearance for line sharing (despite the Chairman's statement to the contrary) based on one incorrect premise: that there was a request for forbearance from line sharing in Verizon's petition. This is a bold claim when the words "line sharing" never appear in either Verizon's Petition,[90] which actually lists the elements for which it is seeking forbearance (which – not coincidentally – is the same list the

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[89] Order, *In the Matter of SBC Communications Inc 's Petition for Forbearance Under 47 U S C §160(c) from Application of Section 271*, WC Docket No. 03-235, DA 04-3532, Released November 5, 2004, ¶ 2.

[90] Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Michael Powell, Chairman, and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, FCC, CC Docket No 01-338 (filed October 24, 2003) ("Verizon Petition").

FCC granted), or BellSouth's Petition.[91] It is important to note in this context that a standard canon of statutory construction holds that when a legislative body or agency provides a list of items to which an order or statute applies—as the FCC did in its Forbearance Order—that list is presumed to be exclusive.

BellSouth's Petition does not identify any elements at all, but expressly adopts Verizon's Petition, stating, "Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 24, 2003."[92] The Verizon Petition specifically lists the "broadband elements" for which it is seeking forbearance: "fiber-to-the-premises loops, the packet-switched features, functions and capabilities of hybrid loops, and packet switching."[93] If that looks like a familiar list, it should. It is same the list of elements the FCC granted forbearance from enforcing as 271 obligations in its Forbearance Order.[94]

BellSouth does not even try to hide the fact that it did not ask for forbearance from line sharing – it must rely on its obscure request for forbearance from "broadband elements."[95] Commissioner Martin, however, expressly says that there was a request for forbearance from line sharing, but the citation he provides to the Verizon Petition is conspicuously missing any page reference.[96] Why? Because the Verizon Petition never mentions line sharing. In apparent recognition that there is absolutely no reference to line sharing in either BellSouth's Petition or Verizon's Petition, BellSouth now asserts that an attachment to a Verizon *ex parte* letter, filed almost a month after BellSouth's Petition and fully five months after Verizon's Petition, added

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91 BellSouth Telecommunications, Inc. *Petition for Forbearance*, WC Docket No. 04-48 (filed March 1, 2004) ("BellSouth Petition").

92 BellSouth Petition at 1 (citing to the Verizon Petition).

93 Verizon Petition at 1.

94 *Broadband Forebearance Order,*, ¶¶ 1, 12, 19, and 37.

95 BellSouth Motion at 32-34.

96 *Broadband Forebearance Order,* Commissioner Martin Statement.

line sharing to the list of elements from which the parties were seeking forbearance.[97] It is absurd to assert that a Petition for Forbearance, which is on a statutorily-imposed twelve month[98] fast track for consideration, may be modified five months after it is filed, by an attachment to an *ex parte* letter.[99] BellSouth's desperate search for *some* reference to line sharing – even a passing reference made in a white paper describing the history of the FCC's treatment of broadband elements filed five months late – evidences the contortions BellSouth is required to make to re-write the FCC's *Order on Forbearance* to say something it clearly does not say. As a consequence, BellSouth is left to argue that it should be *implied* that it asked for forbearance from line sharing and that it should *also be implied* that the FCC granted that request.

If access to line sharing over legacy copper facilities were substantially equivalent to access to new fiber facilities, this argument for "implicit" relief might fall slightly short of absurd. But they have nothing to do with each other, and the rationale for forbearing with respect to fiber facilities – providing incentive for new investment[100] – has no applicability to access to existing legacy copper plant. If the FCC had actually made policy in the way BellSouth suggests, it would be the height of arbitrary and capricious decision-making.

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97 BellSouth Motion at 34.

98 47 U.S.C. §160 (c).

99 Notably, the FCC recently denied an SBC *Petition for Forbearance* on the ground that SBC was not specific enough in describing what it wanted the FCC to forbear from, stating. "we cannot grant a petition such as SBC's, where the facilities and services for which the petitioner seeks forbearance are so nebulously defined." Memorandum Opinion and Order, *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, FCC 05-95, May 5, 2005, ¶ 15.

100 Both quotations provided by BellSouth to support the statement that "[t]he benefits to broadband competition of forbearing from imposing 271 obligations on the fiber loop elements apply equally to forbearance of line sharing" (BellSouth Motion at 35-36) demonstrate the opposite basis for granting the Petition: The FCC states that it is trying to "encourage them [BOCs] to invest in next-generation technologies" and "encourage the BOCs to become full competitors in this emerging industry". *Id* (emphasis added). Legacy copper facilities used to provide line sharing are neither "next-generation facilities" nor an "emerging industry".

In any case, this Authority should refuse to accept such a spurious argument. If BellSouth believed the FCC would have accepted such argument – despite the clear language of the Order and the Chairman's statement to the contrary – then BellSouth should have filed a Motion for Clarification ***at the FCC***. In summary, the Authority should not grant summary judgment to BellSouth on its line sharing position.

Issue 20: Sub-Loop Concentration: What is the appropriate ICA language, if any, to address sub-loop feeder or sub-loop concentration?

BellSouth urges the Authority to grant summary judgment in favor of BellSouth's position that it is not required to "unbundled sub-loop concentration."[101] BellSouth does not, however, provide even a cursory explanation of what all is entailed in its request. It provides the rather unenlightening explanation that sub-loop concentration is "that electronic equipment that in some cases is installed between the sub-loop feeder and the sub-loop distribution."[102] As is true with so many issues in BellSouth's Motion, this is one that screams out for sworn testimony that can explain the technical aspects of BellSouth's position. Summary judgment is completely inappropriate without even a fundamental understanding of what BellSouth is asking the Authority to do.

The Authority should reject BellSouth's overly simplified explanation of what the FCC's actions have been related to subloop unbundling. The FCC's actions in this area provide opportunities for facilities-based CLECs to offer new services that link CLEC loop facilities to the "last 100 feet" of the incumbent's network, particularly in residential multi-tenant environments. In the *TRO*, the FCC determined that requesting carriers are impaired without

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101 BellSouth Motion at 40.

102 *Id*

access to copper loop or subloop facilities.[103] The FCC required ILECs to provide unbundled access to their copper subloops, *i.e.*, the distribution plant consisting of the copper transmission facility between a remote terminal and the customer's premises.[104] The FCC also determined that CLECs are impaired without access to unbundled subloops associated with accessing customer premises wiring at multiunit premises and are also impaired without unbundled access to the incumbent LEC Inside Wire Subloops and NIDs, regardless of loop type.[105]

The FCC defined a subloop as "a smaller included segment of an incumbent LEC's local loop plant, *i.e.*, a portion of the loop from some technically accessible terminal beyond the incumbent LEC's central office and the network demarcation point, including that portion of the loop, if any, which the incumbent LEC owns and controls inside the customer premises."[106] The copper subloop UNE is defined as "the distribution portion of the copper loop that is technically feasible to access at terminals in the incumbent LEC's outside plant (*i.e.*, outside its central offices), including inside wire."[107] The FCC found that any point on the loop where technicians can access the cable without removing a splice case constitutes an accessible terminal.[108] It concluded that a non-exhaustive list of these points includes, "the pole or pedestal,[109] the serving

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103 TRO ¶ 777.

104 TRO ¶ 253.

105 TRO ¶ 777.

106 TRO ¶ 343.

107 TRO ¶ 254. The FCC, in paragraph 233 of the TRO, discusses the history of the unbundling of subloops. In the *UNE Remand Order,* the Commission found that access to subloops was likely to be the catalyst to the eventual deployment of competitive loops and without such access, competitive LECs would be discouraged from attempting to construct their own feeder facilities which, when combined with the incumbent LEC's distribution plant, would enable the competitor to serve customers with minimal reliance on the incumbent LEC. *UNE Remand Order* ¶ 205.

108 TRO ¶ 254. Accessible terminals contain cables and their respective wire pairs that terminate on screw posts that enable a competitor's technician to cross connect its terminal to the incumbent LEC's to access the incumbent LEC's loop from that point all the way to the end-user customer. TRO fn. 1013.

109 The pole or pedestal is near the customer premises and is the point where the "distribution" connects to the dedicated wire connecting the subscriber to the network. TRO fn 1015.

area interface (SAI), the NID itself,[110] the MPOE,[111] the remote terminal, and the feeder/distribution interface."[112] The FCC further described the technically feasible points where subloops can be accessed as "local loop plant consisting of customer premises wiring owned by the incumbent LEC as far as the point of demarcation (the "inside wire" subloop), and other portions of the loop from the central office to the point where the "inside wire" subloop begins."[113]

A subloop is not restricted to copper. In the multi-tenant environment, a subloop can be fiber as well. The FCC's rule (Section 51.319(b)(1)(i)) states that "a point of technically feasible access is any point in the [ILEC's] outside plant at or near a multiunit premise where a technician can access the wire *or fiber* within the cable without removing a splice case to reach the wire *or fiber* within to access the wiring in the multiunit premises." (emphasis added) The only limitation is whether the ILEC owns or controls the inside wire subloop. Thus, the discussion at the hearing regarding whether a high-capacity loop (including OCn) would be dropped down to copper is irrelevant to understanding the expanded ability of CLECs to utilize ILEC subloops in the multi-tenant environment.

The FCC's discussion in the *TRO* reveals that two objectives drove its determinations regarding CLECs' access to subloops. First, the FCC sought to encourage both intramodal and

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110 NIDs were included in the initial set of UNEs and defined as "a cross-connect device used to connect loop facilities to inside wiring" The Commission later modified the definition of a NID to be more flexible and technology neutral, recognizing that its rules enabled methods other than just a cross-connect device for interconnecting customer premises wiring with the incumbent LEC's loop distribution plant. TRO fn. 1008 (citations omitted).

111 The MPOE is the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building. TRO fn 1016. *See also* TRO fn. 1012.

112 TRO ¶ 254. The FDI is the point in the loop where the trunk line or "feeder" leading back to the incumbent LEC's central office, and the "distribution" plant branching out to the subscribers, meet, and interface. TRO fn. 1014.

113 TRO ¶ 343.

intermodal carriers to enter the broadband mass market and make infrastructure investments in equipment.[114] In her comments on the *TRO*, Commissioner Abernathy described as intramodal competition "competitive LECs using their own facilities and incumbents' loops and subloops."[115] The FCC also sought to "promote the deployment of equipment that can unleash the full potential of the embedded copper loop plant so that consumers can experience enhanced broadband capabilities before the mass deployment of fiber loops."[116] Therefore, CLECs that propose to provide their own feeder facilities and use the distribution portion of the copper loop plant are uniquely positioned to help implement the FCC's goals.

Second, the FCC sought to assure that CLECs would be able to serve customers in multi-tenant environments using the ILECs' subloops, recognizing the obstacles CLECs face in gaining access to construct and install their own facilities. A number of facilities-based CLECs complained to the FCC, and to various state commissions, that they were being held hostage to high fees and unreasonable terms and conditions in order to gain access to customers in many multi-tenant properties, while at the same time the ILECs had such access and paid no fees at all. The FCC initiated a notice and rulemaking proceeding in which it examined barriers faced by CLECs.[117]

The FCC's *TRO* rules on subloops provide important avenues for facilities-based competition that should not be unduly limited until all the evidence is heard at hearing.

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114 TRO ¶ 244.

115 TRO Abernathy Comments at 3.

116 *Id.*

117 As the FCC noted in the TRO, "[w]hen the first Inside Wire Subloop rules were adopted in 1999, the Commission had commenced a related rulemaking proceeding, the Competitive Networks proceeding, to address, generally, barriers, including access to all types of customer premises wiring, which competitive LECs faced in gaining access to end-user customers in multiunit buildings or other environments where the premises occupied by the end-user customer was in a building owned or controlled by another." TRO fn. 1028.

BellSouth's efforts to constrict CLEC access to subloops with its vague motion regarding prohibition of "subloop concentration" unbundling should be rejected.

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

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

Issue 28: Fiber-To-The-Home: What is the appropriate language, if any to address access to overbuild deployments of fiber-to-the-home and fiber-to-the-curb facilities?[118]

BellSouth's Motion on Issues 23, 24, and 28 regarding broadband issues essentially requests that the Authority instruct the parties to incorporate contract language in their ICAs that conforms to applicable FCC orders. The Joint CLECs submit that this is exactly what the parties are doing in their negotiations – attempting to craft ICA language that meets the standards set forth by the FCC. To the extent parties present disputed contract language, it will likely involve either: (a) disputes over the meaning of technical terms the FCC used in its decisions (*e.g.*, what constitutes "Fiber to the Home" versus "Fiber to the Curb" or what in particular distinguishes "greenfield" from "brownfield" situations); or (b) specific operational aspects of implementing proposed contract terms. The real world resolution of such disputes will not be assisted or clarified by the generalized legal ruling sought by BellSouth. The Authority would be better served by permitting the parties to narrow disputes through negotiation, addressing only the disputes on this issue that may remain for arbitration, and relying on witnesses' testimony rather than lawyers' pleadings to explain the technical aspects of the FCC's broadband rulings.

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[118] BellSouth included Issue 28 with its "partial summary judgment" issues. The Joint CLECs address it here along with issues the Joint CLECs believe are related, and about which the Joint CLECs' position is the same.

Issue 25: End User Premises: Under the FCC's definition of a loop found in 47 C.F.R. 51.319(a), is a mobile switching center or cell site an "end user customer's premises"?

Despite BellSouth's contention that this issue is strictly a legal issue upon which the FCC has already ruled, there is more to this issue than BellSouth would have the Authority believe. For example, BellSouth's categorical exclusion on the availability of loops to cell sites would deny CLECs the right to use UNE loops to serve personnel who work at those sites. The placement of a cell site atop a building or other structure does not change the loops going to such places into other facilities and it does not transform the nature of the services provided into mobile wireless services exclusively. FCC Rule 309(a) prohibits the use of UNEs for the exclusive provision of mobile wireless services. It does not provide that BellSouth need not unbundle loops that are deployed to provide telecommunications services to personnel and businesses located in buildings housing cell sites or other similar equipment.

Issue 30: Entire Agreement Rule: What is the appropriate language to implement the FCC's "entire agreement" rule under Section 252(i)?

The FCC's "all-or-nothing" rule is expressly limited to interconnection agreements approved under section 252(i). BellSouth accurately describes the intention of the FCC in adopting the rule to encourage "give-and-take" negotiations. The Joint CLECs do not assert that a carrier can adopt (or "pick-and-chose") provisions in another carrier's interconnection agreement, as BellSouth seems to believe. However, BellSouth's proposed contract language seeks to extend the "all-or-nothing" rule beyond its intended scope to preclude a carrier from requesting services not contained in its interconnection agreement which are offered generally to the public by BellSouth in Statements of Generally Available Terms or standard interconnection offerings. None of those documents are limited by the FCC's rule and BellSouth is expressly

precluded by the Act from refusing a service made available generally to any taker to a CLEC. Such refusal is discriminatory and barred by sections 201 and 202 of the Act. Once, again, this issue is one directly tied to the competing contract language offered by the parties and does not lend itself to resolution in the legal vacuum of a Motion for Summary Judgment. Moreover, the "all or nothing" rule has been appealed and that matter has been briefed and is currently pending before the Ninth Circuit. As a consequence, BellSouth's Motion on this issue should be denied.

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

The Joint CLECs take no position as to whether the Authority's orders in this docket can or should bind non-parties. However, the Authority should take no action to – and should make clear that the action it does take does not – upend existing agreements that address how such changes of law should be incorporated into existing and new section 252 interconnection agreements.[119]

II. PARTIAL SUMMARY JUDGMENT ISSUES, OR ALTERNATIVELY, ISSUES THAT THE AUTHORITY CAN ADDRESS BY ISSUING A DECLARATION SETTING FORTH THE APPLICABLE LAW, SO THAT THE PARTIES MAY EFFICIENTLY PRESENT THE FACTUAL DISPUTES SUCH ISSUES PRESENT

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

The *TRRO* not only removed the ILECs' obligation to unbundle certain network elements under § 251, but also established new requirements and restrictions on access to those elements

[119] Pursuant to the Abeyance Agreement entered into by and between NuVox, Xspedius and BellSouth, which was approved by the Authority on July 16, 2004 in Docket No. 04-00046, NuVox, Xspedius and BellSouth have agreed that they will not amend their interconnection agreements but instead will incorporate *TRO*- and *TRRO*-related changes of law into the interconnection agreements which result from the parties' arbitration in that docket.

that still will be available and established a transition plan to govern the rates that CLECs would pay for "declassified" § 251 UNEs until the date on which CLECs' are to shift to other wholesale offerings and services, or to self-provisioned facilities. BellSouth seeks a summary judgment declaration of law on this issue that focuses on the end date of the *TRRO* transition plan.

The implementing language that must be addressed under this issue, however, extends far beyond BellSouth's narrow focus. The real controversy here necessarily includes many other aspects that are ignored in BellSouth's Motion.

A. <u>The interconnection agreement must implement the FCC's directive regarding CLEC "self-certification" for obtaining high-capacity loop and transport UNEs</u>.

The transition language must include the self-certification process available to CLECs under the *TRRO*. The FCC specified the process by which CLECs are to submit orders for DS1 or DS3 loops or transport circuits as § 251 UNEs. In ¶ 234, the FCC stated:

> We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed . . . ., the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.[120]

BellSouth is not permitted to reject orders for § 251 loop and transport orders where the CLEC has provided the self-certification contemplated by the *TRRO*. If BellSouth chooses to contest the CLEC's self-certification, it can do so *after* provisioning the requested UNEs. The *TRRO*

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120 *TRRO* ¶ 234 (footnotes omitted).

provides that disputes concerning ILEC wire center designations (and associated CLEC self-certifications) will occur in state commission dispute resolution proceedings conducted pursuant to § 252.[121] Consequently, the Authority should recognize that the final ICA language must properly recognize and implement the self-certification process and deny BellSouth's Motion.

B. The Transition Plan established by the FCC in the *TRRO* contemplates that CLECs will have an opportunity to execute an orderly transition from § 251 network elements to other wholesale services, with minimal adverse impact on CLECs' embedded customer base.

BellSouth should accept and provision CLECs' orders for unbundled local switching/UNE-P for moves, adds and changes to service being provided to CLECs' embedded customer base. Moreover, it would be entirely appropriate and fully consistent with the FCC's directive to provide for moves, adds and changes to § 251 UNE loops during the FCC's Transition Period.

It is obvious from even a cursory reading of the FCC's determinations in the *TRO*, the Interim Rules, and the *TRRO* that the FCC considered it imperative that CLECs be given time to transition from their reliance on network elements unbundled under § 251 to self-provisioning or other wholesale arrangements. The FCC reached this conclusion not out of a desire to benefit CLECs, but in order to protect CLECs' customers from needless disruption. Notably, the FCC's Interim Rules established a six-month transition period, but that time frame was expanded in the *TRRO* to 12 months for unbundled local switching, UNE-P, and high-capacity loops and transport, and expanded to 18 months for dark fiber loops and transport. These expanded time frames and the FCC's discussion in adopting them in and of themselves indicate a deliberate

[121] *TRRO* ¶ 100.

decision to permit CLECs ample time to put into place whatever operational alternatives they select, including negotiating and completing amendments to their interconnection agreements.[122]

The FCC required that CLECs be able to provide continued and uninterrupted service to their embedded customer base during the period of the Transition Plan. In ¶ 199 of the *TRRO*, with respect to continued provision of UNE-P during the transition period, the FCC stated:

> During the twelve-month transition period . . . competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers . . . .[123]

Then, as to unbundled local switching, the FCC states:

> However, within that twelve-month period, incumbent LECs must continue providing access to mass market unbundled local circuit switching at a rate of TELRIC plus one dollar for the competitive LECs to serve those customers until the incumbent LECs successfully convert those customers to the new arrangements.[124]

The FCC's rules likewise recognize that the ILEC is obligated to provide CLECs with access to local circuit switching (and, thus UNE-P) "to serve [CLECs'] *embedded customer base of end-user customers.*"[125]

If CLECs are to be able to plan for and put into place an orderly transition plan, they need to be able to be as responsive in meeting the needs of their existing customers as they were before the *TRRO* was issued. CLECs need to be able to submit orders for network elements that accommodate requests made by their existing customers for service moves if the customer

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122 Pursuant to the Abeyance Agreement entered into by and between NuVox, Xspedius and BellSouth, which was approved by the Authority on July 16, 2004 in Docket No. 04-00046, NuVox, Xspedius and BellSouth have agreed that they will not amend their interconnection agreements but instead will incorporate *TRO*- and *TRRO*-related changes of law into the interconnection agreements which result from the parties' arbitration in that docket.

123 *TRRO* ¶ 199.

124 *Id.* at ¶ 216.

125 47 C.F.R. § 51.319(d)(iii).

changes its location, for adds if the customer desires to augment the service it receives, and for changes to the features the customer is receiving as part of its service.

To avoid needless churn, unnecessary costs and disruptions to CLECs efforts to develop and implement orderly transitions, ICA language must define under what limited circumstances CLECs are entitled to access to unbundled local switching during the Transition Plan to serve the embedded customer base. Similar language would provide the same opportunity and protections for CLECs using UNE loops that have been "declassified." A full reading of the FCC's analysis regarding CLECs' need to effect an orderly transition of their individual embedded customer base supports permitting moves, adds and changes for these network elements as well during the FCC's Transition Plan.

BellSouth also asserts that the transition of the embedded base of UNE-P customers must be ***completed*** by March 11, 2006.[126] Contrary to BellSouth's assertion, the FCC has made clear that CLECs may submit their conversion orders at any time prior to March 11, 2006 and thus obtain transitional pricing for the entire one-year or eighteen month transition period set forth in the *TRRO*. As the FCC stated in the *TRRO*, "[w]e require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order."[127] The CLEC's obligation is to "submit the necessary orders" within the time period. CLECs have no obligation to ensure that BellSouth fulfills the orders submitted within a set timeframe. CLECs cannot control whether BellSouth fulfills those orders promptly, or even at all. Further, the FCC held that "***[a]t the end of the twelve-month period***, requesting carriers must transition all of their affected high-capacity loops

126 BellSouth Motion at 49.

127 *TRRO* at ¶227.

to alternative facilities or arrangements."[128] The FCC also made similar pronouncements for DS1 and DS1 dedicated transport[129] and mass market switching.[130] Based on the foregoing language, BellSouth is not entitled to a ruling that all conversions must be completed by the end of the FCC prescribed transition periods. Indeed, the plain text of the *TRRO* and the FCC's rules simply do not support BellSouth's assertion that it is entitled to a ruling as a matter of law that the replacement of delisted section 251 UNEs must be ordered and completed prior to the end of the transition periods.

C. Interconnection Agreements must include transition provisions for high capacity loops and transport that BellSouth is currently required to provide on an unbundled basis but may not be required to provide as unbundled network elements as a result of growth in business line counts or collocating carriers.

By its focus on its obligations after March 10 and September 10, 2006, BellSouth seeks to gloss over the need to provide transition periods for high capacity loops and transport in and between wire centers that do not now satisfy the FCC's nonimpairment standards but may do so in the future. This is an essential part of the transition process for unbundled network elements that are currently being used to provide service to CLEC customers but that BellSouth may not be required to provide on an unbundled basis as wire center growth causes more wire centers to fail the FCC's impairment tests.

BellSouth has acknowledged that the FCC "directed parties to negotiate pursuant to the section 252 process the 'appropriate transition mechanisms' for those high-capacity facilities 'not currently subject to the nonimpairment thresholds' established in the *Triennial Review*

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128 *Id* at ¶196 (emphasis added).

129 *Id* at ¶143.

130 *Id.* at ¶227.

Remand Order that subsequently 'may meet those thresholds in the future.'"[131] Yet BellSouth's proposed amendment to implement the *TRRO,* while it clearly relieves BellSouth of the obligation to provide high capacity loop and transport UNEs whenever in the future a wire center exceeds the relevant number of business lines and/or collocating carriers, does not even provide for notice to CLECs in such cases. Rather than provide for any transition, BellSouth's proposal expressly permits it to disconnect without notice any UNE or combination that it decides it is not obligated to continue to provide.

The Authority should not rule that BellSouth has no transition obligations after March 10, 2006 for unbundled DS1 and DS3 loops and transport and September 10, 2006 for unbundled dark fiber loops and transport. Further, the Authority should recognize that BellSouth is obligated to provide for transition of high capacity loops and transport when in the future it is relieved of the obligation to provide them in and between particular wire centers. Issues concerning appropriate transition intervals and appropriate transition pricing are the kinds of factual matters that require development in the context of a hearing.

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

BellSouth's request for summary judgment on this dispute is particularly inappropriate. The Authority is in no position to make judgments about "the conduct of the parties" without hearing factual evidence about what that conduct might be. BellSouth's Motion speculates that CLECs "may choose inaction" as the deadline for the *TRRO* transition approaches, and that the Authority should issue an order based on BellSouth's speculation.

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[131] Letter from Bennett L Ross to Jeffrey J. Carlisle (February 18, 2005) at 2 n.4 (citing *Triennial Review Remand Order* ¶ 142, n 399).

The CLECs will abide by the Transition Plans approved by the Authority and incorporated into the parties' ICAs. If the Authority determines, based on record evidence, that there is a need for language addressing specific action or inaction as the March 2006 *TRRO* Transition Plan date approaches, the Authority can implement such contract language. There is no basis, however, for a ruling on this dispute absent a factual basis for implementing such contract language.

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

A. Section 271 checklist items qualify as "wholesale facilities and services" subject to the FCC's commingling requirements.

BellSouth seeks summary judgment on commingling obligations. After the *TRRO*, commingling is one of the most competitively sensitive issues that state commissions must address. BellSouth's Motion distorts the law on commingling and its request for summary judgment or declaratory order on the issue should be rejected. This is an issue that has far-reaching ramifications that should be addressed based on a full record at hearing.

A brief explanation of "commingling" and the closely related obligation of "combining" is useful to a full understanding of the parties' positions. What defines the difference between a "combination" and "commingling" is not the *facilities* themselves that are connected, but the *legal* obligation under which they are offered.[132] When each of the elements is offered under § 251, a comprehensive set of "combinations" rules apply.[133] Although BellSouth (and other incumbents) vigorously opposed the FCC's combinations rules, the U.S. Supreme Court rejected

[132] If each of the facilities involved in the configuration is required under § 251 as unbundled network element, then the term "combination" is used to describe the arrangement. However, in those instances where one or more of the facilities is not a § 251 UNE (*i e*, it is offered as a special access circuit or network element offered to comply with § 271 of the Act), then the arrangement is referred to as "commingling."

[133] 47 C.F.R. § 51.315.

arguments that combining network elements was not contemplated in the FTA and determined that the FCC's rules were appropriate to guard against anticompetitive behavior.

> It [the Act] forbids incumbents to sabotage network elements that are provided in discrete pieces, and thus assuredly contemplates that elements may be requested and provided in this form (which the Commission 's rules do not prohibit). But it does not say, or even remotely imply, that elements must be provided only in this [discrete] fashion and never in combined form.
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> [T]he [combinations] rule the Commission has prescribed is entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement. . . . It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.[134]

The legal basis for commingling rules is also rooted in federal nondiscrimination requirements. As noted by the U.S. Supreme Court, the "combinations rules" (which apply to § 251 network elements) are based on the nondiscrimination requirement found in § 251. "Commingled" arrangements, however, include *both* § 251 network elements and network facilities/functions offered through a mechanism other than § 251.

The fact that commingled arrangements include both § 251 and non-§ 251 elements does not grant BellSouth license to discriminate, because § 251 is not the only portion of the Act that prohibits discriminatory and anticompetitive conduct. Specifically, the FCC has held (and the D.C. Circuit has affirmed) that the general nondiscrimination obligations of § 202 apply to these other wholesale offerings, including those offerings required by the competitive checklist (loops, transport, switching and signaling) set out in § 271.[135]

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[134] *AT&T Corp. vs Iowa Utilities Board*, 525 U.S. 366, 385, 119 S.Ct. 721, 732 (1999).

[135] As explained in *USTA II*: "Of course, the independent unbundling obligation under § 271 is presumably governed by the *general* non-discrimination requirements of § 202." *USTA II*, 359 F.3d at 590 (emphasis in original).

Like its rules that apply specifically to § 251 network elements, the FCC found that the general nondiscrimination duties of § 202 imposed similar obligations where arrangements that contain both § 251 and non-§ 251 facilities and/or services were involved:

> In addition, upon request, an incumbent LEC shall perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act.[136]
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> ***
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> Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3).[137]

Thus, whether the applicable nondiscrimination standard is contained in § 251 or § 202 is immaterial – BellSouth must not discriminate by refusing to combine wholesale offerings, whether such offerings are entirely comprised of § 251 elements (combinations), or comprised of § 251 elements with other offerings such as § 271 checklist items (commingling).

BellSouth wishes to restrict CLECs' access to commingled arrangements, particularly through its position that CLECs cannot commingle § 251 network elements and § 271 checklist items. Such a position is not consistent with the FTA or the FCC's decisions in the *TRO* and should be rejected.

BellSouth rests its resistance to commingling § 251 UNEs with § 271 checklist items on a blatantly incomplete reading of the *TRO* and its Errata. A complete reading of the FCC's *TRO* Errata demonstrates that the FCC held that commingling is available for the connection of § 251 UNEs with any "wholesale facilities and services" provided by BellSouth. In fact, the Errata

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136 *TRO* ¶ 597.

137 *TRO* ¶ 591 (Footnotes omitted).

shows that the FCC considered excluding § 271 wholesale offerings from its commingling rules and decided against it.

The portion of the Errata to the initial draft of the *TRO* that BellSouth discusses in its Motion[138] effected the following deletion [in brackets]:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including [any network elements unbundled pursuant to section 271 and] any services offered for resale pursuant to section 251(c)(4) of the Act.[139]

Importantly, the editorial deletion cited by BellSouth does not result in a sentence that limits BellSouth's commingling obligations. The cited passage (post-Errata) still reads "...we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services," which would include by definition, wholesale facilities and services required by the § 271 competitive checklist. One would expect that if the FCC had decided to eliminate an entire category of wholesale offerings specifically adopted by Congress (namely, the § 271 checklist items), they would have done so expressly and not through the rather subtle method of issuing text in error and correcting it. Because § 271 competitive checklist services are "wholesale facilities and services," the *TRO* specifically requires BellSouth to commingle such services to a UNE or UNE combination. BellSouth's reliance on the removal of a redundant clause to support its position must fail.

Moreover, a companion deletion in the same Errata lends further support to the Joint CLECs' position. Although BellSouth places great emphasis on footnote 1989[140] as providing the basis to its claim that § 271 wholesale offerings are exempt from the FCC's commingling

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138 BellSouth Motion, at 51.

139 *TRO* ¶ 584.

140 BellSouth Motion, at 52. Footnote 1989 in the post-Errata (i.e., final) TRO appears as footnote 1990 in the pre-Errata *TRO*.

rules (as discussed above), it cannot adequately explain away a sentence in this footnote that the FCC's Errata deleted from the initial *TRO* draft [in brackets below].

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). [We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.]

Obviously, had the FCC intended to exempt the § 271 competitive checklist from its commingling rules, it would not have eliminated this express finding. Viewed in their entirety, the Errata edits support the view that the FCC's *TRO* commingling rules *apply* to § 271 checklist items. The plain language of the *TRO* applies the commingling rules to wholesale services obtained "pursuant to any method other than unbundling under section 251,"[141] and the language that would have exempted § 271 offerings from commingling obligations was removed from the *TRO* by the Errata.

B. DSL over UNE-P

BellSouth's Motion attempts to attain summary judgment on this issue when the issue was not even identified in its Petition to establish this proceeding, or in the Issues List attached to BellSouth's Motion. If BellSouth wants to advocate its position on this issue in testimony and briefs, it has every right to do so. It is completely improper for BellSouth to simply pluck a new issue out of the air and request summary judgment because it has come up with a new argument on a new issue since it filed its Petition.

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[141] *See TRO* ¶ 579 (emphasis added):

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

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

There are essentially three issues in dispute in the competing language on line splitting which will be presented by the parties: (1) the availability of Line splitting to the UNE-P "embedded base;" (2) BellSouth's obligations when BellSouth choses to control the splitter; and (3) BellSouth's obligations to "make all necessary network modifications" to its OSS to facilitate line splitting. BellSouth's requested relief, that the Authority finds that "BellSouth's line splitting obligations are limited to when a CLEC purchases a stand-alone loop and provides its own splitter and that BellSouth has no obligation to provide line splitting under any other service arrangement" grossly oversimplifies its legal obligations under the *TRO* and *TRRO*.[142] BellSouth's legal obligations related to line splitting can be found at 47 C.F.R. 51.319(a)((1)(ii)(line splitting) and (iii)(loop conditioning). Specifically, BellSouth's legal obligations include the provision of line splitting to the UNE-P "embedded base"; compatible splitter functionality (when BellSouth retains control of a splitter); and an obligation make OSS modifications to facilitate line splitting. Again, this issue is best addressed in the context of the presentation of the facts surrounding the dispute and in the context of the competing language of the parties, not in a "partial" Motion for Summary Judgment. BellSouth's requested relief should, therefore, be denied.

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

Any decision on access to call-related databases must recognize that call-related databases (like loops, transport, and switching) are included in the § 271 competitive checklist.

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[142] BellSouth Motion at 55.

Checklist item 10 requires BellSouth provide "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."[143] BellSouth therefore must continue to make these databases available at just and reasonable rates, terms, and conditions, for all the reasons discussed above in relation to Issue 8 (regarding § 271 obligations in ICAs).

BellSouth rests its contention that call-related databases should be excluded from ICAs on its general position that § 271 checklist items should not be included in ICAs. BellSouth states that "[b]ecause CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases."[144] For the reasons discussed in the discussion of Issue 8 above, BellSouth is wrong on both counts: both unbundled switching and call-related databases must continue to be provided to CLECs at just and reasonable rates, terms, and conditions as part of BellSouth's compliance with the § 271 competitive checklist. There is no basis for BellSouth's Motion on this issue.

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

At the same time that the FCC determined in the *TRO* that CLECs were not impaired without access to certain network elements that previously had been required to be unbundled under § 251, the FCC confirmed the ILECs' obligations regarding routine network modifications. This decision benefited facility-based CLECs by increasing their ability to efficiently manage their networks and expand the physical locations they can serve. The D.C. Circuit's decision in *USTA II* did not alter the FCC's ruling on this issue.

The need on the part of CLECs to implement this aspects of the *TRO* (as well as *TRO* provisions regarding commingling and expanded EELs eligibility) has been overshadowed,

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143 47 U.S C. 271(c)(2)(B)(x).

144 BellSouth Motion at 59.

however, by BellSouth's relentless characterization of the industry's battle concerning UNEs as a struggle over UNE-P alone, and was further stymied by BellSouth's and other ILECs' contention following *USTA II* that the only network element still required to be unbundled under § 251 is an analog loop. BellSouth has made these arguments, complaining repeatedly that it has been forced to wait years to see the elimination of UNE-P but conveniently ignoring the fact that CLECs have waited just as long to obtain these and other benefits of the *TRO*.

The parties' disputes on setting forth BellSouth's obligations to provide routine network modifications reflects the parties' fundamental difference in perspective. When BellSouth presents its proposed contract language later in this proceeding, the Joint CLECs expect the Authority will see language that is as restrictive and controlling as possible. CLECs will propose language that provides full access to EELs and routine network modifications in accordance with the FCC's rulings in the *TRO* and with no more limitations – and no more potential restrictive interpretations by BellSouth – than the text of the FCC's rules and orders require. Despite BellSouth's request for a seemingly simple ruling that its routine network modifications obligations should comply with the *TRO*, the real dispute is over the implementing contract language. BellSouth should not be permitted to insert qualifiers that limit BellSouth's responsibilities, resulting in exclusions that the FCC did not recognize in the *TRO* and limiting the instances in which loops will qualify for routine network modifications. Specifically, BellSouth should not be allowed to expand the activities that are excluded from routine network modifications.

The Joint CLECs object to any proposal that would allow BellSouth to impose "individual case basis" ("ICB") pricing for routine modifications. The FCC has defined these modifications as "routine" because they are performed in the usual and normal course of

provisioning service to customers. BellSouth in most instances can be expected to have priced these modifications into its recurring and non-recurring charges. To the extent it has not, it is incumbent upon BellSouth to demonstrate its costs and establish a cost-based rate for these modifications, but not to insert open-ended ICB pricing into the parties' agreement that creates uncertainty for CLECs.

It is also critically important that the implementation of the FCC's policy concerning routine network modifications not provide opportunities for BellSouth to delay the provisioning of facilities. The wholesale provisioning intervals that the Authority has approved are based upon parity between BellSouth's wholesale and retail operations. By definition, a "routine network modifications" is "an activity that the incumbent LEC regularly undertakes for its own customers."[145] Routine network modifications that BellSouth performs for its retail customers have in most, if not all, cases been taken into account in establishing those provisioning intervals. BellSouth cannot be permitted to delay provisioning a loop or transport circuit while the parties dispute whether a particular routine network modification was anticipated in establishing UNE rates or provisioning intervals. As in the case of potentially disputed orders for loops and transport in high density wire centers, BellSouth must be required to perform any and all necessary routine network modifications in a timely fashion and dispute later, if at all, whether the CLEC is required to pay for a particular modification or whether BellSouth's failure to meet a performance measure should be excused because the need for the specific routine network modification was not anticipated in setting performance intervals. This is especially true because routine network modifications, because they are in fact routine, should only rarely fail to be anticipated.

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[145] 47 C.F.R. § 51.319(a)(8)(ii)(local loops), § 51.319(E)(5)(ii)(dedicated transport)

The FCC's definition of "routine network modification" is identical for local loops and dedicated transport facilities. It appears that BellSouth is merely seeking affirmation that its routine network modifications obligation should track the *TRO* and FCC rulings. Such a declaration by this Commission is unnecessary and may serve only to embolden BellSouth in proposing unwarranted qualifiers in its contract language because it "won" on summary judgment. The real issue here is the contract language to implement the *TRO* guidance. As BellSouth agrees, rulings on contract language are not proper subjects for summary judgment.

In its Motion, BellSouth also argues that its line conditioning obligations are somehow modified and limited by the FCC's separate rules on routine network modifications.[146] This is not the case. Neither the line conditioning rule, 47 C.F.R. § 51.319(a)(1)(iii), nor the routine network modification rule, *id.* § 51.319(a)(8), contain any such modification or limitation. Accordingly, the Commission must not find, as a matter of law, that Bellsouth's obligation to perform line conditioning is subject to the same limitations that apply to its obligation to provide routine network modifications.

The FCC defines routine network modifications as "an activity the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(8). BellSouth seizes on a single sentence from the *TRO*'s discussion of line conditioning as the basis for its position. At paragraph 643 of the *TRO*, the FCC outlines the rationale for its rejection of claims that line conditioning constitutes creation of a superior network for CLECs. The FCC explains that line conditioning in some ways resembles routine network modifications: "Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL service to their customers." *Id.* ¶ 643. Yet the *TRO* text and line

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146 BellSouth Motion, at 60.

conditioning rules do not limit ILECs' obligations to perform conditioning to those instances where the requested removal of accretive devices also happens to qualify as a routine network modification under the FCC's separate routine network modification rules. Indeed, the text of the *TRO's* discussion of line conditioning does not even reference those rules. Likewise, the *TRO* text and rules on routine network modification impose no such limitation on line conditioning. Nor do they even reference the subject.

Instead, the FCC reaffirmed that ILECs must condition copper loops: "Competitors cannot access the loop's inherent 'features, functions and capabilities' unless it has been stripped of accretive devices. *We therefore view loop conditioning as intrinsically linked to the local loop* and include it within the definition of the loop network element." *TRO* ¶ 643 (emphasis supplied). Had the FCC intended to limit ILEC conditioning obligations as BellSouth suggests, surely the FCC would have worded this section of the *TRO* differently. However, there are no words of limitation in this paragraph. Indeed, the FCC reiterated in the *TRO* the absence of loop length limitations on ILEC conditioning obligations. *Id* n.1947. And, in this same paragraph, the FCC "reject[ed] Verizon's renewed challenge that the Commission lacks authority to require line conditioning," as it once again found that line conditioning does not constitute the creation of a superior network.

Line Conditioning is an obligation based on Section 25(c)(3)'s nondiscriminatory access obligations that allows CLECs to make the same decisions about removing accretive devices from copper loops that BellSouth can make – it does not subject CLECs to the decisions BellSouth actually makes. BellSouth's interpretation of the rules would give it the sole discretion to determine when line conditioning would be performed. That is, no line conditioning would be done if BellSouth did not "routinely" do such conditioning for itself. But taken to its logical

conclusion, BellSouth's position enables it to *eliminate all line conditioning completely*, based on what it decides is prudent for its own retail customers. If BellSouth determines that something is not "routine,"[147] it will not do what is required by Rule 51.319(a)(1)(iii) (Line Conditioning). Nothing in the rule or the text of the *TRRO* suggests that BellSouth has such an ability to narrow its line conditioning obligations.

For these reasons, BellSouth's attempt to have the Authority adopt as a matter of law BellSouth's erroneous attempt to conflate its separate routine network modification obligations with its line conditioning obligations must be rejected. There are separate rules, and while in certain respects, the obligations may be overlapping, in others they are not.

Issue 29: EELS Audits: What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

The Joint CLECs do not contest that BellSouth has *limited* rights to audit, "based upon cause", compliance with the EELs eligibility criteria established by the FCC in the *TRO/TRRO*. The eligibility criteria are set forth in the FCC's rules, and the contract language implementing them should carefully track the standards set forth therein. Notably, many CLECs have urged BellSouth to amend ICAs to incorporate the *TRO*'s EELs eligibility criteria since the FCC issued that order in 2003. While the parties are now negotiating (or arbitrating) such implementing language, it is noteworthy that BellSouth's Motion does not request a finding that the criteria should be followed, but only that BellSouth should be afforded "unfettered right to conduct an annual audit" of CLEC compliance with the criteria. A threshold ruling affirming the right to audit compliance with criteria that are not yet implemented is a clear case of placing the cart well in front of the horse.

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[147] This determination certainly requires the application of law to facts. For example, BellSouth routinely removes load coils from loops of all lengths to provide DS1 loops. However, it claims that it does not routinely remove such load coils on loops greater than 18,000 feet for other purposes.

There is no implication in the FCC's orders that BellSouth's audit rights are "unfettered." Indeed, the *TRO*, like the *Supplemental Order* Clarification that preceded it, clearly does not grant BellSouth an unfettered right to audit. Instead, it grants a "limited" right to audit, *TRO* ¶ 625, in the event that BellSouth can demonstrate that it has sufficient "cause" to believe that a CLEC has erroneously certified compliance with the eligibility criteria, *TRO* ¶ 622.

Moreover, the difficult negotiation issues related to EELs Audits concern not the broad legal principle – that BellSouth is entitled to conduct limited audits – but also the nuts and bolts aspects of implementation. Disagreements concerning the documentation necessary to establish cause and hence the scope of an audit, as well as selection of independent auditors are among the issues that will need to be resolved by the Authority. Additional issues may involve the precise instructions given to the auditors, and who bears the auditors' fees and the CLEC's internal cost of complying with the audit under various circumstances are the kinds of issues that have delayed audits and led to costly confrontations over the audit process. Past experience strongly suggests that these kinds of detailed issues need to be resolved in contract language designed to avoid the recurrence of disputes that have plagued BellSouth and CLECs in recent years. Such issues require factual development before the Authority, so it can determine the appropriate contract language that will afford BellSouth its limited right to audit while also affording CLECs protections from abusive, overly-expansive and unwarranted audits.

As with most every issue identified by BellSouth, the EELs audit dispute should be narrowed by negotiation, and discussed in testimony by subject matter experts who are familiar with auditing processes and the impact they have on companies' operations. The issue does not at all present a pure legal issue appropriate subject for resolution by summary judgment, and the Authority should reject BellSouth's Motion on this issue.

CONCLUSION

For all the reasons stated, the Joint CLECs respectfully urge the Authority to DENY BellSouth's Motion for Summary Judgment or Declaratory Ruling, and proceed to hearing on the issues identified in the parties' Issues List for this docket.

Respectfully submitted,

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