BELLSOUTH

RECEIVED
2005 JUL 14 AM 10:16
T.R.A. DOCKET ROOM

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy hicks@bellsouth com

Guy M Hicks
General Counsel

615 214 6301
Fax 615 214 7406

July 14, 2005

VIA HAND DELIVERY

Hon Deborah Taylor Tate, Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

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

Dear Hearing Officer Tate.

Enclosed are the original and fourteen copies of BellSouth's *Motion for Leave to a Reply Brief* in this docket. As you know, TRA Rule 1220-1-2-.06(3) provides: "No reply to response shall be filed except upon leave given upon the order of the Authority or Hearing Officer" In compliance with this Rule, BellSouth is requesting that you, as Hearing Officer, grant BellSouth's request to file a *Reply Brief*

Please note that a similar *Reply Brief* is being filed by BellSouth with the Georgia Public Service Commission in connection with its Change of Law proceeding. The Georgia Commission's procedural schedule calls for a *Reply Brief*. BellSouth believes the Authority should have at least as much information available to it in making its decisions as the Georgia Commission

Copies of this letter and attachments thereto are being provided to counsel of record

Very truly yours,

Guy M. Hicks

GMH·ch
cc: Hon. Ron Jones, Chairman

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*

Docket No. 04-00381

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR LEAVE TO FILE REPLY TO COMPSOUTH'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

BellSouth Telecommunications, Inc. ("BellSouth") hereby requests that the Hearing Officer grant it leave to file a *Reply Brief* in this matter.

TRA Rule 1220-1-2-.06(3) states that "[n]o reply to response shall be filed except upon leave given upon the order of the Authority or Hearing Officer."

BellSouth filed its *Motion for Summary Judgment, or in the alternative, Motion for Declaratory Ruling* ("*Motion*") on June 1, 2005. On July 1, 2005, the Competitive Carriers of the South, Inc. ("CompSouth"), on behalf of its membership, the Southeastern Competitive Carriers' Association ("SECCA"), and XO Communications, Inc. ("Joint CLECs") jointly filed a lengthy response to BellSouth's *Motion.* In order to address some of the assertions in the Joint CLECs' response, BellSouth needs to file a reply. BellSouth believes that the arguments and case law cited by BellSouth will be of benefit to the Authority in considering these important threshold change of law issues.[1]

Recently, in another Authority proceeding, NuVox Communications filed a Motion for Leave to File a Reply Brief. BellSouth did not oppose this Motion and the Hearing Officer granted the Motion and allowed NuVox to file its Reply Brief.[2]

[1] A copy of BellSouth's proposed *Reply Brief* is attached hereto.

[2] See *In Re Enforcement of Interconnection Agreement Between BellSouth and NuVox*, Docket No. 04-00133. NuVox's Motion for Leave to File a Reply was filed on September 27, 2004.

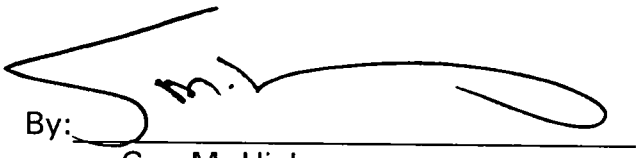
BellSouth believes that the Hearing Officer in this proceeding should act in a manner consistent with the Hearing Officer in the NuVox proceeding and allow BellSouth to file its Reply Brief.

Permission to file reply briefs is often granted in federal court. In fact, Local Rules 8(b)(3) for the Middle District specifically provides for the filing of reply briefs upon leave of court.

Moreover, BellSouth will be filing a similar reply brief with the Georgia Public Service Commission in its Change of Law proceeding. The Georgia Commisson's procedural schedule calls for the filing of a reply brief from Bellsouth. BellSouth believes that the Authority should have at least as much information available to it in making its decisions as the Georgia Commission. BellSouth respectfully requests that it be allowed to file its Reply Brief.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



By: _____

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
Meredith E. Mays
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

The Motion was approved by the Hearing Officer on February 4, 2005 and her Decision was memorialized in a written Order dated March 17, 2005.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*

Docket No. 04-00381

REPLY BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC. ON MOTION FOR SUMMARY JUDGMENT

BellSouth Telecommunications, Inc. ("BellSouth") files this reply to the *Joint CLECs' Response To BellSouth's Motions For Summary Judgment Or Declaratory Ruling* ("*Joint CLECs' Response*").

INTRODUCTION

BellSouth makes two general responses to the *Joint CLECs' Response* and then discusses in more detail two issues, Issue 8 (relating to Section 271), and Issue 17 (Line Sharing).

First, BellSouth's *Motion* was not premature as the CLECs allege. The issues raised in BellSouth's *Motion* can, and should, be decided as a matter of law Deciding the issues raised by BellSouth in advance of the hearing would streamline the hearing process and allow the Authority to focus limited hearing time on true factual issues. BellSouth's *Motion* was designed to allow efficient resolution of the issues before the Authority – nothing more and nothing less.

Second, upon review of the *Joint CLECs' Response*, the vast majority of the issues were fully addressed in BellSouth's opening brief Consequently, BellSouth has chosen not to repeat those dispositive arguments here and instead stands on its opening brief. The two exceptions to that approach are Issue 8 (271) and Issue 17 (line

sharing) Given both the philosophical and legal importance of these two issues, BellSouth addresses below the Joint CLECs' arguments on these points

DISCUSSION

A. ISSUE 8: (a) 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? (b) If the answer to party (a) is affirmative in any respect, does the Authority have the authority to establish rates for such elements? (c) If the answer to part (a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements, and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?

BellSouth's initial brief and the *Joint CLECs' Response* have crystallized the issue regarding Section 271 of the Act as follows Can the Authority require BellSouth to include Section 271 elements in a Section 252 interconnection agreement?[1] The law provides a clear answer to that question and that answer is "no."

To fully analyze this issue, the Authority must not look only at Section 271, as the CLECs advocate, but also must look at Section 252 and the interplay between Sections 271 and 252. This examination leads to the inescapable conclusion that while Congress gave authority to the state commissions under Section 252, authority over Section 271 elements remains with the FCC.

The crux of the CLECs' argument is that because Section 271 references Section 252, the 271 checklist items are thus to be included in Section 252 agreements *See, e.g., Joint CLECs' Response,* at 9 ("the language of Section 271 expressly states that BOCs must have checklist items reflected in agreements approved under Section

[1] The CLECs claim that BellSouth is seeking relief from all of its Section 271 obligations *See Joint CLECs' Response,* at 18 That is not the case BellSouth recognizes that without forbearance from the FCC, BellSouth has an independent obligation to provide the elements in Section 271(c)(2)(B) The issue is how those elements are provided and which regulatory body has authority over them

252"). The necessary corollary of that, argue the CLECs, is that state commissions have the authority to arbitrate and set the rates, terms and conditions of Section 271 elements. *See Joint CLECs' Response,* at 12 (the Section 252 process "is the procedural vehicle that must be used to establish the contract terms, conditions and prices for the Section 271 checklist").

The fallacy in the CLEC's argument is that the CLECs ignore the express language of Section 252. *See Joint CLECs' Response,* at 9 ("[t]he source of the TRA's authority to act under Section 252 to approve terms and conditions for checklist items comes ***directly from the text of Section 271***") (emphasis added). While Section 271 may reference Section 252, Section 252 specifically ***limits*** the rate-setting and arbitration powers of state commissions to ***Section 251*** elements The express limitations on state commission authority in Section 252 preclude any conclusion by the Authority that it can require BellSouth to include Section 271 elements in a Section 252 agreement

Put differently, the CLECs' argument fails because it blurs the statutory difference between rate setting and arbitration for Section 251 elements and rate setting and enforcement for Section 271 elements According to the CLECs, the Section 252 negotiation, arbitration and approval process applies equally to both. *See Joint CLECs' Response,* at 9 ("the Authority is not being asked and does not have to assert authority under Section 271 in order to fulfill its mandate to arbitrate and resolve disputed issues in Section 252 ICAs") That, however, is not the plan that Congress created. Congress allowed states to "set" rates only "for purposes of subSection (c)(3) of such Section [251]" and to arbitrate agreements to "ensure that such resolution and conditions meet

the requirements of Section 251 ...." The Authority must adhere to those fundamental limitations imposed by federal law.

1. Section 252 limits state commission rate-setting authority to Section 251 elements.

State commissions do not have the authority to set rates for Section 271 elements. This is clear because the language in Section 252 limits state commission rate-setting authority to Section 251 elements Section 252(d)(1) provides that state commissions may set rates for network elements *only* "for purposes of subSection (c)(3) of such Section [251]." The FCC has stated that this Section "is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required under Section 271."[2] This express limitation in Section 252(d)(1) on state commission pricing authority in arbitrations is directly on-point and dispositive as to the issue presented here.

In addition to the express language of Section 252, the FCC has confirmed that Section 251's pricing standards (over which the state commission has authority) do not apply to checklist elements under Section 271 *Triennial Review Order,* at ¶¶ 662, 664 It "clarif[ied] that the FCC will determine whether or not the applicable pricing standards are met, either in the context of a Section 271 application for long distance authority or, thereafter, in an enforcement proceeding *Id.* ("[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of Sections 201 and 202" is a fact-specific inquiry that the [FCC] will undertake in the context of a BOC's application

[2] *Triennial Review Order,* at ¶ 657

for Section 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6)").[3]

Finally, the FCC held that

> [w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to ***Section 271*** and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements.

Triennial Review Order, at ¶ 656 (emphasis added) The FCC went on to hold that "[s]ection 252(d)(1) provides the pricing standard 'for network elements for purposes of [Section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under Section 271." *Id.* at ¶ 657 (brackets in original)

The FCC has further held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 – statutes applied and enforced by the FCC. *See TRO,* at ¶ 656; ¶ 664 ("[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake ...."); also *TRO* ¶ 665 ("[i]n the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271").

---

[3] The FCC further explains that BellSouth might meet its burden of proof in such a proceeding by "demonstrating that the rate for a Section 271 element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist Alternatively, a BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carries to provide the element at that rate " *Triennial Review Order*, at ¶ 664 BellSouth has negotiated commercial agreements with more than 100 CLECs throughout its nine-state region Such agreements typically include an agreed-upon alternative to the UNE-P platform the CLECs want to replicate under the guise of section 271

Courts, including the 6th Circuit Court of Appeals, moreover, uniformly have held that claims based on Sections 201(b) and 202(a) are within the FCC's jurisdiction. Section 201(b) speaks in terms of "just and reasonable" which are determinations that "Congress has placed squarely in the hands of the [FCC]." *In Re: Long Distance Telecommunications Litigation,* 831 F 2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co* , 919 F. Supp 472, 478 (D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F 3d 448 (D.C. Cir. 1997) As the D.C. Circuit noted in *Competitive Telecommunications Association v. FCC*, 87 F 3d 522, (D C. Cir. 1996), Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory." The idea of [FCC] regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act" and required that state commission regulation be guided by FCC regulations. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999); *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F 3d 493 (7th Cir. 2004).

Nothing in *USTA II* or in the *TRRO* disturbed the FCC ruling that Section 271 elements are subject to the FCC's jurisdiction. A conclusion by the Authority that it has authority to set rates for Section 271 element would directly conflict with this ruling.

The CLECs admit, as they must, that the FCC is the entity charged by law with "regulating" section 271 rates. *Joint CLECs' Response,* at 31. The CLECs argue that that while the FCC spoke of itself as the "regulator" in charge of compliance with the Section 271 just and reasonable standard, that "[i]t did not, however, establish itself as the agency in charge of arbitrating the rate levels when they are in dispute." *Joint CLECs' Response,* at 32. The distinction the CLECs are trying to draw is one without a difference. The entity charged with "regulating" the rates (which in this case the CLECs admit is the FCC) is by definition the entity that must resolve the issue when the rates "are in dispute " The CLECs presume that a regulatory body must set the rates in the first instance but that is not the case. Rather, the provider sets the rates in accordance with the just and reasonable standard, and the *FCC* resolves any disputes that arise surrounding those disputes.

It makes sense that the FCC rules regarding Section 271 elements (*i.e.,* that the provider can set the rate initially as opposed to the regulator) are less stringent than those under Section 251. Section 251 (b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without which a CLEC is legally "impaired" within the meaning of Section 251(c)(1). Congress thus ensured that state commissions have full authority to arbitrate the rates, terms and conditions of access to these elements. Conversely, the FCC has determined that CLECs are not impaired without access to Section 271 elements that no longer meet the Section 251 test It has done so based on an evidentiary finding that competitive alternatives for

such elements are readily available in the marketplace.[4] Congress did not subject access to these 271 elements to the same regulatory scrutiny. Rather, consistent with its overriding intent to "reduce regulation," parties should be allowed to contract freely as to those items without state regulatory interference [5]

2. Section 252 limits a state commission's authority to arbitrate disputes to Section 251 obligations.

Section 252, the federal law that empowers state commissions to arbitrate disputes under the Act, expressly limits that authority to disputes arising out of Section 251 obligations. Section 252(c) limits the authority of a state commission in an arbitration to "ensur[ing] that such resolution and conditions meet the ***requirements of Section 251*** ...." Congress did not grant the state commissions any authority to arbitrate compliance with the requirements of Section 271. The failure to grant the state commissions such authority is dispositive of this issue. State commissions have the authority to arbitrate Section 252 agreements, but only so far as such agreements comply with Section 251 It follows that Section 252 agreements must, therefore, be limited to Section 251 elements and obligations.

Federal decisions confirm that a state commission's authority to arbitrate under Section 252 is limited to issues arising out of the ILEC's obligations under Section 251. In *Coserv v. Southwestern Bell Telephone Company*,[6] the Fifth Circuit held that an ILEC's duty to negotiate under Sections 251 and 252 is limited to those duties necessary to implement Section 251(b) and (c). As it explained, an "ILEC is clearly free

[4] *See e g , FCC's UNE Remand Order,* ¶ 471 (where a checklist item is no longer required under Section 251, a competitor is "not impaired in its ability to offer services without access to that element," which can be "acquire[d] in the marketplace at a price set by the marketplace ")

[5] *Id* (under these circumstances, the FCC concluded that "it would be counterproductive to mandate that the incumbent offer[] the element" at forward looking prices " Instead, "the market price should prevail, as opposed to a regulated rate")

[6] *Coserv v Southwestern Bell Telephone,* 350 F 3d 482 (5th Cir 2003)

to refuse to negotiate any issues other than those it has a duty to negotiate under the Act," which are "those duties listed in § 251(b) and (c)."[7] In *Coserv,* Southwestern Bell properly refused to negotiate a non-251 issue for inclusion in an interconnection agreement under Section 251. The Fifth Circuit held that the state commission correctly dismissed a petition for arbitration for lack of subject matter jurisdiction

As with the directly relevant statutory provisions, the CLECs have no answer to this binding case law. The Fifth Circuit held that ILECs need not negotiate anything other than "those duties listed in § 251(b) and (c)" and that, if the ILEC refused to negotiate such items, they are not subject to arbitration That holding applies directly here

Similarly, the Eleventh Circuit has held that state commissions' arbitration authority is specifically limited to imposing the terms necessary to implement Section 251(b) and (c). In that court's words, a rule mandating arbitration of items not covered by those parts of Section 251 would be "contrary to the scheme and text of th[e] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate."[8] Additionally, and as discussed in BellSouth's original memorandum, other federal courts have also concluded that "the enforcement authority for § 271 unbundling duties lies with the FCC" and any BellSouth conduct under that provision "must be challenged there first "[9] The CLECs rely on a single federal court decision that allegedly supports their position, while ignoring the most recent decision on this issue.

---

[7] Id at 487-88

[8] *MCI Telecomms Corp v BellSouth Telecomms , Inc* 298 F 3d 1269, 1274 (11th Cir 2002)

[9] *BellSouth Telecommunications, Inc v Cinergy Communications Co* , slip op 12, attached as Exhibit 10 to BellSouth's *Motion* for Review *Accord BellSouth Telecommunications, Inc v Mississippi PSC*, slip op 17, attached as Exhibit 9 to BellSouth's *Motion* for Review

Most recently, on June 9, 2005, a federal district court held that Section 252 did not authorize a state commission even to approve a negotiated agreement for line sharing between Qwest and Covad [10] It reasoned that Section 252 did not apply to this "commercial agreement" because line sharing "is not an element or service that must be provided under Section 251 "[11] This decision squarely conflicts with the CLECs' contention that, under Section 271(c)(2)(A), Section 271 elements must be contained in a Section 252 interconnection agreement That is because if a state commission cannot even approve a negotiated agreement that does not involve Section 251 items, it certainly cannot *arbitrate* terms that are not mandated by Section 251, where, as discussed above, Congress expressly limited the state commissions' authority to implementing Section 251

Instead of addressing the most recent federal court decision, the CLECs cite to *Qwest Corporation v. Minnesota Public Service Commission,* 2004 WL 1920970 (D. Minn. 2004) as support for the claim that Section 271 elements belong in Section 252 agreements. That decision, however, is clearly distinguishable because the FCC, ruling on the same fact pattern, reached a different conclusion about Section 252 in the *Qwest ICA Order* In the *Qwest ICA Order*, the FCC found that "*only* those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under [Section] 252(a)(1)."[12] The FCC reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to

---

[10] It is curious that the CLECs did not cite to this decision since the underlying contract in dispute was between Qwest and Covad Presumably Covad, a signatory to the *Joint CLECs' Response* in this docket, would have had some interest in the outcome of that case

[11] *Qwest Corp v Schneider, et al*, CV-04-053-H-CSO, at 14 (D Ma June 9, 2005)

[12] *Qwest Communications International Inc Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n 26 (2002) ("Qwest ICA Order") (emphasis added)

Section 251(b) or (c) must be filed under Section 252(a)(1)," "settlement contracts that ***do not affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed.***"[13] This finding is consistent with the FCC's Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations. *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004).

The CLECs also attempt to distinguish the recent federal decisions in Kentucky and Mississippi on this issue, but this attempt is unavailing. Both of those courts specifically held that decisions regarding 271 obligations rested with ***the FCC***[14] An attempt by a state commission to set rates or terms and conditions for Section 271 elements would directly conflict with this federal court precedent.[15]

3. Section 271 does not authorize the Authority to set rates or arbitrate Section 251 elements

---

[13] Qwest ICA Order, ¶ 12 (emphasis added), *see also Id*, ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in Sections 251(b) and (c)" must be filed under Section 252)

[14] *BellSouth Telecommunications, Inc v Mississippi Public Serv Com'n et al*, Civil Action No 3 05CV173LN, *Memorandum Opinion and Order* (S D MS Apr 13, 2005) ("*Mississippi Order*"), *2005 U S Dist LEXIS 8498*, p 17 of slip opinion, *BellSouth Telecommunications, Inc v Cinergy Communications Co, et al*, Civil Action No 3 05-CV-16-JMH, *Memorandum Opinion and Order*, (E D Ky Apr 22, 2005) ("*Kentucky Order*"), p 12 of slip opinion

[15] Indeed, the CLECs conceded that some state commissions, including the state commissions of Texas and Kansas, have declined to include Section 271 checklist items in Section 252 interconnection agreements The CLECs likewise acknowledged BellSouth previously cited to analogous decisions from commissions in Utah, Washington, Alabama, North Carolina, and New York (as well as the federal court decisions in Mississippi and Kentucky) The CLECs attempt to counter these decisions by relying upon an interim decision of the Tennessee Regulatory Authority, which is the subject of ongoing preemption petition before the FCC, and to preliminary arbitrator's decisions from Oklahoma and Missouri BellSouth understands the Missouri commission has adopted the arbitrator's decision, BellSouth anticipates that decision will be subject to further review The CLECs also rely on an Illinois decision, which is the subject of a pending Motion for Review/Reconsideration, and a Maine Supreme Court decision The Maine Supreme Court decision is clearly distinguishable as the Court relied upon language in a state tariff that permitted "the use by one public utility or cable television system of the conduits, subways, wires, poles or any part of them belonging to another" There is no such joint statutory use state tariff in Tennessee

To make their case, the CLECs ignore all of the express limitations on state commission authority in Section 252. The CLECs also ignore the relevant case law. Instead the CLECs rely on Section 271(c)(2)(A)'s reference to "agreements that have been approved under Section 252." By its terms, however, that Section expressly refers *only* to "approv[al]" of agreements under Section 252. ***It says nothing about state commission arbitration or rate-setting authority.*** The limitations on rate-setting and arbitration are directly relevant here because the CLECs want this Authority to arbitrate issues around, and ***set rates*** for, the Section 271 elements. The issue before this Authority, therefore, goes far beyond the scope of the Authority's authority to approve agreements, yet that is the extent of the statutory provision in Section 271 upon which the CLECs rely.

Rather, the CLECs' argument utterly disregards the provision that expressly limits state rate-setting authority. And, crucially, Congress made no mention of including Section 271 elements in negotiations under Sections 251(c)(1) and 252(a)(1), arbitration under Section 252(b), or state commission resolution of open issues under Section 252(c) Most importantly for present purposes, Congress did not give state commissions ***any*** rate-setting authority for Section 271 requirements in Section 252(d)(1). On the contrary, ***all*** of those Sections are explicitly linked – and limited – to implementation of Sections 251(b) and (c)

The CLECs also argue that Section 271(c)(1) provides that "the terms and conditions for the checklist items in Section 271 must be in an approved interconnection agreement." *Joint CLECs' Response,* at 12 Section 271(c)(1) says nothing of the sort. Section 271(c)(1) provides that to comply with Section 271, a BOC must meet the

requirements of either subparagraph (A) or (B). Subparagraph (A), in turn, provides that a BOC meets the requirements of the Section if it "has entered into one or more binding agreements that have been approved under Section 252 ...." The Section 252 agreements referenced in that Section refer to agreements that incorporate the required Section 251 elements – nothing is said about Section 271 elements. All that Section 271(c)(1) requires is that the BOC needed either approved Section 252 agreements or an SGAT to obtain Section 271 authority. It says nothing about incorporating Section 271 elements into the Section 252 agreements (nor would it because such a requirement would conflict with the express limitations in Section 252 addressed above).

4. Section 271 vests enforcement over Section 271 elements with the FCC

Section 271 itself vests exclusive authority over the enforcement of Section 271 obligations with ***the FCC***. *See* Section 271(d)(6) Thus, while the CLECs claim that BellSouth wants "sole control over the terms and conditions that apply to the Section 271 checklist items," that is simply not the case *See Joint CLECs' Response,* at 11. If there is an issue of whether BellSouth is meeting its Section 271 obligations through approved agreements or otherwise, Congress was explicit as to what body should address whether BellSouth is in compliance Section 271(d) authorizes the FCC, not the Authority both to approve 271 applications and to determine post-approval compliance. If the CLECs are concerned about BellSouth's Section 271 compliance,

the place to raise that concern is the FCC, not the Authority In the FCC's words, that federal agency has **"exclusive authority"** over the entire "Section 271 process."[16]

The CLECs spent extensive time trying to distinguish what they concede to be the FCC's exclusive enforcement authority over Section 271 from what they call the state commission's "Section 252 authority." *See Joint CLECs' Response,* at 27-32. The obvious flaw in the CLECs' argument is that, as demonstrated above, Section 252 does not confer any jurisdiction over Section 271 elements to the state commissions – in fact, it expressly limits state commission authority to set rates and arbitrate to ***Section 251*** obligations.

Furthermore, the arrangement advocated by the CLECs would be unworkable as a practical matter Under the CLECs' argument, Section 252 interconnection agreements would contain both Section 251 and 271 elements. The CLECs concede, however, that the state commission has no enforcement authority over Section 271 elements *See Joint CLECs' Response,* at 27 ("[t]he Joint CLECs do not contend that if the Section 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"). Thus, under the CLECs' theory, state commissions would enforce certain parts of an interconnection agreement (*i.e* , the 251 elements) and the FCC would enforce other parts (*i.e.,* the 271 elements) of the same contract That scenario, of course, makes no sense.

5. State law does not empower the Authority to include Section 271 elements in a Section 252 agreement.

[16] E g , Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona,* 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999) (emphasis added)

The CLECs make the incredible argument that because there was no "express discussion on preemption in the *TRO* or in the *TRRO* concerning any preemption possibilities for Section 271," *Joint CLECs' Response,* at 26, that the Authority can act under state law to include Section 271 elements in interconnection agreements. This argument misses the point and is incorrect because it utterly ignores the fact that Section 252 agreements and Section 271 elements are creatures of ***federal law***, not of state law, and thus the obligations surrounding them are set forth in the federal statute And, as discussed above, the federal statute clearly delineates the state commissions' authority (rate-setting and arbitration for Section 251 elements) and FCC authority (Section 271 enforcement)

Even if the CLECs' preemption claim was valid here, which it is clearly not, FCC precedent is explicit that state commissions are not to be involved in rate-setting for Section 271 elements In the *Triennial Review Order,* the FCC held that "Section 252(d)(1) is quite specific that it only applies for the purposes of implementation of Section 251(c)(3) – meaning only that there has been a finding of impairment with regard to a given network element." *TRO,* at ¶ 657. The FCC recognized that the distinction between Section 251 elements and Section 271 elements was critical because it "allow[ed] [the FCC] 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." *Id.* at ¶ 659 (emphasis added) Allowing state commissions to set the rates for Section 271 elements would be "gratuitously reimpos[ing]" the same obligations on elements that are not subject to Section 251 obligations.

For all of the reasons set forth above, the Authority should reject the CLECs' invitation for the Authority to violate federal law by reinstating UNE-P under the guise of section 271 or state law

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

Rather than respond to all of the Joint CLEC rhetoric, BellSouth will make three salient points in rebuttal First, the language of Section 271 does not require line-sharing. Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services "[17] The FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises.[18] BellSouth thus meets its checklist item 4 obligation by offering access to complete loops and thus all the "transmission" capability on those facilities.[19] The CLECs argue that because the HFPL is "a complete transmission path," that it constitutes "a ***form*** *of* 'loop transmission facility'" under checklist item 4. This argument is absurd. To make it, the CLECs must ignore the portion of the definition of HFPL that defines HFPL as a "complete transmission path ***on the frequency range above the one used to carry analog circuit switched voice***

[17] 47 U S C § 271(d)(2)(B)(iv)

[18] 47 C F R § 51 319(a)

[19] The Joint CLECs cite to FCC 271 orders for the proposition that line sharing is a Section 271 obligation, yet offer no explanation for the fact that neither New York nor Texas were required to offer line sharing to obtain Section 271 approval If line sharing actually had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted Verizon and SBC Section 271 authority *See In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* CC Docket No 99-295, 15 FCC Rcd 3953 (Dec 22, 1999), *In the Matter of Application by SBC Communications, Inc , et al , Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket no 00-65, 15 FCC Rcd 18354 (June 30, 2000)

transmissions. .." In other words, the HFPL is only part of the facility --- not the "complete transmission path" required by checklist item 4.

A simple but appropriate analogy makes the point --- it is as if one ordered a birthday cake from a bakery but received only the icing Certainly the buyer would not consider the icing alone a "form" of birthday cake. On the contrary, the requirement was a whole cake, not just a portion of it, just as checklist item 4 requires the entire transmission facility, not just the high frequency portion of the transmission facility

Second, the FCC's transition plan demonstrates that the HFPL is not a checklist item 4 requirement The *Triennial Review Order* establishes a carefully calibrated transition plan that establishes specific ***rates*** that CLECs must pay in those limited instances where they can still obtain the HFPL.[20] The Authority unanimously determined in another proceeding that the FCC's transition plan constitutes the ***only*** obligation BellSouth has regarding line sharing [21]

Under the CLECs' theory, however, the FCC's elaborate and carefully crafted transition applies only to non-BOC ILECs very few, if any, of whom sell line sharing.[22] It defies logic that the FCC created such a transition plan for such a handful of lines. Moreover, the CLECs argue that they can obtain the HFPL indefinitely and at rates other than the ones the FCC specifically established simply by requesting access to those facilities under Section 271 instead of Section 251. That position is contrary to the FCC's express conclusion that "access to the whole loop and to line splitting but not

---

[20] *See Triennial Review Order* ¶ 265

[21] Docket No 04-00186, Sept 27, 2004, Tr at 10, 13-14 The Authority has not yet issued a written order, however, and, as a result, Bellsouth has not yet been able to implement interconnection agreement amendments with CLECs in Tennessee resolving this issue

[22] *Id*, ¶660 (only approximately 2 5 percent of ILEC switched access lines are served by LECs that are neither BOCs nor rural telephone companies exempt from Section 251 unbundling)

requiring the HFPL to be separately unbundled ***creates better competitive incentives***."[23] The CLECs have provided absolutely no reason to believe that, having required access to the whole loop under Section 251, the FCC has nevertheless authorized access to just the HFPL under Section 271 -- and thus created the very anti-competitive consequences it sought to avoid in the *Triennial Review Order* There is no basis to conclude that the FCC, having eliminated these anti-competitive consequences under Section 251, has allowed these *same* untoward effects to go on unchecked under Section 271. On the contrary, in its recent *BellSouth Declaratory Ruling Order*, the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop." Moreover, that order specifies that the HFPL is available "***only*** under an express three-year phase out plan."[24] *Id.* ¶ 5 n. 10 (emphasis added).

Third, the CLECs argue that, whatever else may be disputed, Chairman Martin's statement regarding line sharing confirms that it is a Section 271 obligation In a similar vein, they assert that, by making the forbearance argument at all, BellSouth necessarily concedes that line sharing is a Section 271 element.

There is nothing inconsistent about BellSouth's alternative argument that, if any Section 271 obligation existed, the FCC has granted forbearance. BellSouth has never in any forum conceded that any of the broadband elements included in its Petition for Forbearance are Section 271 elements. In fact, BellSouth affirmatively stated in its Petition that it "believes that no such obligation exist[s]" for "any of the broadband elements" included therein.[25] Rather than engage in lengthy litigation over this issue in 51 states, however, BellSouth filed its Petition "in an abundance of caution," asking for

---

[23] *Triennial Review Order* ¶ 260
[24] *Id* at para 5, n 10
[25] *See* BellSouth Petition for Forbearance, at p 1

forbearance of any such obligation, assuming one were to find such an obligation existed. The FCC does not spend any time in its *Forbearance Order* analyzing or finding that broadband elements are Section 271 elements There is no need for lengthy debate of this point (either at the FCC or here) if, assuming that they are, the FCC will forbear from enforcing any such 271 obligations. Thus, as Chairman Martin concludes: "[s]ince line sharing was included in their request for broadband relief, and we affirmatively grant their request, I believe today's order also forbears from ***any Section 271 obligation with respect to line sharing.***"[26]

The CLECs further argue that BellSouth's petition did not include line sharing and, thus, was not included in the relief granted No CLEC argument, however, can obscure the fact that this is precisely what Chairman Martin concluded in his separate statement. Nor does it in any way rebut BellSouth's discussion in its *Motion* of the FCC's own conclusions with respect to the scope of the relief requested It stated in its *Forbearance Order* that

> [a]lthough Verizon's Petition was ambiguous with regard to the exact scope of relief requested, later submissions ... clarify that Verizon is requesting forbearance relief only with respect to those broadband element for which the Commission made a national finding relieving incumbent LECs from unbundling under Section 251(c).[27]

And with respect to these "later submissions," the FCC cited to the very March 26, 2004 ex parte filing upon which BellSouth relies. Thus, the RBOC petitions did include line sharing and "[w]hile the Commission did not specifically address line sharing in [its] decision," because it was "included in their request for broadband relief and we

---

[26] *See* Separate Statement of Commissioner Kevin Martin
[27] *See* FCC's Forbearance Order, ¶ 2, n 9

affirmatively grant their request, the "order also forbears from any Section obligation with respect to line-sharing."[28]

CONCLUSION

For the reasons set forth herein and in BellSouth's Opening Brief, BellSouth respectfully requests that the Authority grant either summary judgment or a declaratory ruling (as appropriate) in favor of BellSouth on each of the issues set forth in its opening brief. Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
Meredith E Mays
675 W Peachtree St., NE, Suite 4300
Atlanta, GA 30375

[28] *See* Statement of Kevin J Martin, Broadband Forbearance Order In any event, and as the Commissioner further concludes, "[r]egardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute Covad does not dispute this argument other than to claim in the first instance and wrongfully as explained herein that BellSouth did not request relief for line sharing

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2005, a copy of the foregoing document was served on the following, via the method indicated:

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
1600 Division Street, #700
Nashville, TN 37219-8062
hwalker@boultcummings.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

James Murphy, Esquire
Boult, Cummings, et al.
1600 Division Street, #700
Nashville, TN 37219-8062
jmurphy@boultcummings.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Ed Phillips, Esq
United Telephone - Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587
Edward.phillips@mail.sprint.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823
don.baltimore@farrar-bates.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

John J. Heitmann
Kelley Drye & Warren
1900 19th St., NW, #500
Washington, DC 20036
jheitmann@kelleydrye.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Charles B. Welch, Esquire
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219
cwelch@farrismathews.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Dana Shaffer, Esquire
XO Communications, Inc.
105 Malloy Street, #100
Nashville, TN 37201
dshaffer@xo.com

560314