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BEFORE THE TENNESSEE REGULATORY AUTHORITY

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

JOINT CLEC POST-HEARING BRIEF

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JOINT CLEC POST-HEARING BRIEF

Competitive Carriers of the South, Inc. ("CompSouth")[1] and XO Communications, Inc. (hereinafter, "Joint CLECs") submit the following Post-Heanng Brief in the above-referenced proceeding.

I. INTRODUCTION

The Joint CLECs represent competitive telecommunications providers who are active, and hope to continue to be, in the market for local services in Tennessee. The Joint CLEC companies use unbundled network elements ("UNEs") purchased from BellSouth to serve business and residential customers of every size in all parts of the State. While various CLECs take unique views on particular issues and have priorities different from others, all of the Joint CLEC companies share a common concern about the issues raised in this proceeding.

That primary shared concern is that BellSouth ıs, plain and simple, overreachıng in ıts efforts to eliminate its legal obligations to unbundle the fundamental loop, switching, and interoffice transport network elements. There is no dispute that in the Triennial Review Order

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[1] CompSouth's members partıcıpatıng ın thıs docket ınclude the followıng companıes Access Poınt Inc , Cınergy Communıcatıons Company, Dıalog Telecommunıcatıons, DIECA Communıcatıons, Inc , d/b/a Covad Communıcatıons Company, IDS Telcom, LLC, InLıne, ITC^DeltaCom, LecStar Telecom, Inc , MCI, Momentum Busıness Solutıons, Inc , Navıgator Telecommunıcatıons, LLC, Network Telephone Corp., NuVox Communıcatıons, Inc, Supra Telecom, Talk Amerıca, Trınsıc Communıcatıons, Inc , and Xspedıus Communıcatıons, LLC

("TRO")[2] and the Triennial Review Remand Order ("TRRO"),[3] the FCC adopted new rules that partially limit BellSouth's obligations to provide competitors access to unbundled network elements ("UNEs") at TELRIC rates. Each company that comprises the Joint CLECs has attempted to negotiate with BellSouth to implement those revised unbundling obligations.

The Joint CLECs have negotiated resolution of many issues, and continue to try to resolve the remaining disputes.[4] The issues brought to the Authority for resolution in this case are those where the BellSouth position would force CLECs to abandon legal rights that have real business consequences. In negotiations, and now in its testimony in this proceeding, BellSouth has consistently insisted on implementing language that is inconsistent with the FCC's rulings in the TRO and TRRO, or with the provisions of the federal statute itself.

Although there are many issues in this proceeding, the docket fundamentally concerns the ability of small competitive entrants to serve small businesses, particularly those small businesses seeking flexible high-speed digital services that provide voice and data in an integrated manner. The foundation for such products is the "DS1," a digital loop facility that is central to competing for the small enterprise customer.

There is no dispute that in the Triennial Review Order ("TRO")[5] and the Triennial Review Remand Order ("TRRO"),[6] the FCC adopted new rules that partially limit BellSouth'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] As noted herein, the parties have resolved one of the contentious issues at hearing (regarding the DS1 transport cap) in the weeks since the hearing

[5] 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

obligations to provide competitors access to DS1 facilities at TELRIC rates. BellSouth's testimony, however, goes much farther than the TRRO allows in foreclosing access to the small business market. Specifically:

* In wire centers where BellSouth does not have a Section 251 obligation to provide access to DS1s at TELRIC-based rates, BellSouth remains obligated to charge just and reasonable rates under Section 271. In fact, BellSouth's Section 271 obligations also apply to unbundled loops, switching, and interoffice transport. BellSouth seeks to evade its Section 271 duty by forcing carriers to pay interstate tariffed special access rates for DS1 services. The FCC has already found that such price levels are not consistent with sustainable local competition, and interstate special access rates are not just and reasonable in the local market. Similarly, the rates offered for unbundled switching in Bellsouth's unapproved "commercial" contracts also fail to comport with the Section 271 "just and reasonable" standard.

* BellSouth is refusing to "commingle" those network elements required under Section 251 of the Act with those elements required by Section 271, claiming that its Section 271 offerings are not "wholesale services."

* The FCC limited access to new broadband facilities (such as new fiber), but only when it is used to serve mass-market customers. The FCC could not have been clearer that its policy applied <u>only</u> to the mass market. Small businesses served by DS1 lines, however, are considered <u>enterprise</u> – not mass-market – customers, and BellSouth's obligation to provide UNE DS1 access is not compromised by the FCC's broadband policies.

* When BellSouth applies the appropriate test to determine whether DS1 access must be offered as a Section 251 UNE – i.e., when it classifies its wire centers according to the number of business lines and fiber-based collocators – it improperly inflates the business line count by including lines used to provide data services and serve residential customers. The Joint CLECs' analysis corrects for BellSouth's inflated numbers and identifies those wire centers in Tennessee where BellSouth's Section 251 unbundling obligations are legitimately reduced.

* BellSouth is attempting to prevent competitors from creating their *own* DS1s to serve customers in wire centers where BellSouth is not required to provide a DS1

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")

[6] 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").

> at TELRIC-based rates. The FCC recognized that competitors could use what is called an "HDSL-capable" loop to provide DS1-level services, even in those wire centers where BellSouth is not required to offer DS1s themselves. BellSouth is claiming that it is also not required to provide HDSL-capable loops wherever it no longer offers a DS1, even though the FCC specifically stated that CLECs could use HDSL loops to offer service is such circumstances.

In addition, BellSouth's proposed contract language short-changes CLECs regarding other provisions of the FCC's TRO and TRRO that are favorable to the competitive industry. BellSouth's proposals on routine network modifications, line conditioning, and EELs audits all attempt to unduly expand BellSouth's rights (and limit CLECs' opportunities) in ways not contemplated by the FCC in the TRO and TRRO. Moreover, BellSouth's proposals are fundamentally inconsistent with the Authority's prior rulings on some of the most important issues in this proceeding, most notably the Authority's October 20, 2005 Final Order in the BellSouth/ITC^Deltacom arbitration.[7]

The Joint CLECs urge that BellSouth's overreaching proposals be rejected and the Authority adopt the positions and implementing language proposed in the CompSouth proposal (Revised Exhibit JPG-1).

II. POST-HEARING STIPULATIONS

Subsequent to the hearing in this matter, the Joint CLEC parties and BellSouth agreed to the following stipulation regarding two disputed issues in the above-referenced proceeding. By this Stipulation, the parties (a) settle the disputed issue regarding implementation of the "DS1 transport cap" set forth in the TRRO; and (b) agreed to a process to finalize the identification of "fiber-based collocators."

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[7] Docket No 03-00119, Petition for Arbitration of ITC^Deltacom Communications, Inc With BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996, Final Order Of Arbitration Award (Oct 20, 2005) ("ITC^Deltacom Order")

A. <u>DS1 Transport Cap</u>.

In the *TRRO*, the FCC adopted a limitation on the number of DS1 unbundled dedicated transport UNEs that CLECs could obtain from ILECs in certain circumstances. Witnesses for BellSouth and CompSouth filed testimony regarding this issue. The parties have agreed to settle their disputes regarding this issue. BellSouth and the Joint CLECs agree that successor interconnection agreements will include the following stipulated contract language addressing the DS1 transport cap:

> CLEC shall be entitled to obtain up to (10) DS1 UNE Dedicated Transport circuits on each Route where there is no unbundling obligation for DS3 UNE Dedicated Transport. Where DS3 Dedicated Transport is available as UNE under Section 251(c)(3), no cap applies to the number of DS1 UNE Dedicated Transport circuits CLEC can obtain on each Route.

This stipulation makes it unnecessary for the Authority to render a decision on the implementation of the DS1 transport cap in this proceeding.[8]

B. <u>Process for finalizing identification of "fiber-based collocators."</u>

The parties have agreed that a process must be established that permits validation of the status of carriers identified as "fiber-based collocators." The parties believe that this process will facilitate the expeditious identification and resolution of disputes regarding identification of fiber-based collocators. The process of finalizing a list of fiber-based collocators may involve supplementation of the hearing record in this proceeding, and the parties request the Authority permit such additions to the record as necessary to complete the process for identifying fiber-based collocators.

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[8] The parties announced the settlement of this issue on the record (TN Tr. at 143-44), and provide this stipulation to memorialize the settlement and the agreed contract language.

III. DISCUSSION OF DISPUTED ISSUES IDENTIFIED ON THE JOINT ISSUES LIST

Issue No. 1: TRRO / FINAL RULES: The Section 252 process requires negotiations and to the extent parties may not be able to negotiate resolution of particular issues arising out of the Final Rules/TRRO or to the extent that new issues related to the Final Rules/TRRO arise, issues related to those matters will be added to this list.

Issue No. 1 was placed on the Issues List merely as a "placeholder" for issues that might arise requiring resolution between the time the Issues List was filed and the hearings in this proceeding. The Joint CLECs address all the issues in the context of the issues included in the filed Issues List, and do not address any matters under this placeholder heading.

Issue No. 2: TRRO / FINAL RULES: What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's Triennial Review Remand Order ("TRRO"), issued February 4, 2005?

CompSouth's proposed contract language (provided in full as revised Exhibit JPG-1 to the rebuttal testimony of CompSouth witness Joseph Gillan) implements the changes in BellSouth's obligations to provide loops, transport, switching, and dark fiber UNEs pursuant to Section 251(c)(3) obligations. In many respects, the Joint CLECs and BellSouth do not disagree on how to implement the TRRO provisions regarding UNEs that have been "de-listed" under Section 251. The disputes instead center on determining whether the FCC's tests for designating de-listed wire centers have been applied correctly.

The primary dispute regarding implementation of the TRRO transition involves the question of what CLECs may transition <u>to</u> when they transition <u>away</u> from UNEs no longer available under Section 251. The contract language proposed by CompSouth that is supported by the Joint CLECs provides for a transition to Section 271 checklist elements that must remain available even where Section 251(c)(3) UNEs have been "de-listed" by the FCC. ICAs should be amended to incorporate Section 271 checklist items that will, in many cases, provide the wholesale service that will replace Section 251(c)(3) network elements. For example, all the major Section 251 UNEs subject to de-listing by the TRRO (switching, high capacity loops and interoffice transport) all must remain available to CLECs pursuant to the Section 271 competitive checklist. Moreover, as the Authority held in the ITC^Deltacom Order, BellSouth "has a duty and cannot refuse to negotiate" the prices for Section 271 checklist elements.[9]

BellSouth includes no provisions for Section 271 checklist elements in its ICA proposal. In BellSouth's view, the ICA should provide only for transitioning away from Section 251 UNEs; what CLECs transition to is, in BellSouth's view, not an appropriate subject for state commissions to review. The dispute regarding this Authority's Section 252 and 271 responsibilities regarding inclusion of Section 271 checklist items in ICAs is addressed in detail under Issue No. 8, and will not be further discussed here. The outcome of that dispute has a significant impact on the Authority's choice of the appropriate language to implement the TRRO transition.

CompSouth's proposed contract language facilitates the completion of the transition plan as contemplated by the FCC in the TRRO. CLECs are entitled to transition rates for any UNEs that are "de-listed" until March 10, 2006. BellSouth's contract proposals would force CLECs off the transition pricing plan well before the end of the FCC-mandated transition period. BellSouth asserts that the transition of the embedded base of UNE-P customers must be completed by March 11, 2006.[10] 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

[9] ITC^Deltacom Order, at 30

[10] Direct Testimony of Pam A Tipton of Behalf of BellSouth, at 5 ("Tipton Direct").

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."[11] 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 to alternative facilities or arrangements."[12] The FCC also made similar pronouncements for dedicated transport[13] and mass market switching.[14] 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.

The Joint CLECs are willing to work cooperatively with BellSouth to ensure that circuits subject to the transition off Section 251(c)(3) UNEs are processed efficiently. BellSouth's proposals in this proceeding, however, have always featured a premature end to the transition pricing mandated by the FCC in the TRRO.[15] The CLECs – whose customers are the ones potentially affected by the transition from one service to another – have a strong interest in

[11] TRRO at ¶227

[12] *Id* at ¶196 (emphasis added)

[13] *Id* at ¶143.

[14] *Id* at ¶227.

[15] BellSouth's proposals also have been premised on denying the Joint CLECs the options and alternatives they are entitled to under current the TRRO and its predecessor, the TRO Notably, BellSouth refuses to amend interconnection agreements to incorporate the FCC's new EEL eligibility criteria, commingling rights and conversion rights necessary to facilitate the transition. Instead, BellSouth insists that all changes of law be implemented its way or not in any way until the Authority resolves disputes over such implementation in arbitrations and in this generic docket *Id* Thus, while BellSouth insists on transition, it denies access to some of the key tools necessary to implement it. To remedy this situation, Joint CLECs submit that the Authority should find that BellSouth is entitled to apply transition rates for de-listed UNEs retroactively to March 11, 2005, only to the extent it makes EEL eligibility criteria, commingling and conversion rights effective retroactively to the same date *See* Exhibit JPG-1 (language proposals for Issue 2, sections 2 2 6, 2 3 6 3, 4 4 4, 5 3.3 4, 6 2 4 4, 6 9 1.5.), *see also* TRRO at ¶ 142, n 398 (finding that the FCC's current rules governing conversions and commingling apply to the transition of delisted UNEs), ¶ 195, n 517 (same)

implementing the FCC's call for an "orderly" transition where Section 251 UNEs are de-listed. In no circumstances should CLEC cooperation with BellSouth to ensure an orderly transition result in CLECs' being forced to pay higher rates than the FCC authorized during the transition period.

The Joint CLECs urge that as the Authority considers the timing of the TRRO transition, it recall the testimony that most of the transitions involve no more than billing or records changes.[16] BellSouth will not be forced, in any event, to conduct many physical network re-arrangements in order to achieve transition away from Section 251 UNEs. Moreover, if the Authority accepts the Joint CLECs' proposals regarding establishment of Section 271 checklist elements in the revised ICAs, the transition will involve exclusively a billing change to convert CLECs to the higher interim rate for Section 271 elements.

In addition to terms and conditions for the TRRO transition, ICAs must include transition provisions for high capacity loops and transport that BellSouth is currently required to provide under Section 251 but may not be required to provide as Section 251 UNEs in the future as a result of growth in business line counts or fiber-based collocators. BellSouth's testimony focuses on its obligations after March 10 and September 10, 2006 (the end dates of the TRRO transition periods). In doing so, 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 non-impairment standards but may do so in the future. This is an essential part of the transition process for UNEs that are currently being used to provide service to CLEC customers but that BellSouth may not be required to provide on an unbundled basis under Section 251 as wire center growth causes more wire centers to qualify for de-listing.

[16] TN Tr at 255:23-25 – 256 1 (Tipton).

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 non-impairment thresholds' established in the *Triennial Review Remand Order* that subsequently 'may meet those thresholds in the future.'"[17] Yet BellSouth's proposed contract 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.

Rather than 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, the Authority should declare that BellSouth is obligated to provide for transition of high capacity loops and transport when in the future it is relieved of the obligation to provide them in and between particular wire centers pursuant to Section 251. As discussed in more detail regarding Issue No. 10, future transitions away from Section 251 UNEs should permit the same one year transition period as provided for by the FCC in the TRRO.

Issue No. 3: TRRO / FINAL RULES:

a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

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

[17] Letter from Bennett L. Ross to Jeffrey J Carlisle (February 18, 2005) at 2 n 4 (citing *Triennial Review Remand Order* ¶ 142, n.399) (*ex parte* filing in WC Docket No. 04-313) The FCC also articulated this negotiation obligation in the *TRRO* at ¶ 196, n.519.

(a) The Authority's decisions in this proceeding should form the basis for interconnection agreement ("ICA") amendments implementing changes in BellSouth's unbundling obligations. Unless parties have specifically agreed otherwise,[18] the ICA amendments should be completed in a timely manner after the conclusion of this proceeding. The parties should have a reasonable period of time to conduct the administrative tasks necessary to ensure that the language in the ICA amendments submitted to the Authority for approval truly reflects the Authority's decisions. Existing ICAs should only be modified, however, regarding disputed issues that are within the scope of this proceeding. If an issue covered by an existing ICA is not in dispute in this proceeding (or was not even affected by the FCC's TRO or TRRO rulings), then the current contract language addressing that issue should not be affected by the decisions in this proceeding.

Joint CLECs strongly oppose approval of the entirely new ICA Attachment 2 that BellSouth has filed along with its testimony in this proceeding.[19] Rather than simply file contract language that is actually responsive to the disputed "change of law" issues on the Issues List, BellSouth's proposed new Attachment 2 addresses issues related to the TRO and TRRO that are *not disputed* in this proceeding (e.g., EELs eligibility criteria).[20] In addition, BellSouth's proposal includes contract language on many issues that were not affected in any way by the recent changes in law arising from the TRO and TRRO (e.g., white pages directory listings and

[18] NuVox and Xspedius have an agreement with BellSouth under which they have agreed that certain changes of law will be implemented through their new interconnection agreements currently being arbitrated by the Authority in Docket No. 04-00046 and not through amendments to their existing agreements.

[19] *See* Rebuttal Testimony of Joseph Gillan on Behalf of CompSouth ("Gillan Rebuttal"), at 35 BellSouth's proposed contract language is included in Exhibits PAT-1 and PAT-2 to BellSouth witness Ms Tipton's direct testimony

[20] *See* BellSouth Exhibit PAT-1 at 43-44

E911 database access).[21] Joint CLECs urge the Authority not to adopt the portions of BellSouth's proposed new Attachment 2 that are unrelated to the disputed issues in this case. (The dispute over adoption of the entire BellSouth proposed replacement for existing Attachment 2 provisions is discussed in more detail under Issue 32 below).

(b) The appropriate way to implement in new agreements pending in arbitration the modifications arising from this proceeding would depend on how the parties to the arbitration have treated the issue. If the issue resolved in this case is an unresolved disputed issue in a pending arbitration, the Authority's ruling in this case should govern the resolution of the arbitration. If the issue resolved in this case is <u>not</u> an unresolved disputed issue in a pending arbitration, and the parties to the arbitration have agreed that they will abide by their negotiated resolutions notwithstanding the results in this case, those resolutions should be honored. On the other hand, absent such a specific agreement, either party to the arbitration should be able to invoke the change of law provisions of the interconnection agreement once the agreement is approved by the Authority. That approach would enable the parties to adopt the new rulings by this Authority in an orderly manner consistent with any specific agreements they may have concerning how those rulings should be addressed.

Issue No. 4: TRRO / FINAL RULES: What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined?

(i) Business Line
(ii) Fiber-Based Collocation
(iii) Building
(iv) Route

[21] *See id* at 71 and 67.

FCC rules adopted in the TRRO to determine non-impairment for high capacity loops and transport require a wire-center by wire-center analysis. The key variables in the analysis are of two factors: (i) the number of "business lines" in each wire center, and (ii) the number of "fiber-based collocators." There is little dispute concerning the appropriate definition of these terms. Rather, the dispute primarily involves the appropriate interpretation of definitions provided by the FCC, particularly as to how the number of business lines should be counted.[22]

(i) Business Line

The Authority should adopt CompSouth's calculation of "business lines" as the only internally consistent reading of the FCC's rules.[23] The FCC's Business Line definition consists of four sentences that must be read together. As the Joint CLECs explain below, BellSouth dissects the FCC's definition, reading each sentence in isolation, so that the definition comprises conflicting instructions, all of which inure to BellSouth's benefit. The purpose of BellSouth's interpretation is to dramatically inflate the number of business lines claimed at each wire center so as to claim non-impairment in wire centers where such relief is not justified by the FCC's findings in the TRRO.

Although BellSouth argues that the FCC instructed BellSouth to calculate business lines in the manner that it did, BellSouth's business line count here is far beyond the level BellSouth provided that the FCC relied upon when determining the impairment thresholds. Indeed, the number of business lines that BellSouth claims here not only significantly exceed the number of business lines it provided the FCC in the TRRO proceeding. BellSouth's "business line" count

[22] The FCC did not provide definitions for the terms "building" or "route." CompSouth has modified its definition of the term "building" to bring it closer to principles articulated by BellSouth in its testimony, but does not believe agreement has been reached. The Joint CLECs are unclear whether there is a significant dispute regarding proposed language the parties have exchanged regarding the "route" definition. The proposed language for both defined terms is discussed herein.

[23] The rationale for the CompSouth business line calculations was included in the direct and rebuttal testimony of CompSouth witness Mr Gillan

provided in this case also dramatically exceeds the number of business lines BellSouth reports to investors, and the number claimed here is well above comparable numbers that BellSouth routinely files with the FCC for that agency's local competition reports.

Because BellSouth incorrectly calculated the number of business lines as defined by the FCC, the Authority should adopt the correct business line count calculated by CompSouth, which faithfully applies the complete definition established by the FCC.

A. The FCC's Definition of "Business Line" Should Be Read so as to be Internally Consistent.

There is no dispute as to the content of the FCC's Business Line definition. "Business Line," as defined in 47 C.F.R. Section 51.5 states:

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

Despite agreeing to the wording of the definition, BellSouth has adopted a reading of the above that causes each directive in the definition to conflict with another. Specifically, BellSouth includes with the Business Line count: (a) residential lines served by CLECs using UNE loops; (b) capacity on its own high-speed digital access lines that are either empty or used for data services; and (c) capacity on the high-speed digital access lines leased to CLECs that are

[24] 47 CFR § 51.5

similarly empty or used for data services. Each of these actions inflates the number of "business lines" counted by BellSouth and directly conflicts with the FCC's definition.

Oddly, BellSouth begins its reading of the above definition in the middle, with the second sentence:

> The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements.

BellSouth claims that the FCC has directed that it count <u>all</u> UNE loops, including loops that are used to serve residential customers. By conveniently downplaying the <u>first</u> sentence of the definition, BellSouth takes the position that "Business Lines" should include residential lines.[25] The Joint CLECs disagree. This first sentence of the definition was not included as meaningless introduction, but represents the <u>core</u> requirement that only business lines be counted when "business lines" are counted. The second sentence of the definition provides elaboration, not contradiction – it simply identifies that the *categories* of LEC-owned switched access lines that serve business customers are: (a) the ILEC's business switched access lines; and (b) lines leased to the CLEC as UNEs. But that fact that most UNEs are used to serve business customers does not mean that UNEs <u>not used</u> to provide switched access line service to business customers are to be counted. The FCC had no reason to conclude that it would be necessary to repeat each line of its Business Line definition as the last clause of every subsequent sentence in order for its instruction to be followed. A reasonable person would read the entire definition with an eye towards maintaining internal consistency, not read individual sentences in isolation so as to conflict with one another.

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[25] TN Tr at 279:15-18 (Tipton)

It is interesting to note that BellSouth does not even follow its own reading of the definition consistently, for its "explanation" for counting residential UNE-L is that the definition directs it to count all UNE loops, which would also include "UNE loops provisioned in combination with other unbundled elements." Strictly read (as BellSouth claims it is doing), that direction would also include UNE-P (which are UNE loops provisioned in combination with unbundled local switching). Nevertheless, BellSouth does not count residential UNE-P (despite what its interpretation of the Business Line definition would suggest).[26]

Second, BellSouth claims that the FCC's definition directs it to count all high-speed digital facilities at their maximum potential capacity – that is, by the maximum number of voice grade lines the facility could support – without regard to whether the lines are being used to provide switched business line service to end users. It is this error that causes the greatest increase in BellSouth's "business line count," for BellSouth inflates both the number of its retail lines *and* the high-speed digital loops that it leases to CLECs.[27]

A full reading of the FCC's definition makes clear that the FCC did not sanction BellSouth's adjustments to either its retail lines, or direct it to count UNE-L in the manner it chose. The FCC was unambiguously clear that when counting either BellSouth's business switched access lines, or when counting UNE-L, a set of additional requirements must be satisfied (emphasis added):

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[26] The Joint CLECs are not suggesting that residential UNE-P should be counted – it should not. BellSouth's exclusion demonstrates that its own reading of the definition runs afoul of other FCC discussion, including the FCC's discussion in ¶ 105 that refers solely to business UNE-P. Under the Joint CLECs' reading of the FCC's definition, there is no need to fall-back on the discussion in ¶ 105 and adopt a supra-definitional direction (as BellSouth must), because under the Joint CLECs' reading it is already clear from the definition that only lines used to serve business customers may be counted

[27] BellSouth's work papers demonstrate that virtually all UNE loop based competition (other than that provided by UNE-P) relies on high-speed DS1 loops to serve customers *See* Hearing Exhibit 19. This exhibit comprises BellSouth's workpapers for its calculation of business lines for all nine states in its service territory. The exhibit includes (at page 33) region-wide line counts for all types of UNE-L A comparison of the number of lines served by various categories of UNE-L demonstrates that DS1 loop-based UNE-L accounts for the lion's share of UNE-L lines in service.

> The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies
>
> (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
>
> (2) shall not include non-switched special access lines,
>
> (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."[28]

These additional requirements obligate BellSouth to provide the best analysis that it can -- for both its retail lines and for the UNE-L it leases -- to assure that only access lines used for switched services are counted. BellSouth is *expressly* prohibited from counting empty channels or data circuits (which are not a switched service) as business lines. BellSouth violates these additional requirements by including in its calculation the maximum potential capacity of its digital access lines, irrespective to how that capacity is used.[29]

The basis for BellSouth's calculation is (once again) an isolated reading -- in this instance, the last clause, of the last sentence. BellSouth reads this last sentence to sanction its counting circuits that do not provide switched access line service – indeed, they may not be providing any service at all – as business lines. There is no indication in the text of the TRRO, or in its definition, that the FCC intended for its third criteria to reverse the prior two. Indeed, upon closer examination, it is clear that (3) above does not direct BellSouth to count each channel in a high capacity circuit as a "business line" at all. The critical sentence in (3) above is

[28] 47 CFR § 51 5.

[29] TN Tr at 281·23-25 to 282:1 (Tipton)

that BellSouth "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line." This requirement, however, does nothing more than it plainly states: It merely directs that each 64 kbps-equivalent should be considered "one line;" it does not direct that each line then be declared a "business line" without regard to the remaining criteria.

The fact that the definition provides an example of how the analysis might count a DS1 is not the same as defining all DS1s as 24 business lines. Indeed, had the FCC wanted to declare all high capacity services business lines, it could have easily simplified the definition to say so. But the FCC did not. It directed that each 64-kbps equivalent be considered one line, and then directed that other criteria – most specifically, that the line be used to provide switched access line service to a business customer -- determine whether each "line" should be considered a business line.

Perhaps the most telling example of how far BellSouth's interpretation forces it to depart from reality is the way BellSouth treats its own "business switched access lines." The term "business switched access lines" is actually a defined term in ARMIS 43-08,[30] which is the report that the FCC directed be used to measure BellSouth's retail lines.[31] Significantly, the ARMIS reporting instructions *already* require that BellSouth report its lines in voice-equivalents,[32] but limit the voice-equivalent line count to only those circuits actually activated to provide business switched access line service. Even though the FCC directed that BellSouth rely on a defined

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[30] *See* *TRRO,* ¶ 105, n.303, specifically referencing a document from the FCC website· http://www fcc gov/wcb/armis/documents/2004PDFs/4308c04.pdf (see page 21 for definition of Business Switched Access Lines).

[31] As the FCC explained (*TRRO*, ¶105 Footnotes omitted)· "The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information "

[32] *See* http.//www fcc gov/wcb/armis/documents/2004PDFs/4308c04 pdf (page 21) defining ARMIS 43-08 Business Switched Access Lines as "total voice-grade equivalent analog or digital switched access lines to business customers " (Emphasis added)

measure already converted to voice grade equivalents – and thus a measure that would require no further adjustment to comply with the business line definition – BellSouth nevertheless increased its switched business line count to include any capacity not used to provide switched business line service.[33]

How much clearer could the FCC be? The *TRRO* points to a previously defined standard measure of BellSouth's business switched access lines that meets each of the FCC's criteria as filed, yet BellSouth nevertheless insists that the FCC's definition requires that it inflate this measure to count capacity that does not comply with the definition. It is not the FCC that provided BellSouth its reading of the business line definition, it is BellSouth's desire to limit unbundling far beyond what the FCC intended.[34]

B. BellSouth's Disjointed Reading of the Business Line Definition Produces Dramatically Inflated Results.

One measure of the reasonableness of BellSouth's business line analysis is to compare its results to other measures produced by BellSouth, including the data that BellSouth provided to the FCC in the TRRO proceeding. The TRRO data is particularly relevant because it was this "version" of BellSouth's business lines that the FCC relied upon in establishing the thresholds for impairment. Although BellSouth claims that the FCC changed the business line definition

33 BellSouth freely admits that it has adjusted its business line count to include capacity not used to provide switched business line service. As BellSouth "explains" (Tipton Direct, page 31): "ARMIS 43-08 line counts only include provisioned or 'activated' 64 kbps channels that ride high capacity digital lines. For example, if a switched DS1 Carrier System had eighteen (18) 64 kpbs channels provisioned as business lines for a customer, the ARMIS 43-08 would count only 18 business lines The *TRRO* definition business lines requires that the full system capacity be counted as business lines, so for *TRRO* purposes, the business line count for that DS1 Carrier System would be the full system capacity, or 24 business lines "

34 As the Joint CLECs discuss herein, even where the FCC's criteria categorize loops or transport as non-impaired (and, therefore, no longer required to be offered under Section 251 at TELRIC), BellSouth remains obligated to offer these same facilities to CLECs as unbundled elements at rates that are just and reasonable under Section 271's competitive checklist.

"with its eyes fully open,"[35] there is no data source that produces the levels of business lines claimed by BellSouth in this proceeding. To the contrary, the number of business lines BellSouth claims here are also at odds with data BellSouth provides investors, and the data BellSouth routinely files with the FCC to be used in the FCC's biannual Local Competition Report.

First, the FCC clearly relied upon business line count information provided by BellSouth when adopting the thresholds used for impairment.[36] Nevertheless, the number of business lines BellSouth claims exist in the affected Tennessee wire centers is 46% higher than the number it provided the FCC in the TRRO proceeding.[37] As the table below shows, the effects of BellSouth's business line counts produce non-impairment findings in its region very different from what the FCC expected when it adopted these thresholds.

Comparing the Number of Wire Centers BellSouth Told the FCC Would Meet Impairment Criteria to BellSouth's Claims Today

Criterion: WC lines>	Use of Criteria under TRRO[38]	Told FCC	Claims Now	Change
60,000	Restricts Access to DS1 Loops	3	11	267%
38,000	Restricts Access to DS3 Loops and DS1/DS3 Transport	15	34	127%
24,000	Restricts Access to DS3 Transport	54	100	85%

BellSouth attempts to explain this discrepancy by claiming that the FCC changed the definition of business lines to produce these very different consequences. However, BellSouth cannot explain the basis for the FCC's changes, since none of BellSouth's calculations here were

35 TN Tr. at 193 2-3 (Tipton)

36 TRRO, ¶ 105, n 304.

37 Hearing Exhibit 18

38 In addition to business line counts, the FCC criteria also considers, as either an alternative qualifying requirement (for transport), or a mandatory additional criteria (for loops), the number of fiber-based collocators

provided to the FCC during its deliberations. There is nothing in the TRRO that BellSouth can point to explaining why the FCC would adopt a test that produces such radically different results from the business line counts the FCC favorably cited in the TRRO. Moreover, none of BellSouth's other available data – such as its public filings with investors, the Securities Exchange Commission or even the FCC's own Local Competition Survey – is consistent with these claims now.

For instance, BellSouth routinely reports the number of business lines, unbundled loops and business UNE-P to investors as part of its quarterly earnings report.[39] Although not available on a state-specific basis, this report can be used to compare the unit volumes used in this proceeding on a region-wide basis to the levels reported to Wall Street for the same period (December 2004).

Comparing BellSouth Claims to Financial Reports

Measure	Lines Claimed by BellSouth in	
	4Q2004 Earnings Report	Impairment Analysis
Business Retail + Resale	5,303,000	6,258,000
Business UNE-P	750,000	811,000
Unbundled Loops[40]	273,000	381,648

In a post-hearing data request, the Authority asked BellSouth to explain the first of these discrepancies, *i e.*, the difference between BellSouth's financial report and the numbers of business lines used in these proceedings.[41] BellSouth's explanation is that the business lines

[39] BellSouth's publicly available quarterly earnings report for the fourth quarter of 2004 (ending December 31, 2004) was entered into the record as Hearing Exhibit 20

[40] Comparison of unbundled loops converts BellSouth's measure of unbundled loops in the state impairment proceedings that are presented on a voice equivalent basis to a basic unit count (i e , a DS1 is counted as a single loop) in order to *minimize* the discrepancy with its financial reports

[41] BellSouth Response to Tennessee Regulatory Authority Data Request, Docket 04-00381, September 23, 2005, Item No. 7 BellSouth's response was filed on October 14, 2005.

reported in its quarterly earnings information does not include ISDN lines (these lines are reported separately), and that once such ISDN lines are included in the financial report (and official lines removed), the difference between the two data sources are effectively reconciled. Leaving aside whether BellSouth's explanation is complete – for instance, it would not explain the wide variation in the claimed number of business UNE-P and does not address the unbundled loop discrepancy at all – the larger point is that this public data would not have forewarned the FCC of the consequence of the changes in the business line definition that BellSouth's claims the FCC adopted. Not only would there have been no record basis in the TRRO for the FCC to so drastically change its business line definition (after establishing impairment thresholds on business line counts provided by BellSouth), there was not even any public data that could have guided the FCC's analysis.[42]

Even more troubling is the discrepancy in the number of UNE loop arrangements that BellSouth claims here and the number of UNE loop arrangements that it routinely filed with FCC so that the FCC could prepare its biannual Local Competition Report. FCC "Form 477" is used by the FCC to collect statistics on local competition. As part of this report, BellSouth is required to provide, for each state, the number of UNE loop arrangements where switching is not provided.[43] In accordance with the instructions for its Form 477 Local Competition Report, BellSouth should be reporting, for each state, all UNE-L that is not part of UNE-P, which would include all UNE loop arrangements that connect to UNE transport (otherwise known as an EEL).

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[42] Of course, as we explained in the prior section, a plain reading of the FCC's business line definition does not support BellSouth's position that the FCC made the drastic changes that BellSouth now reads into the definition

[43] *See* FCC Form 477 Instructions. The Form 477 instructions, which are available from the FCC's public website were produced by CompSouth on October 14, 2005, as part of its response to Authority's post-hearing data request Docket No 04-00381, CompSouth Response to Tennessee Regulatory Authority Data Request dated September 23, 2005, Item No. 2 (Oct 14, 2005) ("CompSouth TRA DR Response"). In particular, note Instruction for Line C.II-4 at the top of page 7 of Form 477 Instruction

The FCC routinely posts selected data from the Form 477 Local Competition Reports filed by the BOCs, including the UNE-L unit data reported on Line C.II-4.[44] As explained in CompSouth's discovery response to the Authority, BellSouth reported to the FCC that it had 39,453 UNE-L (loops without switching) in Tennessee in December 2004.[45] The work papers underlying BellSouth's business line count for Tennessee in this proceeding, however, indicate 42,569 UNE-L arrangements.[46] In other change of law proceedings, BellSouth has identified the discrepancy in this data as being explained by the number of EELs (DS0, DS1 and DS3), which BellSouth asserts it does not include in its Form 477 Reports. Because this error involves the highest capacity facilities, the effect on the number of business lines is substantial. Specifically, the 3,116 additional UNE-L EEL units that BellSouth claims it has failed to file with the FCC translate to 78,373 additional "business lines" using the BellSouth's method of counting here.

The Joint CLECs address how to correct for the discrepancy between BellSouth's business line count in this proceeding and its local competition report in the following section. The point here is that there is not a single datum that the FCC could have used to establish its impairment thresholds, while at the same time changing the methodology to count business lines in the manner claimed by BellSouth. Whether the FCC looked only at the data it cited in the TRRO – which, as explained above, showed business line counts dramatically lower than BellSouth now claims – or whether it supplemented its analysis by considering other public data,

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[44] This data can be found on the FCC's website at: http //www.fcc gov/wcb/iatd/comp.html where it lists "Miscellaneous data from FCC Form 477" – "Selected RBOC Local Competition Data." The data specific to December 2004 can be found at http://www.fcc gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/RBOC_Local_Telephone_Dec_2004 xls This data was provided attached to the CompSouth Response to the Authority's post-hearing data request *See* CompSouth TRA Dr. Response, Item No. 2 (Oct. 14, 2005).

[45] Although BellSouth presents its UNE-L data in this docket in "voice grade equivalent " form, the number of UNE-L VGE can be converted back to basic unit volumes so that it may be compared with the unit volumes reported to the FCC on the Form 477.

[46] *See* CompSouth TRA DR Response, Item No 2

including BellSouth's own local competition filings with the FCC,[47] none of the available data sources would have warned the FCC of the levels of business lines that would result from the dramatic changes in the business line definition that BellSouth claims the FCC adopted.

C. CompSouth's Calculation Provides the Best Good Faith Estimate of Business Lines.

Unlike BellSouth, the analysis of business lines in CompSouth witness Mr. Gillan's testimony applies a straight-forward reading of the FCC's definition to determine the number of "business lines" at each wire center, making sure that the count is not inflated by including data and spare capacity. To do so requires two corrections to BellSouth's data, each intended to ensure that the business line count:

> (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, and
>
> (2) shall not include non-switched special access lines.[48]

These requirements apply equally to BellSouth's retail lines, as well as UNE-P and UNE-L arrangements used by CLECs. To correct the errors in BellSouth's analysis requires that (a) BellSouth's inclusion of non-switched lines in its retail count be removed, and (b) that a reasonable method be applied to similarly remove non-switched capacity from the count of CLEC high-speed UNE loop arrangements.

These corrections were detailed in Exhibit JPG-4 filed with Mr. Gillan's rebuttal testimony for CompSouth.[49] Correcting BellSouth's retail line count so that it conforms to

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[47] Indeed, there is reason to believe that the FCC *expected* UNE volumes comparable to its 477 filings, for it explained (TRRO ¶ 105, emphasis supplied) that "[b]y basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information" The FCC's Form 477 Local is the only federal regulatory filing (of which the Joint CLECs are aware) where ILECs report UNE figures.

[48] 47 CFR § 51 5

ARMIS 43-08 requires only that BellSouth's adjustment be reversed. Correcting CLEC capacity requires the application of a reasonable estimation. The methodology employed by CompSouth is simple and straightforward – it merely assumed that the average utilization of CLEC high-capacity lines equals the average utilization of BellSouth itself.[50] As Mr. Gillan testified, because BellSouth and the CLEC effectively compete for the same customer base, there is no reason to expect differences in relative capacity use. What is clear is that the FCC's definition requires a good-faith estimate in order to ensure, as closely as possible, that only lines used to provide switched access line service to business customers should be included in the count.[51] Only CompSouth has provided a reasonable methodology and its business line count should be adopted for purposes of wire center calculation. Attachment X, comparing the wire center classifications proposed by BellSouth to those of CompSouth, demonstrates the importance of correctly calculating the number of business lines at each wire center in determining the appropriate tier assignment.

In addition, the Authority should correct for the discrepancy between BellSouth's counting of UNE-L units in this proceeding and the units BellSouth reports to the FCC. An important audit mechanism is to ensure that the data BellSouth files at the FCC and in the states are consistent. BellSouth should not be permitted to maintain one UNE-L count at the FCC, while claiming a different (and higher) count here. If, in the future, BellSouth re-files its Form 477 Reports with the FCC, and admits a longstanding error in preparing these reports, then the

[49] Gillan Rebuttal JPG-4

[50] *See* Gillan Rebuttal at 22.

[51] Reiterating a point from earlier, that part of the FCC rule that directs that digital access lines should count "each 64 kbps-equivalent as one line" does not answer whether each 64-kbps channel should be counted as a business line The complete definition makes clear that the count "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services," a criterion that demands further analysis Certainly, where it is known that all the 64kbps equivalents in a DS1 satisfy this requirement, then the exemplar in the definition would apply (*i e* , each of the 24 64 kbps-equivalent would be counted as a business line) But that exemplar does not trump the qualifying requirements of the definition

Authority could adjust any wire center classifications based on those future conditions. However, BellSouth should not benefit from filing conflicting UNE-L claims here and the FCC.[52]

(ii) Fiber-Based Collocation

Unlike the calculation of the number of business lines, there is general agreement on the correct method to identify fiber-based collocators. In part this consensus exists because BellSouth and the CLECs recognized that this issue requires data that is not easily obtained (by either party) and agreed to a parallel process to identify disputes. Because this process is not yet complete, there may yet be underlying disagreements that have not surfaced. It is the joint CLECs' understanding (reflected in the attachments) that there is a question about the number of fiber-based collocators in a single wire center (CHTGTNNS).[53] CompSouth and BellSouth continue to discuss this wire center and, if a dispute remains, will bring it to the Commission in accordance with our agreed upon Fiber-Based Collocator process.[54]

(iii) Building

The definition of the term "building" has significant consequences for Section 251 loop unbundling. The FCC's rules limit the number of DS1 loops a CLEC can receive to 10 in each "building" in areas where there is DS1 loop impairment; similarly, DS3 loops are limited to one

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[52] Attachment B hereto, which is derived from the data in Hearing Exhibit 19 and the publicly available Form 477 reports, provides the calculation for this adjustment If BellSouth re-files its Form 477 data with the FCC (thereby reconciling the data to its claims here), then the business line counts from CompSouth Exhibit JPG-4, as shown on Attachment A should apply

[53] As explained above, there are substantial differences between BellSouth and the Joint CLECs regarding the correct calculation of business lines

[54] The process agreed to between BellSouth and the CLECs requires the parties to work cooperatively to identify any disputed fiber-based collocations and to jointly present that list to the Authority for resolution (either through a separate hearing or by delegation to the Staff).

per "building."[55] The FCC did not, however, adopt a definition of what it considers a "building," and the parties have not reached agreement on the proper definition of the term in the context of the TRRO.

The Authority should adopt the "building definition" proposed by the Joint CLECs. This definition was specifically revised in CompSouth's contract proposal to incorporate BellSouth's concept of a "reasonable person."[56] The main difference between the definitions recommended by CompSouth and BellSouth is that CompSouth's building definition is based on the concept of a "reasonable <u>telecom</u> person," to ensure that the deciding factor in defining a "building" is that the area is served by a single point of entry for telecom services. Thus, a high-rise building with a general telecommunications equipment room would be considered a single building, while a strip mall with separate telecom-service points for each individual business in the mall would not. Such circumstances should be treated, for loop-aggregation purposes, as individual premises, even though they may share common walls.[57] This definition reflects how a "building" would be seen for network engineering purposes, which is the relevant standard in an interconnection agreement.

<u>(iv) Route</u>

There is no dispute among the parties that a "route" is defined by the FCC in 47 C.F.R. Section 51.319(e). For reasons set forth in the rebuttal testimony of XO witness Shulman, however, it is important that the Authority's Order in this docket make clear that a "route" is defined in relation to the two wire centers between which the CLEC is requesting transport, not

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[55] *See* 47 C F R. § 51 319(a)(4)(ii) (DS1 loops) and (a)(5)(ii) (DS3 loops)

[56] *See* Revised Exhibit JPG-1, page 16.

[57] Gillan Supplemental Testimony, at 7

wire centers beyond or subtending either of those two wire centers.[58] In other words, whether an impaired "route" being requested lies, due to the configuration of the BellSouth network, within a larger, non-impaired route should have no impact on the classification of the smaller route. A route is defined by its end-points, not by whatever decision BellSouth employs as to how it will ultimately provide transport between those points.

Issue No. 5: TRRO / FINAL RULES:
a) Does the Authority have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?
b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?
c) What language should be included in agreements to reflect the procedures identified in (b)?

There is no question that the Authority has the jurisdiction to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate. Both BellSouth and the Joint CLECs recognize that challenges concerning wire center classifications are to be resolved in the context of Section 252 interconnection agreements.[59] This indicates that state commissions, as arbiters of Section 252 agreements have the flexibility, in adopting conforming language for such interconnection agreements, to adopt the most efficient process to resolve disputes. The Joint CLECs believe it is more efficient to settle these disputes at the "front end" through review by the Authority, than at the "back end" of a dispute.

The Joint CLECs believe that this is true not only for the establishment of this initial list, but that an orderly process should be established to determine future changes in the wire center

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[58] Rebuttal Testimony of Kris Shulman on Behalf of XO Communications, at 18:17 – 21 7

[59] This point is made explicitly by the FCC in TRRO ¶ 100 BellSouth's witnesses do not contest that state commissions have the authority to determine if BellSouth has correctly followed the FCC's mandates for how to designate non-impaired wire centers

list. The Joint CLECs propose a simple, annual procedure, tied to filing of updated ARMIS 43-08 business line data, which is one-half of the qualifying criteria.[60] While the FCC does not specifically limit how frequently such disputes should be addressed, the Joint CLECs believe that its process is administratively reasonable. If BellSouth sought to reclassify a wire center in mid-year, the CLECs would be entitled to mid-year business line data, requiring BellSouth to provide ARMIS 43-08 calculations more frequently than once a year. Rather than complicate the disputes in this manner by requiring BellSouth to update its access line information more frequently than annually, the Joint CLECs believe the process should by synchronized with the routine filing of ARMIS 43-08.

> Significantly, BellSouth has never explained its objection to the process recommended in CompSouth witness Mr. Gillan's testimony, nor has BellSouth proposed an alternative. The CompSouth proposal is not only a reasonable process to update the wire center list in an orderly manner, it is the *only* process being recommended in this proceeding. The Authority should adopt the CompSouth process.

Issue No. 6: TRRO / FINAL RULES: Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

No, HDSL-capable copper loops are not the equivalent of DS1 loops for purposes of evaluating impairment. The evidence showed that an "HDSL-capable copper loop" is nothing more than a copper loop that has particular characteristics. As BellSouth witness Fogle confirmed on cross-examination, such a loop is nothing more than a copper loop facility that is less than 12,000 feet long and is clear of equipment that could block provision of high-bit rate digital subscriber line ("HDSL") services.[61] An HDSL-capable copper loop does not include the

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[60] The proposal supported by the Joint CLECs is detailed in the Direct Testimony of CompSouth witness Mr. Gillan, at pages 31-33

[61] Hearing Exhibit 17 (chart comparing HDSL-capable copper loops and DS1 loops)

electronics on both ends of the loop that provide the means for the loop to be used to provide DS1-level services.

A loop only qualifies as a "DS1 loop" for purposes of impairment analysis if it includes the electronics that permit the loop to provide a service featuring speeds of 1.544 megabytes per second ("mbps"). The FCC's unbundling rule for DS1 loops states:

> A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.[62]

The FCC's definition makes clear that a DS1 loop must be capable of sending signals at a speed of 1.544 mbps. The definition provides that various types of copper loops can be used to provide such signal speeds, including HDSL-capable loops. The definition <u>does not</u>, however, convert every copper loop that meets the characteristics of being "HDSL-capable" into a "DS1 loop." Standing alone – without electronics attached – an HDSL-capable copper loop is nothing more than a span of copper cable; it is not a loop capable of delivering 1.544 mbps service.

Nevertheless, BellSouth witness Fogle testifies that BellSouth should have the right to withdraw from its UNE offerings <u>all</u> HDSL-capable copper loops in those areas where Section 251 DS1 loops have been "de-listed." Mr. Fogle's testimony asks the Authority to ignore the core point of the FCC's definition of DS1 loop: a DS1 must be capable of delivering a 1.544 mbps service. Mr. Fogle overlooks the first sentence of the FCC's definition and argues that the second sentence (which describes the type of copper transmission facilities that could be capable of delivering DS1 services) should drive the entire definition. Mr. Fogle, who is purportedly BellSouth's technical and network expert, does not contend that an HDSL-capable copper loop

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[62] 47 C.F R § 51.319(a)(4)(i)

can, without the associated electronics, provide a 1.544 mbps service.[63] This does not stop him from testifying that when "DS1 loops" may not be unbundled, that should eliminate unbundling for all loop types that could possibly be used to create a DS1 loop and its associated service levels.

The consequences of Mr. Fogle's selective (and dramatically wrong) reading of the FCC's rules are significant for CLECs. First, if BellSouth's position is adopted it would not only allow BellSouth to withdraw access to its own DS1 UNE loops in non-impaired areas, it would permit BellSouth to prevent CLECs from creating their own DS1 loops. In areas where BellSouth is no longer obligated to provide Section 251 DS1 loops, BellSouth can rightfully refuse to provision DS1 loops (*i.e.*, the copper loop and the electronics that facilitate 1.544 mbps services). BellSouth should still be required to provision the "plain" copper loop without the associated electronics. As discussed above, a copper loop without electronics does not constitute a DS1 loop. The CLEC should still be permitted to obtain access at TELRIC rates to an HDSL-capable loop (without electronics) so that it can add its own electronics and provide a DS1-level service to a customer. If BellSouth is permitted to withdraw HDSL-capable copper loops, BellSouth will have stopped the CLEC not only from using UNE DS1 loops, but from creating a DS1 service using CLEC-provided electronics on a BellSouth copper loop.

This outcome is not all what the FCC had in mind in the TRO or TRRO. In the TRRO, the FCC discussed alternatives that CLECs would have if DS1 loops were de-listed in particular circumstances. The FCC stated: "[t]he record also suggests that in some cases, competitive LECs might be able to serve customers' needs by combining other elements that remain

[63] TN Tr at 130 (Fogle)

available as UNEs" even if DS1 loops were de-listed.[64] The FCC then cited to a filing made by BellSouth which noted that in the absence of DS1 UNEs CLECs could provide DS1 services over, among other loop types, "2-wire or 4-wire High Bit Rate Digital Subscriber Line (HDSL) Compatible Loops."[65] The FCC said that CLECs still had options to provide DS1 loops even if Section 251 UNEs were not available because HDSL-capable copper loops could serve CLECs' need <u>in the place of</u> DS1 UNE loops that were declassified as UNEs. It is inconceivable that the FCC would have both considered HDSL-capable loops to be "DS1 loops" for impairment analysis purposes (and thus subject to de-listing) and simultaneously considered them to be substitutes for the very same "DS1 loops."

BellSouth also contends that HDSL-capable copper loops should be counted as DS1 lines for purposes of determining if a wire center has sufficient "business lines" to qualify for high-capacity loop or interoffice transport de-listing. As discussed above in Issue 4, this position has significant ramifications: BellSouth (erroneously) counts every DS1 line as 24 lines; therefore, counting all HDSL-capable loops as DS1 lines would vastly inflate the business line count. For example, a loop may be "HDSL-capable," but is actually being used to serve a residential POTS customer. In BellSouth's view, it could count that line as 24 "business lines" for impairment purposes. By this artifice, BellSouth could convert substantial portions of 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 de-listing UNEs under Section 251. Such an approach could result in counting thousands of residential or non-switched 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.

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[64] TRRO ¶ 163, n 454

[65] *Id*

BellSouth did not count all HDSL-capable copper loops as "business lines" in the calculations sponsored by witness Tipton. Mr. Fogle, however, urges the Authority to approve this method for use in the future. The Authority should reject this proposal explicitly, and not permit BellSouth to add "business lines" in situations the FCC never would have imagined qualified under its definition of the term.

Resolved Issue No. 7 is omitted.

Issue No. 8: TRRO / FINAL RULES:

(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 part (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?

A. Summary of Joint CLECs' Position

The issue of Section 271 network access is critical to this proceeding, and to the future of local competition in Tennessee. As the Authority recently recognized in the ITC^Deltacom Order, "Congress explicitly charged state commissions with the responsibility to arbitrate Section 252 disputes, and this charge includes arbitrating the rates, terms and conditions of Section 271 elements."[66]. The establishment of Section 271 alternatives for the loop, switching and transport elements delisted under Section 251 is a key component of determining the terms and timing of the transition from Section 251 elements to other unbundled offerings. The Joint CLECs urge the Authority to apply the same reasoning used in the ITC^Deltacom Order

[66] ITC^Deltacom Order, at 32.

regarding switching elements under Section 271 to the high-capacity loop and transport elements that are also at issue here.

As the Authority has noted, the FCC recognized in the TRO that when Section 251 no longer requires UNE access based on a finding of "impairment," unbundled access to loops, transport, and switching is still required under Section 271. The FCC held that Section 271 access must be non-discriminatory and subject to "just and reasonable" rates.[67] BellSouth acknowledges that the obligation to provide unbundled access under Section 271 exists even after Section 251 no longer requires unbundling.[68]

In the TRRO, the FCC held that UNE access under Section 251 will no longer be required for unbundled switching and, where the applicable tests are met, for unbundled loops and transport. The issues in this proceeding involve, in large measure, disputes about the transition from unbundling required by Section 251 to unbundling required by Section 271. Interconnection agreement terms governing the transition *away from* network elements no longer subject to Section 251 unbundling therefore must include provisions for CLECs to *transition to* access to 271 checklist items.

There is no technical, network-related, or other practical reason for the transition from unbundling required under Section 251 to unbundling required under Section 271 to be complicated. The underlying network facilities CLECs are paying for are no different; the transition from provisioning under Section 251 to provisioning under Section 271 can be achieved through billing and records changes.[69] If CompSouth's interim rate proposal is adopted, CLECs will pay rates higher than existing TELRIC rates to obtain access to the loops,

[67] TRO ¶ 656, 663.

[68] BellSouth Rebuttal Testimony of Kathy K Blake at 3-4..

[69] TN Tr. at 255:23-25 – 256:1 (Tipton).

transport, and switching that has been "de-listed" under Section 251. The higher interim rates prevent CLECs from replicating UNE-P, EELs or other UNE-based arrangements at existing TELRIC rates in those situations where the underlying UNEs are no longer available under Section 251. As the evidence in this proceeding shows, however, the higher interim rates proposed in CompSouth's contract language satisfy the "just and reasonable" standard established by the FCC in the TRO.

As discussed in detail herein, the core dispute between the parties is not whether Section 271 checklist items must be made available, but whether the Authority may fulfill its Section 252 responsibilities to ensure their availability. BellSouth seeks to read certain provisions out of Section 271, and in the process advocates moving jurisdiction over <u>all</u> post-251 unbundling to the federal level. The Authority squarely faced this same legal dispute in the ITC^Deltacom arbitration, and held that "Section 271(c)(2)(A) links BellSouth's obligations under the competitive checklist to its providing that access through an interconnection agreement" approved under Section 252.[70] The exact same arguments against the Authority's jurisdiction urged by BellSouth here were rejected in the ITC^Deltacom Order, and they should, for the same reasons, be rejected here.

The Joint CLECs summarize their position on the subparts of this Issue as follows:

(a) The Authority has the authority to require BellSouth to include in its Section 252 ICAs the availability and price of network elements under Section 271. The Joint CLECs also contend that the Authority may include network elements in ICAs pursuant to state law authority, but is not requesting that the Authority exercise such authority in this proceeding. Rather, the Joint

[70] ITC^Deltacom Order, at 32

CLECs request that the Authority approve the contract language proposed by CompSouth that includes rates, terms, and conditions for Section 271 as well as Section 251 network elements.

Section 251 and Section 271 both point to the Section 252 state commission negotiation and arbitration process as the vehicle for establishing contract terms for ILEC unbundling obligations. Under Section 251, all ILECs must provide access to unbundled network elements at TELRIC rates unless there is a finding of non-impairment for a particular network element. Section 251 contemplates that the ICA terms for such network elements will be established pursuant to the Section 252 state commission approval process. The Section 252 process, as the Authority is aware, requires that ILECs and CLECs negotiate interconnection terms and, where negotiation fails, submit their disputes to state commission arbitration.

Under Section 271, Bell Operating Companies ("BOCs") that want to establish or maintain the right to provide interLATA long distance services (a group that includes BellSouth) must provide access to unbundled network elements listed on the Section 271 checklist at just and reasonable rates. Section 271 contemplates that BOC compliance with the competitive checklist requires that the checklist items are included in ICAs established pursuant to the Section 252 state commission approval process. The language of Section 271 itself points to the Section 252 process as the means to implement BellSouth's Section 271 unbundling obligations. In the TRO, the FCC emphasized that Section 271 unbundling obligations are independent of and in addition to Section 251 unbundling obligations. The forum for establishing the rates, terms, and conditions of BellSouth's independent Section 271 unbundling obligations is the state commission ICA arbitration and approval process established in Section 252.

(b) The Authority has jurisdiction to set rates for Section 271 network elements, as it did when it set an interim Section 271 switching rate in the ITC^DeltaCom Order.[71] The federal Act requires that Section 271 network elements be reflected in ICAs approved pursuant to Section 252. The Section 252 process includes state commission review and approval of ICAs. Just as state commissions arbitrate and approve TELRIC rates for Section 251 network element unbundling in the Section 252 process, state commissions have authority to arbitrate and approve just and reasonable rates for Section 271 checklist network elements unbundling. State commissions do not have authority to revoke BellSouth's Section 271 authority for failure to continue meeting the competitive checklist; that enforcement role is assigned to the FCC. State commissions do play a role – as required by the terms of Section 271 itself – in ensuring the non-discriminatory availability of unbundled elements required by the Section 271 competitive checklist.

(c) The rates, terms, and conditions for Section 271 checklist unbundled network elements should be included in BellSouth ICAs along with the rates, terms, and conditions for Section 251 unbundled network elements. The rates for Section 271 elements must meet a "just and reasonable" standard rather than the TELRIC standard applicable to Section 252 unbundled network elements. The terms and conditions for both Section 251 and 271 unbundling must provide for meaningful access to network elements (e.g., ICA terms must prohibit unreasonable restrictions on the way network elements are made available) and must provide that both Section 251 and 271 network elements be available on a non-discriminatory basis.

The ICA terms and conditions regarding meaningful access and non-discrimination should be similar for Section 251 and Section 271 network elements, given that BellSouth's

[71] ITC^Deltacom Order, at 37-39.

obligations related to non-discriminatory access are not substantially different for unbundling under Sections 251 and 271. Pricing terms are governed by different standards and would need to be separately provided for Section 251 and Section 271 unbundled network elements. CompSouth's proposed ICA language provides terms for Section 271 unbundling that ensure meaningful access and non-discrimination. In addition, CompSouth proposes interim rates for Section 271 checklist network elements that should be included in ICAs until the Authority establishes permanent rates for Section 271 elements under the "just and reasonable" standard. The interim rates proposed by CompSouth are above TELRIC levels, and track (a) the "transition rates" for high capacity loops and transport elements approved by the FCC in the TRRO; and (b) the transition rate for Section 271 unbundled local switching established in the ITC^Deltacom Order.

B. <u>Section 271 explicitly states that the checklist items the BOCs are required to unbundle must be included in Section 252 interconnection agreements.</u>

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.[72]

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

[72] 47 U.S.C Section 271(c)(2)(B)(iv)-(vi) (emphasis supplied)

> [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, <u>we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251</u>, but does not require TELRIC pricing.[73]

The D.C. Circuit in *USTA II* considered and affirmed the FCC's treatment of these issues in the *TRO*.[74] Thus BellSouth must make loops, transport, and switching available as checklist items even after the FCC finds those network elements are no longer available under the standards established in Section 251.

Congress did not grant the BOCs sole control over the terms and conditions that apply to the Section 271 checklist items. Rather, Congress required that the checklist items be incorporated into the interconnection agreements that result from the Section 252 negotiation and arbitration process. Section 271(c)(2)(A) of the Act 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 Section 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].[75]

[73] TRO ¶ 659 (emphasis supplied)

[74] *USTA II*, 359 F 3rd at 561

[75] 47 U.S C. Section 271(c)(2)(A)

As the above-quoted statutory language makes clear, the specific interconnection obligations of Section 271's competitive checklist (item ii above) must be provided pursuant to the "agreements" described in Section 271(c)(1)(A) or the SGATs described in Section 271(c)(1)(B). By directly referencing Section 271(c)(1)(A) and (B), the Act ties compliance with the competitive checklist to the review process described in Section 252. As Section 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 <u>one or more binding agreements that have been approved under section 252</u> 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.[76]

Thus, the terms and conditions for the checklist items in Section 271 must be in an approved interconnection agreement. In fact, the statute is explicit that the agreements must be "approved under section 252." Section 252 approval is granted exclusively by state commissions as part of the statutory negotiation and arbitration process.[77] An interstate tariff filed with the FCC, or a "commercial agreement" agreed to by two parties does not satisfy the Section 271 standard for agreements "approved under section 252." The inclusion of the "approved under Section 252" language means that the interconnection agreements incorporating Section 271

[76] 47 U S.C. Section 271(c)(1)(emphasis added)

[77] The only exception to state commission authority under Section 252 involves situations where a state commission "refuses to act" on the issues before it in an arbitration proceeding Given the issues are before the Authority in this proceeding, "failure to act" certainly has not occurred in this case

checklist items are subject to the Section 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. Section 271 references back to the Section 252 state commission review and approval process, and it invokes that process when it describes how the competitive checklist is to be implemented.

Both Section 251 and Section 271 point to Section 252 as the procedural vehicle through which their requirements are to be implemented. Section 252 is entitled "Procedures for Negotiation, Arbitration, and Approval of Agreements." Section 252 provides that all ILECs are subject to the negotiation, arbitration, and approval procedures that lead to bilateral interconnection agreements with CLECs. The Section 251 obligations applicable to all ILECs (unless excused by the Section 251(f) "rural exemption") are to be implemented through the Section 252 process. Similarly, the additional Section 271 obligations applicable only to BOCs with interLATA long distance authority are also to be implemented through Section 252 procedures. It is difficult to understand what else Congress could have meant by Section 271's requirement (quoted above) to "agreements approved under Section 252" as the place where checklist compliance is to be memorialized.

BellSouth's arguments seek to read out of Section 271 the explicit references back to Section 252. As the Authority held in the ITC^Deltacom Order, however, the statutory language contemplates a linkage between agreements over which state commissions have authority under Section 252 and the terms and conditions for competitive checklist items in Section 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 Section 271 checklist items. In the *TRO*, the FCC held that Section 271 checklist network elements that BOCs no longer are required to provide under

Section 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 Section 271 checklist items. Rather, the FCC found that the Section 271 checklist items are to be priced at "just and reasonable" rates.[78] TELRIC rates for Section 251 network elements have been determined in Section 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 Section 271 checklist items to be incorporated in Section 252 agreements. Like the rates, terms, and conditions of Section 251 UNEs, the rates, terms and conditions of Section 271 checklist items should be established using the state commission Section 252 negotiation and arbitration process.

C. Approval of rates, terms, and conditions for Section 271 checklist elements does not constitute "enforcement" of BellSouth's Section 271 obligations by the Authority.

As detailed above, state commission authority to resolve disputes regarding rates, terms, and conditions for Section 271 checklist elements derives directly from the statutory interplay between Sections 271 and 252. Congress granted the Authority the power to resolve disputes and approve ICAs in Section 251; Congress required that the rates, terms, and conditions for Section 271 checklist unbundling be included in ICAs approved under Section 252.

Joint CLECs do not contend that this Authority could enforce the terms of BellSouth's interLATA long distance entry by revoking long distance authority or further conditioning it based on additional requirements. Joint CLECs agree with BellSouth that such enforcement actions would be the province of the FCC.[79] The FCC discussed its enforcement authority in the TRO. In paragraph 664, the FCC provided that "[w]hether a particular checklist element's rate

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[78] TRO ¶ 663

[79] Section 271(d)(6) of the Act provides for enforcement of Section 271 by the FCC. If the FCC finds a BOC is failing to meet its Section 271 checklist obligations on a going-forward basis, the FCC can impose sanctions up to and including revocation of the BOC's interLATA long distance authority.

satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." Thus if a state commission set a Section 271 checklist element rate in a Section 252 proceeding that a party believed did not comport with the "just and reasonable" standard, the FCC could take that question up in the context of a Section 271(d)(6) enforcement proceeding.

The fact that the FCC could review a Section 271 checklist rate in the context of Section 271(d)(6) enforcement does not, however, impact whether the statute requires that rate to be set initially by a state commission under Section 252. Notably, in TRO paragraph 663, the FCC described the "just and reasonable" rate standard and its importance under Section 271 as follows:

> 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 <u>that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act.</u> Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[80]

As the FCC noted, "just and reasonable" rate standards have long been used under federal statutes for interstate services and under state statutes for intrastate services. In describing the *rate standard* in the TRO, the FCC did not hold that only the FCC has exclusive *rate-setting* authority. As the Authority held in the ITC^Deltacom Order:

> [T]he FCC recognized [in the TRO] that the pricing standards of Section 271 elements must be the same as the pricing standards used before the Federal Act such as those standards in Sections 201 and 202. Nevertheless, it is significant that the FCC did not change the division of pricing responsibility defined in the Federal Act. While the FCC will continue to set the pricing standards, it

[80] TRO ¶ 663 (emphasis supplied, footnotes omitted).

> continues to be incumbent upon state commissions to apply those standards in the process of establishing rates. The FCC did not change the process utilized to resolve pricing disputes of Section 271 elements. There is no indication that the FCC intended to remove Section 271 elements from state arbitrations or from approval of interconnection agreements consistent with Section 252.[81]

Along with its Section 271(d)(6) enforcement authority, the FCC also retains the authority to grant the BOCs "forbearance" from their Section 271 (or other statutory) obligations. As with the FCC's enforcement authority, inclusion of Section 271 checklist items in Section 252 ICAs would not limit or negate federal forbearance authority. The FCC exercised its forbearance authority in the 2004 Broadband Forbearance Order.[82] In that Order, the FCC determined that forbearance from Section 271 unbundling obligations was appropriate to facilitate the "broadband" FTTH/FTTC unbundling limitations the FCC adopted in the TRO. When the BOCs requested forbearance, however, some requested it as to all unbundling no longer required under Section 251. In essence, the BOCs asked the FCC to eliminate their independent unbundling obligations that arise under Section 271. The FCC refused.[83] The FCC had every opportunity to remove BOC Section 271 unbundling obligations, and it did not remove those for loops, switching, and interoffice transport outside the limited "broadband" context.

The Authority's establishment of a "just and reasonable" rate for Section 271 checklist elements merely implements the requirement in Section 271 that rates, terms, and conditions for Section 271 checklist items be included in ICAs approved under Section 252. Such rate-setting does not constitute Section 271 "enforcement" activity that is reserved for the FCC.

D. The interim Section 271 rates proposed in the CompSouth contract language meet the "just and reasonable" standard applicable to Section 271 checklist elements.

81 ITC^Deltacom Order, at 34

82 Petitions for Forbearance of Verizon, SBC, Qwest, and BellSouth, WC Docket No 01-338, *et seq* , Memorandum Opinion and Order (rel Oct 27, 2004) ("Broadband Forbearance Order")

83 *Id* at ¶ 12

In those situations where a transition away from Section 251 UNEs will occur as a result of this proceeding, the parties need a rate to be in place for Section 271 checklist network elements. Without rates, terms, and conditions for Section 271 checklist switching, loops, and transport in place, CLECs will have no way to order and provision checklist items as the TRRO transition period ends. BellSouth has refused to provide cost information in this proceeding that would permit the Authority to establish a cost-based permanent Section 271 checklist element rate.

In the absence of up-to-date cost information, the Joint CLECs propose that the Authority adopt, as it did in the ITC^Deltacom Order, "interim" Section 271 checklist element rates. CompSouth proposed interim rates for high-capacity loop and transport elements that are patterned after the transitional rates adopted by the FCC in the TRRO, and an interim rate for unbundled local switching in line with the interim rate adopted in the ITC^Deltacom Order.[84] These rates permit CLEC access to high-capacity loops and transport at a price equal to 115% of the existing TELRIC rate,[85] and access to unbundled local switching at the $5.08 rate approved in the ITC^Deltacom Order.

The TRRO transition rates provide a reasonable basis for high capacity loop and interoffice transport interim rates for three reasons. First, the FCC presumably would not have adopted the rates unless it considered them "just and reasonable." For the FCC to adopt a rate, the rate must be "just and reasonable" under Sections 201 and 202 of the Communications Act. Second, the transition rates exceed TELRIC levels applicable to UNEs available under Section 251. While "just and reasonable" rates are not, *per se*, higher than TELRIC rates, BellSouth has no claim that the interim rates simply "re-create" de-listed Section 251 UNEs if the rates CLECs

[84] Gillan Direct, at 47, Revised JPG-1 at 22-23 (proposed contract language)

[85] The FCC's TRRO interim rates are set forth in the TRRO at ¶ 5

pay are in excess of applicable TELRIC rates. The TRRO transition rates are, by definition, higher than the TELRIC rates CLECs were paying before the TRRO was issued.

Third, the evidence showed that BellSouth has filed testimony in prior cases arguing that TELRIC rates for unbundled switching and transport recover BellSouth costs and provide a reasonable proxy for "just and reasonable" rates. BellSouth's testimony provided that while BellSouth did not believe TELRIC rates for unbundled loops recovered BellSouth's costs, the application of TELRIC standards result in rates that are above-cost for both unbundled transport and switching. The BellSouth testimony, filed in a South Carolina docket regarding reductions in intrastate switched access rates, urged the South Carolina Commission to permit BellSouth to use its TELRIC switching and transport rates as "proxies" for just and reasonable rates in the switched access context.[86] In that case, BellSouth wanted to lower its intrastate switched access rates and increase the amounts it took from a state universal service fund. BellSouth had to demonstrate that its proposed switched access rate reductions resulted in rates above a TSLRIC price floor, *i.e.*, that rates are just and reasonable. In the testimony, BellSouth witness Ms. Blake (the same Ms. Blake who testified in this proceeding) argued that TELRIC-based switching and transport rates are priced above cost, and therefore exceed Total Service Long Run Incremental Costs. In arguing that these TELRIC costs provided useful surrogates purposes of setting "just and reasonable" rates for intrastate switched access, BellSouth' tariff revision documentation filed in the South Carolina case stated:

> BellSouth does not support the TELRIC pricing methodology in part due to its hypothetical nature. The distortion in costs caused by the TELRIC hypothetical approach is most evident in the development of loop costs. However, with respect to switching and interoffice transport (which have to the greatest degree converted to the newer currently available technologies, i.e., digital switches and

[86] Hearing Exhibit 15, Testimony of Kathy K. Blake on Behalf of BellSouth Telecommunications, Inc., Public Service Commission of South Carolina, Docket No 97-239-C (Dec 31, 2003)

> fiber) the cost studies BellSouth filed to support the switching and transport UNEs in Docket 2001-65-C are less impacted by the TELRIC methodology.[87]

BellSouth concluded: "BellSouth believes that the switching and interoffice transport rates set in the most recent generic cost docket for unbundled network elements (Docket No. 2001-65-C) are appropriate cost surrogates for evaluating the price floors for the rate elements of switched access that BellSouth is proposing to reduce in this proceeding."[88] Given BellSouth's prior testimony that TELRIC switching and transport rates provide a solid foundation for establishing just and reasonable rates for other services (like intrastate switched access), BellSouth cannot now claim that TELRIC rates do not provide a reasonable basis for establishing the "just and reasonable" rates for unbundled switching and transport offered pursuant to Section 271.

The Joint CLECs do not claim that the TRRO transition rates or the ITC^Deltacom interim switching rate are the appropriate permanent rates for Section 271 checklist elements. Rather, the Joint CLECs urge the Authority to approve these rates only on an interim basis, until the Authority can fully review the parties' arguments over what a permanent just and reasonable rate should be. The Authority has already established the need for a generic docket to consider permanent Section 271 switching rates pursuant to the ITC^Deltacom Order; the Joint CLECs submit that the permanent Section 271 rates for high capacity loops and interoffice transport should also be considered in the generic pricing proceeding.

The TRA's approach in the ITC^Deltacom Order (setting interim Section 271 rates subject to a follow-on permanent rate proceeding) is precisely the same approach to the issue taken by the Missouri Public Service Commission in a ruling issued in July 2005. The Missouri Commission held:

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[87] Hearing Exhibit 15, Attachment KKB-1, at 5

[88] *Id* at 4 (emphasis supplied)

The Arbitrator's decision with respect to both CLEC Coalition Pricing Issues was that 'The Arbitrator agrees that the ICA must include prices for Section 271 UNEs.' However, the Arbitrator failed to specify what those rates would be. SBC offered no rates because its view is that these ICAs should not contain rates for § 271 UNEs. Likewise, the Coalition's original suggestion of TELRIC rates is not appropriate given that the appropriate standard is now 'just and reasonable.' However, the Commission concurs that the Coalition's compromise position – rates patterned on the FCC's rates for declassified UNEs – constitutes a suitable interim rate structure for Section 271 UNEs. The Final Arbitrator's Report is so modified and the parties are directed to use such rates in their ICAs.[89]

Without interim rates in place, CLECs will have no way to exercise their rights to obtain Section 271 checklist elements under the revised interconnection agreements resulting from this proceeding. The Joint CLECs urge the Authority to approve the interim rates in this proceeding proposed in CompSouth's contract language proposal, consistent with the Authority's decision in the ITC^Deltacom Order.

E. <u>BellSouth's claims that it "satisfies" its Section 271 obligations for loops, transport, and switching should be rejected.</u>

BellSouth argues that it "satisfies" its obligations under Section 271 by offering unbundled switching through private commercial agreements and by offering its interstate special access tariff as a substitute for UNE high-capacity loops and transport.[90] BellSouth's arguments are incorrect for two reasons.

First, as discussed above, BellSouth does not satisfy its Section 271 obligations unless those obligations are reflected in an "agreement approved under Section 252."[91] The Authority fully addressed this issue in its ITC^Deltacom Order, rejecting BellSouth's argument that Section 271 checklist elements do not need to be included in Section 252 agreements.

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[89] 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"), Arbitration Order, at 30.

[90] Rebuttal Testimony of Kathy K Blake, at 3-4

[91] Section 271(c)(1)(A)

Second, the rates, terms, and conditions under which BellSouth purports to offer Section 271 checklist elements do not satisfy "just and reasonable" standards. When the FCC discussed how a Section 271 "just and reasonable" standard could be met, it noted that a BOC "might satisfy the standard" by demonstrating that its Section 271 rate is "at or below" its similar tariffed offerings, or that the BOC has entered into "arms-length agreements" for the elements at particular rates.[92] The FCC did not, as BellSouth claims, state that tariffed alternatives or arms-length agreements provide conclusive evidence that the rate offered by the BOC is just and reasonable. Such alternatives are, according to the FCC, points or reference. They do not provide final answers on the question of "just and reasonable" rates.

In fact, in the TRRO, the FCC examined the question of whether BOC interstate special access services are sufficient as an alternative to UNEs. The BOCs argued to the FCC that CLECS could use special access successfully as a substitute for UNEs. The FCC rejected this argument, and in its discussion of the issue concluded:

> The record does not support the broad inferences of robust local exchange competition urged by the incumbent LECs. Rather, the record is decidedly mixed on whether particular competitive LECs that have relied on special access have been able to economically enter all markets. Furthermore, given the absence of widespread competition in the local exchange market, there is insufficient record evidence to conclude that special access-based competition, to the extent it exists, is sustainable, enduring competition.[93]

In the same section of the TRRO, the FCC noted that interstate special access tariffs are subject to pricing flexibility by the BOCs. Thus, the pricing of interstate special access is primarily within the control of the BOC. Unlike the Section 252 negotiation and arbitration process, the interstate special access regime includes no opportunity for CLECs to negotiate rates, nor does it include an opportunity for state commission review of such rates. In light of these facts, the FCC

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[92] TRO ¶ 664

[93] TRRO ¶ 64, n.180.

found that relying on tariffed special access to replace Section 251 UNEs would be extremely undesirable:

> It would be a hideous irony if the incumbent LECs, simply by offering a service, the pricing of which falls largely within their control, could utterly avoid the structure instituted by Congress to, in the words of the Supreme Court, "give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[94]

The same conclusion applies to Section 271 checklist elements. If there were no Section 271 obligations in the federal Act, BellSouth would offer interstate special access or "commercial agreements" to CLECs when unbundling was not required under Section 251. BellSouth's position is that even though there is an independent obligation to offer loops, transport, and switching under Section 271, that it can satisfy those obligations simply by offering what it would have offered if such obligations did not exist. BellSouth's position renders the Section 271 checklist meaningless; that could not possibly have been what Congress intended when it wrote the statute, or what the FCC meant when it found in the TRO that Section 271 unbundling obligations exist even when Section 251 unbundling is no longer required.

BellSouth's interstate special access tariffed rates are between two and three times higher than the current UNE rates. A shift from Section 251 DS1 EELs to the equivalent special access service would cause a CLEC's monthly cost per EEL to go from approximately $80 (UNE) to $280 (special access) Imposition of those rates would dramatically increase CLECs' cost of serving customers who need DS1 or DS3 level services. The "commercial" switching rate offered by BellSouth would increase the current rate by $7.00. Adding $7.00 to a CLEC's cost of serving every DS0 line would also dramatically diminish the competitor's ability to serve the residential market, where margins are too tight to bear such a steep wholesale price increase.

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[94] TRRO ¶ 59, quoting *Verizon Communications v FCC*, 535 U S 467, 489 (2002)

The Joint CLECs urge that the prices offered by BellSouth as 271-compliant simply are not, and that the Authority should thoroughly review what constitutes a "just and reasonable" rate in the subsequent generic proceeding on Section 271 rates scheduled pursuant to the ITC^Deltacom Order. In the meantime, the Joint CLECs urge that the Authority approve the interim Section 271 rates proposed in the CompSouth testimony and contract language proposal.

F. Federal and state court and regulatory decisions support the inclusion of rates, terms, and conditions for Section 271 checklist elements in Section 252 interconnection agreements.

If the reference to Section 252 interconnection agreements in Section 271 is to mean anything, the statute must be interpreted to permit rates, terms, and conditions for Section 271 checklist elements to be set by state commissions in Section 252 proceedings. The statutory requirement that Section 271 checklist items be included in Section 252 interconnection agreements was recognized in the August 2004 federal district court decision in *Qwest Corporation v. Minnesota Public Utilities Commission.*[95] 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 Section 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 federal Act itself "outlined the scope of Section 252 and provided notice" of what ICAs must be filed. As an example of the "other sources" in the Act that outlined the scope of Section 252 obligations, the court referenced Section 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

[95] 2004 WL 1920970 (D. Minn 2004).

> 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.[96]

Without question, the federal court in *Qwest* read the federal Act to require that Section 271 checklist items must be included in Section 252 agreements.[97]

Similarly, in Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n, 359 F.3d 493, (7th Cir. 2004), the United States Court of Appeals for the Seventh Circuit identified Section 252 interconnection agreements as part of what a BOC must have in place to demonstrate continuing compliance with Section 271. In *Indiana Bell*, the question presented before the Court was stated concisely by the Court itself:

> The issue is whether, during the long-distance application process, a state regulatory commission has the power to enter an order designed to ensure the applicant will continue to meet its obligations in the local service market.[98]

The Seventh Circuit overturned the Indiana Commission's implementation of a "non-voluntary" performance measures plan as part of the Indiana Section 271 long distance entry process. The Court's complaint was that the Indiana Commission's rulings tread on the "enforcement" of Section 271 commitments reserved to the FCC in Section 271(d)(6). Thus, the question of whether Section 271 checklist elements must be in Section 252 ICAs was not squarely before the Court in *Indiana Bell.* However, in its explanation of the structure and purpose of Section 271, the Seventh Circuit references the nexus between the Section 271 checklist and Section 252 ICAs:

> Under section 271(d)(2)(B) the FCC consults with the state commission to verify that the BOC has (1) one or more state-approved interconnection agreements with

[96] *Id* at 6

[97] BellSouth has claimed that the *Qwest* decision was somehow questioned or overturned by an FCC declaratory order requested by Qwest regarding what items must be included in Section 252 interconnection agreements. The FCC Order mandated that fundamental interconnection terms (including those regarding UNEs) are to be included in Section 252 ICAs The FCC declaratory order does not address Section 271 checklist elements, and in no way contradicts or questions the district court's conclusion regarding Section 271 in the *Qwest* decision

[98] *Id* at 494.

> a competitor, pursuant to sections 251 and 252, or a Statement of Generally Available Terms and Conditions (SGAT) under which it will offer local service, and (2) <u>that the interconnection agreements or the SGAT satisfies the 14-point competitive checklist set out in section 271(c)(2)(B)</u> [99]

The Seventh Circuit understood that "interconnection agreements" must satisfy the competitive checklist. The ICAs could not satisfy the checklist if the state commissions responsible for approving them refuse to arbitrate the rates, terms, and conditions of Section 271 checklist elements. The Seventh Circuit found that Section 271 requires checklist items be embodied in, "state-approved interconnection agreements with a competitor."

BellSouth seeks support for its arguments against state commission authority under Section 252 by citing court decisions that, when analyzed carefully, simply do not support BellSouth's position. For example, the 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 Section 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 Georgia, 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 of law" provisions in ICAs.[100]

None of these decisions, however, analyze the question of whether Section 271 checklist items must be included in Section 252 agreements. They only make passing reference to CLEC arguments referencing BellSouth's independent obligation to provide Section 271 checklist items. The Kentucky court stated that "<u>enforcement authority</u> for Section 271 unbundling duties

[99] *Id* at 495 (emphasis supplied)

[100] *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")

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."[101] The court obviously saw the CLEC request before it as a question of enforcing Section 271 rather than determining the scope of Section 252 ICA obligations. In fact, the question of incorporation of specific Section 271 checklist obligations into ICAs was not before the Georgia, Mississippi or Kentucky federal courts; rather, the issue before these courts was simply whether Section 271 required continued provisioning of certain UNEs. Notably, the Eleventh Circuit's decision upholding the Georgia district court ruling does not mention Section 271 at all.[102] 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 Section 271 obligations by the federal court itself.

BellSouth also seeks support in other inapposite court decisions. For example, in prior pleadings, BellSouth erroneously relied on the Sixth Circuit's 1987 decision in *In Re: Long Distance Telecommunications Litigation*[103] and the D.C. Circuit's 1996 decision in *CompTel*[104] for propositions unsupported by either decision. When BellSouth cited these precedents to the FCC in its petition to pre-empt the Authority's decision in the ITC^Deltacom arbitration approving inclusion of Section 271 checklist elements in a Section 252 ICA, the Joint CLECs note that the Authority informed the FCC that:

> The facts giving rise to both of these cases predate both the Federal Act and the cooperative federalism giving both state and federal agencies a joint role in regulation. More importantly, there is nothing in the portions of these cases quoted by BellSouth or in the complete decisions of these cases that supports the argument that the TRA is precluded from setting rates for Section 271 elements, including switching.[105]

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[101] Kentucky Order, at 12.

[102] *BellSouth Telecomms, Inc v MCI*, 2005 WL 2230394 (11th Cir Sept 15, 2005)

[103] In Re Long Distance Telecommunications Litigation, 831 F.2d 627 (6th Cir 1987)

[104] Competitive Telecommunications Association v. FCC, 87 F 3d 522 (D C. Cir. 1996)

[105] WC Docket No 04-245, *BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action,*

The Joint CLECs echo the Authority's position that these cases provide no support for the points on which BellSouth has relied on them regarding Section 271 obligations.

BellSouth has cited to an inapposite case from Montana in prior pleadings.[106] The issue in the Montana case involved whether an agreement between Qwest and Covad should be filed with the Montana Public Service Commission. While the decision does discuss the interplay between Sections 251 and 252, it does not in any way address the question of whether Section 271 checklist elements should be included in Section 252 ICAs. That issue simply was not before the court, and the decision sheds no light on the issues before the Authority here.

In prior pleadings, BellSouth has also cited to the Fifth Circuit's *Coserv*[107] decision. BellSouth attempts to use the *Coserv* decision to support its position that BellSouth need not negotiate, and the Authority cannot arbitrate, Section 271 issues. As the Authority noted in the ITC^Deltacom Order, *Coserv* held that if an ILEC has no statutory obligation to negotiate and arbitrate an issue under the Act, then it can opt out of Section 252 negotiations on the issue. BellSouth's Section 271 obligations simply do not give it the option of "opting out" of negotiating Section 271 checklist rates, terms and conditions.[108] As the *Coserv* court held, ICAs may include terms on issues not covered by Section 251. The language of Section 271 makes clear that for BellSouth (since it invoked Section 271 to attain interLATA long distance authority), ICAs must include the items in the competitive checklist. Nothing in *Coserv* supports any other reading of Section 271.

Opposition of the Tennessee Regulatory Authority To BellSouth's Emergency Petition, at 15-16 (July 30, 2004) at 15-16.

[106] *Qwest Corp v Schneider*, CV-04-053-H-CSO (D Mont June 9, 2005)

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

[108] ITC^Deltacom Order at 30. "Bellsouth has a duty and cannot refuse to negotiate a price for the switching element pursuant to Section 271(c)(2)(B)(vi)."

BellSouth urges that other state commission decisions are contrary to the Authority's definitive ruling on the inclusion of Section 271 checklist elements in Section 252 ICAs. Notably, one of the most recent decisions on the issue tracks almost exactly with what the Authority ruled in the ITC^Deltacom Order.

On July 11, 2005, the Missouri Public Service Commission issued its Order in an industry-wide arbitration involving SBC.[109] The Missouri Order upheld an Arbitrator's finding that ICAs "shall include both Section 251(c)(3) and Section 271 network elements. To the extent SBC Missouri remains obligated to offer pursuant to Section 251(c)(3), then prices must be TELRIC. To the extent it must offer pursuant to Section 271, then prices must be just and reasonable."[110] As noted above, the Missouri Commission determined that it had the authority to establish interim rates for 271 checklist items, and established interim rates that will remain in effect until the PSC determines a "just and reasonable" rate level in a future proceeding.[111] The Missouri Commission's decision was appealed by SBC. As part of the appeal, the CLEC parties agreed to SBC's request for a temporary stay of the provisions of the commission's order pertaining to Section 271 rates for UNE-P. The interim Section 271 rates for high capacity loops and interoffice transport are in effect pending the outcome of the appeal.

In addition, on June 2, 2005, the Illinois Commerce Commission ("ICC") issued an Order in that commission's proceeding regarding various *TRRO*-related issues.[112] The ICC concluded that SBC was incorrect to argue that CLECs are attempting to "enforce" Section 271 rights when

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[109] 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"), Arbitration Order Final Arbitrator's Report, Section III – pp 5-6 (June 21, 2005)

[110] *Id* , Final Arbitrator's Report, Section III – pp 5-6 (June 21, 2005)

[111] *Id* , Arbitration Order, at 28-30.

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

they seek to validate the competitive checklist through Section 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.[113] The ICC reviewed various Illinois SBC ICAs, finding that some existing agreements did include specific reference to Section 271 checklist item rights, while others did not. The ICC concluded that, even where Section 271 checklist items are not included in current agreements, CLECs have the right to "request negotiations to incorporate 271 rights in their ICAs."[114] Moreover, the ICC concluded that since existing ICAs include reference only to TELRIC rates for Section 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."[115] The Illinois Commission clearly saw the need to incorporate terms related to Section 271 obligations into Section 252 ICAs – just as the Act itself contemplates.

In April 2005, the Arbitrator's Report in an industry-wide Oklahoma arbitration also addressed Section 271 checklist items. The Arbitrator recommended that Section 271 checklist items be included in Section 252 interconnection agreements. The Arbitrator also recommended that Section 271 checklist items be subject to commingling requirements under the TRO.[116] 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 later this year.[117]

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[113] ICC Decision at 24

[114] *Id* at 27

[115] *Id* at 28

[116] 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)

[117] State commissions in Vermont and Maine have also recently issued favorable rulings related to inclusion of

BellSouth correctly contends that a number of state commissions have reached conclusions contrary to that reached by the Authority on this issue. In most of those decisions, however, the state commissions declined to include Section 271 checklist elements in Section 271 agreements based on the view that such action constitutes "enforcement" of Section 271 which should be left to the FCC. As discussed above, and in the Authority's ITC^Deltacom Order, "enforcement" of Section 271 obligations is not the same as "rate-setting authority" pursuant to the terms of both Section 271 and Section 252. The Joint CLECs respectfully submit that the reasoning supporting the state commission decisions cited by BellSouth do not adequately consider the full text of the Act and the judicial and FCC interpretations of its provisions regarding Section 271 checklist items.

Issue No. 9: TRRO / FINAL RULES: What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's_respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?

The provisions of the revised ICAs should clarify that the definition of "embedded base"[118] (whether loop, dedicated transport or unbundled switching) permits adds,[119] moves,[120] or changes[121] to be made by a CLEC at the request of a customer that was served the CLEC's network on or before March 11, 2005. The TRRO provides support to the Joint CLECs' position that the FCC intended that CLECs be able to serve their existing customers as of March 11, 2005 by providing adds, moves or changes to the existing customers during the transition period. Both

Section 271 checklist elements in Section 252 ICAs

118 This argument presumes that the Authority has determined that specific wire centers are considered "non-impaired" as of March 11, 2005

119 "Add" means when the existing CLEC customer seeks to add an additional line to his/her service

120 "Move" means when the existing CLEC customer moves to a new address

121 "Change" means when the existing CLEC customer seeks to add or a delete a feature, such as call waiting A "change," therefore, is applicable to unbundled local switching and not to loops or transport

the South Carolina Commissions[122] and, just recently, the Alabama Commission[123] agreed that a CLEC should be able to (1) continue serving a UNE-P customer who moves to another location during the transition period; (2) add a UNE-P line for an existing customer; and (3) change the customer's service.

> BellSouth's proposed language defining "embedded base" for DS1 and DS3 Loops and DS1, DS3 and Dark Fiber Dedicated Transport in non-impaired wire centers and for Unbundled Local Switching each contain the following condition: "Subsequent disconnects or loss of End Users shall be removed from the Embedded Base."[124] BellSouth's language appears to agree with the Joint CLECs' position that the CLEC may continue to serve the existing end user and is able to make adds, moves or changes during the transition period. BellSouth's stated position in the Joint Issue Matrix, however, reflects that BellSouth does not interpret its proposed language in this manner and believes that a CLEC is not entitled to make any adds, moves or changes on behalf of an customer that was taking service from the CLEC prior to March 11, 2005. BellSouth's position statement indicates that it may later interpret its contract language in a way that is contrary to the plain meaning of the ICA language (and the TRRO). The Joint CLECs thus urge that the CompSouth contract language on this issue be incorporated into the revised ICAs.

A. <u>High Capacity Loops and Dedicated Transport</u>

The Joint CLECs do not argue that "adds" of de-listed UNE loops and dedicated transport are permissible during the transition period, once a wire center has been found by the Authority to be non-impaired, even if underlying customer was taking service from the CLEC as of March 11, 2005. Nor is a "change" relevant in connection with loops and dedicated transport as any changes to features is transparent to BellSouth, is affected at the CLEC's switch, and does not affect the services being provided by BellSouth to the CLEC. Consequently, the only issue is

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[122] *In re Petition of the Competitive Carriers of the South, Inc for an Emergency Declaratory Ruling*, Docket 29393, Order Granting Momentum Telecom, Inc.'s Motion for Clarification and Reconsideration, Alabama PSC, Oct 27, 2005

[123] *In re Petition of BellSouth Telecommunications, Inc to Establish a Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law,* Docket 2004-316-C-Order No. 2005-247, South Carolina PSC., Aug. 1, 2005

[124] *See* Exhibit PAT-1, Attachment 2, Sections 2 1 4.2, 4 2.2, and 6 2.2

whether a "move" of a "de-listed" UNE loop or dedicated transport on behalf of a customer that was served by the CLEC as of March 11, 2005 should be permitted.

> The FCC stated, "[t]hese transition plans shall apply only to the embedded customer base," rather than to embedded lines or circuits.[125] Thus, during the transition period, modifications or changes to the customer's service should be processed during the transition period. As long as the "embedded customer" is moving to a location within the same non-impaired serving wire center, and no "disconnect" order or "new install order" is issued, then no "add" has been accomplished. Accordingly, moves completed in this manner should be permitted.

B. Unbundled Switching (UNE-P)

BellSouth should be obligated to continue to process adds, changes, and moves for CLECs at the request of customers that were served through UNE-P arrangements as of March 11, 2005. The transition period adopted by the FCC applies to the CLEC's "embedded customer base" not to the embedded circuits or lines.[126] Thus, the intent of the FCC was to enable the CLEC to continue to serve the needs of the existing customer base, which would include permitting the customer's to make adds, moves and changes to their existing services. The FCC made clear that "eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors."[127] If a CLEC cannot accommodate the existing customer's needs during the transition period, the customer may be forced to seek the service elsewhere or face disconnection or service disruption.

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

[125] TRRO ¶¶ 142, 195

[126] "The transition period shall apply only to the embedded customer base . " TRRO ¶ 227

[127] TRRO ¶ 226

The arguments in Issue No. 2 reflect the Joint CLECs' position as to the rates, terms and conditions that should apply to the UNEs de-listed by the TRRO and for which the FCC set forth rules that govern the transition of existing UNEs to alternative services. Those arguments are incorporated by reference into the discussion of Issue No. 10. Additionally, the arguments in Issue No. 8 as to the inclusion of Section 271 checklist elements that BellSouth is obligated to provide is incorporated by reference in the discussion of Issue No. 10. The Joint CLECs state as follows on the subparts of this Issue.

> (a) There are certain UNEs that were de-listed by the TRO and for which the FCC provided no specific transition plan or for which the transition plan has expired, and which would not be necessarily governed by the transition plan discussed in Issue No. 2. For example, DS1 "enterprise" unbundled switching and OCN loops and transport are UNEs that BellSouth is no longer obligated to provide pursuant to Section 251(c)(3) of the Act. BellSouth proposes that for these de-listed UNEs, the CLECs will be provided a 30-day period in which to submit an order to convert the UNEs to alternative arrangements upon the effective date of the amendment. If the CLEC fails to submit such an order, then BellSouth would be entitled to disconnect or convert the arrangement upon 30-day written notice to the CLEC. BellSouth argues that the CLECs have had more than two years to make such conversions, and so should not be provided any additional time for the transition.

Although CLECs have been "on notice" that certain UNEs were de-listed by the TRO, no agreement existed between BellSouth and the CLECs as to how the transitions or conversions would be completed. For those existing network elements that BellSouth is no longer required to provide as Section 251 elements, and that are not covered by the FCC's TRRO transition rules (or an agreement to subject them to those transition rules), BellSouth should be obligated to identify the specific service agreements or services that it insists be converted to non-Section 251 network elements or other services by circuit identification numbers.[128] CLECs should have 30

[128] Because BellSouth seeks the right to disconnection in the absence of a CLEC order, the process must start with a known and precisely identified list of circuits and service arrangements that should be included on BellSouth's notice. Otherwise, CLECs and their customers might risk a surprise, involuntary disconnection that might occur if a CLEC submits fewer orders than expected by BellSouth. Disputes over circuits or service arrangements, if any,

days from receipt of that notice to submit orders to convert or disconnect such circuits or to dispute the identification of circuits identified on Bellsouth's list. BellSouth should not be able to disconnection any of the service arrangements or services identified on its notice without providing at least 30 days notice to CLECs, and should not be able to disconnect the service arrangements or services if the CLEC has notified BellSouth of a dispute regarding BellSouth's identification of a specific service arrangement or service that BellSouth claims it is not required to provide as a Section 251 element. For those service arrangements or services that BellSouth is not required to provide as Section 251 elements, there should be no service order, labor, disconnection, project management or other nonrecurring charges associated with a conversion and the conversion should take place in a seamless manner without any customer disruptions or adverse affects to service quality. If CLEC chooses to convert DS1 or DS3 loops to special access circuits, BellSouth should be required to include such DS1 and DS3 loops once converted within the CLEC's total special access circuits and apply discounts for which CLEC is eligible.

> (b) The arguments set forth in the Issue Nos. 2, 4, and 5 are incorporated by reference as a response to this issue for the arguments related to the determination of whether subsequent wire centers meet the FCC's non-impairment standards once such wire centers are identified by BellSouth.

The FCC recognized that UNEs for which impairment existed as of March 11, 2005, may subsequently meet the non-impairment standards.[129] Nevertheless, the FCC did not adopt a default transition process for UNEs that are subsequently determined to meet the non-impaired standard. Instead the FCC expected that "incumbent LECs and requesting carriers ... negotiate appropriate transition mechanisms for such facilities through the section 252 process" ("Subsequent Transition Plan"). Therefore, the period by which subsequent "embedded base"

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must be resolved in a manner that does not put customers at risk of involuntary termination.

[129] TRRO ¶ 142, n.399 and ¶ 196, n.519.

must be transitioned ("Subsequent Transition Period") and the rates for such "embedded base" during the subsequent transitional period either must be mutually agreed to by the BellSouth and the CLEC or established in an arbitration proceeding.

A process by which the identification of a non-impaired wire center is confirmed must be determined prior to any requirement that a CLEC commence voluntary conversions of "de-listed" UNEs. The Authority's resolution of Issue Nos. 4 and 5 should provide the process for this confirmation, which leaves the issue of how long a subsequent transition period should be and what the rates should be for the "subsequent embedded based" from the date the non-impairment status of a wire center becomes effective to the date the "subsequent embedded base" is either disconnected or converted to alternative services.

BellSouth proposes a 90-day Subsequent Transition Period, with submission of a spreadsheet identifying the facilities to be converted or disconnected within 40 days of the notice by BellSouth identifying subsequent non-impaired wire centers. BellSouth's proposal of 90 days to transition the de-listed UNEs is unacceptable. Although the CLECs will not be required to re-negotiate amendments to the interconnection agreements as they were required to do with the release of the TRRO, there is still other work that must be accomplished to identify and create a spreadsheet to convert the "de-listed" circuits to alternative services. For example, the CLEC may wish to transition the service to another provider that can provide the facilities rather than BellSouth, which may take time to arrange and execute. As the CLECs will not know when a wire center may become non-impaired, the CLEC may not have agreement with other competitive providers, or the order intervals and coordination of the cut over may not be able to be accomplished in a 90-day period. Accordingly, the Joint CLECs propose a maximum of 12-months for "Subsequent Transition Periods" with a minimum of no less than 180 days. Since the

FCC did not impose the transitional rates to subsequent transition periods, the Joint CLECs submit that, until the conversion of the UNEs is completed, the existing UNE rate applies.

Finally, when BellSouth designates wire centers as "de-listed" in the future, it seeks to post the notice of such determination on its website without providing actual written notice to the CLECs' point of contacts contained in the notice provision of the interconnection agreement. Because of the potential impact on the rights and obligations of the parties when such a notice issued, the Joint CLECs urge that BellSouth be required to comply with the notice provision of the parties' interconnection agreement to ensure that the CLECs are aware of the potential loss of UNEs in a wire center. Constructive notice of a posting on the website is insufficient and is contrary to the general terms and conditions of the interconnection agreement.

Issue No. 11: TRRO / FINAL RULES: What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms and conditions that apply in such circumstances?

The TRRO provides that until March 11, 2006, CLECs have a right to pay no more than the FCC's transition rates for Section 251 network elements subject to non-impairment findings.[130] BellSouth may not force CLECs into paying higher rates prior to the end of the transition period. Both Joint CLECs and BellSouth desire an orderly process for those Section 251 network elements making a transition to a new service arrangement (including transitions to Section 271 network elements, tariffed special access services, or non-BellSouth facilities). The process for making such transitions should not, however, result in CLECs being denied transition pricing during the FCC's mandated transition period.

[130] TRRO ¶ 5

If a CLEC has not converted a circuit "de-listed" under Section 251 by the end of the transition period, the Section 271 checklist element rate should apply. This is the appropriate outcome for two reasons. First, since all the UNEs de-listed by the TRRO (switching and in some circumstances high-capacity loops and interoffice transport) must be provided by BellSouth pursuant to Section 271, it makes sense to "default" the de-listed elements to the rate established by the Authority to satisfy the Section 271 "just and reasonable" rate standard.

Second, the Section 271 checklist element will, if the Joint CLECs' proposals are adopted, have terms and conditions similar to the de-listed Section 251 UNEs. By contrast, the services BellSouth would force CLECs to take after the transition are quite different. BellSouth admits that its interstate special access service is considered a "premium" service, and that it includes numerous terms and conditions that are not part of its UNE offerings. Moreover, the interstate tariff includes rates dramatically higher than the existing UNE rates. CLECs should not be forced on to a service that provides them much more than they are interested in buying (with an associated higher price tag). Similarly, the resale or "commercial" offerings BellSouth would default to for UNE-P lines do not provide the same features and functions as UNE-P – and provide what they do offer at much higher prices.

It is important to note that the identification of network elements subject to the transition is complicated by the ongoing disputes between the parties regarding the proper designation of wire centers where the FCC has authorized non-impairment findings. In those wire centers that are in dispute between the Joint CLECs and BellSouth, the Authority's resolution of the dispute will determine whether the high capacity loop and dedicated transport Section 251 UNEs in those wire centers are subject to a transition at all. CLECs should not be forced off Section 251 UNE arrangements in such situations prior to the Authority's resolution of the issues in this proceeding, or, if such transitions do occur they should be subject to correction at no additional cost to the CLEC. Moreover, CLECs' "behavior" in deciding how to transition certain UNEs should be judged in light of the tremendous uncertainty that exists until these proceedings are complete.

BellSouth's contract proposals seek to penalize CLECs who do not transition circuits on the overly aggressive schedule demanded by BellSouth. The dates in BellSouth's transition proposals are unrelated to the transition periods ordered by the FCC in the TRRO. Moreover, BellSouth witnesses acknowledged that most of the transition activity will involve billing and records changes rather than complicated network re-arrangements.[131] At hearing BellSouth witness Tipton admitted that BellSouth's contract proposal seeks to rush the transition more than justified by the TRRO's transition provision. She stated that BellSouth felt justified in this position because BellSouth has "waited a long time to get some unbundling relief."[132] BellSouth's desire for speed does not justify its proposals to penalize CLECs for not following the transition schedule demanded in its contract language proposal.[133] The Authority should reject contract language that is explicitly intended to penalize CLECs for exercising the transition rights explicitly provided for in the TRRO.

Resolved Issue No. 12 is omitted.

Issue No. 13: TRRO / FINAL RULES: Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

[131] TN Tr at 255:23-25 – 256·1 (Tipton)

[132] TN Tr. at Vol IV, 25 5

[133] Notably, in the Georgia proceeding, Ms Tipton characterized BellSouth's proposal to ensure CLEC compliance with BellSouth's view of the transition as "essentially a club" to be used "in the event a CLEC doesn't cooperate" GA Tr 570 6-8.

The answer to Issue No. 13 is No, to the extent such network elements are still required pursuant to Section 271. The SQM/PMAP/SEEM performance measurements were instituted to confirm BellSouth's compliance with its Section 271 obligations. When switching, loop, and transport network elements are no longer available under Section 251, BellSouth still must provide meaningful, non-discriminatory access to such network elements pursuant to the Section 271 competitive checklist. It is not compliance with Section 251 obligations that SQM/PMAP/SEEM are designed to measure; it is compliance with Section 271 obligations – including the provision of unbundled elements required even after a finding of no impairment under Section 251.

The justification for the institution of performance measurement plans in Section 271 proceedings was to ensure there was no "backsliding" by BOCs on their promises to maintain open local telecommunications markets. BellSouth's testimony and briefs in the Tennessee Section 271 proceeding make this exact point: Section 271 performance measurement plans are in place to ensure compliance with the Section 271 competitive checklist.[134] The need for preventing backsliding does not change simply because the section of the federal Act under which unbundling occurs changes. The Section 271 checklist items that must be unbundled should remain subject to SQM/PMAP/SEEM.

Although BellSouth argued in its Section 271 proceeding that performance measurement plans would ensure ongoing compliance with Section 271 checklist requirements, BellSouth now argues that the performance measurement plans are in place to ensure compliance <u>only</u> with Section 251 obligations.[135] This argument should be rejected for two reasons. First, BellSouth's

[134] *See,* Hearing Exhibit 13 (BellSouth Brief in Support of its FCC application for interLATA long distance authority in Tennessee) and Hearing Exhibit 14 (BellSouth direct and rebuttal testimony in Section 271 proceeding regarding performance measurement plans)

[135] TN Tr Vol I, 55 1-4 (Blake)

witness supporting this position could not point to a single pleading, brief, or other document in the Section 271 proceedings at the Authority or the FCC where BellSouth informed regulators that its performance measurement plans were in place to ensure compliance with Section 251 rather than Section 271. The documents from the Section 271 proceedings presented at hearing made clear that BellSouth repeatedly referenced compliance with Section 271 as the justification for the existence of the performance measurement plans.[136]

Second, it would make no sense for performance measurements designed to ensure there is no backsliding on Section 271 obligations be limited to Section 251 obligations. As discussed thoroughly in the argument on Issue No. 8, BellSouth's Section 271 obligations are independent of and in addition to its Section 251 obligations. The competitive checklist requires that BOCs comply with Section 251 requirements (that is checklist item number 1). The checklist goes on to require that BOCs continue to provide unbundled loops, transport, and switching even if those elements are no longer required pursuant to Section 251. BellSouth admits that it must provide non-discriminatory access to Section 271 checklist elements, just as it must for Section 251 elements. Thus, to ensure there is no backsliding on BellSouth's Section 271 obligations for those items "de-listed" under Section 251, the performance measurement plans must continue to apply to those elements as they are provided under Section 271.

The recent stipulation between BellSouth and certain CLECs in Georgia regarding removal of "de-listed" Section 251 elements from the performance measurement plans applies to the Section 251 UNEs that are no longer available under Section 251 after the TRRO, and only to elements provided pursuant to commercial agreements.. The stipulation does not purport to excuse BellSouth from performance standards once the Authority establishes Section 271

[136] *See*, Hearing Exhibits 13 and 14

checklist elements in the revised ICAs emerging from this proceeding. When a performance measure it tied directly to the provision of a Section 251 UNE, the passing of that requirement due to "de-listing" does not excuse continued compliance with high standards for provisioning Section 271 checklist elements.

Issue No. 14: TRO - 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. Summary of Joint CLEC Position.

Since the TRRO eliminated access to certain Section 251 UNEs, commingling is one of the most competitively sensitive issues that state commissions must address. The mixed voice and data services offered by CLECs using unbundled DS1 loops often rely on the connecting of loop and dedicated transport Section 251 UNEs. When both network elements are provided under Section 251, the FCC's "combinations" rules apply. When one of the connected network elements is no longer available under Section 251 (*e.g.*, a de-listed dedicated transport route in a wire center qualifying as non-impaired), the connecting of the network elements is known as "commingling." As more network elements become unavailable under Section 251, commingling rights become extremely important to CLECs in the small business market.

The FCC authorized commingling in the TRO in 2003. In the final version of the TRO (after conflicting provisions on this topic had been eliminated by the FCC's Errata filing), the FCC required that ILECs "permit commingling of UNEs and UNE combinations with other wholesale facilities and services."[137] As written, the FCC's ruling permits Section 251 UNEs to be commingled with any "wholesale facilities and services," which includes elements unbundled pursuant to Section 271, tariffed services offered by BellSouth, and resold services. BellSouth

[137] TRO ¶ 584

contends that the term "other wholesale facilities and services" does not include network elements unbundled pursuant to the Section 271 competitive checklist. BellSouth's argument is contrary to the language in the TRO, and relies either on language that the FCC removed in its Errata to the TRO or on prior FCC statements superseded by the TRO. The Joint CLECs urge the Authority to review the FCC's orders as they are written and affirm that commingling does not exclude "wholesale facilities and services" offered pursuant to the Section 271 competitive checklist.

Finally, the Joint CLECs urge the Authority adopt the contract language on commingling arrangements proposed by CompSouth. The CompSouth language ensures that certain fundamental commingled arrangements will be available from BellSouth (most notably, the commingled equivalent of today's DS1 transport/DS1 loop and DS3 transport/DS1 loop EELs).[138] BellSouth claims it will provide such commingled arrangements, but resists putting such commitments directly into the ICA. BellSouth prefers to maintain lists of commingled arrangements on its website, which BellSouth alone controls. It is vitally important to the Joint CLECs that the basic, non-controversial commingled arrangements be immediately available from the day the amended ICAs are effective. BellSouth has provided no adequate justification for its refusal to put its key commingling commitments in writing in enforceable contract terms.

B. Commingling of Section 251 and Section 271 elements is legally permissible and is vital to competition.

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

[138] *See.* Revised Exhibit JPG-1, CompSouth proposed contract language on Issue No. 14 (attached to Mr. Gillan's rebuttal testimony)

legal obligation under which they are offered.[139] When each of the elements is offered under Section 251, a comprehensive set of "combinations" rules apply.[140] Although BellSouth (and other incumbents) vigorously opposed the FCC's combinations rules, the U.S. Supreme Court rejected arguments that combining network elements was not contemplated in the federal Act 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.
>
> ***
>
> [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.[141]

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 Section 251 network elements) are based on the nondiscrimination requirement found in Section 251. "Commingled" arrangements, however, include *both* Section 251 network elements and network facilities/functions offered through a mechanism other than Section 251.

The fact that commingled arrangements include both Section 251 and non-Section 251 elements does not grant BellSouth license to discriminate, because Section 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

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[139] If each of the facilities involved in the configuration is required under Section 251 as an 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 Section 251 UNE (*i e*, it is offered as a special access circuit or network element offered to comply with Section 271 of the Act), then the arrangement is referred to as "commingling"

[140] 47 C F.R. Section 51.315

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

of Section 202 apply to these other wholesale offerings, including those offerings required by the competitive checklist (loops, transport, switching and signaling) set out in Section 271.[142]

Like its rules that apply specifically to Section 251 network elements, the FCC found that the general nondiscrimination duties of Section 202 imposed similar obligations where arrangements that contain both Section 251 and non-Section 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.[143]
>
> ***
>
> 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).[144]

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

BellSouth wishes to restrict CLECs' access to commingled arrangements, particularly through its position that CLECs cannot commingle Section 251 network elements and

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

[143] *TRO* ¶ 597

[144] *TRO* ¶ 591 (Footnotes omitted)

Section 271 checklist items. Such a position is not consistent with the Act or the FCC's decisions in the TRO and should be rejected.

BellSouth rests its resistance to commingling Section 251 UNEs with Section 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 Section 251 UNEs with any "wholesale facilities and services" provided by BellSouth. In fact, the Errata shows that the FCC considered excluding Section 271 wholesale offerings from its commingling rules and decided against it.

The portion of the Errata to the initial draft of the TRO that BellSouth witness Ms. Tipton discusses in her direct testimony 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.[145]

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 Section 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 Section 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 Section 271 competitive checklist services are "wholesale facilities and services," the TRO specifically

[145] *TRO* ¶ 584

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[146] as providing the basis to its claim that Section 271 wholesale offerings are exempt from the FCC's commingling 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 Section 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 Section 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,"[147] and the language that would have exempted Section 271 offerings from commingling obligations was removed from the TRO by the Errata.[148]

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[146] See Tipton Direct at 30. Footnote 1989 in the post-Errata (i e , final) TRO appears as footnote 1990 in the pre-Errata *TRO*

[147] *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 "

[148] State commission decisions in New York and Florida analyzed Section 251/271 commingling without focusing on the "whole story" of the FCC's edits in the Errata. Any analysis that focuses on the deleted text in paragraph 584 without also considering the import of the deletion at footnote 1989 (a companion deletion that "cancels out" the other edit) fails to examine the whole picture of the FCC's actions in the TRO and its Errata. Most importantly,

BellSouth also erroneously argues that commingling is restricted to combining Section 251 UNEs with BellSouth's tariffed interstate special access services. BellSouth reaches this position only by a willful misreading of the applicable FCC orders.[149] In FCC orders discussing commingling, the FCC provided examples of services that could be commingled. In those passages, the FCC consistently used the terms "for example" or "e.g." before identifying tariffed special access as a service that could be commingled. The FCC never excluded other services from commingling when it provided examples of what could be commingled. BellSouth's attempts to read such a restriction where it clearly does not belong should be rejected.

If BellSouth is not required to commingle Section 271 checklist elements with Section 251 UNEs, it will have detrimental, real world impacts for CLECs. BellSouth witness Ms. Tipton testified in the Georgia proceeding that, in the absence of commingling rights, a CLEC might still be allowed by BellSouth to connect Section 251 with other wholesale services. In that situation, however, BellSouth would force the CLEC to disconnect the existing circuit and re-terminate it at the CLEC collocation. Normally, the transition from a Section 251 EEL combination to a Section 251/271 commingled loop/transport arrangement (like the transition from an EEL to a 251/special access arrangement) can be achieved with a records change, and without customer disruption. BellSouth proposes to turn that simple records conversion process into a potentially disruptive "hot cut" for every EEL where a CLEC wants to use Section 271 checklist elements approved by the Authority.[150]

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however, it fails to focus on the substance of the text the FCC kept in the TRO that requires commingling with any "wholesale facilities and services"

149 *See* Gillan Rebuttal, at 28-33

150 *See*, GA Tr. at 535.16-25, where BellSouth witness Tipton described the process BellSouth would require to achieve 251/271 connections

Issue No. 15: TRO - CONVERSIONS: Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?

Yes, BellSouth is required to provide conversion of special access circuits to UNE pricing. In the TRO, the FCC required that ILECs provide straightforward procedures for conversion of various wholesale services (including tariffed special access service) to the equivalent unbundled network element or combination of network elements. CompSouth's proposed contract language provides that BellSouth will charge the applicable nonrecurring "switch-as-is" rates for conversions. The charges should be based on the latest approved TELRIC rates for conversion activities, and not on the unsubstantiated rates proposed by BellSouth. Under CompSouth's proposed language, any rate change resulting from the conversion would be effective as of the next billing cycle following BellSouth's receipt of a conversion request from a CLEC, as required by the TRO.[151] CompSouth's proposal also provides that a conversion shall be considered termination for purposes of any volume and/or term commitments and/or grandfathered status between a CLEC and BellSouth, and that any change from a wholesale service to a network element that requires a physical rearrangement will not be considered to be a conversion for purposes of the ICA.

The TRO addressed conversions at paragraphs 585-589. The FCC ruled that "carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility

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A (Tipton): [I]f there was an existing EEL and a wire center was found to be unimpaired, so let's just say the route became unimpaired, then the CLEC would need to do that combining on their own behalf And so the loop would be re-terminated to a collo and the dedicated transport would be reterminated to the collo.

Q: So in that situation then, the EEL circuit would need to go down and be reconfigured?

A (Tipton): It would be similar to a hot cut that we do when we're doing UNE-P to a UNE-L conversion.

[151] TRRO ¶ 588.

criteria that may be applicable."[152] Conversions permit CLECs to shift to and from UNEs or tariffed services as dictated by the needs of their businesses. The FCC recognized that conversion of circuits from tariffed special access to UNEs (or vice versa) is a completely legitimate business activity, and that such "wasteful and unnecessary" ILEC charges would serve to deter economically efficient conversions. Moreover, the FCC acknowledged that conversion activity involves "largely a billing function,"[153] and therefore should be able to be completed without the ILEC efforts typically associated with establishing a new service. In particular, the FCC found that "termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time"[154] may not be applied to conversions. In fact, the FCC found that imposition of such charges by ILECs would violate the non-discrimination provisions of Section 202 of the Communications Act. The FCC refrained from providing explicit procedures governing conversions, but mandated that conversions be conducted using efficient processes and that CLECs be protected from paying "wasteful and unnecessary charges"[155] associated with conversions.

The Authority currently has before it a pending complaint case[156] in which BellSouth has filed cost studies supporting a proposed TELRIC rate for "switch-as-is" conversions. On April 21, 2005, BellSouth filed cost studies intended to justify TELRIC rates for special access to UNE conversions. The rates proposed by BellSouth in April 2005 have not been approved by the Authority. The rates proposed in the cost studies, however, do not match the conversion rates proposed in this proceeding. Ms. Tipton's direct testimony includes proposed conversion rates

[152] TRO ¶ 585

[153] TRO ¶ 588

[154] TRO ¶ 587.

[155] *Id.*

[156] Complaint of XO Tennessee, Inc Against BellSouth, Docket No. 04-00306

that are different from those proposed in the April 2005 BellSouth cost studies.[157] The rates in Ms. Tipton's testimony are not supported by a cost study, not do they reference the April 2005 cost studies for support or substantiation. There is thus no record evidence to justify adoption of the conversion rates approved in Ms. Tipton's testimony. Moreover, the cost studies that were submitted in Docket No. 04-00306 have not been approved.

The changes brought on by the TRRO will likely result in a substantial amount of conversion activity in Tennessee (whether the conversions are to UNEs, 271 checklist elements, or tariffed special access). As discussed above, the FCC emphasized that conversion should not be subject to unnecessary charges. Given the uncertainty and lack of record evidence supporting BellSouth's rate proposals, the Joint CLECs urge the Authority to order BellSouth to inform the Authority what cost studies and associated rates it proposes for conversions in the post-TRRO interconnection agreements under consideration in this docket.[158] The Authority should not give final approval to any such rate until the parties have had an opportunity to review and question the BellSouth cost studies and present their arguments regarding those studies to the Authority.

Issue No. 16: TRO – CONVERSIONS: What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?

The rates, terms, and conditions for conversions pending on the effective date of the TRO should be those that reflect the FCC's decisions in the TRO. Once conversion language reflecting the TRO is included in an ICA, the parties should treat conversions pending as of the 2003 effective date of the TRO based on the FCC's forward-looking conversion procedures that were established in the TRO.

[157] Tipton Direct, at 53.16-22.

[158] That is, is BellSouth proposing the rates set forth in its cost study in Docket No. 04-00306 or the rates included in Ms. Tipton's direct testimony in this docket?

The FCC explicitly addressed the question of how to handle pending conversion requests when it issued the TRO. In paragraph 589, the FCC stated:

> [W]e decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. <u>To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.</u>[159]

The FCC tied pricing provisions regarding conversions to the effective date of the TRO. CLECs have been waiting for over two years for BellSouth to implement the portions of the TRO that improved pricing, terms, and conditions for conversions. The CompSouth proposed language simply provides that the explicit language in the TRO regarding pending conversions will, at last, be implemented in BellSouth ICAs.

Issue No. 17: TRO – 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?

The answer to this question is an unequivocal Yes. BellSouth's obligation to provide access to line sharing pursuant to Section 271 is grounded in two irrefutable legal facts: (1) Line sharing is a Section 271 checklist item 4 loop transmission facility; and (2) BOCs who, like BellSouth, offer long distance services pursuant to Section 271 authority have an obligation to provide checklist item 4 loop transmission facilities irrespective of unbundling determinations under Section 251.[160] 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

[159] TRO ¶ 589 (emphasis supplied)

[160] 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.

irrespective of Section 251 determinations. Nothing BellSouth says can change the fact that every FCC statement on the subject and every 271 brief by BellSouth considered line sharing a checklist item 4 loop transmission facility.

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, like BellSouth, subject to section 271 must provide access to it.[161]

In sum, the FCC line sharing order created a new UNE by defining the high frequency portion of the loop as a separate UNE, available under both 251 and 271. The FCC subsequently determined that CLECs were not impaired without access to the high frequency portion of the loop and therefore it was no longer available under 251. In making that decision, the FCC did not change its decision that the high frequency portion of the loop constituted a separate UNE. That separate UNE remains available under Section 271.

A. Statement of the Law.

1. The History is Clear: Line Sharing is a Section 271 Checklist Item 4 Loop Transmission Facility.

Line sharing is a Section 271 checklist item 4 loop transmission facility. Because checklist items 4, 5, 6, and 10 are independent of section 251 determinations, those 251

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[161] In Maine Order, 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 September 13, 2005 (holding that "Verizon must continue to offer line sharing pursuant to Checklist Item No 4 of section 271")

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 determinations may not remove elements from checklist items 4, 5, 6 or 10.[162] So the simple historical question is: was line sharing in checklist item 4? If it was, then it remains in checklist item 4.[163]

The answer to that question is simple: in numerous FCC Orders, the FCC expressly stated that line sharing is a checklist item 4 element. A few examples include:

The *Massachusetts 271 Order*:

> 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 251c(3) of the Act and, thus, checklist items 2 **and 4** of section 271.[164]

The *Florida and* Tennessee 271 *Order*:

> BellSouth's provisioning of the line shared loops satisfies checklist item 4.[165]

The *Georgia 271 Order*:

> We find that, given BellSouth's generally acceptable performance for all other categories of line-shared loops, BellSouth's performance is in compliance with checklist item 4.[166]

Moreover, before it was in its interest to do otherwise, BellSouth itself placed line sharing in every one of its own 271 briefs to the states and to the FCC under checklist item 4.[167] If

[162] The nature of BellSouth's continuing Section 271 checklist obligations are discussed in depth under Issue No 8.

[163] *Id*, *TRO* ¶¶ 658-59.

[164] *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 (emphasis added). In reply to BellSouth's point that the FCC did not require BOCs to provide line sharing in a December 1999 and June 2000 set of 271 grants, it should be noted that line sharing was not ordered until after those applications were pending and that the FCC specifically addressed the provision of line sharing in those orders

[165] *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 (emphasis added)

[166] *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, ¶ 239

[167] *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

BellSouth had a single quotation from FCC saying that line sharing was not a checklist item 4 element or that line sharing was not a 271 obligation, BellSouth would have provided it. Yet they have not. The quotations provided above make no sense unless line sharing fell under section 271 checklist item 4.

In the world BellSouth attempts to construct, line sharing never was a checklist item 4 element. However, that position renders numerous quotations from the FCC nonsensical. If the FCC did not mean what it said in the above quotations, what did it mean? How does a BOC "satisfy" or "comply" with a checklist item by providing an element which never was subject to the checklist? BellSouth's position simply does not match-up with numerous statements from the FCC. BellSouth's effort to remove line sharing from the checklist by arguing that it never really had to offer line sharing because offering the whole loop was sufficient to fulfill its obligations under the checklist is laughable to any party to the 271 proceedings. BellSouth had to offer both line sharing and whole loops in order to fulfill its obligations under checklist item 4 and those obligations did not change with the 251(c)(3) determinations contained in the TRO.

Importantly, the FCC's statement in the Massachusetts 271 Order was not an anomaly: In every FCC 271 Order granting BellSouth long distance authority[168] – indeed, in every FCC

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 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.

[168] *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

order granting <u>any</u> BOC such authority – the FCC placed line sharing in checklist item 4. Manifestly then, line sharing is a section 271(c)(2)(B)(iv) (checklist item 4) network element.

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.[169] 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."[170] 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"[171] – including line sharing under checklist item 4.[172]

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

[169] 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 .")

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

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

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

3. The Statements of the FCC in the Broadband Forbearance Order Make it Clear that Line Sharing is a 271 Element.

When the FCC released the Broadband Forbearance Order,[173] two of the Commissioners released statements that leave different impressions of what action the FCC took regarding forbearance for line sharing under Section 271. The dueling views of then-Commissioner Martin and then-Chairman Powell, however, 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.[174] Commissioner Martin's statement on line sharing, although stating a different viewpoint, is based upon the clear premise that line sharing is a Section 271 obligation of ongoing force unless and until the FCC grants a petition for forbearance. 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 been—wrong: there is indeed a continuing BOC obligation to provide CLECs with line sharing in accordance with Section 271 of the Act.

BellSouth relies on then-Commissioner Martin's statement in support of its argument that the FCC granted forbearance from line sharing. At the same time, BellSouth still argues that line sharing is not a Section 271 obligation (from which there would be no need to forbear).[175] BellSouth's arguments are completely inconsistent. Either line sharing is a 271 obligation, and

[173] Petitions for Forbearance of Verizon, SBC, Qwest, and BellSouth, WC Docket No 01-338, *et seq.*, Memorandum Opinion and Order (rel. Oct 27, 2004) ("Broadband Forbearance Order")

[174] Broadband Forbearance Order, Chairman Powell's Statement.

[175] BellSouth Motion for Summary Judgment at 31 ("even if section 271 did require line-sharing, the FCC's recent forbearance decision would have removed any such obligation")

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.

4. 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.[176] 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 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, relieved 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.
>
> * * *

[176] BellSouth Motion for Summary Judgment, at 32-33

> 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 packetized 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).[177]

Moreover, the FCC repeatedly explains – as it is statutorily obliged[178] to do – that it is granting forbearance to encourage the BOCs to build next-generation fiber facilities.[179] There is no mention in the Order of any considerations related to legacy copper networks carrying line sharing. Thus then-Chairman Powell's Statement: "By removing 271 unbundling obligations for fiber-based technologies – and not copper based technologies such as line sharing . . . ".[180] Additionally, on November 5 – more than one week <u>after</u> then-Commissioner Martin expressed his view that the FCC granted forbearance from line sharing – the FCC released an Order again stating that "[o]n 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."[181] 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, and a follow-on Order, all make it clear that the Broadband Forbearance Order only addresses fiber based technologies – and not line sharing.[182]

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[177] Broadband Forbearance Order, ¶¶ 1, 12, 19, and 37

[178] 47 U.S.C. § 160 (c) ("The Commission . shall explain its decision in writing.")

[179] *Broadband Forbearance Order*, ¶¶ 6, 12, 20, 21, 24, 25, 27, 31 and 34.

[180] *Broadband Forbearance Order*, Statement of Michael K Powell

[181] 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

[182] If BellSouth believed the FCC granted forbearance from its 271 obligation to provide line sharing – despite the clear language of the Order and the Chairman's statement to the contrary – then BellSouth should have filed a Motion for Clarification <u>at the FCC</u>

In summary, BellSouth is obligated pursuant to 47 U.S.C. Section 271 to provide access to line sharing at just and reasonable rates after October 4, 2004 and the proposed language from CompSouth Revised Exhibit JPG-1, Issue 17, should be adopted as reflecting the appropriate access language. If BellSouth considers the current rates as inconsistent with a just and reasonable rate, then it is free to challenge the rate in an appropriate case.

Issue No. 18: TRO – LINE SHARING – TRANSITION: If the answer to foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

In the event that the Authority determines that BellSouth does not have an obligation under Section 271 to provide continued access to line sharing, then the language offered by either CompSouth or BellSouth appropriately reflects the remaining legal obligations of BellSouth. Issue Nos. 17 and 18 are essentially one issue: What is the legal obligation of BellSouth with regard to line sharing? If BellSouth has an obligation under Section 271, then the CompSouth proposed language from Issue No. 17 should be used, and if BellSouth does not have an obligation to provide line sharing under Section 271, then the language from Issue No. 18 should be used. For the reasons set-forth in the record and this brief regarding Issue No. 17, CompSouth respectfully urges the use of its language from Issue No. 17 for the resolution of these two issues.

Issue No. 19: TRO – LINE SPLITTING: What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

There are three areas of disagreement reflected in the competing language proposed by the parties regarding line splitting:

1. Whether line splitting can involve the commingling of 251 and 271 elements;

2. Whether a CLEC should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLEC involved in the line splitting arrangement; and

3. Whether BellSouth must upgrade its Operational Support Systems (OSS) to facilitate line splitting.

The first issue - Whether line splitting can involve the commingling of Section 251 and 271 elements – is resolved by the resolution of Issue No. 14 regarding commingling. The second issue -- Whether a CLEC should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLEC involved in the line splitting arrangement -- is largely semantic. CompSouth agrees that the CLEC should indemnify and defend BellSouth against claims made against BellSouth. CompSouth is concerned that the inclusion of the words "actions, causes of action" and "suits" might give rise to an obligation for CLECs to defend and indemnify BellSouth against entire "actions" or "suits", rather than the specific claims made against BellSouth (which do not involve accusations of willful misconduct or gross negligence).

Resolved Issue Nos. 20 and 21 are omitted.

Issue No. 22: TRO – CALL-RELATED DATABASES: What is the appropriate ICA language, if any, to address access to call related databases?

The ICA should include language that makes call-related databases accessible pursuant to the Section 271 competitive checklist. Like other 271 checklist items, call-related databases must be made available to CLECs by BellSouth on a non-discriminatory basis on just and reasonable rates, terms, and conditions.

Any decision on access to call-related databases must recognize that call-related databases (like loops, transport, and switching) are included in the Section 271 competitive checklist. Checklist item 10 requires BellSouth provide "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."[183] 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 Section 271 obligations in ICAs).

BellSouth rests its contention that call-related databases should be excluded from ICAs on its general position that Section 271 checklist items should not be included in ICAs. In its Motion for Summary Judgment in this proceeding, BellSouth stated that "[b]ecause CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases."[184] 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 Section 271 competitive checklist. BellSouth's wholesale omission of ICA language on call-related databases is thus inappropriate, and CompSouth's proposed language should be incorporated in BellSouth ICAs.

Issue No. 23: TRO – 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 No. 24: TRO – HYBRID LOOPS: What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

[183] 47 U.S C. 271(c)(2)(B)(x)

[184] BellSouth Motion at 56

Issue No. 28 TRO – 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?

The Joint CLECs address Issue Nos. 23, 24, and 28 together because the dispute between the parties is similar for all three issues.

In the TRO (and subsequent Orders), the FCC adopted reduced unbundling obligations for certain "broadband facilities," specifically "fiber to the home" (FTTH), "fiber to the curb" (FTTC) and "fiber to the predominantly residential multi-dwelling unit" (MDU). Joint CLECs recognize the exclusions from unbundling granted by the FCC in its Orders, and do not have disputes related to the MPOE definition or the ownership of inside wiring from the MPOE to end users (*see* Issue No. 23). In fact, the Joint CLECs have no objection to much of the proposed contract language BellSouth has suggested for implementing these FCC Orders.

There is, however, one fundamental disagreement between BellSouth and Joint CLECs on these issues. The disagreement stems from BellSouth's attempt to extend the application of these reduced broadband unbundling obligations beyond what the FCC intended. The issue is critical for CLECs serving the small and medium-size business market. BellSouth's position is that it can deny access to Section 251 UNE DS1 loops, even in areas that the FCC has found remain "impaired" for purposes of Section 251. BellSouth's position is that anywhere it extends new fiber or replaces existing copper with fiber, it may refuse to provision Section 251 DS1 loops.

There is a critical <u>limiting</u> factor in the FCC's broadband exclusions from loop unbundling. That is, the predicate to BellSouth's reduced unbundling obligations for these network architectures is that the loops are used to serve <u>mass market customers</u>. BellSouth was not granted a total exception to its loop unbundling obligations for all fiber and hybrid loops;

rather, the FCC's broadband exclusions were specifically limited to circumstances where these loops are used to serve the mass market.

A. **The FCC's broadband loop unbundling Orders apply only to "mass market" loops.**

In the TRO, the FCC separated its discussion of loop unbundling into two parts: mass market loops and enterprise loops. The TRO instituted different impairment analyses and unbundling rules for these different types of loops. The FCC's analytical separation of mass market and enterprise loops is clear from the TRO's Table of Contents, which organizes the discussion of "Loop Impairment by Customer Market" into separate sections entitled "Mass Market Loops" and "Enterprise Market Loops."[185] The FCC explained its rationale for analyzing loops in these categories as follows:

> The record reflects that customers generally associated with the mass market typically use different types of loop facilities than customers generally associated with the enterprise market. We note that very small business customers, like residential customers, typically purchase analog loops, DS0 loops, or loops using xDSL-based technologies. <u>We address the loops provisioned to these customers as part of our mass market analysis.</u> All other business customers – whom we characterize as the enterprise market – typically purchase high-capacity loops, such as DS1, DS3, and OCn capacity loops. <u>We address high-capacity loops provisioned to these customers as part of our enterprise market analysis.</u>[186]

The FCC noted that its categorization of loop types did not prohibit particular customers from "crossing over" the mass market/enterprise divide to purchase a loop not usually "associated with" that customer type:

> In considering the different customer markets to inform our understanding of competitive carrier loop deployment, we note that our market classifications allow us to conduct our impairment analyses for various loop types at a more granular

[185] TRO, Table of Contents at pages 2-3. "Loop Impairment by Customer Type" is organized as Section VI A 4 of the TRO. "Mass Market Loops" are discussed under Subsection VI.A 4 and "Enterprise Market Loops" under Subsection VI A 4.b

[186] TRO, ¶ 209 (emphasis supplied).

> level but are not intended to prohibit the use of UNE loops by customers not typically associated with the respective customer class.[187]

For example, some "enterprise" customers may "require DS0 lines, particularly if they have remote business locations staffed by only a few employees where high-capacity loop facilities are not required."[188] The FCC emphasized that it was not limiting what a particular customer could order; rather, it was analyzing impairment by loop type (*i.e.*, enterprise or mass market) because the evidence showed impairment concerns were different for those loop types. The FCC's analysis and resulting Order and rules thus include separate unbundling limits that apply to DS0 (mass market) and DS1/DS3 (enterprise) loop types.[189]

For enterprise market DS1 and DS3 loops, the FCC's impairment analysis included the "subdelegation" to state commissions that resulted in the TRO being remanded back to the FCC by the D.C. Circuit in the *USTA II* decision. In addition, the D.C. Circuit ordered the FCC to undertake a revised impairment analysis before issuing its order on remand. The DS1 and DS3 loop unbundling rules were revised in the TRRO, and enterprise loop unbundling is now subject to the wire center-based business line/fiber-based collocator test discussed elsewhere in this Brief.

When it analyzed mass market loops in the TRO, the FCC determined that it would lift unbundling restrictions for certain "broadband facilities," specifically "fiber to the home" (FTTH),[190] "fiber to the curb" (FTTC), "fiber to the predominantly residential multi-dwelling unit" (MDU), and, in more limited circumstances, hybrid fiber/copper loops. The FCC's

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187 TRO ¶ 210.

188 *Id*

189 The mass market/enterprise distinction is reflected in the organization of the TRO ordering language as well as in the FCC's rules, which include specific separate provisions for DS1 and DS3 loops *See* 47 C F R § 51.319(a)(4) (DS1 loops) and (a)(5) (DS3 loops)

190 Although the FCC refers to fiber-to-the-home and abbreviates the architecture as FTTH, it defines the configuration as fiber-to-the-customer-premise

determination regarding these issues in the TRO was upheld by the D.C. Circuit in *USTA II*. The policy established in the TRO was clarified in certain respects by subsequent FCC Orders: the "Fiber to the curb Reconsideration Order,"[191] the "Multiple Dwelling Unit Reconsideration Order,"[192] and the "Broadband Forbearance Order."[193] In each of these Orders, the FCC re-affirmed its basic conclusions regarding mass market loop unbundling first enunciated in the TRO. The FTTC and MDU Reconsideration Orders clarified the application of the TRO provisions to specific types of premises. In the Broadband Forbearance Order, the FCC used its statutory forbearance authority to excuse the BOCs from unbundling mass market FTTH/FTTC and hybrid loops under Section 271 as well as under Section 251.

The basic premise of the FCC's broadband unbundling policy was to encourage broadband deployment in the mass market, principally to foster competition for "triple play" services that combine voice, data and video.[194] The FCC found that this rationale does not apply to serving the enterprise market, where the FCC found that carriers' incentives were different.

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[191] 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, Order on Reconsideration, FCC 04-248 (rel Oct 18, 2004) ("FTTC Order").

[192] 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, Order on Reconsideration, FCC 04-191 (rel. Aug 8, 2004) ("MDU Reconsideration Order").

[193] Petitions for Forbearance of Verizon, SBC, Qwest, and BellSouth, WC Docket No 01-338, *et seq*, Memorandum Opinion and Order (rel. Oct 27, 2004) ("Broadband Forbearance Order")

[194] For instance, when extending its unbundling exclusion to the fiber-to-the-curb architecture, the FCC concluded

The record reflects that when fiber is brought within 500 feet of a subscriber's premise, carriers can provide broadband services comparable to that provided by FTTH architecture, including data speeds of 10 megabits per second (Mbps) in addition to high definition multi-channel video services.

***

[A]s with FTTH loops, competitive LECs deploying FTTC loops have increased revenue opportunities through the ability to offer voice, multi-channel video, and high-speed data services As the Commission found with respect to FTTH loops in the *Triennial Review Order*, the substantial revenue opportunities that arise from offering this "triple play" of services helps ameliorate many of the entry barriers presented by the costs and scale economies

Federal Communications Commission, CC Docket 01-338, Order on Reconsideration, , October 14, 2004, ("FTTC Order"), ¶¶ 10-11

Throughout the TRO and the subsequent Orders further elucidating the FCC's broadband policy, the FCC repeatedly emphasized that the unbundling limits it was imposing applied to mass market loops, and it did not affect unbundling obligations for enterprise loops. This basic predicate permeates the FCC's Orders:

> ...we find that our unbundling rules for local loops serving the mass market must account for these different loop architectures.[195]
>
> Accordingly, we do not require incumbent LECs to provide unbundled access to new mass market FTTC loops for either narrowband or broadband services.[196]
>
> The Commission granted the greatest unbundling relief for dark or lit fiber loops serving mass market customers that extend to the customer's premises (known as fiber-to-the-home or FTTH loops) in new build or "greenfield" situations. For those loops, the Commission determined that no unbundling is required.[197]
>
> We decline to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market.[198]
>
> ...with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis, competitive LECs will need to continue to seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market.[199]
>
> Thus, we determine that, particularly in light of a competitive landscape in which competitive LECs are leading the deployment of FTTH, removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market.[200]
>
> ... the rules we adopt herein do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in

195 TRO ¶ 221

196 FTTC Order, ¶ 14.

197 FTTC Order, ¶ 6

198 TRO ¶ 288 (emphasis supplied).

199 TRO, ¶ 272 (emphasis supplied)

200 *TRO* ¶ 278 (emphasis supplied)

> DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market.[201]
>
> In the *Triennial Review Order*, the Commission limited the unbundling obligations imposed on mass market FTTH deployments to remove disincentives to the deployment of advanced telecommunications facilities in the mass market. We find here that those policy considerations are furthered by extending the same regulatory treatment to incumbent LECs' mass market FTTC deployments.[202]
>
> … we conclude that, treating FTTC loops the same as FTTH loops will encourage carriers to further deploy fiber architectures necessary to deploy broadband services to the mass market, and the benefits of such deployment outweigh the limited impairment that competitive carriers face.[203]

As CompSouth witness Mr. Gillan noted in his rebuttal testimony when identifying these numerous citations, this list is "representative, not exhaustive," of the mass market limitation imposed by the FCC.

With regard to fiber/copper hybrid loops, the only "limitation" on BellSouth's unbundling obligations is that BellSouth need not provide access to the packet-based capability in the loop.[204] This limitation, however, should not affect CLECs' ability to obtain access to DS1 (and DS3) loops in any meaningful way.

First, the FCC made clear that BellSouth must still provide DS1 and DS3 loops on such facilities:

> We stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers. These TDM-based services – which are generally provided to enterprise customers rather than mass market customers – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs…. Incumbent LECs remain obligated to comply with the nondiscrimination requirements of section 251(c)(3)

[201] *TRO* ¶ 288 (emphasis added)

[202] FTTC Order ¶ 2

[203] FTTC Order, ¶ 13

[204] TRO ¶ 288

> in their provision of loops to requesting carriers, including stand-alone spare copper loops, copper subloops, and the features, functions, and capabilities for TDM-based services over their hybrid loops.[205]
>
> ***
>
> Although packetized fiber capabilities will not be available as UNEs, incumbent LECs remain obligated, however, to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information. Thus, as discussed more specifically in the Enterprise Loops section, consistent with the proposals of HTBC, SBC, and others, incumbent LECs must provide unbundled access to a complete transmission path over their TDM networks to address the impairment we find that requesting carriers currently face. This requirement ensures that competitive LECs have additional means with which to provide broadband capabilities to end users because competitive LECs can obtain DS1 and DS3 loops, including channelized DS1 or DS3 loops and multiple DS1 or DS3 loops for each customer.[206]

Second, the FCC's policies are premised on the understanding that, to the extent that an ILEC does deploy a packet-based architecture, the packet-architecture parallels its TDM-network, and would not isolate customers from access to CLEC DS1-based services.

> In their submissions in this proceeding, incumbent LECs demonstrate that they typically segregate transmissions over hybrid loops onto two paths, *i e.*, a circuit-switched path using TDM technology and a packet-switched path (usually over an ATM network). *See, e.g.*, SBC Jan. 15, 2003 *Ex Parte* Letter at 4 (providing diagram to illustrate that its network architecture consists of a TDM-based portion and a packet-switched portion).[207]

Thus, the exception to BellSouth's general obligation to unbundle DS1 (and DS3) services in the hybrid loop context is a narrow one. To the extent that BellSouth is no longer required to provide access to DS1 (and DS3) loops, those circumstances are defined by the wire center-by-wire center analysis related to establishing the number of switched business lines and unaffiliated fiber-based collocators, and not by the loop architecture deployed by the incumbent.

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[205] *TRO* ¶ 294 Footnotes omitted

[206] *TRO* ¶ 289. Footnote omitted

[207] *TRO* ¶ 294, footnote 846

The FCC thus made two things extremely clear in its broadband Orders: (a) BellSouth would no longer have to offer CLECs access to unbundled mass market loops in the specific circumstances described in the Orders; and (b) the Orders were limited to the mass market loop type, and therefore did not impact the FCC's impairment analysis for DS1 and DS3 enterprise loops.

B. <u>BellSouth seeks to improperly extend the limits on unbundling in the broadband Orders to "enterprise" loops.</u>

In this proceeding, BellSouth seeks to extend the application of the reduced mass market loop unbundling obligations specified in the FCC's broadband Orders. Apparently, the numerous efforts by the FCC to make itself clear that the broadband Orders apply to mass market loops was lost on BellSouth. In Mr. Fogle's testimony, BellSouth urges what would be a massive expansion of the unbundling limitations in the FCC's Orders by suggesting the Authority apply the terms of the mass market broadband Orders to the enterprise market for DS1 and DS3 loops.

BellSouth's testimony correctly identifies the principal limiting the broadband exclusion to mass market loops, but then ignores its importance. In BellSouth's own testimony, Mr. Fogle states:

> BellSouth maintains that the FCC determined in the *TRO* that ILECs have no obligation to unbundle FTTH <u>mass market</u> loops serving greenfield areas or areas of new construction.[208]

According to BellSouth, the "basic principle" that the FCC adopted in its broadband policies is simply that "CLECs continue to have access to currently existing last mile cooper facilities, for

[208] Fogle Direct, at 19 (emphasis supplied, footnote deleted).

as long as those facilities continue to exist."[209] But BellSouth's witness ignores the "mass market" limitation when he describes BellSouth's obligations under the FTTH/FTTC Orders:

> BellSouth, per TRO Paragraph 271, is not obligated to "offer unbundled access to newly deployed or "greenfield" fiber loops.[210]
>
> ... the FCC ruled that hybrid loops should not be unbundled since they are part of the next generation network.[211]
>
> ... the same unbundling relief framework (including any unbundling relief) established by the FCC in the TRO for FTTH loops also applies to FTTC loops.[212]

"What is missing from any of BellSouth's testimony," CompSouth witness Mr. Gillan explained in his rebuttal testimony, "is acceptance that the FCC's rules are not a <u>blanket</u> exemption from unbundling obligations. BellSouth remains obligated to provide access to carriers serving enterprise customers, even where the CLEC could not gain access to the loop facility to serve a mass market customer."[213] In fact, the contract language proposed by BellSouth explicitly scoops all loop types (enterprise as well as mass market) into the limited unbundling exclusions approved in the FCC's broadband Orders.

BellSouth's witness Mr. Fogle presented testimony that at times appeared to argue the issue both ways. Mr. Fogle sponsored the testimony quoted above noting that the broadband Orders apply to "mass market loops." At the same time, he insisted BellSouth could deny access to enterprise loops in greenfield and brownfield locations.[214] The Joint CLECs submit that if Mr. Fogle had reviewed the numerous references in the TRO and subsequent broadband Orders cited

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209 Fogle Direct, at 14

210 Fogle Direct, at 17

211 Fogle Direct, at 18.

212 Fogle Direct, at 19.

213 Gillan Rebuttal, at 7-8.

214 TN Tr. Vol I at 125.

above – all of which explicitly limit the broadband unbundling relief to mass market loops – it would have made eminently clear what outcome the FCC intended: that CLECs retain access to unbundled DS1 UNE loops.

Rather than rely on the direct holdings of the FCC, however, BellSouth's drive to distort the broadband loop unbundling orders resorts to citing any language it can find in the Orders that uses the term "FTTH," "FTTC," or "Greenfield" without the "mass market" qualifier. For example, in pleadings in other states, BellSouth seeks support for its position in paragraphs 13, 21, and 23 of the MDU Reconsideration Order. Those paragraphs all appear in the FCC's "Regulatory Flexibility Analysis" ("RFA") in that order. The RFA is a statement about the need for and objectives of rules adopted by federal agencies. In each paragraph cited by BellSouth in the RFA, the FCC provides the briefest thumbnail sketch of what its rules are designed to accomplish. There is no policy analysis, no evaluation of evidence or parties' arguments, and no ordering paragraphs, (as one finds in the substantive parts of FCC Orders). Apparently, BellSouth hopes to convince the Authority that the FCC's brief description of its Orders in the RFA should override the actual text of the Orders.[215] One can assume this is because in these paragraphs the FCC, as noted above, did not include the "mass market" qualifier every time it described broadband relief. This omission, when read in the context of the RFA, is of no substance, and BellSouth's reliance on it is woefully misplaced.

The FCC did provide a more detailed "summary" of its TRO unbundling analysis in one of the ordering paragraphs of the broadband Orders. In the Broadband Forbearance Order, the FCC summarized its TRO loop impairment findings as follows:

[215] BellSouth also tried this same tactic in similar pleadings by citing paragraphs 23 and 32 from the RFA for the FTTC Order.

Regarding loops for mass market customers, the Commission held that incumbent LECs are required to offer unbundled access to stand-alone copper loops, line splitting, and subloops for the provision of narrowband and broadband services. [Citations omitted.] The Commission also required incumbent LECs to offer unbundled access to hybrid/copper loops for narrowband services. [Citations omitted.] For enterprise customer loops, the Commission required incumbent LECs to offer unbundled access to dark fiber, DS3 and DS1 loops subject to more granular reviews by the state commissions. [Citations omitted.][216]

There can be no question that the FCC intended to limit its broadband findings to "loops for mass market customers," and that it established a different set of unbundling rules for "enterprise customer loops."

The FCC also provided a clear explanation of the scope of its broadband policies in a 2003 filing with the D.C. Circuit Court of Appeals. Responding to a pleading by Allegiance Telecom that expressed the fear that the FCC may have restricted access to DS1 loops as part of its broadband policy, the FCC explained:

> Allegiance also claims that it will lose access to DS1 loops. Motion at 11. It based that claim on the theory that when the Commission changed "residence" to end user in the erratum, it removed business customers served by DS-1 loops from the unbundling obligation. That reading of the erratum is incorrect.... The text, as well as the rules themselves, make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices.[217]
>
> In the [TRO], the FCC excused incumbent telephone companies from having to provide FTTH loops as unbundled network elements to competing telephone companies at forward-look[ing] "TELRIC" rates, but it required incumbents to continue to make DS1 and DS3 loops available to competitors at such rates.[218]
>
> Petitioners are wrong that the resulting rules are vague with respect to their treatment of DS1 and above loops; in fact, the Commission expressly preserved CLEC access to DS1 and DS3 loops at TELRIC rates.[219]

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216 Broadband Forbearance Order, at ¶ 5, n 23 (emphasis supplied).

217 Hearing Exhibit 16, *Allegiance Telecom, Inc et al v FCC*, D C Cir No. 03-1316, Opposition of the Federal Communications Commission to Allegiance Telecom's Motion for Stay Pending Review (filed Oct 31, 2003) at 12

218 *Id* at 1

219 *Id* at 2.

The FCC went out of its way to emphasize in its pleading to the D.C. Circuit that its broadband policies applicable to the mass market would have no impact on a CLEC's ability to purchase DS1 UNE loops to serve the enterprise market.

When BellSouth fails to find support in the actual FCC Orders, it seeks support for its overreaching interpretation of those Orders by appeals to policy considerations. BellSouth urges that in "greenfield" areas that CLECs have the same opportunities to build loops as BellSouth, that the FCC found "no impairment" in such areas, and that when fiber is extended to existing building and copper removed CLECs should lose access to DS1 loops. As with BellSouth's other arguments, they are inconsistent with the terms of the FCC's broadband Orders. The FCC considered all those arguments – and accepted them <u>only</u> as they relate to mass market loops. The FCC found, in the TRO and TRRO, that DS1 enterprise loop impairment is affected by different factors and therefore subject to a different impairment analysis. Under the terms of that analysis, CLEC access to Section 251 UNE DS1 loops is preserved in all locations where there is impairment under the FCC's tests for DS1 loop impairment. The FCC's "no impairment" finding for mass market loops in greenfield areas did not extend to a finding for enterprise loops. As the FCC emphasized in the D.C. Circuit pleading quoted above, access to DS1 loops was preserved when the FCC established its mass market broadband policies.

When a CLEC requests a DS1 loop, by definition the customer it is seeking to serve is considered an enterprise (and not mass market) customer. This was the FCC's point in distinguishing between loops associated with different customer types. Thus, when a CLEC requests a DS1 loop to serve a customer, that request itself means that the customer is (or is becoming) a member of the enterprise market and BellSouth must comply with loop unbundling requirements as defined for that market.[220] DS1 and DS3 loops are available to CLECs, subject to the separate unbundling analysis concerning the appropriate wire center classifications governing access to high capacity loops. BellSouth's position on the broadband Orders would result in CLECs being denied access to DS1 and DS3 loops in numerous situations where the FCC has found impairment still exists. The CompSouth contract language proposal acknowledges and implements the changes resulting from the FCC's broadband Orders, but also properly preserves access to DS1 and DS3 UNE loops where CLECs are still impaired.

The decisions of other state commission support the Joint CLECs on this issue. In a recent decision by an Illinois Commerce Commission Administrative Law Judge, this issue was addressed directly:

> CLECs testimony and briefs are replete with instances in which the FCC clearly indicated that unbundling relief for the loops in question pertains to the mass market, to the exclusion of the enterprise market. The Commission regards CLECs explanation concerning the FCC's omission of the term "residential" in its TRO Errata to be persuasive and, as a result, dispositive of this issue. CLECs made it clear that the FCC in the initial TRO had specifically limited the applicability of FTTH rule to loops serving residential customers. Even though the TRO Errata deleted the term "residential" because it was inconsistent with the decision in the TRO that the rule would also apply to "very small" businesses, this does not overcome all of the other evidence propounded by the CLECs that points to the contrary. CLECs proposed language should be adopted.[221]

As noted in the Illinois ALJ's decision, the FCC initially had included a limit on broadband relief to "residential" mass market customers. That "residential" limitation was removed by the FCC, but the FCC did not eliminate the mass market/enterprise distinction discussed herein. BellSouth misconstrues other state commission decisions as supporting its position merely because the

220 "It is immaterial how may lines, or what type of facility, BellSouth may be using to initially serve the customer If the CLEC is requesting a DS1 (or higher) loop facility for the customer, BellSouth must provide the DS1 so that the customer may become an enterprise customer." Gillan Rebuttal at 8.

221 ICC Docket No 05-0442, *Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order,* Administrative Law Judge's Proposed Arbitration Decision, Issue 2, pp. 12-23 (Sept. 15, 2005)

decisions recognize the deletion of the "residential" limiting term by the FCC. The FCC chose to "draw the line" for application of the broadband unbundling limitations between mass market (DS0) and enterprise (DS1 and above) loops. As the Illinois ALJ recognized, the broadband unbundling limits simply do not apply when the CLEC orders a DS1 or DS3, rather than a DS0, level UNE loop.

Resolved Issue No. 25 is omitted.

Issue No. 26 TRO – ROUTINE NETWORK MODIFICATION: What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

The Joint CLECs' disagreements with BellSouth regarding routine network modifications are twofold. First, the Joint CLECs strongly disagree with BellSouth's attempt to submerge the FCC's pre-existing rules on line conditioning into the rules adopted in the TRO regarding routine network modifications. Second, the Joint CLECs oppose BellSouth's proposed contract language on the issue, which fails to include certain modifications that are required of BellSouth in the TRO.

In its 1996 Local Competition Order,[222] the FCC established that ILECs must modify their facilities to accommodate CLEC access to UNEs. Certain aspects of the FCC's initial rules were overturned, but the current law provides (as the FCC stated in the TRO) that ILECs "can be required to modify their facilities 'to the extent necessary to accommodate interconnection or

[222] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos 96-98, 95-185, First Report and Order, 11 FCC Rcd at 15608, ¶ 209 (1996) ("Local Competition Order").

access to network elements,' but cannot be required 'to alter substantially their networks in order to provide superior quality interconnection and unbundled access.'"[223]

As part of the 1999 UNE Remand Order, the FCC exercised this authority to adopt rules regarding "line conditioning." The line conditioning rules require ILECs to condition copper loops and subloops "to ensure that the copper loop or subloop is suitable for providing digital subscriber line services … whether or not the [ILEC] offers advanced services to the end-user customer on that copper loop or subloop."[224] The line conditioning rules were re-adopted by the FCC in the TRO.[225]

It was not until the TRO that the FCC identified the concept of "routine network modifications" as another set of network changes ILECs are obligated to make to accommodate UNE access. In the TRO, the FCC stated: "By 'routine network modifications' we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers … to provide competitive carriers with greater certainty as to the availability of unbundled high-capacity loops and other facilities throughout the country."[226] In the routine network modification ("RNM") discussion in the TRO, the FCC explicitly limited RNMs to activities ILECs "undertake[s] for their own customers," a limitation that has never been placed on the line conditioning rules.

The line conditioning and RNM rules are contained in different, wholly contained subsections of the loop unbundling rules.[227] They were discussed and approved (or re-approved,

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223 TRO ¶ 630, *quoting*, *Iowa Utilities Board v FCC*, 120 F.3d at 813 (8th Cir. 1997).

224 47 C.F R. § 51.319(a)(1)(iii)

225 TRO ¶ 642

226 TRO ¶ 632

227 Rule 51.319 is the general rule setting forth unbundling requirements for all Section 251 UNEs The line conditioning rules are found at 51.319(a)(1)(iii), the RNM rules are found at 51.319(a)(8).

in the case of line conditioning) by the FCC in two different section of the TRO.[228] As a review of the rules demonstrates, they cover different topics and set forth unique requirements for the ILEC. Nevertheless, BellSouth contends that these independent rules are not independent at all; rather, when the FCC adopted the line conditioning rules in 1999, it really meant that line conditioning is a "subset" of the routine network modification rules that were not adopted until 2003.

BellSouth's contention that the line conditioning rules should be read as part of the RNM rules is based on a few sentences in the TRO, rather than on a comprehensive review of the rules and ordering paragraphs. Primarily, BellSouth relies on a sentence in the line conditioning discussion where the FCC was rebutting arguments that line conditioning violates the prohibition against forcing ILECs to provide access to a "superior network." In countering the ILECs' arguments, the FCC stated:

> Line conditioning does not constitute the creation of a superior network, as some incumbent LECs argue. Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers.[229]

In this discussion, the FCC was comparing the nature of the activities that ILECs must perform under RNM and line conditioning requirements. By comparing the two when describing what activities are included in each, the FCC said nothing that negates the actual terms in its rules. The FCC simply did not, as BellSouth claims, change its long-standing line conditioning rules to make line conditioning, as a legal matter, a subset of RNM. Read in context, the TRO (and the UNE Remand Order before it) clearly treat line conditioning and RNM as separate requirements subject to separate rules. In other words, just because the FCC acknowledged that line

[228] *Compare* TRO ¶¶ 632-641 and ¶¶ 642-648.

[229] TRO ¶ 643.

conditioning is a modification that ILECs routinely make to their networks, the FCC did not require CLEC access to line conditioning on the basis that it is an RNM, but, rather, the FCC established clear rules for CLEC access to line conditioning long prior to the TRRO. Nothing in the TRRO vacated or changed those rules, or placed line conditioning under the RNM rules.

As the evidence at hearing demonstrated, the issue is an important one as broadband services continue to evolve. Currently, BellSouth does not condition copper loops over 18,000 feet in length for its own DSL services.[230] There are emerging DSL technologies, however, that would allow DSL to be provided by CLECs on loops longer than 18,000 feet.[231] If a CLEC chose to use such a technology and needed line conditioning, a straightforward reading of the FCC's Orders indicates that line conditioning would be available at TELRIC rates. If BellSouth's reading of the rules is accepted, BellSouth could decline to perform line conditioning as requested by the CLEC, or demand exorbitant rates to undertake the necessary line conditioning work.

BellSouth's witness Mr. Fogle agreed that DSL standards change regularly.[232] Even if line conditioning different than what BellSouth does for itself is not needed regularly today, an emerging DSL technology could change that quickly. If BellSouth sought to slow a CLEC's deployment of such a technology, it could decline to perform line conditioning, claiming that it only has to perform RNM/line conditioning the same as it does it for its own customers. If BellSouth is not yet serving customers using the new technology, however, that could explain why BellSouth is not conducting the requested line conditioning it could be using refusal to

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230 TN Tr. Vol. I, at 111 (Fogle)

231 TN Tr Vol I at 119-20 (Fogle)(discussion of BellSouth and CLEC use of "ADSL2" and "ADSL2RE" standards for providing DSL.

232 TN Tr. Vol I at 122:4-12 (Fogle)

perform line conditioning as a way to keep CLECs from beating BellSouth to market with an innovative new technology.

As technology emerges, the best hope CLECs have for expanding broadband competition is to get to market quickly with innovative offerings. The line conditioning rules affecting DSL-based and other advanced services were written to facilitate such rapid market entry by competitors. In fact, when the FCC re-adopted the line conditioning rules, the FCC explicitly:

> [D]etermine[d] that requiring incumbent LECs to perform line conditioning advances our section 706 goals. Specifically, line conditioning speeds the deployment of advanced services by ensuring that competitive LECs are able to obtain, as a practical matter, the local loop UNE with the features, functions, and capabilities necessary to provide broadband services to the mass market.[233]

BellSouth's application of RNM standards to line conditioning impose a roadblock that was not contemplated by the FCC's rules. BellSouth's creative reading of the TRO should be rejected, and the FCC's Orders applied as they are written.

The Joint CLECs' second objection to the BellSouth RNM position involves specific terms in the proposed ICA language. When BellSouth "redlined" CompSouth's contract language proposal, Mr. Gillan's Exhibit JPG-1, BellSouth filed its redline as Exhibit PAT-5 to Ms. Tipton's rebuttal testimony. BellSouth inexplicably removed portions of the CompSouth contract proposal that were taken directly from the FCC's RNM rule.

For example, CompSouth proposed the following contract language that BellSouth, in Exhibit PAT-5, urges be stricken:

> BellSouth shall perform these routine network modifications to facilities in a non-discriminatory fashion, without regard to whether the loop or transport facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.[234]

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[233] TRO ¶ 644

[234] BellSouth Tipton Rebuttal, Exhibit PAT-5, p. 61 (showing CompSouth proposed ICA language with BellSouth strikethrough proposals)

The FCC rule on RNMs for unbundled loops provides:

> An incumbent LEC shall perform these routine network modifications to unbundled loop facilities in a non-discriminatory fashion, without regard to whether the loop or transport facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.[235]

A duplicate provision is also included in the RNM rule governing dedicated transport facilities.[236] The Joint CLECs submit there is no reasonable explanation for BellSouth striking such provisions that are explicitly included in the FCC's rule. The Joint CLECs urge the Authority accept CompSouth's proposed contract language, which simply tracks the FCC's rules.

Issue No. 27 TRO – ROUTINE NETWORK MODIFICATION: What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Authority-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

The Joint CLECs object to any proposal that would allow BellSouth to impose "individual case basis" ("ICB") pricing for routine network 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.[237] 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.

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[235] 47 C.F.R. §51 319(a)(8)

[236] *See* 47 C.F R § 51.319(e)(4)

[237] In fact, this is what the FCC anticipated would be the case when it approved the RNM rules in the TRO "The [FCC's] pricing rules provide incumbent LECs with the opportunity to recover the cost of routine network modifications we require here State commissions have discretion as to whether these costs should be recovered through non-recurring charges or recurring charges We note that the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops" TRO ¶ 640 (footnotes omitted).

The CompSouth proposed contract language permits BellSouth to seek cost recovery at a state commission if it can prove that its RNM costs are not recovered in loop rates. This provides BellSouth the opportunity for cost recovery contemplated by the TRO, but does not slow down RNMs or give BellSouth the opportunity to double recover by assessing additional charges to CLECs. In its "redline" of CompSouth's contract language proposal filed as Exhibit PAT-5 to Ms. Tipton's rebuttal testimony, BellSouth proposed to strike language that included the following: "There may not be any double recovery or retroactive recovery of these [RNM] costs."[238] Double recovery of ILEC costs for RNMs is exactly what the FCC stated it was trying to avoid in setting forth pricing rules for RNMs. The Joint CLECs are concerned that BellSouth's proposals would countenance both double recovery of costs and refusal to conduct RNMs while pricing disputes are resolved. The Joint CLECs submit that this outcome what not at all what the FCC intended in the TRO, and that CompSouth's proposed contract language should be approved.

Finally, with respect to line conditioning, the Commission should reject BellSouth's attempt to impose unpredictable "special construction" pricing to line conditioning and affirm that the TELRIC rates it already has set for bridge tap removal and load coil removal (including removal on loops greater than 18,000 feet) continue to apply.

Issue No. 28 is addressed above together with Issue Nos. 23 and 24.

Issue No. 29 TRO – EELS AUDITS: What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

The FCC granted BellSouth a "limited right to audit" CLEC compliance with EELs eligibility criteria. This "limited right" is not an open invitation; in addition, the FCC's intention

[238] BellSouth Tipton Rebuttal, Exhibit PAT-5, p 61 (showing CompSouth language and BellSouth strikethrough proposals)

was to grant CLECs "... unimpeded UNE access based upon self-certification, subject to later verification *based upon cause*."[239] Before it can initiate any audit under the FCC's guidelines, BellSouth must have some basis that an audit is appropriate. CompSouth's proposed contract language reflects this "for-cause" standard, as well as the FCC's other rulings on how EELs audits are to be conducted.

Under the CompSouth proposal, BellSouth would provide the CLECs with proper notification and the basis for BellSouth's assertion that it has good cause to conduct an audit. This would assist CLECs in responding to audit requests, and permit CLECs to review the documentation that forms the basis for the cause alleged. This approach is necessary to implement the FCC's for-cause auditing standard, given that undocumented "cause" is no cause at all. BellSouth may only audit those circuits for which it has (reasonable) cause to believe that the CLEC's certification of compliance with the high capacity EEL eligibility criteria was made in error.[240] Identification of circuits may also obviate the need for an audit, as the CLEC could then conduct an internal review, and admit then if a known mistake was made (if such a situation were to occur, the circuits would be converted to an alternative service and a true-up would be performed for that circuit).

Moreover, because it makes relevant documentation available early in the process, the approach proposed by CompSouth would identify potential issues quickly, thus avoiding unnecessary disputes over whether BellSouth may or may not proceed with an audit. By requiring BellSouth to establish the scope and the basis for its claimed right to audit up front, it is more likely that BellSouth and the target CLEC will be able to narrow and/or more quickly resolve disputes over whether or not BellSouth has the right to proceed with an EEL audit.

[239] TRO ¶ 622 (emphasis supplied).

[240] TRO ¶ 622

Although the TRO did not include a specific notice requirement, this Authority may order such a requirement.[241]

BellSouth's testimony at hearing verified that BellSouth believes it can initiate an audit annually without providing any evidence supporting the audit. Ms. Tipton testified that she "believe[d] that we would not initiate an audit unless we had identified concerns."[242] But when asked if there was anything in the BellSouth proposed contract language that requires BellSouth to identify such concerns, Ms. Tipton replied, "no, there is not."[243] BellSouth's proposals leave it the discretion to completely evade the "for cause" standard by forcing CLECs to prepare for audits yearly with or without justification. The BellSouth proposal gives it far more discretion to disrupt CLECs with audit requests than the FCC intended. The Joint CLECs urge the Authority to adopt the CompSouth proposed contract language on this issue.

Another disputed issue regarding EELs audits relates to which party selects the auditor. The FCC determined that the "details surrounding implementation of these audits may be related to related provisions of interconnection agreements or to the facts of a particular audit, and that the states are in a better position to address that implementation."[244] As discussed above, the CompSouth proposal is offered as a way to avoid disputes with BellSouth – in this case over conflicts and qualifications that would be more efficient to address at the front end (rather than at the back end) of an audit. It is better to avoid problems than it is to fix them, and that is exactly what CompSouth's proposed language would facilitate. CompSouth notes that BellSouth agrees to a "mutual agreement" selection process in the context of selecting an independent

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[241] *See,* TRO ¶ 625 (noting that state commissions are in a better position to address implementation of EEL audit rights and obligations)

[242] GA Tr at 577:3-19 (Tipton).

[243] *Id*

[244] TRO ¶ 625.

auditor for PIU/PLU audits. There is no reason not to apply the same process when EELs audits are involved, where the need to examine actual and potential conflicts is just as important.

The most simple and straightforward way to decide whether an auditor is truly independent (or, conversely, has a conflict of interest) is to require mutual agreement of the parties. This is particularly important because issues regarding an auditing entity's independence can arise at various times. There are those that may arise prior to an audit commencing. For example, an auditor may have known of potential conflicts that should be disclosed and discussed. The parties may be amenable to waiving those conflicts. They may decide to select an alternate auditor or to create a mechanism for isolating the conflict. They may also be unable to resolve the conflict. In that case, the parties should resort to the dispute resolution provisions of their interconnection agreement (which typically identify the state commission as one of the available forums for dispute resolution).

The Joint CLECs are unwilling to agree to a "pre-approved" list of entities from which BellSouth may select to conduct an audit, unless such list also includes a mechanism for identifying conflicts and disqualifying particular auditors based on conflicts (Joint CLECs presume that any auditor on the list would be one that indicates that it is capable and qualified to conduct an AICPA-compliant EEL audit). Given the diversity of CLECs and, more importantly, the fact that relationships between potential auditors and carriers may change during the typical term of an interconnection agreement, a pre-approved list does not appear to be a practical solution.

The CompSouth proposal also more reasonably addresses the audit cost reimbursement provisions adopted by the FCC. These requirements are reciprocal. The FCC established a requirement that the ILEC reimburse CLECs for their audit costs to the extent that an audit finds material compliance (or stated differently, no material non-compliance).[245] Similarly, the FCC has established materiality as a threshold requirement to BellSouth recovering the cost of the audit from the CLEC.[246] To the extent there is material non-compliance, a CLEC must reimburse BellSouth for audit related costs (per TRO ¶627); to the extent there is not material non-compliance, BellSouth must reimburse the CLEC for audit related costs (per TRO ¶628). The Joint CLECs contend that the phrase "to the extent that" in these paragraphs suggests proportional cost reimbursement obligations – that is, to the extent that an audit uncovers some material non-compliance, the CLEC would reimburse BellSouth in the same proportion that the non-compliance bears in relation to circuits found to be compliant and BellSouth would reimburse the CLEC for its audit related costs to the extent that no material non-compliance was found.

Overall, the CompSouth contract language more closely reflects the balances struck by the FCC in the TRO EELs audit provisions, and the Joint CLECs urge the Authority to adopt it.

Resolved Issue No. 30 is omitted.

Issue No. 31 ISP REMAND CORE FORBEARANCE ORDER: What language should be used to incorporate the FCC's *ISP Remand Core Forbearance Order* into interconnection agreements?

In its 2004 ISP Remand Core Forbearance Order, the FCC removed certain restrictions on CLECs' right to receive reciprocal compensation. The FCC granted forbearance regarding the "new markets" and "growth cap" restrictions imposed by the 2001 ISP Remand Order.[247] The contractual changes to implement this forbearance order may differ slightly among various

[245] TRO ¶ 628

[246] TRO ¶ 626.

[247] CC Docket No 99-68, *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, FCC 01-131 (rel Apr 27, 2001).

CLECs' ICAs, but the guiding principle is a simple one: all references to the "new markets" and "growth cap" restrictions should be deleted. Those restrictions may no longer be used to limit CLECs' reciprocal compensation rights, as those rights are provided for under the Act and the portions of the ISP Remand Order that remain in effect. The Authority should order that, using the same processes being used to change ICAs to reflect TRO/TRRO changes, ICAs should be amended to remove "new markets" and "growth caps" restrictions in BellSouth ICA reciprocal compensation provisions.

Given BellSouth's rush to implement many of the changes in law in this proceeding that it finds advantageous, its position on implementing the Core Forbearance Order is quite telling. When the change of law does not directly benefit BellSouth, then BellSouth can come up with reasons why existing ICAs should remain in place; when the change of law is in BellSouth's favor, BellSouth believes implementation should have occurred yesterday. On the Core Forbearance issue, BellSouth witness Ms. Tipton (the sponsor of the one-size-fits all UNE attachment) argues that implementation should be "on a case by case basis" because not all CLECs have the same reciprocal compensation terms in their ICAs.[248]

Ms. Tipton's claim that implementation of the Core Forbearance Order would prevent CLECs from choosing among reciprocal compensation options[249] is completely incorrect. The Core Forbearance provisions impact only those CLECs who have chosen reciprocal compensation rate plans that include provisions regarding the "new markets" and "growth caps" restrictions. The FCC said in its Core Forbearance Order that, to the extent those limitations continue to have effect in ICAs, they no longer should be enforced. The FCC's forbearance action did not, in any way, seek to limit CLEC or ILEC reciprocal compensation options.

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[248] Tipton Direct, at 65.

[249] See *Id.*

The Authority can overcome all of BellSouth's concerns, and fairly implement the Core Forbearance Order, by ordering that all ICAs that include the restrictions overturned by the Core Forbearance Order may be amended on the same timeline and using the same processes as apply to the Authority's Orders on amendments related to changes in the TRO/TRRO.

Issue No. 32 GENERAL ISSUE: How should the determinations made in this proceeding be incorporated into existing Section 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.[250]

As was clear from the cross-examination of BellSouth witness Ms. Blake at hearing, the proposed "Attachment 2" UNE contract language (submitted by BellSouth as Exhibits PAT-1 and PAT-2 to Ms. Tipton's testimony) includes language on dozens of issues that are not in dispute in this proceeding.[251] CompSouth submitted to the Authority a version of PAT-2 that identified the proposals that are unrelated to the issues in this case. Ms. Blake agreed that the Authority should not approve such unrelated contract language in this proceeding, and urged that BellSouth was not seeking such approval.[252]

[250] Pursuant to the Abeyance Agreement entered into by and between NuVox, Xspedius and BellSouth, which was approved by the Authority in Docket 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

[251] TN Tr at Vol. I 58-61 (Blake)

[252] *Id* (Blake). BellSouth's position on this issue was confusing at best Ms. Blake's direct testimony asked the Authority to approve the PAT-1 and PAT-2 contract language attachments in their entirety. *See* Blake Direct at 5. After being forced to concede that much of what is in those attachments has nothing to do with this proceeding, Ms Blake modified her testimony and asked that the Authority approve only the BellSouth language related to issues on the Issues List TN Tr Vol I at 53·9-14 (Blake)

This issue, while a technical one, is extremely important to the Joint CLECs. Many CLECs have negotiated or arbitrated ICAs that address the issues included in PAT-1 and PAT-2 that are not in dispute in this case. CLECs should not be forced to accept new language because the Authority has "approved" it in a case that has nothing to do with the subject matter of the contract language. CompSouth thus urges that the Authority make clear that it is only approving contract language on the disputed issues identified on the jointly submitted Issues List.

As the Authority decides the issues, the Joint CLECs note that the CompSouth contract language proposal (Revised Exhibit JPG-1 to Mr. Gillan's testimony) and BellSouth's redline of the CompSouth proposal (Exhibit PAT-5 to Ms. Tipton's rebuttal testimony) are the only proposed contract language documents in the record that set forth the contract language organized by the issues on the disputed Issues List. The Joint CLECs suggest that those documents, rather than BellSouth's over-inclusive PAT-1 and PAT-2 provide the best starting points for considering the parties' contract language proposals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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Henry M. Walker

ATTACHMENT A

Wire Center Classifications – Tennessee (Does Not Include Reconciliation to Form 477 Data)

Wire Center	Business Lines		Fiber-Based Collocation		Transport Tier		Loop Unbundling	
	BellSouth	CompSouth[1]	BellSouth	CompSouth	BellSouth	CompSouth	BellSouth	CompSouth
NSVLTNMT	78,781	70,400	3	3	1	1	DS1 and DS3 Loops Available in All Wire Centers	
KNVLTNMA	37,284	33,563	3	3	2	2		
MMPHTNOA	36,686	31,680	2	2	2	2		
MMPHTNBA	34,364	29,436			2	2		
MMPHTNEL	30,973	26,462	3	3	2	2		
NSVLTNBW	28,974	23,528			2	3		
MMPHTNGT	26,311	22,535			2	3		
NSVLTNDO	24,914	20,779			2	3		
NSVLTNST	24,911	20,833			2	3		
CHTGTNBR	24,314	21,005			2	3		
MMPHTNMA	23,520	21,495	>4	>4	1	1		
CHTGTNNS	23,166	20,063	3	2	2	3		
MMPHTNSL	22,432	19,810	2	2	3	3		
NSVLTNUN	19,987	17,238	3	3	2	2		
MMPHTNMT	10,289	8,962	3	3	2	2		

§251 Transport Decision Rule				
Category	Business Lines		Fiber-Based Collocator	Consequence
Tier 1	>38,000	OR	4 or more	No DS1 or DS3
Tier 2	>24,000		3 or more	No DS3

§251 Loop Decision Rule			
Business Lines		Fiber-Based Collocator	Consequence
> 60,000	AND	4 or more	No DS1 or DS3
>38,000		4 or more	No DS3

[1] CompSouth Business Lines includes correction for counting maximum potential capacity (i e , no correction for discrepancy to Form 477 data)

ATTACHMENT
B

Wire Center Classifications – Tennessee (Including Reconciliation to Form 477 Data)

Wire Center	Business Lines		Fiber-Based Collocation		Transport Tier		Loop Unbundling	
	BellSouth	CompSouth[1]	BellSouth	CompSouth	BellSouth	CompSouth	BellSouth	CompSouth
NSVLTNMT	78,781	69,842	3	3	1	1	DS1 and DS3 Loops Available in All Wire Centers	
KNVLTNMA	37,284	32,262	3	3	2	2		
MMPHTNOA	36,686	31,433	2	2	2	2		
MMPHTNBA	34,364	29,201			2	2		
MMPHTNEL	30,973	25,750	3	3	2	2		
NSVLTNBW	28,974	21,747			2	3		
MMPHTNGT	26,311	22,378			2	3		
NSVLTNDO	24,914	19,198			2	3		
NSVLTNST	24,911	20,058			2	3		
CHTGTNBR	24,314	20,463			2	3		
MMPHTNMA	23,520	21,479	>4	>4	1	1		
CHTGTNNS	23,166	20,032	3	2	2	3		
MMPHTNSL	22,432	19,732	2	2	3	3		
NSVLTNUN	19,987	15,343	3	3	2	2		
MMPHTNMT	10,289	8,807	3	3	2	2		

§251 Transport Decision Rule				
Category	Business Lines		Fiber-Based Collocator	Consequence
Tier 1	>38,000	OR	4 or more	No DS1 or DS3
Tier 2	>24,000		3 or more	No DS3

§251 Loop Decision Rule			
Business Lines		Fiber-Based Collocator	Consequence
> 60,000	AND	4 or more	No DS1 or DS3
>38,000		4 or more	No DS3

[1] CompSouth Business Lines includes corrections for both counting maximum potential capacity and discrepancy to Form 477 data