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February 21, 2006

Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Pkwy.
Nashville, TN 37243-0505

Re: Docket 04-00381; *CompSouth Responses to Recent BellSouth Filings Regarding Change of Law Issues*

Dear Chairman Jones:

In recent weeks, BellSouth Telecommunications, Inc. ("BellSouth") has made various filings in the pending "Change of Law" docket regarding developments in the Florida and Georgia proceedings. CompSouth believes that each state commission should, as contemplated by the FCC in its *TRO* and *TRRO* orders, resolve disputes based on the record before it. The decisions reached in other states may be instructive, but they are only that; each agency must, as it always does, review the evidence and arguments itself.

When the Authority reviews information from other state proceedings, however, CompSouth believes it important for the TRA to have the full picture of what has transpired in those cases. Therefore, CompSouth files the following information from related proceedings in Georgia, North Carolina, and Florida.

1. Georgia. In January, the Georgia Public Service Commission ("GPSC") voted to commence a proceeding to set rates for unbundled loops, transport, and switching that must be made available by BellSouth pursuant to Section 271 of the federal Telecommunications Act of 1996 (the "Act"). CompSouth previously filed an informational copy of that GPSC Order. BellSouth appealed the GPSC's decision in federal court (BellSouth filed a copy of its Complaint with the Commission). Both CompSouth and the GPSC filed their Answers to BellSouth's Complaint in the federal court case on February 17, 2006. CompSouth's Answer is attached as Exhibit A to this letter. Both the GPSC and CompSouth pleadings evidence an intention to vigorously defend the actions of the Georgia Commission on the Section 271/252 issue. There is no procedural schedule set in the federal court proceeding as of the date of this letter.

In addition, on February 7, 2006, the GPSC voted to approve a Staff Recommendation on the remaining issues in the COL proceeding. The GPSC is expected to issue its final order shortly. While there were several decisions that were disappointing to CompSouth, the GPSC determination generally was well-balanced. Among the highlights of the GPSC's decision:

- The GPSC held that Section 271 checklist network elements are subject to the FCC's commingling rules;
- The GPSC rejected BellSouth's argument that when AT&T and SBC are both "fiber-based collocators" in a wire center that they must be counted twice, in spite of the recent merger that joined AT&T and SBC.
- The GPSC found that line sharing is a Section 271 checklist element, and that BellSouth's line sharing obligations were not affected by the FCC's Broadband Forbearance Order.
- The GPSC ordered that Section 271 checklist elements must be included in BellSouth's SQM/PMAP/SEEM performance plans.

CompSouth has attached the Staff Recommendation approved by the GPSC as Exhibit B to this letter.

2. North Carolina. On February 9, 2006, the North Carolina Utilities Commission ("NCUC") issued an important decision affirming that BellSouth is required to commingle Section 251 and Section 271 network elements.[1] The NCUC decision is attached as Exhibit C. The commingling issue is discussed at pages 15 through 31.

In an arbitration proceeding brought by CompSouth members NuVox Communications, Inc. and Xspedius Management Co., LLC, the NCUC had previously issued a determination that BellSouth is not required to commingle wholesale services made available under the Section 271 checklist with Section 251 UNEs. The NCUC reconsidered that decision, and strongly endorsed the position taken by CompSouth in this proceeding, holding that Section 271 checklist items constitute "wholesale services" that must be commingled with Section 251 UNEs.

Notably, the NCUC's decision relied in part on a key FCC decision issued in December 2005, *after* the hearings and briefs were completed in this proceeding. The NCUC noted that the FCC, in a forbearance order regarding Qwest services in Omaha, Nebraska,[2] included several references to "section 271 wholesale obligations" and referred to Section 271 requirements as "wholesale access obligations." The NCUC concluded:

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[1] North Carolina Public Utilities Commission Docket No. P-772, Sub. 8, *et al.*, In the Matter of Joint Petition of NewSouth Communications, *et al.*, for Arbitration with BellSouth Telecommunications, Inc., *Order Ruling On Objections and Requiring the Filing of The Composite Agreement*, at 15-30 (Feb. 8, 2006) ("NCUC Order").

[2] WC Docket No. 04-223, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Memorandum Opinion and Order* ¶¶ 67-68, 103-05 (Dec. 2, 2005) ("*Qwest Forbearance Order*").

> The Commission believes that if the FCC had intended to limit commingling to only switched and special access services offered pursuant to tariff, the FCC would have specifically and definitively stated that instead of continuously referencing services obtained at wholesale by a (or any) method other than unbundling under Section 251(c)(3) of the Act.[3]

CompSouth urges the Commission to review both the NCUC Order and the FCC's December 2005 Qwest Forbearance Order as it considers the commingling issues before it in this docket.

3. Florida. BellSouth recently circulated a vote sheet from the Florida Public Service Commission ("FPSC") issued in that commission's Change of Law proceeding. Since that time, the FPSC Staff has recommended that the Commission's votes on several issues be vacated because of misconduct by a commission staff member. The staffer, who formerly worked for BellSouth, was trying to improperly influence the agency's decisions in favor of BellSouth. The FPSC Staff recommendation is attached as Exhibit D to this letter. While the final outcome of the Florida proceeding remains uncertain, CompSouth urges this Commission not to rely on the results of the FPSC decision touted by BellSouth in its previous filing.

CompSouth appreciates the Commission's ongoing attention to the important issues that are the subject of this proceeding.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/djc
Attachments:
Exhibit A: CompSouth Answer to BellSouth federal court complaint
Exhibit B: GPSC Staff Recommendation approved by GPSC on Change of Law Issues
Exhibit C: NCUC Order
Exhibit D: FPSC Staff Recommendation

[3] NCUC Order at 30.

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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Oak Brook, IL 60523

on this the 21st day of February, 2006.

Henry M. Walker

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
	)	
Plaintiff	)	
	)	Civil Action File
v.	)	No. 1:06-cv-0162-CC
	)	
The GEORGIA PUBLIC SERVICE COMMISSION; STAN WISE, in his official capacity as Chairman of The Georgia PSC; DAVID L. BURGESS, in his official capacity as Vice Chairman of the Georgia PSC; H. DOUG EVERETT, in his official capacity as Commissioner of the Georgia PSC; ROBERT B.BAKER, JR., in his official capacity as Commissioner of the Georgia PSC; and Angela E. Speir, in her official capacity as Commissioner of the Georgia PSC,	)	
	)	
Defendants	)	

PROPOSED ANSWER AND DEFENSES OF COMPETITIVE CARRIERS OF THE SOUTH, ACCESS POINT, INC., CINERGY COMMUNICATIONS COMPANY, DIALOG TELECOMMUNICATIONS, DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY, IDS TELECOM, LLC, INLINE, ITC^DELTACOM, LECSTAR TELECOM, INC., MOMENTUM TELECOM, INC., NAVIGATOR TELECOMMUNICATIONS, LLC, NETWORK TELEPHONE CORP. (A TALK AMERICA COMPANY), NUVOX COMMUNICATIONS, INC., SUPRA TELECOM, TALK AMERICA, TRNISIC COMMUNICATIONS, INC., and XSPEDIUS COMMUNICATIONS, LLC

COME NOW Competitive Carriers of the South, Inc. ("CompSouth"),[1]

[1] CompSouth is a trade organization whose member companies include each of the Joint CLEC Defendants.

Access Point Inc., Cinergy Communications Company, Dialog Telecommunications, DIECA Communications, Inc., d/b/a Covad Communications Company, IDS Telcom, LLC, InLine, ITC^DeltaCom, LecStar Telecom, Inc., Momentum Telecom, Inc., Navigator Telecommunications, LLC, Network Telephone Corp. (a Talk America Company), NuVox Communications, Inc, Supra Telecom, Talk America, Trinsic Communications, Inc., and Xspedius Communications, LLC. (collectively, "Joint CLEC Defendants") and file their Proposed Answer and Defenses to the Complaint for Declaratory and Injunctive Relief filed by Plaintiff BellSouth Telecommunications, Inc. ("Plaintiffs"), show the Court as follows:

FIRST DEFENSE

Plaintiff's Petition should be dismissed for failure to state a claim under the provisions of the federal Telecommunications Act of 1996, 47 U.S.C. § 251 et seq. ("the federal Telecommunications Act" or "the Act"). While Plaintiff BellSouth invokes the jurisdiction granted under Section 252(e)(6) of the Act, BellSouth fails to meet the jurisdictional prerequisite of that provision, namely, that it seeks relief from a final state commission determination in a proceeding initiated at the state commission pursuant to Section 252 of the Act. *See* 47 U.S.C. §

252(e)(6). Rather, BellSouth filed its Complaint prior to the GPSC's issuance of any final order affecting BellSouth's legal rights or obligations. Plaintiff BellSouth acknowledges in the Complaint that it is such future orders that could potentially prejudice BellSouth, not the order that is the subject of its Complaint. *See* Complaint ¶ 41. The Order that is the subject of BellSouth's Complaint merely establishes a procedural and hearing schedule for the GPSC's consideration of rates for certain unbundled elements; the GPSC's Order does not purport to set those rates, nor does it provide a final "determination," as that term is used in Section 252 of the Act, of the issues in the GPSC's underlying proceeding. BellSouth's Complaint is based purely on speculation about future GPSC Orders, not on any harm that could potentially befall BellSouth based on the GPSC Order now before the Court.

SECOND DEFENSE

Plaintiff's Complaint should be dismissed as it is not ripe. No case or controversy exists; rather, Plaintiff complains about what it perceives the intentions of the Georgia Public Service Commission ("GPSC") to be with respect to future orders. BellSouth's contentions are purely speculative and do not form the basis for any relief that could be granted by this Court. No action taken by the GPSC under the Order that is the subject of this

Complaint has caused Plaintiff any substantive harm. BellSouth's Complaint is plainly "pre-emptive" and should be dismissed as failing to present a controversy that is ripe for resolution by the Court at this time.

THIRD DEFENSE

Plaintiff's claims are barred by a failure to exhaust administrative remedies. Plaintiff BellSouth prays that this Court reverse a determination made by the GPSC. The GPSC has not yet issued a final determination in the proceeding that includes the Order that is the subject of BellSouth's Complaint. BellSouth has failed to pursue the remedies available to it at the GPSC before bringing this matter before this Court for judicial review.

FOURTH DEFENSE

Plaintiff has not met the requirements for the relief requested, including but not limited to, injunctive or declaratory relief. Plaintiff's Complaint itself acknowledges that the relief it seeks is pre-emptive. In Paragraph 41, Plaintiff admits that the GPSC has not yet set rates or taken other actions that prejudice it. Rather, Plaintiff announces that if the GPSC should "issue further orders setting specific rates, BellSouth intends to avail itself of all legal remedies." Complaint ¶ 41. Plaintiff does not even attempt to establish it has suffered irreparable harm, for it cannot: the GPSC has taken no action that has definitively affected Plaintiff's legal

rights or obligations.

FIFTH DEFENSE

To the extent that BellSouth's Complaint involves state law claims, Plaintiff's claims for declaratory and injunctive relief are barred by Plaintiff's failure to exhaust administrative remedies, including judicial review.

SIXTH DEFENSE

The actions of the GPSC of which Plaintiff complains are in accordance with the mandates of the federal Telecommunications Act, as well as state law, and were not arbitrary, capricious or unlawful.

SEVENTH DEFENSE

Plaintiff has failed to join indispensable parties.

EIGHTH DEFENSE

Subject to and without waiving the above defenses, the Joint CLEC Defendants respond to the individually numbered paragraphs of Plaintiff's Complaint as follows:

1.

The Joint CLEC Defendants admit that Plaintiff seeks declaratory and injunctive relief with respect to a decision of the GPSC. The Joint CLEC Defendants deny the remaining allegations set forth in Paragraph 1 of the Complaint.

2.

The Joint CLEC Defendants admit that the FCC issued an Order in 2005 that, in particular circumstances defined by the FCC's Order, restricted access to unbundled network elements ("UNEs") available under Section 251 of the Telecommunications Act of 1996 (the "Act"). The 2005 Order is known as the "Triennial Review Remand Order" ("*TRRO*"). CompSouth denies the remaining allegations set forth in Paragraph 2 of the Complaint.

3.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 3 of the Complaint. The FCC's decisions in the *TRRO* concerning availability of UNEs were limited to incumbent local exchange companies' ("incumbent LECs" or "ILECs") obligations to provide such UNEs under Section 251 of the Act. In an earlier order, the Triennial Review Order ("*TRO*"), the FCC affirmed that ILECs that also meet the statutory definition of "Bell Operating Companies," including Plaintiff BellSouth, must still make available to competitors access to unbundled local switching, loops, and transport, albeit under different pricing standards than those applicable to UNEs offered under Section 251. The FCC made clear, and BellSouth never denied in the proceeding before the

GPSC, that even when unbundling obligations under Section 251 are lifted, BellSouth still has an obligation to provide unbundled local switching, loops, and transport pursuant to Section 271.

4.

The Joint CLEC Defendants deny the allegations set forth in the first sentence of Paragraph 4. The Joint CLEC Defendants admit that the subject GPSC Order – an order unrelated to the GPSC Order now before the Court – was enjoined and that the GPSC has vacated certain portions of that prior order.

5.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 5 of the Complaint. The Joint CLEC Defendants note that it is not the GPSC, but Section 271 of the Act as interpreted by the FCC, that imposes unbundling obligations on BellSouth independent of those required by Section 251 of the Act. The FCC held in the *TRO* that rates for network elements unbundled under Section 271 must be set at "just and reasonable" rates. The FCC's determination that Section 271 unbundled elements must be offered at "just and reasonable" rates even in the absence of Section 251 unbundling obligations was upheld by the United States Court of Appeals for the District of Columbia Circuit in *U.S. Telecom*

Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

6.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 6 of the Complaint. Section 271 of the Act demands that if BellSouth is permitted to provide interLATA long distance services, BellSouth must maintain compliance with the requirements of Section 271. One of those requirements is that BellSouth provide the items that must be unbundled pursuant to Section 271 under the terms of "interconnection agreements," the terms and conditions of which must be approved by state regulatory commissions such as the GPSC. *See* 47 U.S.C. § 271(c)(1)(A). The GPSC's decision to establish the rates applicable to unbundling under Section 271 implements the Act's requirements applicable to Bell Operating Companies such as BellSouth.

7.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 7 of the Complaint.

8.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 8 of the Complaint.

9.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 9 of the Complaint.

10.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 10 of the Complaint.

11.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 11 of the Complaint.

12.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 12 of the Complaint.

13.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 13 of the Complaint.

14.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 14 of the Complaint. The terms of the Act speak for themselves, but the broad purpose of the Act is to facilitate competitive entry into telecommunications markets, including entry that relies on the

use of unbundled network elements. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 475 (2002) ("Under the Act, the new entrants are entitled, among other things, to lease elements of the local telephone networks from the incumbent monopolists.")

15.

The Joint CLEC Defendants deny the allegation that unbundling obligations are statutorily tied to "a transition to facilities-based competition," but otherwise admit the allegations set forth in Paragraph 15 of the Complaint.

16.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 16 of the Complaint.

17.

The Joint CLEC Defendants deny the allegation that all the referenced FCC orders established what BellSouth characterizes as "blanket" unbundling. The Joint CLEC Defendants admit that the referenced FCC orders required unbundling of loop, transport, and switching network elements, but otherwise deny the characterizations of such Orders set forth in Paragraph 17 of the Complaint.

18.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 18 of the Complaint.

19.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 19 of the Complaint regarding the characterizations of the referenced FCC Orders and court decisions. The referenced court decisions speak for themselves.

20.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 20 of the Complaint. The referenced court decision speaks for itself.

21.

The Joint CLEC Defendants admit that the FCC issued the referenced Order (the Order discussed above known as the *TRRO*) on February 4, 2005. The Joint CLEC Defendants deny the remaining allegations set forth in Paragraph 21 of the Complaint.

22.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 22 of the Complaint and state that the referenced Order speaks

for itself. The Joint CLEC Defendants deny that the *TRRO* in any way restricted the availability of unbundled switching that must be provided pursuant to Section 271 rather than Section 251 of the Act.

23.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 23 of the Complaint and state that the referenced Order speaks for itself.

24.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 24 of the Complaint and state that the referenced Order speaks for itself.

25.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 25 of the Complaint and state that the referenced Order speaks for itself.

26.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 26 of the Complaint, but deny that the characterization of Section 271 as being limited to facilitating BOC entry into long distance. *See TRO* ¶ 655 ("In fact, section 271 places specific requirements on

BOCs that were not listed in section 251. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission and the courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market.")

27.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 27 of the Complaint, but clarify that Section 271 requires that the local switching, loop, and transport network elements identified in the competitive checklist must be provided "unbundled" from other elements under the terms of Section 271(c)(2)(B)(iv)-(vi).

28.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 28 of the Complaint to the extent they attempt to characterize the views of any of the Joint CLEC Defendants. The Joint CLEC Defendants admit that local switching as defined in the Section 271 checklist is, from a technical and provisioning perspective, "the same as the switching element" previously offered under Section 251. The Joint CLEC Defendants deny that the Section 271 offering must be the same as the Section 251 element with regards to the price of the unbundled switching offered by BellSouth.

29.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 29 of the Complaint, and state that the referenced FCC Order speaks for itself.

30.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 30 of the Complaint which mischaracterize and take out of context many parts of the referenced FCC Orders. The Joint CLEC Defendants state that the referenced FCC Orders speak for themselves.

31.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 31 of the Complaint, which are directly contrary to judicial interpretation of Section 271 of the Act. *See Verizon New England, Inc. d/b/a/ Verizon Maine v. Maine Public Utilities Commission*, Civil No. 05-53-B-C, Order Denying Plaintiff's Motion for Preliminary Injunction (D. Maine, Nov. 30, 2005) ("[T]he Court concludes that § 271 is not considered by the FCC and was not intended by the Congress to exclude the [state public service commission] in the circumstances of this case from all activity in setting rates under § 271."). The Joint CLEC Defendants state that the referenced FCC Orders speak for themselves.

32.

The Joint CLEC Defendants deny BellSouth's characterization of the justification for its notification to CLECs in February 2005, but admit that such a notification process occurred.

33.

The Joint CLEC Defendants admit the existence of the petitions filed by MCI and other carriers, and state that the contents of such petitions and pleadings, as well as the FCC Order referenced in this Paragraph, speak for themselves.

34.

The Joint CLEC Defendants state that the referenced GPSC Order speaks for itself, and neither admit nor deny the allegations set forth in Paragraph 34 of the Complaint.

35.

The Joint CLEC Defendants state that the referenced BellSouth pleading speaks for itself, and neither admit nor deny the allegations set forth in Paragraph 34 of the Complaint.

36.

The Joint CLEC Defendants state that the referenced Orders of this Court and the United States Court of Appeals for the Eleventh Circuit

speak for themselves, and neither admit nor deny the allegations set forth in Paragraph 34 of the Complaint.

37.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 37 of the Complaint. The GPSC's January 17, 2006 Order (the "Section 271 Order") is baldly mischaracterized in Paragraph 37 as being related to the order that was the subject of this Court's prior decision. The Court's prior Order interpreted provisions of the FCC's *TRRO* that were raised in the complaint filed by MCI referenced by BellSouth in Paragraph 34 of the Complaint. The Section 271 Order was issued as part of a lengthy proceeding addressing issues raised by both the FCC's *TRRO* and *TRO* decisions, including the provisions of the *TRO* requiring BellSouth to make Section 271 unbundled elements available at "just and reasonable" rates. The issues before the Commission when it issued the Section 271 Order were the subject of an extensive evidentiary record and briefing. Other Orders approved by the GPSC in the proceeding that resulted in the Section 271 Order *explicitly* recognized and implemented the Orders of this Court and the Eleventh Circuit on the issues addressed in the case arising from the MCI complaint.

38.

The Joint CLEC Defendants state that the GPSC's Section 271 Order speaks for itself, and neither admit nor deny the allegations set forth in Paragraph 38 of the Complaint. The Joint CLEC Defendants deny that BellSouth's characterization of the GPSC's Section 271 Order in Paragraph 38 is accurate. The GPSC's Section 271 Order is authorized by Sections 271 and Section 252 of the Act.

39.

The Joint CLEC Defendants state that the GPSC's Section 271 Order speaks for itself. The Joint CLEC Defendants admit that the GPSC's Section 271 Order establishes a hearing schedule for a proceeding to establish "just and reasonable" rates for network elements that BellSouth must provide in Section 252 interconnection agreements that require approval by the GPSC.

40.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 40 of the Complaint, and note that BellSouth's allegations are directly contrary to judicial interpretation of Section 271 of the Act. *See Verizon New England, Inc. d/b/a/ Verizon Maine v. Maine Public Utilities Commission*, Civil No. 05-53-B-C, Order Denying Plaintiff's Motion for

Preliminary Injunction (D. Maine, Nov. 30, 2005) ("[T]he Court concludes that § 271 is not considered by the FCC and was not intended by the Congress to exclude the [state public service commission] in the circumstances of this case from all activity in setting rates under § 271."). The Joint CLEC Defendants state that the Act and the referenced FCC Order speak for themselves.

41.

The Joint CLEC Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 41 of the Complaint and therefore can neither admit nor deny the same.

42.

The Joint CLEC Defendants re-allege and incorporate their response to Paragraphs 1-41 above as if fully set forth herein.

43.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 43 of the Complaint.

44.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 44 of the Complaint.

45.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 45 of the Complaint.

46.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 46 of the Complaint.

The Joint CLEC Defendants specifically deny all allegations of Plaintiff's Complaint not specifically admitted.

In response to Plaintiff's Prayer for Relief and "WHEREFORE" Clause, the Joint CLEC Defendants specifically deny that Plaintiff is entitled to the relief sought.

WHEREFORE, having fully responded to Plaintiff's Petition, the Joint CLEC Defendants respectfully request that:

1. Plaintiff's claims for relief be denied;
2. Judgment be entered in favor of all Defendants;
3. all costs be taxed against Plaintiff; and
4. this Court enter and award such other and further relief to the Joint CLEC Defendants as it deems just and reasonable, including attorney's fees.

Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

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EXHIBIT B

Commissioner Motion for the resolution of the remaining issues in Docket No. 19341-U.

SUMMARY

Issue 2: TRRO Transition Plan – 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 TRRO, issued February 4, 2005?

(1) BellSouth has argued that state commissions do not have the authority to require it to offer de-listed UNEs at rates terms and conditions found just and reasonable under Section 271. The Commission has already concluded that it does have such authority.

(2) CLECs have until March 11, 2006 to order conversions from BellSouth. To the extent that it takes BellSouth beyond March 11 to process these orders, BellSouth is entitled to a true-up of the difference between the TELRIC rate and the rate BellSouth may charge after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

(3) Parties are required to negotiate appropriate transition mechanisms through the Section 252 process for high-capacity loops for which the FCC found impairment in the *TRRO,* but which may meet the thresholds for non-impairment in the future.

Issue 3: Modification and Implementation of Interconnection Agreement Language – (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?

(1) Parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

(2) The Commission adopts CompSouth's position to limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO.*

(3) The Commission adopts BellSouth's position and finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise.

(4) The Commission adopts BellSouth's position and concludes that the Abeyance Agreement does not excuse Cbeyond from implementing the *TRRO* until the parties have a new interconnection agreement.

Issue 4: High Capacity Loops and Dedicated Transport – 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; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

(1) Business Line Count: For the counting of business lines, the Commission agrees with BellSouth that the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops. The Commission counts DS1 lines as 24 business lines, provided that those DS1 lines in which all 24 channels are empty shall not be counted at all towards the business line count.

(2) Fiber-Based Collocators: The Commission does not accept CompSouth's proposed language to include planned mergers in the definition of fiber-based collocators. The date certain for counting fiber-based collocators will be the effective date of this Commission's order addressing this issue, and not, as BellSouth proposes, the date the FCC rule became effective.

(3) Building: The Commission adopts CompSouth's "reasonable telecom person" standard for the term "building."

(4) Routes: The Commission adopts BellSouth's definition of route.

Issue 5: TRRO/FINAL RULES:
a) Does the Commission 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)?

The Commission will allow BellSouth to designate future wire centers on an annual basis. The Commission will monitor how this process works and make necessary and appropriate changes moving forward.

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

The Commission adopts BellSouth's position and determines that HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment.

Issue 9 – 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?

Based on the District Court Order granting BellSouth's preliminary injunction, the Commission adopts BellSouth's position and concludes that a CLEC may not use facilities that have already been provided to serve existing customers who move to a new location and that the transition period does not apply to moving, adding or changing orders.

Issue 10 – Transition of Delisted Network Elements To Which No Specified Transition Period Applies – 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?

(1) To the extent that resolution of this issue involves other issues in this proceeding, the Commission acts consistently with its positions on those other issues.

(2) The Commission adopts a transition period of 30 days for CLECs to submit orders to convert UNE-P prior to BellSouth being permitted to disconnect or convert circuits and 60 days for everything else.

(3) The Commission adopts a Subsequent Transition Plan, which applies to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards, of 120 days, which is a compromise between the parties on this issue.

(4) Finally, the Commission adopts CompSouth's position and obligates BellSouth to provide actual written notice to the point of contact in the parties' interconnection agreements. If a party does not have a point of contact identified in the agreement, then posting constructive notice on the website should be deemed acceptable.

Issue 11 - UNEs That Are Not Converted – What rates, terms and condition 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?

(1) In the context of Issue 2, the Commission found that CLECs have until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that are not completed until after March 11, 2006. For conversions that are completed prior to March 10, 2006, the Commission orders BellSouth to true-up the difference.

(2) The Commission has decided to set rates based on the just and reasonable standard in Section 271. Those will be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to charge CLECs the resale tariffed rate beginning March 11, 2006.

(3) The Commission concludes that BellSouth should not take any action with regard to wire centers in dispute until such dispute is resolved by the Commission.

Issue 13 – Performance Plan: -- Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

No. The Commission adopts CompSouth's position and finds that performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251 as opposed to covering only the overlap between Section 271 and Section 251.

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

The Commission finds, consistent with CompSouth's position, that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. The FCC has not been clear on this issue. To reach the position advocated by BellSouth appears to require changing the meaning of the plain language of an FCC order; whereas the position advocated by the CLECs does not involve the same obstacle. That is, the FCC has stated that the commingling obligation applies to facilities or services obtained at wholesale. It has not stated that Section 271 facilities or services obtained at wholesale are excluded from this obligation.

This action should not be construed as the recreation of UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that this Commission has concluded that it would be prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P.

Issue 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?

The Commission will remand this issue to a Hearing Officer, or to itself, for evidence on the issue of the appropriate conversion rate. In the interim, the Commission adopts a rate of TELRIC plus fifteen percent based on the Commission's determination of TELRIC.

Issue 16 – Pending Conversion Requests: -- 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 Commission finds consistent with CompSouth's position that CLECs that submitted legitimate requests to convert wholesale services to UNEs or UNE combinations prior to the effective date of the *TRO* are entitled to UNE pricing as of the date the *TRO* became effective.

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

(1) The issue of whether BellSouth is obligated under Section 271 to provide line sharing breaks down to (1) whether line sharing falls under checklist item 4 and (2) whether, if so, the FCC's Forbearance Order relieved BellSouth of this obligation. As to the first issue, the Commission adopts CompSouth's position and concludes that line sharing is a checklist item 4 item. As to the second, individual FCC commissioners issued conflicting statements as to whether its Forbearance Order addressed line sharing. There is more support for the position that it did not address line sharing, but obviously the conflicting statements create ambiguity. Given the Commission's assertion of Section 271 authority, the Commission maintains the status quo by requiring BellSouth to provide line sharing, until the FCC clarifies that it does not have this responsibility.

(2) The Commission's assertion of Section 271 jurisdiction impacts this issue because it means that a Commission finding that line sharing is a checklist item 4 obligation would require BellSouth to provide line sharing as opposed to the determination being purely consultative.

Issue 18: TRO – Line Sharing – Transition: If the answer to the foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Given the Commission's position on Issue 17, this issue is not applicable.

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

(1) For the reasons set forth in the Commission's decision on Issue 14, the Commission finds that line splitting can involve the commingling of Section 251 and Section 271 elements.

(2) Consistent with CompSouth's proposal, the Commission concludes that CLECs should indemnify and defend BellSouth against claims made against BellSouth, but that the indemnification language should relate to specific claims.

(3) The Commission will remand this issue for evidence as to the extent of BellSouth's line splitting obligations.

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

The Commission asserted Section 271 jurisdiction to set just and reasonable rates. Therefore, the Commission orders that BellSouth is obligated to offer call related databases at just and reasonable rates.

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

a) Pursuant to the FCC's definition, the MPOE is "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. 68.105(b).

b) Based on the *Broadband Forbearance Order,* and consistent with BellSouth's position, the Commission concludes that BellSouth is under no obligation to provide access to greenfield Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops.

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

The Commission adopts BellSouth's proposed language because it tracks the following FCC rule:

When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (*where impairment has been found to exist*) on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop. 47 C.F.R. 51.319(a)(2)(ii) *(emphasis added)*

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

(1) The Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

(2) The Commission should order BellSouth to permit inclusion of the CompSouth proposed language on RNMs that mirrors the FCC rule.

Issue 27 – 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 Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

(1) Because the Commission has found that BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

(2) The Commission finds that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

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

a) The Commission adopts BellSouth's proposed language as modified below:

Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and

the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will ~~not~~ apply~~, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval~~.

b) Because the FCC rules on fiber to the home/fiber to the curb, do not include an exclusion based on impairment analysis, the Commission finds that the FCC's fiber to the home/fiber to the curb rules apply to all central offices. This conclusion rejects CompSouth's apparent position that the fiber to the home/fiber to the curb rules do not apply where impairment was found without access to DS1s or DS3s.

Issue 29 – Enhanced Extended Link ("EEL") Audits: -- What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

(1) The Commission adopts CompSouth's position and finds that it is consistent with the *TRO* to include a requirement that BellSouth have some cause prior to initiating an audit.

(2) The Commission adopts BellSouth's position and does not require BellSouth to obtain the agreement of a CLEC with regard to the auditor.

(3) The Commission adopts BellSouth's position and finds that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. The reimbursement should not be limited to only those circuits for which non-compliance is found.

Issue 31 – Core Forbearance Order: -- What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?

The Commission orders that agreements be amended to remove "new markets" and "growth caps" restrictions in BellSouth's ICA reciprocal compensation provisions. BellSouth has not explained how the distinctions between carrier contracts would render such direction problematic.

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

(1) Consistent with BellSouth's position, the Commission clarifies that its order applies to all certified competitive local exchange carriers.

(2) In the event that parties entered into separate agreements with BellSouth that may impact the implementation of changes of law, the Commission concludes that the parties be bound by those agreements. This issue is also addressed as part of Issue 3.

DISCUSSION

Issue 2: TRRO Transition Plan – 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 TRRO, issued February 4, 2005?

Positions of the Parties

BellSouth

A.

The *TRRO* requires CLECs to work cooperatively for an orderly transition. This is evidenced by the requirement that adequate time be allowed to perform "the tasks necessary to an orderly transition." (*TRRO,* ¶143, 196, 227). Also, BellSouth argues that it is entitled to time in advance of March 10, 2006 so that it may migrate to alternative fiber arrangements. (BellSouth Brief, p. 58). BellSouth adds that there is no basis for transitioning from UNEs to state regulated Section 271 services. *Id.*

B.

Local Switching and UNE-P

BellSouth argues that CLECs should be ordered to identify embedded base via spreadsheets and submit orders as soon as possible or convert or disconnect their embedded base of UNE-P or standalone local switching. (BellSouth Brief, p. 59). BellSouth will then have adequate time to work with CLECs to ensure base elements are identified. If BellSouth is not given adequate time to convert, BellSouth will convert remaining UNE-P lines to the resale equivalent no later than March 11, 2006. *Id.* Remaining stand-alone switch ports will be disconnected. *Id.*

C.

BellSouth states that the Commission is bound by the FCC's rules on transitional rates. (BellSouth Brief, p. 59). 47 CFR 51.319(d)(2)(iii) requires transitional rates of the higher of the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the *TRRO* for that combination of network elements, plus one dollar. TELRIC rates do not apply.

D.

BellSouth urges the Commission to clarify that CLECs may not add new arrangements after March 11, 2005. (BellSouth Brief, p. 61). Any service added after that date must be subject to the appropriate true up. *Id.*

CompSouth

A.

CompSouth's first argument is that CLECs should be able to transition to Section 271 checklist elements. (CompSouth Brief, p. 6). In support of this position, CompSouth states that all of the major Section 251 UNEs that were de-listed by the *TRRO* must remain available to CLECs under Section 271. *Id.*

B.
Ordered vs. Fulfilled.

CompSouth contends that CLECs are entitled to place orders through March 11, 2005. (CompSouth Brief, p. 7). If it takes BellSouth longer to fulfill those orders, CLECs have no control over that part of the process. *Id.*

C.

ICAs must include transition provisions for high capacity loops and transport that BellSouth is currently required to provide under Section 251, but may not have to provide under this statute in the future as a result of growth in either business line counts or fiber-based collocators. (CompSouth Brief, p. 9). The *TRRO* states that when a high capacity loop for which there is currently impairment meets the standards for non-impairment, the FCC "expect[s] ILECs and CLECs to negotiate appropriate transition mechanisms through the section 252 process." *TRRO* ¶ 196, fn. 519.

CompSouth requests that the Commission 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." (CompSouth Brief, p. 10).

Discussion

The first question within this issue pertains to what terms and conditions CLECs may transition to when they must transition away from UNEs. CompSouth argues that the transition should be to Section 271 checklist elements. The Commission has asserted jurisdiction under Section 271 to set just and reasonable rates for de-listed UNEs. The transition plan set forth in the *TRRO* for switching, high capacity loops and dedicated transport should apply during the transition period. After the transition period, the rates ordered by the Commission shall apply subject to the response of the FCC to the Commission's petition.

The second question within this issue pertains to whether there is some point prior to the end of the transition period beyond which CLECs may no longer order conversions. BellSouth states that conversions must be ordered far enough in advance of March 11, 2006, to enable it to process all orders by that date. CompSouth argues that CLECs are allowed to order conversions for the entire year.

The clearest indication of the FCC's intent is in paragraph 227 of the *TRRO* discussing the transition plan for mass market local switching. The FCC states that "We 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 the Order." Given

that the FCC set an express deadline for the submission of orders, it is not prudent for this Commission to imply an earlier deadline from the FCC's expressed wish for an orderly transition. The FCC could have specified that CLECs must submit their orders by some earlier date to ensure that all customers would be converted as of March 10, 2006. The FCC declined to take such action. Instead, the FCC stated that CLECs have one year from the effective date to submit the necessary orders. In the context of high capacity loops, the FCC states that "At the end of the twelve-month period, requesting carriers must transition all of their affected high-capacity loops to alternative facilities or arrangements." (*TRRO,* ¶196). Because the above quotation references the obligation of the requesting carriers, it must be assumed that the FCC is referencing any actions that the requesting carriers must take, such as ordering a conversion. The CLEC does not control when an ILEC would act on its order; therefore, this passage cannot be reasonably construed to obligate the CLECs to submit orders prior to the one year anniversary in anticipation of the time necessary for the ILEC to process the order. The language in paragraph 143 of the *TRRO*, with respect to the transition period for dedicated interoffice transport is the same as that for high-capacity loops.

The three factors that need to be reconciled are (1) that CLECs have until twelve months after the effective date of the *TRRO* to order conversions, (2) that ILECs only have to provide unbundled local switching and dedicated loop and transport for twelve months from the effective date of the *TRRO* (see, 47 C.F.R.§ 51.319(d)(iii) and (3) processing the conversions takes time. During the cross-examination of BellSouth witness, Pamela Tipton, by counsel for Cbeyond Communications Company, John Heitman, the concept of a true up was explored.

Q. (Mr. Heitman) Well, let me ask this, if a CLEC agreed or the Commission ordered that if a conversion wasn't completed by March 10, 2006, that once it was completed after that date, that BellSouth could true up to the rate for that alternative service back to March 11, 2006, would that be acceptable to BellSouth?

A (Ms. Tipton) I mean certainly the Commission has the -- the right to do that.

(Tr. 773). The Commission orders that CLECs have until March 11, 2006 to order conversions from BellSouth. To the extent that it takes BellSouth beyond March 11 to process these orders, BellSouth is entitled to a true up of the difference between the TELRIC rate and the rate BellSouth may charge after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

An additional question within this issue concerns high-capacity loops for which the FCC found impairment in the *TRRO*, but may in the future meet the thresholds for non-impairment. Consistent with footnote 519 of the *TRRO*, the Commission requires the parties to negotiate appropriate transition mechanisms through the Section 252 process.

Issue 3: Modification and Implementation of Interconnection Agreement Language – (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?

Positions of the Parties

BellSouth

A.

TRRO ¶233 obligates carriers to execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. Therefore, CLECs should be ordered to implement promptly the changes of law that are the subject of this proceeding. (BellSouth Brief, p. 63).

B.

For issues that are currently the subject of arbitrations the Commission should address change-of-law issues in this proceeding and apply its conclusions in those arbitrations. This process is more efficient. *Id.*

C.

The Abeyance Agreement between BellSouth and Cbeyond does not excuse Cbeyond from implementing the *TRRO* until the parties have a new arbitration agreement. *Id.* at 64. The parties agreed to hold the arbitration of their new interconnection agreement in abeyance for 90 days in light of the uncertainty of the FCC's unbundling rules. *Id.* The Abeyance Agreement states that the parties "agreed to avoid a separate/second arbitration process of negotiating/arbitrating change-of-law amendments to the current interconnection agreement to address USTA II and its progeny." TR. 1073; Hyde Direct testimony, at 4.

The Abeyance Agreement does not mention the *TRRO*, and was limited to changes from *USTA II*. Neither the *TRO* nor the *TRRO* are "progeny" of *USTA II*. "Progeny" means "a line of opinions that succeed a leading case." *Black's Law Dictionary*. The *TRO* was issued prior to *USTA II*; therefore, it is not a progeny. (BellSouth Brief, p. 65). The *TRRO* is not a legal opinion, and it does not reaffirm the Circuit court's opinion so it is not a progeny. *Id.*

South Carolina rejected Cbeyond's argument on this point, stating that it was an unreasonable result for BellSouth to have given up its right to implement the new rules, even before it knew what the rules would contain. *Id.* at 65-66.

CompSouth

A.

CompSouth agrees that parties should act in reasonable time frame to implement changes. (CompSouth Brief, p. 10). However, CompSouth charges that BellSouth's proposed language exceeds scope of the docket. *Id.* at 11.

B.

As to the forum for the Commission to decide issues, CompSouth proposes a series of processes depending on the stage of the unresolved dispute. If unresolved disputed issue in a pending arbitration, then the Commission ruling in this case should govern. *Id.* If it is not an unresolved disputed issue in an 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. *Id.* at 11-12. If there is no such 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 Commission. *Id.* at 12.

Cbeyond

Cbeyond entered into a voluntary Abeyance Agreement filed with the Commission in Docket No. 18995-U. The Abeyance Agreement obligates the parties to implement the *TRO* and the *TRRO* through the replacement interconnection agreement negotiated and arbitrated between Cbeyond and BellSouth.

Discussion

The first component of this issue that parties addressed in briefs pertained to the obligation under the *TRRO* to implement through good faith negotiations changes to interconnection agreements to account for certain elements no longer being Section 251(c)(3) obligations. There does not appear to be any substantive difference in the parties' positions. Instead, it appears they have chosen different wording to characterize the FCC's holding. The Commission orders that the parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

The Joint CLECs have also charged that BellSouth has proposed language that exceeds the scope of the docket because it pertains to changes unrelated to the *TRO* and the *TRRO*. The Commission initiated this docket in response to two separate petitions for declaratory rulings. In Docket No. 18943-U, XO Georgia, Inc. and Allegiance Telecom of Georgia, Inc. filed a Joint Petition for Declaratory Ruling requesting that the Commission order BellSouth to continue to honor the terms of its interconnection agreements. In Docket No. 19003-U, CompSouth filed a similar petition. The impetus for these petitions was actions taken by BellSouth in the wake of the *USTA II* decision that vacated and remanded portions of the *TRO* in which the FCC established unbundling requirements for local switching, transport and other UNEs. Based on BellSouth's representations that it would not unilaterally violate the terms of its interconnection agreements, the Commission dismissed the petitions and initiated this generic docket. The purpose of this docket was to examine "(a) whether the vacatur represents a "change in law", (b) whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996, and (c) whether BellSouth is obligated to provide UNEs under Georgia State Law." (Order Initiating Docket, p. 1; *quoting* CompSouth Petition, p. 4). The Commission then directed the parties to develop an Issues List for the Commission's consideration. In doing so, the Commission noted that in light of the *TRRO* the issues that the

parties wish to place in front of the Commission may have changed. The Commission adopted the proposed Issues List as part of its Procedural and Scheduling Order in this docket.

Issue 3(a) asks how existing ICAs should be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations. The purpose of this docket was clearly to respond to the *TRO* and the *TRRO*, and not to every change in law that may be the subject of negotiations pursuant to the relevant provisions of the interconnection agreements. The Commission will limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO*. The implementation of other changes of law is not usually the subject of a generic proceeding. This conclusion would not inhibit parties from acting pursuant to the changes of law provisions in their interconnection agreements to implement changes in law unrelated to the *TRO* or *TRRO*.

The Commission also finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise. Parties are free to negotiate interconnection agreements that provide for alternative arrangements. In connection with the three scenarios set forth in CompSouth's brief, the Commission agrees with CompSouth on the first two. However, the Commission does not agree with the process set forth by CompSouth for its third scenario. If there is a pending arbitration, and no agreement among the parties to resolve an issue outside of this generic proceeding, then the parties should incorporate the result of this docket into the interconnection agreement they submit for approval.

Finally, the Commission concludes that Cbeyond is not excused from implementing the *TRRO* until the parties have a new interconnection agreement. The July 23, 2004 Abeyance Agreement included the following language: "Within this framework, Cbeyond and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current Interconnection Agreement to address *USTA II* and its progeny." (Joint Motion, p. 2) (emphasis added). The framework in question appears to include that the abeyance requested by the parties was set to last for ninety (90) days. The parties waived the resolution of the arbitration only through June 2005. It exceeds the scope of the Abeyance Agreement to delay further the implementation of the *TRRO* now that the deadline provided for in the Abeyance Agreement has now passed. While individual statements in the Abeyance Agreement state that the parties will continue to operate pursuant to their existing agreement until the new agreement is finalized, such statements were made within the framework of the abeyance being for ninety (90) days.

Issue 4: High Capacity Loops and Dedicated Transport – 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; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

Positions of the Parties

BellSouth

A.
Business Line

BellSouth cites to two areas of disagreement on the definition of "business line." The first disagreement is over BellSouth's inclusion of all UNE loops. The second disagreement concerns BellSouth's counting of high capacity loops.

BellSouth includes all UNE loops, rather than a subset of them and cites to the *TRRO* for support. The *TRRO* states that "Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify." (¶ 105). The FCC also states that "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." *Id.* (footnotes omitted). BellSouth argues that the *TRRO* included all UNE loops because it gauges business opportunities in a wire center. (BellSouth Brief, p. 72).

The second point of disagreement concerns the counting of high capacity loops. BellSouth again argues that the FCC intended to capture opportunity. *Id.* at 73. BellSouth also asserts that limiting the number of lines runs counter to the FCC's revised impairment standard, which considers whether CLECs can compete without access to particular network elements and considers all the revenue opportunity that a competitor can expect to gain over the facilities it uses. *Id.* Excluding lines because they are not "switched" would ignore the competitive opportunity in the UNE loops. *Id.* It would also violate the direction included in *TRRO ¶ 25* not to evaluate impairment with reference to a particular CLEC's business strategy. *Id. at 74.* The Michigan PSC found that the TRRO requires that the line count include each Centrex line as one line, without a factor to reduce the number to one-ninth. *Id.*

A DS1 line is to be counted as 24 business lines for determining the number of business lines, regardless of how many of the 24 channels are activated. *Id.* Contrary to CompSouth's allegations, BellSouth's reporting is not inconsistent with its financial reporting. *Id.* at 75. Beyond that point, CompSouth's information is not in evidence in Georgia. *Id.*

Finally, BellSouth argues that there is nothing in the federal law that would support limiting its right to designate future wire centers on an annual basis. *Id.* at 76.

B.
Fiber-based collocator

BellSouth argues that the Commission should strike CompSouth's proposed addition to the FCC's definition of "fiber-based collocator" that would result in counting carriers that have

not finalized mergers as one collocator.[1] (BellSouth Brief, pp. 66-69). The practical impact of CompSouth's proposal is that it would result in counting AT&T and SBC as one fiber-based collocator. BellSouth's states that its position has been adopted by the Rhode Island and Michigan commissions. *Id.* at 69.

BellSouth also urges the Commission to reject CompSouth's proposed language about counting the network of fiber-based collocators separately. BellSouth discusses gaming of the routes as a CLEC connecting links from a Tier 1 or Tier 2 wire center in a Tier 3 wire center. *Id.*

C.
Building

BellSouth does not believe the term "building" needs to be defined, but instead, the Commission should just follow a "reasonable person" standard. *Id.* at 67.

CompSouth

A.
Counting of Business Lines

CompSouth states that BellSouth has improperly read the first sentence of FCC Rule 51.5 out of the definition. The first sentence reads as follows:

> 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.

This first sentence eliminates any residential lines so there was no need for the FCC to restate throughout the definition that residential lines were not included. (CompSouth Brief, p. 15). BellSouth's reading is internally inconsistent because it does not include UNE-P, while it does include all UNE loops. *Id.* CompSouth argues there is no basis for this distinction. *Id.*

CompSouth disagrees with BellSouth's argument that the maximum number of voice grade lines the facility could support should be counted. The final three sentences of the definition of "business lines" states:

> 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

[1] CompSouth proposes that the term "fiber-based collocator" apply to "carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same, will be treated as affiliates and therefore as one collocator; provided however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement shall not be counted as a Fiber-Based Collocator."

> 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."

Empty channels are not switched services so do not meet the definition of business lines. (CompSouth Brief, p. 17).

Also, BellSouth treats its own business switched access lines differently than it is proposing the Commission count business lines for purposes of impairment. ARMIS requires that BellSouth report its lines in voice-equivalents, but limit the voice-equivalent line count to only those circuits actually activated to provide business switched access line service. *Id.* at 18. BellSouth has inflated the number of business lines so that they are out of whack with the thresholds relied upon by the FCC. *Id.* at 19-24.

B.
Fiber-Based Collocation

CompSouth argues that state commissions are not bound to looking only at March 10, 2005. CompSouth emphasizes that BellSouth has not cited to any authority for why the Commission must count fiber-based collocators as of March 10, 2005. (CompSouth Brief, p. 27). Moreover, looking backwards to March 10, 2005 is inconsistent with the FCC's direction to count as one fiber collocator multiple collocations at a single wire center by the same or affiliated carriers. *Id.*

C.
Building

CompSouth's definition of "building" incorporates the concept of BellSouth's "reasonable person" standard, but it adapts it to include a "reasonable telecom person." The purpose of this amendment is "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." *Id.* at 29.

D.
Route

CompSouth states that there is no further dispute on the definition of the term "route."

Discussion

FCC Rule 51.5 defines "business line" as follows:

> 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."

For the counting of business lines, the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops. It is not necessary to read the first sentence out of the definition in order to reach this conclusion. The first sentence includes in the definition of "business line" that it serve a "business customer." However, the next sentence of the line instructs on the manner in which such lines shall be calculated. In setting forth what shall be included in the calculation, the rule modifies the sum of all incumbent LEC switched access lines with the word "business." There is no confusion that this part of the addition is limited to business lines. Yet, in the same sentence, when discussing the sum of all UNE loops connected to that wire center, the rule does not similarly use the modifier "business." If, because of the prior sentence, it would have been duplicative to state that these were business UNE loops, as CompSouth suggests, then the switched access lines need not have been identified as business in the first part of the sentence. That the switched access lines were expressly limited to business lines, and the UNE loops were not so limited, indicates that the limitation does not apply to the UNE loops. In the discussion of business line counts in the *TRRO,* the FCC again refers to "business UNE-P, plus UNE-loops." (¶ 105). This conclusion is consistent with the policy goals expressed by the FCC. The FCC states that it intended to measure business "opportunities" in a wire center provides support for why its method to calculate business lines would potentially include non-business lines. *Id.*

The Commission also concludes that it is appropriate to count DS1 lines as 24 business lines, provided that those DS1 lines in which all 24 channels are empty shall not be counted at all towards the business line count. It is consistent with Commission practice to consider a DS1 line to be an access line. If a DS1 line includes channels that are not empty, then it is an access line that connects end-user customers with incumbent LEC end-offices for switched services. Consistent with 47 C.F.R. § 51.5, such a DS1 line must count as 24 lines. However, if a DS1 line does not connect end-users for switched services, then it does not meet the first requirement set forth in the federal rule, and therefore must be excluded from the tally of business lines.

The issue in defining the term "fiber-based collocator" hinges on the date that the impairment test must be applied. BellSouth cites to language that CompSouth has proposed that would expand the definition of "fiber-based collocator" to address planned mergers. In doing so, CompSouth essentially is seeking to apply the impairment test at a later date because it is accounting for situations in which the number of fiber-based collocators in existence as of the

date of the analysis is more than will be available a short while after the analysis is completed. Because the parties agree that a decision to de-list a particular wire center is irrevocable (Tr. 666), the changes to the competitive landscape could not be reflected in the assessment of the wire centers. As the Michigan Public Service Commission observed, however, state commissions are not free to rewrite federal rules with what we may view to be improvements. Therefore, the Commission does not accept this language because there is no basis for it in the federal law.

More directly on point is whether the March 11, 2005 effective date of the *TRRO* requires that the Commission consider the number of fiber-based collocators in a wire center as of that date. BellSouth argues that it does so require, but does not cite to any authority for why it could not be some other date. CompSouth emphasizes this shortcoming in BellSouth's position, and argues that the Commission should look at circumstances as they exist, rather than how they existed on March 11, 2005. The Commission agrees with CompSouth. That the FCC rules became effective March 11, 2005 does not mean that the application of the rules must ignore changes that occurred between the effective date of the rule and its application.. Rather, it means that as of March 11, 2005 any application must comply with the new rule. State commissions often must apply federal rules in reaching its decisions. When state commissions do so they typically apply the federal rules to the evidence with which it has been presented. State commissions do not typically ask the parties to go back and present evidence that reflects the effective date of the FCC rule to be applied. The only policy reason that BellSouth offers for its position is the need for a certain date. The Commission finds that the date of this Commission order is the date certain for the analysis.

It appears contrary to the intent of the *TRRO* essentially to miscount the number of fiber-based collocators currently in existence because the number was different as of the time that the FCC order took effect. For these reasons, the Commission will apply the definition of "fiber-based collocators" set forth in the *TRRO* and federal rules to the circumstances as they exist currently.

The Commission adopts CompSouth's "reasonable telecom person" standard for the term "building." The only difference between CompSouth and BellSouth on this definition is the inclusion of the word "telecom." This difference would allow buildings to be defined by how they are seen for network engineering purposes.

CompSouth represented in its brief that there was no further dispute on routes; therefore, the Commission adopts BellSouth's definition of route.

Issue 5: TRRO/FINAL RULES:
a) Does the Commission 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)?

BellSouth

BellSouth states that state commissions are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO*. (*TRRO* ¶ 234). The Commission must resolve the parties' disputes concerning the wire centers in Georgia that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition UNEs to alternative arrangements. (BellSouth Brief, p. 70). BellSouth urges the Commission to conclude that CLECs cannot self-certify to obtain Section 251 loops and transport in the future.

CompSouth

A.

State commissions have authority to determine whether BellSouth has followed FCC mandates on how to designate non-impaired wire centers. (*TRRO* ¶100). CompSouth believes that it is most efficient for the Commission to settle disputes on the front end. (CompSouth Brief, p. 30) An orderly process should be established to determine future changes in the wire center list. The process of reclassifying a wire center would be synchronized with the routine filing of ARMIS 43-08. BellSouth has not offered an alternative. *Id.* at 31.

Discussion

The *TRRO* provides that competitive LECs will "be able to challenge the incumbent's estimates in the context of section 252 interconnection agreement disputes." (¶100). State commissions have the authority to resolve disputes arising under Section 252 agreements. Therefore, state commissions have the authority to determine whether an ILEC's estimates are accurate. CompSouth's proposed method of having BellSouth file its ARMIS data and allowing time for the CLECs to review it, with a scheduled date for a Commission decision seems reasonable. The Commission will begin by allowing BellSouth to designate future wire centers on an annual basis. The Commission will monitor how this process works and make necessary and appropriate changes moving forward.

BellSouth requests that the Commission confirm that it has applied the appropriate procedures to identify the wire centers. As discussed in Issue 4, the Commission agrees with BellSouth, except on the issue of the effective date of the *TRRO* and the counting of a DS1 that has only empty channels.

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

Positions of the Parties

BellSouth

A.

For those wire centers that meet the FCC's impairment thresholds for DS1 loops, BellSouth does not have any obligation to provide CLECs with its UNE HDSL loop product. (BellSouth Brief, p. 87). The FCC defined DS1 loop as including "2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, such as 2-wire and 4-wire HDSL Compatible Loops." 47 C.F.R. §51.319(a)(4). The FCC has therefore removed any obligation to provide these loops in unimpaired wire centers. In addition, there has been very little CLEC interest in BellSouth's UNE HDSL product. (BellSouth Brief, p. 88).

B.

The second position BellSouth takes with respect to Issue 6 is that it can and should count each deployed UNE HDSL loop as 24 voice grade equivalent lines. The *TRO* states as follows:

> We note throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. Carriers frequently use a form of DSL service, i.e. High-bit DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers. We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps. (n. 634).

For calculating business lines, a DS1 corresponds to 24 kbps-equivalents, and therefore to 24 business lines. 47 C.F.R. § 51.5.

BellSouth's argument is that (1) a DS1 is the equivalent of 24 business lines, (2) a DS1 loop and a T1 are equal in speed and capacity, and (3) UNE HDSL loops are used to deliver T1 services; therefore BellSouth's UNE HDSL loops must be counted as 24 business lines.

CompSouth

A.

HDSL-capable copper loops are not the equivalent of DS1 loops for purposes of evaluating impairment. (CompSouth Brief, p. 31). They are just copper loops that are less than 12,000 feet long and are clear of equipment that could block provision of high-bit rate DSL services. *Id.* They do not include the electronics on both ends of the loop that provide the means for the loop to be used to provide DS1-level services. *Id.* In sum, CompSouth's position is that an HDSL-capable copper loop doesn't have everything that a DS1 loop has.

BellSouth has read the first sentence out of the FCC's definition. 47 C.F.R. § 51.319(a)(4)(i) 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.

A DS1 loop must be capable of sending signals at a speed of 1.544 mbps. (CompSouth Brief, p. 32). If a certain type of copper loop is capable of doing so, then it qualifies as a DS1 loop, but the rule does not state that copper loops that are not capable of doing so become DS1 loops. *Id.* BellSouth does not contend that an HDSL-capable copper loop cannot provide a 1.544 mbps service if it doesn't have the associated electronics. *Id.*

The outcome of adopting BellSouth's reading is inconsistent with the apparent intent of the FCC. Adoption of BellSouth's position would prevent CLECs from creating their own DS1 loops. (CompSouth Brief, p. 33). In the *TRRO*, the FCC stated that "[t]he record also suggests that in some cases, competitive LECs might be able to serve customers' needs by combining other elements that remain available as UNEs." (¶ 163, n.454). The FCC went on to state that in place of DS1 UNE loops that were declassified as UNEs, CLECs could us HDSL-capable loops. *Id.* If DS1 and HDSL-capable loops were the same things for impairment purposes, then the FCC would not have considered HDSL-capable loops to be substitutes for DS1.

B.

BellSouth's contention that HDSL-capable copper loops should be counted as DS1 lines for purposes of counting business lines would inflate the business line count. (CompSouth Brief, p. 34). This method would allow BellSouth to convert a lot of residential lines to business lines. *Id.* It is also inconsistent with how HDSL-capable copper loops were counted by another one of BellSouth's witnesses in this case. *Id.* at 34-35.

Sprint

A.

A DS1 loop is not the same as an HDSL-compatible loop because a DS1 loop is provisioned with all the required electronics; whereas an HDSL-compatible loop is a conditioned copper loop without any electronics. (Sprint Brief, p. 3). The FCC's conclusion that requesting carriers are impaired without access to copper loops remains in effect. *Id.* at 3-4. The intent behind the FCC rule upon which BellSouth relies is "to ensure that ILECs could not refuse to provide DS1 loops if ILECs used other technologies such as HDSL in combination with DS1 loops." *Id.* at 5.

Discussion

This issue turns on whether an HDSL copper loop is a DS1 loop by itself, or whether it is only a DS1 loop if provided with the associated electronics necessary for it to provide DS1 services. More specifically, the first issue turns on whether the word "capable" in the context of 47 C.F.R.§ 51.319(a)(4) means capable on its own. After reviewing the pertinent FCC rules and

orders on this issue, the Commission finds that the FCC intended for HDSL copper loops to be considered a DS1 loop for purposes of counting lines to determine impairment.

Because there are not any copper loops capable of providing DS1 service without the addition of associated electronics, it is unlikely that by "capable," the FCC meant capable on its own. It would not serve any purpose for the FCC to include within the definition of DS1 loops a type of copper loop that does not exist. It is also of note that there are copper loops that cannot provide DS1 service regardless of the electronics added. This fact supports a reading of the word "capable" to include those loops that are capable if provided the associated electronics. The criterion distinguishes between those loops that are capable of providing DS1 service with the provision of associated electronics and those loops that are not.

In its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* ("*Third Report and Order*"), the FCC states that an "xDSL-capable" loop describes "copper loops from which bridge taps, low-pass filters, range extenders, and similar devices have been removed." (¶ 172). Separately in that order, the FCC explains that that "'xDSL' refers to the various kinds of Digital Subscriber Line service, such as ADSL . . . and HDSL" *Id.* at fn 299. Therefore, the FCC description of an xDSL capable loop would apply to an HDSL-capable loop. The above description of these loops does not include any electronics, but rather refers to simply the copper loop. Construing the rule consistent with the FCC's *Third Report and Order,* DS1 loops would include two and four wire HDSL copper loops without the associated electronics. To reach a different conclusion would necessitate finding that the FCC described HDSL copper loops inconsistently between its rule and its order. The Commission concludes that HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment.

Issue 6 explicitly addresses the narrow question of whether HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment. By phrasing the issue in such a manner, it is apparent that the parties intended for the Commission to address only the question of whether HDSL-capable copper loops should be counted the same as DS1 loops for assessing whether the 60,000 business line threshold set forth in the *TRRO* has been met. The Commission will not address questions that exceed the scope of Issue 6 as agreed upon by the parties and adopted by the Commission.

Issue 9 – 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?

BellSouth

A.

BellSouth relies on the District Court's opinion in the appeal of the Commission's order in this docket. The order states "The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ted]' to place new orders." *BellSouth v. MCIMetro,* Case No. 1:05-CV-0674-CC, (April 5, 2005 Order, p. 4). BellSouth argues that

moving a customer's service to a different location would require the placement of a new order for service, and that therefore the transition period would not apply. (BellSouth Brief, p. 77).

BellSouth states that changes to existing orders do not require a new service order. BellSouth will accordingly process orders to modify an existing customer's service by adding or removing vertical features during the transition period. *Id.* Pursuant to the *TRRO,* CLECs may self-certify that they are entitled to unbundled access to a requested element, and BellSouth must process this request. BellSouth may only challenge the order after the fact. BellSouth asserts that at the conclusion of this generic proceeding the Commission should confirm the Georgia wire centers that satisfy the FCC's impairment tests. (BellSouth Brief, p. 77). Doing so would eliminate the situation in which a CLEC would self-certify.

CompSouth

A.

With regard to high capacity loops and dedicated transport, CompSouth identifies the only issue as being whether moves of de-listed UNE loops or dedicated transport on behalf of a customer that was served by the CLEC as of March 11, 2005 should be permitted. (CompSouth Brief, p. 62). The *TRRO* stated that the transition plans shall apply only to the embedded customer base. (¶ ¶ 0142, 195) It did not state embedded lines or circuits.

B.

With regard to unbundled switching (UNE-P), CompSouth argues that 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. (CompSouth Brief, p. 63). Again, the transition period applied to the customer base, not to the circuits or lines. (*TRRO,* 227).

Discussion

The Commission concludes that a CLEC may not use facilities that have already been provided to serve existing customers who move to a new location and that the transition period does not apply to moving, adding or changing orders. To do so would require a new order, and the District Court has interpreted the *TRRO* not to allow such action. The Commission is bound by the District Court's interpretation.

Issue 10 – Transition of Delisted Network Elements To Which No Specified Transition Period Applies – 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?

Positions of the Parties

BellSouth

A.

BellSouth incorporates its arguments from Issue 2 into its position for rates, terms and conditions for elements de-listed by the *TRRO* and which have a designated transition period. (BellSouth Brief, p. 78). CLECs have had two years notice of the *TRO* decision that certain elements no longer needed to be unbundled. Therefore, with the exception of entrance facilities, BellSouth should be authorized to disconnect or convert such arrangements upon 30 days written notice absent a CLEC order to disconnect or convert such arrangements. (BellSouth Brief, p. 78).

CompSouth

A.

CompSouth incorporates into its position on Issue 10 its positions on both Issues 2 and 8. (CompSouth Brief, pp. 63-64). The FCC did not provide a specific transition plan for every type of UNE. Such UNEs are not covered by the transition plan covered in Issue 2. *Id.* at 64. 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 Federal Act. *Id.* BellSouth has proposed a 30 day period for the submission of orders to convert UNEs or BellSouth may disconnect or convert.

CompSouth argues that although CLECs have known since the *TRO* that certain UNEs were de-listed, no agreement has been reached as to how the transitions or conversions would be completed. (CompSouth Brief, p. 64). The CLECs argue for at least a 60 day time period. *Id.* at 64-65.

B.

CompSouth incorporates its arguments on Issues 2, 4 and 5 into Issue 10(b). *Id.* at 65. The FCC did not adopt a default transition process for UNEs that are found to meet the non-impairment standard after March 11, 2005. Therefore, the parties have to agree on a transition period. *Id.* The 90 day Subsequent Transition Period proposed by BellSouth is not adequate. *Id.* In order to complete the work necessary to identify and create a spreadsheet to convert the de-listed circuits to alternative circuits, CompSouth proposes a maximum of 12 months and minimum of 180 days for the Subsequent transition period. *Id.*

C.

CompSouth argues that BellSouth should be obligated to provide written notice to the CLECs' point of contacts contained in the notice provision of the interconnection agreement. *Id.*at 66-67. Merely posting the notice on the website is not acceptable. *Id.* at 67.

Discussion

To the extent that resolution of this issue involves other issues in this proceeding, the Commission adopts the conclusions it reached on those other issues. The Commission adopts a 30 day transition period for UNE-P and a 60 day transition period for everything else. While it is true that CLECs have been on notice for two years, there has been no agreement on how the parties would move forward. A 60-day period is reasonable going forward.

The Subsequent Transition Plan applies to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards. The Commission will allow a 120 day Subsequent Transition Period. This is a compromise between the parties on this issue.

Finally, the Commission finds it prudent to obligate BellSouth to provide actual written notice to the point of contact in the parties' interconnection agreements. If a party does not have a point of contact identified in the agreement, then posting constructive notice on the website shall be deemed acceptable.

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

Positions of the Parties

BellSouth

A.

BellSouth argues that CLECs must transition their entire embedded base by March 10, 2006. (BellSouth Brief, p. 79). BellSouth needs CLECs to provide it with timely information in order to accomplish this transition. BellSouth requests that CLECs be obligated to provide this information by October 1, 2005 or as soon as possible. *Id.* If CLECs do not submit timely orders, then BellSouth should be able to convert or disconnect the remaining embedded base lines by March 10, 2006. *Id.*

B.

For high capacity loops, BellSouth is asking that the Commission direct CLECs to submit spreadsheets by December 9, 2005 or as soon as possible to identify and designate transition plans for their embedded base of these de-listed UNEs. *Id.*

CompSouth

A.

CompSouth argues that CLECs have a right to pay no more than the FCC's transition rates for Section 251 network elements subject to non-impairment findings. (CompSouth Brief, p. 67). The process for transitioning should not result in CLECs being denied transition pricing during the FCC's transition period. *Id.*

B.

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 because (1) all *TRRO* de-listed UNEs must be provided by BellSouth pursuant to Section 271, and (2) Section 271 terms and conditions will similar to those of the de-listed UNEs. *Id.*

C.

The ongoing disputes between the parties regarding the proper designation of wire centers where the FCC has authorized non-impairment findings has complicated the transition. CLECs should not be forced off Section 251 UNE arrangements where there is a dispute over the wire center until the Commission decides this case. The Commission should reject BellSouth's contract proposals that would penalize CLECs for not following its transition schedule. (CompSouth Brief, p. 69).

Discussion

This issue is resolved for the most part by other issues the Commission will address in this docket. The Commission has already concluded that the CLECs have until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that are not completed until after the March 11, 2006. For conversions that are completed prior to March 10, 2006, the Commission orders BellSouth to true-up the difference. The Commission decided to set rates based on the just and reasonable standard in Section 271; therefore those shall be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to charge CLECs the resale tariffed rate beginning March 11, 2006.

Finally, the Commission finds that BellSouth shall not take any action with regard to wire centers in dispute until such dispute is resolved by the Commission.

Issue 13 – Performance Plan: -- Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

Positions of the Parties

BellSouth

A.

Elements that are no longer required to be unbundled pursuant to Section 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan. (BellSouth Brief, p. 81). The purpose of the plan was to ensure nondiscriminatory access to elements as required by Section 251(c)(3), after BellSouth gained permission to provide in-region interLATA service. *Id.* In de-listing a UNE, the FCC found CLECs were able to purchase similar services from other providers. *Id.* It is discriminatory to subject BellSouth to penalties and not these other providers. *Id.*

B.

BellSouth has entered into commercial agreements with more than 150 CLECs. *Id.* These CLECs were willing to forgo the plan's penalties for those included within the commercial

agreement. *Id.* at 81-82. The Commission adopted the Hearing Officer's recommendation to approve a stipulation to remove certain DS0 wholesale platform circuits from the plan. *Id.* at 82.

CompSouth

A.

CompSouth argues that the plan should still apply to the extent such network elements are still required pursuant to Section 271. (CompSouth Brief, p. 69). CompSouth argues that BellSouth still must provide meaningful, non-discriminatory access to such network elements pursuant to the Section 271 competitive checklist. *Id.*

B.

BellSouth's position is inconsistent with the position it took when it applied for Section 271 approval. BellSouth stated that the performance measurement plans were in place to ensure compliance only with Section 271 obligations. *Id.* at 70.

C.

It would make no sense for performance measurements designed to ensure there is no Section 271 backsliding to be limited to Section 251. *Id.*

Discussion

The issue is whether the performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251. The record of BellSouth's Section 271 application indicates that the performance plans were intended to ensure Section 271 compliance. BellSouth's position that the Section 271 compliance the parties were referencing was intended only to cover the overlap between Section 271 and Section 251 is not reflected.

The performance plan was adopted as a condition of the approval of BellSouth's Section 271 application. Therefore, regardless of BellSouth's position that state commissions lack jurisdiction under Section 271, BellSouth subjected itself to this degree of state commission involvement in its Section 271 obligations as part of achieving Section 271 approval. The record reflects that the purpose of the performance plan was to ensure that BellSouth continued to meet its Section 271 obligations. (Tr. 112-19).[2] In its Brief in Support of Application for Provision of In-Region Inter-Lata Services, BellSouth quoted the FCC's Kansas/Oklahoma Order on SBC's Section 271 application. Quoting the FCC, BellSouth stated that the performance plans constitute probative evidence of continued Section 271 compliance. (Tr. 116-17, BellSouth Brief in Support of Application, p. 5). BellSouth also stated in its brief that a performance plan is designed to prevent against Section 271 backsliding. (Tr. 117, BellSouth Brief in Support of Application, p. 5). In its Supplemental Brief filed with the FCC for 271 authority in Georgia,

[2] The Commission took administrative notice of BellSouth's Brief in Support of Application for Provision of In-Region Inter-Lata Services in Louisiana and Georgia, BellSouth's Supplemental Brief filed with the FCC for 271 authority in Georgia, and the FCC order granting BellSouth authority to sell long distance in Georgia. (Tr. 115-16).

BellSouth argued that self-effectuating enforcement mechanisms provided assurance of continued Section 271 compliance. (Tr. 117, Supplemental Brief, p. 7). In its order granting BellSouth Section 271 authority in Georgia, the FCC stated that the performance plans were designed to create a financial incentive for post-entry compliance with Section 271. (Tr. 117-18, FCC's Section 271 Order for Georgia, pp. 9, 13). There is no indication that this purpose was limited to those Section 271 obligations that overlapped what was required by Section 251. The reasonable conclusion is that it was the intent for the performance plan to apply even if BellSouth's Section 251 obligations were to change.

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

Positions of the Parties

BellSouth

A.

BellSouth argues that CompSouth's proposed language would improperly assert state commission authority over Section 271 obligations and would resurrect UNE-P. (BellSouth Brief, p. 37). Only the FCC has the authority to regulate the terms of Section 271 compliance; therefore Section 271 services cannot be commingled with other UNEs. *Id.* at 38.

B.

BellSouth also argues that even if the Commission had Section 271 authority, it wouldn't matter because BellSouth is not obligated to commingle Section 251 services with Section 271 services. (BellSouth Brief, p. 38). The FCC only requires commingling of loops or loop transport combinations with tariffed special access services – not with UNE-P. BellSouth relies on the *SOC's* reference to commingling at ¶28 in which it only mentions tariffed services. *Id.* BellSouth then cites to paragraph 579 of the *TRO* to support its position that the *TRO* is consistent with the *SOC.*

Paragraph 579 states, in relevant part, as follows:

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

While this paragraph on its own would indicate ILECs have the obligation to commingle Section 271 and Section 251 elements, the *TRO Errata* deleted the italicized language from paragraph 584 below:

> 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.

BellSouth argues that this deletion indicates that the commingling requirement does not pertain to Section 271. (BellSouth Brief, p. 40).

At this same time, the FCC also deleted the following sentence from fn 1989 (1990 pre-errata): "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to checklist items." BellSouth argues that the two deletions read together make the *TRO* consistent with the *SOC.* (BellSouth Brief, p. 40). Had the FCC intended to clear up any conflict, as the CLECs argue, then it only would have deleted the footnote. *Id.*

C.

BellSouth next describes how wholesale services are repeatedly referred to as tariffed access services. BellSouth points to the TRO's references to wholesale services always being followed by the parenthetical "(e.g., switched and special access services offered pursuant to tariff)." (BellSouth Brief, p. 41). Along with the deletion of the language from ¶584, BellSouth says the FCC's clear intent was not to require commingling for 271 unbundling obligations. *Id.*

D.

In the *TRRO*, when describing the conversion from wholesale services to UNEs and UNE combinations, the FCC limited its discussion to the conversion of tariffed services to UNEs. ¶229. BellSouth construes this paragraph as further evidence that the FCC is only referring to tariffed services when it discusses commingling. (BellSouth Brief, p. 42). Any other interpretation would undermine the decision in the *TRRO* to eliminate the unbundling of UNE-P. *Id.*

E.

BellSouth also cites to a number of other state commissions that it asserts have agreed with its position on commingling. BellSouth states that both the New York Public Service Commission and the Mississippi Federal District Court indicated an interpretation of the FCC's orders consistent with BellSouth's position. (BellSouth Brief, p. 42). The North Carolina Utilities Commission Panel concluded that the FCC did not intend for ILECs to commingle Section 271 elements with 251 elements. (NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order, p. 24).*

The Florida Public Service Commission was swayed that the removal of language from ¶ 584 indicates FCC intent not to require 271 commingling. FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005). The Kansas Commission also found that commingling Section 271 elements was not a part of interconnection agreements. Kansas Order at ¶¶ 13-14.

BellSouth acknowledged that a number of other states reached a different conclusion, among them Kentucky, Washington and Massachusetts. (BellSouth Brief, fn 81).

CompSouth

CompSouth's presentation of its position on commingling includes (A) a background explanation on the origin and nature of commingling, (B) an analysis of the *TRO*, including the errata and (C) a discussion of the impact of the issue on CLECs.

A.

The FCC authorized commingling in 2003. The *TRO* required that ILECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services. *TRO* ¶584. The difference between commingling and combinations is that while combinations involve both Section 251 elements, commingling involves 251 elements with any other wholesale service.

B.

The legal basis for the FCC's commingling rules is the nondiscrimination requirements set forth in Section 202 of Federal Act.

> 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).

(*TRO*, ¶ 581).

CompSouth addresses the impact of the errata that amended paragraph 584 of the *TRO*. As stated in the discussion of BellSouth's position, the errata removes the language "any network elements pursuant to Section 271" from a sentence that outlined an ILEC's commingling obligations. CompSouth pointed out that even after the phrase in question is deleted from paragraph 584, BellSouth's unbundling obligations are not limited to exclude Section 271 elements. (CompSouth Brief, p. 75). Wholesale facilities and services include those required by 271. *Id.* The FCC merely removed a redundant clause. *Id.* at 76.

In further support of its position, CompSouth states that the *TRO Errata* also removed the last sentence of footnote 1990. In its entirety footnote 1990 reads as follows (with emphasis added to the last sentence):

> 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.*

CompSouth contends that the deletion of this sentence indicates that the FCC did not mean to exclude Section 271 elements from commingling. (CompSouth Brief, p. 76).

In response to BellSouth's argument that the FCC always refers to tariffed interstate special access services, CompSouth emphasizes that the *TRO* always says "for example" before identifying these services. *Id.* at 77.

C.

CompSouth argues that the practical effect of restricting commingling would be dire for CLECs. BellSouth's proposed language would lead to potential disruption to customers. *Id.*

Discussion

Prior to determining whether the FCC has required BellSouth to commingle 251 and 271 elements, the Commission must decide whether the FCC intended state commissions to enforce any such obligation. The *TRO* provides that restricting commingling would be inconsistent with the nondiscrimination requirement in Section 251(c)(3). ¶ 581. State commissions enforce Section 251(c)(3). The *TRO* also states that incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are connected, combined or otherwise attached to wholesale services. State commissions have jurisdiction to consider the unlawful denial of UNEs.

Regardless of any determination of state commission authority under Section 271, it appears that the FCC did intend for the states to require ILECs to permit commingling between UNEs and wholesale services. The question then is whether the FCC intended to include Section 271 requirements within wholesale services. The *TRO* requires ILECs "to 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." ¶ 579. Section 271 elements obtained at wholesale would fit within this description.

The ambiguity exists over whether the FCC intended for the wholesale facilities or services in question to include Section 271 elements. In describing the types of services for which commingling with Section 251 elements is required, the *TRO* offers by way of example "switched and special access services offered pursuant to tariff." *TRO* ¶ 579. This language differs meaningfully from the FCC's treatment of commingling in the *Supplemental Order Clarification* (rel. June 2, 2000). In its *SOC*, the FCC modified the term "commingling" with the following parenthetical "(i.e. combining loops or loop-transport combinations with tariffed special access services)." SOC, ¶ 28. In the *TRO*, issued three years later, the FCC eliminated the restrictions it placed on commingling in the *SOC*, and apparently adjusted its definition of commingling. Tariffed special access services went from being the only services at issue to an example of the services that could be at issue in commingling.

BellSouth maintains, however, that the clear intent of the FCC was not to include Section 271 elements within the commingling requirement. It cites as evidence of this intent the TRO

Errata which deleted the phrase "including any network elements unbundled pursuant to section 271" from paragraph 584 of the *TRO*. CompSouth points out that even without this phrase, the sentence, which requires commingling for wholesale facilities and services, would still apply to Section 271 elements. CompSouth also states that BellSouth should not ignore the other step that the FCC took in the *TRO Errata*, which was to delete a sentence from a footnote that expressly declined to apply the commingling rule to Section 271 checklist items.

In sum, the *TRO* included two statements that shed light on whether Section 271 elements were to be included as part of commingling, and these two statements were directly contradictory to each other. Deletion of either one of the statements would have eliminated any doubt from the requirement. The FCC deleted both statements.

While the focus of the unbundling rules appears to be on special access services, the plain language of the *TRO* would include Section 271 elements provided they were obtained at wholesale. It is unlikely that this result was oversight by the FCC given that the two previously discussed statements expressly mention Section 271, and then were both deleted. BellSouth did not offer any plausible explanation for why the FCC would have deleted the sentence from footnote 1990 that expressly excluded Section 271 elements from the commingling requirement if that was precisely what the FCC wished to do. Granted, it would have been clearer had the FCC not also deleted the phrase from paragraph 584 that specifically included Section 271 elements within the commingling requirement. However, while the specific inclusion was deleted, the general inclusion remains. That is, the sentence as modified still applies the commingling obligation to Section 271 elements obtained at wholesale. The *TRO Errata* removed a redundancy in paragraph 584, but it does not alter the plain meaning of the sentence. In contrast, the meaning of footnote 1990 does change as a result of the *TRO Errata.*

BellSouth also relies on paragraph 229 of the *TRRO,* which states in relevant part that the FCC "determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LECs seeking to convert such services satisfies any applicable eligibility criteria." (*TRRO,* ¶ 229). This language purports neither to modify the plain meaning of the *TRO*, nor to clarify that the commingling obligation in the *TRO* applied exclusively to tariffed services. It cannot be disputed that the *TRO* requires ILECs to commingle Section 251 elements with other wholesale facilities and services. It is also the case that while the FCC used special access services as an example of a wholesale facility or service in the *TRO* it did not exclude other wholesale facilities or services. Finally, it is not disputed that Section 271 elements may be obtained at wholesale. So in the *TRO,* Section 271 elements were included as part of the commingling obligation. Had the FCC in the *TRRO* wished to exclude Section 271 elements from commingling or to clarify that the *TRO* excluded Section 271 elements from the commingling obligation, then it is reasonable to assume it would have stated that it was doing so. It did not make any such statement. Rather, it stated only that the *TRO* allowed CLECs to convert tariffed services to UNEs and UNE combinations, and that this decision was upheld on appeal. (*TRRO,* ¶ 229). Given that the plain language of the *TRO* applies to any facilities or services obtained at wholesale, and that the *TRRO* neither modifies nor clarifies the *TRO* on this issue, BellSouth's reliance on this paragraph is unavailing.

The Commission's interpretation of the *TRO* comports with the 47 C.F.R. § 51.5, which defines commingling as "the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services."

In conclusion, the Commission finds that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. This action should not be construed as recreating UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that the Commission has concluded that it is prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P.

Issue 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?

Positions of the Parties

BellSouth

A.

BellSouth will make the necessary conversions once the language is incorporated into the interconnection agreements. (BellSouth Brief, pp. 82-83).

B.

The applicable rates for single element conversions in Georgia should be $25.06 for single element conversions and $26.55 for projects consisting of 15 or more loops submitted on a spreadsheet. *Id.* at 83. The Commission-ordered rate of $5.70 should apply for EEL conversions, until new rates are issued. *Id.* If physical changes to the circuit are required, the activity should not be considered a conversion and the full nonrecurring and installation charges should apply. *Id.*

C.

CompSouth did not file any testimony on this issue; therefore BellSouth's position should be adopted. *Id.*

CompSouth

A.

The *TRO* requires that ILECs provide procedures to convert various wholesale services, including special access service, to the equivalent UNE or combination of network elements.

(CompSouth Brief, p. 78). The FCC said that "wasteful and unnecessary" ILEC charges would deter economically efficient conversions. *Id.* at 79, quoting *TRO* ¶ 587. The FCC found that "termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time" may not applied to conversions. (*TRO* ¶ 587). Such charges would violate Section 202 of the Communications Act. *Id.*

B.

The Commission has approved a TELRIC rate of $5.70 for switch-as-is conversions of the loop-transport combination known as an EEL. (CompSouth Brief, p. 80). This rate compensates BellSouth for its costs. *Id.* BellSouth proposes new rates for conversions but did not adequately explain the dramatic increase over TELRIC. *Id.* BellSouth did not file the purported cost study that would justify the increase in this proceeding for review by the Commission. *Id.* The increased rate is BellSouth's attempt to circumvent the FCC's requirements to "switch-as-is." *Id.* at 81.

Discussion

The parties do not appear to differ that ILECs must allow CLECs that meet the eligibility requirements to convert the wholesale service used to serve a customer to UNEs or UNE combinations. This requirement is set forth in paragraph 586 of the *TRO*. The FCC declined to establish procedures and stated that parties are bound by good faith.

On the issue of cost, BellSouth proposes a dramatic increase to the Commission's approved TELRIC rate for EEL conversions. According to the testimony of Ms. Tipton, this increase results from a cost study it recently performed. (Tr. 719). This cost study was not provided as part of this proceeding. The Commission finds, therefore, that it shall not afford it any weight. The rate also appears to include a penalty to CLECs that do not work with BellSouth on the schedule preferred by BellSouth. This penalty would involve BellSouth recovering for costs that it does not actually incur. In fact, BellSouth's witness testified that "It isn't a matter, in our minds, of cost recovery at that point." (Tr. 721).

The Commission will remand this issue to a Hearing Officer or to itself for evidence on the issue of the appropriate conversion rate. In the interim, the Commission orders a rate of TELRIC rate plus fifteen percent based on the Commission's determination of TELRIC.

Issue 16 – Pending Conversion Requests: -- 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?

Positions of the Parties

BellSouth

A.

There is no retroactivity; the effective date is the date the agreements were amended. (BellSouth Brief, p. 83). The *TRO* does not contemplate retroactivity. (*TRO* ¶ 588). Moreover,

that CLECs have not agreed to amended contract language shows that the issue is not vital to them.

B.

The Massachusetts Commission found that the rights were not retroactive.

CompSouth

A.

Once conversion language reflecting the *TRO* is included in an interconnection agreement, parties should treat conversions pending as of the effective date of the *TRO*. (CompSouth Brief, p. 81). The FCC stated that it declined to require retroactive billing to any time before its effective date. The FCC went on to state that "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." (*TRO*, ¶ 589).

Discussion

Paragraph 589 of the *TRO* provides as follows:

> As a final matter, we 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. 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.

In the above paragraph, the FCC distinguishes between the time prior to the effective date of the *TRO* and the time after the effective date of the *TRO*. The FCC is clear that it will not require retroactive billing prior to the effective date of the *TRO*, but that "up to the effective date" ILECs would be required to offer the appropriate pricing for orders that were pending at the time of the *TRO*. So a CLEC that submitted an order for conversion prior to the effective date of the *TRO*, that was still pending as of that date was entitled to "the appropriate pricing."

In the preceding paragraphs of the section on conversions, the FCC breaks down the situations in which an ILEC may convert UNE or UNE combinations to the equivalent wholesale service and a CLEC may do the reverse. (*TRO* ¶ 586). In addition, the FCC concludes that it is not fair to permit CLECs to supersede existing contracts through a conversion request; however, ILECs should not be entitled to assess on legitimate conversion requests wasteful and unnecessary fees associated with establishing initial service. *Id.* at 587. The "appropriate pricing" referenced in paragraph 589 appears to reference this discussion. That is, if a CLEC submitted a legitimate request to convert a wholesale service to a UNE or UNE combination and that request was pending as of the effective date of the *TRO*, paragraph 589 indicates that the CLEC is entitled to the UNE or UNE combination rate as of the *TRO*'s effective date. However, any request that sought to supersede an existing contractual arrangement would not be a legitimate request.

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

Positions of the Parties

BellSouth

A.

BellSouth cites to paragraphs 199 and 260-62 of the *TRO* for the proposition that it does not have any obligation to provide new line sharing arrangements after October 1, 2004. (BellSouth Brief, p. 45).

B.

BellSouth argues that Section 271 does not require, and in fact, does not even mention line sharing. (BellSouth Brief, p. 49). Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services." BellSouth's position is that the high frequency portion of the line ("HFPL") is only part of the loop, and that BellSouth is only obligated to provide the entire loop. (BellSouth Brief, p. 46). 47 CFR 51.319(a) defines the local loop network element as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises. *Id.* at 45. BellSouth argues that it meets its checklist item 4 obligation by offering access to complete loops. *Id.* at 49

C.

CompSouth did not provide testimony in support of its proposed contract language on this issue. *Id.* at 47.

D.

BellSouth charges that CompSouth's position would render the FCC's transitional scheme irrelevant because it would allow CLECs to receive line sharing indefinitely under Section 271 and at rates other than the ones the FCC established as part of the transition plan. *Id.* It would also undermine the *TRO's* plan for CLECs to access facilities that do not have the same anti-competitive effects as line-sharing. *Id.* at 47-48.

E.

BellSouth again asserts that states have no authority to require ILECs to include 271 elements in an interconnection agreement. *Id.* at 47.

F.

BellSouth next discusses the FCC's order in response to its forbearance petition.[3] BellSouth asserted that its petition requested forbearance from any stand-alone unbundling obligations on broadband elements. *Id.* at 50. This requested relief would encompass line sharing. *Id.* at 51. Paragraph 34 of the FCC's *Broadband 271 Forbearance Order* includes the following passage:

> The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.

Because its forbearance petition was granted, BellSouth argues that it is not required to provide line sharing even if otherwise required by Section 271.

G.

BellSouth cites to state commission decisions in Tennessee, Massachusetts, Michigan, Rhode Island and Illinois that support its position. *Id.* at 54. BellSouth also references state commissions that have reached different conclusions, but argues that to the extent those other decisions were based on state tariffs, they are distinguishable. *Id.* at fn 105.

CompSouth

A.

CompSouth refers to decisions of the Maine, Pennsylvania and Louisiana commissions that have held that line sharing falls under checklist item 4, and that BOCs that are subject to Section 271 must provide access to it. (CompSouth Brief, p. 83).

B.

In addition, numerous FCC Orders granting Section 271 access to BOCs discuss line sharing as a component of checklist item 4. *Id.* at 84. Even BellSouth included line sharing as a checklist item 4 element at one point. *Id.* If it was necessary to provide an element in order to satisfy the checklist item, then the element is included in the checklist item. *Id.* at 85.

C.

CompSouth addresses the conflicting comments of the FCC commissioners after the issuance of the *Broadband 271 Forbearance Order.* Regardless of their disagreement over the scope of the *Broadband 271 Forbearance Order*, it is clear that each commissioner viewed line sharing to be included as part of checklist item 4. (CompSouth Brief, p. 87). Addressing the scope of the *Broadband 271 Forbearance Order,* CompSouth asserts that it did not apply to line sharing because BellSouth did not request forbearance from line sharing. *Id* The FCC order identifies FTTH loops, FTTC loops, the packetized functionality of hybrid loops and packet

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[3] *Memorandum Opinion and Order,* WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 (*"Broadband 271 Forbearance Order").*

switching as the broadband elements for which it is granting forbearance. *Id.* at 88. An FCC order issued subsequent to the Powell's statement that line sharing was not addressed again listed the same items mentioned above. Therefore, the FCC excluded line sharing from the list of broadband elements. The FCC issued a subsequent order that similarly did not address forbearance for line sharing.[4]

Discussion

The Commission asserted jurisdiction to set just and reasonable rates under Section 271. This issue is not asking about the state commission's authority, but rather whether BellSouth has an obligation under the Federal Act to provide line sharing. The Commission finds that its role in construing Section 271 is consultative and that the FCC possesses ultimate adjudicative authority. Given that condition, the Commission concludes that BellSouth is obligated under Section 271 to provide line sharing.

As pointed out by CompSouth, both the FCC and BellSouth have in the past referred to line sharing as part of checklist item 4 compliance. The FCC has not taken any action to remove this component from checklist item 4. With regards to BellSouth's Petition for Forbearance, it is ambiguous as to whether the FCC construed BellSouth's Petition to include line sharing. Individual FCC commissioners have issued separate conflicting statements on this question, although the statement of the Chairman at the time supports the position that the FCC did not grant BellSouth forbearance with respect to line sharing. On November 5, 2004, subsequent to the conflicting statements of FCC Commissioners, the FCC issued its SBC Order in which it granted 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." The FCC then stated that "SBC's petition remains pending to the extent that it requests forbearance from the requirements of section 271(c)(2)(B) with respect to other network elements." By not listing line sharing in the order and by stating that it would address other network elements separately, it can be argued that the FCC did not intend to include line sharing among the obligations from which it was granting forbearance. At the very least, this subsequent order did not support the position that BellSouth is excused from its obligation to provide line sharing under Section 271.

Given the ambiguity, the Commission will maintain the status quo by requiring BellSouth to provide line sharing until the FCC clarifies that it does not have this responsibility.

Issue 18: TRO – Line Sharing – Transition: If the answer to the foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

[4] See, *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, Order, (Rel. November 5, 2004) ("SBC Order").

Positions of the Parties

BellSouth

A.

Those CLECs with line sharing customers must amend their interconnection agreements in accordance with the transition plan set out in paragraph 265 of the *TRO*.

CompSouth

CompSouth agrees with the transitional language should the Commission determine that BellSouth does not have a line sharing obligation.

Discussion

Given the Commission action on Issue 17, this issue is not applicable.

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

Positions of the Parties

BellSouth

A.

Line splitting occurs when one CLEC provides narrowband voice service over the low frequency portion of a loop and a second CLEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter. No CLEC provided testimony on line splitting so CompSouth's proposal should not be adopted.

B.

The Commission should not adopt CompSouth's proposal because it would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271. (BellSouth Brief, p. 89). This issue is covered in the context of Issue 14.

C.

BellSouth should not be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L because splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by using the integrated splitter built into all ADSL platforms. *Id* at 90.

D.

The parties dispute what OSS modifications are necessary. BellSouth sponsored expert testimony that CLECs do not need anything from BellSouth to facilitate line splitting. (Joint Exhibit 2, at 94).

CompSouth

A.

The first question under this issue is whether line splitting can involve the commingling of Section 251 and 271 elements. This issue is the same as was addressed in Issue 14.

B.

The second issue is 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. CompSouth agrees that a CLEC should indemnify and defend BellSouth against claims against BellSouth. (CompSouth Brief, p. 91). However, CompSouth argues that the language to be included in the interconnection agreement should refer to specific claims, and not entire actions. *Id.*

C.

The third issue is whether BellSouth must upgrade its OSS to facilitate line splitting. BellSouth has electronic ordering for its Fast Access plan. (Tr. 376). The only electronic ordering scenarios available to CLECs right now involve adding line splitting or data to an existing UNE-P account. (Tr. 377). Because UNE-P is going away as of March 11, 2006, these scenarios will not be of use to CLECs after that point. (Tr. 377-78). The difference in manual orders and electronic orders is about $19 ("in excess of $22 vs. $3.50). (Tr. 382).

D.

If BellSouth has deployed ADSL 2-plus, and was conditioning loops over 18,000 feet for itself, then it should be obligated to provide this service to CLECs at TELRIC rates. (Tr. 379). If BellSouth has not deployed ADSL 2-plus, then CLECs would pay the special construction rate for this service. (Tr. 379). So a CLEC that is innovative enough to deploy its own ADSL 2-plus has to pay the higher special construction rate for line conditioning. (Tr. 380-81).

Discussion

For the reasons set forth in the Commission's discussion of Issue 14, the Commission finds that line splitting can involve the commingling of Section 251 and Section 271 elements.

BellSouth did not brief the issue of whether the indemnification language should cover the entire action or be limited to specific claims. CompSouth's position appears reasonable. The Commission concludes that CLECs should indemnify and defend BellSouth against claims made against BellSouth, but that the indemnification language should relate to specific claims.

The Commission remands this issue for a hearing as to the extent of BellSouth's line splitting obligations. In Docket No. 11900-U, the parties dispute how many line splitting scenarios BellSouth must make available. At the time the Commission initially addressed line splitting, the record was not complete on the number of line splitting scenarios. A hearing to determine a fair and reasonable number of line splitting scenarios for BellSouth to provide would be beneficial to the parties, especially in light of the imminent end of the transition period.

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

Positions of the Parties

The parties do not dispute that the obligation of BellSouth to provide nondiscriminatory access to call-related databases arises out of Section 271, and not Section 251. The dispute, as it has been on a number of issues discussed in detail above, has to do with whether the Section 271 obligation must be included in a Section 251 interconnection agreement and whether state commissions have the authority to require ILECs to meet this obligation.

Discussion

The Commission asserted Section 271 jurisdiction to set just and reasonable rates. Therefore, the Commission orders that BellSouth is obligated to offer call related databases at just and reasonable rates.

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

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

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

Positions of Parties

BellSouth

A.

Covad and some other CLECs have moved for reconsideration of the FCC decision to eliminate certain unbundling requirements concerning certain types of fiber loops.

B.

BellSouth identifies a minor difference between the parties relating to the deletion by CompSouth of BellSouth's proposed language that states that it is not obligated to ensure that non-retired copper loops in FTTH/FTTC overbuild areas are capable of transmitting signals prior to receiving a request for access to such loops by a CLEC. (BellSouth Brief, p. 91).

C.

The major difference between the parties relates to the extent of fiber unbundling. CompSouth erroneously claims its limitation is supported by the FCC's use of terms "mass market." (BellSouth Brief, p. 92). With regard to fiber, the FCC provided that there was no impairment on FTTH, except in overbuild situations where the ILEC elects to retire existing copper loops. (*TRO*, ¶273). In that situation, the unbundling requirement only applies for narrowband. *Id.*

The FCC did not use the term "mass market" in explaining the scope of its fiber relief. The FCC stated that the obligations and limitations for such loops do not vary based on the customer to be served. *Id.* at ¶ 210. In its *MDU Reconsideration Order*[5], the FCC determined that fiber loops that serve MDUs that are predominantly residential are governed by the FTTH rules. (¶ 7).

In its *FTTC Reconsideration Order*,[6] the FCC found that the FTTC Loop is a transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises. (¶ 10). The FCC also stated that "requesting carriers are not impaired in Greenfield areas and face only limited impairment without access to FTTC loops where FTTC loops replace pre-existing loops." *Id.* at 11. CompSouth would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. (BellSouth Brief, p. 94).

BellSouth also cites to other state commissions, including Michigan and Massachusetts, that have found in the ILEC's favor on this issue and rejected limitations for the definition of FTTH, FTTC and hybrid loops. *Id.* at 94-95.

D.
Hybrid loops

BellSouth should not be required to provide access to hybrid loops as a Section 271 obligation. *Id.* at 96.

CompSouth

A.

The FCC distinguishes between "mass market" and "enterprise" loops. For instance, paragraph 209 of the *TRO* states as follows:

> Loops, such as analog loops, DS0 loops or loops using xDSL based technologies are generally provided to small business customers and will be addressed as part of mass market analysis. While high capacity loops

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[5] *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) (*MDU Reconsideration Order")*

[6] *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-248 (*"FTTC Reconsideration Order")*

> (DS1, DS3, OCn capacity) are generally provisioned to larger customers and will be addressed as part of enterprise market analysis.

The FCC did not limit what the customer could order, but rather was conducting the analysis for purposes of impairment. (CompSouth Brief, p. 91).

CompSouth supported its position with numerous references in the *TRO* and *FTTC Order* in which the FCC did not require unbundling for mass market customers. 47 CFR § 51.319(a)(4) also distinguishes between enterprise and mass market loops.

B.

With regard to fiber/copper hybrid loops, the only limitation on BellSouth's unbundling obligation is that BellSouth need not provide access to the packet-based capability in the loop. (*TRO*, ¶288). CompSouth argues that this limitation should not affect CLECs' ability to obtain access to DS1 and DS3 loops because the FCC made clear that BellSouth must 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 customer – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs. (*TRO*, ¶294).

C.

CompSouth next criticizes BellSouth for relying on the summaries of orders, instead of the text of the orders. (CompSouth Brief, p. 101). That the summaries did not include the distinction between market and enterprise is a result of it being a summary and should not override the text of the orders. *Id.* In the *Broadband Forbearance Order*, the FCC summarized its *TRO* loop impairment findings and stated that "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. ¶5, n. 23. The FCC's pleading in the D.C. Circuit Court of Appeals also explained that the *TRO* and the rules coming out of them "make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices." CompSouth Ex. 1. When a CLEC requests a DS1 loop, by definition it is seeking to serve an enterprise customer.

Discussion

Issue 23:

a) The appropriate definition of MPOE is the FCC's definition. The MPOE is "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. 68.105(b).

b) Based on the following language from the *Broadband Forbearance Order,* the Commission concludes that BellSouth is under no obligation to provide access to greenfield Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops.

> [In the TRO] The [FCC] distinguished new fiber networks used to provide broadband services for the purposes of its unbundling analysis. Specifically, the [FCC] determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including FTTH loops in greenfield situations.... (*Broadband Forbearance Order*, ¶ 6).
>
> In the subsequent Triennial Review FTTC Reconsideration Order, the Commission found that the FTTH analysis applied to FTTC loops, as well, and granted the same unbundling relief to FTTC as applied to FTTH. *Id* (footnote omitted).

Issue 24

The FCC's rules are clear on this issue:

> When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (*where impairment has been found to exist*) on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop. 47 C.F.R. 51.319(a)(2)(ii) *(emphasis added)*

BellSouth's language tracks the FCC's rules and should be adopted.

Issue 28

The parties debated the meaning of paragraph 210 of the *TRO.* The Commission construes this paragraph to mean that while the FCC considered the customers served by a particular loop type for purposes of its impairment analysis, its conclusions on impairment track the loop and not the customer served.

Fiber to the Home ("FTTH") is, by definition, fiber facilities extending to a residence. Because FTTH is an extension of Fiber to the Curb ("FTTC"), it follows that FTTC must also describe facilities to a residence. The FCC's rules on FTTH and FTTC provide for one exception to the foregoing definition. That exception is that primarily residential multiple dwelling units ("MDUs") should be treated consistent with traditional residences. Therefore, FTTH/ FTTC could in fact describe fiber facilities to a business, but only if that business is located in a primarily residential MDU.

In overbuild deployments, the requirement that incumbent LECs provide capacity to competitive LECs, regardless of whether the copper facilities have been retired, applies only to narrowband facilities. *See* 47 C.F.R. 51.319(a)(3)(iii) BellSouth proposes the following language:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval.

The Commission finds that BellSouth's proposal is consistent with the federal rule for the most part and adopts BellSouth's language with one modification. Because the third sentence of BellSouth's language would exclude orders for legacy copper from the SQM/ SEEM plan, the Commission modifies that sentence to require these orders to remain in the SQM/ SEEM plan until the Commission determines the appropriate interval for provisioning such an order. BellSouth may petition the Commission to modify the interval. Therefore, the Commission orders the following language:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will apply.

Finally, CompSouth appears to argue that the FTTH/ FTTC rules do not apply in central offices in which the FCC found that competitive LECs were impaired without access to DS1s and DS3s. However, the FCC rules on FTTC/ FTTH make no mention of any exclusion based on impairment analysis. Presumably, the FCC did not anticipate that competitive LECs would seek to provide high-capacity services to residential customers. The Commission finds that the FCC's FTTH/ FTTC rules apply to all central offices.

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

Positions of the Parties

BellSouth

A.

Routine Network Modifications (RNMs) are "those activities that incumbent LECs regularly undertake for their own customers." (*TRO*, ¶ 632). ILECs are not obligated to alter substantially its network to provide superior quality interconnection. (*TRO*, at ¶ 630 quoting Iowa Util. Bd. 120 F.3d. 753 (1997)).

B.

Line conditioning is an RNM. (*TRO*, ¶ 643). Therefore, BellSouth's only obligation is to provide line conditioning at parity. *Id.* Paragraph 250 of the *TRO* states that "line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service."

C.

The Florida Public Service Commission did not obligate BellSouth to remove at TELRIC rates load coils on loops greater than 18,000 feet. (BellSouth Brief, pp. 98-99). The Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access. *Id.* at 99.

CompSouth

A.

BellSouth is wrong to "submerge the FCC's pre-existing rules on line conditioning into the rules adopted in the TRO regarding routine network modifications." (CompSouth Brief, p. 106). In its *Local Competition Order,*[7] the FCC established ILECs must modify their facilities to accommodate CLEC access to UNEs. (¶ 209). In the *UNE Remand Order*, the FCC adopted line conditioning rules, which stated that ILECs are required 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." 51.319(a)(1)(iii).

In the *TRO,* the FCC (1) re-adopted the line conditioning rules, (2) identified the concept of "routine network modification" for the first time, (3) treated line conditioning and RNMs in different sections and (4) included language that "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." (¶ 643).

This dispute has important policy implications because there are emerging DSL technologies, and CLECs need to be able to respond with innovative offers. BellSouth's position is a roadblock. (CompSouth Brief, pp. 109-10).

B.

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[7] *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 (1996) ("*Local Competition Order*").

BellSouth struck language from the CLECs proposal that was taken directly from the FCC's rule on RNMs. *Id.* at 110-11).

Discussion

The Commission finds that BellSouth is obligated to perform line conditioning in instances in which BellSouth is not providing advanced services to the customers in question. The FCC notes that in the context of the *UNE Remand Order* it concluded that the Eighth Circuit holding stating that an ILEC is not required to construct a network of "superior quality" did not overturn the FCC's rules requiring an ILEC to condition loops regardless of whether it was providing advanced services to those customers. (TRO, fn 1947). The FCC notes that in the *UNE Remand Order* it found that line conditioning enabled the requesting carrier to use the basic loop. (TRO fn 1947, quoting UNE Remand Order, ¶ 173).

The FCC promulgated line conditioning rules provide, in part, as follows:

> The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop.

47 C.F.R. § 319(a)(1)(iii).

The FCC states in the *TRO* that it is re-adopting its line conditioning rules set forth in the UNE Remand Order. (¶ 642).

The language relied upon by BellSouth states that line conditioning does not constitute the creation of a superior network, but rather, should be "seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (*TRO*, ¶ 643). Read in the context of the remainder of the section on line conditioning and the pertinent FCC's rules, this paragraph cannot mean that ILECs are not required to provide line conditioning unless it provides advanced services to the end-user customers. Such a reading would flatly conflict with the remainder of the line conditioning section and 47 C.F.R. § 319(a)(1)(iii). The more consistent reading of the language at issue is that the FCC was explaining why the requirement expressly set forth in its rules does not conflict with the Eighth Circuit holding on the creation of a superior network. At the bottom of paragraph 643, the FCC notes that "Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices." This explanation is properly viewed as an expansion on the policy behind the excerpt from the *UNE Remand Order* set forth in footnote 1947 of the *TRO* that line conditioning enables use of the basic loop. The FCC did not backtrack on the requirement set forth in its earlier orders. Instead, it rebutted once again the claim that the requirement runs afoul of the Eighth Circuit holding.

The FCC emphasizes that ILECs must provide line conditioning to CLECs on a nondiscriminatory basis. (*TRO*, ¶ 643). The FCC states that line conditioning is seen as a routine network modification that an ILEC regularly performs to provide advanced services to its own customers and does not constitute the creation of a superior network. *Id.* Given this direction, the Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

As to the second issue, the Commission directs BellSouth to permit inclusion of the CompSouth proposed language on RNMs that mirrors the FCC rule.

Issue 27 – 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 Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

Positions of the Parties

BellSouth

If BellSouth is not obligated to perform an RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC. The appropriate rate is a commercial or tariffed rate. (BellSouth Brief, p. 99).

CompSouth

A.

BellSouth should not be allowed to impose individual case basis pricing for routine modifications. The rate should be cost-based. (CompSouth Brief, p. 111).

B.

Recovery should be allowed if its RNM costs are not recovered in loop rates. BellSouth should not be able to double recover its costs. *Id.* at 112).

Discussion

In its Line Conditioning Order, the FCC applied ILECs' line conditioning obligation to loops of any length. 14 FCC Rcd 20912, 20951-53, ¶¶ 81-87. BellSouth's position that a commercial rate is appropriate for removing load coils or bridged tap on loops that exceed 18,000 feet was premised on its argument that it is not obligated to perform these functions on such loops. Based on the FCC's Line Conditioning Order, and the reference to such order in the *TRO*, the Commission reaches a different conclusion. Because the Commission has found that BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be

TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

The Commission also agrees with CompSouth that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

Issue 29 – Enhanced Extended Link ("EEL") Audits: -- What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

Position of the Parties

BellSouth

A.

BellSouth proposed language that would enable it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria. BellSouth should not be required to show cause prior to the commencement of an audit. (BellSouth Brief, p. 85). It argues that the requirement is both unnecessary because it is paying for the audit and is used as a delay tactic. *Id.*

B.

BellSouth should not be required to incorporate a list of acceptable auditors in interconnection agreements or only use an auditor the other party agrees to use. *Id.*

C.

If the auditor determines that a CLEC's noncompliance is material in one area, then the CLEC should be responsible for the cost of the audit. *Id.*

CompSouth

A.

BellSouth's audit rights are limited. The cause requirement is set forth in paragraph 622 of the *TRO*. (CompSouth Brief, p. 113). This requirement could make the process run smoother because if BellSouth identifies circuits, then the internal review conducted by the CLEC may obviate the need for an audit. *Id.* In addition, the identification of circuits would make relevant documentation available earlier in the process. *Id.*

B.

CompSouth's proposal for a mutual agreement process would resolve problems on the front end and is consistent with the way PIU/PLU audits are performed. *Id.* at 115. The CLECs are not willing to agree to a "pre-approved" list of entities. (CompSouth Brief, p. 114).

C.

CLECs should only have to pay for the costs of the audit concerning those audits where material. *Id.* at 116.

D.

CompSouth also argues that a notice requirement makes practical sense. While the FCC didn't require it, state commissions may because the FCC noted that the states were in a better position to provide for implementation. (*TRO*,¶ 625).

Discussion

The *TRO* provides as follows:

> Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order Clarification, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable.

(*Triennial Review Order*, ¶ 622).

It is consistent with the *TRO* to include a requirement that BellSouth have some cause prior to initiating an audit.

The *TRO* requires that the audit be conducted by an independent auditor in accordance with the standards established by the AICPA. (*TRO*, ¶ 626). It does not require that a CLEC agree to the specific auditor. An objection to an auditor that is unrelated to the standard of independence should not suffice to reject the auditor. If the CLEC has an objection that the auditor does not meet the legal standard, then it may raise that objection with the Commission. CompSouth's argument that it is more efficient to resolve any issues with regard to the auditor on the front end is not persuasive. CLECs would be able to delay the process if agreement was required.

The Commission also finds that that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. The *TRO* states that "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." (*TRO*, ¶ 627). The *TRO* does not support CompSouth's position that CLECs should only have to compensate BellSouth related to those circuits for which material non-compliance was found. It states that ILECs are entitled to be reimbursed for the cost of the audit; it does not reference any sub-part of the audit. This conclusion is strengthened by the very next paragraph of the *TRO*, in which the FCC includes the reciprocal position regarding the ILECs compensating the CLECs for their costs in the event the auditor found compliance in "all" material respects. The question then in determining which party has to pay for the other's costs is whether the CLEC complied in "all material respects." And the reimbursement, regardless of who pays who, relates to the audit as a whole. That a CLEC may have complied in numerous material respects does not answer the question of whether it complied in all material respects. If it did not do so, according to the *TRO*, it must compensate the ILEC for the costs of the audit.

Issue 31 – Core Forbearance Order: -- What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?

Positions of the Parties

BellSouth

The order should be incorporated on a case by case basis because BellSouth has entered into specific carrier settlements implementing the Core Order. (BellSouth Brief, p. 86). ITC^DeltaCom's proposed language would not address all scenarios encountered in the implementation of the Core Order. *Id.* at 86-87.

CompSouth

A.

The *2004 ISP Remand Core Forbearance Order* removed certain restrictions on CLEC's right to receive reciprocal compensation. The Commission should order that interconnection agreements should be amended to remove "new markets" and "growth caps" restrictions in BellSouth ICA reciprocal compensation provisions. (CompSouth Brief, p. 117). CompSouth argues that such a result would not upset the contractual differences between CLECs. *Id.*

B.

BellSouth's position is hypocritical because when a change is to its benefit, it always wants the implementation completed as promptly as possible. *Id.*

Discussion

The Commission concludes that agreements be amended to remove "new markets" and "growth caps" restrictions in BellSouth's ICA reciprocal compensation provisions. BellSouth has not explained how the distinctions between carrier contracts would render such direction problematic.

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

Positions of Parties

BellSouth

BellSouth argues that the Commission should make clear that the order in this case is binding upon all CLECs, including those who chose not to participate in this docket. (BellSouth Brief, p.80). It is important that the deadlines not be extended beyond March 10, 2006. *Id.* The Commission should give the parties no more than 45 days from the date of the Commission order to execute complaint amendments. *Id.*

CompSouth

A.

CompSouth did not take a position on whether the order should bind non-parties.

B.

The order should not upend existing agreements that address how such changes of law should be incorporated into existing and new section 252 interconnection agreements. (CompSouth Brief, p. 118).

C.

The Commission should not approve language on issues that were not within the scope of this proceeding. *Id.* at 119.

Cbeyond

See comments from Issue 3.

Discussion

The Commission provided notice of the proceeding and the issues to be addressed in this proceeding to all competitive local exchange carriers. A condition of the certificate of these local exchange carriers is that they comply with orders of the Commission. A carrier may not avoid its obligations by choosing not to participate in a proceeding. The Commission clarifies that its order applies to all certified competitive local exchange carriers.

The Commission concludes that in the event that parties entered into separate agreements with BellSouth that may impact the implementation of changes of law that the parties be bound by those agreements. The Joint CLECs referenced an abeyance agreement between BellSouth and a couple of CLECs in which the parties agreed on a method of implementing *TRO* and *TRRO* changes. This issue was addressed in the context of Issue 3. The Commission also finds that it is appropriate to limit its consideration in this docket to those issues that are within the scope of the proceeding.

EXHIBIT C

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 8
DOCKET NO. P-913, SUB 5
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.	))))))	ORDER RULING ON OBJECTIONS AND REQUIRING THE FILING OF THE COMPOSITE AGREEMENT

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Robert V. Owens, Jr., and Lorinzo L. Joyner

BY THE COMMISSION. On July 26, 2005, the Commission issued its *Recommended Arbitration Order* (*RAO*) in this docket. The Commission made the following:

FINDINGS OF FACT

1. The term "End User" should be defined as "the customer of a party."

2. The industry standard limitation of liability limiting the liability of the provisioning party to a credit for the actual cost of services or functions not performed or improperly performed should apply.

3. If a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from its decision not to include the limitation of liability

4. The rights of end users should be defined pursuant to state contract law.

5. The Agreement should state that incidental, indirect, and consequential damages should be defined pursuant to state law.

6. The proposal of the Joint Petitioners (including NewSouth Communications Corp. (NewSouth), NuVox Communications, Inc. (NuVox), and Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC (Xspedius)) found in Section 10.5 of their Appendix A should be approved.

7. The parties may seek resolution of disputes arising out of the Agreement from the Commission, the Federal Communications Commission (FCC), or courts of law.

8. The Agreement should contain the language proposed by BellSouth Telecommunications, Inc. (BellSouth) as modified by the Conclusions in this issue.

9. BellSouth shall permit a requesting carrier to commingle an unbundled network element (UNE) or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that the requesting carrier has obtained at wholesale from an incumbent local exchange company (ILEC) pursuant to a method other than unbundling under Section 251(c)(3) of the Telecommunications Act of 1996 (TA96 or the Act). However, this does not include services, network elements, or other offerings made available only under Section 271 of the Act.

10 The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51 319(a)(1)(iii)(A) BellSouth should perform line conditioning in accordance with FCC Rule 51 319(a)(1)(iii).

11. The line conditioning activity of load coil removal on copper loops should not be limited to copper loops with only a length of 18,000 feet or less.

12. Any copper loop ordered by a competing local provider (CLP) with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission.

13. Thirty to forty-five days advance notice of an audit provides a CLP with an adequate time to prepare. In its Notice of Audit BellSouth shall state its concern that the requesting CLP has not met the qualification criteria and set out a concise statement of its reasons therefore. BellSouth may select the independent auditor without the prior approval of the CLP or the Commission. Challenges to the independence of the auditor may be filed with the Commission after the audit has been concluded. BellSouth is not required to provide documentation to support its basis for an audit, as distinct from a statement of concern, or seek concurrence of the requesting carrier before selecting the audit's location.

14. BellSouth should not be permitted to charge a Tandem Intermediary Charge (TIC) when providing a tandem transit function for CLPs.

15. The Joint Petitioners' proposed language concerning how disputes over alleged unauthorized access to customer service record (CSR) information should be handled under the Agreement is reasonable and appropriate. Accordingly, the

Commission adopts the Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement.

16. BellSouth must provide service expedites at total element long-run incremental cost (TELRIC)-compliant rates. BellSouth and the Joint Petitioners are instructed to negotiate in good faith an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

17. The payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission requires the Joint Petitioners and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Section 1 4, in accordance with this decision.

18. It is appropriate to adopt the Joint Petitioners' proposed language concerning suspension or termination notices for Section 1.7 2 of Attachment 7 of the Agreement.

19. The deposit requirements specified in Commission Rule R12-4 are applicable and the language proposed by BellSouth should be incorporated into the Agreement.

20. The Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

21. The language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 is appropriate.

22. The language proposed by the Joint Petitioners on the need for or amount of a deposit to be included in Section 1.8.7 of the Agreement is appropriate.

On September 1, 2005, BellSouth and the Joint Petitioners each separately filed their Objections to the *RAO*. The following chart indicates the issues for which a Motion for Reconsideration has been filed:

Finding of Fact No.	**Party filing Motion for Reconsideration/Clarification**
2	Joint Petitioners
3	Joint Petitioners
4 and 5	Joint Petitioners
6	BellSouth
8	Joint Petitioners
9	Joint Petitioners
10, 11, and 12	BellSouth

Finding of Fact No.	Party filing Motion for Reconsideration/Clarification
13	Joint Petitioners
14	BellSouth
15	BellSouth
16	BellSouth
17	BellSouth
18	BellSouth
19	Joint Petitioners
20	Joint Petitioners
21	Joint Petitioners

On September 8, 2005, the Commission issued an *Order* requesting comments and reply comments on the Objections filed concerning the *RAO*. On September 26, 2005, the Joint Petitioners filed a Motion for Extension of Time to File Initial Comments and to Consolidate Comment Cycle. On September 27, 2005, BellSouth filed a Response to the Motion. By Order and Errata Order dated September 28, 2005, the Commission retained the comment and reply comment cycles, but extended the due dates to October 14, 2005, and October 26, 2005, respectively.

Initial comments were filed on October 14, 2005 by BellSouth, the Joint Petitioners, and the Public Staff.

Reply comments were filed on October 26, 2005 by BellSouth, the Joint Petitioners, and the Public Staff.

On December 14, 2005, BellSouth filed a copy of the Recommendation of the Arbitration Panel to the Mississippi Public Service Commission (PSC) in its Joint CLP Arbitration as supplemental authority in this docket.

On January 11, 2006, BellSouth filed a copy of an Ohio PSC Order as additional supplemental authority in support of its comments.

On January 13, 2006, BellSouth filed a copy of an Indiana PSC Order as additional supplemental authority in support of its comments.

Following is a discussion, by Finding of Fact, of the outstanding Objections to the *RAO*. Appendix A provides a list of the acronyms used in this Order.

FINDING OF FACT NO. 2 (ISSUE NO. 2 – MATRIX ITEM NO. 4): What should be the limitation on each party's liability in circumstances other than gross negligence or willful misconduct?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth's language providing that liability with respect to this issue should be limited to service credits should be adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 2 because they believed that the Commission's reliance on the FCC's *Verizon Arbitration Order* was misplaced and that, contrary to the Commission's view, their proposed "Day the Claim Arise" language is not imprudent.

Regarding the former, the Joint Petitioners argued that they are not seeking the "perfect service" sought by WorldCom, Inc. (WorldCom) in the *Verizon Arbitration Order* but only a small and reasonable measure of relief. They also maintained that BellSouth treats its retail customers more favorably than its wholesale customers in liability situations. Concerning the latter, the Joint Petitioners argued that their proposal captures and implements the concept of "risk versus revenue" and is thus commercially reasonable.

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Commission's decision should be upheld. The *Verizon Arbitration Order* stands for the proposition that an ILEC's liability to a CLP should be the same as an ILEC has to its retail customers. Other state commissions have reached similar conclusions. BellSouth asserted that the Joint Petitioners can cite to no interconnection agreement containing language that is similar to what they propose. Contrary to the Joint Petitioner's assertions, BellSouth has not testified that it provides itself more favorable terms in customer contracts than it does to CLPs. BellSouth further argued that the Joint Petitioners' argument that their proposal is commercially reasonable is both repetitive and flawed. Interconnection agreements are not typical or ordinary commercial contracts and should not be construed as such. The Joint Petitioners' "Day Claim Arose" standard is one-sided and only benefits the Joint Petitioners.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners on this issue warranted a change in the Commission's decision.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners repeated that both they—and BellSouth—find it commercially reasonable to negotiate for liability in excess of bill credits. The Joint Petitioners also maintained that the use of a constant of 7.5% of the amounts paid or payable for all service provided under the Agreement on the day the claim giving rise to liability arose, not contingent on the time the liability was incurred, was fair and reasonable.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO* the Commission characterized this issue as presenting the choice between the adoption of a "cap" of 7.5% of the amounts paid or payable for all service provided under the Agreement on the day the claim giving rise to liability arose, as advocated by the Joint Petitioners, or the payment of a credit for the actual cost of services or functions unperformed or performed improperly, as advocated by BellSouth. The Commission concurred with BellSouth, which had, among other things, argued that the Joint Petitioners' proposal irrationally limited or expanded damages based on the point in time that the event occurred giving rise to the liability. The Commission noted that, while the parties may certainly negotiate a liability cap between themselves, it would be imprudent to impose a limit "related to the *timing* of the event rather than the event itself" (emphasis in original). Therefore, the Commission adopted BellSouth's proposal.

The arguments put forward by the Joint Petitioners on reconsideration are essentially repetitive of the arguments they have originally put forward and the Commission has rejected. The Commission is therefore not persuaded that Finding of Fact No. 2 should be reconsidered.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 2.

FINDING OF FACT NO. 3 (ISSUE NO. 3 – MATRIX ITEM NO. 5):

Joint Petitioners' Issue Statement: Should each party be required to include specific liability-eliminating terms in all its tariffs and end-user contracts (past, present, and future) and to the extent that a Party does not or is unable to do so, should it be obligated to indemnify the other Party?

BellSouth's Issue Statement: If the CLP elects not to place in its contracts with end users and/or tariff standard industry limitations of liability, who should bear the risks that result from this business decision?

INITIAL COMMISSION DECISION

The Commission concluded that, if a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from that decision. Accordingly, BellSouth's proposed language in the Agreement in the General Terms and Conditions, Section 104.2 was adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of the Commission's decision arguing that it hamstrings the Joint Petitioners' ability to compete, while their revised proposal is commercially reasonable

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Joint Petitioners' Motion for Reconsideration is devoid of merit and should be rejected. BellSouth stated that it was not seeking to dictate terms to the Joint Petitioners In fact, BellSouth's language is the language that has governed the Parties' relationship for several years and has never been the subject of dispute. BellSouth should not be made to suffer any financial hardship as a result of the Joint Petitioners' business decision not to limit liability. Other state commissions, such as the Florida PSC and the Kentucky PSC, support the Commission's analysis of this issue The Commission's decision does not impair the Joint Petitioners' ability to compete, and the Joint Petitioners have not shown factually how it does or might do so. The Joint Petitioners have revised their proposal to the extent of proposing language to include the words "to a commercially reasonable extent" (sic), but this does not cure the underlying problem with the Joint Petitioners' position.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners warranted a change in the Commission's decision.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners argued that BellSouth's comments provide no basis for denying the relief sought herein by the Joint Petitioners. Both BellSouth's premises for argument and factual assertions are in error. The commercial

reasonableness standard proposed by the Joint Petitioners will allow the parties to compete fairly.

PUBLIC STAFF: The Public Staff reiterated its view that it did not believe that the Joint Petitioners' objections warranted reconsideration of this issue.

DISCUSSION

In the *RAO*, the Commission identified the fundamental issue here as being whether BellSouth can require the Joint Petitioners to indemnify it if they do not limit their liability to their customers in their own tariffs and contracts. The Commission noted that BellSouth said "yes", while the Joint Petitioners said "no". The Joint Petitioners maintained that they cannot limit BellSouth's liability in third-party contracts and that BellSouth's language impairs their ability to compete. BellSouth argued that its language was not aimed at third-party contracts but at the contract between itself and the Joint Petitioners. BellSouth maintained that its language simply required the Joint Petitioners to bear the risk of their business decisions. The Public Staff, while expressing concern about the rights of consumers and about the BellSouth language allowing the parties to limit their liability to end users and third parties for losses in contract or in tort, stated that its concerns were allayed because the BellSouth language does not dictate the terms of the agreements between CLPs and customers but provides them the discretion to include such limitation of liability. The Public Staff said there was no evidence of present or prospective harm.

The Commission stated that it believed that the arguments advanced by BellSouth were the more persuasive and that, therefore, its contract language should be adopted. Upon reconsideration, the Commission finds the arguments of the Joint Petitioners to be largely repetitive of arguments that have already been made and rejected. Accordingly, the Commission believes that Finding of Fact No. 3 should not be reconsidered.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 3.

FINDINGS OF FACT NOS. 4 AND 5 (ISSUE NOS. 4 AND 5 – MATRIX ITEM NO. 6):

Joint Petitioners' Issue Statement: Should limitation or liability for indirect, incidental, or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLP's (or BellSouth's) end-users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's or CLP's performance obligations set forth in the Agreement?

BellSouth's Issue Statement: How should indirect, incidental, or consequential damages be defined for purposes of the Agreement.

INITIAL COMMISSION DECISION

The Commission concluded that the rights of end-users should be defined pursuant to state contract law. The Commission further concluded that incidental, indirect, and consequential damages should be defined pursuant to state law. Accordingly, the Commission ruled that BellSouth's proposed language for Section 104.4 should be adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of these issues. The Joint Petitioners argued that, contrary to the Commission's and BellSouth's suggestion, the language the Joint Petitioners proposed was neither unnecessary nor potentially confusing.

INITIAL COMMENTS

BELLSOUTH: BellSouth rejected the Joint Petitioners' view that the Joint Petitioners' proposed language was necessary and clear. BellSouth cited to NuVox witness Russell's testimony to the effect that the Joint Petitioners' language was to ensure that damages arising directly and proximately from "BellSouth's negligence, gross negligence or willful misconduct cannot be termed in this Agreement as incidental or consequential because we cannot contract to take away the rights of third parties." This construction has the effect of subverting the parties' agreement that no party would be liable to the other for indirect, consequential, and incidental damages. Both the Kentucky PSC and the Florida PSC, in similar arbitration proceedings, agreed with BellSouth's and this Commission's decision on these issues.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners on these issues warranted a change in the Commission's conclusions.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners maintained that their position had always been clearly stated that parties should be responsible for damages that are direct and foreseeable. The Joint Petitioners said that there had been disagreement and confusion on this issue between the parties, for which both parties are responsible; but they urged that they had set forth the reasonable premise that direct and foreseeable damages are excluded from indirect, incidental, and consequential damages.

PUBLIC STAFF: The Public Staff reiterated its view that the objections of the Joint Petitioners do not warrant changing the Commission's conclusion on this issue.

DISCUSSION

In the *RAO*, the Commission found that the language proposed by the Joint Petitioners was unnecessary and potentially confusing. The Commission noted that end users are not parties to this Agreement or arbitration, and their rights should therefore be defined, not by the Agreement, but according to state contract law. As such, the Commission believed the Joint Petitioners' proposed language to be superfluous and indirect, incidental, and consequential damages should be defined by state law.

The Commission believes that its original decision on this issue was well-founded, and the arguments put forward by the Joint Petitioners to be not particularly compelling. Indeed, in a moment of comparative candor, the Joint Petitioners admitted that they had perhaps contributed to some of the confusion surrounding this issue. The Commission concurs but is not persuaded to adopt the Joint Petitioners' language.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Findings of Fact Nos. 4 and 5.

FINDING OF FACT NO. 6 (ISSUE NO. 6 – MATRIX ITEM NO. 7): What should the indemnification obligations of the Parties be under the Agreement?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners' proposed language for Section 10.5 in the General Terms and Conditions of the Agreement should be approved.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth sought reconsideration of this issue. BellSouth argued that the Joint Petitioners' language requires BellSouth to indemnify the Joint Petitioners in virtually all circumstances while imposing essentially no indemnification obligations on the Joint Petitioners. The language the Joint Petitioners endorse imposes greater obligations than the Joint Petitioners have placed in their own tariffs where they are the providing parties. Such expansive language runs counter to the holding in the FCC's *Verizon Arbitration Order*. By contrast, the Commission rejected the Joint Petitioners' expansive view regarding the definition of applicable law. Since the standard here relates to applicable law, the Commission should take a similar narrow view on this issue. Moreover, even when read together with the Commission's ruling on Issue No. 3 (Matrix Item No. 5), the Joint Petitioners' language regarding indemnification is still at issue and objectionable. BellSouth's proposed language complies with industry standards and requires the receiving party to indemnify the providing party in only two

limited situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the receiving party's own communications, or (2) any claim, loss, or damage claimed by the "End User or customer of the party receiving services arising from such company's use or reliance on the providing party's services, actions, duties, or obligations arising under this Agreement."

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners argued that BellSouth's Motion for Reconsideration concerning this issue should be denied. The Joint Petitioners argued that the language adopted by the Commission does not violate the *Virginia Arbitration Order* or any state commission order. The clause at issue here is not a blanket indemnity provision such as that in the *Virginia Arbitration Order* but one more narrowly focused. The Joint Petitioners also denied that the Commission's decision here conflicted with its decision elsewhere – it does not redefine Applicable Law but rather includes it as defined. Moreover, consistent with their own tariffs, the Joint Petitioners do not require the receiving party to indemnify the providing party for the providing party's negligence, nor is the language cast in such a way as to benefit only the Joint Petitioners.

PUBLIC STAFF: The Public Staff did not believe that BellSouth's objections warranted a change in the Commission's conclusions on this issue

REPLY COMMENTS

BELLSOUTH: BellSouth replied that the indemnification language adopted by the Commission is unique and is contrary to industry standards. BellSouth stated that the Kentucky PSC and the Florida PSC have already rejected such language in similar proceedings before them. In contrast to the *Virginia Arbitration Order*, the language adopted here is extremely broad and one-sided.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its position that the objections of BellSouth did not warrant reconsideration of the Commission's decision.

DISCUSSION

This issue concerns the indemnification obligations of the parties. In the *RAO*, the Commission adopted the language proposed by the Joint Petitioners as follows: "The Party providing services hereunder, its Affiliates, and its parent company, shall be indemnified, defended, and held harmless by the Party receiving services hereunder against any claim for libel, slander or invasion of privacy arising from the content of the receiving party's communications. The Party receiving services hereunder, its Affiliates

and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent arising from (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the Providing Party's negligence, gross negligence or willful misconduct."

BellSouth's principal argument is that this provision unfairly opens it to potentially extremely expansive liability. However, the Commission in its Discussion in the *RAO* on this issue noted that the Conclusion in this issue must be read together with the Commission's adoption of Finding of Fact No 3. Finding of Fact No. 3 was decided favorably to BellSouth concerning limitations on liability. This decision, upheld in this Order, provides that if a party elects not to place standard industry limitations of liability in its contracts with end users or its tariffs, that party shall indemnify for any loss resulting from this decision. The Commission found that this provision "appears to remove BellSouth's objection to the Joint Petitioners' proposals. Without that objection, there appears to be no issue."

Of course, it should be anticipated that a party whose language was not adopted may continue to argue that its language should be adopted, but this does not change the fact that the adoption of BellSouth's language with reference to Finding of Fact No. 3 substantially mitigates the exposure that BellSouth might otherwise have with reference to the language adopted here. BellSouth has not offered any new, much less persuasive, arguments for the Commission to reconsider its decision The Commission, therefore, does not believe that its decision on this Finding of Fact should be changed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 6.

FINDING OF FACT NO. 8 (ISSUE NO. 8 – MATRIX ITEM NO. 12): Should the agreement explicitly state that all existing state and federal laws, rules, regulations and decisions apply unless otherwise specifically agreed to by the parties?

INITIAL COMMISSION DECISION

The Commission concluded that the BellSouth language should be adopted as modified to read: "This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right, or other requirement, not expressly memorialized herein, is applicable under this Agreement by virtue of an FCC or Commission rule or order or, with respect to Applicable Law relating to substantive Telecommunications law only, and such obligation, right or other requirement is disputed by the other Party, the Party asserting such obligation, right, or other requirement is applicable shall petition the Commission, a court of law, or the FCC for resolution of the dispute."

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration on the basis that the provision adopted by the Commission is potentially prejudicial and contrary to Georgia's contract law, inasmuch as Georgia law provides the "[s]ilence as to that law is, so to speak, no defense." According to the Joint Petitioners, the apparent obligation under the Commission's conclusion to reference all provisions incorporated appears to stand on its head the very contract law agreed to. If the Commission wishes to stand by its language, the Joint Petitioners asked to be given the opportunity to add to the document references and further requested for clarification and guidance in this regard.

INITIAL COMMENTS

BELLSOUTH: BellSouth characterized the Joint Petitioners' arguments on consisting of "rambling parentheticals and fragmented, erroneous critiques" of the Commission's conclusions BellSouth denied the Joint Petitioners' description of this issue as requiring compliance with Georgia contract law. Simply stated, BellSouth will comply with applicable law, including Georgia law, to the extent applicable. The Joint Petitioners' language creates fertile ground for mischief and, by creating ambiguity and encouraging litigation, defeats the purpose of arbitrations. The Joint Petitioners' view that the law in effect at the time of execution of the Agreement should be automatically incorporated, unless the parties agree otherwise, is simply unworkable. Here again, in similar arbitration proceedings, the Kentucky PSC and the Florida PSC agreed with BellSouth's position and the Commission's decision. As for the Joint Petitioners' request to "add to the document references," the Joint Petitioners do not indicate what such references might be and their plea for guidance only serves to illustrate how unworkable their request is.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the Commission's conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners noted that the parties have agreed to abide by Applicable Law and, to the degree they have not negotiated to the contrary, the predefined Applicable Law applies. Contrary to BellSouth's assertions, the Joint Petitioners cannot take a telecommunications rule or order that is contrary to how the parties address the issue and attempt to enforce it against BellSouth. The Joint Petitioners also argued that BellSouth's reliance on the Florida PSC and the Kentucky PSC decisions were misplaced. In both cases, the Joint Petitioners are intending or undertaking reconsideration or appeal.

PUBLIC STAFF: The Public Staff reiterated its view that the objections of the Joint Petitioners do not warrant a change in the Commission's conclusions.

DISCUSSION

In the *RAO*, the Commission viewed the original proposed language of both parties to be problematical. The Commission noted that the purpose of a contract is to memorialize the parties' mutual agreement as of a particular point in time for the term of the contract, and the general purpose of the typical applicable law provision in a contract is to ensure that the parties do not break the law. Thus, the specific terms of the contract are to have primary significance and, if there are particular laws which the parties wish to provide terms, but which they do not want to rewrite or negotiate, these specific laws can be incorporated by reference.

The principal defect that the Commission saw in the Joint Petitioners' language was that it purported to import the entirety of "Applicable law," except where the parties have agreed otherwise. The Commission feared that this amounted to a "roving expedition" for a party to seek out other law—no matter how discrete—to supply terms for the Agreement. The Commission believed this to be going too far and to be out of harmony with what a standard applicable law provision is supposed to be

The principal defect that the Commission saw in BellSouth's language was the insertion of a "prospectivity" clause which, as the Public Staff pointed out, would give an incentive for the parties to engage in extreme positions and posturing. "Prospectivity" is also out of harmony with what a standard applicable law provision is supposed to do. Nevertheless, the Commission saw the BellSouth language as more susceptible to reform. The Commission therefore amended BellSouth's original language. BellSouth has not sought reconsideration of those amendments.

The Commission concluded by saying that it was doubtful any language could be framed that would anticipate all possible disputes given the volume of law, legal principles, and possible fact situations involved. If they are so disposed, the parties are free to negotiate something which seems better to them.

The Joint Petitioners' line of argument on reconsideration is essentially what they have argued from the beginning. While this may have the virtue of consistency, it has not added to its persuasiveness. The Joint Petitioners' default suggestion concerning further document references and detailed Commission guidance thereto is untimely and illustrates the difficulties, if not the unworkability, of the Joint Petitioners' proposal. If the Joint Petitioners wish to pursue that route, they may seek an amendment to the Agreement with BellSouth.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 8.

FINDING OF FACT NO. 9 (ISSUE NO. 9 – MATRIX ITEM NO. 26): Should BellSouth be required to commingle a UNE or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth shall permit a requesting carrier to commingle a UNE or UNE combination obtained pursuant to Section 251 with one or more facilities or services that the requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act. However, this does not include services, network elements, or other offerings made available only under Section 271 of the Act.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 9, arguing that the Commission has tentatively rejected the Joint Petitioners' language for Matrix Item No. 26 based on two incorrect findings: first, that the FCC held that its commingling rule does not apply to Section 271 elements; second, that BellSouth is correct in asserting that only tariffed elements are eligible for commingling. The Joint Petitioners contended that neither of these findings is supported by the *TRO*, and that their Brief demonstrated that the FCC made clear that it never intended to exclude Section 271 elements from commingling. Accordingly, the Joint Petitioners claimed that the Commission's tentative decision is not in keeping with federal law.

The Joint Petitioners argued that FCC Rules 51.309(e) and (f) give the Joint Petitioners the right to connect Section 251 UNEs with any element or service obtained at wholesale. The Joint Petitioners claimed that Rule 51.309 has no limitation and does not exclude any type of element or wholesale offering. The text of the *TRO* also does not contain the exception claimed by BellSouth and embraced in the *RAO*. The Joint Petitioners argued that their Brief further demonstrated that BellSouth's argument in attempting to exclude Section 271 elements from commingling was unsupported, was contrary to established telecommunications law and practice, and did not hold up to cross-examination.

The Joint Petitioners asserted that this is an issue of paramount importance for facilities-based competitors such as the Joint Petitioners, as application of the FCC's new impairment tests may result in the need to replace Section 251 UNEs, particularly dedicated transport, with network elements unbundled pursuant to Section 271. Notably, these elements will be the same, only under Section 271, a just and reasonable pricing standard applies instead of TELRIC. These Section 271 elements will be necessary to connect to UNEs, such as UNE loops, that are still available pursuant to Section 251 and that were previously used in combination with Section 251 transport (i.e. EELs). In this regard, the Joint Petitioners noted that they do not agree that tariffed special access satisfies the Section 271 checklist requirements, as such

offerings (which were available at the time the Act was enacted and, if indeed satisfactory, would have made the Section 271 checklist unnecessary) are not made pursuant to Section 252 interconnection agreements.

The Joint Petitioners maintained that the FCC did not hold that Section 271 elements are ineligible for commingling. The *RAO* quotes a passage from the *TRO* as grounds to reject the Joint Petitioners' language: "[w]e decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251." This passage appears in Footnote 1990 of the *TRO*. The Joint Petitioners contended that they do not support BellSouth's argument for two reasons. First, to combine is not the same mandate as to commingle. These terms of art refer respectively to the connecting of likes (combining of Section 251 elements with Section 251 elements, which is required, and combining of Section 271 elements with Section 271 elements, which is not required) and dislikes (commingling of Section 251 elements with any other wholesale offering, including those mandated by Section 271, which, pursuant to Section 251 and Section 201 is required). The rule requiring commingling of elements was promulgated under Section 251, as well as Sections 201 and 202, which prohibit unjust and unreasonable practices.[1] It was codified in a wholly separate rule - 47 C.F.R. § 51.309. The combinations rule is contained in 47 C.F.R. § 51 315. Thus, the Joint Petitioners asserted, the FCC's conclusion that ILECs need not combine Section 271 elements with Section 251 UNEs should not be read to mean something that the FCC did not say, in Footnote 1990 or anywhere else, that ILECs need not commingle these items with UNEs offered pursuant to Section 251 of the Act.

Further, the Joint Petitioners argued, though the *TRO* may "refer [] to tariffed access services" in the context of commingling, such references cannot be deemed to contravene the plain language of FCC Rule 51.309 that contains no such tariffing limitation. Indeed, the tariff references in the *TRO* are mere suggestions rather than commands. The Joint Petitioners stated that Paragraph 579 of the *TRO* states that ILECs must commingle Section 251 UNEs with "services (e.g., switched and special access services offered pursuant to tariff)." The Joint Petitioners contended that tariffed services were only one example, not an exhaustive list, of items to be commingled with Section 251 UNEs. Similarly, Paragraph 581 of the *TRO* states that ILECs must commingle UNEs with services "including interstate access services." The Joint Petitioners asserted that access services are tariffed and must be commingled, but this provision establishes a clear requirement and in no way purports to limit services that must be commingled. In summary, nothing in the *TRO* states that elements obtained at wholesale are exclusively those provided pursuant to a tariff.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners' arguments in support of their objections are two-fold: (1) BellSouth has an obligation to commingle Section 251 and Section 271 services because commingling and combining are two different things; and

[1] *TRO*, at ¶ 581.

(2) the phrase "wholesale services" includes Section 271 services. BellSouth asserted that both of these arguments are incorrect and should be rejected.

First, BellSouth argued that the Commission correctly determined that BellSouth has no obligation to commingle Section 251 and Section 271 services. Contrary to the Joint Petitioners' attempt to distinguish commingling from combining, the FCC defined commingling in the *TRO* as the combining of a Section 251 element with a wholesale service obtained from an ILEC by any method other than unbundling under Section 251(c)(3) of the Act. BellSouth pointed out that the Joint Petitioners agreed at the hearing that commingling is the same as combining. BellSouth noted that, specifically, KMC witness Johnson testified that commingling means combining elements that are different in terms of their regulatory nature.

BellSouth maintained that it has no Section 271 obligation to combine Section 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act.[2] Further, with the *TRO Errata Order,* the FCC deleted the only reference in the *TRO* that would have required ILECs to combine Section 251 and Section 271 services.[3] BellSouth stated, based on the above, that the Commission correctly determined that "the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements " The Florida PSC also recently reached this same conclusion in its recent arbitration proceeding involving the Joint Petitioners and BellSouth

> . . . In Paragraph 584 of the *TRO,* the FCC said 'as a final matter we require the incumbent LECs to 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.' The FCC's errata to the *TRO* struck the portion of Paragraph 584 referring to '. . any network elements unbundled pursuant to Section 271....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also required to be unbundled under Section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to Section 271. . .[4]

Thus, BellSouth maintained that the Commission correctly excluded Section 271 services from BellSouth's commingling obligations.

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[2] *See TRO* at ¶ 655, Footnote 1990. ("We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251."); *United States Telecom Ass'n v. FCC,* 359 F.3d at 589 (D.C. Cir. 2004) *(USTA II).*

[3] *See TRO Errata Order* at ¶ 27.

[4] FPSC Order No. PSC-05-0975-FOF-TP at 19

Second, BellSouth argued that the Commission cannot adopt the Joint Petitioners' proposed language, because the Commission has no jurisdiction to determine or enforce the terms and conditions under which BellSouth must provide elements pursuant to Section 271. On the contrary, Congress gave the FCC the exclusive right to enforce compliance with Section 271. 47 U.S.C. § 271(d)(6)(A). As the FCC explained, the Act grants "sole authority to the [FCC] to administer... Section 271."[5] BellSouth maintained that the only role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271 approval process.[6]

BellSouth asserted that a state commission's authority to arbitrate and approve interconnection agreements entered into pursuant to Section 251 is specifically limited by the Act to implementing Section 251 obligations, not Section 271 obligations.[7] Accordingly, BellSouth argued that Congress did not authorize a state commission to enforce Section 271 obligations, to establish any Section 271 obligations, to establish rates for any Section 271 obligation, or to otherwise regulate Section 271 obligations.[8]

BellSouth noted that the United States District Court for the Eastern District of Kentucky confirmed this bedrock jurisdictional prohibition in finding that "[t]he enforcement authority for Section 271 unbundling duties lies with the FCC and must be challenged there first."[9] Likewise, the United States District Court for the Southern District of Mississippi held that, "even if Section 271 imposed an obligation to provide unbundled switching independent of Section 251 with which BellSouth had failed to comply, Section 271 explicitly places enforcement authority with the FCC...." *BellSouth Telecommunications, Inc. v. Mississippi Public Ser. Comm 'n, 368 F.* Supp. 2d 557 (S.D Miss. 2005). This court concluded by stating that "[t]hus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long-distance service." *Id* at 566 (emphasis added).

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[5] *InterLATA Boundary Order*, 14 FCC Rcd at 14400-01, ¶¶ 17-18; *see also*, *TRO* at ¶¶ 664, 665. ("Whether a particular checklist element's rate satisfies the just and reasonable standard of Section 201 and 202 is a fact-specific inquiry that the Commission will under take....", " .. Section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271 BellSouth stated, in particular, this section provides the Commission with enforcement authority where a BOC 'has ceased to meet any of the conditions required for such approval.'").

[6] 47 U.S.C. § 271(d)(2)(B), *see also Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) (state commission cannot "parley its limited role" in consulting with the FCC on a BOC's application for long-distance relief to impose substantive requirements under the guise of Section 271 after that application has been granted).

[7] *See* 47 U.S.C. § 252(c), (d); *see also Coserv Ltd. Liab. Co. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487-88 (5th Cir. 2003) (ILEC has no duty to negotiate items not covered by Section 251); *MCI Telecomms. Corp, v. BellSouth Telecomms , Inc.*, 298 F 3d 1269, 1274 (11th Cir. 2002) (same).

[8] *See UNE Remand Order* at ¶ 470; *TRO* at ¶¶ 656, 664, *USTA II*, 359 F.3d at 237-38.

[9] *BellSouth Telecommunications, Inc. v Cinergy Communications Co. ET AL.*, Civil Action No. 3:05-CV-16-JMH at 12 (Apr. 22, 2005).

BellSouth stated that to adopt the Joint Petitioners' arguments regarding commingling would be to determine or enforce the terms and conditions under which BellSouth must provide services pursuant to Section 271. As made clear above, BellSouth asserted that the Commission has no authority to do that. BellSouth noted that the Kansas Corporation Commission (Kansas Commission) made this expressly clear in a recent arbitration proceeding:

> The FTA's (the Act's) 271 provisions explicitly provide that a BOC, desirous of entering the interLATA marketplace, may apply to the FCC for authorization to do so (§ 271(d)(1)); the FCC determines the BOC's qualification for interLATA authority (§ 271(d)(3)); and, it is the FCC that possesses the sole authority to determine if the BOC continues to abide by the 271 requirements (§ 271(d)(6)). The only state participation in the 271 qualification inquiry is consultation with the FCC to verify BOC compliance with 271 requirements The clear implication here is that there is no place for independent state action. The Commission concludes for the foregoing reasons, and those expressed by the Arbitrator, that the FCC has preemptive jurisdiction over 271 matters.[10]

Third, BellSouth maintained that the Commission should reject the Joint Petitioners' arguments because it results in effectively recreating UNE-P with Section 271 services in contravention of federal law. BellSouth argued that the FCC made clear in the *TRRO*, that there is "no Section 251 unbundling requirement for mass market local circuit switching nationwide."[11] BellSouth pointed out that this Commission has already determined that it "does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P."[12] Likewise, BellSouth noted that the New York PSC, as well as the Mississippi Federal District Court, have indicated that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to Section 271-based UNE-P arrangements.'"[13] Accordingly, BellSouth asserted that the regulatory landscape is now clear - UNE-P is abolished and state commissions cannot recreate it with Section 271 elements.

BellSouth further noted that the Florida PSC, in a sound analysis, used the elimination of UNE-P in the *TRRO* to adopt BellSouth's position on commingling in the Florida Joint Petitioner arbitration proceeding, as follows: "Further, we find that connecting a

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[10] *In the Matter of Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB, *et al.* at ¶¶ 13-14 (July 18, 2005) (emphasis added)

[11] *TRRO* at Paragraph 199.

[12] *In re: Complaints Against BellSouth Telecommunications, Inc., Regarding Implementation of the TRRO*, Docket No. P-55, Sub 1550 at 13 (April 25th 2005).

[13] *BellSouth v Mississippi Public Serv Comm'n*, Civil Action No. 3:05CV173LN at 16-17 (stating that the court would agree with the New York PSC's findings) (quoting *Order Implementing TRRO Changes*. Case No. 05-C-0203, N.Y. P.S.C. (March 16, 2005)).

Section 271 switching element to a Section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential recreation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition."[14] BellSouth contended that this additional reason further supports the Commission's decision.

In any event, BellSouth noted that, as made clear by their objections, the Joint Petitioners want to commingle Section 251 loops with Section 271 transport. BellSouth provides Section 271 transport via its access tariff, and there is nothing in the Commission's decision that would prohibit the Joint Petitioners from commingling Section 251 loops with tariffed access services. Indeed, they could commingle those services today (if they were subject to a *TRO* and *TRRO* compliant agreement). Thus, BellSouth commented that it appears that the Joint Petitioners' objection with the Commission's decision is simply a rate issue, because they do not want to pay tariffed rates for transport Such an objection does not support a reversal of the correct and well-reasoned decision of the Commission. This is especially true because only the FCC has jurisdiction to determine whether a rate under Section 201 is "just and reasonable." And, only the FCC or a federal court can address violations of Section 201.[15] Thus, BellSouth argued that the Joint Petitioners are not harmed by the Commission's decision, and any challenge to BellSouth's Section 271 transport rates must be made at the FCC and not before this Commission.

Fourth, BellSouth argued that the Joint Petitioners' reliance on the *TRO Errata Order* to Footnote 1990 of the *TRO* is misplaced. Specifically, the Joint Petitioners focus on the FCC's deletion of the last sentence of Footnote 1990 in the *TRO Errata Order*, which provided that ILECs have no obligation to commingle Section 251 with Section 271 elements The FCC deleted this sentence because it held immediately prior that ILECs have no obligation to combine Section 271 services with services no longer required to be unbundled pursuant to Section 251 (Footnote 1990) and because of the FCC's deletion to the reference of Section 271 services in Paragraph 584 (*TRO Errata Order* ¶27). Thus, BellSouth maintained that there is nothing monumental about the FCC's *TRO Errata Order* regarding Footnote 1990. It was simply an attempt to remove redundant, unnecessary language.

Fifth, BellSouth further asserted that, contrary to the Joint Petitioners' arguments and as found by the Commission, Section 271 services are excluded from the definition of wholesale services as it relates to commingling. BellSouth stated that this conclusion is supported by the express wording of the *Supplemental Order Clarification (SOC)* released on June 2, 2000, the *TRO,* the *TRO Errata Order*, and the *TRRO*. Specifically, Paragraph 579 of the *TRO* states that the commingling obligations addressed in the

[14] FPSC Order No. PSC-05-0975-FOF-TP at 19.

[15] *See* 47 U.S.C. §§ 201, 207; *Citibank v. Graphic Scanning Corp.*, 618 F.2d 222, 225 (6th Cir 1980) ("This is so notwithstanding that the Act vests exclusive jurisdiction over claims for damages for statutory violations of the Act in federal courts or the FCC.") (Citations omitted)

TRO arose from the *SOC*.[16] The *SOC*, in turn, defined commingling as "i.e. combining loops or loop-transport with tariffed special access services...."[17] Thus, what the FCC changed in the *TRO* was the commingling obligation set forth in the *SOC*—the obligation to combine loops with tariffed special access circuits.

Moreover, BellSouth argued that, in the *TRO Errata Order*, the FCC deleted the only reference to Section 271 services in the entire commingling section of the *TRO*. The Joint Petitioners do not dispute this fact or the fact that the *TRO Errata Order* is in force and effect. In fact, contrary to the Joint Petitioners' interpretation of this issue, throughout the entire commingling section in the *TRO* the FCC limits its description of the wholesale services that are subject to commingling to tariffed access services.[18] BellSouth argued that these passages, in conjunction with the *TRO Errata Order*, make it clear that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 elements

Furthermore, BellSouth contended that the FCC confirmed that the phrase "wholesale services" does not include Section 271 services in the *TRRO* Particularly, in addressing conversion rights, the FCC in the *TRO* used the same wholesale services phrase that it used in describing ILECs' commingling obligations.[19] In the *TRRO*, the FCC described its holding in the *TRO* regarding conversions to be limited to the conversion of tariffed services to UNEs. "We determined in the *TRO* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations ...." *TRRO* at ¶ 229. Thus, BellSouth asserted, the FCC has subsequently construed the phrase wholesale services to be limited to tariffed services, which is consistent with BellSouth's position.

Accordingly, BellSouth stated that to adopt the Joint Petitioners' argument would mean that the FCC meant for wholesale services to have two different meanings in the same order. BellSouth argued that such a finding is illogical and also in violation of basic statutory construction principles. BellSouth asserted that the only logical conclusion based upon the express wording of the *TRO*, as well as the *TRO Errata Order* (and the *TRRO)*, is that BellSouth has no obligation to commingle Section 271 elements with Section 251 elements.

Sixth, and finally, BellSouth argued that the Commission should not be persuaded by the Joint Petitioners' argument that the manner in which BellSouth complies with its Section 271 obligations somehow undermines its commingling arguments. Specifically, the fact that BellSouth complies with its Section 271 obligations to provide loops and transport via its access tariff and its Section 271 switching obligation via a commercial agreement is of no consequence. The loop and transport access services in BellSouth's

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[16] *See TRO* at ¶ 529.

[17] (*SOC* at ¶ 28).

[18] *See TRO* at Paragraphs 579, 580, 581, 583

[19] *See TRO* at Paragraph 585 ("We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations. ..").

tariffs were available well before the Act was implemented, and are generally available to BellSouth customers. The fact that these same services also happen to satisfy BellSouth's obligation to make available loops and transport elements under Section 271 neither eliminates BellSouth's obligation to commingle Section 251 elements with these access services, nor creates an obligation for BellSouth to commingle Section 251 elements with Section 271 elements that are not otherwise available from BellSouth. BellSouth argued that, regardless of how BellSouth complies with its Section 271 obligations, BellSouth has no obligation to commingle Section 251 elements with services provided only pursuant to Section 271.

For all of these reasons, BellSouth urged the Commission to confirm the Commission's decision that BellSouth has no obligation to commingle Section 251 services with services that BellSouth makes available only pursuant to Section 271.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff stated that the Joint Petitioners objected to the Commission's conclusions that the commingling rule does not apply to Section 271 elements and that only tariffed elements are eligible for commingling. The Public Staff noted that the Joint Petitioners discussed in their brief that FCC Rules 51.309(e) and (f) give them the right to connect Section 251 UNEs with any element or service obtained at wholesale. These rules are without limitation and do not exclude any type of element or wholesale offering The Public Staff stated that it agrees with the Joint Petitioners; the rules are unambiguous, and their legality is unchallenged by any party.[20]

The Public Staff stated that it also believes that the *RAO* mistakenly equates the terms commingle and combine. The Public Staff opined that "combining" is the joining of like elements, such as two or more Section 251 UNEs. The Public Staff opined that "commingling" is the joining of two or more unlike elements, such as Section 251 UNEs and special access service, or, in the case at hand, Section 251 UNEs and Section 271 elements. Paragraph 579 of the *TRO* specifically defines commingling as:

> 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 other 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.

The Public Staff opined that the FCC made a clear distinction between combining and commingling in Paragraph 572 of the *TRO* when it stated that it would address its "rules for UNE combinations, specific issues pertaining to EELs, the ability of requesting

[20] *See MCIMetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 881 (4th Cir 2003) (construing 47 C.F.R. § 51.703(b) and finding that a state commission is bound by an FCC rule that is unambiguous and unchallenged).

carriers to commingle UNEs and UNE combinations with other wholesale services, [and] issues surrounding conversions of access services to UNEs."

In addition, the Public Staff stated that it believes that the Commission's conclusions fail to account for the FCC's intent regarding commingling of Section 271 elements. The Public Staff argued that this intent is demonstrated in the *TRO Errata Order* where the FCC removed the sentence, "We also decline to apply our commingling rule.. to services that must be offered pursuant to these checklist items."[21] The Public Staff asserted that the removal of this language strongly supports the conclusion that the FCC did not intend to exempt Section 271 elements from the commingling requirement. The Public Staff argued that, had the FCC intended for Section 271 elements to be exempt from the commingling requirements, it would not have needed to remove this language.

The Public Staff further stated that the FCC also evinced this intent in Footnote 1787 of the *TRO*, where it stated that, "[i]n light of the determinations we make herein, we grant WorldCom's request to clarify that requesting carriers may commingle UNEs with other types of services." WorldCom had requested that the FCC clarify "that requesting carriers are entitled to access to UNEs in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, for the efficient provision of telecommunications services."[22] The Public Staff averred that, although WorldCom did not specifically request commingling of Section 271 elements in its clarification motion, the FCC's grant of WorldCom's request for clarification indicated it contemplates more services to be commingled with Section 251 UNEs than just the LECs' tariffed access services.

The Public Staff commented that BellSouth's argument that the FCC means only tariffed services when it refers to wholesale services is somewhat misleading. At the time the *TRO* was issued, ILECs offered no alternatives to the loop, transport, and switching Section 251 UNEs other than their tariffed offerings. Thus, the only real examples that the FCC could use for wholesale services were the ILECs' tariffed services

Further, the Public Staff asserted that, by specifying that tariffed services are merely examples of wholesale services in Paragraph 579 of the *TRO,* the FCC does not limit the term wholesale service to tariffed offerings. The Public Staff opined that, by spelling out that the commingling requirement is applicable generally to wholesale services, the FCC automatically included any future wholesale service, such as Section 271 elements, in this requirement without the constant revision of its rules.

The Public Staff recommended that the Commission reconsider its conclusions with regard to this issue and instead find that BellSouth should permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or

[21] Footnote 1990 of the *TRO*.

[22] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Petition of MCI WorldCom, Inc. for Clarification, pp. 21-23, February 17, 2000.

more facilities or services that the requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners contended that the lack of an obligation to combine Section 271 elements with other Section 271 elements cannot lawfully be transformed into an exception to the FCC's unqualified requirement that ILECs provide for commingling of Section 251 elements with any other service provided on a wholesale basis. The Joint Petitioners opined that this obligation includes those made available only under Section 271

The Joint Petitioners argued that, despite their clear explanation of the conceptual difference between commingling and combining elements, BellSouth continues to obfuscate. BellSouth's attempt to show that the Joint Petitioners made some fatal concession is misguided. First, BellSouth ignored the fact that witness Johnson stated that commingling involves the "combining [o]f elements that are different in terms of their regulatory nature". Thus, the Joint Petitioners opined that witness Johnson's testimony supports their assertion that the combining of Section 271 elements with other Section 271 elements (elements of the same regulatory nature) is different from commingling.

Second, the Joint Petitioners stated that BellSouth failed to disclose that witness Johnson precisely explained the differences between combining and commingling ("as defined in the *TRO* specifically, the FCC lifted its prohibition on combining wholesale services with UNEs in order to allow CLPs to commingle tariff services or wholesale services with Section 251 UNEs."). The Joint Petitioners opined that witness Johnson confirmed that Section 271 elements are wholesale services. Thus, the Joint Petitioners maintained that commingling of Section 251 elements with Section 271 elements and combining Section 271 elements with other Section 271 elements are different concepts. The Joint Petitioners argued that commingling Section 251 elements with other wholesale offerings, including those mandated by Section 271, is required by Section 251, as interpreted and implemented by the FCC.[23] The Joint Petitioners argued that the FCC's revision to Footnote 1990 of the *TRO* clarified that Section 271 elements are not subject to a Section 271 combinations rule, but are subject to the FCC's Section 251 commingling rule.

The Joint Petitioners asserted that BellSouth also mistakenly claimed that, by adopting the Joint Petitioners' language, the Commission will recreate UNE-P. The Joint Petitioners stated that UNE-P includes local switching elements and the local loop, all priced at TELRIC pursuant to Section 251. The Joint Petitioners argued that, on the other hand, a commingled arrangement replacing UNE-P would not include all elements

[23] *See* 47 C F.R. §§ 51.309, 51.315.

priced at TELRIC. Thus, the Joint Petitioners argued, the two scenarios result in different pricing and therefore commingling does not result in the "all Section 251 UNE" combination commonly referred to as UNE-P.

Finally, the Joint Petitioners noted that BellSouth relied on the holding of the Florida PSC to support its claim that BellSouth is under no obligation to commingle Section 271 elements with Section 251 elements. The Joint Petitioners contended that the Florida PSC's decision creates an implied exception that cannot be squared with the second part of the FCC's *TRO Errata Order*, which deleted the FCC's Footnote 1990 sentence that had said "[w]e decline to apply our commingling rule. . to services that must be offered pursuant to these checklist items." The Joint Petitioners opined that the Florida PSC made no attempt to read the *TRRO* as a whole and, as a result, reached an erroneous conclusion.

PUBLIC STAFF: The Public Staff recommended that the Commission reconsider its conclusions in the *RAO* such that Finding of Fact No. 9 should read as follows:

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Telecommunications Act of 1996 (the Act), including those obtained as Section 271 elements.

The Public Staff disagreed with the Commission's conclusion that Section 271 services are excluded from the definition of "wholesale services" as it relates to commingling.

The Public Staff stated that the resolution of the commingling issue depends on whether Section 271 elements, local switching in particular, are wholesale services. The Public Staff opined that BellSouth provides Section 271 elements as wholesale services pursuant to the common definition of "wholesale" found in Black's law dictionary. The Public Staff maintained that, in the *RAO*, the Commission noted that, in Paragraph 579 of the *TRO* the FCC "repeatedly references 'switched and special access services offered pursuant to tariff' when using the term wholesale services. In describing wholesale services that are subject to commingling, the FCC refers to tariffed access services."

However, the Public Staff maintained that, on September 16, 2005, the FCC granted in part a petition for forbearance filed by Qwest Corporation (Qwest) seeking relief from statutory and regulatory obligations that apply to it as an incumbent telephone company. The Public Staff stated that, in the press release announcing the decision, the FCC stated the following:

> The Commission leaves in place other section 251(c) requirements such as interconnection and interconnection-related collocation obligations as well as *section 271 obligations to provide wholesale access to local loops,*

local transport, and local switching at just and reasonable prices." [emphasis added]

The Public Staff maintained that BellSouth acknowledged at the hearing that it provides certain Section 271 elements, such as transport elements, as wholesale services through its special access tariff. However, the Public Staff argued that Rule 51.5 does not qualify "wholesale" to mean only those wholesale services offered by an ILEC through its tariffs, and the FCC has used the term "wholesale" recently when referring to Section 271 obligations to provide access to local switching, local loops, and local transport, without limiting its meaning to "switched and special access services offered pursuant to tariff." Thus, the Public Staff asserted, the Commission may reconsider its Finding of Fact No. 9 in this docket based on the plain language of the rule and the evidence at the hearing.

DISCUSSION

After careful consideration, the Commission concludes that it should reconsider its decision in the *RAO* finding that services, network elements, or other offerings made available only under Section 271 of the Act should not be subject to commingling with Section 251 elements or combinations thereof. Instead, the Commission now believes that such commingling should be allowed for both legal and public policy reasons.

This has been an extraordinarily difficult issue to grapple with. All the parties have presented strong and cogent arguments, and reasonable persons can disagree about which arguments are better and more convincing. The task of decision has been complicated by the relative opaqueness of the FCC's pronouncements on the subject. This lack of clear FCC guidance has been a serious handicap for both the parties and the Commission. It is thus not surprising that, construing the same language, different State commissions have reached different conclusions on this issue and that no consensus appears evident. For its part, the Commission must examine this matter according to what it believes constitutes the better legal and public policy considerations.

In brief, the Commission has come to believe on reconsideration that Section 271 services, elements, or offerings constitute "wholesale services" within the meaning of the commingling rule and therefore that they should be made available on a commingled basis with Section 251 UNEs. The Commission has also come to believe that this is the sounder public policy choice, largely because it ensures the availability of Section 271 services, elements, and offerings in a more predictable and practically usable form to competitors. The Commission believes that this is consistent with the FCC's general stress on the continued *availability* of certain Section 271 services, elements, and offerings by RBOCs in a delisted Section 251 UNE environment, with due recognition that those Section 271 services, elements, and offerings, among other things, are subject to a different rate standard from their Section 251 counterparts.

Concerning the legal arguments, the Joint Petitioners filed a Motion for Reconsideration on this issue requesting that the Commission reconsider Finding of Fact No. 9 since, they argued, it was based on two incorrect findings: first, that the FCC held that its commingling rule does not apply to Section 271 elements; and second, that BellSouth is correct in asserting that only tariffed elements are eligible for commingling. The Joint Petitioners contended that neither of these findings is supported by the *TRO,* and that their Brief demonstrated that the FCC made clear that it never intended to exclude Section 271 from commingling. Accordingly, the Joint Petitioners claimed that the Commission's tentative decision is not in keeping with federal law.

The Public Staff filed initial comments and reply comments agreeing with the Joint Petitioners that the Commission's decision on Finding of Fact No. 9 should be reconsidered. The Public Staff stated that it agreed with the Joint Petitioners that the FCC's rules are unambiguous, and their legality is unchallenged by any party.

The Commission notes that FCC Rule 51 309(e) states:

> Except as provided in § 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

The Rule clearly states that commingling of UNEs or combinations of UNEs with wholesale services obtained from an ILEC shall be permitted, while not, in any way, limiting the type of wholesale service. In fact, as noted on Page 22 of the *RAO*, BellSouth acknowledged in this docket that it does occasionally provide some Section 271 elements as wholesale services In particular, BellSouth stated that it agreed to commingle UNEs with tariffed services or resold services and that it would commingle a Section 271 transport element. However, BellSouth maintained, it will not commingle switching because it does not provide switching as a wholesale service. The Commission does not believe that FCC Rule 51.309(e) allows BellSouth to determine which Section 271 elements are indeed wholesale services and which Section 271 elements are not wholesale services.

The Commission further notes that in Paragraph 579 of the *TRO*, the FCC specifically stated that commingling involves 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 ILEC pursuant to **any** method other than unbundling under Section 251(c)(3) of the Act. Specifically, Paragraph 579 of the *TRO* states, in its entirety:

> We eliminate the commingling restriction that the Commission adopted as part of the temporary constraints in the Supplemental Order Clarification and applied to stand-alone loops and EELs. We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (e.g., switched and special access

services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request. 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 a UNE combination with one or more such wholesale services. Thus, an incumbent LEC shall permit a requesting telecommunications carrier 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**. 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** As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services. [Emphasis added.]

The Commission believes that Section 271 elements qualify as wholesale services that a requesting carrier can obtain from an ILEC under a method other than Section 251 unbundling.

The Commission also notes that Paragraph 579 of the *TRO* removes the commingling restriction that the FCC adopted as part of its temporary constraints in its *SOC*. However, further in Part VII.A(2)(c) of the *TRO*, specifically at Paragraph 584, the FCC states, as modified by the *TRO Errata Order*, that, "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251(c)(4) of the Act." Therefore, the FCC's discussion on commingling in the *TRO* was **not** limited to the previous commingling restriction from the *SOC*; if it was, Paragraph 584 would not have been included in the *TRO*.

Further, the Commission believes that the FCC's *TRO Errata Order*, which eliminated the phrase "any network elements unbundled pursuant to section 271 and" from Paragraph 584, must be read in context and within the framework of the *TRO*. After the altered sentence, the remaining portion of Paragraph 584 discusses commingling and services offered pursuant to resale. Furthermore, the FCC dedicated a separate section of the *TRO* to Section 271 issues, specifically, Section VIII.A. It is within that section that the FCC states that a BOC's obligations under Section 271 are not

necessarily relieved based on any determination the FCC made under the Section 251 unbundling analysis (See Paragraph 655 of the *TRO*). Therefore, the Commission believes that the logical interpretation of the FCC's changes in the *TRO Errata Order* to Paragraph 584 was that the FCC would discuss Section 271 elements and commingling under its separate Section 271 part of the *TRO* (namely, Section VIII.A).

Turning to Section VIII.A of the *TRO* concerning Section 271 issues, the Commission notes that the FCC's *TRO Errata Order* also altered Footnote 1990 to delete the following sentence: "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." Footnote 1990 was attached to the following sentence in Paragraph 655 of the *TRO*: "As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis." The Commission believes that the fact of the matter is that if the FCC had intended to relieve BOCs of their obligation to commingle Section 251 elements with Section 271, wholesale elements, it would not have deleted the last sentence in Footnote 1990. Without the *TRO Errata Order*, the FCC would have declined to require BOCs to commingle Section 251 elements with Section 271 elements; with the removal of this language, the FCC clearly intended not to decline, or rather to continue to enforce, its requirement for BOCs to commingle Section 251 elements with Section 271 elements

As the Public Staff noted, the ultimate question is whether Section 271 UNEs are wholesale services which must be commingled pursuant to FCC Rule 51.309(e). The Commission agrees with the Joint Petitioners and the Public Staff and believes that all Section 271 elements are wholesale services. In reaching this conclusion, the Commission is convinced by several references made by the FCC in its December 2, 2005[24] *Memorandum Opinion and Order* addressing a Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area (FCC 05-170; WC Docket No. 04-223, adopted on September 16, 2005), as follows:

> . . . Indeed, Qwest's section 251(c)(4) and **section 271(c) wholesale obligations** remain in place. . . [Paragraph 67 – Emphasis added.]
>
> . . . We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that **relies on Qwest's wholesale inputs** – which must be priced at just, reasonable and nondiscriminatory rates and is subject to Qwest's **continuing obligations under section 251(c)(4) and section 271(c)** – supports our conclusion that . . . [Paragraph 68 with footnotes omitted and emphasis added.]

[24] The Commission notes that the FCC's *Qwest Order* was released after the *RAO*, Motions for Reconsideration, initial comments, and reply comments were filed in this docket.

> We deny Qwest's Petition for forbearance to the extent Qwest seeks relief from its section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA (i.e., checklist items 4-6). In contrast to checklist items 1 through 3 and 14, which incorporate by reference other provisions of the Act, checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide **wholesale access to loops, transport and switching**[25], irrespective of any impairment analysis under section 251 to provide unbundled access to such elements. . . [Paragraph 100 with footnotes omitted and emphasis added.]
>
> . . . The Commission also has explained that it is reasonable to conclude that section 251 and section 271 establish independent obligations because the entities to which these provisions apply are different – namely, section 251(c) applies to all incumbent LECs, while section 271 imposes obligations only on BOCs. . . [Footnote 246]
>
> We conclude that Qwest has not demonstrated that sufficient facilities-based competition exists in the Omaha MSA to justify forbearance from **Qwest's wholesale access obligations under sections 271(c)(2)(B)(iv)-(vi)**. . . [Paragraph 103 – Emphasis added.]
>
> . . . Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of **Qwest's wholesale obligation to provide these network elements under sections 271(c)(2)(B)(iv) and (v)**. . . [Paragraph 105 – Emphasis added.]

The Commission believes that if the FCC had intended to limit commingling to only switched and special access services offered pursuant to a tariff, the FCC would have, specifically and definitively stated that instead of continuously referencing services obtained at wholesale by a (or any) method other than unbundling under Section 251(c)(3) of the Act.

Finally, the Commission believes that, in addition to the legal analysis above, requiring commingling of Section 251 elements with Section 271 elements is better public policy. As previously noted, the Commission believes that reconsideration on this issue is appropriate to ensure the availability of Section 271 services, elements, and offerings in a more predictable and practically usable form to competitors. The entire reason for making Section 271 elements available is to allow a competitor to serve end-user customers. Placing limits on the manner in which a competitor can utilize Section 271 elements as advocated by BellSouth runs counter to this policy goal. The

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[25] The Commission notes that the FCC references wholesale access to Section 271(c)(2)(B) (the competitive checklist) and specifically to switching, which is checklist item 6. Therefore, BellSouth's position that it will not commingle switching because it does not provide switching as a wholesale service is unpersuasive and inconsistent with the FCC's recent *Qwest Order*.

Commission believes that its decision herein is in harmony with the FCC's general emphasis on the continued access by competitors to certain Section 271 services, elements, and offerings by RBOCs regardless of any de-listing due to a nonimpairment analysis under Section 251.

Based upon the foregoing, the Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration on Finding of Fact No. 9 and to alter Finding of Fact No. 9 to state, as follows.

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

CONCLUSIONS

The Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration and, thus, alter Finding of Fact No. 9, as outlined hereinabove. The Commission notes that its decision herein does not address the issue of the appropriateness of including Section 271 elements in interconnection agreements Nor does the decision herein address the issue of the appropriate rates for Section 271 elements These issues, in addition to the specific commingling issue decided herein, will be addressed by the Full Commission by order in the change of law docket (Docket No P-55, Sub 1549)

FINDING OF FACT NO. 10 (ISSUE NO. 10 – MATRIX ITEM NO. 36): How should line conditioning be defined in the Agreement; and what should BellSouth's obligations be with respect to line conditioning?

FINDING OF FACT NO. 11 (ISSUE NO. 11 – MATRIX ITEM NO. 37):

Joint Petitioners' Issue Statement: Should the Agreement contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less?

BellSouth's Issue Statement: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

FINDING OF FACT NO. 12 (ISSUE NO. 12 – MATRIX ITEM NO. 38): Under what rates, terms, and conditions should BellSouth be required to perform line conditioning to remove bridged taps?

INITIAL COMMISSION DECISION

In Findings of Fact Nos. 10, 11, and 12, the Commission concluded as follows:

10. The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.3219(a)(1)(iii)(A). BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii)

11. The line conditioning activity of load coil removal on copper loops should not be limited to copper loops with only a length of 18,000 feet or less.

12. Any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: In its Objection No. 2, BellSouth objected to Findings of Fact Nos. 10, 11, and 12 in the *RAO*. BellSouth asserted that the Commission erred in requiring BellSouth to perform line conditioning for the Joint Petitioners that exceeds what BellSouth provides to its own customers in contravention of its nondiscrimination obligations under the Act. BellSouth argued that both the *TRO* and the FCC Rules relating to line conditioning require the Commission to reach a different conclusion and rule in favor of BellSouth. In its Footnote No. 3 of its September 1, 2005 Motion for Reconsideration, BellSouth observed that these line sharing issues are also captured by Issue No. 26, in Docket No. P-55, Sub 1549 (change of law docket): "What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?"

BellSouth maintained that it is undisputed that BellSouth's line conditioning obligation is derived from its Section 251(c) duty to provide nondiscriminatory access. Further, BellSouth stated that the FCC has expressly held, in relation to line conditioning, that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves." As such, BellSouth asserted that both the FCC Rules and the *TRO* require the Commission to find that BellSouth's line conditioning obligations are limited to what BellSouth provides to its own customers.

BellSouth noted that, in the *RAO*, the Commission focused on the express wording of FCC Rule 51.319(a)(1)(iii)(A) and held that "ILEC's line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include copper subloops." BellSouth stated that it could appreciate the Commission's decision, because the subject matter can be confusing in light of the various FCC decisions. However, BellSouth argued that the Commission's analysis and findings are incorrect as a matter of law.

BellSouth observed that its line conditioning obligations in FCC Rule 51.319(a)(1)(iii) expressly state that line conditioning applies to copper loops being requested "under

paragraph (a)(1) of this section . . . ." Next, BellSouth noted that Paragraph (a)(1) of the section states that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the copper loop on an unbundled basis." BellSouth argued that the obligation to provide nondiscriminatory access to the copper loop is identical to BellSouth's general obligation to provide access to local loops as set forth in subsection (a) of the same Rule 51.319(a), which provides that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis, in accordance with Section 252(c) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section." Accordingly, BellSouth maintained that its obligation to provide line conditioning is limited and based upon its obligation to provide nondiscriminatory access to copper loops, specifically, and local loops, generally, pursuant to Section 251(c)(3) of the Act and the FCC's rules.

Further, BellSouth stated that nondiscriminatory access is defined under the FCC Rules (47 C.F.R § 51.311(a) and (b)) established in the *TRO* in the following manner:

> (a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element.
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> (b) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. . . .

BellSouth asserted that, prior to the *TRO*, the FCC's Rules provided that, upon request, an ILEC had to provide access to UNEs superior in quality to that which it provides itself, which is exactly what the Joint Petitioners are asking here. In particular, BellSouth stated that the prior rule (47 C.F.R. § 51.311(c) (2001 ed.)) provided the following: "To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network elements, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself." BellSouth observed that this "superior in quality" standard was struck down by the Eighth Circuit in *Iowa Utilities Board.*[26] BellSouth argued that the FCC memorialized this nondiscrimination requirement in the *TRO*, wherein, at Paragraph 643, it found that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide [digital subscriber line] xDSL

[26] *Iowa Util. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000), *aff'd in part and reversed in part on other grounds, Verizon Communications, Inc v FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (*Iowa Utilities Board*).

services to their own customers. . . incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves. . . line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251 (c)(3) nondiscrimination obligations."

Accordingly, BellSouth contended that the parameters of its line conditioning obligations changed in the *TRO*, even though the definition of line conditioning in Rule 51.319(a)(1)(iii) did not. Thus, BellSouth maintained that its obligation to perform line conditioning for the Joint Petitioners is limited as a matter of law to its nondiscrimination obligation under the Act, which requires BellSouth to provide to the Joint Petitioners the same type of line conditioning that it provides to itself, nothing more. In addition, BellSouth noted that the Florida PSC, in an arbitration proceeding in Docket No. 040130-TP[27], reached this same conclusion such that it rejected the Joint Petitioners' interpretation and proposed language and held that "to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders."

Furthermore, BellSouth commented that the fact that the Commission established TELRIC pricing for load coil removal and bridged taps of any length in 2001 does not require a different conclusion because these UNE rates were established prior to the FCC's issuance of the *TRO* and the new rules relating to BellSouth's nondiscrimination obligation. In summary, BellSouth contended that the Commission should make the *RAO* consistent with BellSouth's nondiscrimination obligations under the Act, adopt BellSouth's language for Issue Nos. 10-12 (Matrix Item Nos. 36-38), and find that BellSouth's obligation to provide line conditioning at TELRIC is limited to the type of line conditioning BellSouth provides to itself.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners maintained that BellSouth's arguments are not compelling and they provide no sound reasons for the Commission to modify the *RAO* in any respect with regard to these issues

The Joint Petitioners noted that BellSouth has lodged a single objection on these three separate issues with the principal theory in BellSouth's objection being that the Commission's decisions effectively provide the Joint Petitioners with access to a superior network. As noted in the *RAO*, the FCC in its *TRO*, at Paragraph 643, states that "[l]ine conditioning does not constitute the creation of a superior network, as some incumbent LECs argue." Further, the Joint Petitioners observed that the FCC in Paragraph 643 also states that "requiring the conditioning of xDSL-capable loops is not

[27] An Exhibit A was attached to BellSouth's filing of objections in this docket. Said Exhibit A is a copy of the Florida PSC Staff's recommendations set forth in its July 21, 2005 Memorandum in Docket No 040130-TP and the Florida PSC's August 30, 2005 Vote Sheet ruling on said recommendations.

mandating superior access." The Joint Petitioners pointed out that the FCC did not qualify these statements or make compliance with its independent line conditioning rule contingent upon a BellSouth decision to make such line conditioning available (routinely) on a retail basis. Thus, the Joint Petitioners argued that, without having to go further, the Commission should dismiss BellSouth's superior network argument which already has been rejected by the FCC in the *TRO*.[28]

Next, the Joint Petitioners pointed out that, notwithstanding the foregoing and without citation, BellSouth is asserting that a superior network results when it is required to condition loops beyond the parameters in which it boldly claims it is routinely willing to condition loops for its own retail customers. The Joint Petitioners asserted that there is no legal basis for BellSouth's argument, which incorporates a carefully skewed re-articulation of the Act's nondiscrimination standard, which ignores the fact that the *copper loop* is the network element to which the nondiscrimination obligation attaches and that obligation commands that CLPs be afforded the same access to the loop that BellSouth has – not the same gated access that BellSouth elects to provide to its retail customers (who are not similarly entitled to purchase such loops at TELRIC pricing). Thus, the Joint Petitioners stated that the Act's nondiscrimination standard commands that CLPs will have cost-based access to copper loops, which the FCC has defined to include line conditioning,[29] irrespective of whether BellSouth elects to perform such conditioning "routinely" or claims that it does not or perhaps "no longer" performs[30] such conditioning routinely and does so only when it can charge "special construction" or similarly unpredictable and non-TELRIC compliant pricing.[31] The Joint Petitioners asserted that the *RAO* comports fully with the Act's nondiscriminatory access obligation, as it provides the Joint Petitioners with the same nondiscriminatory access to copper loops, including the ability to condition them for use in providing advanced services that BellSouth has – regardless of whether BellSouth elects to make such conditioning available to its retail customers on a routine basis. Moreover, the Joint Petitioners stated that, given that BellSouth conditions loops of all lengths routinely to provide DS1 service, the basis upon which BellSouth claims it does not condition loops routinely is

[28] The Joint Petitioners remarked that, "notably, the *USTA II* provided BellSouth the opportunity to challenge the FCC's finding that line conditioning does not create a superior network, but FCC determination was not at issue in the case before the court. BellSouth may not lodge an indirect challenge to the FCC's decision through this proceeding."

[29] See *TRO*, Paragraph 643, where the FCC stated: "[w]e therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element."

[30] See *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., et al.*, Georgia PSC, Docket No. 18409-U, Hearing Transcripts at Page 813:16-17 (February 8-10, 2005) The Joint Petitioners observed that, therein, BellSouth witness Fogle stated in the Georgia hearing that "we no longer routinely remove load coils "

[31] The Joint Petitioners observed that the *RAO* notes that the FCC readopted its line conditioning obligations for the same reasons stated in the *UNE Remand Order* and that in the *UNE Remand Order* the FCC required line conditioning regardless of whether the ILEC did it for its own customers

anything but clear.[32] Thus, the Joint Petitioners asserted that there is nothing in the Act, the *TRO*, or the FCC's rules that says line conditioning is limited to those functions BellSouth determines it is willing to offer "routinely" to its retail customers. In addition, the Joint Petitioners maintained that the *Iowa Utilities Board* finding pertaining to interconnection, upon which BellSouth heavily relies, lends no credence to BellSouth's theory as it merely holds that the FCC could not mandate superior access to interconnection.

Further, the Joint Petitioners commented that the *TRO* clearly notes that the FCC's intent behind its line conditioning obligations is that the obligations "*cover loops of all lengths*" and, thus, the limitation proposed by BellSouth is not in the FCC's Order.[33] In other words, as explained by the Joint Petitioners, line conditioning applies to the entire loop (not just to portions of the loop) and to loops in excess of 18,000 feet ("long loops"), and a superior network does not result where line conditioning is requested beyond an incumbent's self-imposed parameters. The Joint Petitioners maintained that, as the FCC repeatedly has found, line conditioning results in the modification of the existing network and not the construction of an un-built superior one.[34] The Joint Petitioners maintained that nondiscriminatory access requires that the Joint Petitioners have the same access to the loop that BellSouth has, regardless of whether BellSouth elects to take advantage of its access by conditioning the loop in order to provide a retail advanced services offering.[35]

Furthermore, the Joint Petitioners asserted that if the Commission were to reverse its decision, then it would bestow upon BellSouth the ability to wipe out its line conditioning obligations in their entirety. The Joint Petitioners pointed out that, at the hearing, in this proceeding, Commissioner Kerr recognized that BellSouth's position necessarily reaches this untenable conclusion. The Joint Petitioners also noted that other state commissions have seen this, as well. In particular, the Joint Petitioners stated that in Georgia, a panel member (Commissioner Burgess) observed during hearing in an arbitration proceeding that "literally you [BellSouth] could wipe away your [its]

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[32] At this point, the Joint Petitioners cited the following: *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 Paragraphs 172-173 (1999) (*UNE Remand Order), reversed and remanded in part sub nom. United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *(USTA), cert. denied sub nom WorldCom, Inc. v. United States Telecom Ass'n,* 123 S.Ct 1571 (2003 Mem.); *see also TRO*, Paragraph 642, where the FCC stated: "[a]ccordingly, we readopt the [FCC's] previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order* "

[33] See *TRO*, Paragraph 642, Footnote 1947.

[34] See *TRO*, Paragraph 643; see also *UNE Remand Order*, Paragraph 173.

[35] See *UNE Remand Order*, Paragraph 173, where the FCC disagreed with GTE's contention "that the Eighth Circuit, in *Iowa Utils. Bd. v. FCC* decision, overturned the rules established in the *Local Competition First Report and Order* that required incumbents to provide competing carriers with conditioned loops capable of supporting advanced services even where the incumbent is not itself providing advanced services to those customers "

requirement and obligation" and that BellSouth is attempting "to change" the rules.[36] The Joint Petitioners stated that, simply put, what BellSouth wants is in direct defiance of the FCC's line conditioning rules. The Joint Petitioners contended that the clear intent in creating the rules was not to provide incumbents with the ability to dictate their line conditioning obligations Indeed, it is the position of the Joint Petitioners that if the Commission were to reverse its recommendation here, then BellSouth will cease conditioning loops at TELRIC rates, regardless of loop length, which would be detrimental to the deployment of competitive advanced services and contrary to the Act, the FCC's rules, and the federal regulatory scheme.

In addition, the Joint Petitioners asserted that BellSouth's argument that the parameters of BellSouth's line conditioning obligations changed with the *TRO,* even if such change was not reflected in the FCC's rules, is also untenable. The Joint Petitioners maintained that the Commission already has soundly rejected this claim in its *RAO.*[37] The Joint Petitioners commented that the Commission correctly notes that the FCC's adoption of its routine network modification rules in the *TRO* did not change BellSouth's line conditioning obligations. In the *RAO*, the Commission noted that in the *TRO*, the FCC stated that it was readopting its previous line conditioning rules for the reasons previously set forth by the FCC in the *UNE Remand Order.*[38] The Joint Petitioners contended that if, as BellSouth claims, the *TRO*'s adoption of the routine network modification rules changed line conditioning obligations, then the FCC certainly would have noted the change in how the rules would be applied and would have modified the basis it set forth for re-adopting the line conditioning rules. The Joint Petitioners opined that the only change in application evident on the record is that the line conditioning obligations were extended to include copper subloops.[39] The Joint Petitioners maintained that the FCC would not have noted only this single change in application if there were another

In response to BellSouth's notation concerning the Florida PSC's action on similar issues in an arbitration proceeding, the Joint Petitioners commented that under the standard embraced by the Florida PSC, the Joint Petitioners, at least in certain contexts, apparently have no rights greater than Florida retail customers. The Joint Petitioners asserted that the Florida PSC's decision renders, in many respects, the Act and the FCC's line conditioning rules a nullity; and the Joint Petitioners intend to appeal the Florida PSC's ruling to federal court. The Joint Petitioners also noted that in the concurrent Kentucky arbitration proceeding, the Kentucky PSC made the same finding

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[36] See Georgia Transcript of Hearing of an arbitration proceeding between NewSouth, et al., with BellSouth, in Docket No. 18409-U, at Page 816:13-14 and Page 812:18.

[37] See *RAO* at Pages 32-33.

[38] Id. at Page 34, citing *TRO* Paragraph 250, Footnote 747; see also Id at Page 35, citing *TRO* Paragraph 642.

[39] Id at Page 28.

as the Commission here on all three line conditioning issues in its Order released September 26, 2005, in Case No. 2004-00044.[40]

Finally, the Joint Petitioners argued that BellSouth's position is belied by the FCC's purpose in creating the line conditioning rules. The Joint Petitioners explained that as noted in the *TRO*, "line conditioning speeds the deployment of advanced services by ensuring that competitive LECs are able to obtain, as a practical matter, a local loop UNE with the features, functions, and capabilities necessary to provide broadband services."[41] By setting limitations on when line conditioning will be provided at TELRIC rates, the Joint Petitioners stated that BellSouth is attempting to hobble the Joint Petitioners' ability to innovate and compete.

In summary, the Joint Petitioners maintained that for each of the forgoing reasons, as well as those already stated so well by the Commission in its *RAO*, BellSouth's arguments offer no compelling reason why the Commission should change its initial decisions on these three issues and, therefore, the Commission should affirm its decisions on Issue Nos. 10-12 (Matrix Item Nos. 36-38)

PUBLIC STAFF: The Public Staff stated that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth responded to the Joint Petitioners' initial comments by stating that the Joint Petitioners made two erroneous arguments: (1) BellSouth's nondiscrimination obligations require it to provide a copper loop only on a nondiscriminatory basis; and (2) adoption of BellSouth's position will "hobble" the Joint Petitioners' ability to compete. BellSouth asserted that both of these arguments should be rejected by the Commission.

First, BellSouth stated that the Joint Petitioners claimed that BellSouth's nondiscrimination obligation "commands that CLPs be afforded the same access to the loop that BellSouth has – not the same gated access that BellSouth elects to provide to its retail customers . . ." BellSouth argued that this assertion is incorrect as a matter of law. BellSouth stated that FCC Rule 51.319(a) provides that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis, in accordance with Section 251(c) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section." BellSouth maintained that its obligation to provide line conditioning is limited to its obligation to

[40] See *In the Matter of Joint Petitioner for Arbitration of NewSouth Communications Corp. et al.*, Kentucky PSC, Order, Case No. 2004-00044 (released September 26, 2005) (*Kentucky Arbitration Order*) at Pages 10-14.

[41] See *TRO* Paragraph 644.

provide nondiscriminatory access to copper loops pursuant to Section 251(c) of the Act and the FCC's rules.

BellSouth stated that its nondiscriminatory access obligation requires it to provide CLPs with the "quality of an unbundled network element, as well as the quality of the access to such unbundled network... [that is] at least equal in quality to that which the incumbent LEC provides itself." (47 C.F.R. § 51.311(a)and (b)). In other words, it is BellSouth's position that the nondiscrimination obligation requires it to provide the Joint Petitioners with the same quality UNE that it provides to itself, nothing more; and this obligation takes into account line conditioning. Again, BellSouth noted that the FCC's rules in the *TRO,* as well as federal courts, have rejected a "superior in quality" obligation.[42]

Next, BellSouth asserted that the FCC's statement in Paragraph 643 of the *TRO* that line conditioning does not "constitute the creation of a superior network" does not support the decision reached in the *RAO.* BellSouth represented that the FCC made this finding in rejecting Verizon's argument that providing line conditioning to a CLP customer that is not receiving advanced services from the ILEC constitutes the creation of a superior network for the CLP's end user. BellSouth maintained that this statement does not, however, translate into BellSouth being obligated to provide line conditioning to CLPs that exceeds what it provides for its retail customers; and BellSouth believes that this is made clear in the remaining section of *TRO* Paragraph 643, where the FCC further describes the incumbent LECs' line conditioning obligations.

In particular, BellSouth explained that the FCC stated in Paragraph 643 that "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." Further, BellSouth noted that the FCC went on to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations."

Second, BellSouth stated that the Joint Petitioners argued that adoption of BellSouth's position for line conditioning would prohibit them from competing. BellSouth noted that the Joint Petitioners made the unsupported statements that BellSouth's position would "bestow upon BellSouth the ability to wipe out its line conditioning obligations in their entirety" and that "if the Commission were to reverse its recommendation here, then

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[42] *Iowa Util. Bd. v. FCC,* 219 F.3d 744, 758 (8th Cir. 2000), *aff'd in part and reversed in part on other grounds, Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) BellSouth noted that prior to the implementation of the FCC's Rules in the *TRO,* the FCC's Rules provided that, upon request, an ILEC had to provide access to UNEs superior in quality to that which it provides itself. 47 C.F.R. § 51 311(c) (2001 ed.).

BellSouth will cease conditioning loops at TELRIC rates, regardless of loop length." BellSouth asserted that these are erroneous arguments.

BellSouth argued that changing the *RAO* to reflect BellSouth's position will not result in BellSouth refusing to condition any loops at TELRIC rates, as BellSouth has agreed to provide the Joint Petitioners with the same line conditioning that it provides its own end users at TELRIC. BellSouth explained that it will condition all loops by removing load coils on loops up to 18,000 feet at TELRIC. However, BellSouth stated that the removal of load coils beyond 18,000 feet would be done pursuant to special construction charges.

Further, BellSouth commented that just as specious is the Joint Petitioners' claim that, by adopting BellSouth's language, BellSouth could effectively prevent any line conditioning from occurring by deciding not to provide any line conditioning to itself. While technically possible, BellSouth observed that this hypothetical is not very practical because BellSouth "is very interested in selling its DSL services."

BellSouth again recommended that the Commission conclude that BellSouth's obligation to provide line conditioning at TELRIC is limited to the type of line conditioning BellSouth provides to itself. Further, in response to the Joint Petitioners' notation concerning the Kentucky PSC's action on similar issues in an arbitration proceeding, wherein the Kentucky PSC made the same finding as the Commission here on all three line conditioning issues in its Order in Case No. 2004-00044, BellSouth commented that it has sought rehearing of this decision.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its position that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*, which was issued after extensive testimony and briefing by the parties. The Public Staff did not provide any other comments on these issues.

DISCUSSION

In summary, in regard to Findings of Fact Nos. 10, 11, and 12 (Matrix Item Nos. 36, 37, and 38) in the *RAO*, BellSouth requested that the Commission reconsider said findings and conclude that BellSouth's language should be adopted for these three findings, such that BellSouth's obligation to provide line conditioning at TELRIC rates would be limited to only the type of line conditioning BellSouth provides to itself.

In opposition, the Joint Petitioners asserted that BellSouth's arguments are not compelling and provide no sound reasons for the Commission to modify the *RAO* in any respect regarding these issues Likewise, the Public Staff commented that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*.

Based upon our further review of these matters, the Commission agrees with the Joint Petitioners and the Public Staff that these findings in the *RAO* should not be modified. The Commission finds no new or compelling rationale in BellSouth's arguments that warrants any change in our prior decisions with respect to these issues.

In the *RAO*, the Commission found that BellSouth's line conditioning obligations were not changed by the *TRO*, nor were the line conditioning rules and the routine network modification rules changed by the *TRRO*[43]. The Commission believes it is appropriate to affirm our initial findings on these issues In support of such affirmation, the Commission finds it pertinent to note just a couple of paragraph excerpts from the *RAO* as follows:

> . . . . The Commission notes that the text of Paragraph 642 [in the *TRO*] explicitly indicates that the FCC readopted its previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*. In addition, in said Paragraph and Footnotes, the FCC (1) required incumbent LECs to provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops; (2) recognized that access to xDSL-capable stand-alone copper loops may require incumbent LECs to condition the local loop for the provision of xDSL-capable services; (3) explained that line conditioning is necessary because of the characteristics of xDSL service, i.e., certain devices added to the local loop to provide voice service disrupt the capability of the loop in the provision of xDSL services; (4) concluded that providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face; (5) required incumbent LECs to provide line conditioning to requesting carriers; (6) identified the removal of bridge taps, load coils, and similar devices as part of the line conditioning obligation; and (7) observed that the *Line Sharing Order* refined the conditioning obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable incumbent LECs to charge for conditioning loops. Based upon the foregoing, the Commission does not believe that BellSouth's line conditioning obligations have now been constrained by the FCC's inclusion in Rule 51.319 of its routine network modifications' Section (a)(8).
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> . . . . The Commission does not believe that the FCC's statement in Paragraph 643 [in the *TRO*], that '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' supports BellSouth's position that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL

[43] *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, FCC 04-290, rel. February 4, 2005. (*Triennial Review Remand Order* or *TRRO*).

services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. The Commission believes that this language merely means that the function of line conditioning is to be properly seen as a routine network modification, i.e, the function of line conditioning, constitutes a form of routine network modification, not the conditions under which this function is performed. The Commission observes that in Footnote 1951, the FCC stated that '[w]e note that all BOCs offer xDSL service throughout their service areas ' Furthermore, the FCC found that 'Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices. We therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element.' Consistent with that finding, the Commission notes that in the FCC's specific unbundling requirements, Rule 51.319(a)(1), the FCC provided, in part, that 'A copper loop is a stand-alone local loop comprised entirely of copper wire or cable. Copper loops include two-wire and four-wire analog voice-grade copper loops, digital copper loops (e.g , DS0s and integrated services digital network lines), as well as two-wire and four-wire loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares.' (Emphasis added.)

CONCLUSIONS

The Commission finds that it is appropriate to deny BellSouth's request and to affirm and uphold our initial rulings, as set forth in the *RAO* in Findings of Fact Nos. 10, 11, and 12 (Matrix Item Nos. 36, 37, and 38).

FINDING OF FACT NO. 13 (ISSUE NO. 13 – MATRIX ITEM NO. 51):

(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?

(C) Who should conduct the audit and how should the audit be performed?

INITIAL COMMISSION DECISION

The Commission concluded that the *TRO* sufficiently outlines the requirements for an audit. A 30 – 45 day notice of the audit provides a CLP with adequate time to prepare. In its Notice of Audit, BellSouth should state its concern that the requesting CLP has not met the qualification criteria and a concise statement of its reasons thereof. The Commission further concluded that BellSouth may select the independent auditor without the prior approval of the CLP or this Commission. Challenges to the independence of the auditor may be filed with the Commission after the audit has concluded. Additionally, the Commission concluded that BellSouth is not required to

provide documentation, as distinct from a statement of concern, to support its basis for audit or seek concurrence of the requesting carrier before selecting the audit's location.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration for several reasons. With respect to Matrix Item No. 51(B), the Joint Petitioners argued that a true "for cause" standard for audits is necessary for the auditors to be implemented in a meaningful, verifiable way. Audits are costly and intrusive, and the standards that trigger an audit should be higher than what the Commission has endorsed. With respect to Matrix Item No. 51(C), the Joint Petitioners argued that it is crucial that auditors be truly independent BellSouth has already agreed to use mutually approved auditors in other contexts, and BellSouth's resistance in this case is puzzling Conflicts involving auditors do occur and are better dealt with up front rather than after-the-fact.

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Commission had correctly rejected the Joint Petitioners' proposals as unnecessary and illegal impediments to BellSouth's audit rights. With respect to Matrix Item No 51(B), BellSouth noted that it has no ability to challenge a CLP's EEL self-certification from the outset, so audit rights are provided to insure compliance with EEL eligibility. Additional conditions such as those the Joint Petitioners seek cannot be found in the *TRO* and should not be imposed Furthermore, BellSouth argued that the Joint Petitioners' "costly and intrusive" argument regarding audits is a red herring. The Joint Petitioners are simply trying to erect more barriers to BellSouth's rightful exercise of its audit rights. With respect to Matrix Item No. 51(C), BellSouth argued that a requirement for mutual agreement for the selection of an auditor is not workable, as NuVox's position on KPMG illustrates. KPMG is NuVox's external auditor, yet NuVox argued that KPMG was not independent, even after BellSouth and NuVox had agreed to use KPMG. In any event, mutual agreement on an auditor is not sanctioned by the *TRO*.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the Commission's decision on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: With respect to Matrix Item No. 51(B), the Joint Petitioners argued that BellSouth had presented little that was new. The Joint Petitioners stated that the *RAO* decision will not prevent litigation and that they would not cede to any attempt by BellSouth to gut or end-run the protections against abusive EEL audits established by the FCC. With respect to Matrix Item No. 51(C), the Joint Petitioners contended that BellSouth also had little to offer other than what the Joint Petitioners call

"blatant mischaracterization of the dispute over KPMG's independence." The Joint Petitioners said that KPMG "was caught providing certain information to BellSouth in violation of [a nondisclosure agreement] it executed with NuVox." Prior to this incident NuVox had only expressed opposition to a single auditor proposed by BellSouth, which the Georgia Public Service Commission (Georgia PSC) also found unfit.

PUBLIC STAFF: The Public Staff reiterated its view that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

Finding of Fact No. 13, which, in part, addresses Matrix Item No. 51(B), has to do with whether there is a notice requirement and, if so, what should the notice contain. While the Commission found that the *TRO* did not require notice of an audit, advance notice would afford the CLP the opportunity to compile appropriate documentation. The Commission held that the ILEC need not supply carriers additional documentation to support their request, but, as distinct from documentation, it should state its concern. Since BellSouth has agreed to provide notice to a CLP stating the cause for the audit, the Commission found this proposal to be reasonable.

Finding of Fact No. 13, which, in part, addresses Matrix Item No. 51(C), has to do with who performs the audit and how it should be performed. The Joint Petitioners insisted that the auditor should be an independent auditor mutually agreed upon, while BellSouth asserted that the requirements that the Joint Petitioners want added do not appear in the *TRO*. The Commission in the *RAO* noted that it had addressed the issue of auditor selection in Docket No. P-772, Sub 7, in its *Order Granting Motion for Summary Disposition and Allowing Audit* issued on August 24, 2004, and *Order Denying Motion for Reconsideration* issued on January 20, 2005. (This matter is currently on appeal in the U.S. District Court, Eastern District, Western Division). In accordance with its decisions in Docket No. P-772, Sub 7, the Commission rejected the additional requirements sought by the Joint Petitioners.

The Commission believes that these issues have been sufficiently addressed both in this arbitration and in Docket No. P-772, Sub 7. The Commission believes that it has carefully construed the applicable law regarding audits, and it is not persuaded by the Joint Petitioners' argumentation that it should reconsider its decisions on this Finding of Fact. So far the Joint Petitioners have had four bites of the apple on this issue in this venue, perhaps a few more courtesy of the Competitive Carriers of the South (CompSouth) in Docket No P-55, Sub 1549, with no doubt even more being in store on the federal level, by which time the apple will have been thoroughly consumed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 13.

FINDING OF FACT NO. 14 (ISSUE NO. 14 – MATRIX ITEM NO. 65): Should BellSouth be allowed to charge the CLP a Tandem Intermediary Charge (TIC) for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth sought reconsideration of Finding of Fact No 14 arguing that the Commission's decision is incorrect as a matter of law. BellSouth stated that, in contrast to the Commission's decision, the FCC has pronounced that, to date, the Commission's rules have not required ILECs to provide transiting. Similarly, the FCC's Wireline Competition Bureau (WCB) in the *Virginia Arbitration Order* declined to find that ILECs have an obligation to provide a transit function at TELRIC. BellSouth stated that the WCB subsequently reaffirmed these principles in denying AT&T's request for reconsideration, wherein it found that (1) it "did not find that Verizon had a legal obligation to provide transit service at TELRIC"; (2) it "did not agree with AT&T's assertion that the Virginia Commission would have been required to agree with AT&T that Verizon must provide transit service under the Act, nor do we agree that the Bureau was required to so conclude." BellSouth further stated that the Commission should not feel constrained by its decision in Docket No. P-19, Sub 454. In addition, BellSouth noted that decisions that are contrary to the *RAO* are not limited to the FCC, citing the Georgia and Florida PSC decisions on this issue. BellSouth urged the Commission to reconsider its previous decision or, at a minimum, avoid finding that BellSouth has a Section 251 obligation to provide the transit service until the FCC addresses the issue in the context of its *Intercarrier Compensation* rulemaking proceeding.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners argued that the Commission should keep with its initial recommendation on this issue. The Joint Petitioners noted that in Paragraph 534, Footnote 1640 of the *TRO*, the FCC plans to address transiting in its pending *Intercarrier Compensation* rulemaking proceeding. The Joint Petitioners argued that, if transiting is determined by the FCC to be outside the scope of BellSouth's Section 251 and TELRIC pricing obligations, BellSouth can invoke the change of law provisions in the Agreement and it can petition the Commission to establish an appropriate rate. The Joint Petitioners conceded that, until the FCC opines on whether it believes transit service is a Section 251 obligation, it simply makes sense to maintain the status quo by adopting the Commission's initial recommendation on this issue.

PUBLIC STAFF: The Public Staff argued that BellSouth provided no basis for modifying the Commission's conclusion. The Public Staff stated that the Commission has considered this matter in great detail before in Docket No. P-19, Sub 454 and concluded that Verizon South Inc. has a legal obligation to provide tandem transit service under both state and federal law. The Public Staff noted that the Commission declined, however, to decide the appropriate rate to be charged for tandem transit service, and deferred the matter to Docket No. P-100, Sub 151. However, the Public Staff opined that Docket No. P-100, Sub 151 has not provided an answer to this question. Moreover, the Public Staff noted that the current appeal of the Commission's Order in Docket No. P-19, Sub 454, has been stayed pending negotiations between parties regarding the manner in which tandem transit traffic is to be routed and billed. The Public Staff stated that based upon recent filings in that docket, there appears to be some dispute as to the status of negotiations. The Public Staff contended that the issue of the appropriate rates, terms and conditions for BellSouth to charge for transit traffic from the Joint Petitioners is left to this proceeding The Public Staff believes that the Commission appropriately concluded that BellSouth should not be permitted to charge a TIC.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that both the Public Staff and the Joint Petitioners argue that there is no FCC decision that expressly finds that BellSouth is not obligated to provide a transit service at TELRIC and, thus, the Commission can make such a finding in the absence of a contrary federal ruling. BellSouth asserted that this argument, however, does not reflect the fact that the FCC has repeatedly refused to find that ILECs have an obligation to provide transit service under Section 251 of the Act. BellSouth noted that the WCB refused to find such an obligation in the *Virginia Arbitration Order*, and the FCC stated in Paragraph 534, Footnote 1640 of the *TRO* that, "[t]o date, the Commission's rules have not required incumbent LECs to provide transiting." Thus, BellSouth argued that, while the FCC has not expressly held that ILECs do not have to provide the transit function at TELRIC, it is clear that the FCC has refused to make such a finding to date, notwithstanding many opportunities to do so. BellSouth maintained that, if the FCC decides differently in the *Intercarrier Compensation* rulemaking proceeding and finds for the first time that ILECs have a Section 251(c) obligation to provide the transit function at TELRIC, then the Commission can apply that ruling on a going-forward basis.

BellSouth urged the Commission to reconsider its decision and allow BellSouth to charge the TIC rate of $.0015. BellSouth suggested that, if the Commission still has concerns about the rate, the Commission could elect to follow the Georgia PSC's approach and order BellSouth's proposed rate until such time as a permanent rate is established. BellSouth further suggested that, even if the Commission rejects the $.0015 rate, the Commission should find that BellSouth is allowed to charge some interim rate or at least provide BellSouth with the ability to back bill the Joint Petitioners from the date a Commission-approved rate is established

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff did not provide any additional reply comments on this issue.

DISCUSSION

In the *RAO*, the Commission found that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs As discussed above, in Docket No. P-19, Sub 454, the Commission held that ILECs have a legal obligation to provide the transit function under both state and federal law. As pointed out by the Commission in its *September 22, 2003 Order*, in Docket No. P-19, Sub 454, the tandem transit function may also involve a billing intermediary function, and the rates for providing this service are not required to be TELRIC-based.

On March 3, 2005, the FCC released its *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33 (March 3, 2005) (*Further NPRM*). In this notice of proposed rulemaking, the FCC discusses intermediary carriers and the reciprocal compensation rules The FCC's discussion in the *Further NPRM* is relevant to the decision at issue here.

In the *Further NPRM*, the FCC observes that it has not adopted rules governing the charges of intermediary (i.e. transiting) carriers. The FCC states the following:

> The reciprocal compensation provisions of the Act address the exchange of traffic between an originating carrier and a terminating carrier, but the Commission's reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider.[44]

The FCC states further,

> If rules regarding transit service are warranted, we seek comment on the scope of such regulation. Specifically, we seek comment on whether transit service obligations under the Act should extend solely to the incumbent LECs or to all transit service providers, including competitive LECs. [45]

And additionally,

> [W]e seek further comment on the appropriate pricing methodology, including the possibility of requiring that transit service be offered at the same rates, terms, and conditions as the incumbent LEC offers for equivalent exchange access services (e.g., tandem switching and tandem

[44] *Further NPRM*, at ¶ 120.

[45] *Further NPRM*, at ¶ 130.

switched transport) and how this option would be affected by our proposals to alter the current switched access regime.[46]

Based on the foregoing, the Commission finds it appropriate to uphold its decision until such time as the FCC addresses the issue in the context of the *Intercarrier Compensation* rulemaking proceeding.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No 14.

FINDING OF FACT NO. 15 (ISSUE NO. 15 – MATRIX ITEM NO. 86(B)): How should disputes over alleged unauthorized access to customer service record (CSR) information be handled under the Agreement?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners' proposed language concerning how disputes over alleged unauthorized access to CSR information should be handled under the Agreement is reasonable and appropriate. Accordingly, the Commission adopted the Joint Petitioners' proposed language, as follows, for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement:

Section 2.5.5.2 – Joint Petitioners

Notice of Noncompliance. If, after receipt of a requested LOA [Letter of Authorization], the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken as soon as practicable.

Section 2.5.5.3 – Joint Petitioners

Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties

[46] *Further NPRM*, at ¶ 132.

cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 15 stating that the Commission erred in adopting the Joint Petitioners' proposed language regarding how disputes over alleged unauthorized access to CSR information should be handled under the Agreement.

BellSouth maintained that, in adopting the Joint Petitioners' language, the Commission "agree[d] with the Joint Petitioners that it is unclear from BellSouth's proposed language whether BellSouth gets to pull the plug while a dispute concerning noncompliance is pending." BellSouth stated that its proposed language, however, clearly provides that disputes over unauthorized access to CSR information will be handled pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions section of the Agreement. BellSouth asserted that under the clear wording of the Dispute Resolution provision, access to ordering systems will not be suspended nor will services be terminated while such a dispute is pending. Accordingly, BellSouth argued that its proposal gives the Joint Petitioners exactly what they want.

In contrast, BellSouth maintained, the Joint Petitioners' proposal is unacceptable for many reasons. First, BellSouth argued, the Joint Petitioners' language is unduly vague. For example, BellSouth noted, under the Joint Petitioners' language the offending Party is required to undertake "appropriate corrective measures", which is subject to debate and cannot be reconciled with the Parties' contractual obligation "to access CSR information only in strict compliance with applicable laws." Second, BellSouth maintained, the Joint Petitioners do not impose any time period in which to cure any unauthorized access even though the Joint Petitioners concede that they can produce a LOA in as little as two business days. Third, and perhaps most importantly, BellSouth opined, the Joint Petitioners' proposal provides no remedy or recourse if the accused party ignores its legal and contractual obligations and thus fails to respond to a request to provide an appropriate LOA.

BellSouth argued that under its proposal, suspension and termination rights are triggered only if a Party: (1) disregards its obligation to produce an appropriate LOA upon request; and (2) thereafter fails to dispute (i.e. ignores) a notice that specifies the alleged CSR-related noncompliance. BellSouth maintained that suspension or termination of service based upon undisputed allegations that a party is engaging in unauthorized, unlawful, or fraudulent activity is not a new concept. In fact, BellSouth maintained, the Joint Petitioners retain the right to immediately terminate service provided to their North Carolina end users under similar circumstances.

For the foregoing reasons, BellSouth asserted, the Commission should modify its *RAO* to adopt BellSouth's proposed language for Matrix Item No. 86(B).

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners stated in initial comments that, although BellSouth claims otherwise, its language proposal with regard to unauthorized access to CSRs does not give the "Joint Petitioners exactly what they want." The Joint Petitioners stated that they have explained as much in their brief. The Joint Petitioners maintained that, despite assurances that BellSouth provides in its brief, BellSouth refuses to incorporate such assurances into its proposed language in North Carolina. Instead, the Joint Petitioners argued that BellSouth intentionally leaves its proposal unacceptably vague and leaves the Joint Petitioners and their customers dangerously exposed to potential coercion and manipulation (when BellSouth will rely solely on the language of the Agreement and not on its curious attempt to get the Commission to approve language that appears designed to provide potential for future coercion and manipulation)

The Joint Petitioners stated that they are fully committed to complying with all regulations regarding access to CSRs. Nevertheless, the Joint Petitioners maintained that their proposal for Matrix Item No. 86(B) ensures that their service is protected while disputes over unproven BellSouth allegations of CSR abuse are resolved by a neutral decision maker such as the Commission. The Joint Petitioners noted that they have agreed to provide a LOA upon request and have never given BellSouth cause for concern in the past. Yet, the Joint Petitioners opined, because disputes may still arise, even when a LOA is provided, the Joint Petitioners wish to remain protected from service suspension or termination unless it is proven they are in violation of the law. Even then, the Joint Petitioners stated they would, with the dispute resolved, prefer an opportunity to cure or correct the violation that does not impact their customers so adversely. The Joint Petitioners argued that BellSouth's language does not afford the Joint Petitioners that protection, but rather effectively entitles BellSouth to suspend or terminate all of the Joint Petitioners' services at its whim. The Joint Petitioners stated that they simply cannot live with the uncertainty and unpredictability in BellSouth's language. Moreover, the Joint Petitioners asserted that nothing in BellSouth's language assures the Joint Petitioners that a LOA will save them from suspension and termination.

The Joint Petitioners noted that, as support of its Objection, BellSouth asserted that the Joint Petitioners "retain the right to immediately terminate service provided to their North Carolina end users under similar circumstances." The Joint Petitioners maintained that this argument, for which BellSouth provides no citation to the NuVox and Xspedius "rights" it refers to, is in any event, fatally flawed. The Joint Petitioners opined that even if the Joint Petitioners retain similar rights as to an individual end user, the situation would not be analogous to the suspension and termination rights afforded BellSouth

under its proposed language. More specifically, the Joint Petitioners stated that BellSouth makes an apples-to-oranges comparison between a retail service offering and a wholesale service offering. In other words, the Joint Petitioners maintained that if the Joint Petitioners were to exercise that right, then only a single North Carolina customer would lose service; but if BellSouth were to exercise its right under its proposed language, then thousands of North Carolina customers would be deprived of service and for actions not any one of them had taken. In essence, the Joint Petitioners argued that BellSouth attempts to interrupt service to the Joint Petitioners' customers as a means of gaining an unfair competitive advantage.

The Joint Petitioners maintained that the Commission should affirm its decision for Matrix Item No. 86(B).

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners filed comments to BellSouth's Objections as to the Panel's findings for Issue No. 15 (Matrix Item No. 86(B)) regarding disputes over unauthorized access to CSRs. BellSouth noted that, without citing any portion of BellSouth's proposed language, the Joint Petitioners continue to claim that BellSouth's proposal is "unacceptably vague and leaves Joint Petitioners and their customers dangerously exposed to potential coercion and manipulation." BellSouth argued that the Commission should disregard this argument. BellSouth stated that its proposed language clearly provides that disputes over unauthorized access to CSRs will be handled pursuant to the Dispute Resolution provisions in the General Terms and Conditions section of the Agreement. BellSouth noted that, under the clear wording of this provision, access to ordering systems will not be suspended nor will services be terminated while such a dispute is pending. Accordingly, BellSouth stated that its proposal gives the Joint Petitioners exactly what they want, insurance that "their service is protected while disputes over unproven BellSouth allegations of CSR abuse are resolved by a neutral decision maker such as the Commission."

BellSouth maintained that, in adopting BellSouth's proposed language, the Florida PSC recognized that the Joint Petitioners have an irrational fear of BellSouth's language BellSouth noted that the Florida PSC stated "BellSouth witness Ferguson claims that its proposed modified language to the Interconnection Agreement should have resolved this issue and further does not understand why the proposed language does not calm the Joint Petitioners' fears. We agree." BellSouth asserted that the Commission should not be fooled by the Joint Petitioners' unsupported fears.

Again, BellSouth stated that under its proposal, suspension and termination rights are triggered only if a Party: (1) disregards its obligation to produce an appropriate LOA; and (2) thereafter fails to dispute (i.e. ignores) a notice that specifies the alleged

CSR-related noncompliance (*See* BellSouth Exhibit A, Attachment 6, §§ 2.5 5.2 and 2.5.5.3). For the foregoing reasons, BellSouth stated, the Commission should modify its *RAO* to adopt BellSouth's proposed language for Matrix Item No 86(B)

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that BellSouth asserted that the Joint Petitioners' proposed language is unacceptable for many reasons. First, BellSouth argued that the Joint Petitioners' language is unduly vague. The Commission notes that the Joint Petitioners also asserted that BellSouth's proposed language is unacceptably vague. The Commission does not agree with BellSouth that the Joint Petitioners' proposed language is unduly vague.

Second, BellSouth maintained that the Joint Petitioners' proposed language does not impose any time period in which a Party must cure any unauthorized access even though the Joint Petitioners concede that they can produce a LOA in as little as two business days. The Commission believes that this argument by BellSouth does have merit. The Commission believes that it is appropriate to impose time periods in the language. Therefore, the Commission concludes that it is appropriate to modify the Joint Petitioners' proposed language in this regard, as follows:

Section 2.5.5.2
Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7^{th}) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken ~~as soon as practicable~~ **within seven (7) business days**.

Section 2.5.5.3
Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within ~~a reasonable time~~ **seven (7) business days** or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the

non-compliance **within seven (7) business days**, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

Third, and perhaps most importantly, BellSouth opined, the Joint Petitioners' proposal provides no remedy or recourse if the accused Party ignores its legal and contractual obligations and thus fails to respond to a request to provide an appropriate LOA. The Commission believes that, under the Joint Petitioners' proposed language, if the accused Party ignores the request to provide an appropriate LOA or fails to respond to a notice of noncompliance, the other Party should proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions of the Agreement. The Commission believes that invoking the dispute resolution provisions sufficiently qualifies as a remedy or recourse for the accusing Party and is a more reasonable course of action in such circumstances.

The Commission believes that BellSouth has provided no new or compelling arguments, with the exception of not imposing specific time periods, which warrant the Commission to alter its decision to adopt the Joint Petitioners' proposed language. The Commission does, however, believe it is appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Motion for Reconsideration on this issue, thereby affirming its decision to adopt the Joint Petitioners' proposed language concerning disputes over alleged unauthorized access to CSR information. However, the Commission does find it appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party, as follows:

Section 2.5.5.2

Notice of Noncompliance. If, after receipt of a requested LOA [Letter of Authorization], the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7^{th}) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken ~~as soon as practicable~~ **within seven (7) business days**.

Section 2.5.5.3

Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within ~~a reasonable time~~ **seven (7) business days** or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance **within seven (7) business days**, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions In such instance, the Parties cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5 5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement

FINDING OF FACT NO. 16 (ISSUE NO. 16 – MATRIX ITEM NO. 88): What rate should apply for Service Date Advancement (a/k/a service expedites)?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth must provide service expedites at TELRIC-compliant rates. The Commission further ordered BellSouth and the Joint Petitioners to negotiate in good faith an appropriate rate for service expedites. The Commission concluded that if the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 16 stating that the Commission erred, as a matter of law, in arbitrating this issue as it involves a service that BellSouth is not obligated to provide under Section 251. Additionally, BellSouth maintained that the Commission erred, as a matter of law, in ruling that BellSouth must expedite service orders at TELRIC-compliant rates.

BellSouth stated that, as an initial matter, the Commission should refrain from arbitrating this issue. BellSouth noted that, as stated in its brief, this item is not appropriate for arbitration under Section 252 of TA96, because BellSouth has no Section 251 obligation to expedite service orders. BellSouth asserted that compulsory arbitration under Section 252 should be properly limited to those issues necessary to implement a Section 252 agreement. BellSouth argued that expedite charges are not necessary to implement the Agreement. As such, BellSouth commented that the Commission should reconsider its initial decision and decline to arbitrate Matrix Item No. 88.

BellSouth stated that, assuming *arguendo* that the Commission addresses the issue, the Commission should reconsider its *RAO* because it is incorrect as a matter of law. BellSouth noted that, in finding that BellSouth has an obligation to provide expedited

services at TELRIC, the Commission cited to Section 251(c)(3) of TA96 and FCC Rule 51.311(b). BellSouth asserted that Section 251(c) obligates BellSouth to provide "nondiscriminatory access" to UNEs. BellSouth noted that FCC Rule 51.311(b) requires such access to "be at least [equal] in quality to that which the incumbent LEC provides to itself." BellSouth argued that nothing in Section 251(c)(3) or in FCC Rule 51.311(b), however, requires or implies that an ILEC must provide services to a CLP that are superior in quality to those provided to a retail customer requesting similar services.

BellSouth maintained that its obligation under Section 251 is to provide service within standard provisioning intervals – intervals that have already been established by the Commission. Specifically, BellSouth noted, the Commission recognized the obligation to provide service in standard intervals in establishing a performance measurement plan (collectively, the Service Quality Measurement (SQM)/Self-Effectuating Enforcement Mechanism (SEEM) plan) in North Carolina BellSouth stated that the SQM/SEEM plan is designed to ensure that BellSouth meets its Section 251 obligation to provide service to CLP customers on a nondiscriminatory basis by establishing certain time periods for the provision of service. Further, BellSouth maintained that the SQM/SEEM plan requires BellSouth to pay penalties if BellSouth fails to provision services within these established intervals. Significantly, BellSouth argued that the Joint Petitioners concede that the SQM/SEEM plan contains no "expedited" provisioning measures. BellSouth asserted that if service expedites were a Section 251 obligation, the Commission would have established an interval for them.

Rather, BellSouth maintained that the standard for service expedites is nondiscrimination BellSouth asserted that it meets its nondiscrimination obligations by charging its retail and CLP customers the same service expedite rate - $200 per circuit per day - from its federal access tariff. BellSouth stated that by charging CLPs and its retail customers the same rate for this optional, voluntary service, BellSouth complies with all of its obligations regarding the provision of service expedites.

BellSouth argued that, tellingly, the Joint Petitioners cannot cite to any authority (state or federal) that specifically supports the proposition that an ILEC must expedite service orders at TELRIC. In contrast, BellSouth noted, a state commission recently addressed this issue by adopting BellSouth's position. Specifically, BellSouth stated, the Florida PSC refused to require BellSouth to provide expedites at TELRIC and held that BellSouth's tariffed rate should apply unless the parties negotiate different rates. In reaching this conclusion, BellSouth maintained, the Florida PSC cited to FCC Rule 51.311(b) and found that BellSouth meets its nondiscrimination obligation by charging identical service expedite rates to CLPs and its retail customers. Specifically, BellSouth maintained that the Florida PSC stated, as follows:

> Accordingly, where technical feasibility is not an issue, incumbents are required to provide access to UNEs *at parity* (as a minimum) to that provided to their retail customers. It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer requesting similar

services. So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites, and there is no conflict with Rule 51.311(b)

BellSouth argued that, at its core, the Commission's ruling gives the Joint Petitioners something more than standard provisioning intervals priced at TELRIC without any legal or policy justification for doing so. Accordingly, BellSouth asserted that the Commission should refrain from setting rates for voluntarily-offered services, and should adopt BellSouth's position on Matrix Item No. 88, as it is reasonable and nondiscriminatory.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners stated that BellSouth's objection to the Commission's ruling on service order expedites is comprised of two arguments, and neither argument is persuasive. The Joint Petitioners maintained that for the following reasons, the Commission should affirm its decision for this issue in its entirety.

The Joint Petitioners asserted that BellSouth's first argument that "the Commission should refrain from arbitrating this issue," for "this item is not appropriate for arbitration under Section 252 of the Act, because BellSouth has no Section 251 obligation to expedite service orders" is wrong in several ways Most fundamentally, the Joint Petitioners argued that BellSouth errs in asserting that it has no Section 251 obligation to expedite orders for UNEs. The Joint Petitioners maintained that for the reasons set forth by the Commission in its initial decision and by the Joint Petitioners in their brief, BellSouth does indeed have a Section 251 obligation to provide access to UNEs on a nondiscriminatory basis at TELRIC rates. The Joint Petitioners opined that because BellSouth expedites the provision of analogous circuits for itself when providing services to its retail customers, BellSouth has a Section 251 obligation to expedite UNE orders upon request on a nondiscriminatory basis. The Joint Petitioners maintained that this functionality is part and parcel of UNE provisioning. The Joint Petitioners asserted that CLPs are not retail customers and they do not pay retail for such services; TA96 provides them with the ability to attain such services at TELRIC rates so as to provide them with a meaningful opportunity to compete.

The Joint Petitioners opined that BellSouth's argument also fails because it ignores the very fact that the parties voluntarily negotiated terms for this Section 252 interconnection agreement that provide for such expedites. The Joint Petitioners noted that the only issue not resolved through negotiation was the rate to be applied to such expedites. The Joint Petitioners stated that the Commission necessarily arbitrated that issue and the parties presented testimony and briefing on it. Indeed, the Joint Petitioners asserted that under the rationale of the *Coserve* case, which provides that state commissions in Section 252 arbitrations have the jurisdiction to arbitrate Section 251 obligations, as well as those issues voluntarily negotiated by the parties, there is no doubt that the Commission has jurisdiction to arbitrate this issue.

The Joint Petitioners maintained that BellSouth's erroneous assertion that the Commission's *RAO* on this issue is incorrect as a matter of law rests upon two sub-arguments, neither of which has merit. First, the Joint Petitioners noted that BellSouth claimed that because the Commission has set intervals for provisioning UNEs and those intervals do not include service expedites, there cannot be a Section 251 obligation to perform such expedites – otherwise, the Commission would have created an interval for service expedites. The Joint Petitioners maintained that this circular argument is flawed in several respects. The Joint Petitioners argued that BellSouth cannot deduce and attribute to the Commission a conclusion or rationale never supplied by the Commission in its performance measurements order. Obviously, the Joint Petitioners opined that the Commission does not agree with the rationale, as it has correctly declined to endorse BellSouth's unfounded assertion that its Section 251 obligations are limited to providing UNEs in certain intervals. In addition, the Joint Petitioners stated that service expedite requests do not lend themselves to the creation of standard intervals as they are themselves a request to obtain a UNE outside a standardized interval. Thus, the Joint Petitioners argued that BellSouth's assertion that there can be no Section 251 obligation because no interval has been set by the Commission is nonsensical.

Second, the Joint Petitioners stated that BellSouth suggested that the Commission's decision here somehow results in the provision of services to the Joint Petitioners that are superior in quality to those provided to BellSouth retail customers. The Joint Petitioners argued that in no way does the Commission's decision provide the Joint Petitioners with services that are superior in quality. Instead, the Joint Petitioners argued that they are simply assured that they get the same access BellSouth gets at the TELRIC rates they are entitled to under TA96. The Joint Petitioners asserted that the Commission's enforcement of TA96's nondiscriminatory access requirement in no way creates a superior service obligation; the Joint Petitioners get the same loops and the same opportunity to expedite as BellSouth gets in providing services to its retail unit and in turn to its retail customers.

The Joint Petitioners asserted that the Commission should affirm its decision for Matrix Item No. 88.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Commission Panel erred, as a matter of law, in arbitrating this issue as it involves a service that BellSouth is not obligated to provide under Section 251. Additionally, BellSouth maintained that the Commission erred, as a matter of law, in ruling that BellSouth must expedite service orders at TELRIC.

BellSouth asserted that the Joint Petitioners take issue with BellSouth's Objections to the Commission's finding on Issue No. 16 (Matrix Item No 88), wherein the Commission incorrectly concluded that BellSouth has an obligation to expedite service orders at TELRIC. BellSouth argued that, citing no authority other than the Commission's *RAO*, the Joint Petitioners proclaim that "BellSouth does indeed have a Section 251 obligation to provide access to UNEs [including expediting UNE orders] on a nondiscriminatory basis at TELRIC rates." BellSouth commented that, as an initial matter, the Kentucky and Florida PSCs have rejected the Joint Petitioners' arguments regarding this issue, finding that BellSouth's pricing of expedites is nondiscriminatory and that service expedites are not a Section 251 obligation. Accordingly, BellSouth maintained, there are two decisions directly on point that refute the Joint Petitioners' arguments and suggest that the Commission should modify its *RAO* and find in favor of BellSouth.

Next, BellSouth stated that the Joint Petitioners contended that because they "are not retail customers and do not pay retail rates for such services [expedites], the Act provides them with the ability to attains (sic) such services [expedites] at TELRIC rates so as to provide them with a meaningful opportunity to compete " BellSouth argued that the Joint Petitioners' contentions are factually and legally incorrect First, BellSouth opined that the Joint Petitioners currently do pay the same tariffed rates for service expedite requests that BellSouth's retail customers pay. Second, BellSouth maintained that the assertion that CLP status somehow automatically entitles the Joint Petitioners to TELRIC pricing for service expedites is simply wrong Fundamentally, BellSouth argued that, in the absence of a finding of impairment (and there is none in this case), TELRIC pricing is inappropriate and impermissible BellSouth noted that *USTA II*, 359 F.3d at 589 states, "we find nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment [under Section 251]". Accordingly, BellSouth asserted that the Commission should reject any argument that TELRIC pricing is applicable in any instance other than Section 251(c). BellSouth contended that, at its core, the Commission's ruling gives the Joint Petitioners something more than standard provisioning intervals priced at TELRIC without any legal or policy justification for doing so. Accordingly, BellSouth asserted, the Commission should refrain from setting rates for voluntarily-offered services and should adopt BellSouth's position on Matrix Item No. 88, as it is reasonable and nondiscriminatory.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission does not believe that BellSouth provided any new or compelling arguments which warrant a change in the Commission's decision on this issue. The Commission continues to agree with the Public Staff that, if technically feasible, an ILEC should provide a CLP with access to UNEs at least equal in quality to that which the

ILEC provides to itself. The Commission also believes that expediting service to customers is simply one method by which BellSouth can provide access to UNEs and that, since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b). As noted by the Public Staff in its proposed order, the $200 per circuit, per day rate from BellSouth's federal access tariff that BellSouth proposes as its rate to the Joint Petitioners is the rate BellSouth charges its large retail customers. However, there is no cost support for the rate Based upon the foregoing, the Commission finds it appropriate to uphold the *RAO* in this regard.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Objection to Finding of Fact No. 16, thereby affirming its initial decision that BellSouth must provide service expedites at TELRIC-compliant rates. In addition, BellSouth and the Joint Petitioners should negotiate, in good faith, an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

FINDING OF FACT NO. 17 (ISSUE NO. 17 – MATRIX ITEM NO. 97): When should payment of charges for service be due?

INITIAL COMMISSION DECISION

The Commission concluded that the payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission required the Joint Petitioners and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Section 1.4, in accordance with the decision.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 17 stating that the Commission should clarify that its Payment Due Date ruling applies only to bills that are received electronically.

BellSouth stated that it seeks clarification regarding the Commission's Finding of Fact No. 17, as well as its conclusion with respect to Matrix Item No. 97. Specifically, BellSouth noted that the Commission concluded that "the payment due date should be 26 days from the date of receipt of the bill." BellSouth stated that it does not object to the Commission's ruling to the extent that it sets a payment due date of 26 days from receipt of the bill, for electronic bills only. BellSouth maintained that this clarification should not concern the Joint Petitioners because they receive most of their bills electronically. Further, BellSouth commented that this clarification is necessary because BellSouth does not know when bills that are sent via U.S. mail are received by the Joint Petitioners.

BellSouth noted that the Agreement that will ultimately be approved by the Commission will be available for adoption by other CLPs BellSouth stated that, unlike the Joint Petitioners, such CLPs may not receive the majority of their bills in an electronic format (it is a CLP's choice as to whether it wants to receive bills electronically). BellSouth maintained that, for bills that are mailed, in addition to not knowing when such bills are received by a CLP, BellSouth has a concern that a CLP may abuse the "date received" standard in order to avoid the timely payment of bills. Accordingly, BellSouth respectfully requested the Commission to clarify that for electronic bills only, the payment due date should be 26 days from the receipt of such bills; in all other instances, the payment due date should be the next bill issuance date. BellSouth asserted that such clarification should have a minimal impact on the Joint Petitioners, and it will have no impact whatsoever if the Joint Petitioners elect to receive all bills electronically. Further, BellSouth argued, such clarification will protect BellSouth from abuse by CLPs that do not receive bills in an electronic format.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners noted that BellSouth's Objection appears to be in the nature of a request for clarification, and yet it would vitiate a good portion of the Commission's finding. The Joint Petitioners maintained that BellSouth wants the Commission to clarify its decision to the extent that the 26-days from receipt payment period will apply only to bills received electronically. To support its request, the Joint Petitioners noted that BellSouth claimed: (1) that the clarification should not concern the Joint Petitioners because they receive most of their bills electronically; (2) that the clarification is necessary because BellSouth does not know when bills sent via U.S. mail are received; and (3) that other CLPs can adopt this Agreement and take advantage of the "date received" standard. The Joint Petitioners argued that these reasons for clarification are unconvincing and should not at all be considered as grounds for modifying the Commission's decision.

The Joint Petitioners asserted that BellSouth's claim that the Joint Petitioners should not be concerned with such a clarification is unduly presumptuous and should not be considered. The Joint Petitioners argued that they are indeed concerned because they do not receive all bills electronically. The Joint Petitioners argued that they need sufficient time to review bills, regardless of the format in which they are received. In addition, the Joint Petitioners noted, BellSouth's claim that it cannot determine the receipt date for bills sent by U.S mail already has been disproven. As the Joint Petitioners have maintained, and as the Commission recognized in its recommendation, courier services – such as UPS and FedEx – and the United States Postal Service have long provided return receipt or delivery confirmation services to their customers. The Joint Petitioners also stated that, as for other CLPs taking advantage of the "date received" standard, this is an argument based upon nothing but unsupported speculation that other CLPs could, or somehow would, manipulate the date received standard, which is easily made transparent.

The Joint Petitioners argued that BellSouth presented no compelling reason why the Joint Petitioners' electronic and mailed bills should be treated differently. Accordingly, the Joint Petitioners asserted that the Commission should reject BellSouth's request and keep with its initial finding that the payment due date will be 26 days from bill receipt, regardless of the format in which the bill is delivered.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth asserted that the Commission should clarify that its Payment Due Date ruling applies only to bills that are received electronically

BellSouth maintained that it is disappointing, but not surprising, that the Joint Petitioners object to BellSouth's request for clarification regarding the Panel's findings as to Matrix Item No. 97 and the payment due date. BellSouth stated that, despite the fact that the Joint Petitioners receive most of their bills electronically and can choose to receive all bills electronically, the Joint Petitioners oppose BellSouth's request for the Commission to clarify that its payment due date ruling applies to electronic bills only. BellSouth argued that this clarification is necessary because BellSouth does not know when bills that are sent via U.S. mail are received by the Joint Petitioners. BellSouth noted that the Joint Petitioners appear to assert that BellSouth can (and should) incur the additional cost and time necessary to use delivery confirmation services to track receipt of mailed bills BellSouth noted that the Joint Petitioners have not offered to pay for such additional costs, and imposing such additional costs is inappropriate given the fact that this Commission and the FCC have already found that BellSouth's billing practices are nondiscriminatory and provide CLPs with a meaningful opportunity to compete in the local market.

Accordingly, BellSouth requested the Commission to clarify that, for electronic bills only, the payment due date should be 26 days from the receipt of such bills; in all instances, the payment due date should be by the next bill issuance date. In the alternative, BellSouth maintained that the Commission should clarify that the Joint Petitioners are required to pay BellSouth for all costs associated with confirming delivery of mailed bills.

JOINT PETITIONERS: The Joint Petitioners did not address this issue in their reply comments.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that, in its *RAO*, it found that the Commission's decision in the ITC^DeltaCom Communications, Inc. (ITC^DeltaCom) / BellSouth arbitration proceeding was reasonable and applicable to this proceeding as well. The Commission noted that BellSouth did not provide any compelling arguments why a 26-day billing period, as was adopted in the ITC^DeltaCom/BellSouth docket, was not appropriate in this proceeding. The Commission does not believe that BellSouth has provided any new or compelling reasons for the Commission to alter its initial decision on this issue. The Commission's decision in the ITC^DeltaCom/BellSouth arbitration docket did not distinguish between electronic or mailed bills, and, therefore, it is not appropriate for the decision in this case to make such a distinction. Therefore, the Commission finds it appropriate to affirm its initial decision on this issue

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Objection to Finding of Fact No. 17, thereby affirming its initial decision that the payment due date should be 26 days from the date of receipt of the bill.

FINDING OF FACT NO. 18 (ISSUE NO. 18 – MATRIX ITEM NO. 100):

Joint Petitioners' Issue Statement: Should a CLP be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

BellSouth's Issue Statement: Should a CLP be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

INITIAL COMMISSION DECISION

The Commission concluded that it is appropriate to adopt the Joint Petitioners' proposed language, as follows, concerning suspension or termination notices for Section 1.7.2 of Attachment 7 of the Agreement:

> **Section 1.7.2 – Joint Petitioners**
> Each Party reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the Due Date, the billing Party may provide written notice to the other Party that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, as indicated on the notice in dollars and cents, is not received by the fifteenth (15^{th}) calendar day following the date of the notice. In addition, the billing Party may, at the same time, provide written notice that the billing Party may discontinue the provision of

existing services to the other Party if payment of such amounts, as indicated on the notice (in dollars and cents), is not received by the thirtieth (30^{th}) calendar day following the date of the Initial Notice.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 18 stating that the Commission erred in adopting the Joint Petitioners' proposed language. BellSouth argued that the Commission's ruling effectively gives the Joint Petitioners a rolling 15-day extension to pay undisputed billings.

BellSouth asserted that in adopting the Joint Petitioners' proposed language (and thus obligating BellSouth to provide service and access to ordering systems despite not being paid undisputed, past due, and previously billed charges), the Commission concluded that "the potential sanctions for nonpayment are too sever[e] to let the risk of calculation errors potentially occur " However, BellSouth stated that it has committed to advise the Joint Petitioners of the undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service.

Further, BellSouth maintained that the Joint Petitioners know when they receive bills, they know when the bills are due, and they concede that the amount of such bills can be predicted with a reasonable degree of accuracy. Moreover, BellSouth asserted that the Joint Petitioners presented no evidence that so-called "calculation errors" have ever resulted in suspension or termination action and did not produce one example of any suspension/termination notice that required the undertaking of any calculation on behalf of the Joint Petitioners Moreover, BellSouth stated that Joint Petitioners witness Russell testified that NuVox has paid all BellSouth bills in a timely manner for seven years. BellSouth asserted that, to state the obvious, a CLP that pays its bills in a timely manner does not interact with BellSouth's collections organization. Accordingly, BellSouth argued that the Commission should disregard (or at least discount) the Joint Petitioners' hypothetical concerns about BellSouth's collections practices.

Accordingly, BellSouth maintained that there is no guess work involved in BellSouth's collections process and, thus, no potential for calculation errors. BellSouth argued that holding otherwise allows the Joint Petitioners to have a revolving extension of payment of undisputed, past due, previously billed amounts – a privilege not afforded to others similarly situated in the industry.

Finally, BellSouth asserted that termination of service for nonpayment is a universally accepted and straightforward principle. BellSouth stated that the financial risk BellSouth faces when CLPs do not pay for services rendered is no "game", but a stark reality of the telecommunications world Accordingly, BellSouth maintained that the Commission should: (1) disregard the Joint Petitioners' unsupported assertion about collections "shell games"; and (2) allow BellSouth to protect its financial interest by giving BellSouth the right to discontinue providing service to any Joint Petitioner that fails to timely pay

for services rendered. BellSouth asserted that the Commission should reconsider its initial decision and adopt BellSouth's proposal for Matrix Item No. 100.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not address this issue in its initial comments.

JOINT PETITIONERS: The Joint Petitioners noted that BellSouth argued that the Commission's decision "allows the Joint Petitioners to have a revolving extension for payment of undisputed, past due, previously billed amounts – a privilege not afforded to others similarly situated in the industry." The Joint Petitioners argued that BellSouth's conclusion is nonsensical and unpersuasive. Accordingly, the Joint Petitioners recommended that the Commission should disregard BellSouth's argument and affirm its initial decision in the *RAO*.

The Joint Petitioners maintained that BellSouth provides no support for its "rolling 15-day extension" argument, as there is none. The Joint Petitioners asserted that the Commission's decision on this issue has nothing to do with when payment is due or at which point late payment charges will continue to accrue The Joint Petitioners argued that by adopting the Joint Petitioners' position and language on this issue, the Commission's *RAO* is reasonably attempting to eliminate the potential for calculation errors that could result in suspension or termination – events that could have a hugely detrimental impact on the Joint Petitioners and their North Carolina customers. The Joint Petitioners stated that the Commission's decision also ensures that the Joint Petitioners will have a full 15 and 30 days within which to verify the amount demanded and make payment to BellSouth before the threat of suspension or termination arises and without the undue complexity and unfairness of aggregating and collapsing these 15 to 30-day notice periods for subsequent accounts that may become past due (for which a separate billing notice will be sent and the same straightforward process would apply).

The Joint Petitioners noted that in support of its objection, but not clearly related to its argument, BellSouth also pointed to its post-hearing offer to advise the Joint Petitioners of additional amounts due to avoid suspension and termination that are not included in the figure it provides with the notice. For the reasons explained in the Joint Petitioners' brief, the Joint Petitioners asserted that this commitment to provide additional unspecified information upon request and within an unspecified timeframe does not satisfactorily eliminate the potential for erroneous or even wrongful suspension or termination. To the contrary, the Joint Petitioners argued that it seems to add more uncertainty to the process, as the Joint Petitioners and this Commission have no grounds upon which they could conclude that such information will be timely, accurate, or reliable.

Accordingly, the Joint Petitioners recommended that the Commission affirm its finding on this item in its *RAO*.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Commission Panel erred in adopting the Joint Petitioners' proposed language because there is no "guess work" involved with the Joint Petitioners knowing that they should timely pay undisputed amounts. BellSouth argued that the Commission's ruling effectively gives the Joint Petitioners a rolling 15-day extension to pay undisputed billings.

BellSouth noted that, in opposing BellSouth's Objections to the Commission's findings regarding Matrix Item No. 100, the Joint Petitioners asserted that the "Commission's decision on this issue has nothing to do [with] when payment is due" and that by adopting the Joint Petitioners' position the Commission "reasonably attempt[ed] to eliminate the potential for calculation errors that could result in suspension or termination [of service]." First, BellSouth stated that it agrees that this issue has nothing to do with the Joint Petitioners' obligation to timely pay previously billed amounts. Second, BellSouth noted, regarding supposed calculation errors, the Joint Petitioners provide no evidence in support of, or attempt to articulate how, such errors could occur given the fact that BellSouth has committed to advise the Joint Petitioners of the undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service. Indeed, BellSouth noted that the Florida PSC determined that BellSouth's language and practice takes any guesswork out of the collection process BellSouth asserted that the Commission should reach the same conclusion here.

Accordingly, BellSouth argued that the Commission should reverse its prior ruling and find that there is no guesswork involved in BellSouth's collections process and find in favor of BellSouth. BellSouth asserted that holding otherwise allows the Joint Petitioners to have a revolving extension for payment of undisputed, past due, previously billed amounts – a privilege *not* afforded to others similarly situated in the industry. BellSouth noted that the Florida PSC found, "We do not believe the Joint Petitioners should view the due date of a treatment notice as an automatic extension of the payment due date of the original bill."

JOINT PETITIONERS: The Joint Petitioners did not address this issue in their reply comments.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that BellSouth has provided no new or compelling arguments concerning this issue. The Commission further notes that BellSouth's commitment to advise the Joint Petitioners of undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service relies exclusively on a request made by a Joint Petitioner (i.e., BellSouth will provide this information only upon request by the competitor).

The substantive difference between BellSouth's proposed language and the Joint Petitioners' proposed language concerns amounts not in dispute that become past due subsequent to the issuance of the written notice. Under BellSouth's proposed language, if a Joint Petitioner pays all past due, undisputed amounts within 15 days of a notice, but other amounts become past due subsequent to the issuance of the notice, then the Joint Petitioner will be subject to suspension or termination by BellSouth. The Commission continues to believe that the potential sanctions for nonpayment are too severe to let the risk of calculation errors potentially occur. Under the Joint Petitioners' proposed language, BellSouth must explicitly show the amount due, in dollars and cents, to avoid suspension or termination; the Commission continues to believe that this language is appropriate and reasonable.

Therefore, the Commission concludes that it is appropriate to deny BellSouth's Motion for Reconsideration concerning Finding of Fact No 18, thereby affirming its decision to adopt the Joint Petitioners' proposed language for Section 1.7.2 of Attachment 7 of the Agreement.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Motion for Reconsideration concerning Finding of Fact No. 18, thereby affirming its decision to adopt the Joint Petitioners' proposed language for Section 1.7.2 of Attachment 7 of the Agreement.

FINDING OF FACT NO. 19 (ISSUE NO. 19 – MATRIX ITEM NO. 101): How many months of billing should be used to determine the maximum amount of the deposit?

INITIAL COMMISSION DECISION

The Commission concluded that the deposit requirements specified in Commission Rule R12-4 are applicable and the language proposed by BellSouth should be incorporated into the Agreement.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 19 arguing that the Commission recommended that the Agreement entitled

BellSouth to a full two-months' deposit on the ground that Commission Rule R12-4, which governs retail end-users' deposit obligations, requires this deposit standard. The Joint Petitioners have requested that the Agreement provide for either (1) the deposit requirement to which BellSouth agreed in the ITC^DeltaCom Agreement of one-month's deposit for services paid in advance and two-months' deposit for services paid in arrears, or (2) their initially proposed deposit of one-and-one-half month's deposit for the Joint Petitioners and two-months for new CLPs. The Joint Petitioners argued that this two-month deposit obligation, given the ITC^DeltaCom deposit language, contravenes the Act's nondiscrimination requirement, because there is no basis for distinguishing the Joint Petitioners from ITC^DeltaCom such that a larger maximum deposit provision should be imposed upon them. The Joint Petitioners stated that, in addition, it is based upon a rule that does not and should not apply to a Section 252 wholesale (as opposed to non-Section 252 retail) contract arrangement.

The Joint Petitioners claimed that BellSouth admittedly has agreed with ITC^DeltaCom to a less onerous maximum deposit provision than what it demands from the Joint Petitioners. The Joint Petitioners argued that this inequity is a clear case of discrimination, violating the principle of Section 251 that BellSouth must treat all CLPs in the same manner and must treat them in the same manner it treats itself. The Joint Petitioners asserted that given the Commission's commitment to ensuring parity, it should not permit BellSouth to demand a larger maximum deposit provision than that which it voluntarily agreed to with ITC^DeltaCom.

In addition, the Joint Petitioners stated that the Commission's reliance on Commission Rule R12-4, which applies to retail end-users, to set deposit language for a wholesale interconnection agreement is inappropriate. The Joint Petitioners argued that comparing a wholesale agreement to a retail agreement is misleading and ineffective. The Joint Petitioners asserted that the type of service, and more importantly, the amounts of money involved, in this Agreement are more complex and far more substantial than what is involved in simple retail service to end-user customers.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners make the unsupported argument that the Commission's reliance on Rule R12-4 is misplaced, as it allegedly applies to retail end-users only. BellSouth asserted that the Commission's deposit rules make no distinction between wholesale and retail customers. In fact, the words "wholesale" and "retail" do not appear in the Commission's deposit rules. To the contrary, Commission Rule R12-1 provides that "[a]ny utility requiring a deposit shall apply a deposit policy in accord with these rules in an equitable and nondiscriminatory manner to all applicants for service and to all customers...." BellSouth stated that setting aside whether or not the Commission's deposit rules technically apply to the Joint Petitioners, BellSouth's maximum deposit-cap proposal is nondiscriminatory (as it applies to both retail and CLP customers) and it mirrors the Commission's maximum deposit rule (Rule R12-4(a)). Thus, BellSouth opined that, a maximum deposit amount equal to two-months' billing is in accord with the stated public policy of the Commission.

The Joint Petitioners have offered no credible reason why they should be afforded special treatment that is inconsistent with such public policy.

BellSouth stated that the Joint Petitioners make the unsupported and inaccurate claim that there is no basis for distinguishing the Joint Petitioners from ITC^DeltaCom for maximum deposit purposes. As an initial matter, the Commission's deposit rules, as well as the agreed-upon deposit criteria in the Agreement, recognize that the amount of deposit (if any) that may be required from a customer turns on the credit risk presented by such customer.[47] There is nothing in the record that establishes that ITC^DeltaCom and the Joint Petitioners pose the same credit risk to BellSouth. Thus, BellSouth asserted that, there is nothing to support the assertion that the Joint Petitioners should be treated the same as ITC^DeltaCom for deposit purposes.

In addition and more fundamental, BellSouth claimed that, the Joint Petitioners are not requesting the same treatment as ITC^DeltaCom. Rather, the Joint Petitioners want the ITC^DeltaCom deposit-cap language without the deposit criterion that accompanies the cap. Specifically, the deposit criterion contained in the BellSouth/ITC^DeltaCom interconnection agreement is much more stringent than the deposit criterion contained in the Agreement which is the subject of this arbitration. BellSouth pointed out that, not surprisingly, it offered the Joint Petitioners the same deposit language in its entirety that it agreed to with ITC^DeltaCom, but the Joint Petitioners rejected it. BellSouth argued that, because the Joint Petitioners are not seeking the complete ITC^DeltaCom deposit language, their claim of discrimination lacks any merit. Simply put, there is nothing discriminatory in the fact that different deposit criterion results in a different deposit-cap. To the contrary, BellSouth argued that, allowing the Joint Petitioners to "pick and choose" the ITC^DeltaCom maximum security deposit provision, while permitting them to throw out the associated ITC^DeltaCom deposit criterion, as well as rejecting the ITC^DeltaCom Agreement in its entirety, is inappropriate and impermissible, as it resurrects a "pick and choose" regime that the FCC abandoned in July 2004.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners stated that BellSouth, in an attempt to defend its discriminatory refusal to agree to the same maximum deposit provision that it agreed to with ITC^DeltaCom, mistakenly claims that the Joint Petitioners are trying to "pick and choose" deposit language from the ITC^DeltaCom Agreement. Contrary to BellSouth's misleading assertion, the Joint Petitioners are not trying to engage in "pick and choose" in contravention to the FCC's new rule implementing how Section 252(i) is

[47] Commission Rule R12-1; *see* Attachment 7, Section 1.8.5.

to be implemented. The Joint Petitioners stated, indeed, they have negotiated an entire Agreement and are now arbitrating it before the Commission. By doing so, the Joint Petitioners stated that, they obviously have chosen not to invoke their Section 252(i) rights in this context.

The Joint Petitioners claimed that, this diversionary tactic was employed by BellSouth because BellSouth is unable to supply a sound basis for defending its unlawfully discriminatory demand to impose a more onerous maximum deposit provision on the Joint Petitioners than it has agreed to impose on other CLPs. The Joint Petitioners stated that BellSouth, in an effort to defend its discriminatory conduct, claims that there is nothing in the record that establishes that ITC^DeltaCom and the Joint Petitioners pose the same credit risk to BellSouth. The Joint Petitioners maintained that there also is nothing to the contrary on the record. The Joint Petitioners argued that credit risk has no direct correlation to the establishment of a maximum deposit provision, but rather, is a factor in determining how much a carrier must provide up to the deposit maximum

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the deposit requirements specified in Commission Rule R12-4 are applicable for these circumstances and the language proposed by BellSouth should be incorporated into the Agreement. The Joint Petitioners have not offered any new or persuasive arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this finding of fact should be changed

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 19.

FINDING OF FACT NO. 20 (ISSUE NO. 20 – MATRIX ITEM NO. 102): Should the amount of the deposit BellSouth requires from a CLP be reduced by past due amounts owed by BellSouth to the CLP?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 20 arguing that the Commission's reliance on Rule R12-4 is inapposite and unhelpful in the context of this wholesale interconnection agreement. The Joint Petitioners stated that the Commission reasons that because Commission Rule R12-4 does not have a provision by which a retail end-user may offset against a BellSouth deposit request, then Petitioners are similarly not entitled to such an offset. Yet, the lack of any offset provision in Commission Rule R12-4, rather than militating against the Joint Petitioners' proposal, only underscores the fact that the rule cannot be applied in the context of a Section 252 agreement. The Joint Petitioners argued that consumers do not need offset provisions; it is difficult to conceive of a situation in which BellSouth would owe a consumer fees for services rendered Accordingly, the Joint Petitioners asserted that the Commission's application and reliance on Commission Rule R12-4 is improper in this context.

The Joint Petitioners commented that, by contrast, they are quite often owed considerable sums by BellSouth, often in the tens of millions of dollars. The Joint Petitioners argued that there is no legitimate reason that any CLP should pay a deposit when BellSouth is in essence holding that CLP's money already. The Joint Petitioners asserted that it is for this reason that two other state commissions, Kansas and Oklahoma, have held that deposit offsets are appropriate The Joint Petitioners noted that these commissions found that requiring an offset is simply the fair and appropriate resolution to the ILEC's combined poor-payment history and large-deposit requests. The Joint Petitioners claimed that the rationale of these decisions applies to this case as well, as BellSouth has demonstrated a poor-payment history and a penchant for deposits. And, all BellSouth need do to avoid an offset is to comply with the same good payment history standard that applies to the Joint Petitioners.

The Joint Petitioners argued that because deposits have the potential to tie up so much of the Joint Petitioners' capital, they could hinder the Joint Petitioners' ability to deploy new products and services for North Carolina customers. This result is not ameliorated by the other options to address late payments that the Commission proposes—e.g. the assessment of late charges, the suspension of service, or the disconnection after notice (the latter two would threaten needlessly the small businesses that rely on the Joint Petitioners' services). The Joint Petitioners argued that late fees do not counterbalance the harm of carrying millions of dollars in uncollectibles while simultaneously devoting millions of dollars in deposits. The Joint Petitioners maintained that an offset is the only method for correcting this clear inequity to a meaningful degree.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Commission correctly concluded that Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by BellSouth. The Joint Petitioners objected to the Commission's decision by claiming that the Commission's deposit rules should have been disregarded when determining

this issue. Again, BellSouth argued that, the Commission's policy, as set forth in Commission Rule R12-1, plainly provides that "any utility requiring a deposit from its customers shall fairly and indiscriminately administer a reasonable policy... in accord with these rules, for the requirement of a deposit...." BellSouth asserted that, the Commission reasonably concluded that, since its rules do not provide for such an offset, it should not create one for the Joint Petitioners. BellSouth stated that, similar to Item No. 101 (maximum deposit amount), the Joint Petitioners have offered no credible reason why they should be afforded special treatment that is inconsistent with such public policy.

Moreover, BellSouth noted that the Commission's conclusion is the same conclusion reached by the Kentucky and Florida PSC. BellSouth commented that the rationale stated by the Florida PSC is particularly insightful:

> [P]erhaps most important, we find that requiring a deposit from the Joint Petitioners and the dispute of charges or late payment made by BellSouth are separate issues. A deposit required under the interconnection agreement is intended to protect the ILEC from the financial risk of non-payment for services provided to the CLEC. If BellSouth has a billing dispute or is late paying the Joint Petitioners, it should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount of services provided to the Joint Petitioners.[48]

Finally, BellSouth argued that, the Joint Petitioners claim that BellSouth has a penchant for deposits. However, the record demonstrates that BellSouth has actually lowered NuVox's deposit and that Xspedius' deposit is substantially less than two-months' billing. In summary, BellSouth maintained that neither the facts nor the Commission's Rules support a reversal of the Commission's ruling that a deposit offset provision is inappropriate.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners asserted that BellSouth offers no new arguments in its comments on this issue and does not offer anything to refute the Joint Petitioners' argument that the Commission's retail rules should not apply to this issue. Moreover, the Joint Petitioners stated, as demonstrated in the record, due to the

[48] FPSC Order No PSC-05-0975-FOF-TP at 71.

less-than perfect payment history of BellSouth, there is a real need for the Joint Petitioners to protect themselves from past-due amounts BellSouth refers to the Florida and Kentucky PSC decisions on this issue to support its comments. However, the Kentucky PSC decision does little to support BellSouth. The Joint Petitioners stated that, the Kentucky PSC did not adopt the Joint Petitioners' proposed language, noting BellSouth has agreed that in the event a deposit is requested of the CLEC, the deposit will be reduced by an amount equal to undisputed past due amounts, if any, that BellSouth owes the CLEC. The Joint Petitioners have sought reconsideration and clarification on this issue. With regard to the Florida PSC decision, the Joint Petitioners asserted that the Florida PSC was incorrect in holding that BellSouth's late payment should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount or services provided to the Joint Petitioners. The Joint Petitioners argued that this rationale is misguided because the amount of services BellSouth provides to the Joint Petitioners is not at issue; rather it is the amount of money that the Joint Petitioners are required to freeze in deposits while simultaneously being deprived of money due from BellSouth The Joint Petitioners argued that it is patently unfair to require the Joint Petitioners to post deposits without tying such an obligation to BellSouth's establishment of a good payment record

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice. The Joint Petitioners have not offered any new or compelling arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this finding of fact should be changed

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 20.

FINDING OF FACT NO. 21 (ISSUE NO. 21 – MATRIX ITEM NO. 103): Should BellSouth be entitled to terminate service to a CLP pursuant to the process for termination due to non-payment if the CLP refuses to remit any deposit required by BellSouth within 30 calendar days?

INITIAL COMMISSION DECISION

The Commission concluded that the language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 is appropriate.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 21 arguing that the Commission recommended the rejection of the Joint Petitioners' language that would protect them from complete service shut-down if they fail to comply with BellSouth's deposit demands within 30 days. The Joint Petitioners stated that the Commission reasoned that sufficient protections are in place—namely the billing dispute process—that would ensure that the Joint Petitioners are not abused through this provision. The Joint Petitioners argued that these protections are not in fact sufficient to protect either the Joint Petitioners or their North Carolina customers

The Joint Petitioners commented that BellSouth should not be entitled to terminate service to a Joint Petitioner for failure to pay a deposit within 30 days unless (1) the Petitioner agreed to submit the requested amount, or (2) the Commission ordered the Petitioner to submit the requested amount. Suspension or termination of service is too grave a remedy for what amounts to a dispute over, or failure to agree on, the precise amount requested. And despite the fact that the parties agree on the general criteria for triggering deposits, the fact remains that legitimate disputes can often arise over the precise dollar amount that is reasonable based on the circumstances. The Joint Petitioners argued that they should not be forced, on pain of summary termination, to remit a deposit that has not been agreed to and may reasonably be determined to be excessive and unnecessary.

The Joint Petitioners stated that underlying the Commission's decision appears to be the idea that Joint Petitioners' language would require that BellSouth seek advance approval from both a CLP and the Commission every time it requested a deposit from a CLP. The Joint Petitioners argued that conclusion somewhat overstates the issue, as this scenario is not what the Joint Petitioners hope to accomplish with their proposed language. The Joint Petitioners argued that, simply put, they do not want BellSouth to have an unqualified right to terminate their services based on an unsatisfied deposit demand, which is markedly different than non-payment for services rendered. The Joint Petitioners conceded that, indeed, the Joint Petitioners and BellSouth always have been able to resolve deposit requests amicably through negotiation without Commission involvement and without the balance shifting threat of service business destroying and customer impacting termination. The Joint Petitioners stated that the Commission ought not to shift this balance now.

INITIAL COMMENTS

BELLSOUTH: BellSouth commented that the Commission correctly concluded that BellSouth should be able to terminate service because of non-payment of a deposit and that BellSouth's proposed language should be included in the parties' interconnection agreement. BellSouth stated that, in adopting BellSouth's language, the Panel found that sufficient protections were in place in the event there was a disagreement regarding a deposit demand. BellSouth commented that, indeed, the Parties have agreed to a specific deposit dispute provision. BellSouth noted that the Joint Petitioners curiously

failed to mention that the Parties have an agreed upon deposit dispute provision. Instead, BellSouth argued that the Joint Petitioners continue to confuse this straight-forward issue by asserting that legitimate disputes can arise regarding deposit demands. BellSouth stated that the Commission should disregard the Joint Petitioners' continued attempt to create confusion, as aptly observed by the Florida PSC:

> We are concerned that the Joint Petitioners either do not understand the issue or have tried to expand the issue to include dispute resolution provisions.[49]

Further, BellSouth noted that the parties have agreed upon criteria that governs when BellSouth may demand a deposit (Attachment 7, Section 1.8.5) and have criteria that governs when BellSouth must refund a deposit (Attachment 7, Section 1.8.10). BellSouth asserted that given these contractual provisions, and the undisputed fact that it takes BellSouth approximately 74 days to terminate service for non-payment under the Agreement, it is reasonable, appropriate, and necessary for BellSouth to have the ability to protect its financial interests and terminate service to a Joint Petitioner that ignores a deposit demand

BellSouth urged the Commission to confirm the *RAO* and find that if a Joint Petitioner: (1) fails to remit a deposit demand, and (2) does not dispute such demand in accordance with Attachment 7, Section 1.8.7, then BellSouth may terminate service within 30 calendar days.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners stated, as with its other comments on their objections, that BellSouth's opposition to the Joint Petitioners' objection on this issue relies principally on a mischaracterization of the Joint Petitioners' position. The Joint Petitioners have argued that suspension or termination is too grave a remedy to be imposed in the absence of an agreement or in the event of a dispute over a deposit. The Joint Petitioners consistently have refused to agree to allow for suspension or termination related to a deposit request in all but two straight-forward instances: (1) the Joint Petitioners and BellSouth have agreed on a deposit amount, and (2) the Commission has ordered payment of a deposit. The Joint Petitioners claimed that if they fail to deliver an agreed-upon or Commission-ordered deposit, they have agreed that suspension or termination should be an option.

[49] Florida PSC Order No. PSC-05-0975-FOF-TP at 72.

The Joint Petitioners argued that BellSouth disingenuously has responded to this clarity with charges that the Joint Petitioners are confusing the issue by claiming legitimate disputes can arise regarding deposit demands. The Joint Petitioners' statement, however, is not a part of an effort by the Joint Petitioners to confuse; rather, it is part of an effort to clear-up confusion that BellSouth deliberately has tried to create. The Joint Petitioners have consistently maintained that the remedies proposed by BellSouth are too dire to impose in any circumstance other than the two set forth above. Thus, the Joint Petitioners stated that, a failure to agree and a dispute are two instances in which the Joint Petitioners believe that BellSouth should not be left to its own devices to threaten or impose draconian, customer-impacting remedies. The Joint Petitioners stated, to be sure, resolved Item No. 104 now properly refers deposit disputes to the standard dispute resolution process and no longer includes the burden shifting language originally proposed by BellSouth However, the Joint Petitioners stated that it does not cover a failure to agree and they never have conceded that suspension or termination would be appropriate in that context.

The Joint Petitioners asserted that the Commission's tentative conclusion suggests that the Joint Petitioners will have an obligation to agree or to dispute within 30 days or expose themselves and their customers to dire consequences. The Joint Petitioners object to that conclusion as the Joint Petitioners' experience indicates that the 30-day timeframe is too tight. The Joint Petitioners contended that there may be a number of reasons for a failure to agree—usually these relate to information regarding payment of undisputed amounts and a host of other factors to be considered—and, while these reasons may eventually lead to a dispute, there is no guarantee that a dispute will be fully identified within a 30-day period. The Joint Petitioners explained, for there is no sliding scale for translating deposit criteria into precise deposit amounts, and BellSouth deposit requests historically have exceeded two-months' billings and have inevitably been based on faulty information reflecting inadequate BellSouth practices for posting payments and disputes. As explained previously, sorting this out often takes considerable amounts of time. Thus, the Joint Petitioners argued that there may be instances when a failure to agree exists beyond 30 days while the parties are exchanging information and negotiating resolution of a deposit request. Nevertheless, under the resolution proposed by the Commission, such failures to agree must (or will) be deemed disputes within 30 days, so as to provide adequate and necessary protection to the Joint Petitioners and their North Carolina customers.

Finally, the Joint Petitioners commented that BellSouth once again relies on the Florida PSC's Order. The Joint Petitioners asserted that the Florida PSC Order on this issue makes plain that the Florida PSC did not understand the issue, the language proposed by the Joint Petitioners on their position. Indeed, the Florida PSC determined that the Joint Petitioners' proposal would require BellSouth to acquire the CLP's or the Commission's approval before asking for a deposit. The Joint Petitioners stated that they never took that position; and it is not reflected in their language. The Joint Petitioner's asserted that it cannot suffice as the basis for reasoned decision making in Florida or anywhere else. By contrast, the Joint Petitioners believed that the Kentucky PSC's decision shows no confusion on this issue. In its arbitration order, the Kentucky

PSC held that BellSouth should not be permitted to terminate CLP services when the CLP has met all of its financial obligations to BellSouth with the exception of the demand deposit.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 of the Agreement is appropriate The Commission concludes that the Joint Petitioners have provided no new or compelling arguments for the Commission to reconsider its decision The Commission, therefore, finds it appropriate to affirm its initial ruling on this issue.

CONCLUSIONS

The Commission finds that it is appropriate to affirm and uphold Finding of Fact No. 21, and finds that if a Joint Petitioner: (1) fails to remit a deposit demand, and (2) does not dispute such demand in accordance with Attachment 7, Section 1.8.7, then BellSouth may terminate service within 30 calendar days.

IT IS, THEREFORE, ORDERED as follows:

1. That, in accordance with the Commission's January 24, 2001 and November 3, 2000 Orders issued in Docket No. P-100, Sub 133, the Joint Petitioners and BellSouth shall jointly file a Composite Agreement by no later than Friday, March 10, 2006.

2. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

3. That the Commission denies all objections to Findings of Fact Nos. 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, and 21, thereby upholding and affirming its original decisions regarding these issues.

4. That for Finding of Fact No. 9, the Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration. Therefore, Finding of Fact No. 9 is altered to read:

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities

or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

5. That for Finding of Fact No. 15, the Commission finds it appropriate to deny BellSouth's Motion for Reconsideration, thereby affirming its decision to adopt the Joint Petitioners' proposed language concerning disputes over alleged unauthorized access to CSR information. However, the Commission does find it appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party, as outlined hereinabove.

ISSUED BY ORDER OF THE COMMISSION

This the 8th day of February, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner Robert V. Owens, Jr. dissents from the majority's decision on reconsideration on Finding of Fact No. 9.

bp020806.01

Glossary of Acronyms
Docket Nos. P-772, Sub 8; P-913, Sub 5; and P-1202, Sub 4

Act	Telecommunications Act of 1996
Agreement	Interconnection Agreement
BellSouth	BellSouth Telecommunications, Inc.
BOCs	Bell Operating Companies
CLEC	Competitive Local Exchange Company
CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
CompSouth	The Competitive Carriers of the South
CSR	Customer Service Record
DSL	Digital Subscriber Line
EEL	Enhanced Extended Link (Loop)
FCC	Federal Communications Commission
ILEC	Incumbent Local Exchange Company (Carrier)
ISP	Internet Service Provider
ITC or ITC^DeltaCom	ITC^DeltaCom Communications, Inc.
Joint Petitioners	NewSouth, NuVox, and Xspedius
LOA	Letter of Authorization
NewSouth	NewSouth Communications Corp.
NPRM	Notice of Proposed Rulemaking
NuVox	NuVox Communications, Inc.
PSC	Public Service Commission
Public Staff	Public Staff – North Carolina Utilities Commission
RAO	Recommended Arbitration Order
SEEM	Self-Effectuating Enforcement Mechanism
SOC	Supplemental Order Clarification
SQM	Service Quality Measurement
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long-Run Incremental Cost
TIC	Tandem Intermediary Charge
TRO	Triennial Review Order
TRRO	Triennial Review Remand Order

UNE	Unbundled Network Element
Verizon	Verizon Virginia, Inc.
WCB	Wireline Competition Bureau (of the FCC)
WorldCom	WorldCom, Inc.
xDSL	Digital Subscriber Line
Xspedius	Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC

EXHIBIT D

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: February 17, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Salak)
Office of the General Counsel (Teitzman, Wiggins)

RE: Docket No. 041269-TP – Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

AGENDA: 02/28/06 – Regular Agenda – Posthearing Procedural Decision – Parties May Participate

COMMISSIONERS ASSIGNED: Edgar, Deason, Arriaga

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\041269.RCM.DOC

Case Background

On August 21, 2003, the FCC released its Triennial Review Order (TRO), which contained revised unbundling rules and responded to the D.C. Circuit Court of Appeals' remand decision in USTA I.

On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in USTA II, which vacated and remanded certain provisions of the TRO. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and further found that the national findings of impairment for mass market switching and high-capacity transport were improper.

The FCC released an Order and Notice (Interim Order) on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops, and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after publication of the Interim Order in the Federal Register. On February 4, 2005, the FCC released the Triennial Review Remand Order (TRRO), wherein the FCC's final unbundling rules were adopted with an effective date of March 11, 2005.

In response to the decisions handed down in USTA II and the FCC's Orders, BellSouth Telecommunications, Inc. (BellSouth) filed on November 1, 2004, its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth asked that the Commission determine what changes are required in existing, approved interconnection agreements between BellSouth and CLECs in Florida as a result of changes in law. Pursuant to Order No. PSC-05-0736-PCO-TP, Order Establishing Procedure, issued on July 11, 2005, 31 issues were identified.

On May 5, 2005, the Commission issued the No-New-Adds Order, finding that the TRRO is specific, as is the revised FCC rule, that CLECs are prohibited from adding new local switching as a UNE, effective March 11, 2005.

On July 15, 2005, BellSouth filed a Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling. On July 22, 2005, CompSouth responded to the Motion and filed a Cross Motion for Summary Final Order or Declaratory Ruling.

On August 22, 2005, Supra Telecommunications and Information Systems, Inc. filed its Emergency Motion to Require BellSouth to Effectuate Orders for Supra's Embedded Customer Base. On November 8, 2005, the Commission issued its Embedded Base Order, which denied Supra's motion and found that the TRO prohibits CLECs from adding any new local switching UNE arrangements.

On September 29, 2005, parties filed prehearing statements. The administrative hearing was conducted on November 2-4, 2005. At the commencement of the administrative hearing, the Commission denied BellSouth's Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling and CompSouth's Cross-Motion or Declaratory Ruling. Post-hearing briefs were filed on November 30, 2005.

On January 26, 2006, staff filed its recommendation addressing the remaining unresolved issues. At the February 7, 2006 Agenda Conference, the Commission considered and approved staff's recommendations on all remaining issues with exception of issue 13 upon which staff was denied. Parties are currently scheduled to file their signed interconnection agreements and amendments on February 27, 2006, for Commission approval.

Subsequent to the Commission's consideration of staff's recommendation at the February 7, 2006 Agenda Conference, the Inspector General completed an investigation into alleged misconduct by a staff member, Ms. Doris Moss, who was assigned to this docket. The Inspector General concluded that Ms. Moss had sent, under fictitious names, unauthorized e-mail communications to Commissioners and BellSouth which constituted violations of Commission

policy and State and Commission rules including conduct unbecoming a state employee (under Rule 60L-36.005(3)(f), F.A.C.) and improper communication between a Commission employee and a party (under Rule 25-22.033, F.A.C.) Ms. Moss' employment was promptly terminated following conclusion of the investigation.

On February 14, 2006, the Chairman's office received a letter from Covad Communications Company (Covad) requesting that the Commission, *sua sponte*, withdraw all portions of the staff recommendation in this docket that were the responsibility of Doris Moss, as well as those she discussed in her e-mails, assign new staff to those issues, and direct such staff to prepare an independent recommendation for the Commission's de novo consideration to ensure fair and impartial consideration of the affected issues. The affected issues are 5, 13, 16-18, and 22(b).

On February 16, 2006, the Chairman's office received a letter from BellSouth in response to Covad's letter and request. BellSouth states in its letter that although it does not believe reconsideration of the affected issues is necessary to ensure fairness and impartiality to the parties, BellSouth has no objection to *sua sponte* reconsideration of the affected issues. BellSouth further requests that the Commission neither withdraw or suspend its rulings on the issues while additional review is being conducted.

This recommendation addresses the appropriate action for the Commission to take in light of the identified employee misconduct.

Discussion of Issues

Issue 1: Should the Commission, on its own motion, vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct staff to assign new staff members to review the existing record and prepare a new recommendation on those issues for the Commission's de novo consideration?

Recommendation: Yes. Staff recommends, in an abundance of caution and to promote public confidence in the impartiality of its consideration of issues 5, 13, 16-18, and 22(b), that the Commission should vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct that new staff members be assigned to review the existing record and prepare a new recommendation on these issues for the Commission's de novo consideration. **(TEITZMAN)**

Staff Analysis:

The Commission Code of Ethics requires that, consistent with their role as public servants of the State of Florida, Commissioners and Staff of the Commission shall aspire to "provide fair and impartial analyses, recommendations, and decisions regarding all Commission matters." The Code of Ethics also clearly identifies that its purpose is "to communicate to the public that the Commissioners and Staff of the Florida Public Service Commission are dedicated to the highest standards of professional integrity and conduct and that, individually and collectively, we are fair and honest with all parties in all Commission-related business and professional activities."

Staff believes that the conduct of Ms. Moss has created a perception of bias and raises reasonable concerns regarding the impartiality of her analyses and recommendations addressing Issues 5 and 16-18. Additionally, her actions raise concern regarding the handling of Issues 13 and 22(b) on which she improperly communicated with a party. Staff believes the perception of bias in this case contravenes the purpose of the Commission Code of Ethics and that the Commission should take aggressive action to ameliorate these concerns.

Accordingly, staff recommends, in an abundance of caution and to promote public confidence in the impartiality of its consideration of issues 5, 13, 16-18, and 22(b), that the Commission should vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct that new staff members be assigned to review the record and prepare a new recommendation on these issues for the Commission's de novo consideration.

Issue 2: Should the Commission issue a Final Order on the non-vacated issues?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, the Commission should direct that a Final Order on the non-vacated issues be issued immediately. In light of the March 11, 2006 deadline, staff recommends further that the Commission require the filing of interconnection agreements and amendments compliant with the Commission's decisions on the non-vacated issues or the result of negotiation by March 2, 2006, for approval by the Commission.

If the Commission denies staff's recommendation on Issue 1, the Commission should direct that a Final Order on all issues be issued immediately and should require the filing of interconnection agreements and amendments compliant with the Commission's decisions or the result of negotiation by March 2, 2006, for approval by the Commission. **(TEITZMAN)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, the Commission should direct that a Final Order on the non-vacated issues be issued immediately. In light of the March 11, 2006 deadline, staff recommends further that the Commission require the filing of interconnection agreements and amendments compliant with the Commission's decisions on the non-vacated issues or the result of negotiation by March 2, 2006, for approval by the Commission.

If the Commission denies staff's recommendation on Issue 1, the Commission should direct that a Final Order on all issues be issued immediately and should require the filing of interconnection agreements and amendments compliant with the Commission's decisions or the result of negotiation by March 2, 2006, for approval by the Commission.

Issue 3: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending the Commission's consideration of Issues 5, 13, 16-18, and 22(b). Upon resolution of these issues, the Commission should set forth a time frame for the submission of signed amendments addressing these issues for approval by the Commission. **(TEITZMAN)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending the Commission's consideration of Issues 5, 13, 16-18, and 22(b). Upon resolution of these issues, the Commission should set forth a time frame for the submission of signed amendments addressing these issues for approval by the Commission.