BELLSOUTH

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March 28, 2006

VIA HAND DELIVERY

Filed Electronically in Docket Office 03/28/06

Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

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

Dear Chairman Jones:

The parties in this docket have provided information regarding developments in other states. BellSouth provides the following updated information regarding a decision of the North Carolina Public Utilities Commission and a Recommendation from the Staff of the Florida Public Service Commission.

On Tuesday, March 23, 2006, the North Carolina Public Utilities Commission voted to deny Covad's motion to stay a portion of that Commission's decision, stating that "[e]ven a cursory examination of the rather convoluted history of the line sharing issue discloses that line sharing is no longer a Section 251 UNE, except insofar as the provisions of the FCC's transitional plan apply to existing customers." A copy of the Order is enclosed.

The Florida Public Service Commission Staff's Recommendation supports BellSouth's positions on commingling, line sharing, line splitting and fiber issues. A Commission vote is expected on April 4, 2006. A copy of the Recommendation is enclosed.

Copies are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch
627601

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1549

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law	)))))	ORDER DENYING MOTION FOR STAY

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Sam J. Ervin, IV, Lorinzo L. Joyner, and Howard N. Lee

BY THE COMMISSION: On March 1, 2006, the Commission issued an Order in this docket requiring BellSouth Telecommunications, Inc. (BellSouth) and all competing local providers (CLPs) in North Carolina to execute and file amendments to their interconnection agreements (ICAs) on or before March 10, 2006 based on changes of law. The amendments were to incorporate language that was either approved in the Order or consistent with its conclusions, provided that the parties may agree to language that departs from the Order. In that Order, however, the Commission concluded that it would not rule on Issue No. 16 as to whether BellSouth is obligated pursuant to Section 271 of Telecommunications Act of 1996 (the Act) and the Federal Communications Commission (FCC) Orders to provide line sharing to new customers after October 1, 2004. BellSouth had argued that Section 271 did not obligate it to provide line sharing. Specifically, the Commission concluded:

> The Commission concludes that, since it has decided in Finding of Fact No. 8 that it does not have the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252, nor have the authority to set rates for such elements, it will not rule on whether BellSouth is obligated pursuant to the Act and FCC Orders to provide line sharing to new customers after October 1, 2004, under its Section 271 obligations.

COVAD MOTION FOR STAY

On March 10, 2006 DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) filed a Motion for Partial Stay of Order Concerning Changes of Law with respect to line sharing while Covad petitions the FCC regarding this issue. Covad stated that it is preparing an informal complaint, which will be converted into a Section 271(d)(6) complaint shortly thereafter, to be filed with the FCC to resolve the merits of this matter. Under Section 271(d)(6)(B), the FCC must act with 90 days of the filing.

Covad stated that the Commission has the authority to grant motions to stay and, generally speaking, the Commission has stayed prior orders of the Commission upon the showing of good cause. Here Covad asks for a stay to preserve the status quo pending resolution of this issue for approximately 90 days while the issue is pending before the FCC.

Covad noted that BellSouth has made clear that it will cease taking line sharing orders from Covad. Absent a stay, Covad argued that it would suffer irreparable harm, since it will be unable to provision new digital subscriber line (DSL) orders in North Carolina. Covad processed in 2005 an average of 163 line sharing orders per month in North Carolina. Prospective customers will seek other providers, and Covad's relationships with wholesale partners will be terminated or impaired. An imminent threat of lost customers, lost goodwill, and lost business reputation constitute irreparable harm.

Covad further argued that it is also likely to succeed on the merits of its petition to the FCC. It argued that it is clear that BellSouth is obligated to provide line sharing under the Checklist Item No. 4 of Section 271 of the Act. Other state commissions, including Georgia, have reviewed this issue and have declared line sharing to be a Section 271 element.

PUBLIC STAFF COMMENTS

On March 10, 2006, the Public Staff also filed Comments in support of Covad's Motion for Partial Stay. The Public Staff agreed with Covad's arguments noted above and emphasized that Covad's request for a temporary and partial stay would not be unduly harmful to either BellSouth or the Commission.

BELLSOUTH RESPONSE

On March 14, 2006, BellSouth filed its Response in Opposition to Covad's Motion for Partial Stay. Should the Commission elect to grant a partial stay—which it should not—it should require Covad as a condition of obtaining that stay to submit to BellSouth a payment of $76, 914.41 as security for its Motion.

BellSouth represented that Covad has asked the Commission to preserve the status quo, which would require BellSouth to provide Covad with line sharing as a Section 251 unbundled network element (UNE). Regardless of whether Covad actually files a petition at the FCC, the Commission has properly decided that delisted Section 251 UNEs must be removed from ICAs and that it has no authority to require BellSouth to include Section 271 elements in ICAs. Essentially, Covad is asking the Commission to permit it to continue to disregard the specific transition plan that the FCC adopted years ago to transition CLPs such as Covad away from line sharing. Under the

FCC transition plan, Covad should not have been able to obtain new line sharing arrangements as of October 2004—18 months ago. Moreover, Covad is wrong that, absent a stay, it cannot provision new DSL orders. It can do so, but not at the currently very low rate.

As background, BellSouth reviewed the regulatory history of line sharing. It noted, first, that the FCC created line sharing in 1999, three years after the Act, when the FCC authorized unbundled access to the "high frequency portion of the loop" (HFPL), the portion of the loop spectrum used to provide high-speed or broadband DSL services, on the theory that this would permit competing carriers to provide DSL-based services. The FCC's original order on line sharing was appealed to the D.C. Circuit, where it was vacated and remanded. In 2003, the FCC addressed line sharing on remand and refused to impose line sharing under Section 251(c)(3), stating that competitors were not impaired without it, that its marginal benefits were outweighed by its costs, and that it actually discouraged competition and innovation. The FCC then adopted a transitional plan to enable competitors to modify their business practices and operations on a going-forward basis, though it preserved existing line sharing arrangements entered into before October 2, 2003 (the effective date of the *Triennial Review Order)* at existing rates "until the next biennial review" (which has yet to occur). The FCC also allowed for new line sharing arrangements for one additional year—until October 2, 2004—at 25% of the cost of purchasing stand-alone copper loops. Thus, after October 2, 2004, ILECs could deny competitors access to new line-sharing arrangements. Moreover, after October 2, 2006, the FCC ordered that the rate for line sharing arrangements entered into between October 2, 2003, and October 2, 2004, would rise incrementally until October 2006 to the full cost of the loop. Covad unsuccessfully sought to stay the FCC ruling, but the D.C. Circuit affirmed the FCC's decision not to re-impose line sharing.

With respect to Section 271, BellSouth noted that the FCC alone has approval and enforcement authority under Section 271. To show compliance, the Bell Operating Company (BOC) must satisfy the "competitive checklist" set out in Section 271. This list includes "local loop transmission from the central office to the customer's premises, unbundled from switching and other services." The Section 271 checklist existed before the FCC created the now vacated line sharing UNE. It requires BOCs to provide local loops—not line sharing.

In North Carolina, Covad filed a Petition with the Commission in Docket No. P-775, Sub 8, seeking action to preserve line sharing, but by order dated October 29, 2004, the Commission declined to answer the question and left unchanged the terms of the parties' 2001 interconnection agreement. In its March 1, 2006, Order in Docket No. P-55, Sub 1549, the Commission held, among other things, that the Commission has no authority to require BellSouth to include Section 271 elements in Section 251/252 ICAs, that Covad and other CLPs must delete the delisted Section 251 UNEs from interconnection agreements, and that ICAs should only contain language for line sharing transitioning.

BellSouth argued that Covad's Motion for Stay suffers from the fatal flaw that line sharing provided as a UNE under the terms of Section 251/252 is contrary to federal law. In addition, the Commission has properly recognized the limitations on its Section 271 authority, and has no role in implementing or enforcing that obligation.

Additionally, Covad's contentions that it is likely to succeed on the merits in a yet-to-be-filed FCC petition and that it will suffer irreparable harm if a stay is not granted are in error. Covad's argument that line sharing is a Section 271 requirement is without merit. Even if Covad were correct that line sharing were required under Section 271, the FCC would have imposed line sharing requirements in Section 271 orders before it required line sharing as a Section 271 UNE, but it did not do so. Indeed, in the 1999 *New York 271 Order,* the FCC specifically refused to require the BOC applicant to establish that it provided access to line sharing, the *Line Sharing Order* not yet being in effect at that time. As for state law decisions, BellSouth observed that Covad had selectively cited decision from some states (e.g., Georgia) favorable to it, while omitting other states that have rejected its claims (e.g., South Carolina). The result that Covad seeks is nothing less than the subversion of the FCC's transition mechanism.

Lastly, BellSouth noted that it is the entity that will suffer if a partial stay is granted. It will continue to be forced to provide access to line sharing at "nearly confiscatory" total-element, long-run incremental cost (TELRIC) rates. It will lose customers and be irreparably harmed as a result.

COVAD'S REPLY

On March 20, 2006, Covad filed a Reply to BellSouth's Response. Covad restated its view that without a partial stay to maintain the status quo, it would suffer irreparable harm. Covad also pointed out that, in the event that the FCC resolves this matter in BellSouth's favor, BellSouth can recover fees that it asserts are owned as a result of its continuing provision of line sharing and thus will suffer no harm if the Commission grants the partial stay. BellSouth's request for security as a condition for Covad obtaining the stay should also be denied where, as here, the Public Staff has intervened on behalf of the using and consuming public to maintain the status quo pending a hearing on the merits. *See, e.g., In the Matter of US LEC of North Carolina, Inc. v. BellSouth Telecommunications, Inc.,* Docket No. P-55, Sub 1480, at p. 9 (December 23, 2003).

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to deny Covad's Motion for Stay.

Even a cursory examination of the rather convoluted history of the line sharing issue discloses that line sharing is no longer a Section 251 UNE, except insofar as the provisions of the FCC's transitional plan apply to existing customers. Line sharing's dawn as a Section 251 UNE was belated, its day in the sun short, but its twilight has been long. Covad is hoping for its revival as a Section 271 UNE. Some state commissions have agreed with Covad on this; others have not. This Commission, when first presented with the issue in 2004, demurred and hoped for FCC resolution, which has unfortunately not yet occurred. The Commission has most lately said in its March 1, 2006, Order Concerning Changes of Law in this docket that Section 271 elements do not belong in ICAs, that the Commission will not set the rates for such elements, that the primary responsibility for enforcement of Section 271 obligations rests with the FCC, and that the Commission will decline to rule on whether BellSouth is required to provide line sharing to new customers after October 1, 2004. The Commission is pleased that Covad has now indicated it will take the matter up with the FCC under a ninety-day process. Perhaps with the matter squarely before it, the FCC will make a definitive ruling.[1]

The question at hand, of course, is whether this Commission should issue a stay. Covad makes two main arguments. First, it says a stay is necessary to "preserve the status quo" for it would otherwise suffer irreparable harm; and, second, it says that it is likely to prevail at the FCC. These propositions are open to doubt.

As noted above, the applicable status quo is one in which line sharing is no longer a Section 251 UNE, its interim availability is tightly constrained under the transitional plan, and neither this Commission nor the FCC has pronounced it to be a Section 271 UNE. As such, Covad cannot be said to be suffering irreparable harm in not receiving something that it is legally no longer entitled to receive. As to the likelihood of prevailing at the FCC, the Commission is skeptical. While understandably convinced of the merits of its case, Covad has not shown a probability of prevailing on the merits before the FCC.

Finally, the Commission is disturbed both by the lateness of Covad's apparent intent to file under Section 271(d)(6)(B) with the FCC and Covad's filing for a stay here. The Commission issued its Order Concerning Line Sharing, where it declined to rule whether BellSouth was obligated to provide line sharing under Section 271, on October 24, 2004—*well over a year ago.* If Covad were confident in its belief that line sharing was a Section 271 element and that BellSouth's failure to provide line sharing constituted one of the "failures of Bell operating companies to meet conditions required for approval" of Section 271 authority, then presumably it could have petitioned the FCC much earlier. In any event, the March 10, 2006, deadline for wrapping up the change of law amendments has been well-advertised. The Commission issued its Order Concerning Changes of Law on March 1, 2006, yet Covad waited until *March 10, 2006,* the date when conforming amendments were originally due, to file its Motion for Stay.

[1] Or perhaps not. Section 271(d)(6)(B) states only that the FCC, unless the parties otherwise agree, "shall *act on* such complaint within 90 days." (emphasis added) This is no guarantee of a definitive ruling.

For all the above reasons, the Commission declines to issue a stay in this Order, but applauds Covad's apparent intent even at this late date to seek a definitive ruling from the FCC.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 23rd day of March, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Patricia Swenson

Patricia Swenson, Deputy Clerk

DI032306.01

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: March 23, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Hallenstein, Harvey, Lee, Shafer, Vickery)
Office of the General Counsel (L. Fordham, 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: 04/04/06 – Regular Agenda – Post-hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: Edgar, Deason, Arriaga

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\041269B.RCM.DOC

Table of Contents

Abbreviations and Acronyms

Act	Telecommunications Act of 1996
ADSL	Asymmetric Digital Subscriber Line
ARMIS	Automated Reporting Management Information System
BOC	Bell Operating Company
BR	Brief
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
COCI	Central Office Channel Interface
d/b/a	Doing Business As
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility. A DS1 is the equivalent of 24 DS0s.
DS3	Digital Signal, level Three. A DS3 is the equivalent of 28 DS1s.
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer
EEL	Enhanced Extended Link
ESF	Extended SuperFrame
EXH	Exhibit
FCC	Federal Communications Commission
FTTC	Fiber to the Curb
FTTH	Fiber to the Home
FTTP	Fiber to the Premises
HDSL	High-bit-rate Digital Subscriber Line
HFPL	High Frequency Portion of the (Copper) Loop
ICA	Interconnection Agreement
ILEC	Incumbent Local Exchange Company
ISDN	Integrated Services Digital Network
kbps	Kilobits per second
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
LMU	Loop Make-Up
MDF	Main Distribution Frame
MDU	Multiple Dwelling Unit
MPOE	Minimum Point of Entry
NID	Network Interface Device

OCn	Optical Carrier level N. An optical interface designed to work with a Synchronous Optical Network (SONET). OCn transmission facilities are deployed as SONET channels having a bandwidth of typically 155.52 Mbps (OC3 or the equivalent capacity of 3 DS3s) and higher, e.g., OC12 (622.08 Mbps); OC48 (2.488 Gbps); etc.
OSS	Operation Support System
POTS	Plain Old Telephone Service
Sprint	Sprint Communications Company Limited Partnership
T1	Trunk Level 1
TDM	Time Division Multiplexing
TELRIC	Total Element Long-Run Incremental Cost
TR	Transcript
UNE	Unbundled Network Element
UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform
USOC	Universal Service Order Code
xDSL	"x" distinguishes various types of DSL

Legal Citations

Reference Used in Recommendation	Full Citation
Court Decisions	
USTA I	United States Telecom Association v. FCC, decided May 24, 2002, 290 F. 3d 415 (D.C. Cir. 2002).
USTA II	United States Telecom Association v. FCC, decided March 2, 2004, 359 F. 3d 554 (D.C. Cir. 2004).
FCC Orders	
Local Competition Order	Order No. FCC 96-325, released August 8, 1996, CC Docket Nos. 96-98 and 95-185, In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order.
UNE Remand Order	Order No. FCC 99-238, released November 5, 1999, CC Docket No. 96-98, In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking.
Supplemental Order	Order No. FCC 99-370, released November 24, 1999, CC Docket No. 96-98, In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order.
Line Sharing Order	Order No. FCC 99-355, released December 9, 1999, CC Docket Nos. 98-147 and 96-98, In Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98.
Supplemental Order Clarification	Order No. FCC 00-183, released June 2, 2000, CC Docket No. 96-98, In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification.
Line Sharing Recon Order	Order No. FCC 01-26, released January 19, 2001, CC Docket Nos. 98-147, 96-98, In Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Order on Reconsideration.
BellSouth Long Distance Order	Order No. FCC 02-331, released December 19, 2002, WC Docket No. 02-307, In Re: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee, Memorandum Opinion and Order.
TRO	Order No. FCC 03-36, released August 21, 2003, CC Docket Nos. 01-338, 96-98, and 98-147, In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking.

Reference Used in Recommendation	Full Citation
TRO Errata	Order No. FCC 03-227, released September 17, 2003, CC Docket Nos. 01-338, 96-98, and 98-147, In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability, Errata.
MDU Order	Order No. FCC 04-191, released August 9, 2004, CC Docket Nos. CC Docket No. 01-338, CC Docket No. 96-98, In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers.
FTTC Recon Order	Order No. FCC 04-248, released October 18, 2004, CC Docket Nos. 01-338, 96-98, and 98-147, In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Reconsideration.
Broadband 271 Forbearance Order	Order No. FCC 04-254, released October 27,2004, WC Docket Nos. 01-338, 03-335, 03-260, 04-48, In Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), Memorandum Opinion and Order.
Qwest Forbearance Order	Order No. FCC 05-170, released December 2, 2005, WC Docket No. 04-223, In Re: Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(C) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order.
TRRO	Order No. FCC 04-290, released February 4, 2005, WC Docket No. 04-313 and CC Docket No. 01-338, In Re: Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand.
Florida Public Service Commission Orders	
No-New-Adds Order	Order No. PSC-05-0492-FOF-TP, issued May 5, 2005, in Docket No. 041269-TP, In Re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.; Docket No. 050171-TP, In Re: Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing BellSouth Telecommunications, Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO); Docket No. 050172-TP, In Re: Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing Verizon Florida Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO). This order has been appealed.

Reference Used in Recommendation	Full Citation
Joint Petitioner's Order	Order No. PSC-05-0975-FOF-TP, issued October 11, 2005, in Docket No. 040130-TP, In Re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications. Inc.
Embedded Base Order	Order No. PSC-05-1127-FOF-TP, issued November 8, 2005, in Docket No. 041269-TP, In Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, By BellSouth Telecommunications, Inc.
Verizon Arbitration Order[1]	Order No. PSC-05-1200-FOF-TP, issued December 5, 2005, in Docket No. 040156-TP, In Re: Petition for arbitration of amendment to interconnection agreements with certain competitive local exchange carriers and commercial mobile radio service providers in Florida by Verizon Florida Inc.
BellSouth Change of Law Order	Order No. PSC-06-0172-FOF-TP, issued March 2, 2006, in Docket No. 041269-TP, In Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecommunications, Inc.

[1]On December 20, 2005, four separate Motions were filed seeking Reconsideration or Clarification of Order No. PSC-05-1200-FOF-TP. The Commission addressed these Motions at the January 24, 2006, Agenda Conference, although the order setting forth the Commission's decision is pending as of the filing date of this Recommendation.

Case Background

On November 1, 2004, BellSouth filed a 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 the D.C. Circuit Court of Appeal's decisions in USTA I and USTA II and the FCC's TRO and TRRO. A final administrative hearing on the Petition was conducted on November 2-4, 2005.

On January 26, 2006, staff filed its recommendation addressing the remaining unresolved issues in the docket. 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 were 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 Ms. 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.

On February 17, 2006, staff filed a recommendation addressing the appropriate action for the Commission to take in light of the identified employee misconduct. At the February 28, 2006 Agenda Conference, the Commission, on its own motion voted to vacate its decision on issues 5, 13, 16-18 and 22(b) in an abundance of caution and to promote public confidence in its decision. New staff members were assigned and directed to review the record and prepare a new recommendation on these issues. Additionally, the deadline for the parties to file interconnection agreements or amendments on the non-vacated issues was extended from February 27, 2006 to March 10, 2006.

This recommendation was prepared based upon an independent review of the record on Issues 5, 13, 16-18 and 22(b).

Overview

This recommendation is the result of an independent review of the record relating to issues 5, 13, 16-18, and 22(b).

The record on these issues included comprehensive language proposals from both BellSouth and CompSouth. Sprint also presented a language proposal, although only for a limited number of issues. Staff evaluated each proposal and either recommends the approval of one of the parties' proposed language without changes, or with certain changes, or blends aspects of the proposals under consideration. Staff's recommended language is provided in Appendix A. The first page of Appendix A (Page A-1) presents an issue-specific matrix that shows into which general category staff's recommended language falls. The subsequent pages provide staff's recommended language, if applicable.

Issue 5 addresses whether HDSL-capable copper loops should be considered as the equivalent of DS1 loops for the purpose of evaluating impairment. The primary debate in this issue is whether HDSL-capable loops should be counted on a unit basis, or as voice-grade equivalents. BellSouth asserts that HDSL-capable loops should be counted as voice-grade equivalents, and CLEC parties disagree. Staff believes that HDSL-capable loops are not the equivalent of DS1 loops for evaluating wire center impairment and should not be counted as voice grade equivalents. However, provisioned HDSL loops that include the associated electronics, whether configured as HDSL-2-wire or HDSL-4-wire, should be considered the equivalent of a DS1 and counted as 24 business lines for determining wire center impairment in meeting part (3) of the business line count definition found in 47 CFR §51.5. Additionally, in those wire centers that are no longer DS1 impaired, BellSouth will not be required to offer an HDSL UNE. The Unbundled Copper Loop (UCL) UNE with Loop Makeup (LMU) and routine network modifications will allow CLECs to deploy HDSL electronics on the UCL.

Issue 13 addresses the scope of commingling allowed under the FCC's rules. The principal disagreement in this issue is whether §271 checklist items should be considered "wholesale services" that are to be commingled with the §251 UNEs. BellSouth believes it has no obligation to commingle §251 unbundled network elements with §271 checklist items. The Joint CLECs assert the opposite view. Staff recommends that BellSouth is required to commingle or to allow commingling of a UNE or UNE combination with one or more facilities or services that a CLEC has obtained at wholesale from an ILEC pursuant to any method other than unbundling under §251(c)(3). However, this does not include offerings made available under §271. Staff also recommends that BellSouth not be required to effectuate commingling with a third party's service or a CLEC-provided service. Finally, staff recommends that multiplexing rate in a commingled circuit rate should be based on the higher bandwidth circuit.

Issues 16 and 17 address BellSouth's obligations regarding line sharing. BellSouth asserts that after October 1, 2004, it is not obligated to provide new line sharing arrangements. BellSouth's language proposal states that any line sharing arrangement placed in service on or after October 2, 2004, if not terminated before October 2, 2006, shall be terminated on the latter date. The Joint CLECs contend that BellSouth is obligated pursuant to §271 of the Act to continue to offer line sharing. Staff recommends that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004. For Issues 16 and 17, staff recommends that BellSouth is under no ongoing obligation to provide line sharing to CLECs. Staff's recommended language for this issue is modeled after BellSouth's language proposal, with certain changes.

Issue 18 addresses the language that should be included in interconnection agreements regarding line splitting. BellSouth acknowledges that line splitting remains an obligation, although the purchasing CLEC must procure the whole loop and provide its own splitter before dividing the frequency spectrum of the loop with a second CLEC. The Joint CLECs again raise commingling concerns addressed in Issue 13, and also assert that BellSouth has a legal obligation to upgrade access to its Operational Support Systems to accommodate the unique needs of the two CLECs in a line splitting arrangement. Staff recommends that BellSouth's ICA language regarding line splitting should be limited to when a CLEC purchases a stand-alone loop. Staff further recommends that: (1) language in the ICA should be revised to reflect that the requesting carrier is responsible for obtaining the splitter; (2) BellSouth's existing and proposed indemnification language in the ICA remains unaffected; and (3) BellSouth include a provision in the ICA to make all necessary network modifications to accommodate line splitting arrangements

Issue 22(b) addresses access to newly-deployed ("greenfield") fiber loops, including such loops deployed to multiple dwelling unit (MDU) buildings that are predominantly residential. A point of contention in this issue is whether the loop impairment analysis in the TRO should apply equally between "enterprise" and "mass market" customer segments. BellSouth asserts that it is under no obligation to unbundle its "greenfield" fiber loops. The Joint CLECs believe the FCC's rulings on "greenfield" loops are subject to interpretation. Staff recommends BellSouth is under no obligation to offer unbundled access to "greenfield" FTTH/FTTC loops used to serve residential MDUs. In those wire centers where impairment exists, a CLEC's access to unbundled DS1 and DS3 loops was not exempted and BellSouth, upon request, shall unbundle the fiber loop to satisfy the DS1 or DS3 request.

Discussion of Issues

Issue 5: Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

Recommendation: No, HDSL-capable loops are not the equivalent of DS1 loops for evaluating wire center impairment and should not be counted as voice grade equivalents. However, provisioned HDSL loops that include the associated electronics, whether configured as HDSL-2-wire or HDSL-4-wire, should be considered the equivalent of a DS1 and counted as 24 business lines for determining wire center impairment in meeting part (3) of the business line count definition found in 47 CFR §51.5. Additionally, in those wire centers that are no longer DS1 impaired, BellSouth will not be required to offer an HDSL UNE. The Unbundled Copper Loop (UCL) UNE with Loop Makeup (LMU) and routine network modifications will allow CLECs to deploy HDSL electronics on the UCL.

Staff believes that neither the language proposed by BellSouth, the Joint CLECs nor Sprint is totally appropriate to implement this recommended decision. Instead, staff believes that parts of the language proposed by BellSouth, the Joint CLECs and Sprint should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A. (**Vickery**)

Position of the Parties

BELLSOUTH: For wire centers in which BellSouth is not required to provide UNE DS1 loops, BellSouth is also relieved of any obligation to provide CLECs with a UNE HDSL loop. Also, UNE HDSL loops can and should be counted as 24 business lines for the purpose of evaluating impairment.

GRUCom: No, as implicitly conceded by BellSouth's count of business lines to determine impairment. HDSL loops are conditioned copper loops without associated electronics. DS1 loops include associated electronics. The FCC did not include restrictions on the use of conditioned copper loops nor did they make a finding of non-impairment of them.

JOINT CLECs: No. BellSouth claims that it is not required to provide HDSL-capable loops wherever it does not offer DS1 loops, even though the FCC specifically stated that CLECs *could* use HDSL-capable loops in such circumstances. BellSouth's position would improperly deny CLECs the ability to create alternative high-capacity services.

SPRINT: HDSL Capable Loops and DS1 loops are not equivalent for impairment purposes. BellSouth cannot refuse to provide HDSL Loops in wire centers where DS1 loop impairment criteria are met. HDSL Loops are conditioned copper loops. The FCC has neither restricted the use of nor made a non-impairment finding for such loops.

Staff Analysis:

The parties have modified this issue during the course of the proceeding. Originally, it was to determine if an HDSL-capable loop is the equivalent of a DS1 loop for the purpose of evaluating wire center impairment. It grew to include how many business lines should be counted for each HDSL-capable loop (24 business lines or one or two voice grade equivalents) and whether or not BellSouth should continue to provide its HDSL products as UNEs following a non-impairment decision for a particular wire center.

PARTIES' ARGUMENTS

BellSouth

BellSouth's witness Fogle argues "this should not be a contentious issue between the parties because BellSouth counted Unbundled Network Elements (UNE) High-bit rate Digital Subscriber Loop (HDSL) capable copper loops on a one for one basis and did not convert each HDSL capable loop to voice grade equivalents." (TR 296) He continues, stating that BellSouth did not employ a literal interpretation of the FCC ruling to count loops that are capable of being provisioned using HDSL technology as 24 business lines. (Id.) Accordingly, witness Fogle argues that the FCC thought every "deployed HDSL loop would be counted as a 24 line equivalent." However, BellSouth "opted to undercount business lines in various central offices." (Id.) Nevertheless, he states that according to the FCC, ". . . provisioned DS1s are to be counted as 24 64 kbps-equivalents for the purposes of establishing the number of business lines. . ." and therefore, HDSL deployed lines should be counted in the same manner. (TR 298)

Witness Fogle contends the concerns of the parties are overstated in Florida because if BellSouth counted UNE HDSL-capable loops as 24 voice grade equivalents, there would still be no impact to the wire center list. (TR 324) He expounds that when wire centers do become non-impaired for DS1s, BellSouth will no longer be required to offer HDSL-capable loops as UNEs, because the FCC's definition of DS1 loops included the 2-wire and 4-wire HDSL loops. (TR 325) He argues that, without impairment, BellSouth should not be required to offer a loop product such as an HDSL-capable loop since it merely identifies it as a loop with certain characteristics. (TR 326) Besides, CLECs will continue to have access to loops known as unbundled copper loops (UCL) under USOC UCL and, in order to utilize the UCL for HDSL, the CLEC would order the UCL with USOC LMU to qualify the loop for HDSL, he argues. (TR 326)

GRUcom

In its brief, GRUcom asserts that there is uncertainty concerning business line counts performed by BellSouth. It claims that BellSouth's most recent 2004 business line count is overstated and advances the arguments of witnesses Montano and Gillan that BellSouth is improperly applying the FCC's TRRO and its applicable rules. (BR at 14) GRUcom, utilizing witness Montano's rebuttal testimony at pages 13 and 14, supports the argument that CLECs do not use all of the capacity of a DS1 to deliver voice services. It claims that none of the §251 DS1 loops it purchases are used to support voice services. (BR at 14)

GRUcom believes that regardless of how the Commission decides the issue, there will be disputes involving wire center non-impairment determinations. It says the need for a "reasonable process" for non-impairment determinations must be adopted by the Commission and included in the ICA language. (BR at 16)

Joint CLECs

CompSouth's witness Gillan explains that an HDSL-capable loop is a dry copper loop and is not a digital facility until the addition of CLEC electronics. (TR 409) He argues the very definition of business line counting according to the FCC would preclude it from being counted as 24 64 kbps-equivalents. (Id.) He cites to the TRRO as follows:

> . . . 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-equivalent and therefore 24 "business lines." (47 CFR §51.5)

He contends to count an HDSL-capable loop as 24 64 kbps-equivalents is unwarranted because the HDSL-capable loop may or may not have the necessary electronics deployed by the CLEC to make the loop a digital facility. (TR 409)

Witness Gillan also argues the FCC specifically rejected suggestions that it include CLEC loops in its business line tally and that HDSL-capable loops "to the extent it is activated at all – are essentially CLEC loops." (TR 410; TRRO, ¶105) He further contends that the FCC intended for BellSouth to continue to provide HDSL-capable loops even when impairment no longer existed for DS1 loops. (TR 412) He reasons that the FCC's rationale for the ILEC's relief from unbundling DS1s is based on an ex parte filing by BellSouth that indicated the CLECs would still be able to utilize HDSL-capable loops as UNEs. (Id.; TRRO footnote 454 to ¶163) He concludes that before you can determine non-impairment for a particular wire center, you are required to read the definition of a business line in its entirety and conduct the business line tally accordingly. (TR 499)

Sprint

Sprint's witness Maples argues that when CLECs order HDSL-compatible loops, BellSouth will provision a conditioned copper loop that contains no electronics and that the CLEC will provide the electronics. (TR 120) He states the "FCC has made no finding of non-impairment for copper loops or established use restrictions that prevent CLECs from accessing all the features and capabilities of those UNEs." (Id.)

Witness Maples expressed concern that BellSouth was trying to limit Sprint's ability to provide DS1 loops in those non-impaired wire centers by no longer offering HDSL compatible loops. BellSouth indicated that Sprint would still be able to provide DS1 services. However, it must use unbundled copper loops and the associated conditioning. This could be accomplished by ordering a UCL and LMU. Sprint argues that this is a wasted and unnecessary exercise when it could simply order an HDSL compatible loop that is comprised of a UCL and LMU. (TR 127)

ANALYSIS

Reconciling the HDSL-capable loop positions between the parties would, at first glance, appear difficult in that HDSL-capable loops seem to run the gamut of HDSL descriptions. CompSouth and Sprint both argue that an HDSL-capable loop is not a DS1, but rather a copper loop, without electronics, that is merely conditioned to provide the capability for HDSL services and therefore should not be counted as 24 64 kbps-equivalents in determining the business line tallies for wire centers. (TR 409; TR 120) In response to staff discovery, BellSouth stated, that an HDSL-capable loop is not currently provisioned by BellSouth. Instead, it provides UNE HDSL loops to its CLEC customers only upon request, without line conditioning, loop modifications or electronics. (EXH 4, p. 23) In its brief, BellSouth asserts that there is very little CLEC interest in Florida for the UNE HDSL offering and, as of July 2005, it had only 883 UNE HDSL loops in service and that it had conservatively calculated deployed UNE HDSL loops as single loops for wire center impairment. It argues it would have been more appropriate to calculate the UNE HDSL loops as 24 64 kbps-equivalents. (BR at 90; TR 324)

Staff believes the parties are describing similar HDSL loops. However, BellSouth has no HDSL-capable loop product offering that can be ordered by any CLEC. The Joint CLECs and Sprint describe the HDSL-capable loop as a conditioned loop devoid of electronics that is provisioned by BellSouth. Staff notes that BellSouth does offer a UNE HDSL loop that is a loop without electronics. Staff believes this can be construed to describe the HDSL-capable loop being argued. We arrive at this construction because BellSouth described the UNE HDSL loop in discovery responses stating that it provides a loop without line conditioning, loop modifications, or electronics. In those situations where the loop does not meet HDSL specifications, the CLEC may request "Unbundled Loop Modifications." (EXH 4, p. 23) Therefore, one can conclude that the HDSL-capable loop and the UNE HDSL loop are closer to being the same, absent the line conditioning and loop modifications, than they are apart. The key is the loops are devoid of any electronics being supplied by BellSouth.

Staff is not persuaded by BellSouth's argument that the HDSL-capable loops should be counted as 24 64 kbps-equivalents instead of the conservative amount that was reported. The FCC stated that ". . . business line counts are an objective set of data that incumbent LECs have created for other regulatory purposes. The BOC wire center that we analyze in this Order is based on ARMIS 43-09 business lines, plus business UNE-P, plus UNE-loops. . . ." (TRRO ¶105) Staff believes BellSouth counted the UNE HDSL loops as UNE-loops on a one-for-one basis and not converting them to 24 64 kbps-equivalents is appropriate because the UNE HDSL loops were appropriately counted as UNEs. Staff does not believe they qualify as business lines within the definition that the FCC defined 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-equivalents as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore 24 "business lines." (47 CFR 51.5)

Staff believes BellSouth's attempt to reclassify its UNE HDSL loops as DS1s and then use that to satisfy part (3) of the business line definition above is unwarranted. There is no doubt that UNE HDSL loops could be interpreted as a DS1 within the FCC's definition. However, staff is persuaded by CompSouth's argument that until the loop has electronics supplied by the CLEC, it is just a UNE loop. We also agree that when determining business line tallies, the entire definition must be used and no part of the definition can be singled out to satisfy the ILEC's wishes. Therefore, HDSL-capable loops which staff construed to include UNE HDSL loops should not be counted as 24 64 kbps-equivalents and are more appropriately counted as one UNE.

Sprint's concern that BellSouth would limit the use of HDSL compatible loops once a wire center was determined to no longer be impaired is unjustified. BellSouth based its conclusion on the specific unbundling requirements found in 47 CFR §51.319 and the description of a DS1 loop in that it ". . . 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." BellSouth also stated that it would no longer offer its UNE HDSL once it is relieved of its unbundling obligations based on a finding of non-impairment at a particular wire center. Staff notes that BellSouth asserted that there is very little CLEC interest in its UNE HDSL offering and therefore staff believes that Sprint's concerns can be allayed by BellSouth's Unbundled Copper Loop (UCL) and loop makeup information to enable Sprint to provision HDSL services over the UCL loops it obtains from BellSouth as UNEs.

CONCLUSION

HDSL-capable loops are not the equivalent of DS1 loops for evaluating wire center impairment and should not be counted as voice grade equivalents. However, provisioned HDSL loops that include the associated electronics, whether configured as HDSL-2-wire or HDSL-4-wire, should be considered the equivalent of a DS1 and counted as 24 business lines for determining wire center impairment in meeting part (3) of the business line count definition found in 47 CFR §51.5. Additionally, in those wire centers that are no longer DS1 impaired, BellSouth will not be required to offer an HDSL UNE. The Unbundled Copper Loop (UCL)

UNE with Loop Makeup (LMU) and routine network modifications will allow CLECs to deploy HDSL electronics on the UCL.

Staff believes that neither the language proposed by BellSouth, the Joint CLECs nor Sprint is totally appropriate to implement this recommended decision. Instead, staff believes that parts of the language proposed by BellSouth, the Joint CLECs and Sprint should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A.

Issue 13: 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)?

Recommendation: Staff recommends that BellSouth is required to commingle or to allow commingling of a UNE or UNE combination with one or more facilities or services that a CLEC has obtained at wholesale from an ILEC pursuant to any method other than unbundling under §251(c)(3). However, this does not include offerings made available under §271. Staff also recommends that BellSouth is not required to effectuate commingling with a third-party's service or a CLEC-provided service. Finally, staff recommends that the multiplexing rate in a commingled circuit rate should be based on the higher bandwidth circuit.

Staff believes that the language proposed by BellSouth best implements this recommended decision and should be adopted. The recommended language is found in Appendix A. **(P. Lee)**

Position of the Parties

BELLSOUTH: Commingling is properly interpreted to include the combining of Section 251 UNEs with the ILEC's resale services and switched and special access services. Section 252 agreements should also include language that BellSouth has no obligation to combine Section 251 UNEs with Section 271 checklist items.

GRUCom: No position.

JOINT CLECS: The FCC required that ILECs "permit commingling of UNEs and UNE combinations with other wholesale facilities and services." As written, the FCC's ruling permits Section 251 UNEs to be commingled with any "wholesale facilities and services," which includes elements unbundled pursuant to Section 271, tariffed services offered by BellSouth, and resold services.

SPRINT: Sprint has reached agreement with BellSouth on all Issues except Issue 5, discussed below.

Staff Analysis:

The TRO 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. (TRO ¶579)

The dispute between the parties concerning commingling involves whether BellSouth is obligated to commingle §251 UNEs with §271 services[2]; whether BellSouth is obligated to permit CLECs to commingle either their service, or a third-party's service, with a BellSouth UNE or tariffed service; and how to determine the appropriate rate for the multiplexing equipment.

BACKGROUND

In the Local Competition Order, the FCC adopted rules that prohibit ILECs from separating network elements that are ordinarily combined. The FCC also adopted rules that required ILECs to provide combinations of UNEs when requested by CLECs and to perform the necessary functions to make such combinations available. (Local Competition Order ¶¶292-293) In the UNE Remand Order, the FCC required ILECs to provide unbundled access to Enhanced Extended Links (EELs),[3] explaining that because ILECs could not separate currently combined loop and transport elements purchased through their special access tariffs, CLECs were entitled to obtain EELs at UNE prices. (UNE Remand Order ¶476, ¶480) Shortly after the release of the UNE Remand Order, the FCC issued the Supplemental Order, in which it temporarily constrained access to EELs by requiring CLECs to "provide a significant amount of local exchange service . . . to a particular customer." (Supplemental Order ¶2, ¶9) Subsequently, the FCC released the Supplemental Order Clarification in which it extended the temporary constraint,[4] clarified the local usage requirement, established safe harbors, and adopted the commingling restriction, which prevented a CLEC from connecting a loop or EEL to tariffed access services used as interoffice transmission facilities. (Supplemental Order Clarification ¶22, ¶28; EXH 9, p. 76) The FCC referred to commingling as "i.e. combining loops or loop-transport combinations with tariffed special access services." (Supplemental Order Clarification ¶28)

The FCC reaffirmed its rules regarding UNE combinations, including EELs[5], in ¶¶572-578 of the TRO. The FCC concluded that EELs facilitate the growth of facilities-based competition, allow CLECs to reduce their collocation costs, promote self-deployment of interoffice transport facilities by CLECs, and promote innovation. (TRO ¶576)

The FCC specifically addressed commingling issues in ¶¶579-584 of the TRO. The FCC eliminated the restriction adopted in the Supplemental Order Clarification and modified its rules to affirmatively permit commingling of UNEs and combinations of UNEs with "services (e.g., switched and special access services offered pursuant to tariff)" and required ILECs to perform the necessary functions to effectuate such commingling upon request. (TRO ¶579) The FCC held in ¶581 that the Act does not prohibit the commingling of UNEs and wholesale services and that §251(c)(3) gives the FCC the authority to adopt rules and permit the commingling of UNEs and UNE combinations with wholesale services, including special access services. Moreover, the FCC concluded in ¶583 that commingling does not constitute the creation of a new UNE but

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[2] Section 271(c)(2)(B) sets forth a 14 point competitive checklist. Items 4-6 relate to access to loops, transport, and switching.

[3] An EEL is a combination consisting of an unbundled loop and unbundled dedicated transport, together with any facilities, equipment, or functions necessary to combine those network elements. (47 CFR 51.5)

[4] The temporary constraint did not apply to stand-alone loops.

[5] In ¶575 of the TRO, the FCC declined to designate EELs as UNEs but continued to view EELs as UNE combinations.

rather allows a CLEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services. In ¶584, the FCC required ILECs "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." (TRO ¶584) Notwithstanding this, in footnote 1990 under the discussion regarding §271 issues, the FCC explicitly declined to apply the commingling rule to services offered pursuant to §271 checklist items. (TRO fn 1990)

In the TRO Errata, the FCC corrected, among other things, ¶584 and footnote 1990. Specifically, the FCC struck language in ¶584 that included unbundled §271 network elements as services required to be commingled with UNEs and UNE combinations. The FCC also struck language in footnote 1990 that declined to apply the commingling rule to §271 checklist items. However, the FCC continued to decline requiring BOCs to combine network elements that are no longer required to be unbundled under §251.

PARTIES' ARGUMENTS

Commingling of §251 and §271 elements

BellSouth witness Tipton believes that BellSouth does not have a mandated requirement to commingle a §271 element with a §251 element, but rather the requirement is to commingle a §251 element with BellSouth's tariffed access services. (TR 581). The witness asserts that the Commission already reached a similar conclusion in the Joint Petitioner's Order. (Tipton TR 706) In its brief, BellSouth argues that the Commission should confirm that ruling applies here. (BR at 37)

BellSouth advances in its brief that the commingling rule that forms the basis for the parties' dispute in this proceeding was enacted in the FCC's TRO at ¶¶579-584. BellSouth believes the commingling discussion in the TRO is consistent with the findings in the Supplemental Order Clarification, in which the FCC defined commingling as "i.e. combining loops or loop/transport combinations with tariffed special access services." (Supplemental Order Clarification ¶28) BellSouth asserts that the FCC explicitly used the abbreviation "i.e." in describing commingling, meaning "that is." Thus, argues BellSouth, the FCC understood commingling in the Supplemental Order Clarification to refer to the combination or connection of UNEs and tariffed access services. (BR at 38) In ¶579 of the TRO, asserts BellSouth, there is significance in the FCC using the verb "combining" in explaining the commingling obligation as "the combining of a UNE or UNE combination with one or more such wholesale services." BellSouth contends the FCC used the terms "commingling" and "combining" interchangeably thereby creating no distinction between a commingling obligation and the combination obligation. (BR at 38-39) Moreover, asserts BellSouth witness Tipton, the FCC described the pertinent wholesale services in ¶579 of the TRO as "switched and special access services offered pursuant to tariff." (TR 579-580)

BellSouth believes that the commingling dispute centers on ¶584 and footnote 1990 in the TRO where language was deleted as a result of the TRO Errata. (BellSouth BR at 40-41) Paragraph 584 originally stated:

> [a]s 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. (TRO ¶584)

In the TRO Errata however, explains BellSouth, the phrase "unbundled pursuant to section 271" was deleted. (TRO Errata ¶27) The corrected language now requires the commingling of UNEs and UNE combinations with wholesale facilities and services, and any services offered for resale pursuant to §251(c)(4). (BellSouth BR at 40) Thus, opines BellSouth witness Tipton, the correction to ¶584 made in TRO Errata clarifies that these wholesale services do not include §271 elements. (TR 579-580)

The TRO Errata also corrected footnote 1990 by deleting the sentence, "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to these checklist items," from its discussion in the §271 discussion of the TRO. (Tipton TR 580-581; BellSouth BR at 40-41) BellSouth argues that had the FCC desired to impose some type of commingling or combining obligation on BellSouth, it would have only needed to delete the language in footnote 1990, as the original wording of ¶584 appeared to impose an obligation to commingle UNEs with §271 network elements. (Tipton TR 581; BellSouth BR at 41) However, the FCC made two deletions, one of which clearly removed any commingling of §251 UNEs with §271 network elements. (BellSouth BR at 41)

BellSouth contends that post-errata, the TRO is clear that it has no obligation to combine §271 elements that are no longer required to be unbundled pursuant to §251(c)(3). Footnote 1989[6] now states "[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." (BellSouth BR at 39; TRO ¶655, fn 1989) While this aspect of the TRO was subject to appeal, BellSouth asserts that USTA II upheld the FCC's holding that there is no requirement to commingle or combine UNEs with independent §271 checklist items. (BR at 39-40)

By making the corrections to ¶584 and footnote 1990, argues BellSouth, the FCC made the commingling rule consistent with the definition of commingling in the Supplemental Order Clarification because the words "wholesale services" are repeatedly referred to as tariffed access services. (BellSouth BR at 41-43; TRO ¶¶579-583, fn 1786, fn 1795) BellSouth asserts that the commingling mandate in the TRO specifically requires ILECs "to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations." (TRO ¶581) This shows, contends BellSouth, the FCC's intention to limit the types of wholesale services that are subject to commingling to tariffed access services. (Tipton TR 581; BellSouth BR at 42-43) Moreover, the deletion of §271 in the description of commingling in the TRO Errata evidence the FCC narrowly interprets "wholesale services" and does not require BellSouth to commingle or combine §271 elements with §251 UNEs. (BR at 42-43; EXH 3, p. 10-11)

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[6]As a result of the corrections made in the TRO Errata, the footnotes were renumbered. Footnote 1989 was originally numbered as footnote 1990.

Finally, BellSouth believes that CompSouth witness Gillan's interpretation of the commingling obligation undermines the TRRO findings that eliminated UNE-P unbundling and improperly asserts state commission regulation over §271 obligations, specifically setting rates for §271 services. (EXH 23; Gillan TR 432; BellSouth BR at 38, 43-45; TRRO ¶218) BellSouth argues that if it is required to combine or commingle §251 UNEs with §271 network elements, the result will be to effectively recreate or resurrect UNE-P under the guise of commingling. (BR at 43) BellSouth asserts that this is evidenced by CompSouth witness Gillan's recommendation that BellSouth be required "to offer §271 elements under the same terms and conditions as apply (or in the case of switching, applied) to the parallel §251 offering, except as to price." (BellSouth BR at 44-45; Gillan TR 432) BellSouth argues that it complies with the commingling requirements because it combines UNEs with its tariffed services. It satisfies its §271 obligation via its access tariffs. (BellSouth BR at 45)

The Joint CLECs believe that commingling is one of the most competitively sensitive issues to be addressed, given the reduced unbundling obligations in the TRRO. (Joint CLECs BR at 58) CompSouth witness Gillan testifies that the Commission, as a general policy, should require BellSouth to offer §271 services that are identical to the §251 offerings they replace, except as to price. (TR 432, 437) Witness Gillan declares that BellSouth has an obligation to connect a §251 network element to any other wholesale offering, such as a §271 network element. (TR 433)

CompSouth witness Gillan submits that §271 services listed in the competitive checklist are wholesale services. (TR 434) The witness opines that the FCC specifically found in the TRO that the general nondiscrimination duties of §202 imposed similar obligations where arrangements containing both §251 and non-§251 facilities and/or services were involved. (TR 435) Witness Gillan contends that the FCC held in ¶579 of the TRO that an ILEC is required to commingle a UNE or a UNE combination with one or more facilities or services a CLEC has obtained at wholesale from an ILEC pursuant to any method other than unbundling under §251(c)(3). (TRO 579; TR 435-436) The witness asserts that the FCC also held that a restriction on commingling would constitute an "unjust and unreasonable practice" under §201 as well as an "undue and unreasonable prejudice or advantage" under §202, and that restricting commingling would be inconsistent with the nondiscrimination requirement in §251(c)(3). (TRO ¶581; TR 435) Therefore, claims witness Gillan, Bellsouth must combine wholesale offerings, whether such offerings are entirely comprised of §251 elements (combinations), or §251 elements with other offerings (commingling). (TR 436)

In response to BellSouth witness Tipton's testimony that the FCC excluded the wholesale offerings of the competitive checklist when it adopted its commingling rules, witness Gillan asserts that the FCC's discussion of commingling and its rule do not reference any exclusions. (TR 474) Witness Gillan contends that BellSouth's claim rests on (1) ¶¶579 and 584 of the TRO and (2) the TRO Errata. The witness believes that the FCC simply illustrated its commingling rules in ¶579 of the TRO by giving examples of wholesale services to which its commingling rules would apply, rather than limiting commingling to switched and special access services. (TR 475-476) The witness contends that the FCC consistently used the terms "for example" or "e.g." throughout ¶579 before identifying tariffed special access as a service that could be commingled. The FCC never excluded other wholesale services from commingling.

Moreover, asserts the witness, it is reasonable that the FCC would point to access services as a specific example of a wholesale service to remove any doubt that prior restrictions in the Supplemental Order were being changed. (TR 477) The Joint CLECs argue that ¶584, corrected by the TRO Errata, still reads ". . . we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services," which would include by definition, wholesale facilities and services required by the §271 checklist. (Joint CLECs BR at 62) The Joint CLECs opine that if the FCC had intended to eliminate the §271 category of wholesale offerings the commingling obligation, it would have done so expressly rather than the subtle method of issuing text in error and correcting it. Because §271 competitive checklist services are "wholesale facilities and services," the Joint CLECs argue that the TRO specifically requires BellSouth to commingle such services to a UNE or UNE combination. (Joint CLECs BR at 62)

CompSouth witness Gillan explains that the TRO Errata deleted language in ¶584 that would have explicitly permitted commingling with §271 services, and it also deleted language in footnote 1990 that would have explicitly prohibited §271 commingling. (Gillan TR 480) Witness Gillan deduces that had the FCC intended to exempt the §271 competitive checklist from its commingling rules, it would not have eliminated the express finding in footnote 1990. (TR 480) Therefore, assert the Joint CLECs, the TRO Errata supports the view that the TRO commingling rules apply to §271 checklist items. Witness Gillan and the Joint CLECs argue that the plain language of the TRO applies the commingling rules to wholesale services obtained "pursuant to any method other than unbundling under section 251," and the language that would have exempted §271 offerings from commingling obligations was removed in the TRO Errata. (TR 480; Joint CLECs BR at 61) Furthermore, wholesale services by definition would include wholesale services required by the §271 competitive checklist. (Gillan TR 480)

The Joint CLECs acknowledge that the Commission addressed commingling of §271 elements in the Joint Petitioners Order. However, the Joint CLECs suggest that the reasoning supporting the Commission's decision in that order did not fully consider the entirety of the FCC's treatment of commingling in the TRO and ignored the need for facilities-based carriers to utilize commingled arrangements to replace the EEL service arrangements. The Joint CLECs believe the Commission should reconsider the conclusions in the Joint Petitioners Order. (Joint CLECs BR at 59)

The Joint CLECs urge the Commission to adopt the contract language on commingling arrangements proposed by CompSouth. This language, assert the Joint CLECs, ensures that fundamental commingled arrangements such as the commingled equivalent of today's DS1 transport/DS1 loop and DS3 transport/DS1 loop EELs will be available from BellSouth. The Joint CLECs argue that such commingled arrangements should be included in the ICAs rather than simply posted on BellSouth's website. The Joint CLECs argue that BellSouth has provided no justification for its refusal to put its key commingling commitments in ICAs. (Joint CLECs BR at 59)

The Joint CLECs argue that if BellSouth is not required to commingle §271 checklist elements with §251 UNEs, it will have detrimental impacts on CLECs. The Joint CLECs explain that even if BellSouth permits CLECs to connect §251 UNEs with other wholesale services, BellSouth witness Tipton indicated that CLECs will need to disconnect the existing circuit and re-terminate it at the CLEC collocation unless BellSouth offers a commercial agreement that allows for the combining of elements. (Joint CLECs BR at 64; Tipton TR 702-704; EXH 47) The Joint CLECs argue that normally, the transition from a §251 EEL combination to a §251/§271 commingled loop/transport arrangement can be achieved with a records change, and without customer disruption. (Joint CLECs BR at 64) This is because there is no difference in the physical facilities; the difference is only in the legal obligation. (Gillan TR 434) However, under BellSouth's contract language, a simple records conversion process will be turned into a potentially disruptive "hot cut" for every EEL where a CLEC wants to use §271 checklist elements. (Joint CLECs BR at 64) For carriers currently using UNE-P, the move to a commingled switching-loop arrangement would be quite different because the pricing of the switching component would be priced at a "just and reasonable" rate rather than TELRIC. For this reason, the Joint CLECs assert that such commingling does not resurrect UNE-P. On the other hand, unduly restricting commingling would detrimentally impact all CLECs, including those relying on their own facilities to provide EEL-based services to small business customers. (Joint CLECs BR at 64-65)

Commingling with a Third Party's Service

While no CLEC specifically addresses commingling with a third party's service through filed testimony, CompSouth does propose contract language that would permit such commingling. (EXH 23, p. 32) In contrast, BellSouth witness Tipton asserts that BellSouth's commingling obligation does not involve the commingling of its UNEs or tariffed services with another carrier's services. The witness contends that neither the TRO nor the TRRO impose such an obligation on ILECs. Witness Tipton believes that the TRO is clear that ILECs are only required to commingle UNEs "that a requesting carrier has obtained from an incumbent LEC." (TRO ¶579; TR 582)

Multiplexing

CompSouth proposes that when multiplexing equipment is attached to a commingled arrangement, the multiplexing equipment should be billed at a cost-based rate. (EXH 23, p. 32) In contrast, BellSouth witness Tipton asserts that the cost of the multiplexing equipment should be "based on the jurisdiction of the higher capacity element with which it is associated." (TR 642) As an example, the witness explains that if a UNE DS1 loop is attached to a special access DS3 via a multiplexer, the multiplexing function is necessarily associated with the DS3 because it is the DS3 signal that is being multiplexed into 28 individual channels. Thus, opines the witness, the multiplexing equipment is always associated with the higher bandwidth service that is being broken down into smaller channel increments. (TR 642)

ANALYSIS

Commingling of §251 and §271 elements

Staff observes that the commingling dispute centers on an interpretation of ¶584 and footnote 1990 of the TRO and the subsequent TRO Errata. Staff notes that BellSouth and CompSouth both believe that the TRO Errata did not change BellSouth's commingling obligations. (EXH 3, pp. 10, 49) BellSouth believes it is obligated to commingle UNEs and UNE combinations with switched and special access services it offers pursuant to tariff, but is not obligated to commingle UNEs and UNE combinations with §271 elements. (EXH 3, p. 10) BellSouth believes the FCC narrowly interprets "wholesale services" with respect to commingling to mean tariffed access services. (BellSouth BR at 41-43) In contrast, CompSouth believes the plain language of the TRO requires BellSouth to commingle §251 UNEs with §271 network elements. (EXH 3, p. 49) CompSouth believes the FCC broadly interprets "wholesale services" to include wholesale services required by §271. (Joint CLECs BR at 62; Gillan TR 480)

Staff observes that originally, ¶584 of the TRO required ILECs 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." (emphasis added) (TRO ¶584) However, the TRO Errata corrected ¶584 striking the §271 reference. (TRO Errata ¶¶1, 27) Nonetheless, CompSouth believes that, by definition, wholesale services include services required by the §271 competitive checklist. (Gillan TR 480) Staff believes that prior to the TRO Errata, ¶584 could have been construed to suggest §271 network elements could be commingled, but that striking the §271 reference suggests a reasonable post-errata interpretation that commingling of network elements unbundled pursuant to §271 is not required.

In footnote 1990 of the TRO, the FCC declined to require Bell Operating Companies (BOCs), such as BellSouth, pursuant to §271, to combine network elements that are no longer required to be unbundled under §251.[7] The FCC also originally declined to apply its commingling rule to §271 checklist services. In the TRO Errata however, the FCC corrected footnote 1990 by taking out the sentence declining to apply the commingling rule to §271 checklist items. BellSouth believes the correction to ¶584 made the footnote language unnecessary and it was therefore removed. On the other hand, CompSouth believes that had the FCC intended to exempt §271 services from its commingling rules, it would not have eliminated the express finding in footnote 1990. (Gillan TR 480) Staff believes that attempting to discern the FCC's intent for correcting the footnote is inconsequential to the explicit correction to ¶584.

As noted previously, the Supplemental Order Clarification was the first time the FCC addressed commingling. Staff observes that the FCC referred to commingling as "*i.e.* combining loops or loop-transport combinations with tariffed special access services." (emphasis added) (Supplemental Order Clarification ¶28) In the TRO, the FCC refers to commingling as the combining of a UNE or UNE combination with wholesale services "*e.g.*, switched and special access services offered pursuant to tariff." (emphasis added) (TRO ¶579) Both BellSouth and the Joint CLECs interpret "i.e." and "e.g." used in the Supplemental Order Clarification and the TRO to support their respective positions. BellSouth argues that wholesale services are repeatedly referred to as tariffed access services in the TRO and the Supplemental Order Clarification, thus showing the FCC's intent to limit the types of wholesale services subject to commingling to tariffed access services. (Tipton TR 581; BellSouth BR at 42-43; EXH 3, p. 10-

[7] Staff observes that footnote 1990 is tied to ¶655, in which the FCC discusses its interpretation that §251 and §271 operate independently and holds that §271 obligations are not necessarily relieved if there is no §251 unbundling obligation.

11) In contrast, CompSouth witness Gillan asserts that the use of "for example" and "e.g." throughout ¶579 of the TRO simply illustrates the types of wholesale services to which commingling applies; there is nothing in the TRO that expressly limits commingling to only those illustrated services. (TR 474-476; Joint CLECs BR at 62) Staff observes that throughout the commingling discussion in the TRO, the FCC continually refers to commingling of UNEs and UNE combinations with interstate access service. (TRO ¶¶579-583, fn 1795) Also, the FCC explicitly held in ¶583 that commingling is not the creation of a new UNE but instead allows a CLEC to combine a UNE or UNE combination with an interstate access service.

Staff observes that the FCC reaffirmed in ¶¶652-653 of the TRO that BOCs have an independent obligation under §271(c)(2)(B) to provide access to certain network elements that are no longer subject to §251 unbundling. In this case, such non-§251 elements provided under §271 would be subject to the just and reasonable pricing standard of §§201 and 202. BellSouth offers §271 switching via a commercial agreement and §271 loops and transport via special access tariffs. (EXH 3, p. 2; Tipton TR 704) BellSouth affirms that as long as CLECs buy special access and combine it with a §251 UNE, commingling is not a problem. (TR 704; EXH 7, pp. 173-176, 211-212; EXH 47) However, BellSouth believes it is not obligated to commingle stand-alone switching with a §251 UNE or UNE combination because the switching is only offered through a commercial contract and not special access. Thus, the parties appear to agree that §271 services are wholesale services. The dispute is whether or not those specific wholesale services are included in the commingling obligation. In other words, whether the FCC "narrowly" defined commingling to include only certain wholesale services or whether the FCC "broadly" defined commingling to include any and all wholesale services.

Staff observes that the FCC defined commingling in the Supplemental Order Clarification as the combining of loops or loop-transport combinations with tariffed special access services. Paragraph 581 in the TRO appears to provide instructions to ILECs regarding how to implement commingling and those instructions appear limited to tariffed services. Staff notes that ¶581 is specific that "we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combination." There is no similar requirement for any commercial contracts. Staff notes that there is no explicit affirmation by the FCC in the TRO that §271 services are wholesale services to be commingled. In fact, the language that would have made that affirmative holding was struck in the TRO Errata. Staff believes the Supplemental Order Clarification and the TRO as corrected by the errata, lead reasonably to the conclusion that wholesale services, as they relate to commingling, include switched and special access and resale services only; they do not include §271 services.

BellSouth asserts it provides CLECs with a number of methods to put elements together – collocation, commercial agreement, tariffed services, or resale. For example, CLECs may obtain access combined with loops and shared and common transport using BellSouth's commercial agreement. Alternatively, CLECs may purchase just the switching port and combine the service themselves, within a collocation arrangement, to a UNE loop. For loops and transport, CLECs may commingle a UNE loop or a UNE transport element with a special access transport or loop, respectively, pursuant to the commingling terms and conditions in the CLEC's ICA. Similarly, CLECs may deliver loops and/or transport to a collocation arrangement and combine these elements or services with other elements or services themselves within the collocation arrangement. BellSouth notes that it is not necessary for a CLEC to have its own collocation arrangement to accomplish the combining itself, so long as it has executed an agreement or letter of authorization with the collocated CLEC to use the space. (EXH 3, p. 3; Tipton TR 702-706) BellSouth wishes to offer its §271 elements unattached from other elements. (Tipton TR 706)

In contrast, CompSouth asserts that restricting commingling to special access and resale would require CLECs to effectively combine elements themselves and such a decision would result in effectively denying them access. (EXH 3, p. 46) Moreover, explains CompSouth, "the §271 element would have little or no practical use, thereby rendering the §271 obligation an empty shell, contrary to Congress' desire that §271 provide entrants with meaningful access." (EXH 3, p. 47; Gillan TRO ¶663) The Joint CLECs note in their brief that normally, the transition from a §251 EEL to a §251/§271 commingled loop/transport arrangement can be achieved simply with a records change, and without customer disruption. This is because there is no physical difference between the two. Nonetheless, argue the Joint CLECs, BellSouth's proposed language will turn a simple records conversion process into a physical "hot cut" process for every EEL where a CLEC wishes to use §271 elements. (Joint CLECs BR at 64)

Staff notes that the Joint CLECs are not without remedy if they believe that BellSouth is not meeting the §271 requirements. If the Joint CLECs disagree with BellSouth that special access and commercial agreements satisfy §271 requirements, they can and should file a complaint with the FCC. As noted in the BellSouth Change of Law Order, §271(d)(6) permits CLECs to file complaints with the FCC concerning failures by BOCs to meet conditions required for §271 approval. Staff observes that pursuant to §271(d)(6)(b), the FCC shall act on such complaints within 90 days. (BellSouth Change of Law Order at 53)

Staff observes that in the Verizon Arbitration Order, the Commission concluded that CLECs are required to commingle UNEs and UNE combinations with all wholesale services, including switched access, special access, and resale services. (Verizon Arbitration Order at 58-60) Staff notes that the issue in the Verizon arbitration centered around whether or not Verizon was obligated to commingle resold services with UNEs and UNE combinations; Verizon is not subject to the §271 requirements.

In the Joint Petitioner's Order, the issue at hand was whether the TRO requires BellSouth to commingle UNEs or UNE combinations with any service, network element, or other offering that it is obligated to make available pursuant to §271. The Commission held that striking the reference to §271 in the TRO Errata illustrated that the FCC did not intend commingling to apply to §271 elements that are no longer also required to be unbundled under §251(c)(3) of the Act. Therefore, "BellSouth's commingling obligation does not extend to elements obtained pursuant to §271." (Joint Petitioner's Order at 19) Furthermore, the Commission found that commingling a §271 switching element with a §251 unbundled loop element "would, in essence, resurrect a hybrid of UNE-P." This potential, explained the Commission, "is contrary to the FCC's goal of furthering competition through the development of facilities-based competition." (Joint Petitioner's Order at 19)

Staff notes that arbitration proceedings are not binding. Nevertheless, the Joint CLECs have not presented any compelling evidence why the Commission should render a different decision now.

Both BellSouth and the Joint CLECs point to decisions of other state commissions that presumably support their respective positions. Staff has reviewed the state commission decisions and believes they indicate a wide disparity of holdings. For this reason, staff believes that little guidance can be taken. The Joint CLECs also point to the FCC's Qwest Forbearance Order as purportedly confirming that the FCC considers §271 elements as wholesale services. Staff observes that in this Order, the FCC held as it had in the TRO that §251 and §271 establish independent obligations because the entities to which these provisions apply are different – namely, §251(c) applies to all ILECs, while §271 imposes obligations only on BOCs.[8] (Qwest Forbearance Order ¶246; TRO ¶655) Specifically, the FCC held that a BOC must continue providing access to loops, switching, and transport network elements pursuant to §271(c)(2)(B)(iv)-(vi) even if those elements are not subject to §251(c)(3). (Qwest Forbearance Order ¶107; TRO ¶¶649-667; TRO Errata ¶¶30-33) Moreover, the FCC found that the §271(c) obligations do not require the provisioning of wholesale access under a cost-based pricing requirement. (Qwest Forbearance Order ¶107; TRO ¶¶656-664; TRO Errata ¶¶32-33) As noted, the Qwest Forbearance Order provides nothing not previously held by the FCC. Staff also notes, as previously discussed, that BellSouth does not appear to dispute that §271 elements are wholesale services. The dispute centers on whether those specific wholesale services are included in the commingling obligation. Staff believes they are not.

Considering the TRO in its entirety, as corrected by the TRO Errata, as well as the Supplemental Order and Supplemental Clarification Order, staff believes that wholesale services, as they relate to commingling, include switched and special access and resale services only; they do not include §271 services. Therefore, BellSouth's commingling obligation is limited to switched and special access and resale services combined with a UNE or UNE combination.

Commingling with a Third Party's Service

Staff observes that there is scant record evidence concerning commingling with a third party's service. CompSouth proposes that BellSouth permit CLECs the commingling of a BellSouth UNE or UNE combination with wholesale services obtained from BellSouth, third parties, or facilities provided by the CLEC. Staff notes that neither CompSouth witness Gillan nor any other CLEC specifically addressed this matter in testimony.

The TRO is explicit that ILECs are required to commingle UNEs "that a requesting carrier has obtained from an incumbent LEC" and that ILECs are required to "effectuate such commingling upon request." (TRO ¶579) Staff observes that the TRO is silent regarding commingling with a third party's services or CLEC-provided services. Notwithstanding this, staff notes that BellSouth witness Tipton states that BellSouth is required to permit the commingling, but is not required to effect such a commingling. (EXH 7, pp. 166-167)

[8] Staff notes that the independence of §251 and §271 was also upheld by the D.C. Circuit in USTA II.

Staff notes that neither CompSouth nor any CLEC offered testimony to support CompSouth's proposed language, nor did any CLEC party address the matter in its brief. Staff believes BellSouth is not obligated to effectuate commingling with a third party's service or a CLEC-provided service. Staff recommends that no language is needed.

Multiplexing

BellSouth witness Tipton asserts that the multiplexing equipment rate is associated with the higher bandwidth service. (TR 642) Staff observes that although CompSouth proposed language indicating the multiplexing rate should be cost-based, no CLEC witness refuted BellSouth either through filed testimony or briefs. For this reason, staff believes the multiplexing rate should be determined as BellSouth proposes.

CONCLUSION

Staff recommends that BellSouth is required to commingle or to allow commingling of a UNE or UNE combination with one or more facilities or services that a CLEC has obtained at wholesale from an ILEC pursuant to any method other than unbundling under §251(c)(3). However, this does not include offerings made available under §271. Staff also recommends that BellSouth not be required to effectuate commingling with a third party's service or a CLEC-provided service. Finally, staff recommends that multiplexing rate in a commingled circuit rate should be based on the higher bandwidth circuit.

Staff believes that the language proposed by BellSouth best implements this recommended decision and should be adopted. The recommended language is found in Appendix A.

Issue 16: 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?

Recommendation: In light of (1) the action of the D.C. Circuit in USTA I to vacate and remand the FCC's decision on line sharing, (2) the FCC's subsequent decision, upon reconsideration, not to reinstate line sharing as an unbundled network element, and (3) the FCC's own words regarding ongoing enforcement of §271 approvals contained in the TRO, staff concludes that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004. **(Shafer)**

Position of the Parties

BELLSOUTH: BellSouth is not obligated to provide new line sharing arrangements after 10/1/2004. CLECs have many options to provide broadband services that create better competitive incentives. There is no Section 271 line sharing obligation, and, if such an obligation existed (it does not), the FCC has forborne from applying it.

GRUCom: No position.

JOINT CLECS: Yes. Line sharing is a loop transmission facility that must be provided by BellSouth pursuant to the Section 271 competitive checklist (checklist item 4). BellSouth acknowledged this fact when it was seeking Section 271 approval, but has now changed course and seeks to eliminate line sharing from the competitive checklist.

SPRINT: Sprint has reached agreement with BellSouth on all Issues except Issue 5, discussed below.

Staff Analysis:

The term line sharing, or alternatively, the high frequency portion of the loop (HFPL) is used by the FCC to describe "when a competing carrier provides xDSL service over the same line that the incumbent LEC uses to provide voice service to a particular end user, with the incumbent LEC using the low frequency portion of the loop and the competing carrier using the HFPL."

In its December 9, 1999 Line Sharing Order, the FCC determined that access to the HFPL was an unbundled network element that should be made available to requesting carriers by incumbent LECs. The Order added Rule 47 CFR § 51.319(h) to reflect this decision.

On May 24, 2002, the U.S. Court of Appeals, D.C. Circuit (D.C. Circuit), in response to an appeal by the United States Telecom Association, vacated and remanded the FCC's decision on line sharing. The FCC had found that line sharing should be unbundled but did so in "disregard of the competitive context." (USTA I) Specifically, the court cited the FCC's lack of recognition of competition for broadband service, in particular, by cable companies. By vacating the FCC's decision on line sharing, USTA I made the related rules inoperable, as though they no longer existed.

In the TRO, the FCC again took up the issue of whether line sharing should be unbundled. The TRO was released August 21, 2003. In this case, the FCC concluded that, ". . . we do not reinstate the Commission's vacated line sharing rules because we determine that continued unbundled access to stand-alone copper loops enables a requesting carrier to offer and recover all its costs from all of the services that the loop supports, including broadband service." (TRO ¶199) In addition, the FCC grandfathered existing line sharing arrangements and provided for a transition period for CLECs seeking new line sharing customers. (TRO ¶¶264, 265)

The primary disagreement among the parties is whether line sharing is a component of loop transmission facilities as referenced in §271(c)(2)(B)(iv) of the competitive checklist (checklist item 4), and further, whether its inclusion as a checklist item 4 element requires BellSouth to continue to provide line sharing despite the subsequent decision of the FCC not to require line sharing as an unbundled network element.

The record is limited on this issue; however, since the issue hinges largely on interpretation of FCC orders and §§271, 251, and 252 of the Telecommunications Act of 1996, staff has mainly relied on the briefs filed by the parties to characterize their arguments and interpretations relating to this issue.

PARTIES' ARGUMENTS

BellSouth argues that, "...the FCC has made clear in paragraphs 199, 260, 261, 262, 264, and 265 of the TRO that BellSouth is not obligated to provide new line sharing arrangements after October 1, 2004. . ." (TR 328) In addition, BellSouth believes that, per the FCC's transition rules, all line sharing arrangements should terminate on October 2, 2006. (EXH 3, p. 30)

In addressing the Joint CLECs' position that line sharing is a §271(c)(2)(B)(iv) element, BellSouth argues that the particular requirement for checklist item 4 is that BOCs (Bell Operating Companies) must offer ". . . local loop transmission, unbundled from local switching, and other services being provided over a single line." (47 U.S.C. §271(d)(2)(B)(iv)) The FCC has defined a local loop 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." (47 CFR 51.319(a)) However, in its Line Sharing Order, the FCC defined the HFPL "as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions." (Line Sharing Order Appendix B B-1) Thus, BellSouth argues in its brief, the HFPL is only part of the facility, not the entire "transmission path" required by checklist item 4. (BellSouth BR at 48)

In addition, BellSouth notes in its post hearing brief:

> Even if line sharing could be construed to be a §271 network element, state commissions have no authority to require an ILEC to include §271 elements in a §252 interconnection agreement. (BellSouth BR at 47)

> [T]he CLECs' theory that line sharing is still available as a §271 element would render irrelevant the FCC's carefully-calibrated transition plan to wean CLECs away from line sharing and to other means of accessing facilities . . . that do not have the same anti-competitive effects that the FCC concluded are created by line sharing. (BellSouth BR at 49)
>
> [T]here is not a single mention of line sharing in Section 271. (BellSouth BR at 50)
>
> Even if §271 did require line sharing, the FCC's Broadband 271 Forbearance Order would have removed any such obligation. (BellSouth BR at 50)
>
> [C]ommission decisions in Tennessee, Massachusetts, Michigan, Rhode Island and Illinois support BellSouth's position. (BellSouth BR at 54)

The Joint CLECs contend that "line sharing was (and remains) a checklist item 4 element and BellSouth remains obligated to provide access to it at just and reasonable rates until the FCC grants forbearance from that obligation pursuant to 47 U.S.C. § 160. (EXH 3, p. 36) The Joint CLECs cite as evidence language from the FCC's Order granting BellSouth authority under 47 U.S.C. §271 to sell interLATA long distance telephone service in the State of Florida. (BellSouth Long Distance Order ¶144) The language cited appears in paragraph 144 of the Order and states, "BellSouth's provisioning of the line shared loops satisfies checklist item 4."

As noted previously, it is BellSouth's position that even if line sharing is a checklist item 4 component, the FCC's Broadband 271 Forbearance Order relieves it from an obligation to provide line sharing. In response to BellSouth's position, the Joint CLECs note that the Separate Statements of Commissioners Martin and Powell attached to that Order, while differing in perspective and intent, each indicate their belief that line sharing is a §271 unbundling obligation. Furthermore, the Joint CLECs note that the FCC did not grant forbearance for line sharing because the Broadband 271 Forbearance Order repeatedly lists the elements from which the FCC is forbearing and line sharing is not on the list. (Joint CLECs BR at 74-75)

ANALYSIS

FCC Ends New Line Sharing Arrangements

In its TRO the FCC refused to reinstate the vacated line sharing rules. (TRO ¶199) However, because of its initial decision to unbundle the HFPL, the FCC determined that line sharing as an unbundled network element is to be grandfathered for those CLECs providing line sharing to customers as of October 1, 2003, (the effective date of the Order) until such time as the FCC concludes its next biennial review, which commenced in 2004. (TRO ¶264) In addition, the TRO also adopted a three-year transition plan for new line sharing arrangements of requesting carriers which provides that, during the first year of transition, CLECs may add new line sharing customers using the HFPL at 25 percent of the state-approved rates or the agreed upon rates in existing interconnection agreements. (TRO ¶264) In years two and three of the transition, the rate for the HFPL increases to 50 then 75 percent of the state-approved rates or the agreed upon rates in existing interconnection agreements and that no new HFPL arrangements may be added in. (TRO ¶265) Thus, as put forth by BellSouth's witness Fogle, as an unbundled network element, new line sharing arrangements ended as of October 2, 2004, the first day of the second year of the transition plan enumerated in the TRO. (TR ¶298) The Joint CLECs also acknowledge this circumstance. (EXH 3, p. 36)

Line Sharing As a "Checklist Item 4" Element

The Joint CLECs note that the FCC considered line sharing as a checklist item 4 element in its BellSouth Long Distance Order. (EXH 3, p. 36) The FCC has also included line sharing as a checklist item 4 component in its Orders approving BOC long distance entry for Verizon in Massachusetts and BellSouth in Georgia. (Joint CLECs BR at 71) The Joint CLECs allege that ". . . indeed, in every FCC order granting any BOC such authority – the FCC placed line sharing in checklist item 4." (Joint CLECs BR at 72)

The FCC's BellSouth Long Distance Order further supports the Joint CLECs' contention that line sharing was considered a checklist item 4 element. The Order contains an Appendix D, titled Statutory Requirements. Appendix D is an annotated history of the statutory requirements necessary for approval of a BOC petition to provide in region, interLATA long distance services. Here, under the heading "D. Checklist Item 4 – Unbundled Loops" of Appendix D, the FCC indicates that in order to comply with checklist item 4, "[a] BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops. Specifically, the BOC must provide access to any functionality requested by a competing carrier unless it not technically feasible. . ." (BellSouth Long Distance Order, Appendix D ¶49) In the following paragraph of the same section of Appendix D, the FCC notes that its Line Sharing Order "introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high frequency portion of the loop (HFPL)." (BellSouth Long Distance Order, Appendix D ¶50)

Staff believes the FCC's inclusion of the line sharing discussion under the Section D. Checklist Item 4 – Unbundled Loops heading, as well as, the use of the term 'BOCs' in reference to line sharing obligations, offers further support that line sharing was considered a §271 checklist item 4 element by the FCC at the time it issued the BellSouth Long Distance Order. BellSouth has not provided evidence that refutes this conclusion.

Line Sharing a Current "Check List Item 4" Element?

Thus, the critical issue is whether the decision by the D.C. Circuit in USTA I to vacate and remand the FCC's initial decision requiring line sharing, and the subsequent FCC conclusion in the TRO not to reinstate line sharing as a UNE, effectively eliminates line sharing as a checklist item 4 element. In other words, stated hypothetically, if BellSouth were required today to apply for 271 relief, would line sharing be included as a required element under checklist item 4?

Why Line Sharing Is Not a Current "Checklist Item 4" Element

Webster's Ninth New Collegiate Dictionary defines vacate as "to make legally void: annul." The Joint CLECs argue that line sharing remains a checklist item 4 element beyond the FCC's decision in the TRO not to reinstate the vacated line sharing unbundled element.

However, if the FCC's determination to include line sharing as a component of checklist item 4 hinges on the vacated Line Sharing Order and that decision is annulled, it would seem that the Joint CLECs argument would be nullified as well.

The TRO offers additional insight in this matter. In ¶665, the FCC addresses its ongoing responsibility to enforce the conditions of §271 approval. It states:

> While we believe that section 271(d)6 establishes an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that the "conditions required for such approval" would not change with time. Absent such a reading, the Commission would be in a condition where it would be imposing backsliding requirements on BOCs solely based on date of section 271 entry, rather than on the law as it currently exists. We reject this approach as antithetical to public policy because it would require the enforcement of out-of-date or even *vacated* (emphasis added) rules. (TRO ¶665)

In the FCC's own words, on remand "we do not reinstate the Commission's vacated line sharing rules . . ." (TRO ¶199). It would appear that the FCC anticipated a situation directly analogous to that of line sharing and put forth its position that enforcement of vacated rules in the context of §271(d)6 would not be appropriate. Put another way, it appears that if BellSouth were to apply for 271 approval today it would not be required to offer line sharing as a checklist item 4 compliance element.

Staff believes that, given (1) the D.C. Circuit's decision to vacate and remand the FCC's decision on line sharing, (2) the FCC's subsequent decision on remand not to reinstate line sharing as an unbundled network element, and (3) the FCC's own words regarding ongoing enforcement of §271 approvals contained in the TRO, that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004.

271 Elements

Moreover, as reflected in its BellSouth Change-of-Law Order, this Commission determined that it does not have the authority to require BellSouth to include §271 elements in §252 interconnection agreements. The Commission further found that to do so would be contrary to both the plain language of §251 and §252 and the regulatory regime set forth in the TRO and the TRRO.

Thus, even if this Commission were to conclude that BellSouth must continue to offer line sharing as a §271 checklist item 4 element, the Commission does not have the authority to require inclusion of line sharing (or any §271 element) as part of a §252 interconnection agreement.

CONCLUSION

In light of (1) the action of the D.C. Circuit in USTA I to vacate and remand the FCC's decision on line sharing, (2) the FCC's subsequent decision on remand not to reinstate line sharing as an unbundled network element, and (3) the FCC's own words regarding ongoing enforcement of §271 approvals contained in the TRO, staff concludes that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004.

Issue 17: If the answer to the foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Recommendation: Staff believes that neither the language proposed by BellSouth nor the Joint CLECs is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth, with the modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A. **(Shafer)**

Position of the Parties

BELLSOUTH: The FCC's line sharing transition language is appropriate. For any line sharing arrangements that were placed in service after October 1, 2004, the CLEC should be required to pay the full stand-alone rate for such arrangements.

GRUCom: No position.

JOINT CLECS: The Joint CLECs' proposal provides that if the Commission finds line sharing is not required under the Section 271 competitive checklist (checklist item 4), then line sharing arrangements in service as of October 1, 2003, under prior ICAs will be grandfathered until the end user customer discontinues or moves xDSL service.

SPRINT: Sprint has reached agreement with BellSouth on all issues except Issue 5.

Staff Analysis:

As recommended in Issue 16, staff believes that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC orders to make line sharing available to new CLEC customers after October 1, 2004.

PARTIES' ARGUMENTS

BellSouth witness Fogle indicates that BellSouth's proposed language includes both the FCC's line sharing transition plan and a requirement that CLECs that have ordered line sharing arrangements after October 1, 2004, pay the full stand-alone loop rate for those arrangements and add no new line sharing arrangements going forward. (TR 301) In addition, witness Fogle also indicates that the Joint CLEC proposed language, as reflected in Exhibit 23 (EXH 23, pp. 44-46), would continue to obligate BellSouth to provide access to line sharing as an UNE. Witness Fogle suggests this language should be rejected in its entirety. (TR 328)

The Joint CLECs proposed contract language, as reflected in Exhibit 23, does not reflect the FCC's line sharing transition plan contained in the TRO at ¶¶264-265. However, the Joint CLECs suggest that, if the Commission finds in Issue 16, "that BellSouth does not have an obligation under Section 271 to provide continued access to line sharing, then the language offered by either CompSouth or BellSouth appropriately reflects the remaining legal obligations of BellSouth." (Joint CLECs BR at 75)

ANALYSIS

Staff has recommended in Issue 16 that BellSouth is not obligated to continue to provide access to line sharing arrangements to CLECs after October 1, 2004. Staff agrees with BellSouth that the transition plan for line sharing arrangements adopted by the FCC should be reflected in the language of the agreement. The transition plan states:

> The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state-approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary. (TRO ¶265)

As noted by BellSouth witness Fogle, BellSouth has no ongoing obligation to provide access to line sharing to requesting CLECs after October 1, 2004. (TR 298) Staff has reviewed the language proposed by BellSouth in Exhibit 12 and recommends the following modifications:

- In light of the line sharing transition plan enumerated previously, it is appropriate, in order to reduce confusion, to separately delineate each of the line sharing scenarios created by the TRO, i.e., those line sharing arrangements in service prior to October 1, 2003, and grandfathered, those line sharing arrangements established between October 2, 2003 and October 1, 2004, and those line sharing arrangements placed in service on or after October 2, 2004.

- The paragraph addressing the conversion of line sharing arrangements to line splitting arrangements should be modified to reflect that line splitting is an arrangement offered by BellSouth to the CLEC purchasing the entire loop. In addition, the CLEC will purchase any needed equipment.

CONCLUSION

Staff believes that neither the language proposed by BellSouth nor the Joint CLECs is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth, with the modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A.

Issue 18: What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

Recommendation: Staff recommends that BellSouth's ICA language regarding line splitting should be limited to when a CLEC purchases a stand-alone loop. Staff further recommends that the language in the ICA regarding line splitting should be revised to reflect: (1) that the requesting carrier is responsible for obtaining the splitter; (2) that indemnification remains unaffected; and (3) BellSouth is responsible for all necessary network modifications to accommodate line splitting arrangements.

Staff believes that neither the language proposed by BellSouth or CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes the language proposed by BellSouth, with modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A. **(Hallenstein)**

Position of the Parties

BELLSOUTH: BellSouth's proposed language is appropriate. BellSouth's language involves a CLEC purchasing a stand-alone loop (the whole loop), providing its own splitter in its central office leased collocation space, and then sharing the high frequency portion of the loop with a second CLEC.

GRUCom: No position.

JOINT CLECS: BellSouth's legal obligations include the provision of line splitting to the UNE-P "embedded base"; compatible splitter functionality (when BellSouth retains control of a splitter); and an obligation [to] make OSS modifications to facilitate line splitting. BellSouth's position is inconsistent with its legal obligations under the TRO and TRRO.

SPRINT: Sprint has reached agreement with BellSouth on all Issues except Issue 5, discussed below.

Staff Analysis:

On January 19, 2001, the FCC adopted the Line Sharing Recon Order in which the FCC clarified that existing rules support the availability of line splitting.[9] (Line Sharing Recon Order ¶16) The FCC found that ILECs have a current obligation to provide competing carriers with the ability to engage in line splitting arrangements. This obligation extends to situations where a competing carrier seeks to provide combined voice and data services on the same loop, or where two competing carriers join to provide voice and data services through line splitting. (Line Sharing Recon Order ¶18) Moreover, ILECs are required to make all necessary network modifications to facilitate line splitting, including providing nondiscriminatory access to Operations Support Systems (OSS) necessary for pre-ordering, ordering, provisioning,

[9] Line splitting is similar to line sharing, in that it involves the availability of both voice and DSL services on the same line. However, line splitting makes it possible for a single competitor, or two competitor carriers operating as a joint venture, to provide voice and DSL services over the same line.

maintenance and repair, and billing for loops used in line splitting arrangements. (Line Sharing Recon Order ¶20)

In its Line Sharing Recon Order, the FCC noted that ILECs have an obligation to permit competing carriers to engage in line splitting using the UNE-platform where the competing carrier purchases the entire loop and provides its own splitter. (Line Sharing Recon Order ¶19) In the TRO, the FCC expanded its decision in the Line Sharing Recon Order by stating that line splitting also applies when the CLEC purchases stand-alone loops. (TRO ¶251) Furthermore, within the TRO, the FCC recognized that an ILEC's line splitting obligation with UNE-P would be permitted "so long as the unbundled loop-switch combination is permitted in a particular state, the rules make clear that incumbent LECs must permit competitive LECs providing voice service through that arrangement to line split with another competitive LEC." (TRO ¶252) In the TRRO, the FCC found that ILECS no longer have an obligation to provide UNE-P as a §251 unbundling requirement. (TRRO ¶5)

This issue pertains to the appropriate language to be included in the ICA with regards to BellSouth's obligation to provide line splitting. Specific language disagreement lies in the interplay between §§271 and 251 of the Act, who should provide the splitter, indemnification, and BellSouth's obligation to upgrade its OSS.

PARTIES' ARGUMENTS

BellSouth

BellSouth's existing ICA language provides for line splitting over a UNE-Loop, and through March 10, 2006, with UNE-P arrangements. In this docket, BellSouth proposes to remove the specific language in the ICA that discusses line splitting over an embedded base of UNE-P lines.

For CLECs that enter into an agreement with BellSouth after the end of the 12-month transition plan specified by the FCC in the TRRO (March 10, 2006), BellSouth's proposed ICA does not include the provisioning of Line Splitting pursuant to an UNE-P arrangement. Since new CLECs would not have an embedded base of UNE-P lines, they are not permitted to order UNE-P from BellSouth and may also not order line splitting over UNE-P. (EXH 3, p. 5)

BellSouth witness Fogle contends that BellSouth's line splitting obligations are limited to a CLEC's purchase of the stand-alone loop. (TR 8-9) In other words, witness Fogle is asserting that BellSouth has no obligation to provide line splitting under a commingled arrangement that consists of a loop and unbundled switching provided by BellSouth pursuant to §271. (Id.) It is BellSouth's position that UNE-P should not be reincarnated and, moreover, §271 obligations should not be included in §§251 and 252 interconnection agreements. (BellSouth BR at 91)

BellSouth witness Fogle also argues that BellSouth is not obligated to provide the splitter for the CLEC in a line splitting arrangement. (TR 303) According to witness Fogle, "A CLEC can provide the splitter in its leased collocation space in BellSouth's central office. Using its own splitter, the CLEC is free to offer voice service on the low frequency portion of the loop, and have another CLEC provide broadband service, such as DSL, over the high frequency portion of the loop (or vice-versa)." (Id.)

Joint CLECs

The Joint CLECs and CompSouth did not offer direct or rebuttal testimony addressing the line splitting issue; however, CompSouth witness Gillan proposed ICA language regarding line splitting in exhibits to his testimony (Exhibit 23, pp. 47-49). Further discussions of the ICA revisions were raised in CompSouth's response to staff's interrogatories and in the Joint CLECs' brief. (Joint CLECs BR at 76-77) The areas of concern can be summarized as follows:

- BellSouth should provide line splitting on a commingled arrangement of §§251 and 271 elements.
- BellSouth should remove language denoting that CLECs are responsible for providing their own splitter.
- BellSouth should remove specific terms within the ICA's indemnification provision to protect BellSouth against claims, loss or damages, which arise out of actions related to the other service provider.
- A provision should be added for BellSouth to make all necessary network modifications to accommodate line splitting arrangements.

With respect to CompSouth's first concern, CompSouth notes that BellSouth has both a §271 obligation and a §251(c)(3) obligation to provide line splitting. (EXH 3, p. 41) CompSouth asserts that under the FCC's rules regarding commingling, BellSouth is obligated to attach the unbundled switching with any other service provided at wholesale, such as line splitting. (Id.)

The next area of concern to CompSouth is the ICA language regarding the provisioning of a splitter. BellSouth's proposed ICA language regarding line splitting over a UNE-L requires the voice CLEC to provide the splitter to facilitate line splitting. CompSouth witness Gillan asserts that the limitation of a splitter to be provided by the voice CLEC is not supported by FCC rules or orders related to line splitting. (EXH 4, p. 159) It is CompSouth's position that facilitation of line splitting is BellSouth's responsibility. (Id.)

CompSouth further proposes to remove specific terms within the ICA's line splitting indemnification provision. The indemnification provision is provided to protect BellSouth from claims by third parties. In response to a staff interrogatory, CompSouth is concerned with the following specific words within the provision; "actions, causes of actions," "suits," "injuries," and "reasonable attorney fees." CompSouth argues that inclusion of these specific terms may obligate the CLECs to defend and indemnify BellSouth in every stage in a litigation, rather than specific claims against BellSouth. (EXH 4, p. 162)

CompSouth's last area of concern is for BellSouth to include a provision in the ICA to reference the TRO requirement that ILECs modify their OSS in such a manner to facilitate line splitting. Accordingly, CompSouth proposes the phrase "BellSouth must make all necessary network modifications, including providing non-discriminatory access to operations support systems necessary for . . . line splitting arrangements." In response to a staff interrogatory, CompSouth states that the phrase comes from 47 CFR 51.319(a)(1)(ii)(B). Incorporating the phrase in the ICA imposes the requirement on BellSouth to identify CLEC needs and associated OSS modifications. (EXH 3, p. 42)

ANALYSIS

The first area of contention between the parties is whether BellSouth should provide line splitting on a commingled arrangement of §§251 and 271 elements. For all new contracts BellSouth and CLECs enter into after the end of the transition period specified in the TRRO (March 10, 2006), the CLECs would not have an embedded base of UNE-P and are not permitted to order UNE-P from BellSouth. BellSouth proposes to remove all language in the ICA that references the provisioning of Line Splitting pursuant to an UNE-P arrangement. (EXH 2, p. 5) The Joint CLECs argue that BellSouth has an obligation to commingle line splitting with switching pursuant to §§251 and 271. (EXH 3, p. 41)

Staff believes the authority to enforce 271 obligations resides with the FCC, and thus it is inappropriate to extend the scope of this proceeding to require commingling of §271 elements. Furthermore, the Joint CLECs did not offer any testimony that specifically addressed the issue of line splitting being included in the FCC's commingling rules. However, the Joint CLECs did observe in their brief that this issue should be resolved upon resolution of Issue 13 in this docket. (Joint CLEC BR at 76) Staff agrees with the Joint CLECs' observation and that resolution of Issue 13 will also resolve this issue. Furthermore, §271 concerns are addressed in Issue 7. Upon approval of Issue 13, it is staff's position that the line splitting language in the ICA not reflect the availability of UNE-P or the commingling of loops and switching for all new contracts entered into after March 10, 2006.

The next area of concern is regarding the provision of a splitter. It is BellSouth's position that the voice CLECs should provide their own splitter. BellSouth witness Fogle asserts that CLECs are not impaired without access to BellSouth's splitters. According to witness Fogle, "Splitter functionality can easily be provided by either an inexpensive standalone splitter or by utilizing the integrated splitter built into all Asynchronous Digital Subscriber Line ("ADSL") platforms." (TR 303) In response to a staff interrogatory, CompSouth argues that FCC rules and orders do not require the voice CLEC to specifically provide the splitter. CompSouth contends that the splitter may be provided by either BellSouth, the data CLEC, the voice CLEC, or a third party. (EXH 23, p. 47)

Regarding the provision of the splitter, the FCC states in the TRO "existing rules require incumbent LECs to permit competing carriers to engage in line splitting where a competing carrier purchases the whole loop and provides its own splitter to be collocated in the central office." (TRO ¶251) This seems to assume that the splitter will be provided by the requesting carrier. However, the FCC does not appear to preclude the requesting carrier from using a splitter provided by the ILEC, another CLEC, or a third party. In other words, BellSouth may provide a splitter to the requesting carrier, but it is not obligated to provide the splitter. Staff believes that BellSouth's proposed line splitting language in the ICA should be revised to reflect that the requesting carrier is responsible for obtaining the splitter. Staff's recommended language is found in Appendix A.

BellSouth's existing ICA language regarding line splitting also has an indemnification provision to limit BellSouth's liability. CompSouth objects to the following specific terms within the provision; "actions, causes of actions," "suits," "injuries," and "reasonable attorney fees." (EXH 23, p. 48) The Joint CLECs agree that CLECs should indemnify and defend BellSouth against claims by third parties. However, the Joint CLECs state that they are concerned the inclusion of these specific terms might obligate CLECs to defend and indemnify BellSouth "against entire 'actions' or 'suits,' rather than the specific claims made against BellSouth." (Joint CLECs BR at 76) In response to a staff interrogatory, CompSouth provides an example of such an action in which a mixed set of claims involving allegations of both willful and non-willful errors by BellSouth could arise. (EXH 4, pp. 14-15) In this instance, CompSouth would only agree to indemnify BellSouth against the non-willful error.

BellSouth argues that the indemnification terms are included to ensure that the limitation of liability is comprehensive. (EXH 2, p.7) BellSouth further notes that elimination of these terms could be interpreted to eliminate the obligation for the CLEC to defend BellSouth against a lawsuit or other action once it has progressed past the claims stage. BellSouth asserts that these terms are intended to impose an obligation on the CLEC to make BellSouth whole. (Id.)

Staff's position is that protection against indemnifying BellSouth from willful or negligent errors is already provided to the Joint CLECs in the indemnification provision. The provision states, ". . . shall indemnify . . . BellSouth . . . except to the extent caused by BellSouth's gross negligence or willful misconduct. (EXH 18, p. 29) Therefore, staff agrees with BellSouth that CompSouth's proposed revisions are unnecessary." Staff's recommended language is found in Appendix A.

CompSouth is also requesting to add a provision to the ICA to require BellSouth to make all necessary network modifications to accommodate line splitting arrangements. In response to a staff interrogatory, CompSouth discusses the need for BellSouth to modify its network to provide CLECs with the capability to submit electronic orders for all data services. (EXH 3, pp. 6-7) CompSouth further references ¶252 of the TRO wherein its proposed language is codified. (EXH 3, p. 41) The language states:

> As the Commission did before, we encourage incumbent LECs and competitors to use existing state commission collaboratives and change management processes to address OSS modifications that are necessary to support line splitting. (TRO ¶252)

Accordingly, it is CompSouth's position to incorporate this language into the ICA to denote that BellSouth must make all necessary network modifications to provide non-discriminatory access to BellSouth's OSS. (EXH 3, p. 41)

BellSouth does not disagree with the FCC's ruling in the TRO to require BellSouth to make modifications to its OSS necessary for line splitting. (BellSouth BR at 92) BellSouth argues that CompSouth's proposed language is too vague and would create additional issues between the parties. (Id.) Additionally, BellSouth notes that its comprehensive OSS language is detailed in a separate attachment to the ICA.[10] BellSouth further asserts that network modifications are not necessary since the line splitting function is performed between two CLECs, without the involvement of BellSouth. (EXH 3, p. 28). Hence, there are no necessary network modifications required by BellSouth to facilitate line splitting. (Id.)

Staff agrees with CompSouth's position that language should be added to the ICA to reflect the FCC's decision in the TRO. Staff would further note that the FCC's Line Sharing Recon Order states, ". . . an incumbent LEC must perform central office work necessary to deliver unbundled loops and switching to a competing carrier's physically or virtually collocated splitter that is part of a line splitting arrangement." (Line Sharing Recon Order ¶20) Staff recommends that additional language be added to the ICA to reflect BellSouth's obligation to perform all necessary OSS modifications to accommodate line splitting arrangements. The specific revisions to the ICA are found in Appendix A.

CONCLUSION

Staff recommends that BellSouth's ICA language regarding line splitting should be limited to when a CLEC purchases a stand-alone loop. Staff further recommends that the language in the ICA regarding line splitting should be revised to reflect: (1) that the requesting carrier is responsible for obtaining the splitter; (2) that indemnification remains unaffected; and (3) BellSouth is responsible for all necessary network modifications to accommodate line splitting arrangements.

Staff believes that neither the language proposed by BellSouth or CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes the language proposed by BellSouth, with modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A.

[10] Since OSS is not an issue in this docket, BellSouth did not include the OSS attachment as an exhibit to any witness's testimony.

Issue 22: (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?

Recommendation: BellSouth is under no obligation to offer unbundled access to "greenfield" FTTH/FTTC loops used to serve residential MDUs. In those wire centers where impairment exists, a CLEC's access to unbundled DS1 and DS3 loops was not exempted and BellSouth, upon request, shall unbundle the fiber loop to satisfy the DS1 or DS3 request.

Staff believes that neither the language proposed by BellSouth nor the Joint CLECs is totally appropriate to implement the recommend decision. Instead, staff believes that parts of the language proposed by BellSouth and the Joint CLECs should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A. **(Vickery)**

Position of the Parties

BELLSOUTH: BellSouth has no obligation to provide CLECs with unbundled access to newly-deployed or "Greenfield" fiber loops.

GRUCom: No position.

JOINT CLECs: The Joint CLECs recognize the exclusions from unbundling granted in the FCC's "broadband" Orders. The FCC's broadband exclusions were limited, however, to circumstances where loops are used to serve mass market customers. CLECs are still permitted to order DS1 and DS3 loops in "greenfield" locations absent a finding of "no impairment."

SPRINT: Sprint has reached agreement with BellSouth on all issues except Issue 5, discussed below.

Staff Analysis:

The issue statement above concerns BellSouth's obligations, if any, to offer CLECs unbundled access to "greenfield" fiber loops deployed to multiple dwelling units that are primarily residential. Staff believes that all the parties recognized that the FCC had created a set of circumstances relieving the ILECs of certain unbundling obligations in relation to FTTH/FTTC facilities. (Fogle TR 313, Gillan 454, Maples 144) Sprint and BellSouth have reached agreement on this instant issue by adding language such that FTTH/FTTC loops do not include local loops to predominately business MDUs. (TR 382) However, BellSouth and the Joint CLECs could not reach an accord on the proposed definition due to its broadness, or suggested limitations and whether or not the unbundling exemption was applicable to business MDUs.

PARTIES' ARGUMENTS

BellSouth

Witness Fogle defines "greenfield" as a term "used in the telecommunications industry to describe an area of the public switched telephone network outside plant infrastructure that is being built to support new residential and commercial construction." (TR 309) The witness extends the definition to include "greenfield fiber loops" as new construction of fiber to residential or business areas. He states these are areas that "never had existing copper facilities," and argues that BellSouth is not required to "offer unbundled access to newly-deployed or 'greenfield' fiber loops" in accordance with ¶273 of the TRO. (TR 310) He asserts the effects of the FCC's "greenfield" fiber unbundling relief will provide incentives for ILECs, such as BellSouth, to invest in the latest network technology and that future services will be deployed using greater bandwidth than what is currently being used. (TR 311)

Witness Fogle argues the FCC determined in the TRO that ILECs have no obligation to unbundle fiber to the home (FTTH) mass market loops serving "greenfield" areas or areas of new construction and that the FCC expanded its ruling to include fiber to the curb (FTTC). (TR 312) The witness defines a FTTC loop as a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises." (FTTC Recon Order ¶¶1, 9; TR 312) Therefore, witness Fogle argues, the same relief afforded the ILECs in relation to FTTH also applies to FTTC. (Id.)

BellSouth's witness Fogle explains that in the relationship of multiple dwelling units (MDUs) and FTTH, the FCC in the TRO, determined the rules are also applicable to mostly residential MDUs such as condominiums, apartment buildings, cooperatives and planned unit developments. (TR 313) Witness Fogle asserts the FCC also stated that even when businesses occupied space in the MDUs that such buildings were not exempt from the FTTH unbundling relief afforded the ILECs. As support, witness Fogle says the FCC stated "a multilevel apartment that houses retail stores such as a dry cleaner and/or a mini-mart on the ground is predominately residential while an office building that contains a floor of residential suites is not." (MDU Order ¶1; TR 313) The witness continues asserting that in the TRO Errata, the FCC deleted the term "residential" to the extent that a fiber to the home loop is a local loop serving an end user's customer premises. (TRO Errata ¶37; TR 336)

Witness Fogle argues BellSouth's position regarding "greenfields" and FTTH is that it has no unbundling obligation whatsoever. Explains witness Fogle, BellSouth believes that the FCC stated there is no impairment requirement because CLECs have the same opportunities and the same capabilities to deploy fiber as the ILECs. He asserts, without impairment, there is no need to unbundle the "greenfield" fiber loop. (TR 354) In reference to the mass market or enterprise customers, the witness argues, "the unbundling exemptions do not vary based on the type of customer to be served" and that the FCC made the distinction as an analytical tool. (TR 355) He states that generally what the FCC is saying is that an enterprise customer is one that typically orders DS1s and above, whereas a mass market customer is a person who orders slower services. (TR 369) Witness Fogle continues and argues the FCC is trying to incent new fiber deployments and the FCC concluded that the CLECs are either ahead in new fiber to the home deployments or are doing more than the ILECs. He asserts, "if we build it, we don't have to share it. This creates an economic incentive for us to build it as quickly as possible." (TR 370) Enterprise customers, on the other hand, have revenue opportunities that are even greater, he argues. The witness explains, that when a building is going to be constructed that has only business tenants, the CLEC and the incumbent are similarly situated, and there is no impairment as both could build the facilities to the building. He concludes, "[s]o if there is no impairment, there is no requirement to unbundle." (TR 370)

In Exhibit 37, also known as the Allegiance pleading, witness Fogle explains the reason the FCC stated it was maintaining access to DS1 and DS3 loops is because the deployment of all fiber loops is in its infancy and the "grand majority of locations and situations the impairment standard applies because there's hybrid loops or copper loops that are providing the DS1s and DS3s." (TR 372) He argues that there is not a "large overlap" between the unbundling exemption being afforded the ILECs and impairment. (TR 373)

Witness Fogle stated that BellSouth does not object to the specific proposed language involving fiber to the home or fiber to the curb loops rather that it is more of a definitional issue. He argues that an all fiber loop to a mass market type customer, such as a small business or residential customer, differs because other loops are simply called fiber when sent to a building primarily used to provide high capacity facilities such as DS1 or DS3. (TR 380) Calling it FTTH or FTTC for the purposes of the contract and excluding enterprise customers would limit BellSouth's requirements. So it comes down to how those terms are defined, states the witness. If they are defined narrowly and the unbundling exemption is broader, then BellSouth would need additional language to cover the unbundling exemptions that are broader. If the terms are matched with the unbundling exemption, BellSouth would have no objections. (TR 381) The witness stated that BellSouth and Sprint had reached agreement to resolve this instant issue and added such language that FTTH/FTTC loops do not include local loops to predominately business MDUs. (TR 382)

Joint CLECs

CompSouth's witness Gillan argues that BellSouth seems to go beyond the unbundling relief being granted by the FCC. He asserts that according to BellSouth, the FCC adopted a basic principle in its broadband policies that CLECs continue to have access to the existing last mile copper facilities for as long as those facilities continue to exist. (TR 451) The witness alleges that BellSouth completely ignores a "critical limiting factor" in the FCC's unbundling exemptions for fiber to the home and fiber to the curb. Witness Gillan argues that the exemptions for FTTH and FTTC loops are limited and explains that those loops are used to serve "mass market customers." (emphasis by witness) (TR 452) He attests the FCC's TRO and the FTTC Order are permeated with references to mass market customers and the fiber loops serving those customers. (TRO ¶¶ 221, 228, 272, 278, 288; FTTC Order ¶¶14, 6, 2, 13; TR 452-454)

Witness Gillan maintains BellSouth does not have a blanket exemption from unbundling obligations. He contends it is still required to provide access to carriers serving enterprise customers, "even where the CLEC could not gain access to the loop facility to serve a mass market customer." (TR 455) He argues that when a CLEC orders a DS1 loop, the customer it is wishing to serve is by definition an enterprise customer and not a mass market customer. The witness states the FCC separated enterprise customers from the mass market, as follows:

> All other business customers – whom we characterize as the enterprise market – typically purchase high capacity loops, such as DS1, DS3, and OCn capacity loops. We address high-capacity loops provisioned to these customers as part of our enterprise market analysis. (TRO ¶209; TR 455)

He explains that when a CLEC is ordering a DS1 loop to serve a customer, the request means the customer is a member of the enterprise market and BellSouth must unbundle the loop. (TR 455)

Witness Gillan argues the FCC requires ILECs to provide CLECs unbundled DS1 loops without regard as to whether or not the loop is FTTH or FTTC. He explains BellSouth's unbundling relief for DS1 loops is based upon the number of fiber-based collocators and switched business lines in a wire center not by the type of loop architecture. The witness quotes the TRO ¶325, footnote 956, which discusses DS1 loop availability as follows:

> DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, e.g. two-wire and four-wire HDSL or SHDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will service unless otherwise specifically indicated. See Supra Part VI.A.4.a. (v) (Discussing FTTH). The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops used to serve mass market customers. See Supra Part VI.A.4.a.(v)(b)(i). (emphasis by witness) (TR 456)

Witness Gillan states to the extent that there is any confusion, the FCC put that to rest in its brief to the D.C. Circuit Court of Appeals when it responded to a pleading by Allegiance Telecom that expressed fear over losing access to DS1 loops. Witness Gillan highlights Exhibit 37 by quoting the following passage from the FCC's brief: (TR 457)

> Allegiance also claims that it will lose access to DS1 loops. Motion at 11. It based that claim on the theory that when the Commission changed "residence" to end user in the erratum, it removed business customers served by DS-1 loops from the unbundling obligation. That reading of the erratum is incorrect. . . . The text, as well as the rules themselves makes it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices. (EXH 37, p. 12)

Therefore, surmises the witness, DS1 loops remain available to CLECs contingent upon the impairment analysis performed on a wire center by wire center basis found within the TRRO. (TR 458) Witness Gillan contends the only limitation to BellSouth's unbundling obligations regarding fiber/copper hybrid loops is that BellSouth need not provide access to the packet-based capabilities in the loop. (TRO ¶288; TR 457)

Witness Gillan further argues, that TRO ¶289 clearly states there is a continuing ILEC obligation to provide unbundled access to a complete transmission path over TDM networks in order to address the impairment that requesting carriers currently face. The witness asserts that the FCC ensured CLECs would have additional means with which to provide broadband capabilities to end users because CLECs can obtain DS1 and DS3 loops, including channelized DS1 or DS3 loops and multiple DS1 or DS3 loops for each customer. (TR 458)

Witness Gillan concludes by arguing to the extent that the ILEC deploys packet based technology, such deployment typically parallels the incumbent LEC's TDM network and therefore would not isolate customers to CLEC DS1 and DS3 services. The witness believes that the unbundling exemption for BellSouth is very narrow as confined within the impairment definition of a wire center. (TR 459)

Sprint

Sprint's witness Maples argues that enterprise customers and businesses in a predominately business multi-dwelling unit were not subject to the ILEC's relief of not providing access to fiber to the home (FTTH) loops in areas that were never previously served by such loops (greenfields). (TR 144) He states that when the FCC defined FTTH loops in the TRO, it was basing its analysis on "mass market loops" found within ¶274. (Id.) The witness explains that footnote 956 of the TRO included fiber optic facilities in order to satisfy the ILEC's obligation to provide access to DS1 loops. Witness Maples argues "[t]he FTTH exemption was not intended to eliminate CLEC access to every fiber loop; however, the FTTH loop unbundling restrictions do apply to certain small business customers, but not enterprise customers." (TR 145)

Witness Maples states the FCC also extended the unbundling restriction to include fiber to the curb (FTTC) loops in an order known as the FTTC Recon Order. (TR 145) He broadens his argument for not applying the FTTH/FTTC exemptions to predominately business multiple dwelling units by arguing the FCC in its MDU Order clearly stated the exemption did not apply. The witness quotes paragraph 8 of the MDU Order as follows:

> Second, we conclude that tailoring FTTH relief to predominantly residential MDUs is more appropriate than a single, categorical rule covering all types of multiunit premises. A categorical rule either would retain disincentives to deploying broadband to millions of consumers contrary to the goals of section 706 **or would eliminate unbundling for enterprise customers where the record shows additional investment incentives are not needed**. As discussed above, we find that extending relief to predominately residential MDUs best tailors the unbundling relief to those situations where the analysis of impairment and investment incentives indicates that such relief is appropriate. **We thus reject commenter's categorical assertions that the FTTH rules should never apply in the case of any multiunit premises, or that the unbundling relief should extend to all multiunit premises**. Because we can draw an administratively workable distinction between predominately residential MDUs and other multiunit premises, we find that we can more carefully target the unbundling relief warranted by the consideration of section 706's goals. (emphasis added by witness) (TR 146)

Witness Maples concludes his argument by recommending additional language to BellSouth's proposed definition of FTTH/FTTC loops to address enterprise customers and predominantly business MDUs. (TR 147)

ANALYSIS

Staff notes that the issue statement above concerns BellSouth's obligations, if any, to offer CLECs unbundled access to "greenfield" fiber loops deployed to multiple dwelling units that are primarily residential. Issue 22 (a) concerning the MPOE definition will not be reiterated as that issue has been decided. Staff surmises the parties are in agreement that the FTTH/FTTC loops serving those end users designated by the FCC as mass market customers were exempt from unbundling regardless of impairment. (TRO ¶211, footnote omitted; Fogle TR 313; Gillan 454; Maples 144) Staff arrived at this supposition by the plain reading of the record testimony that stated the FCC eliminated the ILEC's obligation. Staff believes that all the parties accepted the unbundling exemption for residential MDUs and instead concentrated on resolving their differences regarding interpretation of the ILECs obligations, if any, for FTTH/FTTC loops that served business MDUs. Staff and all the parties recognized that the FCC created a set of circumstances relieving the ILECs of certain unbundling obligations in relation to FTTH/FTTC facilities. (Fogle TR 313, Gillan 454, Maples 144) Again, Sprint and BellSouth did reach agreement concerning this instant issue by adding language to the definition such that FTTH/FTTC loops do not include local loops to predominately business MDUs. (TR 382)

BellSouth's argument above could be interpreted that the unbundling exemption applied to all "greenfield" fiber regardless of the type of customer, that is a mass market or an enterprise customer. (TR 354-355) CompSouth's interpretation, on the other hand, would be that BellSouth's unbundling exemption is very limited and applies only to those ILEC next generation networks that are packet based and typically deployed adjacent to the network that is currently using TDM. (TR 459)

Staff agrees with Sprint in its characterization of the FTTC Recon Order in that the FCC broadened the definition of FTTH to include FTTC and in the MDU Order rejected polar opposite arguments that asserted its FTTH rules should not apply to any MDU or that the unbundling relief should be extend to all MDUs. (TR 146) Staff also agrees with Sprint that the FCC recognized that it could incent ILEC investment in residential MDUs by allowing the ILEC an exemption for unbundling FTTH/FTTC loops to the residential MDU; however, the FCC concluded no such incentive was needed to build broadband facilities to predominately business MDUs. (TR 146)

BellSouth appears to be concluding that new construction of fiber to a building is "greenfield", that the CLEC and ILEC are similarly situated in having the opportunity to deploy fiber and therefore not entitled to DS1 or DS3 UNEs. Staff believes BellSouth's interpretation is contrary to the intent of the TRO and the TRRO. The best example supporting our belief is found in Exhibit 37 which is the FCC's brief filed with the D.C. District Court of Appeals in opposition to Allegiance Telecoms' motion for stay pending review where in the FCC's own words it stated "[t]he text, as well as the rules themselves make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices." (EXH 37, p.12)

The FCC in the TRRO impairment analysis looked at wire centers and their associated business line counts and fiber based collocators. In those wire centers with high business line counts and a large number of fiber based collocators, the FCC concluded that CLECs would more than likely accept the high cost of constructing a lateral to the fiber ring of a fiber based collocator. However, in those wire centers where impairment exists, there are not enough fiber based collocators and a CLEC could not endure the high cost of deploying fiber to the building containing high capacity users. Therefore, the FCC concluded that a CLEC is not similarly situated as BellSouth and maintained the unbundling requirement for DS1 and DS3 loops based upon wire center impairment. (TRRO ¶¶169-174)

Staff disagrees with CompSouth's assertion that the FCC maintained CLEC access to multiple DS1s and DS3s to each of its customers. (TR 458) Staff notes the FCC in TRO ¶177 stated "[t]herefore even where our test requires DS3 loop unbundling, we limit the number of unbundled DS3s that a competitive LEC can obtain at each building to a single DS3 to encourage facilities based deployment when such competitive deployment is economic." Staff can not reconcile the statement to include multiple DS1s or DS3 when, clearly, the FCC set certain limits.

CONCLUSION

BellSouth is under no obligation to offer unbundled access to "greenfield" FTTH/FTTC loops used to serve residential MDUs. In those wire centers where impairment exists, a CLEC's access to unbundled DS1 and DS3 loops was not exempted and BellSouth, upon request, shall unbundle the fiber loop to satisfy the DS1 or DS3 request.

Staff believes that neither the language proposed by BellSouth nor the Joint CLECs is totally appropriate to implement the recommended decision. Instead, staff believes that parts of the language proposed by BellSouth and the Joint CLECs should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A.

Issue 32: Should this docket be closed?

Recommendation: No, the parties should be required to submit signed amendments or agreements for issues 5, 13, 16-18 and 22(b), that comply with the Commission's decisions in this docket for approval within 10 days of the Commission's order in this proceeding. Staff requests that the Commission grant staff administrative authority to approve any amendments and agreements filed in accordance with the Commission's decision in this proceeding. Such amendments or agreements will be effective on the date the Commission issues its final order approving the signed amendments. This docket should remain open pending Commission approval of the final arbitration agreements in accordance with §252 of the Telecommunications Act of 1996. **(Wiggins)**

Staff Analysis:

The parties should be required to submit signed amendments or agreements for issues 5, 13, 16-18 and 22(b), that comply with the Commission's decisions in this docket for approval within 10 days of the Commission's order in this proceeding. Staff requests that the Commission grant staff administrative authority to approve any amendments and agreement filed in accordance with the Commission's decision in this proceeding. Such amendments or agreements will be effective on the date the Commission issues its final order approving the signed amendments. This docket should remain open pending Commission approval of the final arbitration agreements in accordance with §252 of the Telecommunications Act of 1996.

Index of Staff's Recommended Language

Issue (Page reference in Appendix)	BellSouth's Proposed Language		CompSouth's Proposed Language		Combination of BellSouth and Comp-South Language Proposals
	With No Changes	With Changes	With No Changes	With Changes	
Issue 5 (p. A2)					X
Issue 13 (p. A3)	X				
Issue 16/17 (p.p. A4-A7)		X			
Issue 18 (p. A8-A9)		X			
Issue 22b(p. A10)					X

Issue 5: Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

Recommended Language:

2-wire or 4-wire HDSL-Compatible Loop.

This is a designed Loop that meets Carrier Serving Area (CS) specifications, may be up to 12,000 feet long and may have up to 2,500 feet of bridged tap (inclusive of Loop length). It may be a 2-wire or 4-wire circuit and will come standard with a test point, OC and a DLR

4-wire Unbundled DS1 Digital Loop.

This is a designed 4-wire Loop that is provisioned according to industry standards for DS1 or Primary Rate ISDN services and will come standard with a test point, OC and a DLR. A DS1 loop may be provisioned over a variety of loop transmission technologies including copper, HDSL-based technology or fiber optic transport systems. It will include a 4-wire DS1 Network Interface at the End User's location. For the purposes of this Agreement, including the transition of DS1 and DS3 Loops described in Section XXX above, DS1 loops include provisioned HDSL loops and the associated electronics whether configured as HDSL-2-wire or HDSL-4-wire loops.

Issue 13: 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)?

Recommended Language: The language below is applicable both to existing and to new ICAs.

Commingling of Services

Commingling means the connecting, attaching, or otherwise linking of a Network Element, or a Combination, to one or more Telecommunications Services or facilities that <<customer_short_name>> has obtained at wholesale from BellSouth, or the combining of a Network Element or Combination with one or more such wholesale Telecommunications Services or facilities. <<customer_short_name>> must comply with all rates, terms or conditions applicable to such wholesale Telecommunications Services or facilities.

Subject to the limitations set forth elsewhere in this Attachment, BellSouth shall not deny access to a Network Element or a Combination on the grounds that one or more of the elements: (1) is connected to, attached to, linked to, or combined with such a facility or service obtained from BellSouth; or (2) shares part of BellSouth's network with access services or inputs for mobile wireless services and/or interexchange services.

Unless otherwise agreed to by the Parties, the Network Element portion of a commingled circuit will be billed at the rates set forth in Exhibit _ and the remainder of the circuit or service will be billed in accordance with BellSouth's tariffed rates or rates set forth in a separate agreement between the Parties.

When multiplexing equipment is attached to a commingled circuit, the multiplexing equipment will be billed from the same agreement or tariff as the higher bandwidth circuit. Central Office Channel Interfaces (COCI) will be billed from the same agreement or tariff as the lower bandwidth circuit.

Notwithstanding any other provision of this Agreement, BellSouth shall not be obligated to commingle or combine Network Elements or Combinations with any service, network element or other offering that it is obligated to make available only pursuant to Section 271 of the Act.

Issue 16: 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?

Recommended Language:

See issue 17.

Issue 17: If the answer to the foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Recommended Language: The recommended language below is applicable only to CLECs having existing ICAs with BellSouth.

Line Sharing

General. Line Sharing is defined as the process by which <<customer-short-name>> provides digital subscriber line "xDSL" service over the same copper loop that BellSouth uses to provide Retail voice service, with BellSouth using the low frequency portion of the loop and <<customer-short-name>> using the high frequency spectrum (as defined below) of the loop.

Line Sharing arrangements in service as of October 1, 2003, under a prior Interconnection Agreement between BellSouth and <<customer-short-name>>, will remain in effect until the End User discontinues or moves xDSL service with <<customer-short-name>>. Arrangements pursuant to this Section will be billed at the rates set forth in Exhibit __.

For Line Sharing arrangements placed in service on or after October 2, 2003 and before October 1, 2004, the rates will be as set forth in Exhibit __.

For Line Sharing arrangements placed in service on or after October 2, 2004 (whether under this Agreement only, or under this Agreement and a prior Agreement), the rates will be as set forth in Exhibit __.

Any Line Sharing arrangements placed in service on or after October 2, 2003 and not otherwise terminated, shall terminate on October 2, 2006.

No new line sharing arrangements may be ordered.

The High Frequency Spectrum is defined as the frequency range above the voiceband on a copper loop facility carrying analog circuit-switched voiceband transmissions. Access to the High Frequency Spectrum is intended to allow <<customer-short-name>> the ability to provide xDSL data services to the End User for which BellSouth provides voice services. The High Frequency Spectrum shall be available for any version of xDSL complying with Spectrum Management Class 5 of ANSI T1.417, American National Standard for Telecommunications, Spectrum Management for loop Transmission Systems. BellSouth will continue to have access to the low frequency portion of the loop spectrum (from 300 Hertz to at least 3000 Hertz, and potentially up to 3400 Hertz, depending on equipment and facilities) for the purposes of providing voice service. <<customer-short-name>> shall only use xDSL technology that is within the PSD mask for Spectrum Management Class 5 as found in the above-mentioned document.

Access to the High Frequency Spectrum requires an unloaded, 2-wire copper loop. An unloaded loop is a copper loop with no load coils, low-pass filters, range extenders, DAMLs, or similar devices and minimal bridged taps consistent with ANSI T1.413 and T1.601.

BellSouth will provide Loop Modification to <<customer-short-name>> on an existing loop for Line Sharing in accordance with procedures as specified in Section __ of this Attachment. BellSouth is not required to modify a loop for access to the High Frequency spectrum if modification of that loop significantly degrades BellSouth's voice service. If <<customer-short-name>> requests that BellSouth modify a loop and such modification significantly degrades the voice services on the loop, <<customer-short-name>> shall pay for the loop to be restored to its original state.

Line Sharing must be provide only on loops on which BellSouth is also providing, and continues to provide, analog voice service directly to the End User. In the event the End User terminates its BellSouth provided voice service for any reason, or in the event BellSouth disconnects the End User's voice service pursuant to its tariffs or applicable law, and <<customer-short-name>> desires to continue providing xDSL service on such loop, <<customer-short-name>> or the new voice provider, shall be required to purchase a full stand-alone loop UNE. In those cases in which BellSouth no longer provides voice service to the End User and <<customer-short-name>> purchases the full stand-alone loop, <<customer-short-name>> may elect the type of loop it will purchase. <<customer-short-name>> will pay the appropriate recurring and nonrecurring rates for such loop as set forth in Exhibit __ to this Attachment. In the event <<customer-short-name>> purchases a voice grade loop, <<customer-short-name>> acknowledges that such loop may not remain xDSL compatible.

If the End User terminates its BellSouth provided voice service, and <<customer-short-name>> requests BellSouth to convert the Line Sharing arrangement to a Line Splitting arrangement, BellSouth will discontinue billing <<customer-short-name>> for the High Frequency Spectrum and begin billing the voice <<customer-short-name>> for the full stand-alone Loop. BellSouth will continue to bill the <<customer-short-name>> for all associated splitter charges if the <<customer-short-name>> continues to use a BellSouth splitter.

Only one <<customer-short-name>> shall be permitted access to the High Frequency Spectrum of any particular loop.

Once BellSouth has placed cross-connects on behalf of <<customer-short-name>> to provide <<customer-short-name>> access to the High Frequency Spectrum and chooses to rearrange its splitter or <<customer-short-name>> pairs, <<customer-short-name>> may order the rearrangement of its splitter or cable pairs via "Subsequent Activity." Subsequent Activity is any rearrangement of <<customer-short-name>>'s cable pairs or splitter ports after BellSouth has placed cross-connection to provide <<customer-short-name>> access to the High Frequency Spectrum. BellSouth shall bill and <<customer-short-name>> shall pay the Subsequent Activity charges as set forth in Exhibit __ of this Attachment.

BellSouth's Local Ordering Handbook (LOH) will provide <<customer-short-name>> the LSR format to be used when ordering disconnections of the High Frequency Spectrum or Subsequent Activity.

Maintenance and Repair – Line Sharing

<<customer-short-name>> shall have access for repair and maintenance purposes to any Loop for which it has access to the High Frequency Spectrum. <<customer-short-name>> may test from the collocation space, the Termination Point or the NID.

BellSouth will be responsible for repairing voice services and the physical line between the NID at the End User's premises and the Termination Point. <<customer-short-name>> will be responsible for repairing its data services. Each Party will be responsible for maintaining its own equipment.

<<customer-short-name>> shall inform its End Users to direct data problems to <<customer-short-name>>, unless both voice and data services are impaired, in which event <<customer-short-name>> should direct the End Users to contact BellSouth.

Once a Party has isolated a trouble to the other Party's portion of the Loop, the Party isolating the trouble shall notify the End User that the trouble is on the other Party's portion of the Loop.

Issue 18: What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

Recommended Language:

Line Splitting

Line splitting is defined to mean that a provider of data services (a Data LEC) and a provider of voice services (a Voice CLEC) deliver voice and data service to End Users over the same Loop. The Voice CLEC and Data LEC may be the same or different carriers.

Line Splitting – UNE-L.

If <<customer_short_name>> provides its own switching or obtains switching from a third party, <<customer_short_name>> may engage in line splitting arrangements with another CLEC using a splitter, provided by <<customer_short_name>>, in a Collocation Space at the central office where the loop terminates into a distribution frame or its equivalent.

Provisioning Line Splitting and Splitter Space – UNE-L

The requesting carrier provides the splitter when providing Line Splitting with UNE-L. When <<customer_short_name>> owns the splitter, Line Splitting requires the following: a loop from NID at the End User's location to the serving wire center and terminating into a distribution frame or its equivalent.

An unloaded 2-wire copper Loop must serve the End User. The meet point for the Voice CLEC and the Data LEC is the point of termination on the MDF for the Data LEC's cable and pairs.

CLEC Provided Splitter – Line Splitting – UNE-L

To order High Frequency Spectrum on a particular Loop, <<customer_short_name>> must have a DSLAM collocated in the central office that serves the End User of such Loop.

<<customer_short_name>> may purchase, install and maintain central office POTS splitters in its collocation arrangements. <<customer_short_name>> may use such splitters for access to its customers and to provide digital line subscriber services to its customers using the High Frequency Spectrum. Existing Collocation rules and procedures and the terms and conditions relating to Collocation set forth in Attachment XXX-Central Office shall apply.

Any splitters installed by <<customer_short_name>> in its collocation arrangement shall comply with ANSI T1.413, Annex E, or any future ANSI splitter Standards. <<customer_short_name>> may install any splitters that BellSouth deploys or permits to be deployed for itself or any BellSouth affiliate.

Maintenance – Line Splitting – UNE-L

BellSouth will be responsible for repairing voice troubles and the troubles with the physical loop between the NID at the End User's premises and the termination point.

Indemnification

<customer_short_name>> shall indemnify, defend and hold harmless BellSouth from and against any claims, losses, actions, causes of action, suits, demands, damages, injury, and costs including reasonable attorney fees, which arise out of actions related to the other service provider, except to the extent caused by BellSouth's gross negligence or willful misconduct.

Network Modifications

BellSouth must make all necessary network modifications, including providing non-discriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.

Issue 22: 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?

Recommended Language:

Fiber to the Home (FTTH) loops are local loops consisting entirely of fiber optic cable whether dark or lit, serving an End User's premises or, in the case of predominately residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the MDU minimum point of entry (MPOE). Fiber to the Curb (FTTC) loops are local loops consisting of fiber optic cable connecting to a copper distribution plant that is not more than five hundred (500) feet from the End User's Premises or, in the case of predominately residential MDUs not more than five hundred (500) feet from the MDUs MPOE. The fiber optic cable in a FTTC loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than five hundred (500) feet from the respective End User's premises. FTTH/FTTC loops do not include local loops to predominately business MDUs.

In new build (Greenfield) areas, where BellSouth has only deployed FTTH/FTTC facilities, BellSouth is under no obligation to provide such FTTH and FTTC Loops. FTTH facilities include fiber loops deployed to the MPOE of a MDU that is predominately residential regardless of the ownership of the inside wiring from the MPOE to each End User in the MDU.

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2006, a copy of the foregoing document was served on the following, via the method indicated:

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