BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 6, 2006

IN RE:	)	
	)	
BELLSOUTH'S PETITION TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)	**DOCKET NO. 04-00381**

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT AND DENYING ALTERNATIVE MOTION FOR DECLARATORY RULING

This matter came before Chairman Ron Jones, Director Deborah Taylor Tate and Director Sara Kyle of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on August 22, 2005 for consideration of *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment, or in the Alternative, Motion for Declaratory Ruling* ("*Motion*" or "*Motion for Summary Judgment*") filed on June 1, 2005.

BACKGROUND

BellSouth Telecommunications, Inc. ("BellSouth") initiated this docket by filing its *Petition to Establish Generic Docket* ("*Petition*") on October 29, 2004. BellSouth asserted that the docket was necessary to address recent decisions of the Federal Communications Commission ("FCC") and the United States Court of Appeals for the District of Columbia Circuit related to local unbundling rules.[1] BellSouth specifically pointed to the FCC's *Triennial*

[1] *Petition*, pp. 1-2 (October 29, 2004).

Review Order (or "*TRO*"),[2] the FCC's *Interim Rules Order*,[3] the *USTA II* decision of the DC Circuit[4] and the FCC's "final" unbundling rules, later released as the *Triennial Review Remand Order* ("*TRRO*").[5] BellSouth asserted that these decisions mandated changes in the interconnection agreements ("ICAs") between BellSouth and the competing local exchange carriers ("CLECs"). BellSouth asked the TRA to determine what changes to the agreements would be necessary to implement the new rules.

The *TRRO*, released by the FCC on February 4, 2005, reclassified specific unbundled network elements ("UNEs") and altered the obligations of incumbent local exchange carriers ("ILECs"), such as BellSouth, to provide those UNEs to CLECs. The *TRRO* also set forth transition plans for the UNEs, which distinguished a CLEC's ongoing service to its embedded customer base from new orders for the de-listed UNEs ("New Adds").

Several CLECs filed petitions to intervene in the proceedings, which were granted.[6] BellSouth and the CLECs (together, the "Parties") assert opposing interpretations of the *TRRO*. As an initial matter, the Parties disagreed about whether the termination of New Adds was

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[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978 (2003), *corrected by Errata*, 18 FCC Rcd. 19020 (2003), *vacated and remanded in part, aff'd in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*TRO*").

[3] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01- 338, WC Docket No. 04-313, *Order and Notice of Proposed Rulemaking*, 19 FCC Rcd. 16783 (2004) ("*Interim Rules Order*").

[4] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*")

[5] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, *Order on Remand*, 20 FCC Rcd. 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[6] *See Order Granting Petitions for Intervention, Directing Filing of Issues Matrix, and Establishing Status Conference Date* (February 3, 2005); *Order Granting Petition for Intervention, Granting Permission to Practice Pro Hac Vice, and Establishing Status Conference Date* (April 4, 2005); *Order Granting Motion for Leave to File Reply Brief, Granting Petition to Intervene, Accepting Withdrawal and Adopting Joint Issues Matrix* (July 29, 2005); *Order Granting Petition to Intervene* (August 22, 2005). For a detailed history of this docket, *see Order Granting Alternative Relief Requested in Motions for Emergency Relief*, pp. 2-10 (July 13, 2005).

self-effectuating as of the effective date of the *TRRO*.[7] The Parties brought the dispute before the panel, which convened to deliberate the matter on April 11, 2005.[8] At that time, a majority of the panel ordered BellSouth and the CLECs to negotiate an appropriate implementation of the *TRRO* provisions concerning de-listed UNEs and the availability of commingling and conversion provided in the *TRO*.[9] The Majority set an initial negotiation period of thirty days, through May 11, 2005.[10] The Majority also directed BellSouth to "continue to accept, and not reject, CLEC orders for New Adds" during the negotiation period and until further notice from the Authority.[11]

The panel again considered the New Adds question during the May 16, 2005 Authority Conference. The Majority noted that the negotiation period provided as alternative relief in the April 11, 2005 deliberations had expired.[12] The Majority noted that the initial negotiations between BellSouth and the CLECs had been unsuccessful and found further negotiations were not likely to yield results or agreement among the Parties.[13] The majority therefore concluded

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[7] *See, e.g., Motion for Emergency Relief* (February 25, 2005); *MCI's Motion for Expedited Relief Concerning UNE-P Orders* (March 2, 2005); *Cinergy Communications Company's Motion for Emergency Relief*, Exhibits 2-3 (March 2, 2005); *BellSouth Telecommunications, Inc.'s Response in Opposition to the Joint Petitioners' Motion for Emergency Relief* (March 8, 2005); *BellSouth Telecommunications Inc.'s Response to Cinergy Communications Company's Motion for Emergency Relief* (March 10, 2005); and *BellSouth Telecommunications Inc.'s Response to MCI's Motion for Expedited Relief Concerning UNE-P Orders* (March 10, 2005).

[8] For the substantive and procedural history of the parties' dispute regarding New Adds, *see Order Granting Alternative Relief Requested in Motions for Emergency Relief*, pp. 4-5 (July 13, 2005); *Order Terminating Alternative Relef Granted During April 11, 2005 Deliberations*, pp. 2-3 (July 25, 2005); *Order Denying Motion for Clarification*, pp. 2-6 (December 21, 2005).

[9] Director Kyle did not vote with the majority and instead moved that BellSouth's responsibility to continue furnishing UNEs exempted by the *TRRO* ended on March 11, 2005. *See* Transcript of Deliberations, p. 18 (April 11, 2005); Supplement to Transcript of April 11, 2005 Deliberations (November 7, 2005).

[10] *See* Transcript of Deliberations, pp. 9, 13-14 (April 11, 2005). At that time, the TRA was scheduled to have an Authority Conference on May 2, 2005, before the expiration of the negotiation period. The TRA later cancelled the May 2, 2005 Authority Conference, and BellSouth agreed to extend the time during which it would continue accepting New Adds through May 16, 2005 to allow deliberations by the panel at the next Authority Conference, scheduled for May 16, 2005. *See Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations*, p. 3 (July 25, 2005).

[11] *Order Granting Alternative Relief Requested in Motions for Emergency Relief*, p. 14 (July 13, 2005).

[12] Transcript of Authority Conference, pp. 45-7 (May 16, 2005). Director Kyle did not vote with the Majority and instead reiterated her position from the April 11, 2005 deliberations that the FCC expressly prohibited New Adds after March 11, 2005 and that BellSouth was not required to furnish the de-listed UNEs as of March 11, 2005.

[13] Transcript of Authority Conference, pp. 34, 36-37 (May 16, 2005).

that the alternative relief granted in the April 11, 2005 deliberations should not be extended and should end.[14]

Two CLECs, Cinergy Communications Company and Momentum Telecom, Inc., sought clarification of the majority's oral ruling.[15] BellSouth opposed the motion.[16] On July 25, 2005, the Authority issued the *Order Terminating Alternative Relief Granted during April 11, 2005 Deliberations* ("*Order Terminating Alternative Relief*"), memorializing the findings of the majority at the May 16, 2005 Authority Conference. During the August 8, 2005 Authority Conference, the majority denied the CLECs' request for clarification.[17] The majority found that the May 16, 2005 ruling was clear and the issues raised by Cinergy and Momentum were rendered moot by the July 25, 2005 *Order Terminating Alternative Relief.*[18]

BELLSOUTH'S *MOTION FOR SUMMARY JUDGMENT*

On June 1, 2005, BellSouth filed its *Motion for Summary Judgment*, asserting that certain issues in the docket are entirely or partially questions of law that should be addressed by the Authority before hearing. BellSouth identified twenty (20) issues, which it divided into two groups: Section I, for which BellSouth sought complete summary judgment, and Section II for which BellSouth sought partial summary judgment or a declaration of law. According to BellSouth, Section I issues are, in the entirety, questions of law that may be completely disposed of before hearing.[19] In contrast, BellSouth acknowledged that Section II issues involve both

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[14] *Id.* at 33, 35, 47. *See also Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations* (July 25, 2005).
[15] *Motion for Clarification* (May 23, 2005); *Momentum Telecom's Motion in Support of Cinergy Communications Company's Motion for Clarification* (June 27, 2005).
[16] *BellSouth Telecommunications, Inc.'s Response to Cinergy's Motion for Clarification* (June 2, 2005).
[17] *Order Denying Motion for Clarification* (December 21, 2005). Director Kyle abstained from the vote; Director Kyle did not vote with the majority on April 11, 2005 when they granted the alternative relief or on May 16, 2005 when they terminated it and therefore took no position on whether the Majority should clarify the May 16 ruling. Transcript of Authority Conference, p. 22 (August 8, 2005).
[18] Order Denying Motion for Clarification, pp. 5-6 (December 21, 2005).
[19] *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment, or in the Alternative, Motion for Declaratory Ruling* ("*Motion for Summary Judgment*"), pp. 5-6, 47 (June 1, 2005).

questions of law and fact. BellSouth, however, asked the Authority to provide a clear statement of what the law requires for these issues, either through partial summary judgment or a declaratory ruling from which the parties may frame their factual disputes.[20]

In support of its *Motion*, BellSouth asserted that the Authority would make the most efficient use of its resources by addressing these questions of law before a hearing. BellSouth explained that it was not asking the Authority for specific contract language. Rather, in each instance, BellSouth asked the Authority to resolve the legal question underlying the issue.[21]

On July 1, 2005, the Joint CLECs[22] and Sprint Communications Company L.P. and Sprint Com, Inc. d/b/a Sprint PCS (together "Sprint") independently filed their responses to BellSouth's *Motion for Summary Judgment*.[23] The Joint CLECs argued that all the issues involve a dispute concerning the application of law and as such should be resolved only after an evidentiary hearing.[24] Moreover, they contended that the issues in this proceeding all involve mixed questions of policy, law and fact.[25] The Joint CLECs asserted that BellSouth, in asking the Authority to rule on these legal issues in a summary manner, would remove from the Authority the opportunity to consider the issues in the context of the actual contractual dispute.[26]

Sprint commented only on Issues 2, 6 and 20(a) from BellSouth's *Motion for Summary Judgment* but specified that it was not waiving objection to, and reserved the right to

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[20] *Id.*
[21] *Motion for Summary Judgment*, p. 2 (June 1, 2005).
[22] The Joint CLECs consist of Competitive Carriers of the South, Inc. ("CompSouth"), the Southeastern Competitive Carriers' Association ("SECCA"), and XO Communications Services, Inc. ("XO").
[23] *Joint CLECs' Response to BellSouth's Motions for Summary Judgment or Declaratory Ruling* ("*Joint CLECs' Response*") (July 1, 2005) and *Sprint's Response to BellSouth Telecommunications, Inc.'s Motion for Summary Judgment, or in the Alternative , Motion for Declaratory Ruling* (July 1, 2005) ("*Sprint's Response*").
[24] *Joint CLECs' Response*, pp. 3-4 (July 1, 2005).
[25] *Id.* at 3.
[26] *Id.*

subsequently address, the remainder of the legal arguments in the *Motion*.[27] Sprint requested that the Authority deny BellSouth's *Motion for Summary Judgment* on Issues 2, 6 and 20(a).

On July 14, 2005, BellSouth filed *BellSouth Telecommunications, Inc.'s Motion for Leave to Reply to CompSouth's Response to Motion for Summary Judgment* ("*Motion for Leave to Reply*") and attached its *Reply Brief of BellSouth Telecommunications, Inc. on Motion for Summary Judgment*. The Reply Brief addressed Issues 8 and 17. Both CompSouth and XO objected to BellSouth's *Motion for Leave to Reply*. At a status conference on July 21, 2005, the Hearing Officer took the matter under advisement and, on July 29, 2005, issued an order granting the *Motion for Leave to Reply* and deeming BellSouth's reply brief filed in the record. The Hearing Officer gave the opposing parties until August 4, 2005 to file briefs in response to BellSouth's Reply Brief. Those response briefs were limited to those matters raised or discussed by BellSouth in its Reply Brief.[28]

On August 4, 2005, DIECA Communications, Inc. d/b/a Covad Communications Company filed *Covad Communications Company's Response to BellSouth's Reply Brief*, which was supported by CompSouth and addressed Issue 17, and CompSouth filed *CompSouth's Response to BellSouth's Reply Brief on Motion for Summary Judgment,* which addressed Issue 8.

On August 8, 2005, the panel heard oral argument on BellSouth's *Motion*.

Standard of Review

Summary judgment is appropriate when (1) the record as a whole shows that no genuine issues with regard to any material facts remain to be tried and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts.[29] "Courts should 'grant a summary

[27] *Sprint's Response*, p. 1 (July 1, 2005).
[28] *See Order Granting Motion for Leave to File Reply Brief, Granting Petition to Intervene, Accepting Withdrawal and Adopting Joint Issues Matrix* (July 29, 2005).
[29] Tenn. R. Civ. P. 56.04. *See also Penley v. Honda Motor Co., Ltd.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991).

judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion.'"[30] "The burden is on the moving party to show the absence of a genuine issue as to any material fact and that movant is entitled to judgment as a matter of law."[31] The pleadings and evidence must be considered in the light most favorable to the opposing party.[32]

The TRA is expressly authorized to hear requests for declaratory rulings pursuant to Tenn. Code Ann. § 65-2-104 (2004) and under the procedure set forth in the Uniform Administrative Procedures Act at Tenn. Code Ann. § 4-5-223 (1998). TRA Rules also provide for the filing of requests for declaratory orders or rulings.[33] The moving party must specifically state "the factual circumstances warranting a declaration by the Authority; the specific statute, rule or order as to which a declaration is sought; how the application of that statute, rule or order, affects or threatens to affect the petitioner, and a statement of the declaration requested."[34] Upon a petition filed by an interested party, the Authority may (1) convene a contested case hearing and issue a declaratory order, or (2) refuse to issue a declaratory order.[35]

The August 22, 2005 Authority Conference

At a regularly scheduled Authority Conference held on August 22, 2005, the panel deliberated the *Motion for Summary Judgment.* The panel first addressed those issues for which BellSouth sought full summary judgment: Issues 6, 8(a), 8(b), 17, 20(a), 23, 24, 25, 30 and 32.[36] The panel then addressed those issues for which BellSouth sought partial summary judgment or

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[30] *Penley v. Honda*, 31 S.W.3d at 183, quoting *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000).
[31] *Jones v. Home Indemnity Ins. Co.*, 651 S.W.2d 213, 214 (Tenn. 1983).
[32] *Biscan v. Brown*, 160 S.W.3d 462, 476-477 (Tenn. 2005) ("examine the evidence and all reasonable inferences from the evidence in a light most favorable to the nonmoving party").
[33] Tenn. Comp. R. & Regs. 1220-1-2-.05(1).
[34] Tenn. Comp. R. & Regs. 1220-1-2-.05(3).
[35] Tenn. Code Ann. § 4-5-223(a) (1998). *See also* Tenn. Comp. R. & Regs. 1220-1-2-.05(4).
[36] In its *Motion*, BellSouth also requested summary judgment in the entirety for Issues 7 and 21. The parties later agreed to remove those issues from the joint issues matrix and from consideration in this docket. *See Order Granting Motion for Leave to File Reply Brief, Granting Petition to Intervene, Accepting Withdrawal and Adopting Joint Issues Matrix*, p. 5 (July 29, 2005).

in the alternative a declaratory ruling: Issues 2, 11, 14, 19, 22, 26, 28 and 29. The positions of the parties and the panel's findings and conclusions concerning each issue are set forth below.

SECTION I: ISSUES FOR WHICH BELLSOUTH SEEKS FULL SUMMARY JUDGMENT

BellSouth asserts that the Authority should decide the following issues as a matter of law in their entirety, thus completely disposing of the issues.[37]

ISSUE 6: TRRO/FINAL RULES: Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

A. Positions of the Parties

BellSouth states that as a condition to a finding of no impairment, a wire center must have a certain number of business lines, a certain number of fiber-based collocators or some combination of the two.[38] BellSouth cites FCC Rule 51.5 for the proposition that a DS1 line corresponds to 24 business lines.[39] According to BellSouth, the entire capacity of DS1 loops, 24 channels, must be counted as business lines, even if a particular DS1 loop has only 10 of the 24 channels actually activated.[40] BellSouth further asserts that the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity and that HDSL loops are used to deliver T1 services.[41] Based on this, BellSouth concludes that the FCC has declared as a matter of law "that an HDSL loop is the equivalent of a DS1 loop, and therefore each HDSL loop must be included in the 'business line' count at its full capacity, 24 channels."[42]

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[37] *Motion for Summary Judgment*, p. 6, 47 (June 1, 2005).
[38] *Id.* at 8.
[39] *Id.* (citing 47 C.F.R. § 51.5).
[40] *Id.*
[41] *Id.* at 9.
[42] *Id.*

The Joint CLECs contend that the FCC did not conclusively hold that HDSL-capable loops are the same thing as DS1 loops for purposes of impairment analysis.[43] The Joint CLECs note that the definition for business line loops in the *TRRO* refers to DS1 lines but does not make any assertions about HDSL-capable copper loops.[44] In addition, the FCC stated that an HDSL-compatible loop could act in place of a DS1 loop that was declassified as a UNE.[45] The Joint CLECs suggest that it is inconceivable the FCC would have considered HDSL-capable loops both as DS1 loops for the impairment analysis and, at the same time, as a substitute for DS1 loops.[46] The Joint CLECs further assert that BellSouth will have converted nearly all its copper loops, even those used to provide residential service, into DS1 lines that can be counted as business lines for purposes of declassifying UNEs.[47] According to the Joint CLECs, the Authority should refrain from ruling on this issue until it can hear testimony from witnesses who can describe the characteristics of HDSL-capable copper loops, DS1 lines, and how those terms relate to the definitions in the *TRRO*.[48]

Sprint did not comment on BellSouth's specific legal argument on counting HDSL-capable copper loops as 24 business lines for purposes of the impairment analysis.[49] Sprint instead asserts that the FCC has never established a specific use restriction for CLECs' access to cooper loops for HDSL. Sprint therefore contends that a non-impairment threshold for a wire center with regard to DS1 loops would not result in the HDSL-capable copper loops in that wire center also becoming unavailable to CLECs.[50] Sprint acknowledges that BellSouth's *Motion* regarding HDSL-capable copper loops does not reach this specific issue; Sprint,

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[43] *Joint CLECs' Response*, p. 5 (July 1, 2005).
[44] *Id.*
[45] *Id.*
[46] *Id.* at 6.
[47] *Id.*
[48] *Id.* at 7.
[49] *Sprint's Response*, p. 2 (July 1, 2005).
[50] *Id.*

however, understands BellSouth's position to be that a finding of no impairment in a wire center would relieve BellSouth of providing HDSL-capable loops in that center.[51] Sprint objects to any attempt by BellSouth to request such a ruling as a matter of law from the Authority, and Sprint asks the Authority to deny summary judgment.[52]

B. Deliberations and Conclusions

The panel unanimously found that the CLECs raised factual issues material to Issue 6. For example, the parties disagree on the definition of HDSL-capable copper loop and the relationship between HDSL-capable loops, HDSL loops and DS1 facilities. Additionally, BellSouth did not establish that it is entitled to judgment as a matter of law. Therefore, the panel found this issue is not appropriate for summary judgment and, as a result, denied the *Motion* as to Issue 6.[53]

ISSUE 8(a): TRRO/FINAL RULES: Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

A. Positions of the Parties

BellSouth argues that the CLECs are attempting to recreate UNE-platforms ("UNE-Ps") eliminated by the *TRO* and *TRRO* using Section 271[54] and state law. BellSouth requests two findings from the Authority: (1) there is no legal basis for a state commission to compel the inclusion of Section 271 network elements in a Section 252[55] interconnection agreement; and (2)

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[51] *Id.* at 2-3.
[52] *Id.* at 3.
[53] Transcript of Authority Conference, p. 23 (August 22, 2005).
[54] 47 U.S.C. § 271.
[55] 47 U.S.C. § 252.

there is no legal basis for a state commission to force BellSouth to include de-listed network elements in a Section 252 interconnection agreement based on state law.[56]

In support of its *Motion*, BellSouth contends that the plain language of the Telecommunications Act of 1996 (the "Act") refers only to the negotiation of Section 251[57] elements and therefore prohibits state commissions from forcing negotiations of any topics outside the scope of Section 251.[58] BellSouth references decisions from federal district courts and state commissions in support of its position.[59]

BellSouth further asserts that the CLECs may not use Section 271 or state law as a basis for reinstating UNE-Ps.[60] BellSouth asserts that state commissions have no authority to require BellSouth Operating Companies ("BOCs") to provide unbundled access to elements for which the FCC has found no impairment. BellSouth maintains that providing unbundled access to such elements using state law would contradict federal law.[61]

The Joint CLECs argue that the inclusion of Section 271 elements in a Section 252 interconnection agreement is an issue that has already been ruled on by the Authority and that such inclusion was allowed on an interim basis at least.[62] The Joint CLECs draw a distinction between enforcing Section 271 and allowing elements from the checklist into interconnection agreements.[63] According to the Joint CLECs, references to Section 252 in Section 271 require that Section 271 elements be included in Section 252 agreements, and the standards for just and reasonable pricing set forth in Section 252 are properly applied by the state commission to

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[56] *Motion for Summary Judgment,* pp. 11-12 (June 1, 2005).
[57] 47 U.S.C. § 251.
[58] *Motion for Summary Judgment,* pp. 12-13 (June 1, 2005).
[59] *Id.* at 14-18.
[60] *Reply Brief of BellSouth Telecommunications, Inc. on Motion for Summary Judgment,* pp. 14-16 (July 14, 2005).
[61] *Motion for Summary Judgment*, p. 23 (June 1, 2005).
[62] *Joint CLECs' Response*, p. 7 (July 1, 2005) (citing *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119 ("*DeltaCom Arbitration*")).
[63] *Id.* at 16.

Section 271 elements.[64] The Joint CLECs contend that only TELRIC-priced UNE-Ps have been declassified, not all loop-switch combinations.[65] The Joint CLECs also maintain that federal jurisdiction over enforcement of Section 271 does not prohibit state unbundling laws and would only preempt such laws if they were in direct conflict with federal law.[66]

B. Deliberations and Conclusions

The panel unanimously voted to deny summary judgment as to Issue 8(a).[67]

ISSUE 8(b): TRRO/FINAL RULES: If the answer to part (a) is affirmative in any respect, does the Authority have the authority to establish rates for such elements?

A. Positions of the Parties

BellSouth states that if a state commission has the authority to require the inclusion of Section 271 network elements or network elements unbundled under state law in a Section 252 interconnection agreement, the state commissions have no authority to set rates for those elements.[68] BellSouth's arguments against the Authority's ability to establish rates for such elements are similar to its arguments against inclusion of those elements in Section 252 interconnection agreements.[69] BellSouth reiterates its contention that the federal government maintains exclusive authority over enforcement of Section 271, including pricing, and that any

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[64] *Id.* at 13.
[65] *Id.* at 21.
[66] *Id.* at 26.
[67] Chairman Jones understood the issue has having two (2) parts: one related to Section 271 elements and the other related to state law authority. As to the Section 271 elements, Chairman Jones found BellSouth had established that there are no genuine issues of material fact but had failed to demonstrate that it is entitled to judgment as a matter of law. Chairman Jones noted the agency's prior determination in the *DeltaCom Arbitration* that it may include rates, terms and conditions of Section 271 elements in Section 252 interconnection agreements. Chairman Jones was not convinced by the authorities cited by BellSouth that the agency's position is legally infirm and should be modified. Chairman Jones noted that the parties seem to argue different questions regarding state law authority and found that summary judgment could not be granted in such an instance. Director Tate and Director Kyle voted for the denial of summary judgment but did not adopt Director Jones's interpretation and reasoning. Transcript of Authority Conference, pp. 24-25 (August 22, 2005).
[68] *Motion for Summary Judgment*, p. 24 (June 1, 2005).
[69] *Id.*

effort by state commissions to set rates would be inconsistent with federal law.[70] Further, BellSouth asserts that Sections 201[71] and 202[72] set the standard by which compliance with Section 271 is determined.[73]

The Joint CLECs argue that enforcement of Section 271 involves imposing penalties on BellSouth or revoking BellSouth's approval to provide long distance.[74] The Joint CLECs contend they are not requesting that this authority be granted to state commissions. The Joint CLECs assert that establishing rates, terms, and conditions for unbundled elements is a routine part of arbitration. According to the Joint CLECs, the authority of state commissions to do so follows from their authority to include Section 271 elements in Section 252 agreements.[75]

B. Deliberations and Conclusions

The panel unanimously voted to deny summary judgment as to Issue 8(b).[76]

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

A. Positions of the Parties

BellSouth asserts that its line sharing obligations ceased on October 1, 2004 and its only remaining obligation is to provide line sharing during and in accordance with the FCC's 3-year transition plan.[77] BellSouth maintains the CLECs' argument for line sharing must fail because, even if line sharing is construed as a Section 271 element, state commissions have no authority to require ILECs to include Section 271 elements in a Section 252 interconnection agreement.[78]

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[70] *Id.* at 24-28.
[71] 47 U.S.C. § 201.
[72] 47 U.S.C. § 202.
[73] *Motion for Summary Judgment,* pp. 24-28 (June 1, 2005).
[74] *Joint CLECs' Response*, pp. 26-27 (July 1, 2005).
[75] *Id.* The Joint CLECs contend state commissions have such authority. *See* the discussion of Issue 8(a), *supra.*
[76] Transcript of Authority Conference, pp. 25-26 (August 22, 2005).
[77] *Motion for Summary Judgment*, pp. 28-30, 38 (June 1, 2005) (citing *TRO*, 18 FCC Rcd. at 17138-9, ¶ 265 (2003)).
[78] *Id.* at 30.

Moreover, BellSouth contends the Authority has determined that the FCC's transition plan constitutes the only obligation BellSouth has regarding line sharing.[79] BellSouth argues the CLECs' theory that line sharing is still available as a Section 271 element is "illogical" because it would render irrelevant the FCC's scheme to wean CLECs away from the use of line sharing and transition them to other facilities such as whole loops and line splitting.[80] Finally, BellSouth argues that the FCC's recent forbearance decision ("Forbearance Order") removed any obligation to provide line sharing, even if line sharing is construed as a Section 271 element.[81]

The Joint CLECs assert that line sharing indisputably is a checklist item 4 loop transmission facility under Section 271.[82] Therefore, the Joint CLECs assert that BellSouth is obligated to provide nondiscriminatory access to line sharing, irrespective of any Section 251 unbundling determinations by the FCC.[83] The Joint CLECs also contend that the FCC's 3-year transition plan applies to ILECs for which the obligation to provide access to line sharing was removed pursuant to the FCC's unbundling analysis, but not to BOCs, like BellSouth, who have an ongoing obligation to provide access to line sharing under Section 271.[84] In response to BellSouth's contentions regarding the Forbearance Order, the Joint CLECs assert the separate statements of former FCC Chairman Powell and Commissioner Martin make it clear that Section 271 imposes line sharing obligations on BellSouth.[85] The Joint CLECs contend that forbearance from line sharing was never requested and thus was not granted, by implication or otherwise, by

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[79] *Id.* at 29-30 (citing *In re: Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration of Interconnection Agreement Amendment with BellSouth*, Docket No. 04-00186).
[80] *Id.* at 31.
[81] *Id.* at 32-37. *See 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)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, *Memorandum Opinion and Order*, 19 FCC Rcd. 21496 (2004) ("Forbearance Order").
[82] *Joint CLECs' Response*, p. 32-34 (July 1, 2005).
[83] *Id.* at 35.
[84] *Id.* at 40-41.
[85] *Id.* at 41-42.

the FCC.[86] Further, the Joint CLECs note the statement of Chairman Powell specified that the Forbearance Order did not apply to line sharing.[87]

B. Deliberations and Conclusions

The panel unanimously voted to deny summary judgment as to Issue 17.[88]

ISSUE 20(a): TRO – SUB-LOOP CONCENTRATION: What is the appropriate ICA language, if any, to address sub-loop feeder or sub-loop concentration?

A. Positions of the Parties

BellSouth takes the position that it has no legal obligation to unbundle sub-loop feeder or sub-loop concentration.[89] BellSouth contends the FCC has very clearly established that BellSouth does not have to unbundle access to sub-loop feeder.[90] BellSouth further asserts the FCC "has expressly stated the unbundling obligation applies only to that portion of the copper loop necessary to access the end-user's premises," which BellSouth contends is loop distribution.[91] BellSouth thus concludes that it has no obligation to provide sub-loop concentration, which it describes as that electronic equipment that in some cases is installed between the sub-loop feeder and the sub-loop distribution.[92] Based on these arguments, BellSouth asserts there is no need for any interconnection agreement to contain language with respect to either sub-loop feeder or sub-loop concentration.[93]

The Joint CLECs assert that BellSouth is over-simplifying this issue and that testimony is needed to resolve the technical nature of this issue.[94] The Joint CLECs contend the "FCC's

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[86] *Id.* at 42.
[87] *Id.* at 43.
[88] Chairman Jones found Issue 17 contains several issues that may involve disputed facts, including whether the high frequency portion of the loop is in the Section 271 checklist and whether the FCC granted forbearance as to the provisioning of the element.
[89] *Motion for Summary Judgment*, pp. 38-40 (June 1, 2005).
[90] *Id.* at 39.
[91] *Id.* at 39-40.
[92] *Id.* at 40.
[93] *Id.*
[94] *Joint CLECs' Response*, p. 47 (July 1, 2005).

actions in this area provide opportunities for facilities-based CLECs to offer new services that link CLEC loop facilities to the 'last 100 feet' of the incumbent's network, particularly in residential multi-tenant environments."[95] The Joint CLECs cite 47 C.F.R. § 51.319 (b)(1)(i) in support of their argument that BellSouth has an obligation to provide sub-loops at any technically feasible access point at or near a multi-unit premise with copper or fiber.[96] Further, the Joint CLECs assert the FCC had two objectives in forming its rules concerning CLEC access to sub-loops: to promote the deployment of equipment that can work within the existing copper plant as well as promote the CLECs' ability to serve multi tenant buildings.[97]

Sprint did not comment on BellSouth's *Motion* as to Issue 20(a) but noted that the *Motion* did not address subparts (b) and (c) of Issue 20, which were added to the Joint Issues Matrix filed on June 29, 2005, after the *Motion* was filed.[98] Sprint asks the Authority to exclude Issues 20(b) and 20(c) from the *Motion for Summary Judgment*.[99]

B. Deliberations and Conclusions

A majority of the panel voted to deny summary judgment as to Issue 20(a).[100]

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

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[95] *Id.*
[96] *Id.* at 48-49.
[97] *Id.* at 49-50.
[98] *Sprint's Response*, p. 6 (July 1, 2005).
[99] *Id.*
[100] Chairman Jones did not vote with the majority. He found no dispute of law or fact as to BellSouth's obligation to unbundle the sub-loop feeder and found that a genuine factual dispute exists as to BellSouth's obligation to provision unbundled access to sub-loop concentration and as to the definition of sub-loop concentration. Chairman Jones therefore moved that the panel grant the *Motion for Summary Judgment* in part as to sub-loop feeder and deny the *Motion* as to any remaining aspects of the issue. Transcript of Authority Conference, p. 29 (August 22, 2005).

A. Positions of the Parties

BellSouth asserts that it has no obligation to unbundle fiber-to-the-home ("FTTH") mass market loops serving greenfield areas or areas of new construction.[101] In support of this contention BellSouth cites paragraph 275 of the *TRO*.[102] BellSouth further asserts that these FTTH rules apply to multiple dwelling units ("MDUs") that are predominantly residential, such as condominiums, apartment buildings, or planned unit developments.[103] BellSouth notes the FCC's determination that FTTH loops include fiber loops deployed to the MPOE of predominantly residential MDUs, regardless of who owns the inside wiring.[104] BellSouth also relies on the FCC's definition of MPOE as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings."[105]

BellSouth asserts the FCC concluded that fiber-to-the-curb ("FTTC") loops should be subject to the same unbundling framework the FCC established for FTTH loops.[106] BellSouth explains that an FTTC loop is a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises."[107]

Based on these authorities and definitions, BellSouth asks the Authority to find as a matter of law that BellSouth has no obligation to unbundle (1) FTTH or FTTC mass market loops in greenfield areas, (2) FTTH or FTTC mass market loops serving predominantly

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[101] *Motion for Summary Judgment*, p. 41 (June 1, 2005).
[102] *Id.* (citing *TRO*, 18 FCC Rcd. at 17143, ¶ 275 (2003)).
[103] *Id.* at 42 (citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Order on Reconsideration*, 19 FCC Rcd. 15856, ¶ 1 (2004) ("*MDU Reconsideration Order*")).
[104] *Id.* (quoting *MDU Reconsideration Order*, 19 FCC Rcd. at 15861, ¶ 10 (2004)).
[105] *Id.* (quoting 47 C.F.R. § 68.105(b)).
[106] *Id.* at 41 (citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Order on Reconsideration*, 19 FCC Rcd. 20293, 20297, ¶ 9 (2004) ("*FTTC Reconsideration Order*")).
[107] *Id.* (quoting *FTTC Reconsideration Order*, 19 FCC Rcd. at 20297-98, ¶ 10 (2004)).

residential MDUs, or (3) fiber loop facilities that are deployed to the MPOE of an MDU, regardless of whether the ILEC owns or controls any copper cable facilities in the MDU.[108] BellSouth also asks the Authority to adopt the FCC's definition of MPOE.[109]

The Joint CLECs contend that BellSouth's *Motion* as to Issue 23 "essentially requests that the Authority instruct the parties to incorporate contract language in their ICAs that conforms to applicable FCC orders."[110] The Joint CLECs assert that appropriate contract language is the essence of the current dispute. According to the Joint CLECs, the parties have been unable to adequately define either the technical terms employed by the FCC or specific operational aspects with which to implement the proposed contract terms. The Joint CLECs contend the parties' contract language disputes likely will involve the technical terms used by the FCC in its decisions[111] and specific operational aspects of implementing proposed contract terms. They assert "the real world resolution of such disputes will not be assisted or clarified by the generalized legal ruling sought by BellSouth."[112] The Joint CLECs therefore contend the Authority would be better served by permitting the parties the opportunity to narrow the disputes through negotiation; the Authority then may rely on witnesses' testimony rather than lawyers' pleadings regarding the technical aspects of the FCC's rulings.[113]

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[108] *Id.* at 43.
[109] *Id.*
[110] *Joint CLECs' Response*, p. 51 (July 1, 2005). The Joint CLECs joined Issues 23, 24, and 28 in their response.
[111] For example, "what constitutes 'Fiber to the Home' versus 'Fiber to the Curb' or what in particular distinguishes 'greenfield' from 'brownfield' situations." *Id.*
[112] *Id.*
[113] *Id.*

B. Deliberations and Conclusions

A majority of the panel voted to deny summary judgment as to Issue 23.[114]

ISSUE 24: TRO - HYBRID LOOPS: What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

A. Positions of the Parties

BellSouth explains that hybrid loops are local loops that consist of fiber and copper as well as the associated electronics, such as digital loop carrier ("DLC") systems.[115] BellSouth points to the FCC's determination that BellSouth is not obligated to unbundle "the next generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market."[116] According to BellSouth, the "D.C. Circuit Court of Appeals affirmed the FCC's holding that BellSouth is not obligated to unbundle the broadband capabilities of a hybrid loop."[117] Based on these FCC and D.C. Circuit decisions, BellSouth asks the Authority to clarify that BellSouth is not obligated to unbundle the next-generation elements of its hybrid loops.[118]

The Joint CLECs joined Issues 23, 24 and 28 in their response; their contentions regarding Issue 23 thus apply equally to Issue 24.[119] In general, the Joint CLECs contend that these issues involve technical matters related to contract language. The Joint CLECs therefore

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[114] Chairman Jones did not vote with the majority. He noted that resolution of this issue will not fully resolve the issues as written, and the issues as written do not fully capture the parties' disputes as he understands them. Nevertheless, Chairman Jones concluded that partial summary judgment would be appropriate. Specifically, he moved that the panel adopt the definition of MPOE set forth in 47 C.F.R. § 68.105. He further moved that the panel find as a general proposition that BellSouth has no obligation to unbundle FTTH or FTTC in greenfield areas, FTTH or FTTC mass market loops serving predominantly residential multi-dwelling units, or fiber loop facilities deployed to the MPOE of a MDU regardless of whether the ILEC owns or controls any copper facilities in the MDU. Transcript of Authority Conference, pp. 30-31 (August 22, 2005).

[115] *Motion for Summary Judgment*, p. 43 (June 1, 2005).

[116] *Id.* at 44 (quoting *TRO*, 18 FCC Rcd. at 17149, ¶ 288 (2003)).

[117] *Id.*

[118] *Id.*

[119] *See Joint CLECs' Response*, p. 51 (July 1, 2005); *supra*, Issue 23, Section A (Positions of the Parties).

ask that the Authority permit the parties to narrow the disputes through negotiation; address only the disputes on this issue that may remain for arbitration, and rely on "witnesses' testimony rather than lawyers' pleadings" regarding the technical aspects of the FCC's broadband rulings.[120]

B. Deliberations and Conclusions

The panel noted that BellSouth did not request partial summary judgment on this issue and a finding in BellSouth's favor therefore would remove Issue 24 from the proceedings. The panel found that many hybrid loops are utilized in the telecommunications field and, based on the information provided, they were not able to determine that Issue 24 is limited to only the packetized portion of the hybrid loop, as suggested by BellSouth. The panel therefore voted unanimously to deny BellSouth's *Motion* as to Issue 24.[121]

ISSUE 25: TRO – END USER PREMISES: Under the FCC's definition of a loop found in 47 C.F.R. § 51.319(a), is a mobile switching center or cell site an "end user customer's premises"?

A. Positions of the Parties

BellSouth argues the FCC has determined that a cell site or mobile switching center location should be considered part of the transmission services that exist outside the ILEC's local network.[122] Thus, the FCC has denied CLECs and mobile wireless carriers access to ILECs' unbundled dedicated transport and elements for the exclusive provision of mobile wireless service.[123] Based on these assertions, BellSouth asks the Authority to rule that a mobile switching center or cell site cannot constitute an "end user customer premises."[124]

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[120] *Id.*
[121] Transcript of Authority Conference, p. 32 (August 22, 2005).
[122] *Motion for Summary Judgment*, p. 45 (June 1, 2005) (citing *TRO*, 18 FCC Rcd. at 17203-4, ¶ 366 (2003)).
[123] *Id.* (citing *TRO*, 18 FCC Rcd. at 17206, ¶ 368 (2003). BellSouth states the FCC confirmed this finding in the *TRRO*, at n. 99).
[124] *Id.*

The Joint CLECs contend there is more to Issue 25 than the strict legal principle upon which the FCC has already ruled.[125] The Joint CLECs agree that the FCC Rule prohibits the use of UNEs for the exclusive provision of mobile wireless services.[126] The Joint CLECs, however, contend that the placement of a cell site atop a building or other structure does not transform the nature of services provided to the structure into exclusively mobile wireless services. The Joint CLECs further argue that loops to cell sites should be available to provide local service to workers at those sites.[127]

B. Deliberations and Conclusions

The panel noted that the parties have agreed to certain definitional limitations to the terms "mobile switching center" and "cell site." The parties also agree that the FCC rule does not apply to every cell site. The panel found that Issue 25 requires fact-specific language detailing which mobile switching centers or cell sites qualify as end user customer premises. Based on these findings, the panel unanimously voted to deny BellSouth's *Motion for Summary Judgment* on Issue 25.[128]

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

Under Section 252(i) of the Telecommunications Act,

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[129]

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[125] *Joint CLECs' Response*, p. 52 (July 1, 2005).
[126] *Id.* at 52.
[127] *Id.*
[128] Transcript of Authority Conference, pp. 32-33 (August 22, 2005).
[129] 47 U.S.C. § 252(i) (2001).

In 1996, the FCC "interpreted section 252(i) to mean that requesting carriers can choose among individual provisions contained in publicly filed interconnection agreements."[130] In 2004, the FCC adopted a different interpretation, the "all-or-nothing rule," codified at 47 C.F.R. § 51.809.

A. Positions of the Parties

BellSouth asserts that, as a matter of law, a CLEC may not obtain piecemeal portions of one interconnection agreement to combine with provisions from other existing agreements.[131] According to BellSouth, "a CLEC can only adopt an interconnection agreement in its entirety."[132] BellSouth asks the Authority to "expressly confirm that there are no exceptions to the 'all-or-nothing' rule."[133]

The Joint CLECs argue that BellSouth is attempting to extend the all-or-nothing rule beyond its intended scope.[134] The Joint CLECs contend BellSouth's interpretation would "preclude a carrier from requesting services not contained in its interconnection agreement which are offered generally to the public by BellSouth in Statements of Generally Available Terms or standard interconnection offerings."[135] According to the Joint CLECs, BellSouth is "expressly precluded by the Act" from refusing service to a CLEC that BellSouth generally makes available to any taker.[136] Moreover, the Joint CLECs argue the all-or-nothing rule has been appealed, the issue is pending before the United States Court of Appeals for the Ninth Circuit, and the Authority thus should deny summary judgment on Issue 30.[137]

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[130] *Review of Section 251 Unbundling Obligations of Local Exchange Carrier*, CC Docket No. 01-338, *Second Report and Order*, 19 FCC Rcd. 13494, 13495, ¶ 2 (2004).
[131] *Motion for Summary Judgment*, p. 46 (June 1, 2005).
[132] *Id.*
[133] *Id.* at 46-47.
[134] *Joint CLECs' Response*, p. 52 (July 1, 2005).
[135] *Id.*
[136] *Id.* at 52-53.
[137] *Id.* at 53.

B. Deliberations and Conclusions

The panel found the parties do not dispute that CLECs cannot assemble contracts by taking fragments of other CLECs' contracts. The panel further found that BellSouth seeks an expanded statement of the all-or-nothing rule and an interpretation that, on its face, is not required by the rule. The facts of the case do not permit a reasonable person to reach only one conclusion, and BellSouth did not establish that it is entitled to summary judgment. Based on these findings, the panel unanimously voted to deny summary judgment on Issue 30.[138]

ISSUE 32: GENERAL ISSUE- How should determinations made in this proceeding be incorporated into existing Section 252 interconnection agreements?

A. Position of the Parties

BellSouth argues that the outcome of this docket should be binding on active parties and on CLECs that were provided notice of the docket but did not actively participate.[139] BellSouth maintains that the Authority has provided parties of record and "interested parties" notice of the various proceedings and all CLECs have had ample opportunity to intervene and participate in the docket.[140] BellSouth suggests that the notice provided by the Authority "should satisfy any . . . concerns" regarding application of the Authority's determinations in this docket to CLECs that were not party to the docket.[141]

The Joint CLECs take no position on the question of "whether the Authority's orders in this docket can or should bind non-parties."[142] The Joint CLECs contend, however, the Authority should take no action to disturb existing agreements addressing how changes of law should be incorporated into existing and new Section 252 interconnection agreements.[143]

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[138] Transcript of Authority Conference, pp. 33-35 (August 22, 2005).
[139] *Motion for Summary Judgment*, p. 46 (June 1, 2005).
[140] *Id.*
[141] *Id.*
[142] *Joint CLECs' Response*, p. 53 (July 1, 2005).
[143] *Id.*

B. Deliberations and Conclusions

The panel voted unanimously to deny summary judgment on Issue 32.[144]

SECTION II: ISSUES FOR WHICH BELLSOUTH SEEKS PARTIAL SUMMARY JUDGMENT

BellSouth asserts that the following issues include both questions of law and questions of fact. BellSouth requests that the Authority address the legal questions by providing a clear statement of what the law requires, either by granting partial summary judgment or, alternatively, by issuing a declaratory ruling from which the parties may frame their factual disputes.[145]

ISSUE 2: TRRO/FINAL RULES: What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's Triennial Review Remand Order, issued February 4, 2005?

ISSUE 11: TRRO/FINAL RULES: What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms and conditions that apply in such circumstances?

A. Positions of the Parties

BellSouth requests that the Authority enter an order declaring, as a matter of law, that BellSouth's legal obligation to effectuate the FCC's transition plans are exactly as specified in the *TRRO* and the corresponding federal rules: specifically *TRRO* ¶¶ 143, 144, 196, 197, 227 and 47 C.F.R. §§ 51.319(a)(4)(iii), 51.319(a)(5)(iii), 51.319(a)(6)(ii), 51.319(d)(2)(iii), 51.319(e)(2)(ii)(C) and 51.319(e)(2)(iii)(C).[146] BellSouth states those rules specify that BellSouth is obligated to provide certain loops and transport routes from March 11, 2005 through

[144] Transcript of Authority Conference, p. 35 (August 22, 2005).
[145] *Motion for Summary Judgment*, p. 47 (June 1, 2005).
[146] *Id.* at 48-49.

March 10, 2006 at 115% of the rate that was in effect on June 15, 2004.[147] For dark fiber loops and transport, BellSouth's obligation continues until September 10, 2006. With respect to local circuit switching, BellSouth states it is obligated to provide access to the embedded base through March 10, 2006 at the rate that was in effect on June 15, 2004 plus one dollar.[148] Furthermore, BellSouth asks the Authority to clarify, absent a mutual agreement otherwise, that CLECs cannot expect to receive rates that are lower than the rates specified in the transition plan.[149] BellSouth also contends "if CLECs fail to convert former UNEs, loss of service may result.[150]

The Joint CLECs state that this issue extends beyond BellSouth's focus. The Joint CLECs assert that an interconnection agreement must first include the self-certification process available to CLECs under paragraph 234 of the *TRRO*.[151] The Joint CLECs further contend BellSouth should accept and provision CLEC orders for unbundled switching/UNE-P for moves, adds and changes to service being provided to CLECs' embedded customer base during the transition period.[152]

The Joint CLECs also counter BellSouth's position regarding the completion of the transition. According to the Joint CLECs, BellSouth has asserted that the "the transition of the embedded base of UNE-P customers must be ***completed*** by March 11, 2006."[153] In contrast, the Joint CLECs contend their obligation is to submit transition orders with BellSouth "at any time prior to March 11, 2006 and thus obtain transitional pricing for the entire one-year or eighteen month transition period set forth in the *TRRO*." The CLECs have no obligation to ensure that BellSouth fulfills the orders submitted within the time frame.[154] Furthermore, BellSouth has not

[147] *Id.* at 48.
[148] *Id.* at 48-49.
[149] *Id.* at 49-50.
[150] *Id.* at 48, n.75.
[151] *Joint CLECs' Response*, p. 54 (July 1, 2005).
[152] *Id.* at 55.
[153] *Id.* at 57 (emphasis in original).
[154] *Id.*

addressed the future transition plans for high capacity loops and transport between wire centers that do not satisfy the FCC's nonimpairment standards but may do so in the future.[155] Sprint specifically objects to BellSouth's proposed "abbreviated time period" for CLECs to transition services from such centers.[156] For this reason, the CLECs state the Authority should not rule that BellSouth has no transition obligation after March 10, 2006.[157]

Finally, the Joint CLECs contend Issue 11 is particularly unsuited to summary judgment.[158] They assert the issue concerns the "conduct of the parties" and factual issues regarding specific action or inaction.[159] The Joint CLECs assert there is no basis for ruling on this dispute and the Authority may implement any contract language that may become necessary as the March 2006 *TRRO* transition plan date approaches.[160]

B. Deliberations and Conclusions

The panel determined there are no general issues of material fact and BellSouth is entitled to judgment as a matter of law on the legal conclusion that BellSouth's obligations as to the transition plan are exactly as specified in the *TRRO*.[161] The panel further found that BellSouth's request for declaratory ruling should be denied as this docket was not convened as a request for declaratory order pursuant to Tenn. Code Ann. § 4-5-223 and, therefore, requisite notice has not been provided to the public.[162]

Based on these findings, the panel unanimously voted to grant partial summary judgment on Issues 2 and 11 and ruled that the transition plan for switching high capacity loops, dedicated transport and dark fiber should be in accordance with 47 CFR §§ 51.319(a), (d), and (e). The

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[155] *Id.* at 58.
[156] *Sprint's Response*, p. 4 (July 1, 2005).
[157] *Joint CLECs' Response*, p. 59 (July 1, 2005).
[158] *Id.*
[159] *Id.* at 59-60.
[160] *Id.* at 60.
[161] Transcript of Authority Conference, pp. 36-37 (August 22, 2005).
[162] *Id.*

panel further ruled that any remaining request for summary judgment and the request for declaratory ruling was denied. The panel specified that the decision was not intended to address issues related to post transition rates, transitions from wire centers that meet nonimpairment criteria in the future, the timing of conversion requests, or the actual conversion or the consequences of a CLEC failing to request conversion by March 10, 2006.[163]

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

A. Positions of the Parties

BellSouth states that there are two aspects of this issue that can be resolved as a matter of law.[164] The first is whether BellSouth must commingle Section 271 network elements with other UNEs. BellSouth maintains that the dispute is whether the wholesale services referred to in the federal commingling rules include Section 271 services.[165] BellSouth contends the FCC intended to limit the types of wholesale services subject to commingling and cites the *TRO* as referring only to tariffed access services.[166] Moreover, BellSouth argues that the Authority cannot regulate the terms by which BellSouth complies with its Section 271 obligations.[167] BellSouth thus maintains that it is not required to combine Section 271 elements with Section 251 elements and, even if there is a factual dispute as to whether BellSouth offers Section 271 services as wholesale services, the Authority cannot regulate or enforce Section 271 services.[168]

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[163] *Id.*
[164] *Motion for Summary Judgment*, p. 50 (June 1, 2005).
[165] *Id.* at 52.
[166] *Id.* at 52-53.
[167] *Id.* at 50, 54.
[168] *Id.* at 53-54.

According to BellSouth, the second aspect of Issue 14 is whether DSL over UNE-P is an allowable form of commingling.[169] BellSouth argues that the FCC has expressly rejected the assertion that the commingling rules apply to the provisioning of wholesale DSL services over a UNE loop facility.[170] Additionally, BellSouth notes the Authority previously ruled on this issue in Docket No. 01-00987, where it relied on the FCC's order and rejected the contention that the commingling rules apply to DSL over UNE-P.[171]

The Joint CLECs argue that Section 271 elements qualify as wholesale facilities and services subject to commingling requirements.[172] The Joint CLECs maintain that BellSouth is being discriminatory by refusing to commingle Section 251 elements with other offerings such as Section 271 elements, and that such actions run counter to the nondiscrimination standards contained in Section 251 and Section 202 of the Telecommunications Act.[173] The Joint CLECs assert that commingling applies to the use of wholesale services obtained pursuant to any method other than unbundling under Section 251.[174]

As to the DSL over UNE-P issue, the Joint CLECs contend BellSouth did not identify this issue in the *Petition* establishing this docket or in the Issues List.[175] Accordingly, the Joint CLECs contend summary judgment on this issue is improper, although BellSouth certainly may advocate the position in testimony and briefs.[176]

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[169] *Id.* at 50, 54.
[170] *Id.* at 54-55 (quoting *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, *Memorandum Opinion and Order and Notice of Inquiry*, 20 FCC Rcd. 6830, 6848, ¶ 35 (2005)).
[171] *Id.* at 55 (citing *In re: Petition for Interconnection by Cinergy Communications Company against BellSouth Telecommunications, Inc.*, TRA Docket No. 01-00987, *Order Denying Motion for Summary Judgment*, p. 6 (August 3, 2005)).
[172] *Joint CLECs' Response,* p. 60 (July 1, 2005).
[173] *Id.* at 61-62.
[174] *Id.* at 60-62. The CLECs specify a "combination" is formed when each of the elements is offered under § 251, while the "commingled" arrangements include both § 251 network elements and facilities or functions offered through a mechanism other than § 251.
[175] *Id.* at 64.
[176] *Id.*

B. Deliberations and Conclusions

The panel found that further proof would aid the interpretation of the term "wholesale" for purposes of applying the commingling requirements.[177] The panel also found a dispute between the parties as to whether the DSL over UNE-P issue was properly before the panel in this docket.[178] Finally, the panel found that BellSouth's request for declaratory ruling should be denied as this docket was not convened as a request for declaratory order pursuant to Tenn. Code Ann. § 4-5-223 and, therefore, requisite notice has not been provided to the public.[179] Based on these findings, the panel unanimously voted to deny the motion for partial summary judgment and the request for declaratory ruling.[180] The panel further asked the parties to notify the panel whether the DSL issue is before the Authority.[181]

ISSUE 19: TRO – LINE SPLITTING: What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

A. Positions of the Parties

BellSouth asserts that its line-splitting obligations first applied only to CLECs providing voice services using the UNE-P.[182] The FCC later expanded the obligation to apply when CLECs purchase stand-alone loops.[183] According to BellSouth, the *TRRO* establishes that BellSouth no longer has an obligation to provide UNE-P or unbundled local switching.[184] BellSouth therefore argues that its obligation with regard to line splitting is limited to when a CLEC purchases a stand-alone loop and provides its own splitter.[185]

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[177] Transcript of Authority Conference, pp. 37-38 (August 22, 2005).
[178] *Id.* at 38.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Motion for Summary Judgment*, p. 56 (June 1, 2005).
[183] *Id.*
[184] *Id.* at 56-57.
[185] *Id.* at 57.

The Joint CLECs maintain that BellSouth is legally obligated to provide line-splitting to the UNE-P embedded base of customers. The Joint CLECs further contend BellSouth must provide compatible splitter functionality when BellSouth retains control of the splitter and must make operating support system ("OSS") modifications to facilitate line-splitting.[186] According to the Joint CLECs, this issue may be best addressed by the Authority after the presentation of facts surrounding the dispute and in the context of the parties' competing language, not in a summary judgment proceeding.[187]

B. Deliberations and Conclusions

The panel found that BellSouth did not satisfy the requirements for summary judgment on Issue 19.[188] For example, BellSouth cited no legal or factual support for its contention that its line splitting obligations are limited to when a CLEC provides its own splitter. The panel found the presentation of facts and language from the parties would help determine BellSouth's obligations to provide line splitting. Additionally, the panel found that BellSouth's request for declaratory ruling should be denied as this docket was not convened as a request for declaratory order pursuant to Tenn. Code Ann. § 4-5-223 and, therefore, requisite notice has not been provided to the public. For these reasons, the panel unanimously voted to deny BellSouth's motion for summary judgment or declaratory ruling on Issue 19.[189]

ISSUE 22: TRO – CALL-RELATED DATABASES: What is the appropriate ICA language, if any, to address access to call-related databases?

A. Positions of the Parties

BellSouth contends the FCC has determined CLECs that deploy their own switches are not impaired without access to ILEC call-related databases with the exception of 911 and E911

[186] *Joint CLECs' Response*, p. 65 (July 1, 2005).
[187] *Id.*
[188] Transcript of Authority Conference, p. 39 (August 22, 2005).
[189] *Id.*

databases.[190] BellSouth thus argues that "ILECs must only provide access to signaling, call-related databases, and shared transport facilities on an unbundled basis to the extent that local circuit switching is unbundled."[191] BellSouth reasons that because CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases.[192] Accordingly, BellSouth argues its only legal obligation is to provide the 911 and E911 databases and to provide call-related databases on an unbundled basis where CLECs have access to unbundled switching pursuant to the FCC's transition plan.[193]

The Joint CLECs assert that databases are Section 271 checklist items and BellSouth must provide nondiscriminatory access to databases and associated signaling in accordance with that Section.[194] The Joint CLECs contend BellSouth therefore must continue to provide call-related databases at just and reasonable rates, terms, and conditions.[195]

B. Deliberations and Conclusions

The panel found that additional evidence was required on Issue 22. Also, the docket was not convened as a request for declaratory order pursuant to Tenn. Code Ann. § 4-5-223, requisite notice has not been provided to the public, and, therefore, BellSouth's request for declaratory ruling should be denied. For these reasons, the panel unanimously voted to deny BellSouth's motion for summary judgment or declaratory ruling on Issue 22.[196]

ISSUE 26: TRO – ROUTINE NETWORK MODIFICATION: What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

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[190] *Motion for Summary Judgment*, p. 58 (June 1, 2005).
[191] *Id.* (citing 47 C.F.R. 51.319(d)(4)(i)).
[192] *Id.* at 59.
[193] *Id.*
[194] *Joint CLECs' Response*, p. 66. (July 1, 2005).
[195] *Id.*
[196] Transcript of Authority Conference, p. 40 (August 22, 2005).

A. Positions of the Parties

BellSouth states that it is not obligated to perform routine network modifications that it does not regularly undertake for its own customers or that result in the substantial alteration of BellSouth's network or in a superior quality network for CLECs.[197] BellSouth contends the same rules that apply to routine network modifications also apply to line conditioning and that its obligation to perform line conditioning for CLECs is limited to line conditioning it regularly undertakes for its own customers.[198]

The Joint CLECs state the real dispute is over the appropriate implementing contract language, and BellSouth should not be allowed to expand the activities that are excluded from routine network modifications.[199] The Joint CLECs argue that "BellSouth must perform any and all necessary routine network modifications in a timely fashion and dispute later, if at all, whether the CLEC is required to pay for a particular modification."[200] Likewise, BellSouth must be required to perform the modifications before consideration of whether "BellSouth's failure to meet a performance measure should be excused because the need for the specific routine network modification was not anticipated in setting performance intervals."[201] According to the Joint CLECs, "[t]his is especially true" because routine network modifications should only rarely fail to be anticipated because they are, in fact, routine.[202]

The Joint CLECs also dispute BellSouth's assertion that line conditioning obligations are modified or limited by the FCC's separate rules on routine network modifications.[203] The Joint CLECs agree that line conditioning may in some instances happen to qualify as a routine

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[197] *Motion for Summary Judgment*, p. 60. (June 1, 2005).
[198] *Id.* at 60-61.
[199] *Joint CLECs' Response*, p. 67 (July 1, 2005).
[200] *Id.* at 68.
[201] *Id.*
[202] *Id.*
[203] *Id.* at 69.

network modification under the FCC's separate routine network modification rules.[204] The Joint CLECs explain, however, that this overlap does not limit ILECs' obligations to perform line conditioning to only those instances of overlap and does not limit application of the line conditioning rule, 47 C.F.R. § 51.319(a)(1)(iii), in general.[205] Moreover, the Joint CLECs contend BellSouth's interpretation of the rule would give BellSouth the sole discretion to determine when line conditioning would be performed and, ultimately, may enable BellSouth to eliminate all line conditioning completely.[206] The Joint CLECs therefore ask the Authority to reject BellSouth's interpretation.[207]

B. Deliberations and Conclusions

The panel concluded that routine network modifications are activities that BellSouth regularly undertakes for its own customers, but the panel rejected BellSouth's attempt to equate the requirements of line conditioning and routine network modifications.[208] The panel further found that BellSouth's request for declaratory ruling should be denied as this docket was not convened as a request for declaratory order pursuant to Tenn. Code Ann. § 4-5-223 and, therefore, requisite notice has not been provided to the public.[209]

Based on these findings, the panel granted partial summary judgment on the legal conclusion that routine network modifications are activities that BellSouth regularly undertakes for its own customers and BellSouth cannot be required to substantially alter its network to provide superior quality interconnection or unbundled access.[210] The panel denied any remaining request for summary judgment and the request for declaratory ruling on Issue 26. [211]

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[204] *Id.* at 69-70.
[205] *Id.*
[206] *Id.* at 70-71.
[207] *Id.* at 71.
[208] Transcript of Authority Conference, pp. 41-42 (August 22, 2005).
[209] *Id.* at 42.
[210] *Id.*
[211] *Id.*

ISSUE 28: TRO – FIBER TO THE HOME: What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?

A. Positions of the Parties

BellSouth argues that interconnection agreements should not include any language with respect to unbundling of FTTH and FTTC loops in greenfield situations.[212] BellSouth asserts it has no obligation to offer unbundled access to broadband or narrowband services in situations involving greenfield loops.[213] BellSouth contends it is only "obligated to unbundle FTTH/FTTC loops in the limited situation of fiber overbuilds where it retires the copper facility, and only to the extent the CLEC is seeking narrowband access."[214]

The Joint CLECs contend BellSouth's *Motion* "essentially requests that the Authority instruct the parties to incorporate contract language in their ICAs that conforms to applicable FCC orders."[215] The Joint CLECs assert that appropriate contract language is the essence of the current dispute. According to the Joint CLECs, the parties have been unable to adequately define either the technical terms employed by the FCC or specific operational aspects with which to implement the proposed contract terms. The Joint CLECs contend the parties' contract language disputes likely will involve the technical terms used by the FCC in its decisions[216] and specific operational aspects of implementing proposed contract terms. They assert "the real world resolution of such disputes will not be assisted or clarified by the generalized legal ruling sought by BellSouth."[217] The Joint CLECs therefore submit the Authority should permit the

[212] *Motion for Summary Judgment*, p. 63-64 (June 1, 2005).
[213] *Id.* at 63.
[214] *Id.*
[215] *Joint CLECs' Response*, p. 51 (July 1, 2005). The Joint CLECs joined Issues 23, 24, and 28 in their response.
[216] For example, "what constitutes 'Fiber to the Home' versus 'Fiber to the Curb' or what in particular distinguishes 'greenfield' from 'brownfield' situations." *Id.*
[217] *Id.*

parties to narrow the disputes through negotiations and then rely on witnesses' testimony rather than lawyers' pleadings regarding the technical aspects of the FCC's rulings.[218]

B. Deliberations and Conclusions

The panel found that no factual or legal dispute exists regarding BellSouth's obligation with respect to FTTH and FTTC loops in overbuild situations. The panel relied on and adopted the FCC's statement: "Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops and in such cases the fiber loops must be unbundled for narrow band services only."[219] The panel also found the docket was not convened as a request for declaratory order pursuant to Tenn. Code Ann. § 4-5-223, requisite notice therefore has not been provided to the public, and BellSouth's request for declaratory ruling should be denied.[220]

Based on these findings, the panel granted partial summary judgment on the legal conclusion that an incumbent LEC must offer unbundled access to fiber loops only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops and, in such cases, fiber loops must be unbundled for narrow band services only.[221] The panel denied any remaining request for summary judgment and the request for declaratory ruling on Issue 28. [222]

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[218] *Id.*
[219] Transcript of Authority Conference, pp. 43-44 (August 22, 2005) (quoting *TRO*, 18 FCC Rcd. at 17142, ¶ 273 (2003)).
[220] *Id.*
[221] *Id.* at 44-45.
[222] *Id.*

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

A. Positions of the Parties

BellSouth states that in order to obtain an EEL, a CLEC must self-certify that it is using the EEL in compliance with the *TRO*'s eligibility criteria.[223] BellSouth argues it has no ability to challenge a CLEC's certification on the front end, and the *TRO* provides it with audit rights to ensure the CLEC's compliance with EEL eligibility requirements.[224] BellSouth asserts the law provides it an absolute, unfettered legal right to conduct such audits of each CLEC annually.[225]

The Joint CLECs agree that BellSouth has limited audit rights, as defined in the *TRO*.[226] The Joint CLECs, however, contend such audit rights must be based upon cause.[227] The Joint CLECs argue the FCC's orders contain no implication that BellSouth's audit rights are unfettered; instead, BellSouth must demonstrate that it has sufficient cause to believe a CLEC has erroneously certified compliance with the EEL eligibility criteria before BellSouth may utilize its limited audit right.[228]

The Joint CLECs assert the parties must determine the documentation necessary to establish cause and the scope of audit, how the independent auditors will be selected, and who will bear the auditors' fees and the CLECs' internal costs of complying with the audit under various circumstances. The Joint CLECs thus contend this issue should be narrowed by negotiation and discussed in testimony by subject matter experts who are familiar with the

[223] *Motion for Summary Judgment*, p. 64 (June 1, 2005) (citing *TRO,* 18 FCC Rcd. at 17368, ¶ 623 (2003)).
[224] *Id.* (citing *TRO*, 18 FCC Rcd. at 17369, ¶ 626 (2003)).
[225] *Id.* at 65.
[226] *Joint CLECs' Response*, p. 71 (July 1, 2005).
[227] *Id.*
[228] *Id.* at 72 (citing *TRO*, 18 FCC Rcd. at 17368-69, ¶¶ 622, 625 (2003)).

auditing process.[229] The Joint CLECs therefore ask the Authority to reject BellSouth's *Motion for Summary Judgment* on this issue.

B. Deliberations and Conclusions

The panel found that BellSouth failed to demonstrate it is entitled to judgment as a matter of law on Issue 29.[230] BellSouth did not address the apparent contradiction between its request for unfettered audit rights and the FCC's explicit recognition of incumbents' "limited" audit rights.[231] The panel also determined that BellSouth's request for declaratory ruling should be denied as this docket was not convened as a request for declaratory order pursuant to Tenn. Code Ann. § 4-5-223 and, therefore, requisite notice has not been provided to the public.[232] Based on these findings, the panel unanimously voted to deny BellSouth's motion for summary judgment and for declaratory ruling on Issue 29.

IT IS THEREFORE ORDERED THAT:

1. Summary judgment is granted in part on Issues 2 and 11 for the legal conclusion that the transition plan for switching high capacity loops, dedicated transport and dark fiber should be in accordance with 47 CFR §§ 51.319(a), (d), and (e).

2. Summary judgment is granted in part on Issue 26 for the legal conclusion that routine network modifications are activities that BellSouth regularly undertakes for its own customers and BellSouth cannot be required to substantially alter its network to provide superior quality interconnection or unbundled access.

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[229] *Id.*
[230] Transcript of Authority Conference, pp. 45-46 (August 22, 2005).
[231] *Id. See also TRO*, 18 FCC Rcd. at 17369, ¶ 626 (2003).
[232] *Id.*

3. Summary judgment is granted in part on Issue 28 for the legal conclusion that an incumbent LEC must offer unbundled access to fiber loops only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops and, in such cases, fiber loops must be unbundled for narrowband services only.

4. In all other respects *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment, or in the Alternative, Motion for Declaratory Ruling* is denied.

Ron Jones, Chairman

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Deborah Taylor Tate, Director[233]

Sara Kyle, Director

[233] Director Tate voted with the majority but resigned her position as director before the issuance of this order.