BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 28, 2007

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

ORDER

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This matter came before Chairman Ron Jones, Director Pat Miller and Director Sara Kyle of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket,[1] at a regularly scheduled Authority Conference held on March 6, 2006 and May 15, 2006 for consideration of the remaining issues in this docket.

BACKGROUND

On October 29, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed a *Petition to Establish Generic Docket* ("*Petition*"), asserting that a generic docket was necessary to address recent decisions of the Federal Communications Commission ("FCC")[2] and a decision by the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit")[3] related to local unbundling rules, specifically the FCC's *Triennial Review Order* ("*TRO*"), the FCC's *Interim Rules Order*, and the *USTA II* decision of the DC Circuit.[4]

The FCC released the *TRO* on August 21, 2003. The incumbent local exchange carriers ("ILECs") and competing local exchange carriers ("CLECs") appealed various aspects of the *TRO*, and the DC Circuit vacated portions of it. The FCC thereafter issued its *Interim Rules Order*, which further altered the parties' rights and obligations.

As set forth in the *Petition*, BellSouth states the decisions "materially modified the rights and obligations" of ILECs such as BellSouth and of CLECs.[5] BellSouth asserted that the *TRO* and *Interim Rules Order* mandated changes in the interconnection agreements between BellSouth and the CLECs. BellSouth represented that it had not been able to reach agreement with the CLECs on how

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[1] On February 24, 2006, a *Notice of Reassignment of Panels* was issued reassigning this docket to the panel of Chairman Jones, Director Pat Miller and Director Sara Kyle due to the resignation of Director Debra Taylor Tate on January 3, 2006.

[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 01-338, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16,978 (2003), as modified by *Errata*, 18 FCC Rcd. 19020 (2003), vacated in part, *U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*Triennial Review Order*" or "*TRO*"); *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*").

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

[4] *Petition*, pp. 1-2.

[5] *Id.*

to amend the interconnection agreements to implement the revised rules, and BellSouth asked the TRA to determine what changes to the agreements were necessary in accordance with the *TRO* and *Interim Rules Order*.

BellSouth's *Petition* also raised issues regarding the "final" FCC unbundling rules, which were due to be released by the FCC in early 2005.[6] The proposed issues matrix in BellSouth's *Petition* included questions about how the parties would implement the additional changes resulting from those final rules.

At a regularly scheduled Authority Conference held on January 10, 2005, the panel, then consisting of Director Deborah Taylor Tate, Director Sara Kyle and Director Ron Jones, voted unanimously to open a generic docket to proceed to resolve change-of-law issues resulting from the FCC decisions and directives, which affect interconnection agreements in Tennessee.[7] In addition, the panel appointed Director Tate to act as Hearing Officer in this proceeding.[8]

Several CLECs filed petitions to intervene in the docket, which the TRA granted.[9] Some also filed motions to dismiss, which later were withdrawn, converted, or deemed moot.[10]

On February 4, 2005, the FCC released the *Triennial Review Remand Order* ("*TRRO*").[11] In the *TRRO*, the FCC reclassified certain unbundled network elements ("UNEs") and modified the obligation of ILECs to provide those UNEs to CLECs. The *TRRO* also provided transition plans, which distinguished the CLECs' service to their embedded customer bases from new orders for the de-listed UNEs ("New Adds").[12]

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[6] *Id.*, Exhibit A. On February 4, 2005, the FCC released the *Triennial Review Remand Order*, which contained the "final" rules referenced by BellSouth.
[7] *Order Opening Generic Docket and Appointing Hearing Officer* (February 8, 2005).
[8] *Id.*
[9] *See Order Granting Petitions for Intervention, Directing Filing of Issues Matrix, and Establishing Status Conference Date* (February 3, 2005).
[10] *See Order Granting Petition for Intervention, Granting Permission to Practice Pro Hac Vice, and Establishing Status Conference Date* (April 4, 2005).
[11] *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*").
[12] This was the "final" unbundling order BellSouth had referenced in its original issues matrix, filed on October 29, 2004 as Exhibit A to BellSouth's *Petition*.

On February 11, 2005 and February 25, 2005, BellSouth issued carrier notification letters informing the CLECs that it would no longer provide New Adds as of March 11, 2005, the effective date of the *TRRO*. In response to the notification letters several CLECs filed *Emergency Relief Petitions*. BellSouth responded, and the matter was scheduled for oral argument on March 14, 2005 before the panel. In a letter dated March 8, 2005, BellSouth notified the Hearing Officer that it was extending the March 11, 2005 deadline for the provision of New Adds and would continue accepting and processing orders for New Adds until the earlier of: (1) April 17, 2005 or (2) "an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders."[13] BellSouth, however, also notified the CLECs that "it intends to pursue the various CLECs who place orders for 'new adds' after March 10, 2005 to the greatest extent of the law, in an effort to recover the revenue that BellSouth loses as a result of placement of these unlawful orders."[14]

During a regularly scheduled Authority Conference held on March 14, 2005, the parties presented oral argument regarding the interpretation and implementation of the *TRRO*'s provisions related to discontinuing New Adds. The panel convened on April 11, 2005 and at that time, a majority of the panel[15] 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*. A majority of the panel set an initial negotiation period of thirty days through May 11, 2005,[16] and 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.[17] During a Status Conference held by Director Tate on May 2, 2005, BellSouth agreed to extend the

[13] Letter of March 8, 2005 from BellSouth to Director Deborah Taylor Tate as Hearing Officer, p. 1 (March 8, 2005).
[14] *Id.*, March 7, 2005 carrier notification from BellSouth to the CLECs included as an attachment to the letter.
[15] Director Kyle did not vote with the majority and instead moved that BellSouth's responsibility to continue furnishing unbundled network elements ("UNEs") exempted by the *TRRO* ended on March 11, 2005.
[16] Transcript of Proceedings, 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. *See* Transcript of Status Conference, pp. 3, 42-45 (May 2, 2005).
[17] *Order Granting Alternative Relief Requested in Motions for Emergency Relief*, p. 14 (July 13, 2005).

time during which it would continue accepting New Adds through May 16, 2005 to allow deliberations by the panel at the May 16, 2005 Authority Conference.[18]

During the May 16, 2005 Authority Conference, a majority of the panel[19] noted that the negotiation period provided as alternative relief in the April 11, 2005 deliberations had expired. The majority found that the negotiations between BellSouth and the CLECs had been unsuccessful and concluded that further negotiations would not likely yield an agreement between the parties. The majority, therefore, determined that the alternative relief should not be extended and should end.[20]

On May 23, 2005, Cinergy filed its *Motion for Clarification* seeking clarification of the panel's May 16, 2005 ruling. On June 2, 2005, BellSouth filed *BellSouth Telecommunications, Inc.'s Response to Cinergy's Motion for Clarification* ("*BellSouth's Response*"), arguing that the Authority's May 16, 2005 ruling was clear and the relief requested by Cinergy would contradict the language and purpose of the *TRRO.* BellSouth urged the Authority to deny Cinergy's *Motion for Clarification* or, in the alternative, treat the *Motion for Clarification* as a motion for reconsideration and defer ruling on it until after the Authority entered a written order memorializing the May 16, 2005 ruling. Momentum Telecom, Inc. ("Momentum") filed *Momentum Telecom's Motion in Support of Cinergy Communications Company's Motion for Clarification* ("*Momentum's Motion in Support*") on June 27, 2005.

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 panel at the May 16, 2005 Authority Conference. During the August 8, 2005 Authority Conference, the panel considered Cinergy's *Motion for Clarification, BellSouth's Response*, and *Momentum's Motion in Support.* A majority of the panel concluded that Cinergy's

[18] *See* Transcript of Status Conference, pp. 42-44 (May2, 2005).
[19] Director Kyle did not vote with the majority on May 16, 2005, but instead reiterated her position from the April 11, 2005 deliberations that the FCC expressly prohibited New Adds after March 11, 2005 and beginning on March 11, 2005 BellSouth was not required to furnish the de-listed UNEs.
[20] Transcript of Authority Conference, pp. 33-37, 47 (May 16, 2005).

Motion for Clarification and *Momentum's Motion in Support* should be denied[21] because the May 16, 2005 ruling was clear and was set forth in the July 25, 2005 *Order Terminating Alternative Relief*, specifically addressing the issues raised by Cinergy and Momentum and thereby rendering their motions moot.

On June 1, 2005, BellSouth filed its *Motion for Summary Judgment, or in the Alternative, Motion for Declaratory Ruling* ("*Motion for Summary Judgment*") containing twenty issues, which BellSouth argued involved questions of law and as such should be addressed prior to the hearing. BellSouth divided these issues into two groups: Section I issues which could be decided, in their entirety, as a matter of law, and Section II issues which would involve the entry of a partial summary judgment or a declaration of applicable law. On July 1, 2005, the Joint CLECs[22] and Sprint filed responses ("*Responses*") to BellSouth's *Motion for Summary Judgment.*[23] In the *Responses*, the CLECs asserted that all the issues involve a dispute concerning the application of law and should be resolved only after an evidentiary hearing. On August 8, 2005, the panel heard oral argument from the parties on BellSouth's *Motion for Summary Judgment.*

At a regularly scheduled Authority Conference held on August 22, 2005, the panel deliberated BellSouth's *Motion for Summary Judgment.* With regard to those Issues for which partial summary judgment was requested the panel denied Issues 14, 19, 22 and 29. The panel did request that the parties work with the Hearing Officer to determine whether Issue 14 included DSL or excluded it. The panel granted partial summary judgment for Issues 2, 11, 26 and 28. Specifically, as to Issues 2 and 11, the panel ruled that the transition plan should be in accordance with 47 C.F.R.

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[21] 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).

[22] The Joint CLECs consist of CompSouth, Southeastern Competitive Carriers Association ("SECCA"), and XO Communications Services, Inc.

[23] *Joint CLECs' Response to BellSouth's Motion 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). In Sprint's Response, Sprint provided comment on items 2, 6 and 20 only and in all three instances Sprint requested that the Authority deny BellSouth's request.

§ 51.319 (a), (d) and (e). As to Issue 26, the panel ruled that routine network modifications are activities that ILECs perform for their own customers, and that an ILEC cannot be required to substantially alter its own network to provide superior quality to a CLEC. The panel granted partial summary judgment for Issue 28 by ruling that the ILEC is required to offer UNE fiber loops only in fiber loop overbuild situations where the ILEC elects to retire existing copper loops, and in such situations the ILEC is only required to offer narrow band loops. Issues 7 and 21 were not addressed because of the Joint CLECs' remark that no live dispute existed.[24]

On September 9, 2005, the parties filed a revised issues matrix that included the resolution of Issues 7, 12, 20, 21, 25 and 30. A hearing was held on the remaining issues from September 13, 2005 through September 14, 2005. On October 28, 2005, the parties submitted Post-Hearing Briefs. In the Joint CLECs' Brief, the CLECs' report states that, "the parties (a) settle[d] the disputed issue regarding implementation of the 'DS1 transport cap' set forth in the *TRRO*; and (b) agreed to a process to finalize the identification of 'fiber-based collocators.'"[25]

THE MARCH 6, 2006 AUTHORITY CONFERENCE

At a regularly scheduled Authority Conference held on March 6, 2006, the Authority considered the Issues 2, 4, 5, 6, 9, 11, 14, 22, and 32.

ISSUE 2: *TRRO* TRANSITION PLAN

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

Positions of the Parties

BellSouth, through witness Pam Tipton, explained that the FCC addressed the elimination of mass market switching ("local switching") as a UNE in the *TRRO*. According to BellSouth the *TRRO* sets March 11, 2005, as the effective date for the elimination of all new local switching obligations imposed on the ILECs and thus, ILECs no longer must provide unbundled access to local

[24] *Joint CLECs' Response*, p. 4 (July 1, 2005).
[25] *Joint CLEC Post-Hearing Brief*, p. 4 (October 28, 2005).

switching pursuant to Section 251 of the Telecommunications Act of 1996 ("the *Act*"). The *TRRO* sets out a transition period of twelve months for most elements, including local switching and high capacity loops and dedicated transport, while dark fiber has a transition period of eighteen months. Although not explicitly stated in the caption of the Issue, a transition plan is needed for dark fiber loops and transport.[26]

BellSouth explains that it has over 280 CLECs in this state, and that both BellSouth and the CLECs need time to move former UNEs to alternative arrangements; thus, the transition period. BellSouth asserts that CLECs cannot wait until March 10, 2006 to submit their orders to transition their embedded base. BellSouth relies on the *TRRO* in stating that the FCC had envisioned that the transition period would afford the time to perform the tasks necessary to migrate to alternative facilities.[27] Specifically, BellSouth has requested that CLECs submit orders by October 1, 2005 to convert or disconnect their embedded base of local switching. This deadline provides BellSouth and the CLECs with enough time to ensure that lines are identified and deadlines are negotiated. BellSouth states that if the CLECs do not submit their orders by October 1, 2005, it is unlikely that all of the conversions can be accomplished before March 11, 2006. BellSouth further states that if CLECs do not submit orders in a timely manner so that BellSouth can work the conversions, BellSouth will convert remaining UNE-P lines to resale equivalents effective March 11, 2006. For any remaining standalone switch ports that have not been converted, BellSouth will disconnect those arrangements effective March 11, 2006.[28]

Regarding Digital Signal 1 ("DS1") and Digital Signal 3 ("DS3") Loops, BellSouth asserts that there are two issues that need to be addressed. The first issue is the high capacity loops that were in service on March 11, 2005 in wire centers where CLECs are not impaired. This constitutes the embedded base. Additionally, BellSouth asserts, in wire centers where CLECs are impaired without

[26] Pam Tipton, Pre-filed Direct Testimony, pp. 3-4, 7 (July 26, 2005).
[27] *Id.* at pp. 5-6.
[28] *Id.* at pp. 7-8.

access to DS1 and or DS3 loops, there is a cap of ten DS1 loops and a cap of one DS3 loop per building.[29]

In order to comply with the *TRRO*, BellSouth proposes that by December 9, 2005, CLECs submit spreadsheets identifying their embedded base and high capacity loops affected by the cap. The spreadsheets should include information as to which circuits are to be converted or disconnected. BellSouth assures that if the CLECs submit their spreadsheets by December 9, 2005, BellSouth will establish a project schedule to convert the embedded base and excess high cap loops by the end of the transition period.[30] BellSouth proposes the same dates and procedures for dedicated high cap transport with the addition of entrance facilities. BellSouth requests that CLECs provide spreadsheets identifying embedded base and excess high capacity transport, including entrance facilities. Again, if a CLEC does not submit its spreadsheet in a timely manner, then BellSouth proposes that on March 11, 2006, those circuits will be converted to the corresponding tariff service.[31]

Dark fiber has an 18-month transition period; therefore, BellSouth proposes that CLECs submit spreadsheets by June 10, 2006. Those spreadsheets should identify dark fiber loops that need to be converted or disconnected. If the CLECs submit those spreadsheets by June 10, 2006, BellSouth will schedule those conversions by the end of the transition period. If a CLEC does not submit its orders in a timely fashion so that conversion can be completed by September 11, 2006, BellSouth proposes to commence conversion of any remaining unbundled dark fiber to the corresponding tariff service. BellSouth makes the same proposal for dark fiber transport with the addition of dark fiber entrance facilities.[32]

Joseph Gillan testified on behalf on CompSouth that all changes made by the *TRRO* are to be effectuated through contract changes and not unilateral action by one party. The *TRRO* changes are

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[29] *Id.* at p. 9.
[30] *Id.*
[31] *Id.* at p. 11.
[32] *Id.* at pp. 10-12.

to be added into interconnection agreements at the same time. This enables a CLEC to introduce the positive elements of the *TRRO* along with the price increases.[33] Gillan explained, "that most of the affected UNEs are unlikely to be moved to different network arrangements as opposed to a different price schedule."[34] Gillan also pointed out that CLECs will need to consider the options available to them with regard to affected UNEs, including BellSouth's § 271 offering which would "parallel" the § 251 item being withdrawn. CLECs do not currently have information concerning this offering on which they could make a decision. Finally, Gillan asserted that, with regard to loop and transport, CLECs had no knowledge of which wire centers are no longer impaired.[35]

Gillan asserted that BellSouth has taken liberties with its interpretation of the *TRRO*, for example, BellSouth's claim that CLECs are limited to ten DS1 transport facilities between every end office. Gillan posits that the *TRRO* limits DS1 transport only when DS3 transport is no longer required to be unbundled.[36]

Deliberations and Conclusions

In its *Motion for Summary Judgment*, BellSouth requested 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,[37] which specify that BellSouth is obligated to provide certain loops and transport routes from March 11, 2005 through March 10, 2006 at 115% of the rate that was in effect on June 15, 2004. BellSouth's obligation to provide dark fiber continues until September 10, 2006.[38] In its deliberations of the *Motion for Summary Judgment* on August 22, 2005, the panel concluded that the transition plan for switching,

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[33] Joseph Gillan, Pre-filed Direct Testimony, pp. 9-10 (July 26, 2005).
[34] *Id.* at p. 11 (July 26, 2005).
[35] *Id.* at p. 12 (July 26, 2005).
[36] *Id.*
[37] Specifically, BellSouth referenced *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).
[38] *Motion for Summary Judgment,* pp. 48-50 (June 1, 2005).

high capacity loops, dedicated transport and dark fiber should be in accordance with 47 C.F.R. §§ 51.319(a), (d) and (e).[39]

The period of time established by the FCC for CLECs to transition away from UNE switching, affected UNE high capacity loops and transport, and dark fiber began on March 11, 2005, the effective date of the *TRRO,* and continues for twelve months, ending March 10, 2006, for switching and high capacity loops and transport, and for eighteen months, ending September 10, 2006 for dark fiber loops. BellSouth has an obligation to maintain affected high capacity loops, transport and dark fiber during the transition period at a rate equal to the higher of 115% of the rate the requesting carrier paid for the loop element on June 15, 2004 or 115% of the rate the state commission has established or establishes between June 16, 2004 and the effective date of the *TRRO* for that element.[40] BellSouth is to provide access to local circuit switching in combination with loop and transport during the transition period at a rate equal to the price the carrier obtained those combinations of elements on June 15, 2004 plus one dollar, or the rate the state public utility commission established between June 16, 2004 and the effective date of the *TRRO.*[41]

The Authority finds that because the CLECs ordered the elements from BellSouth, the CLECs should know which elements are affected. The FCC determined that, "At the end of the twelve-month period, requesting carriers must transition the affected DS1 or DS3 dedicated transport UNEs to alternate facilities or arrangements."[42] The FCC made a similar finding with regard to converting the embedded base of UNE-P.[43] For these reasons, the CLECs should initiate this process. Upon receipt of the list of affected UNEs, BellSouth will have thirty days to review the list and will return to the CLEC a spreadsheet that notes which UNEs will be converted or disconnected per the CLEC's request and the date on which such activity will transpire.

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[39] *See* Transcript of Authority Conference, pp. 35-37 (August 22, 2005).
[40] 47 C.F.R. §§ 51.319(a)(4)(iii), 51.319 (a)(5)(iii), 51.319(a)(6)(ii), 51.319(e)(2)(ii)(C), and 51.319(e)(2)(iii)(C) (2005).
[41] 47 C.F.R. § 51.319(d)(2)(iii) (2005).
[42] *TRRO* at ¶ 143.
[43] *Id.* at ¶ 216.

The panel voted unanimously that the appropriate language to implement the FCC's transition plan should include the following: (1) that the transition plan should be in accordance with 47 CFR §§ 51.319(a), (d) and (e); (2) CLECs should submit an Excel spreadsheet to BellSouth for all affected local switching, high-capacity loops, and transport, including entrance facilities and excess capacity; (3) CLECs should submit an Excel spreadsheet to BellSouth for all affected UNE dark fiber loops, transport, and entrance facilities; (4) BellSouth will return a spreadsheet to the CLECs including finalized UNEs subject to conversion or disconnection no later than 30 days from receipt of the CLECs' initial spreadsheet; (5) all affected UNEs that are still in service after the end of the transition period, March 10, 2006 for switching and affected high-capacity loops and transport and September 10, 2006 for dark fiber, will be subject to a true-up to the new rate.

ISSUE 4:

What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined?

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

Positions of the Parties

The parties agree on the criteria established by the FCC in the *TRRO* to determine an ILEC's obligation to provide unbundled access to high capacity loops but do not agree on the methodology used to determine whether a wire center meets those criteria. The parties originally disagreed on when the cap of ten unbundled DS1 UNE Dedicated Transport circuit per route applies and on the method of counting the number of business lines and fiber-based collocators at a wire center, which relies on the meaning of the four terms listed in the issue. The parties have subsequently agreed on the application of DS1 transport caps and a procedure for counting fiber-based collocators.[44]

[44] *Joint CLEC Post-Hearing Brief*, p. 4 (October 28, 2005).

The *TRRO* capped DS1 UNE loop availability to ten per building. In situations where the cap applies, an important determinant of the number of unbundled DS1 loops available to CLECs is the definition of "building." Initially, BellSouth proposed no contractual definition of "building" preferring to rely on a "reasonable person" standard to define the term should a disagreement arise.[45] The Joint CLECs proposed contract language, which contained the classification of multi-tenant buildings as multiple buildings.[46] In subsequent filings, the parties treat multi-tenant buildings in a similar fashion although the proposed contract language remains slightly different.[47]

The parties agree to the definitions of the terms "business line," "fiber-based collocation" and "route," as defined by the FCC. Nevertheless, the parties disagree on the interpretation of business line and fiber-based collocation and on how those interpretations influence the count of business lines and fiber-based collocators and thereby determine the impairment classification of wire centers.[48] BellSouth favors contract language that references the FCC rule defining each term. The Joint CLECs propose language that includes the FCC definition plus language regarding how business lines and fiber based collocators should be counted.

The parties offer no language regarding the definition of "route." The Joint CLECs request the Authority clarify that a route is determined by the two wire centers between which the CLEC requests transport regardless of whether those wire centers fall within a larger non-impaired route.[49] In the post hearing brief, BellSouth proposes parts (v) and (vi) to this issue that address the clarification requested by the CLECs separate from the definition of route. BellSouth argues that connecting smaller, unimpaired routes with larger, impaired routes should be disallowed as gaming.[50]

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[45] Pamela A. Tipton, Pre-Filed Direct Testimony, p. 17 (July 26, 2005).
[46] Joseph P. Gillan, Pre-Filed Direct Testimony, Exhibit JPG-1 p. 17 (July 26, 2005).
[47] Joseph P. Gillan, Pre-Filed Supplemental Testimony, p. 2 (September 8, 2005).
[48] *Id.*
[49] *Joint CLEC Post-Hearing Brief*, pp. 27-28 (October 28, 2005).
[50] *BellSouth Telecommunications, Inc.'s Post-Hearing Brief* ("*BellSouth's Post-Hearing Brief*"), p. 77 (October 28, 2005). BellSouth adds:

> *(v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?*

Deliberations and Conclusions

The FCC provides detailed definitions for the terms "business line," "fiber-based collocator," and "route." In addition, the parties agree with these definitions. Therefore, these terms should be defined as the FCC dictates in 47 C.F.R. §§51.5 and 51.319(e). Specifically,

> *Business line.* A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
>
> (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
>
> (2) Shall not include non-switched special access lines,
>
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 ''business lines.''[51]
>
> *Fiber-based collocator.* A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that
>
> (1) Terminates at a collocation arrangement within the wire center;
>
> (2) Leaves the incumbent LEC wire center premises; and
>
> (3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as nonincumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.[52]
>
> A ''route'' is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (*e.g.*, wire center or switch ''A'' and wire center or switch ''Z'')

[51] 47 C.F.R. § 51.5
[52] *Id.*

may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch "X"). Transmission paths between identical end points (*e.g.*, wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.[53]

Business Line and Fiber Based Collocation

With the *TRRO*, the FCC chose to adopt business line density and fiber-based collocation as proxy measures of actual and potential competition. These measures were chosen in large part because they represent both the presence of competitive transport facilities and the presence of revenue opportunities significant enough to justify the high fixed cost of transport facility deployment as well as being readily available objective measures.[54] The definition of business lines in the *TRRO* (ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops) is based in ARMIS filings to ensure accuracy and simplify information gathering.[55] The *TRRO* also provides that any under-representation of competition due to intermodal competition line loss or full facilities based competition resulting from the adopted definition of business line is compensated for by establishing lower thresholds for classifying wire centers.[56] For the purpose of determining the level of competition at a wire center, the *TRRO* defines fiber-based collocation as "a competitive carrier collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center."[57]

Both parties agree that 47 C.F.R. §51.5 provides the definition of "business line." The Joint CLECs, however, contend that the definition should contain additional clarification on how to count business lines. Specifically, the Joint CLECs, in addition to the 47 C.F.R. §51.5 definition, include reference to paragraph 105 of the *TRRO* to support the use of ARMIS data and an explicit exclusion of HDSL capable loops from the business line count.[58] The differences in language go ultimately to

[53] 47 C.F.R. § 51.319(e)
[54] *TRRO* at ¶¶ 93-94.
[55] *Id.* at ¶ 105.
[56] *Id.* at ¶ 104.
[57] *Id.* at ¶ 102 (footnotes omitted).
[58] Joseph P. Gillan, Pre-Filed Supplemental Testimony, pp. 16-17 (September 8, 2005).

the methodology used to count business lines. Such differences are the subject of other arbitration issues and are more appropriately handled separately from the definition of the term.[59]

Similarly, the proposed definition for fiber-based collocation is taken directly from 47 C.F.R. § 51.5 with the Joint CLECs proposing additional instruction regarding the count of fiber-based collocators. The parties agreed to a process to finalize the identification of fiber-based collocators.[60] Unlike the Joint CLECs, BellSouth treats count methodology as procedural rather than part of the definition. BellSouth, therefore, continues to argue against the contract definition provided by the Joint CLECs while the CLECs post-hearing brief regards Issue 4 (ii) as settled. The panel adopted BellSouth's classification of count methodology as procedural and part of Issue 5.

Route

In the *TRRO*, the FCC establishes impairment on a route-by-route basis. In classifying routes that are similarly situated, the FCC established categories of routes based on the competitive deployment at each endpoint. The *TRRO* defines a route as,

> a connection between incumbent LEC wire center or switch A and incumbent LEC wire center or switch Z. Even where in the incumbent LEC's network, a transport circuit from A to Z passes through an intermediate wire center X, the relevant determination is whether competitive providers are impaired without access between the two end-points, A and Z.[61]

Routes are classified by the business line density and fiber-based collocation at their endpoint wire centers.[62] Wire centers with four or more fiber-based collocations or with 38,000 or more business

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[59] Wire center classification is the subject of Issue 5. Whether or not to count HDSL-capable cooper loops as DS1 loops for the purpose of evaluating impairment is the subject of Issue 6.
[60] *Joint CLEC Post-Hearing Brief*, p. 4 (October 28, 2005).
[61] *TRRO* at ¶ 80.
[62] Depending on the design of a LEC's network, a call may pass through several intermediate wire centers or switches between the wire centers where the call originates and terminate. The wire center where the call originates is generally referred to as "A" while the terminating call center is known as "Z." Any intermediate switches or wire centers that the call may pass through are labeled alphabetically using "B" – "Y." In the event that a CLEC is transporting a call over an ILEC's network, the CLEC may not collocate in all or any of the intermediate wire centers.

lines are Tier 1.[63] Tier 2 wire centers have three fiber-based collocations or have 24,000 or more business lines.[64] All remaining wire centers are classified as Tier 3.[65]

No party proposed a definition of "route" different from that set forth by the FCC. The parties request the Arbitrators render a decision on whether the availability of route depends only on the two wire centers requested as endpoints or whether an impaired route within a larger non-impaired route should also be considered unimpaired. BellSouth argues that unbundled transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers should be disallowed to prevent potential "gaming" of wire center classifications as described in paragraph 106 of the *TRRO*.[66]

Rather than disallowing the connection of a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers, the Arbitrators interpret the *TRRO* explicitly recognizing that the FCC rules allow such connections and that economics rather than regulation should be relied on to prevent gaming. Moreover, the *TRRO* explicitly states that ILECs must provide DS1 and DS3 transport that originates or terminates at any Tier 3 wire center[67] and only relieves ILECs from unbundling dark fiber transport on routes where both endpoints are Tier 1 or Tier 2.[68]

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[63] *TRRO* at ¶ 112.
[64] *Id.* at ¶ 118.
[65] *Id.* at ¶ 123.
[66] *Id.* at ¶106.

> We do not anticipate that "gaming" of the tiers by competitive LECs is likely such that competing carriers will be able to obtain unbundled transport completing routes that would otherwise not be unbundled. Specifically, in theory, a competitive LEC that seeks unbundled transport between, for example, a pair of Tier 1 wire centers (for which there is no unbundled transport requirement) could also collocate in a third wire center classified as Tier 3 to which it can obtain transport from each of the two Tier 1 wire centers, thus using the Tier 3 wire center as a hub. We do not expect that this type of gaming will result from our rules because our tests remove unbundling only where competing carriers have deployed or could deploy transport facilities. Nor do we expect that this type of gaming will result from our rules because of two primary costs constraints. First, the costs of adding a collocation arrangement to serve as a hub are likely to be significant enough to prevent such gaming. Second, such a gaming practice requires an additional span of transport which typically includes distance-sensitive pricing component, likely making the additional transport leg significantly more costly than other direct connection alternatives, including special access services. These factors likely make the additional transport needed to perform this gaming significantly more costly than directly connecting the two Tier 1 wire centers directly through alternative carriers or services.

[67] *Id.* at ¶¶ 126,129.
[68] *Id.* at ¶ 133.

Building

Where impairment exists, the *TRRO* caps UNE loop availability on a per building basis and is silent as to the definition of "building." While the parties appear to agree on the interpretation of "building," they cannot reach agreement on the specific wording of the definition. Both parties agree that a strip mall constitutes multiple buildings while a high rise office building should count as a single building. Reasonable individuals should be able to agree on how to count buildings in the telecommunications industry when faced with real life examples. Therefore, what constitutes a building should be determined on a case-by-case basis using the standard of a "reasonable person in the telecommunications industry" rather than including a strict definition in the contract language. In the event of a dispute over what constitutes a building or buildings, that dispute can be brought before the Authority for resolution.

Conclusion

Based on the foregoing deliberations, the panel voted unanimously that the terms "business line," "fiber-based collocation," and "route" should be defined as found in 47 C.F.R. §§ 51.5 and 51.319(e). The panel determined that the classification of a "route" depends on the A-Z wire centers, and a CLEC is therefore entitled to obtain DS3 and dark fiber transport from a Tier III wire center to each of two or more Tier I or Tier II wire centers if the CLEC is originating and terminating calls in each of those wire centers. The determination of what constitutes a "building" should be made on a case-by-case basis using the standard of a "reasonable person in the telecommunications industry" rather than including a definition in the contract language.

ISSUE 5: UNIMPAIRED WIRE CENTERS

(a) Does the Authority have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?

(b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?

(c) What language should be included in agreements to reflect the procedures identified in (b)?

Positions of Parties

The CLECs assert that the FCC did not provide guidance as to how to count UNE loops for the purpose of determining impairment. The Joint CLECs further assert that BellSouth cannot directly measure the number of voice equivalents of UNE loops used to provide switched services. To solve BellSouth's measurement problem, the Joint CLECs recommend that "BellSouth be permitted to propose wire center classifications that simply convert each digital UNE-L facility to its voice grade equivalent assuming that each circuit is used to provide switched service to a business customer."[69] In the event that the line count assumption proposed by the Joint CLECs leads to a finding of no impairment in a wire center, the Joint CLECs propose that BellSouth should then submit "the names of each carrier and the amount of digital capacity that BellSouth assumes is being used to provide switched services to business customers" so that the impairment finding can be verified.[70]

BellSouth states that it modifies its ARMIS 43-08 line count to show the full capacity of its digital systems instead of the actual number of business lines in service.[71] BellSouth claims that its accounting convention is required by the definition of "business line" in the *TRRO*.[72]

With respect to sub-issue (a), the issue of jurisdiction, the parties agree that the Authority is permitted to resolve disputes concerning BellSouth's implementation of non-impairment criteria. BellSouth notes that "[a]s a practical matter, therefore, the Authority must resolve the parties'

[69] Joseph Gillan, Pre-Filed Direct Testimony, p. 23 (July 26, 2005).
[70] *Id.* at p. 24.
[71] Pamela A. Tipton, Pre-Filed Direct Testimony, p. 31 (July 26, 2005).
[72] *TRRO* at ¶ 105.

disputes concerning the wire centers in Tennessee that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition UNEs to alternative arrangements."[73] Likewise, the Joint CLECs note that disputes concerning wire center designations, per the *TRRO*, should be handled in Section 252 arbitrations, which obviously come within the jurisdiction of state regulatory agencies such as the TRA.[74]

Deliberations and Conclusions

The FCC intended business line counts to be a proxy for the ability of a competitive carrier to compete and hence a proxy for impairment. More specifically, the FCC intended the line count to approximate the revenue potentially available to a competitor.[75] The FCC was clear when it stated that "[t]he BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops."[76] The ARMIS data was used by the FCC, in part, because the information is easily obtainable.[77] BellSouth claims that it is required to modify the ARMIS data to account for the full capacity of its digital systems. This modification is at odds with the FCC's clear statement to simply use available ARMIS data. Further, modification of the ARMIS data is inconsistent with the FCC's desire to use easily available data sources.

BellSouth asserts that UNE-loops should be counted based upon their voice grade equivalents. The CLECs maintain that counting in this manner will lead to inclusion of non-switched capacity that will overstate the line count. The data reported via the ARMIS system has a detailed set of instructions, including instructions for reporting UNEs and determining the equivalence of digital loops. The method for determining the equivalence described in the ARMIS report is the same as that proposed by BellSouth for UNE lines. The panel finds that the FCC ARMIS instructions as sufficient to resolve this issue.

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[73] *BellSouth's Post-Hearing Brief*, pp. 80-81 (October 28, 2005).
[74] *Joint CLEC Post-Hearing Brief*, p. 28 (October 28, 2005).
[75] *TRRO* at ¶ 95.
[76] *Id.* at ¶ 105 (footnotes omitted).
[77] *Id.* at ¶ 105.

The CLECs object to line count data proposed by BellSouth, claiming that residential lines are inappropriately included, that line counts are inconsistent with reported financial data, and that the FCC expected different line count numbers. Such objections are not relevant to the interpretation of the business line definition. The FCC was clear that ARMIS data should be used because it was easily verifiable and it provided an extensive set of instructions. While the CLECs complain that UNE-P counts, for instance, may inaccurately include some residential lines, the FCC notes that its measures are proxies designed to capture actual and potential competition and "are not, nor are they required to be, error-proof."[78]

Based on the foregoing, the panel voted unanimously that the TRA has authority to resolve disputes concerning whether wire centers meet the FCC's impairment tests because such relates to 251 agreements. The panel voted further that BellSouth must not modify the number of business lines reported in its ARMIS 43-08 report by reporting full-system capacity. In other respects BellSouth's line count methodology is correct.[79]

ISSUE 6: HDSL CAPABLE COPPER LOOPS

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

Positions of the Parties

The Joint CLECs assert that BellSouth counts HDSL-capable loops as 24 voice grade equivalents.[80] The Joint CLECs assert that the practice of counting HDSL-capable loops, which are merely dry copper, as 24 voice grade equivalents is not permitted under the counting procedures set forth in the *TRRO*.[81]

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[78] *Id.* at ¶ 88.

[79] Director Jones voted in favor of the prevailing motion, but noted a specific qualification. In his opinion, BellSouth should only count digital access lines that provide multiple 64 kilobit per second equivalents when those lines connect end-users with ILEC end-offices for switched services. Director Jones cited in support of his opinion paragraph 105 of the *TRRO* and the qualification in the business line definition set forth in 47 C.F.R. § 51.5 that the tallies "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services."

[80] Joseph Gillan, Pre-Filed Direct Testimony, p. 24 (July 26, 2005).

[81] *Id.*

BellSouth states that it is not interpreting the *TRRO* to count "every loop that is capable of being provisioned using HDSL" as 24 voice equivalents for the impairment test.[82] BellSouth, however, claims that deployed HDSL loops should be counted as 24 voice equivalents.[83]

Deliberations and Conclusions

The majority of the panel voted that HDSL loops sold to CLECs should be counted at their full capacity per the ruling on Issue 5 and that HDSL UNE loops are considered to be DS1 loops per the FCC's rules.[84] The ruling on Issue 5 covers all digital loop UNE products provided by BellSouth to CLECs. Therefore, deployed UNE HDSL loops sold to CLECs should be counted at their full voice grade equivalence. The ruling on Issue 5 applies here, because HDSL loops are just a specific digital UNE loop product.

The panel found that the definition of DS1 loop in 47 CFR § 51.319(a)(4) shows that HDSL loops are included in the definition of DS1 loops. The rules define a DS1 loop as "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."[85] The panel interprets the FCC's definition of DS1 to include loops that are purchased as HDSL-capable by CLECs. Thus, in the event that no impairment triggers are met for DS1 loops in a given wire center, BellSouth will no longer have to offer UNE HDSL loops.

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[82] Eric Fogle , Pre-Filed Direct Testimony, p.3 (July 26, 2005).
[83] *Id.*
[84] Director Jones did not vote in favor of the prevailing motion. It is his opinion that the Authority should rule that BellSouth is not permitted to count each deployed UNE HDSL loop as 24 voice grade equivalent lines and, after a wire center is declared to be unimpaired, CLECs may not order as Section 251 UNEs two or four wire copper loops having a total digital signal speed of 1.544 megabits per second. In his opinion, this position is supported by paragraphs 105 and 163 and footnote 454 of the *TRRO* and the plain language of 47 C.F.R. §§ 51.5 and 51.319(a)(4).
[85] 47 C.F.R. § 51.319(a)(4).

ISSUE 9:

What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?

Positions of the Parties

BellSouth defines "embedded base" as switching, high-capacity loops and dedicated transport in service as of March 10, 2005.[86] For each UNE arrangement in question, switching, high-capacity loops and dedicated transport, the *TRRO* states, "These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new [UNE arrangements] in the absence of impairment."[87] BellSouth interprets these statements to mean that the transition plans prohibit new UNE arrangements for all CLEC customers including existing customers. BellSouth posits that the *TRRO* prohibits the classification of arrangement by a CLEC customer who moves to disconnect service at one location and places a new order at the new location.[88]

The Joint CLECs define "embedded customer base" as entities having executed a valid contract or service order or subscribing to CLEC services as of March 10, 2005.[89] The Joint CLECs reference certain statements in the *TRRO*:

> During the transition periods, competitive carriers will retain access to [UNE arrangement] at a rate equal to the higher of (1)115 percent of the rate the requesting carrier paid for the [UNE arrangement] on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.[90]

The Joint CLECs interpret these sentences and other sentences in paragraphs 199 and 216 of the *TRRO* as permitting the CLECs to retain access to new UNE arrangements for existing customers.[91] In the post-hearing brief, the Joint CLECs separate this issue into the treatment of high capacity loops and dedicated transport and the treatment of UNE-Ps. The Joint CLECs argue that as to UNE-P's,

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[86] Pamela A. Tipton, Pre-Filed Direct Testimony, Exhibit PAT-1 pp. 9, 33, 45 (July 26, 005).
[87] *TRRO* at ¶5.
[88] Kathy K. Blake, Pre-Filed Direct Testimony, p. 9 (July 26, 005).
[89] Joseph P. Gillan, Pre-Filed Direct Testimony, Exhibit JPG-1 pp. 23-24 (July 26, 005).
[90] *TRRO* at ¶5.
[91] *Motion for Clarification*, p. 2 (May 23, 2005).

the CLEC should be allowed to add lines to, make changes to the services of, and move current customers. Furthermore, they contend moves of high capacity loops and dedicated transport should be allowed.[92]

Deliberations and Conclusions

The panel voted unanimously that the transition plan described in the *TRRO* applies to the existing lines used to serve the CLEC's embedded customer base and that the transition plans do not allow "new adds" to serve a CLEC's embedded customer base, which include moves, adds, and changes that require a new service order. The panel determined that BellSouth may reject any and all new orders for the de-listed UNEs.

While the *TRRO* states that transition plans apply to the embedded customer base, it also specifies that the transition plans do not allow CLECs to add new delisted UNE arrangements.[93] Therefore, the panel finds that with respect to new orders for delisted UNEs, embedded customer base versus embedded lines is a distinction without a difference. The *TRRO* provides CLECs continued "access" only to UNE arrangements already in place at the applicable price through the transition period not to new orders for delisted UNE arrangements. Moves and adds requested by the CLECs would constitute new UNE orders, and BellSouth is not required to process such orders for delisted UNEs. BellSouth has agreed to honor requests for changes to UNE-P arrangements that do not require a new service order.[94] Additionally, the Authority has already ruled on this issue and specifically rejected the UNE-P argument put forth by the Joint CLECs in the *Motion for Clarification* denied by the Authority.[95]

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[92] *Joint CLEC Post-Hearing Brief*, pp. 58-60 (October 28, 2005).
[93] *TRRO* at ¶ 5.
[94] *BellSouth's Post-Hearing Brief*, p. 91 (October 28, 2005).
[95] *See Order Denying Motion for Clarification* (December 21, 2005).

ISSUE 11: UNEs THAT ARE NOT CONVERTED

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

Positions of the Parties

BellSouth maintains that, similar to Issue 2, none of the de-listed network elements for which the FCC established a transition plan should remain in effect after March 10, 2006.[96] BellSouth states that CLECs must transition their entire embedded base of local switching by March 11, 2006. In accordance with FCC Rule 51.319(d)(ii) a CLEC must migrate its embedded base to an alternative arrangement within twelve months of the effective date of the *TRRO*.[97]

Specifically, BellSouth requests the TRA to authorize that BellSouth may disconnect any stand-alone switching ports, because there is no tariff equivalent. For UNE-P, BellSouth asked the CLECs to submit a spreadsheet by October 6, 2005. If a CLEC fails to do so, BellSouth asserts that it should be permitted to identify all such remaining embedded UNE-P lines and convert them to the equivalent resold services no later than March 10, 2006.[98] Furthermore, BellSouth states that those conversions to resale should be subject to "applicable disconnect charges and the full nonrecurring charges in BellSouth's tariff."[99]

Regarding high capacity loops and transport, BellSouth reiterates that it has asked CLECs to provide a spreadsheet listing the circuits in need of transition or disconnection. BellSouth proposed that this spreadsheet be provided to BellSouth by December 9, 2005. If a CLEC fails to submit the spreadsheet by December 9, 2005, BellSouth is of the opinion that it should be permitted to identify all such remaining embedded and excess high capacity loops and transport and transition such circuits to corresponding BellSouth tariffed services no later than March 10, 2006.[100] BellSouth

[96] Pamela Tipton, Pre-filed Direct Testimony, p. 41 (July 26, 2005).
[97] *Id.* at p. 42; *see* 47 C.F.R. 51.319(d)(ii).
[98] Pamela Tipton, Pre-filed Direct Testimony, p. 42 (July 26, 2005).
[99] *BellSouth's Post-Hearing Brief*, p. 94 (October 28, 2005).
[100] Pamela Tipton, Pre-filed Direct Testimony, p. 43 (July 26, 2005).

takes the same position with regard to dark fiber loops and transport, except that the spreadsheet from the CLECs would be due to BellSouth on June 10, 2006. If the spreadsheet is not received by June 10, 2006, BellSouth would identify the circuits in question and convert them to tariff equivalents no later than September 10, 2006.[101]

CompSouth witness Joseph Gillan testified that, "The conversion of Section 251(c) (3) UNEs to Section 271 checklist items or other services is addressed in the CompSouth language included under Issue 2."[102] Mr. Gillan further proposed that BellSouth provide the CLECs a list identifying specific UNEs that are no longer offered under Section 251(c)(3) and that CLECs must disconnect or convert those services. CompSouth opined that the CLECs should be able to choose between wholesale facilities provided by BellSouth or another carrier, as well as BellSouth special access services, self-provisioned circuits or Section 271 checklist items. After receipt of the BellSouth list, a CLEC will have thirty days to verify the list, notify BellSouth of concerns, or request alternative arrangements.[103] Mr. Gillan testified, "If CLEC fails to submit disputes or orders to disconnect or convert such arrangements within such thirty (30) day period, BellSouth will transition such circuits to the equivalent tariffed BellSouth service(s)."[104]

Finally, CompSouth asserted that the transition of affected UNEs must take place in a seamless manner, and that no service order or order to disconnect or convert should have associated nonrecurring charges. CompSouth argued that the parties should absorb their own costs associated with effectuating this process, and that new recurring charges should not commence until the affected UNE has been transitioned to a new arrangement.[105]

Deliberations and Conclusions

The panel found that Issue 11 is similar to Issue 2 in that both issues involve the transition period and both issues were submitted together for partial summary judgment. In BellSouth's

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[101] *Id.* at p. 44.
[102] Joseph Gillan, Pre-filed Direct Testimony, Exhibit JPG-1, p. 27 (July 26, 2005).
[103] *Id.*
[104] *Id.*
[105] *Id.*

Motion for Summary Judgment, BellSouth requested 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). Those rules specify that BellSouth is obligated to provide certain loops and transport routes from March 11, 2005 through March 10, 2006 at the higher of 115% of the rate paid by the carrier or 115% of the rate that was in effect on June 15, 2004. For dark fiber, BellSouth's obligation continues until September 10, 2006.[106] The Authority deliberated the *Motion for Summary Judgment* on August 22, 2005 and concluded that access to UNE local switching, high capacity loops and transport ceases to exist on March 10, 2006.[107]

As with the decision in Issue 2, the panel found that the CLECs, because they know what they have purchased from BellSouth, should send BellSouth an Excel spreadsheet listing affected UNE high capacity loops and transport, switching and dark fiber. The panel determined that allowing BellSouth to file a complaint against the carrier would provide both parties the opportunity to continue negotiations to ensure a substitute product is both sufficient in features and priced at an agreeable rate. The new rate would be subject to true-up back to March 11, 2006. Any party who failed to participate, as BellSouth fears, would be provided the opportunity to defend its position before the Authority.

During the deliberations, the panel unanimously reaffirmed the Authority's previous ruling that the transition plan is in accordance with 47 C.F.R. §§ 51.319(a), (d) and (e) and voted to require the CLECs to submit to BellSouth an Excel spreadsheet for all affected local switching, high capacity loop and transport, including entrance facilities and excess capacity, and an Excel spreadsheet for all affected UNE dark fiber loops, transport and entrance facilities. BellSouth will return a spreadsheet to the CLEC listing finalized UNEs subject to conversion or disconnection no later than thirty days

[106] *Joint CLECs' Response* at pp. 48-50.
[107] Transcript of Authority Conference, pp. 35-37 (August 22, 2005).

from receipt of the CLEC's initial spreadsheet. The panel determined that all affected UNEs that are still in service after the end of the transition periods of March 10, 2006 and September 10, 2006 for dark fiber will be subject to a true-up to the new negotiated rate. The CLECs shall immediately submit the spreadsheets and if they fail to do so, BellSouth may bring the issue to the Authority for resolution. In the event BellSouth alters its list of impaired wire centers, CLECs may submit spreadsheets to BellSouth within thirty days of receipt of the updated information. The panel voted that BellSouth may not unilaterally convert a CLEC's circuits prior to March 10, 2006 or September 10, 2006 for dark fiber nor disconnect any circuits regardless of time.

ISSUE 14: COMMINGLING

What is the scope of commingling allowed under the FCC's rules and orders and what language would be included in interconnection agreements to implement commingling (including rates)?

Positions of the Parties

BellSouth stated that the dispute is whether the wholesale services referred to in the FCC's commingling rules include Section 271 services.[108] BellSouth is of the opinion that the FCC intended to limit the types of wholesale services subject to commingling and cites the *TRO* as referring only to tariffed access services.[109] BellSouth also maintained that the FCC made it clear in its *Errata Order*[110] that ILECs are not required to combine UNEs and UNE combinations with Section 271 elements.[111] As a result, BellSouth argued that it is not required to combine Section 271 elements with Section 251 elements.[112]

BellSouth also argued that it is not obligated to commingle its UNEs or tariffed services with the services of another carrier[113] and that it is not required to ratchet individual facilities but is allowed to assess rates for UNEs or UNE combinations commingled with its tariffed access services

[108] *Motion for Summary Judgment*, p.52 (June 1, 2005).
[109] *Id.*
[110] *See TRO* at *Errata.*
[111] Pamela A. Tipton, Pre-Filed Direct Testimony, p. 48 (July 26, 2005).
[112] *Motion for Summary Judgment*, p.50 (June 1, 2005).
[113] Pamela A. Tipton, Pre-Filed Direct Testimony, p. 50 (July 26, 2005).

on an element-by-element and service-by-service basis.[114] In short, BellSouth asserted that its only commingling obligation is to permit CLECs to commingle, attach or otherwise link a UNE or UNE combination with one or more BellSouth tariffed access services and nothing more.[115] In such cases, BellSouth stated that it will bill the UNE portion of the circuit at rates contained in the interconnection agreement with the CLEC and the remainder of the circuit at the applicable tariff rate or the rate contained in a separate agreement.[116] Finally, BellSouth maintained that the Act makes it clear that state commissions do not have jurisdiction over decisions related to Section 271 obligations and the FCC has exclusive jurisdiction in such matters.[117]

The CLECs argued that the FCC's rules involving commingling arrangements ensure that discrete elements provided by BellSouth whether pursuant to Section 251 of the Act as special access or any wholesale arrangement, including elements offered pursuant to Section 271, are available in connected form.[118] In other words, the CLECs maintained that Section 271 elements meet the definition of wholesale facilities and services subject to commingling requirements.[119] The CLECs argued that Section 271 of the *Act* obligates BellSouth to provide all the 271 checklist elements via Section 252 interconnection agreements even when those elements are not required to be unbundled pursuant to Section 251.[120]

The CLECs further argued that the FCC has determined that the unjust practices and non-discrimination requirements of Section 201 and 202 of the Act obligate BellSouth to commingle Section 251 and non 251 elements.[121] As a result, the CLECs asserted that BellSouth is acting in a discriminatory manner by refusing to commingle Section 251 elements with other offerings such as

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[114] *Id.* at p. 51.
[115] *Id.* at p. 50.
[116] *Id.* at p. 51.
[117] *Id.* at p. 49.
[118] Joseph Gillan, Pre-Filed Direct Testimony, p. 50 (July 26, 2005).
[119] *Response,* p.60 (July 1, 2005).
[120] Joseph Gillan, Pre-Filed Rebuttal Testimony, p. 25 (August 16, 2005).
[121] Joseph Gillan, Pre-Filed Direct Testimony, p. 51 (July 26, 2005).

Section 271 elements.[122] The CLECs are of the opinion that the Authority should require BellSouth to offer Section 271 elements under the same terms and conditions as the parallel Section 251 offering except for pricing.[123]

The CLECs did not offer specific pricing recommendations for BellSouth's Section 271 elements.[124] The CLECs argued that because specific information needed to propose just and reasonable rates has not been provided by BellSouth, the Authority should establish interim prices for Section 271 elements that would remain in effect until the conclusion of a permanent rate proceeding.[125] The CLECs suggested that the Authority use the approach taken by the Missouri Commission to establish such interim rates which involved simply using the transition period rates for declassified UNEs.[126]

Deliberations and Conclusions

The FCC requires Bell Operating Companies ("BOCs") to continue to offer de-listed Section 271 elements to competing carriers at rates that are "just and reasonable."[127] The FCC also stated that a BOC might satisfy the "just and reasonable" standard by demonstrating that the rate for a 271 element is at or below the rate at which the BOC offers comparable functions under its interstate access tariff or that the rate is contained in arms-length agreements with other purchasing carriers.[128] Additionally, the FCC has provided guidance on how commingled Section 251 elements and elements or services priced under access tariffs should be billed. Specifically, the FCC has stated that its rules permit incumbent LECs to assess rates for UNEs commingled with tariffed access services on an element-by-element and service-by-service basis.[129] As such a CLEC connecting a UNE loop to special access transport would pay UNE rates for the unbundled loops and tariffed rates

[122] *Response,* p.62 (July 1, 2005).
[123] Joseph Gillan, Pre-Filed Direct Testimony, p. 53 (July 26, 2005).
[124] Joseph Gillan, Pre-Filed Rebuttal Testimony, p. 33 (August 16, 2005).
[125] *Id.* at pp. 33-34.
[126] *Id.* at p. 34.
[127] *TRO* at ¶¶ 656, 659 and 664.
[128] *Id.* at ¶ 664.
[129] *Id.* at ¶ 582.

for the special access service. The FCC has removed the requirement for BOCs to commingle a Section 271 element with a Section 251 element. For this reason, provision of a Section 251/271 commingled service by BellSouth is voluntary.

The majority of the panel found that unbundling and commingling are Section 251 obligations, and when BellSouth provides an element pursuant only to Section 271, BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element or service.

Section 271(2)(B), which contains the competitive checklist of the fourteen required items that control BellSouth's entry into the long distance market, requires BellSouth to provide access and interconnection and includes, in part; local loop transmission from the central office to the customer's premises, unbundled from switching or other services, local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services, and local switching unbundled from transport, local loop transmission, or other services.[130] Section 271(2)(B) requires that local loop transmission from the central office to customer premise, local transport from the trunk side of a switch and local switching are to be unbundled. Because the Act specifies that these elements are to be unbundled from "other services," it follows that the unbundling obligation is independent of Section 251. In paragraph 579 of the *TRO*, the FCC stated,

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE or UNE combination, to one or more facilities or service that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.[131]

The FCC states in paragraph 584 of the *TRO*,

> [W]e 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.[132]

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[130] 47 U.S.C. § 271(2)(B).
[131] *TRO* at ¶ 579.
[132] *Id.* at ¶ 584.

The majority of the panel found that the CLECs are relying on this statement when they state that the FCC's rules involving commingling arrangements ensure that discrete elements provided by BellSouth, whether pursuant to Section 251 of the Act, as special access or any wholesale arrangement, including elements offered pursuant to Section 271, are available in connected form. Nevertheless, as BellSouth points out, the FCC issued the *Errata* to the *TRO* on September 17, 2003, in which the FCC stated at paragraph 27,

> [I]n paragraph 584 we change the first sentence to read: [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 services offered for resale pursuant to Section 251(c)(4) of the Act.[133]

The above statement refers to commingling UNEs and UNE combinations with services offered by tariff or through other agreements, thus eliminating commingling with elements required by Section 271. Through the *Errata*, the FCC removed the issue of commingling Section 251 elements with Section 271 independent unbundled elements.

In addition, the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's determination that while incumbents must unbundle local loops, local transport, local switching and call-related databases in order to enter the interLATA market, the incumbents' unbundling obligations under the independent checklist items of Section 271 differ in some important respects from those under Sections 251 and 252.[134] The Court stated further "the commission decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements."[135] It is important to point out that the Court agreed "...with the Commission that none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 checklist."[136]

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[133] *Id.* at *Errata*, ¶ 27.
[134] *USTA II* at p. 589.
[135] *Id.*
[136] *Id.* at p. 590.

If BellSouth is required to commingle a Section 251 local loop with Section 271 unbundled local switching, the result would be the equivalent of UNE-P, which is the type of arrangement the FCC has said BellSouth must no longer provide. BellSouth admitted that it will provide local switching and a local loop to a CLEC's collocation space so a CLEC can combine those elements itself.[137]

BellSouth maintained that state commissions do not have jurisdiction over decisions related to Section 271 obligations. Nevertheless, the panel found that the Authority has previously exercised jurisdiction over such matters.[138] For example, in Docket No. 03-00119, the Authority found that BellSouth must provide switching as a Section 271 element.[139] In that docket, the Authority relied on the FCC rules, which state that in situations where unbundled switching is not required under Section 251, the element must still be offered to competitors in order to comply with the requirements of Section 271; however, the rate does not have to comply with TELRIC pricing methodology.[140]

The majority of the panel voted to deny the CLEC's position and not require BellSouth to commingle UNEs or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act. Consistent with paragraph 27 of the *Errata* to the *TRO,* the majority voted to require BellSouth to permit CLECs to commingle UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to Section 251(c)(4) of the Act. The commingled result must be priced consistent with paragraphs 580 and 582 of the *TRO* which requires the UNE to be priced at the UNE TELRIC rate and the wholesale service priced at the tariffed rate. The majority of the panel acknowledged that BellSouth and the CLECs are free to negotiate commingling a Section 251 element with a

[137] Transcript of Proceedings, v. IV, p. 11 (September 14, 2005).
[138] *See In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to The Telecommunications Act of 1996*, Docket No. 03-00119, *Final Order of Arbitration Award*, pp. 25-39 (October 20, 2005).
[139] *Id.* at p. 31.
[140] *Id.* at pp. 25-39.

Section 271 element but provision of a Section 251-271 commingled service by BellSouth is voluntary.[141]

ISSUE 22: TRO – CALL-RELATED DATABASES

What is the appropriate ICA language, if any, to address access to call-related databases?

Positions of the Parties

BellSouth argued that FCC rules provide 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. Therefore, BellSouth stated its obligation to provide databases is limited to the 911 and E911 databases. Furthermore, BellSouth asserts that the D.C. Circuit affirmed the FCC's decision on call-related databases.[142]

The Joint CLECs asserted that databases are a Section 271 checklist item 10 requirement and need to be provided in accordance with that Section.[143] The CLECs argued that, for this reason, call-related databases must continue to be provided to CLECs at just and reasonable rates, terms, and conditions.[144]

Deliberations and Conclusions

The FCC defines call-related databases as "databases that are used in signaling networks for billing and collection or for the transmission, routing or other provision of telecommunications services."[145] Several specific databases are: LIDB – line information database, CNAM – caller id

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[141] Director Jones did not vote in favor of the prevailing motion. It is his opinion that the commingling obligation includes both resell services provided pursuant to Section 251(c)(4) and wholesale services provided pursuant to Section 271. In support of his opinion he cites the plain language of 47 C.F.R §51.309(e) and (f) and paragraphs 579 through 584 and footnote 1990 of the *TRO*, as corrected by the September 17, 2003 *Errata*. A detailed explanation of his position is set forth in his separate opinion filed in Docket No. 04-00046, *In re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co., Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC of an Interconnection Agreement with BellSouth.*

[142] *Motion for Summary Judgment*, p. 58. (June 1, 2005).

[143] *Joint CLECs' Response*, p. 66. (July 1, 2005).

[144] *Id.* at p. 66.

[145] *TRO* at ¶ 549.

with name database, Toll Free Calling database, LNP – local number portability database, AIN – advanced intelligent network database, and E911 database (including the 911 database).[146]

BellSouth claims that the Court of Appeals affirmed the FCC's decision on call-related databases because, on appeal, the CLECs argued that the only reason that alternatives existed to ILEC databases was because the FCC had previously ordered access to such databases. The Court rejected this argument and held that CLECs evidently have adequate access to call-related databases but if subsequent developments alter this situation, affected parties may petition the FCC to amend the rule.[147] Nevertheless, 47 U.S.C. § 271(c)(2)(B)(x) requires BellSouth to provide nondiscriminatory access to databases and associated signaling necessary for call routing and completion.[148] Moreover, the FCC stated that in instances where switching remains a UNE, CLECs purchasing the switching UNE would continue to have access to signaling and the call-related databases.[149] Pursuant to Section 271(c)(2)(B)(vi) switching, in some cases, is a de-listed UNE.

As set forth in the discussion of Issue 8(a), historically, issues related to interconnection, including Section 271 elements, have been accepted by the Authority for arbitration and included in Section 252 agreements. For example in Docket No. 03-00119 regarding market rate local switching, the Authority relied on Section 252(c)(2) to find that it could establish any rate for interconnection, services, or network elements. In the record with regard to Issue 22, BellSouth offers nothing new that should affect the Authority's previous findings regarding the inclusion of Section 271 elements in Section 252 interconnection agreements. The panel voted unanimously to require BellSouth to provide access to call-related databases pursuant to 47 U.S.C. § 271 (c)(2)(B) and priced pursuant to the FCC's just and reasonable standard.[150]

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[146] *Id.*.
[147] *Motion for Summary Judgment*, p. 58 (June 1, 2005).
[148] Such signaling includes LIBD, Toll Free Calling , AIN and LNP databases which would be necessary for the billing and collection or for the routing and transmission of telecommunications traffic.
[149] *TRO* at ¶ 551.
[150] Director Jones voted in favor of the prevailing motion, but also added that language related to BellSouth's Sections 251 and 271 obligations with respect to call related databases should be memorialized in interconnection agreements.

ISSUE 32:

How should determinations in this proceeding be incorporated into existing Section 252 interconnection agreements?

Positions of the Parties

BellSouth asserted that the TRA should approve specific contractual language resolving each disputed issue in this docket. BellSouth further maintained that the approved language should automatically take effect for any CLEC in the State of Tennessee that does not execute a compliant contract amendment with BellSouth within forty-five days of the Authority's order, whether or not the CLEC participated in this docket.[151] BellSouth argues "the Authority provided all CLECs with liberal opportunities to intervene throughout the course of the proceedings" and, therefore, "the outcome of this docket [should] be binding upon both active parties and upon those CLECs that have been provided with notice of this proceeding, but have elected not to actively participate."[152]

The CLECs took no position on whether the Authority's orders in this docket can or should be binding on non-parties.[153] The CLECs, however, argued the Authority should take no action to alter existing agreements addressing how changes of law should be incorporated into existing and new Section 252 interconnection agreements and stated that the Authority should make such limitation clear.[154]

Deliberations and Conclusions

The panel addressed within the context of this issue, whether the Authority can require companies taking no action be bound by the decisions in this docket even if these companies have not executed new contracts. The panel concluded that the Authority took all measures available to it to provide every affected party with ample notice and opportunity to participate in this docket.

The majority of the panel voted that the decisions from this proceeding should be incorporated into existing Section 252 interconnection agreements through negotiation between the

[151] *BellSouth's Post-Hearing Brief*, pp. 95-96 (October 28, 2005).
[152] *Id.* at p. 95.
[153] *Joint CLEC Post-Hearing Brief*, p. 115 (October 28, 2005).
[154] *Id* at pp.115-116.

parties. The majority of the panel also determined those companies who fail to execute new interconnection agreements shall be deemed to have done so, consistent with the FCC's goal of an orderly, timely transition.[155]

THE MAY 15, 2006 AUTHORITY CONFERENCE

At a regularly scheduled Authority Conference held on May 15, 2006, the panel assigned to this docket considered Issue Numbers: 1, 3, 8(a-c), 10, 13, 15, 16, 17, 18, 19, 23, 24, 26, 27, 28, 29, and 31.

ISSUE 1:

The Section 252 process requires negotiations and to the extent parties may not be able to negotiate resolution of particular issues arising out of the Final Rules/TRRO or to the extent that new issues related to the Final Rules/TRO arise, issues related to those matters will be added to this list.

Positions of the Parties

The parties did not offer testimony on this issue because of their stipulation to allow the addition of new items to the Issues Matrix throughout the proceedings rather than an active dispute regarding interconnection contract language.

Deliberations and Conclusions

This issue was intended to be a "placeholder" to allow new issues to be added between the filing of the Joint Issues Matrix and the hearings in this docket.[156] In as much as the hearings have been concluded and post hearing briefs have been filed, the panel voted unanimously that the Authority affirm that the parties are not allowed to add new issues to the matrix at this point in the proceedings. Should any new issues arise, the parties may request that the Authority open a new docket.

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[155] Director Jones did not vote in favor of the prevailing motion. It is his opinion that BellSouth and the CLECs should incorporate the Authority's decisions in accordance with the change of law provisions in their effective interconnection agreements. In the event a dispute arises, it likewise should be resolved in accordance with the terms of the existing interconnection agreement. Regardless of the negotiations or dispute resolution provisions, the parties should keep in mind throughout their communications, the binding and precedential nature of the decisions rendered in this docket.

[156] *Joint CLEC Post-Hearing Brief*, p. 6 (October 28, 2005).

ISSUE 3: TRRO/FINAL RULES

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

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

Positions of the Parties

BellSouth is of the opinion that because the FCC has removed several elements from the unbundling requirements of Section 251(c)(3), such elements should be removed from existing interconnection agreements. BellSouth explained that because interconnection agreements address Section 251 obligations and because those obligations are the only ones required to be included in Section 252 interconnection agreements, those non-251 elements should be removed.[157] BellSouth requested that the TRA approve its proposed interconnection agreement language, specifically Attachment 2, which sets forth the terms and conditions relating to UNEs. BellSouth further requested that for those CLECs with which BellSouth has been unable to reach agreement, the Authority require such CLECs to execute a contractual amendment with the TRA-approved language following the conclusion of this proceeding.[158]

For interconnection agreements that are pending in arbitration, BellSouth requested that issues similar to issues in this proceeding be addressed in this proceeding. Furthermore, BellSouth maintained that this proceeding is intended to address interconnection agreements that are in the process of being negotiated but prior to arbitration being filed. If there are *TRO/TRRO* issues upon which the parties cannot mutually agree, BellSouth suggested that it be allowed to incorporate the TRA-approved language into the parties' new agreement.[159]

CompSouth witness Joseph Gillan testified that CompSouth's proposed language for Issue 2 (*TRRO* Transition) sets forth appropriate language for UNEs pursuant to Section 251(c)(3) as well as

[157] Kathy Blake, Pre-filed Direct Testimony, p. 5 (July 26, 2005).
[158] *Id.* at p. 6.
[159] *Id.* at p. 7.

language that provides for the availability of Section 271 elements that will act as substitutes for Section 251 UNEs. Additionally, specific contract language for commingling has been proposed that affects previously combined elements subject to commingling. Existing interconnection agreements should be amended to incorporate BellSouth's obligations to provide elements pursuant to Section 251, as well as Section 271.[160]

Deliberations and Conclusions

The majority of the panel found that an interconnection agreement should contain all elements the parties want to include in the agreement, but the parties are free to enter into independent special contract arrangements. The majority of the panel found while parties have a right to bring issues to the Authority for arbitration, the decisions rendered in this docket should provide guidance for future negotiations between BellSouth and the CLECs on similar issues.

A majority of the panel voted that existing interconnection agreements should be modified to incorporate the deliberations of this docket and new interconnection agreements currently in negotiation or in arbitration should progress normally with the Authority's deliberations in this docket governing the negotiations. The majority determined that any issue that is presented to the Authority in a new arbitration that is duplicative of an issue in this proceeding should be rejected unless the party can demonstrate that there exists a material change which should be considered by the TRA. In instances where parties fail to amend their existing agreements pursuant to the change of law provision, their agreements shall be deemed amended to reflect the decisions rendered in this docket.[161]

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[160] Joseph Gillan, Pre-filed Direct Testimony, Exhibit JPG-1, p. 14 (July 26, 2005).

[161] Director Jones offered a motion that failed to receive a second. Unlike the prevailing motion, Director Jones' motion did not include a conclusion that in the event that a new arbitration is filed that contains an issue that is duplicative of an issue in this docket then the duplicative issue should be rejected absent a demonstration of a material change. Similarly, Director Jones' motion did not include the conclusion that when parties fail to amend their existing agreements, then their agreements shall be deemed amended in accordance with the decisions in this docket.

ISSUE 8(a):

Does the Authority have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

Positions of the Parties

BellSouth asserted that the Authority should reject any theory regarding state law requirements for unbundling.[162] BellSouth noted that "no CLEC presented testimony supporting the contention that BellSouth has state law unbundling obligations that are different from federal unbundling obligations."[163] The CLECs contend the Authority may include network elements in interconnection agreements pursuant to state law authority.[164] The CLECs, however, are not requesting that the Authority exercise such authority in this proceeding and instead focus their arguments on BellSouth's Section 271 obligations.[165]

With regard to Section 271, BellSouth argued that "state regulators do not have the authority to require BellSouth to include in Section 252 interconnection agreements any element not required by Section 251 of the 1996 Act."[166] Further, BellSouth asserted that the TRA "does not have jurisdiction over Section 271 elements, nor are Section 271 elements to be included in Section 252 interconnection agreements."[167] According to BellSouth, the CLECs' arguments regarding inclusion of elements are an attempt by the CLECs to continue getting UNE-P, which was eliminated by the *TRO* and *TRRO* for Section 251 elements.[168]

In support of its position, BellSouth argued that "Section 252 explicitly limits the rate-setting and arbitration powers of state commission [sic] to Section 251 elements." According to BellSouth, this express limitation precludes the Authority from requiring BellSouth to include Section 271

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[162] *BellSouth's Post-Hearing Brief*, p. 12 (October 28, 2005).
[163] *Id.*
[164] *Joint CLEC Post-Hearing Brief*, p. 35 (October 28, 2005).
[165] *Id.* at pp. 35-36.
[166] Pamela A. Tipton, Pre-Filed Direct Testimony, p. 38 (July 26, 2005).
[167] Kathy K. Blake, Pre-Filed Rebuttal Testimony, p. 2 (August 16, 2005).
[168] *BellSouth's Post-Hearing Brief*, p. 12-13 (October 28, 2005). BellSouth asserts that the FCC decided "the UNE-P regime was not providing the right incentives for real facilities-based competition and should end."

elements in a Section 252 agreement."[169] BellSouth asserted that the plain language of Section 252 refers only to Section 251 and includes "absolutely nothing . . . that says the state commissions can include Section 271 obligations in interconnection agreements."[170] Moreover, BellSouth argued that an ILEC is not required to negotiate more than is required by Section 251 in the context of a Section 252 agreement.[171]

BellSouth further contended that enforcement of Section 271 lies exclusively with the FCC.[172] BellSouth referenced decisions from federal district courts and state commissions in support of its position.[173] According to BellSouth, the tribunals concluded state commissions have no Section 271 regulatory authority.[174]

The CLECs asserted BellSouth has an obligation under Section 271 to offer checklist items in interconnection agreements.[175] According to the CLECs,

> Each [Section] 271 network element must be offered through interconnection agreements that are subject to the [Section] 252 state commission review and approval process. Section 271(c)(2)(A) of the Act clearly links a BOC's duty to satisfy its obligations under the competitive checklist to the BOC providing that access through an interconnection agreement (or a statement of generally available terms ("SGAT").[176]

The CLECs therefore argued "the 252 process [must] be used to establish the contract terms, conditions and prices for [Section] 271-compliant network elements."[177]

The CLECs also emphasized that BellSouth's "Section 271 unbundling obligations are independent of and in addition to Section 251 unbundling obligations."[178] According to the CLECs, "Section 251 and Section 271 both point to the Section 252 state commission negotiation and

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[169] *BellSouth's Post-Hearing Brief*, p. 13 (October 28, 2005) (emphasis omitted).
[170] Transcript of Proceedings, v. I, p. 20 (September 13, 2005).
[171] *BellSouth's Post-Hearing Brief*, pp. 17-18 (October 28, 2005).
[172] *Id.* at pp. 24-27.
[173] *Id.* at pp. 28-36.
[174] *Id.* at p. 28.
[175] Joseph Gillan, Pre-Filed Rebuttal Testimony, p. 25 (August 16, 2005).
[176] Joseph Gillan, Pre-Filed Direct Testimony, p. 43 (July 26, 2005).
[177] *Id.* at p. 44.
[178] *Joint CLEC Post-Hearing Brief*, p. 36 (October 28, 2005).

arbitration process as the vehicle for establishing contract terms for ILEC unbundling obligations."[179] Likewise, "[b]oth Section 251 and 271 point to Section 252 as the procedural vehicle through which their requirements are to be implemented."[180] The CLECs thus concluded that the "forum for establishing the rates, terms, and conditions of BellSouth's independent Section 271 unbundling obligations is the state commission ICA arbitration and approval process established in Section 252."[181]

The CLECs pointed out that Section 271 applies only to Bell operating companies while Sections 251 and 252 apply to all ILECs.[182] According to the CLECs, Section 271 requires that checklist items be offered through interconnection agreements approved under Section 252 and that requirement is not repeated in Section 252 because that is "the general section of the statute that applies to all ILECs."[183]

While acknowledging changes existing under the *TRRO*, the CLECs contended that the *TRRO* established that de-listed elements will no longer be available at TELRIC rates, but the order did not eliminate BellSouth's obligation to provide Section 271 checklist items, which BellSouth must provide at just and reasonable rates.[184] Thus, the CLECs stated that the parties' disagreement concerns "what price should apply" to the required checklist elements.[185]

The CLECs argued a distinction between enforcing Section 271 and resolving disputes regarding Section 271 checklist elements. The CLECs "do not contend that [the TRA] could enforce the terms of BellSouth's interLATA long distance entry by revoking long distance authority or further conditioning it based on additional requirements."[186] The CLECs asserted that state

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[179] *Id.* at p. 36.
[180] *Id.* at p. 41.
[181] *Id.* at p. 36; *see also* Transcript of Proceedings, v. IV, pp. 92-94 (September 14, 2005).
[182] Transcript of Proceedings, v. IV, pp. 80-81 (September 14, 2005).
[183] *Id.*
[184] *Id.* at pp. 47-48, 54.
[185] *Id.* at p. 75.
[186] *Joint CLEC Post-Hearing Brief*, p. 42 (October 28, 2005).

commissions have authority to resolve disputes regarding the rates, terms and conditions for Section 271 checklist elements based on the interplay between Sections 271 and 252.[187]

According to the CLECs, "the core dispute between the parties is not whether Section 271 checklist items must be made available, but whether the Authority may fulfill its Section 252 responsibilities to ensure their availability."[188] The CLECs assert the TRA already considered and ruled on this issue in TRA Docket No. 03-00119, *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications* ("DeltaCom Arbitration").[189] The CLECs concluded that the Authority, in the DeltaCom Arbitration, rejected the "exact same arguments against the Authority's jurisdiction urged by BellSouth here."[190]

Deliberations and Conclusions

The majority of the panel found that, historically, issues related to interconnection, including Section 271 elements, have been accepted by the Authority for arbitration and included in Section 252 agreements. In other arbitration proceedings, the TRA exercised authority to (1) arbitrate enforcement mechanisms although the Act does not expressly provide for such mechanisms,[191] and order that an interconnection agreement state terms and conditions of network elements compliant with both state and federal rules and regulations.[192] In the DeltaCom Arbitration, the Arbitrators considered whether BellSouth was required to provide local switching at market rates where it was

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[187] *Id.*
[188] *Id.* at p. 35.
[189] *Id.* at p 33. "Congress explicitly charged state commissions with the responsibility to arbitrate Section 252 disputes, and this charge includes arbitrating the rates, terms and conditions of Section 271 elements." *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications*, Docket No. 03-00119, *Final Order of Arbitration Award*, p. 32 (October 20, 2005).
[190] *Joint CLEC Post-Hearing Brief*, p. 35 (October 28, 2005).
[191] *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 99-00430, *Interim Order of Arbitration Award*, pp. 12-13 (August 11, 2000).
[192] *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996* ("*DeltaCom Arbitration*"), Docket No. 03-00119, Transcript of Arbitration Hearings, pp. 7-8 (January 12, 2004).

not required to provide the switching as a UNE.[193] By rejecting TELRIC rates, the Arbitrators implicitly established that the switching at issue in the docket was not Section 251 UNE switching.[194]

BellSouth asserted in that docket that an arbitration proceeding is not an appropriate forum for consideration of its local switching rates because such rates are not governed by Section 251 or 252.[195] "Notwithstanding BellSouth's assertions that the Authority lacked jurisdiction, the Arbitrators deliberated the switching issue as an open issue presented in a [Section] 252 arbitration proceeding."[196] The Arbitrators further determined that "Section 271 of the Federal Act requires an incumbent telephone company to satisfy its [Section 271] competitive checklist obligations through interconnection agreements . . . required to be approved by a state commission under Section 252."[197] BellSouth argued in this proceeding that the Authority should reverse its decision in the DeltaCom Arbitration, citing certain federal district court decisions and state commission rulings in support of its position, none of which are binding on this Authority.[198]

BellSouth cites no decisions from Tennessee, the United States Supreme Court, or the 6th Circuit Court of Appeals. Instead, it relies on lower court federal decisions from Kentucky, Mississippi, and Montana and rulings from other state commissions.[199] In fact, other state commissions have concluded that Section 271 elements should be included in such agreements, or that the FCC has not provided clear direction on the issue. The Michigan Public Service Commission has determined "that obligations under Section 271 should be included in interconnection agreements approved pursuant to Section 252."[200] Similarly, the Public Service

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[193] *Id.* at pp. 7-8, 15-18, 48-49.
[194] This issue was not debated by the parties.
[195] *DeltaCom Arbitration, Revised Joint Issues Matrix*, p. 10 (August 15, 2003).
[196] *DeltaCom Arbitration, Final Order of Arbitration Award*, p. 29 (October 20, 2005).
[197] *Id.* at p. 31. BellSouth filed an Emergency Petition in the DeltaCom arbitration with the FCC seeking preemption of the Authority's action. The TRA filed an opposition to BellSouth's petition, defending the panel's decision in the DeltaCom arbitration. The FCC has not acted on BellSouth's Emergency Petition.
[198] *BellSouth's Post-Hearing Brief*, pp. 28-36 (October 28, 2005).
[199] Transcript of Oral Argument, pp. 8-10 (August 8, 2005); *CompSouth's Response to BellSouth's Reply Brief on Motion for Summary Judgment*, p. 4 (August 4, 2005).
[200] *In the matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Case No. U-14447, *Order*, 2005 Mich. PSC LEXIS 309, at *25 (Sept. 20, 2005).

Commission of Missouri adopted the arbitrator's finding that interconnection agreements must include prices for Section 271 UNEs, and the commission set an interim rate for such UNEs.[201] The Utah Public Service Commission found that "states are not preempted as a matter of law from regulating in the field of access to network elements."[202] The Utah PSC further recognized that, "under a careful reading of the law, the [Utah Public Service Commission] may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration."[203]

Based on these authorities and the TRA's previous decision in the DeltaCom Arbitration, a majority of the panel found that the TRA has the authority to require inclusion of Section 271 elements in agreements filed and approved pursuant to Section 252. The TRA, however, is not required to exercise such authority with regard to every proceeding. Instead, the TRA has discretion to decide on a case-by-case basis whether a particular agreement is required to be filed as an interconnection agreement and to advise carriers whether certain types of agreements are interconnection agreements that require filing in the state. For these reasons, the majority of the panel voted that the Authority may include rates, terms and conditions for Section 271 elements in Section 252 interconnection agreements.[204]

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[201] *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("MDA")*, Case No. TO-2005-0336, *Arbitration Order*, 2005 Mo. PSC LEXIS 963, at *47-48 (July 11, 2005).

[202] *In re: Petition of DIECA Communications, Inc., D/B/A Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Utah Public Service Commission Docket No. 04-2277-02, *Arbitration Report and Order*, 2005 Utah PUC LEXIS 16, at *25 (Feb. 8, 2005) ("*Utah Order*").

[203] *Utah Order*, 2005 Utah PUC LEXIS 16, at *26.

[204] Director Kyle offered a motion that failed to receive a second. Director Kyle moved that this Authority should not use Section 271 to require the inclusion of UNEs in interconnection agreements when those UNEs are no longer provided under Section 251 requirements and adopt BellSouth's proposed contract language. *See* Transcript of Authority Conference, pp. 57-59 (May 15, 2006).

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

Positions of the Parties

BellSouth stated, as to Issue 8(a), that state commissions have no jurisdiction over Section 271 elements.[205] BellSouth further asserted that Section 201 and 202 of the Telecommunications Act establish the standards the BOCs must meet in offering access to Section 271 elements[206] and that "the market price should prevail" for Section 271 elements.[207]

The CLECs asserted that the contract terms for Section 271 elements, including the conditions and prices for such elements, must be established through the Section 252 process.[208] The CLECs further argued that access to Section 271 elements "must be non-discriminatory and subject to 'just and reasonable' rates."[209]

Deliberations and Conclusions

In the DeltaCom Arbitration the Authority set an interim rate for switching classified as a Section 271 element.[210] In that docket, the Arbitrators specifically found, "Congress explicitly charged state commissions with the responsibility to arbitrate Section 252 disputes, *and this charge includes arbitrating the rates, terms and conditions of Section 271 elements.*"[211] Moreover, the arbitrators determined that the language of Section 271(c)(1) "demonstrates that Section 271 network elements must be offered pursuant to the same, identical review process as Section 252 network elements."[212] The Arbitrators further stated, "[w]hile the FCC will continue to set the pricing

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[205] Kathy K. Blake, Pre-Filed Rebuttal Testimony, p. 2 (August 16, 2005).
[206] *BellSouth's Post-Hearing Brief*, p. 40 (October 28, 2005).
[207] *Id.* at p. 41 (quoting *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3696, 3906, ¶ 473 (1999)).
[208] Joseph Gillan, Pre-Filed Direct Testimony, p. 44 (July 26, 2005).
[209] *Joint CLEC Post-Hearing Brief*, p. 34 (October 28, 2005).
[210] *DeltaCom Arbitration*, Docket No. 03-00119, *Final Order of Arbitration Award*, pp. 26-39 (October 20, 2005).
[211] *Id.* at p. 32 (emphasis added).
[212] *Id.* at p. 33.

standards, it continues to be incumbent upon state commission to apply those standards in the process of establishing rates."[213] Based on the TRA's earlier decision in the DeltaCom Arbitration wherein the Authority reserved the right to set any rates in disputed arbitrations proceedings, a majority of the panel voted that the Authority may set rates for Section 271 elements.[214]

ISSUE 8(c):

If the answer to part (a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements, and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?

Deliberations and Conclusions

In resolving this issue, a majority of the panel voted that the Authority should not adopt specific language for inclusion in interconnection agreements.[215] Instead, BellSouth should negotiate with the CLECs concerning the terms, conditions, and rates applicable to BellSouth's Section 271 obligations. In the event of unsuccessful negotiations either party to the negotiations may seek arbitration by the TRA[216]

ISSUE 10 – TRRO/FINAL RULES

What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment of such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do no meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

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[213] *Id.* at p. 34.

[214] Director Kyle did not vote in favor of the prevailing motion. It is Director Kyle's opinion that whether or not the Authority has jurisdiction to do so, the Authority should decline to exercise any jurisdiction to require Section 271 elements to be included in 252 agreements or to set rates for those elements, and would prefer to adopt BellSouth's proposed contract language. *See* Transcript of Authority Conference, p. 61 (May 15, 2006).

[215] Director Kyle did not vote in favor of the prevailing motion. It is Director Kyle's opinion that whether or not the Authority has jurisdiction to do so, the Authority should decline to exercise any jurisdiction to require Section 271 elements to be included in 252 agreements or to set rates for those elements, and would prefer to adopt BellSouth's proposed contract language.. *See* Transcript of Authority Conference, p. 62 (May 15, 2006).

[216] *See, e.g., Michigan Order*, Case No. U-14447, *Order*, 2005 Mich. PSC LEXIS 309, at *26 (Sept. 20, 2005) ("The Commission is still convinced that obligations under Section 271 should be included in interconnection agreements approved pursuant to Section 252. However, the Joint CLECs must negotiate with [the ILEC] concerning terms and conditions, seeking Commission arbitration if necessary.").

Deliberations and Conclusions

The CLECs proposed a process whereby BellSouth should identify the affected facilities and provide a minimum of thirty days to change service arrangements.[217] BellSouth claims that it should be allowed to disconnect or convert such arrangements upon thirty days written notice, absent CLEC specific actions to disconnect or convert.[218]

Issue 10 involves the transition of elements whose unbundling obligations disappeared with the original *TRO*. Given that CLECs have known for two years that unbundling obligations for enterprise switching, OCn loops, fiber loops, line sharing and packet switching are no longer available, it is unreasonable for CLECs to have not made alternative arrangements. Nevertheless, to prevent service outages, the majority of the panel found that BellSouth should not be permitted to disconnect CLEC UNE arrangements unless requested by the CLEC. Instead, the majority of the panel found that BellSouth may convert CLEC arrangements for the UNEs no longer subject to Section 251 unbundling after thirty days notice.

Based on the foregoing, a majority of the panel voted that BellSouth should be permitted to convert CLEC service arrangements no longer subject to Section 251 unbundling. BellSouth may not disconnect arrangements unless requested by CLECs.[219]

ISSUE 13: FINAL RULES

Should network elements de-listed under Section 251(c)(3) be removed from the SQM/PMAP/SEEM?

Positions of the Parties

BellSouth maintained that the purpose of establishing and maintaining an

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[217] *Joint CLEC Post-Hearing Brief*, pp. 61-62 (October 28, 2005).
[218] *BellSouth's Post-Hearing Brief*, p. 93 (October 28, 2005).
[219] Director Jones did not vote in favor of the prevailing motion. Instead, he specifically stated that as to (a), CLECs should have thirty days from the execution of an interconnection agreement or amendment thereto within which to provide BellSouth a list of UNEs that must be converted and or disconnected. BellSouth shall verify the list within thirty days of receipt, and in the absence of a CLEC order, BellSouth may convert a UNE after providing 30 days written notice to the CLEC. As to (b), Director Jones concluded that the terms and conditions shall be consistent with the transition mechanism set forth in the *TRRO*, but shall specify that: the time period shall begin to run upon notification by BellSouth that a wire center is unimpaired; requests for conversion shall be provided to BellSouth by the last day of the transition period; and rates shall be trued-up to the last day of the transition period.

SQM/PMAP/SEEM plan is to ensure that BellSouth provides nondiscriminatory access to network elements that Section 251 of the Act requires it to unbundle.[220] BellSouth stated that once elements are no longer required to be unbundled pursuant to Section 251, such de-listed elements should not be subject to measurement by performance plans.[221] According to BellSouth, such de-listed elements are offered pursuant to commercially negotiated agreements that provide for consequences that replace SQM/PMAP/SEEM measurements and penalties due to BellSouth's non-performance.[222] Finally, BellSouth maintained that "the structure of its SQM/SEEM plan demonstrates that it should not include Section 271 elements"[223] because there is no parity obligation for such elements.[224]

The CLECs argued that performance penalty plans were part of BellSouth's commitment to maintain open markets and ensure compliance with Section 271 after it obtained approval to offer long distance services.[225] Additionally, the CLECs maintained, "the FCC's impairment findings with respect to loops, transport, switching and signaling do not eliminate BellSouth's obligations under §271 to continue to offer these elements."[226] Given such, performance plans "should continue to apply to those offerings made available to comply with §271."[227] The CLECs maintain that performance plans are not a Section 251 obligation. BellSouth's SQM/PMAP/SEEM plan is designed to measure performance rather than to act as a deterrent against backsliding on BOC promises to maintain open markets.[228]

Deliberations and Conclusions

The panel determined that the Tennessee Performance Plan is not intended only to measure BellSouth's compliance with Section 251 elements. In the May 15, 2001 order opening Docket No. 01-00362 the Authority stated that an ongoing performance program with enforcement mechanisms

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[220] Kathy K. Blake, Pre-Filed Direct Testimony, p. 11 (July 26, 2005).
[221] *Id.*
[222] *Id.* at 12.
[223] Kathy K. Blake, Pre-Filed Rebuttal Testimony, p. 8 (August 16, 2005).
[224] *Id.* at 9.
[225] Joseph Gillan, Pre-Filed Direct Testimony, pp. 53-54 (July 26, 2005).
[226] Joseph Gillan, Pre-Filed Rebuttal Testimony, p. 40 (August 16, 2005).
[227] Joseph Gillan, Pre-Filed Direct Testimony, p. 54 (July 26, 2005).
[228] *Joint CLEC Post-Hearing Brief*, p.67 (October 28, 2005).

would enable the Authority to ensure that BellSouth was offering nondiscriminatory access to its network in a competitively neutral manner.[229] Therefore, the Authority's focus has been on access to BellSouth's network, not only on Section 251 UNEs. Further, the FCC, when approving BellSouth's Tennessee 271 application, recognized that the Tennessee Performance Plan provides sufficient incentives to foster post entry checklist compliance.[230] Such would not be the case if the performance program was limited to Section 251 elements alone. A majority of the panel voted that network elements de-listed under Section 251(c)(3) but required by Section 271 should not be removed from the SQM/PMAP/SEEM plan.[231]

ISSUE 15: TRO-CONVERSIONS

Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms, and conditions and during what timeframe should such new requests for such conversions be effectuated?

Positions of the Parties

BellSouth stated that it is required to convert special access to UNE pricing subject to the FCC's limitations on high-capacity EELs and that it is required to convert UNE circuits to special access services, provided that the CLECs have contracts that incorporate those terms. BellSouth is of the opinion that the same conversion rate should apply regardless of the conversion and has offered that the conversion be effective as of the next billing cycle following receipt of an accurate order to convert. Nevertheless, BellSouth asserted that conversions should be limited to switch-as-is arrangements.[232] Additionally, BellSouth maintained that a conversion should be considered

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[229] *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, Docket No. 01-00362, *Order Consolidating Docket Nos. 99-00347 and 00-00392 into Docket No. 01-00193 and Opening Docket No. 01-00362*, p. 6 (May 15, 2001).

[230] *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee,* WC Docket No. 02-307, *Memorandum Opinion and Order,* FCC 02-331, ¶ 168 (2002).

[231] Director Kyle did not vote in favor of the prevailing motion. It is Director Kyle's opinion that 271 network elements should not be included in the SQM/PMAP/SEEM plan. *See* Transcript of Authority Conference, p. 66 (May 15, 2006).

[232] Pamela Tipton, Pre-filed Direct Testimony, p. 52 (July 26, 2005).

termination for the purposes of any applicable volume and term discount plans or grandfathered arrangements.[233]

BellSouth proposed a rate of $23.42 to convert a single DS1 or lower capacity loop and $24.82 for a project consisting of 15 or more such loops in a state and submitted on a single spreadsheet. For DS3 and higher capacity loops and for interoffice transport conversion, BellSouth proposed a rate of $40.35 for single conversions and $64.20 for projects consisting of 15 or more elements in a state and submitted on a single spreadsheet.[234]

CompSouth asserted that BellSouth should convert a wholesale service to the equivalent network element or combination. CompSouth stated that BellSouth should charge a non-recurring switch-as-is rate for conversion with any rate change resulting from conversions becoming effective as of the next billing cycle, and similar to BellSouth, CompSouth believes that conversions should be for switch-as-is.[235]

Deliberations and Conclusions

The FCC concluded in the *TRO* that carriers could convert UNEs and UNE combinations to wholesale services so long as the CLEC meets the applicable eligibility criteria.[236] The FCC also determined that converting from wholesale services to UNE or UNE combinations should be seamless and not affect the end-user customer.[237]

The parties were in agreement that a conversion is a switch-as-is and that any change from a wholesale facility to a UNE that requires a physical change would not be considered a conversion.[238] The parties also agreed that a conversion would affect any existing volume and term arrangements or

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[233] *Id.* at p. 53.
[234] *Id.* BellSouth stated that the Authority previously ordered a rate of $52.73 for an EEL conversion.
[235] Joseph Gillan, Pre-filed Direct Testimony, Exhibit JPG-1, p. 34 (July 26, 2005).
[236] *TRO* at ¶ 586
[237] *Id.*
[238] *Joint CLEC Post-Hearing Brief*, p. 76 (October 28, 2005); *BellSouth Post-Hearing Brief*, p. 98 (October 28, 2005).

grandfathered arrangements.[239] While BellSouth proposed specific non-recurring rates,[240] the CLECs did not submit a proposed rate in their testimony.[241]

The panel voted unanimously to require BellSouth to convert special access circuits to UNE pricing and to conclude that conversions should consist of switched as-is arrangements. The nonrecurring rate should be TELRIC based, consistent with the decision in Docket No. 03-00119, include the appropriate billing charges, and should not include termination, reconnection, or disconnection fees or nonrecurring charges associated with establishing service for the first time. BellSouth may use its proposed rates on an interim basis until a permanent rate is established through negotiations or upon petition of a party. The interim rate will be trued-up to the permanent rate. The panel made no determination as to timing given the lack of input by the parties on this subject.

ISSUE 16: TRO-CONVERSIONS

What are the appropriate rates, terms, conditions, and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?

Positions of the Parties

BellSouth asserted that its obligation to convert special access circuits to UNE equivalent TELRIC circuits commenced with the *TRO*. BellSouth argued that the Authority should reject a request to make the conversion effective date preexisting the *TRO* for any circuits for which a CLEC had requested conversion before the FCC established the requirement.[242] Furthermore, BellSouth maintained that the *TRO* is not self-effectuating, referring to paragraph 710 of the *TRO* in support of this contention.[243] CompSouth asserted the position that, "Conversions pending on the effective date of the TRO should be handled using conversion provisions set forth in the amended ICAs."[244]

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[239] *Joint CLEC Post-Hearing Brief*, p. 76 (October 28, 2005); *BellSouth Post-Hearing Brief*, p. 98 (October 28, 2005).
[240] *BellSouth Post-Hearing Brief*, p. 98 (October 28, 2005).
[241] *Joint CLEC Post-Hearing Brief*, p. 77 (October 28, 2005). The CLECs did point out that in TRA Docket 04-00306 *Complaint of XO Tennessee, Inc. Against BellSouth*, BellSouth submitted cost studies that did not match the conversion rates in this proceeding.
[242] Pamela Tipton, Pre-filed Direct Testimony, pp. 54-55 (July 26, 2005).
[243] *Id.* at p. 56.
[244] Joseph Gillan, Pre-filed Direct Testimony, Exhibit JPG-1, p. 235 (July 26, 2005).

Deliberations and Conclusions

The panel found that the terms and conditions for the conversion requests that were pending on the effective date of the *TRO* should be controlled by the interconnection agreement between the parties at the time of the request with one exception. In accordance with paragraph 589 of the *TRO*,[245] in the event that a request was pending on the effective date of the *TRO*, the rate should be trued-up to the effective date of the *TRO,* whereas for conversion requests made after the *TRO* effective date that have not yet been completed, the rate should be trued-up to the date the conversion was requested.

The panel disagreed with the CLECs that any pending conversion request should be retroactively priced to the effective date of the *TRO*. Instead, any such pending conversion should be retroactively priced to the date the CLEC issued the request to BellSouth if that date was subsequent to the *TRO*. Because the *TRO* established CLECs' right to convert those circuits in those instances where a CLEC placed a request to convert circuits prior to the *TRO* those requests should be trued-up to the effective date of the *TRO*. The *TRO* provides at paragraph 589, "As a final matter, we decline to require retroactive billing to any time before the effective date of this Order."[246] The FCC further states, "To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order."[247]

The panel voted to require that for any circuit for which conversion was requested after the *TRO* but for which conversion has not been resolved, those circuits should be trued-up to the date the conversion was requested. In those situations where the request pre-dated the *TRO*, those circuits should be trued-up to the effective date of the *TRO*.

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[245] Paragraph 589 states:

> As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

[246] *TRO* at ¶ 589.

[247] *Id.*

ISSUE 17:

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

Positions of the Parties

BellSouth asserted that "[t]he FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004."[248] In addition, BellSouth contended line sharing is not a Section 271 obligation and specified that Section 271 checklist item 4 merely "requires BOCs to offer 'local loop transmission, unbundled from local switching and other services.'"[249] BellSouth thus argued that it "meets its checklist 4 obligations by offering access to unbundled loops and the 'transmission' capability on those facilities."[250] According to BellSouth, the FCC has required CLECs to obtain a whole loop or engage in line-splitting, in lieu of continuing access to line sharing.[251] Further, BellSouth asserted that it cannot be required to continue providing line sharing under Section 271 in light of the FCC's recent forbearance decision which BellSouth asserts forbears any Section 271 obligation with respect to line sharing.[252] BellSouth further asserted that the TRA previously addressed this issue in addressing a dispute between BellSouth and Covad and "determined that the FCC's transition plan constitutes the only obligation BellSouth has regarding line sharing."[253]

The CLECs argued that ILECs are required to provide line sharing under Section 271 and that line sharing must be included in the interconnection agreement.[254] They asserted that the FCC placed line sharing in checklist item 4 in every order granting any regional BOC long distance

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[248] *BellSouth's Post-Hearing Brief*, p. 55 (October 28, 2005).
[249] *Id.* at p. 56.
[250] *Id.*
[251] *Id.* at p. 59.
[252] *Id.* at pp. 59-63 (citing *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. § 169(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),* 19 FCC Rcd 21496 (2004) ("*Section 271 Broadband Forbearance Order*")).
[253] *BellSouth's Post-Hearing Brief*, p. 64 (October 28, 2005) (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 ("*Covad Arbitration*"), *Order* (July 20, 2005)).
[254] *Joint CLEC Post-Hearing Brief*, pp. 79-87 (October 28, 2005).

authority.[255] The CLECs concluded that BellSouth remains obligated to provide access to line sharing as a Section 271 element, regardless of any Section 251 unbundling determinations by the FCC.[256] The CLECs responded to BellSouth's argument about the FCC's 271 broadband forbearance decision, asserting that line sharing is not on the list of "broadband elements" for which the FCC granted forbearance in the Section 271 Broadband Forbearance Order.[257]

Deliberations and Conclusions

"Line sharing" exists "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 [high-frequency portion of the local loop]."[258] In 1999, the FCC determined that the high-frequency portion of the loop ("HFPL") "meets the statutory definition of a network element and must be unbundled pursuant to Sections 251(d)(2) and (c)(3)" of the Telecommunications Act.[259] The U.S. District Court vacated the FCC's line sharing rules and directed the FCC to apply some limiting standard rationally related to the goals of the Act.[260] In the *TRO*, the FCC declined to reinstate the line sharing rules, determining "that allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives."[261] The FCC adopted a three-year transition plan under which ILECs had no obligation to provide line sharing for new CLEC customers after October 1, 2004.[262]

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[255] *Id.* at pp. 82-83.
[256] *Id.* at p. 83.
[257] *Id.* at pp. 85-86.
[258] *TRO* at ¶ 255.
[259] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, *Third Report and Order in CC Docket No. 98-147, Fourth Report and order in CC Docket No. 96-98*, 14 FCC Rcd. 20912, 20916, ¶ 6 (1999).
[260] *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388, 142 L. Ed. 2d 834, 855, 119 S. Ct. 721, 734 (1999)).
[261] *TRO* at ¶ 260.
[262] *Id.* at ¶¶ 264-265. The transition period began on the effective date of the *TRO*, October 2, 2003. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provision of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 68 Fed. Reg. 52,276.

The panel found that, having no general obligation to provide line sharing, BellSouth may be required to provide line sharing only if such is a Section 271 obligation. Section 271, however, does not specifically require line sharing. Section 271 requires that BellSouth provide access to "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[263] The majority of the panel therefore voted that BellSouth has no obligation pursuant to the *Act* and FCC orders to provide line sharing to new CLEC customers after October 1, 2004.[264]

ISSUE 18:

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

Positions of the Parties

BellSouth asserted that it has no obligation to add new line sharing arrangements after October 2004 and that those CLECs with line sharing customers must transition the customers in accordance with the FCC's transition plan set forth in the *TRO*.[265] BellSouth therefore asserted that the interconnection agreements for CLECs with line sharing customers should incorporate both the line sharing transition plan contained in the federal rules and language requiring the CLECs to pay the stand-alone loop rate for arrangements added after October 1, 2004.[266] The CLECs argued that BellSouth has an ongoing obligation under Section 271 to provide continued access to line sharing and suggested language implementing such a requirement.

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[263] 47 U.S.C. § 271(c)(2)(iv) (2001).

[264] Director Jones did not vote in favor of the prevailing motion. Instead, it was his motion that the panel determine that BellSouth must fulfill its Section 271(c)(2)(B)(iv) obligation and, therefore, provide line sharing until such time as the FCC unequivocally grants forbearance from the line sharing obligation or declines to act on a petition that clearly requests line sharing relief.

[265] *BellSouth's Post-Hearing Brief*, pp. 65-66 (October 28, 2005).

[266] *Id.* at p. 66.

Deliberations and Conclusions

The majority of the panel voted that BellSouth has no obligation under Section 271 to provide continued access to line sharing. Accordingly, the interconnection agreements should include provisions properly implementing the transition plan established by the FCC in the *TRO*. [267]

ISSUE 19: TRO - LINE SPLITTING

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

Positions of the Parties

BellSouth argued that its line splitting obligations first applied only to CLECs providing voice services using the UNE-platform.[268] The FCC later expanded that obligation to apply when CLECs purchase stand-alone loops. According to BellSouth, the *TRRO* establishes that BellSouth no longer has an obligation to provide UNE-P or unbundled local switching. BellSouth, therefore, argued that its obligation with regard to line splitting is limited to when a CLEC purchases a stand-alone loop and provides its own splitter.[269]

Additionally, BellSouth asserted that it is not obligated to provide splitters between data and voice CLECs that are splitting a BellSouth provided UNE-L.[270] According to BellSouth, splitter functionality can easily be provided by either an inexpensive standalone splitter (placed in the CLEC's leased collocation space) or by utilizing the integrated splitter built into all Asynchronous Digital Subscriber Line ("ADSL") platforms.[271]

The CLECs maintained that there are three issues in dispute on line splitting: (1) the availability of line splitting to the UNE-P "embedded base"; (2) BellSouth's obligations when BellSouth chooses to control the splitter; and (3) BellSouth's obligations to make all necessary

[267] Director Jones did not vote in favor of the prevailing motion.
[268] *Motion for Summary Judgment*, p. 56 (June 1, 2005).
[269] *Id.* at p. 57.
[270] Eric Fogle, Pre-Filed Rebuttal Testimony, p. 8 (August 16, 2005).
[271] Eric Fogle, Pre-Filed Direct Testimony, p.10 (July 26, 2005).

modifications to its operating support system ("OSS") to facilitate line splitting.[272] In their *Post Hearing Brief*, the CLECs introduced two additional areas of disagreement: (1) whether line splitting can involve the commingling of 251 and 271 elements; and (2) whether a CLEC should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLEC involved in the line splitting arrangement.[273]

Deliberations and Conclusions

Paragraphs 251 and 252 of the *TRO* address the line splitting issue. The FCC has stated: "We find that when competitive carriers opt to take an unbundled stand-alone loop, the incumbent LEC must provide the requesting carrier with the ability to engage in line splitting arrangements."[274] The *TRO* requires that "incumbent LECs modify their OSS in such a manner as to facilitate line splitting" and "provide access to physical loop test access points on a nondiscriminatory basis."[275] The FCC also readopted its rules "allowing incumbent LECs to maintain control over the loop and splitter equipment and functions in certain circumstances."[276]

The panel voted unanimously that in order for BellSouth to fulfill its obligation it must (1) facilitate line splitting including providing the splitter when requested to do so, (2) allow the Data LEC, the Voice CLEC, or a third Party to provide the splitter (as desired by the CLEC); and (3) modify its OSS in accordance with 47 C.F.R. § 51.319(a)(1)(ii) to facilitate line splitting.

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[272] *Joint CLECs' Response to BellSouth's Motions For Summary Judgment or Declaratory Ruling*, p. 65 (July 1, 2005).

[273] The question of whether line splitting can involve the commingling of Section 251 and 271 elements will be resolved by the resolution of Issue 14 regarding commingling (in this Docket). The parties' disagreement over "indemnification" is not relevant to line splitting. Further, no pre-filed or Hearing testimony or evidence regarding line splitting indemnification was presented by either party. Therefore, the issue is not appropriate for consideration in this particular docket. *Joint CLEC Post-Hearing Brief*, pp. 87-88 (October 28, 2005).

[274] *TRO* at ¶ 251.

[275] *Id.* at ¶ 252.

[276] *Id.*

ISSUE 23: GREENFIELD AREAS

(a) What is the appropriate definition of minimum point of entry ("MPOE")?

(b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly deployed or "greenfield" fiber loops, including fiber loops deployed to the 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?

Positions of the Parties

BellSouth argued that it has no obligation to provide unbundled fiber-to-the-home mass market loops serving greenfield areas or areas of new construction. According to BellSouth, fiber-to-the-home loops apply predominantly to multiple dwelling units ("MDU") such as condominiums. Regarding fiber-to-the-curb, BellSouth cited the FCC's order on reconsideration regarding MDUs ("*MDU Reconsideration Order*").[277] BellSouth asserted that, per this FCC order, fiber-to-the-curb is a transmission facility connecting a copper distribution plant that is not more than 500 feet from the customer's premises. BellSouth further cited the FCC's decision in the *MDU Reconsideration Order*, in support of its contention that the appropriate definition for MPOE is either the closest practical point to where the wiring crosses the property line or the closest point to where the wiring enters a building.[278]

BellSouth requested the Authority to rule that BellSouth is not required to unbundle fiber-to-the-home or fiber-to-the-curb in greenfield areas; that it has no obligation to unbundle fiber-to-the-home or fiber-to-the-curb serving predominantly residential multi-dwelling units; that it has no obligation to unbundle fiber loop facilities to the MPOE or MDU, regardless of whether the ILEC owns or controls any copper cable facilities in the MDU; and that the MPOE should be defined in accordance with the aforementioned FCC decision.[279]

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[277] *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, ¶ 1, 20297, ¶ 9 (2004).

[278] *Motion for Summary Judgment*, pp. 41-42 (June 1, 2005).

[279] *Id.* at p. 43.

The CLECs stated that they did not dispute issues "related to the MPOE definition or ownership of inside wiring from the MPOE to end users" and had "no objection to much of the proposed contract language BellSouth has suggested for implementing these FCC Orders."[280]

Deliberations and Conclusions

With respect to the unbundling obligations for greenfield fiber loops, the FCC rules established in the original *TRO* have not been overturned. FCC Rule 51.319(a)(3)(ii) provides, "An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility."[281]

The FCC has clearly stated "Incumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops."[282] The FCC further clarifies that unbundling requirements for greenfield loops are less stringent than fiber overbuild situations, stating "we do not require incumbent LECs to provide unbundled access to new FTTH loops for either narrowband or broadband services."[283] In a clarification of the greenfield fiber rules, the FCC stated that "the fiber-to-the-home (FTTH) rules will apply to MDUs that are predominantly residential."[284]

The majority of the panel found that FCC orders reflect the CLECs' argument that they have access to greenfield fiber loops and voted that BellSouth does not have an obligation to provide access to its greenfield fiber plant used to serve mass markets nor enterprise markets where no impairment exists. BellSouth has a continuing obligation to make available DS1 and DS3 UNE loops in the enterprise market where impairment exists. This includes the obligation to make

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[280] *Joint CLEC Post-Hearing Brief*, pp. 90 (October 28, 2005).
[281] 47 C.F.R. § 51.319(a)(3)(ii).
[282] *TRO* at ¶ 273.
[283] *Id.* at ¶ 275.
[284] *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).

available greenfield fiber DS1 and DS3 UNE loops serving enterprise markets including multiple dwelling units containing predominately business customers.[285]

ISSUE 24: HYBRID LOOPS

What is the appropriate interconnection agreement language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

Positions of the Parties

BellSouth witness, Eric Fogle testified that, "[a] hybrid Loop is a local Loop composed of both fiber optic, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant."[286] BellSouth argued that it is not required to provide access to unbundled hybrid loops. According to BellSouth the FCC determined that hybrid loops are part of the next-generation network, and expressed concern that unbundling hybrid loops would stymie deployment of fiber-based networks. The exception is with regard to the time division multiplexing feature of a hybrid loop in an overbuild situation.[287] According to BellSouth, CompSouth's position that the hybrid loops should be made available pursuant to Section 271 is inaccurate and the Authority should not include Section 271 language in a Section 252 agreement.

CompSouth asserted that a hybrid loop is composed of both fiber and copper wire, and that BellSouth should provide CLECs with nondiscriminatory access to the time division multiplexing features, function and capabilities of hybrid loops, including DS1 and DS3 capacity under Section 251 where impairment exists. Where impairment does not exist, BellSouth should provide hybrid loops at just and reasonable rates pursuant to Section 271.[288]

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[285] Director Jones did not vote in favor of the prevailing motion. Instead, it was his motion that the panel determine as to Issue 23(a) that the definition of MPOE adopted by this agency should be that contained in 47 C.F.R. § 68.105. As to Issue 23(b), he moved that the panel conclude that BellSouth has no obligation to provide in newly deployed or greenfield areas: (1) unbundled fiber-to-the-home or fiber-to-the-curb mass market loops or (2) unbundled fiber-to-the-home or fiber-to-the-curb loops deployed to the minimum point of entry of predominantly residential multi-dwelling units, regardless of whether the ILEC owns or controls any copper facilities in the multi-dwelling units. In support of this motion, Director Jones relied upon paragraphs 273 through 280 of the *TRO*, paragraphs 2 through 14 of the *FTTC Reconsideration Order*, paragraphs 2 through 11 of the *MDU Reconsideration Order*, and 47 C.F.R. § 51.319(a)(3)(ii).

[286] Eric Fogle, Pre-filed Direct Testimony, p. 16 (July 26, 2005).

[287] *Id.* at p. 18.

[288] Joseph Gillan, Pre-filed Direct Testimony, Exhibit JPG-1, p. 51 (July 26, 2005).

CompSouth maintained that the only limitation on BellSouth's obligation to provide access to hybrid loops is with regard to the packet-based capabilities.[289] Furthermore, CompSouth asserted that BellSouth is wrong in its assertion that its unbundling limitation extends to the enterprise market for DS1 and DS3 loops.

Deliberations and Conclusions

The FCC, has determined that an ILEC does not have to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market.[290] The FCC did, however, require ILECs to "provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information."[291] The FCC concluded that "LECs must provide unbundled access to a complete transmission path over their TDM networks to address the impairment we find that requesting carriers currently face."[292] Furthermore, the FCC stated that:

> [w]e stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers. These TDM-based services – which are generally provided to enterprise customers rather than mass market customers – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs.[293]

The majority of the panel found that while BellSouth has no obligation to provide unbundled access to the packet switched features of its hybrid loops pursuant to 47 C.F.R. § 51.319(a)(2)(i), BellSouth has an obligation to provide access to hybrid loops for broadband services and voice-grade service, using time division multiplexing technology pursuant to 47 C.F.R. § 51.319(a)(2)(ii) and (iii). The majority of the panel also found that the CLECs' claim that a non-impaired DS1 or DS3 hybrid loop should be made available under Section 271 should be dismissed because the availability

[289] *Joint CLEC Post-Hearing Brief*, p. 95 (October 28, 2005).
[290] *TRO* at ¶ 288
[291] *Id.* at ¶ 289
[292] *Id.*
[293] *Id.* at ¶ 294 (footnotes omitted).

and pricing of DS1 and DS3 loops is outside the scope of this issue, and that determination will be made independently of this issue.

The majority of the panel voted that BellSouth must offer hybrid loops in accordance with 47 C.F.R. § 51.319 (a) (2) (2005) and *TRO* paragraphs 294 and 289. Further, the majority of the panel voted to dismiss the CLECs' claim that a non-impaired DS1 and DS3 hybrid loop should be made available under Section 271.[294]

ISSUE 26: TRO – ROUTINE NETWORK MODIFICATION

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

Positions of the Parties

BellSouth stated it is not obligated to perform routine network modifications that it would not regularly undertake for its own customers or which result in superior quality for CLECs.[295] BellSouth contended that the same rules that apply to routine network modifications also apply to line conditioning and that it is obligated to perform line conditioning for CLECs on the same terms and conditions that BellSouth provides for its own customers.[296]

The CLECs stated that the real dispute is over the appropriate contract language and that BellSouth should not be allowed to expand the activities that are excluded from routine network modifications.[297] The CLECs asserted 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 or whether BellSouth's failure of a particular performance measure should be excused because the need for routine network modification was not anticipated when

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[294] Director Jones did not vote in favor of the prevailing motion having characterized the issue differently than the majority. Director Jones determined that the only determination raised by BellSouth under this issue was whether the CLECs should be able to include language with regard to BellSouth's Section 271 obligations in the interconnection agreement. In response, he moved that the language in the interconnections agreement may include Section 271 obligations and should accurately reflect BellSouth's obligation to provide access to hybrid loops as reflected in 47 C.F.R. § 51.319 (a) (2) and the *TRO*.

[295] *Motion for Summary Judgment*, p. 60. (June 1, 2005).

[296] *Id.* at p. 60.

[297] *Joint CLECs' Response*, p. 67 (July 1, 2005).

setting performance intervals.[298] The CLECs also asserted that the *TRO* line conditioning rules do not limit BellSouth's obligation to perform line conditioning to instances that also happen to qualify as routine network modifications; instead the *TRO* provided separate rules for these separate obligations.[299]

Deliberations and Conclusions

The parties raise two issues. The first is whether line conditioning is a subset of routine network modification and, therefore, limited to provisioning only when BellSouth performs line conditioning for its customers. The second issue raised by the CLECs is whether language concerning the nondiscriminatory provisioning of routine network modifications stricken by BellSouth in its rebuttal testimony should be included in the agreement.

As to the first issue, line conditioning should not be treated the same as routine network modifications. In the *UNE Remand Order,* the FCC required line conditioning because without such conditioning access to the line might not include access to all the features, functions and capabilities of the line.[300] Thus, the FCC determined that line conditioning falls within the definition of the line.[301] In the *TRO,* the FCC stated: "we readopt the Commission's previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order.*" The FCC's references in the *TRO* and the *UNE Remand Order* to Section 251(c)(3) of the *Act* relate to the CLECs' right to nondiscriminatory access to the line, which necessarily includes line conditioning.[302] Thus, the obligation to provision line conditioning is tied to the obligation to provision the line and is not dependant on how or whether the ILEC provides line conditioning to its retail customers. Further, BellSouth's argument that line conditioning is nothing more than a particular routine network modification must be rejected as the argument is inconsistent with the underlying reasoning of the

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[298] *Id.* at p. 68.
[299] *Id.* at pp. 69-71.
[300] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Rulemaking*, 15 FCC Rcd. 3696, ¶ 173 (1999) ("*UNE Remand Order*").
[301] *Id.*
[302] *Id.* at ¶ 173; *TRO* at ¶ 643.

FCC supporting the provisioning of line conditioning and the language of the FCC suggesting that routine network modifications and line conditioning are similar, not that one is a subset of the other.[303] As to the second issue, to the extent that a party seeks to include language in the agreement that is consistent with the rule, such language should be included.

Based on the foregoing, the majority voted that the appropriate interconnection agreement language to implement BellSouth's obligation to provide routine network modifications should be consistent with 47 C.F.R. § 51.319 and should not include line conditioning.

ISSUE 27: ROUTINE NETWORK MODIFICATION

What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission–approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

Positions of the Parties

BellSouth stated that if it is required to perform a routine network modification, the rate should be based on TELRIC, and if it is not obligated to perform a particular network modification, the rate should be that contained in the applicable tariff or a commercial agreement.[304]

The CLECs objected to "any proposal that would allow BellSouth to impose 'individual case basis' ("ICB") pricing for routine network modifications.'"[305] The CLECs argued, the Authority should not allow BellSouth to impose unpredictable "special construction" pricing for line conditioning and affirmed that TELRIC rates for bridge tap and load coil removal should apply.[306] The CLECs also maintained that to the extent BellSouth has not priced these routine network modifications into its recurring and non-recurring charges, BellSouth should demonstrate its costs and establish a cost-based rate.[307] This course of action, the CLECs claimed, would prevent double recovery of routine network modifications by BellSouth.[308]

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[303] *TRO* at ¶ 635.
[304] Eric Fogle, Pre-Filed Direct Testimony, p. 27 (July 26, 2005).
[305] *Joint CLEC Post-Hearing Brief*, p.108 (October 28, 2005).
[306] *Id.* at p. 109.
[307] *Id.*
[308] *Id.*

Deliberations and Conclusions

The majority of the panel voted that the appropriate process for establishing a rate for routine network modifications not already recovered in Authority approved recurring or non-recurring rates is through TELRIC-based cost studies submitted by BellSouth and approved by the Authority.[309] Such pricing methodology is also supported by 47 U.S.C. § 251(c)(3) that requires ILECs:

> to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

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?

Positions of the Parties

BellSouth asserted that interconnection agreements should not include any language with respect to unbundling of Fiber to the Home ("FTTH") and Fiber to the Curb (FTTC) loops in Greenfield situations.[310] BellSouth also argued that it is only obligated to unbundled 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.[311] According to BellSouth the FCC determined that ILECs have no obligation to unbundle FTTH mass market loops serving greenfield areas or areas of new construction.[312]

The CLECs asserted that this issue embodies the Parties' attempt to craft ICA language that meets the standards set forth by the FCC. In addition, other disputes exist over the meaning of technical terms used by the FCC in its decisions and specific operational aspects of implementing

[309] Director Jones' motion was generally in agreement with the prevailing motion except his motion also set forth the mechanisms through which rates could be set: (1) petition of BellSouth, (2) negotiation or (3) arbitration.
[310] *Motion for Summary Judgment*, p. 63. (June 1, 2005).
[311] *Id.*
[312] Eric Fogle, Pre-Filed Direct Testimony, p. 19. (July 26, 2005), referencing paragraph 275 of the *TRO*.

proposed contract terms (e.g., what constitutes "Fiber to the Home" versus "Fiber to the Curb" or what in particular distinguishes "greenfield" from "brownfield" situations).[313]

Deliberations and Conclusions

The FCC defines FTTH as a "local loop consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark, that connects a customer's premises with a wire center (i.e., from the demarcation point at the customer's premises to the central office)."[314] The FCC also defines FTTC :

> FTTC loop deployments bring fiber from the central office to a location near – but not all the way to – the customer's premises. The fiber is connected to an optical network unit (ONU) or similar electronics at that location, from which copper and, often, coaxial cable are connected to each customer premises to provide voice, multichannel video, and high-speed data services. An ONU typically serves, for example, eight to 12 homes.[315]

Two questions are raised under this issue. The first is whether FTTH and FTTC obligations with regard to overbuild situations apply only to mass market loops.[316] The answer is yes.[317]

The second question raised is whether BellSouth may restore on a project basis rather than within the standard loop provisioning interval a copper loop in an overbuild situation where the copper loop has not been retired. Neither the *TRO* nor the FCC's rules address this specific question. Nevertheless, given that BellSouth is required to provision the copper loop as part of its Section 251 unbundling obligations and pursuant to 47 C.F.R. § 51.319(a)(iii)(A) in a nondiscriminatory manner, it must provision the copper loops within the standard loop provisioning interval. If BellSouth is unable to meet the standard loop provisioning interval, then it must provide a 64kbps voice grade channel over its FTTH/FTTC facilities while the copper is being restored.[318]

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[313] *Joint CLECs' Response*, p. 51. (July 1, 2005).
[314] *TRO* at ¶ 273, n.802.
[315] *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, ¶ 1, n.1 (October 18, 2004) ("*FTTC Reconsideration Order*")
[316] *TRO* at ¶¶ 274, 277-80.
[317] *FTTC Reconsideration Order* at ¶ 6.
[318] *TRO* at ¶ 277; 47 CFR 51.319(a)(3)(iii)(C).

Based on the foregoing, the panel unanimously voted to affirm its earlier summary judgment decision and to specify that FTTH and FTTC obligations in overbuild situations apply only to mass market loops. Further, the panel unanimously voted that (1) in overbuild situations where BellSouth retains the copper loops, BellSouth will make those copper loops available to CLECs on an unbundled basis within the standard loop provisioning interval; (2) where BellSouth is unable to meet the standard loop provisioning interval, BellSouth must provide a 64kbps voice grade channel over its FTTH/FTTC facilities while the copper is being restored; (3) BellSouth's retirement of copper loops must comply with applicable law; and (4) where copper has been retired, BellSouth will offer a 64kbps voice grade channel over its FTTH/FTTC facilities.

ISSUE 29: EEL AUDITS

What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

Positions of the Parties

BellSouth stated that in order to obtain an EEL, a CLEC must self-certify that the EEL meets the eligibility requirements set forth in the *TRO*.[319] Since it has no ability to challenge a CLEC's certification on the front end, BellSouth argued that the *TRO* provides it with audit rights to ensure the CLEC's compliance with EEL eligibility requirements.[320] Therefore, BellSouth insisted that it has the right to audit CLECs annually as a matter of law.[321] Additionally, BellSouth asserted that it is not under any obligation to show cause prior to conducting such audits because the CLECs do not have to show any data that demonstrates they are qualified to order EELs.[322]

BellSouth also maintained that as long as the American Institute for Certified Public Accountants ("AICPA") standards are followed, any auditor who can meet such standards should be

[319] *Motion for Summary Judgment*, p.64 (June 1, 2005).
[320] *Id.*
[321] *Id.* at p. 65.
[322] Transcript of Proceedings, v. III. p. 240 (September 13, 2005); *see also* Pamela A. Tipton, Pre-Filed Rebuttal Testimony, p. 36 (August 16, 2005).

acceptable to perform EEL audits.[323] Additionally, there is no requirement for the parties to agree to a particular auditor or even to have an acceptable list of auditors in advance.[324]

Finally, BellSouth argued that the cost of the audit should be borne by BellSouth unless the auditors find that the CLEC did not comply in even one material respect with the EEL service eligibility criteria.[325] If the audit report concludes the CLEC complied with the eligibility criteria in all material respects BellSouth will reimburse the CLEC for all costs associated with the audit.[326]

The CLECs conceded that BellSouth has limited audit rights, as defined in the *TRO*, however, such audit rights must be based upon cause and in compliance with the eligibility criteria established in the *TRO/TRRO*.[327] The CLECs argued that there is no requirement in any of the FCC's orders that would allow BellSouth to conduct audits unfettered and that BellSouth must demonstrate it has sufficient cause to believe a CLEC has erroneously certified compliance of its EELs.[328] In particular, the CLECs asserted that BellSouth should provide the CLECs with proper notification and the basis of the audit that demonstrates that BellSouth has good cause to conduct an audit.[329] The CLECs maintained that documentation necessary to establish cause and the scope of an audit, the selection of independent auditors, instruction given to the auditors, and who pays for the audit fees and the CLECs' costs are among the issues that need to be resolved by the Authority.[330]

Deliberations and Conclusions

The FCC's *Supplemental Order Clarification* found that incumbent LECs "must provide at least 30 days written notice to a carrier… that it will conduct an audit."[331] Additionally, paragraph

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[323] Pamela A. Tipton, Pre-Filed Direct Testimony, p. 60 (July 26, 2005).
[324] *Id.*
[325] *Id.* at p. 62.
[326] *Id.* at p. 61.
[327] *Joint CLECs' Response to BellSouth's Motions for Summary Judgment or Declaratory Ruling,* p. 71 (July, 1, 2005).
[328] *Id.* at 72.
[329] Joseph Gillan, Pre-Filed Direct Testimony, p. 61 (July 26, 2005).
[330] *Joint CLECs' Response to BellSouth's Motions for Summary Judgment or Declaratory Ruling,* p. 72 (July, 1, 2005).
[331] *Implementation of the Local Competition Provisions Of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd. 9587, 9603-4, ¶ 31 (June 2, 2000).

625 of the *TRO* states that implementation of EEL audits "may be specific to related provisions of interconnection agreements or to the facts of a particular audit, and that states are in a better position to address that implementation."[332] The plain reading of paragraph 625 shows the FCC's intent that the states decide such issues as how CLEC EEL audits must be initiated as well as how they should be conducted when the parties involved in the audits cannot agree.

As long as the requirement that AICPA standards will be followed, any auditor who can meet such standards should be acceptable to perform EEL audits.[333] This position is supported by paragraph 626 of the *TRO* that provides that "incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria."[334] There is no requirement that the auditor selected by the incumbent LEC must be approved by the CLEC. The Authority addressed this same issue in TRA Docket No. 02-01203 where the Authority was asked to enforce interconnection agreements between BellSouth and ITC^DeltaCom Communications, Inc. ("DeltaCom") and with XO Tennessee, Inc. because the agreements did not contain specific language that permitted the CLECs to participate in the selection of the auditor. In Docket No. 02-01203, the Authority determined that "BellSouth shall submit for TRA approval the letter of engagement between itself and its independent auditor"[335] in order to resolve this dispute. Such language should be included in BellSouth's interconnection agreements with CLECs, to avoid a continual disagreement concerning the independence of the auditor selected by BellSouth and the manner in which the audit will be conducted. In addition, CLECs should be able to know the identity of the auditor BellSouth has selected to perform the audit prior to the audit commencing.

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[332] *TRO* at ¶ 625.
[333] Pamela A. Tipton, Pre-Filed Direct Testimony, p. 60 (July 26, 2005).
[334] *TRO* at ¶ 626.
[335] *See In re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and ITC^DeltaCom Communications, Inc.; Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and XO Tennessee, Inc.,* Docket No. 02-01203, *Order Approving Report and Recommendation*, p. 5 (September 29, 2004).

Paragraph 627 of the *TRO* addresses who pays for EEL audits, stating:

> Thus to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor.[336]

Continuing, paragraph 628 of the *TRO* states:

> Similarly, to the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit.[337]

Based on these paragraphs, the majority of the panel finds that the FCC intended the cost of EEL audits to be borne by the CLEC if the CLEC is found non-compliant in even one respect of the service eligibility criteria and to be reimbursed to the CLEC only if the CLEC was found compliant in all material respects of the service eligibility criteria.

The majority of the panel voted that BellSouth may conduct an EEL audit no more frequently than once a year and only when it has a concern that the requesting carrier has not met the criteria for providing a significant amount of local exchange service. The majority also voted that, prior to commencing an audit, BellSouth shall notify the CLEC in writing of its intent to audit the CLEC's service eligibility criteria. Such notice shall include the concern upon which the audit will be based; however, such concern need only be stated generally without the requirement to detail such things as the number, type or identity of circuits to be audited. This notice shall be provided to the CLEC to be audited at least 30 days prior to the start of the audit pursuant to paragraph 31 of the *Supplemental Order*[338] and shall include the name of the independent auditor BellSouth has selected to perform the audit. A copy of this notice shall be furnished to the Authority.

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[336] *TRO* at ¶ 627.
[337] *Id.* at ¶ 628.
[338] *Supplemental Order Clarification* at ¶ 31. This is not consistent with the Authority decision in Docket No. 02-01203. However, in that Docket, the Authority was asked to interpret an existing interconnection agreement that did not contain specific language covering this issue. In Docket No. 02-01203 the Authority found that BellSouth was not required to articulate a justification prior to the commencement of an audit conducted pursuant to the terms of the agreement.

The majority of the panel voted, consistent with the Authority's decision in Docket No. 02-01203, that if a CLEC challenges the concern provided by BellSouth, or the independence of the auditor selected, BellSouth shall submit for TRA approval the letter of engagement between itself and its independent auditor along with a proposed methodology/procedure for conducting each EEL audit. The majority also voted that the cost of EEL audits shall be borne by the CLEC if the CLEC is found non-compliant in only one material respect of the service eligibility criteria. The CLEC shall be due reimbursement for its costs by BellSouth only if the CLEC is found compliant in each and every material respect of the service eligibility criteria.[339]

ISSUE 31: ISP REMAND CORE FORBEARANCE ORDER

What language should be used to incorporate the FCC's *ISP Remand Core Forbearance Order*[340] into interconnection agreements?

Positions of Parties

The CLECs argued that changes to reflect the *ISP Remand Core Forbearance Order* should be implemented the same as changes stemming from the *TRRO*.[341] The CLECs asserted that the *ISP Remand Core Forbearance Order* "requires that reciprocal compensation provisions delete references to the 'new markets' and 'growth caps' restrictions that were part of the FCC's *ISP Remand Order*."[342] BellSouth stated that language to implement the *ISP Remand Core Forbearance Order* should be negotiated on a case-by-case basis.[343]

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[339] Director Jones did not vote in favor of the prevailing motion having characterized the determinations to be made within the issue more narrowly than the majority. His position departed significantly from the majority's decision with regard to who pays for the audit. It was Director Jones' motion that the cost of an audit shall be paid by the CLEC if the CLEC is found to have failed to comply in all material respects with the service eligibility criteria. The CLEC shall be reimbursed its costs by BellSouth, if the CLEC is found compliant in all material respect with the service eligibility criteria. Director Jones also determined that prior to commencing an audit, BellSouth shall notify the CLEC in writing of BellSouth's intent to audit the CLEC's service eligibility criteria and include in the notice a general statement as to the concern upon which the intent to audit is based. Additionally, Director Jones determined that there is no requirement that the parties mutually agree to the auditor.

[340] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-17 (October 18, 2004) (*"ISP Remand Core Forbearance Order"*).

[341] *Joint CLEC Post-Hearing Brief,* p. 114 (October 28, 2005).

[342] Joseph Gillan, Pre-Filed Direct Testimony, Exhibit JPG-1 p. 59 (July 26, 2005).

[343] Pamela A. Tipton, Pre-Filed Direct Testimony, p.65.

Deliberations and Conclusions

Upon review of the parties' post-hearing brief, there does not appear to be a controversy concerning whether the *ISP Remand Core Forbearance Order* should be implemented and what the Order requires. Rather, the parties disagree as to whether the Order should be implemented by the Authority adopting contract language, as requested by the CLECs, or by bilateral negotiations as requested by BellSouth. The dispute is whether the subject matter of the *ISP Remand Core Forbearance Order* should be included within the *TRRO* negotiations.

BellSouth and the CLECs did not submit proposed contract language to resolve this issue. Only DeltaCom submitted language that it claimed implements the *ISP Remand Core Forbearance Order.* Because the Authority encourages negotiations between parties and because there does not appear to be disagreement about the substantive provisions of the *ISP Remand Core Forbearance Order*, the panel found that BellSouth cannot refuse to negotiate inclusion of language to implement the *ISP Remand Core Forbearance Order* in the course of adopting *TRRO* amendments.

The panel voted unanimously that BellSouth be required to negotiate amendments resulting from the *ISP Remand Core Forbearance Order* in the course negotiating *TRO* and *TRRO* amendments.

ORDERED

The foregoing *Order* reflects the TRA resolution of Issue Nos. 1, 2, 3, 5, 6, 8(a-c), 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 26, 27, 28, 29, 31 and 32. All resolutions contained herein comply with the provisions of the Telecommunications Act of 1996 and are supported by the record in this proceeding.

Ron Jones, Chairman[344]

11-20-07

Pat Miller, Director

Sara Kyle, Director

[344] Director Jones provided additional comments on or dissented from the determinations of Issues 3, 5, 6, 10, 14, 17, 18, 22, 23, 24, 27, 29 and 32.