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VIA HAND DELIVERY

Hon. Eddie Roberson, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

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

Dear Chairman Roberson:

Enclosed are the original and four copies of *AT&T Tennessee's Response to CompSouth's Petition for Reconsideration.*

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*

Docket No. 04-00381

AT&T TENNESSEE'S RESPONSE TO COMPSOUTH'S PETITION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T Tennessee") respectfully submits this response to the Petition for Reconsideration ("Petition") filed by the Competitive Carriers of the South, Inc. ("CompSouth") in the above-referenced docket. In its Petition, CompSouth requests the Tennessee Regulatory Authority ("Authority") to reverse course and change its commingling decision (Issue 14) as set forth in the Authority's Order dated November 28, 2007 ("*Order*").[1] Regarding commingling, the Authority correctly concluded that AT&T Tennessee (then known as BellSouth) has no obligation under federal law "to commingle UNEs [unbundled network elements] 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."[2] As discussed below, the Authority's commingling ruling is consistent with federal law as pronounced by the Federal Communications Commission ("FCC") in its *Triennial Review Order*,[3] wherein the

[1] *Order* at 27-33.
[2] *Id.* at 32.
[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated and remanded in part, aff'd in part,*

FCC held that carriers like AT&T Tennessee were not required "pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[4] Additionally, the Authority's commingling decision is completely consistent with the FCC's elimination of the UNE Platform ("UNE-P") regime in its *Triennial Review Remand Order* ("*TRRO*")[5] wherein the FCC ended the UNE-P regime in order to encourage facilities-based competition and discourage dependence on the networks of incumbent local exchange carriers ("ILECs") like AT&T Tennessee.[6]

In its Petition, CompSouth largely repeats it core commingling argument (i.e. that "wholesale facilities and services" that are subject to the FCC's commingling rule should be expanded to include elements unbundled pursuant to Section 271 of the Telecommunications Act of 1996 (the "Act").[7] This tired argument has already been made, considered, and properly rejected by the Authority. Except as noted below, because CompSouth offers nothing new in support of its position – a position that would impermissibly resurrect access to the same set of facilities that comprise UNE-P[8] -- the Authority should deny CompSouth's Petition.[9]

United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) *("USTA II"), cert. denied, NARUC v. United States Telecom Ass'n,,* 125 S. Ct. 313 (2004).

[4] *TRO*, ¶ 655, footnote 1989 (prior to the issuance of the *TRO*'s Errata, footnote 1989 was footnote 1990).

[5] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[6] *TRRO*, ¶ 218.

[7] *Cf.* Petition *and* CLEC Post-Hearing Brief at pp. 69-75.

[8] If commingling were permitted in the manner suggested by CompSouth, that would not change the fact that switching as a Section 271 checklist item remains subject only to a market-rate pricing requirement. *See TRO,* ¶ 664. It remains AT&T Tennessee's position that the

That said, CompSouth offers two new arguments in support of its Petition. As discussed below, both arguments are unavailing and should be disregarded by the Authority.

The Authority should disregard the *NuVox v. Edgar* court opinion because the opinion undermines federal law regarding the scope of 271 obligations and is contrary to federal policy mandating the eliminate of UNE-P in favor of genuine competition.

In support of its Petition, CompSouth claims that the Authority's decision is inconsistent with the "only" federal court decision that is on point – *NuVox Communications v. Edgar*, 511 F.Supp.2d 1198 (N.D. Fla. 2007)("*NuVox v Edgar*").[10] This assertion overlooks other federal court cases. In an appeal of an arbitration order issued by the Missouri Public Service Commission ("MPSC"), the federal court reversed the MPSC's decision which had required Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC") to combine Section 271 elements with Section 251 facilities:

> Separate from the issue of the MPSC's jurisdiction to impose obligations on SBC under § 271, SBC argues that the substantive obligations imposed in the Arbitration Order contravene the clear intent of the FCC as expressed in the TRRO, and are therefore preempted. Specifically, SBC contends that the MPSC's requirement that it combine switching, which is only required under § 271, with facilities required under § 251 creates the same substantive

Authority has no jurisdiction to determine compliance with Section 271. *See* 47 U.S.C. § 271(d)(6).

[9] For the Panel's convenience, AT&T Tennessee has as attached as Exhibit A to this response, the commingling discussion set forth in BellSouth Telecommunications, Inc.'s Post-Hearing Brief. To the extent necessary, AT&T Tennessee incorporates by reference the aforementioned commingling position.

[10] Petition at 1.

combination as the UNE Platform and is directly contrary to the FCC's holding. The Court agrees.[11]

Additionally, a federal court in Mississippi has likewise concluded that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it . . . clear that there is no federal right to 271-based UNE-P arrangements.'"[12] In short, CompSouth's claim that *NuVox v Edgar* is the only case on point is inaccurate. Further, although NuVox Communications, Inc. is a CompSouth member, CompSouth failed to mention that the commingling aspect of the *NuVox v Edgar* decision is on appeal and is currently pending before the United States Court of Appeals for the Eleventh Circuit.[13]

In *Nuvox v. Edgar*, the district court vacated a Florida Public Service Commission ("FPSC") ruling which held that BellSouth did not have an obligation under federal law to commingle UNEs with Section 271 elements.[14] In doing so, the District Court did not address the FCC's holding that BOCs (like AT&T

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[11] *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1069 (E.D. Mo. 2006), *appeals pending*, Docket Nos. 06-3701, 06-3726, 06-3727 (8th Cir.).

[12] *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565 (S.D. Miss. 2005) (quoting Order Implementing TRRO Changes, Case No. 05-C-0203, 2005 WL 607973, at *13 (N.Y. Pub. Serv. Comm'n Mar. 16, 2005)); *see also Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149, 2006 WL 2796488, at *14 (N.D. Ill. Sept. 28, 2006) (rejecting state commission's attempt to require the combination of § 251 elements and § 271 elements); Opinion, *Indiana Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communications Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order*, Cause No. 42857, 2006 Ind. PUC LEXIS 40, at *53 (Ind. Util. Reg. Comm'n Jan. 11, 2006) ("[F]ootnote 1990 also holds that ILECs are not required to combine Section 271 network elements because Section 271 does not contain any such requirement. Since neither Section 271 nor the FCC's interpretation requires commingling of Section 271 network elements, the same analysis applies.").

[13] Case No. 07-13028-F (oral argument scheduled for January 17, 2008).

[14] Final Order Regarding Petition for Arbitration, FPSC Docket No. 040130-TP, Order No. PSC-05-0975-TP at 19.

Tennessee) are not required "pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[15] The district court also failed to address the FPSC's conclusion that a requirement to provide Section 271 and Section 251 elements in pre-combined form would effectively recreate a hybrid form of UNE-P, which the FPSC noted would be "contrary to the FCC's goal of furthering competition through the development of facilities-based competition."[16] Again, the *Nuvox v. Edgar* decision is on appeal, and as discussed above, the district court's decision cannot be squared with federal law regarding Section 271 and federal policy regarding the elimination of UNE-P. As such, the Authority should decline the invitation to adopt the reasoning in *NuVox v. Edgar* and thus should deny CompSouth's Petition for Reconsideration.

CompSouth concedes, as it must, that *USTA II* upheld the FCC's determination that BOCs (like AT&T Tennessee) have no obligation to combine 271 elements with 251 elements,[17] but then makes the strained argument this does not necessarily mean that AT&T Tennessee has no obligation to commingle 271 elements with 251 elements.[18] In essence, CompSouth suggests that the same substantive result is required so long as it is termed a "commingling" request and not a request for a "combination" of facilities. Such a suggestion is incorrect.

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[15] *Triennial Review Order*, ¶ 655 footnote 1989.

[16] Final Order Regarding Petition for Arbitration, FPSC Docket No. 040130-TP, Order No. PSC-05-0975-TP at 19

[17] Petition at 7; *Triennial Review Order*, ¶ 655 footnote 1989. The D.C. Circuit specifically affirmed the FCC's decision not to require that companies like AT&T Tennessee provide on a combined basis facilities offered only under Section 271 with other facilities. *United States Telecom Ass'n v. FCC,* 359 F.3d 554, 589-590 (D.C. Cir. 2004) *("USTA II"), cert. denied, NARUC v. United States Telecom Ass'n,,* 125 S. Ct. 313 (2004)

[18] Petition at 7.

Again, the FCC specifically discussed the concept of "combining" in terms of Section 271 facilities, and it declined to impose such an obligation in this context. Nowhere in the *TRO* did the FCC indicate that its limitation on combining as to Section 271 was utterly meaningless because, as CompSouth argues here, the same substantive obligation is imposed by the separate commingling rules. The FCC's decision should be interpreted so that all of the agency's determinations have meaning, not in the self-defeating and internally contradictory manner urged by CompSouth.

Moreover, CompSouth's interpretation of the commingling rule would also undermine the FCC's specific determination that carriers should no longer have access to the combined facilities that make up UNE-P. As the Eleventh Circuit has observed, the FCC barred access to the UNE-P based on a finding that access to those combined facilities undermined facilities-based competition and was thus "anticompetitive and contrary to federal policy."[19]

The Authority should dismiss as completely unpersuasive CompSouth's contention that its commingling position would not result in the recreation of UNE-P.

Regarding the resurrection of UNE-P, CompSouth claims that a commingling arrangement that combines loops and switching is not the equivalent of UNE-P because the switching component of a combined package of loops and switches would not be subject to TELRIC pricing.[20] Regardless of pricing, CompSouth's

[19] BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., 425 F.3d 964, 970 (11th Cir. 2005).

[20] Petition at 10.

proposed interpretation of the commingling rule would undermine the FCC's elimination of UNE-P. As the Eleventh Circuit has explained, the FCC rejected UNE-P based on a finding that it "frustrated sustainable, facilities-based competition," and moreover was "anticompetitive and contrary to federal policy."[21]

Regardless of whether it is labeled "combining" or "commingling," connecting a Section 271 switching element to a Section 251 unbundled loop element would, in essence, resurrect a hybrid form of UNE-P, which is contrary to the FCC's goal of furthering competition through the development of facilities-based competition.[22] The Authority's commingling ruling is consistent with the Missouri federal district court's finding that "facilities which are required only under § 271, unlike UNEs required under § 251, need not be provided in combined, pre-packaged form," and that the Missouri commission's contrary decision was "preempted" because it "permits CLECs to use the same combination of facilities which comprise the UNE Platform, without limitation."[23]

Indeed, in granting in part a forbearance petition filed by Qwest (a BOC like AT&T Tennessee), the FCC explained that Qwest had "introduc[ed] a commercial product designed to replace [UNE-P]," *"even in the absence of a legal mandate to*

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[21] *BellSouth v. MCImetro*, 425 F.3d at 970 (internal quotation marks and alterations omitted); *see TRRO*, ¶ 218 (holding that UNE-P "hinder[s] the development of genuine . . . competition"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *USTA II*, 359 F.3d at 576 ("After all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition.").

[22] *TRRO*, ¶ 218.

[23] *Southwestern Bell*, 461 F. Supp. 2d at 1070; *see also BellSouth v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d at 565; *Illinois Bell*, 2006 WL 2796488, at *14.

do so."[24] The FCC would not have made such a statement if, as CompSouth urges, the commingling rule imposes a legal mandate to combine facilities made available under Section 251 (such as loops) with those provided under Section 271 (such as switching). Specifically, the commercial product that the FCC analyzed in the *Qwest* decision was a UNE-P replacement; such arrangements contain both loops (§ 251 UNEs), and switches (available only under § 271, if at all).[25] In other words, the commercial product at issue precisely fits CompSouth's understanding of a "commingled" arrangement.

In sum, ending UNE-P has been a central federal priority in order to encourage reliance on alternative facilities and discourage dependence on ILEC networks.[26] The Authority's commingling decision is consistent with such federal policy. In contrast, accepting CompSouth's commingling position would place the Authority squarely at odds with the FCC's decision to *change* – not *perpetuate* – the regulatory nature of the telecom market in order to incent real, facilities-based competition As such, the Authority should deny CompSouth's Petition for Reconsideration.

CONCLUSION

The Authority's commingling ruling is consistent with the FCC's determination that carriers like AT&T Tennessee have no obligation to provide

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[24] Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area , Qwest Order* ("*Qwest Order*"), 20 FCC Rcd at 19455, ¶ 82 (emphasis added).

[25] *See Qwest Order*, 20 FCC Rcd at 19455, ¶ 82; 47 C.F.R. § 51.319(a) (requiring § 251 access to basic loops); 47 U.S.C. § 271(c)(2)(B)(vi) (requiring access to unbundled switching).

[26] *See BellSouth v. MCImetro* 425 F.3d at 970; *TRRO*, ¶ 218.

Section 271 elements in a combined, pre-packaged form. Additionally, the Authority's commingling decision is consistent with the FCC's elimination of UNE-P in favor of facilities-based competition. In its Petition for Reconsideration, CompSouth urges the Authority to reverse course and adopt a commingling ruling that undermines and negates the aforementioned federal law and which would result in access to the same set of facilities that comprise UNE-P. Rather than adopting a position that is contrary to federal law, the Authority should deny CompSouth's Petition for Reconsideration.

Respectfully submitted,

AT&T TENNESSEE

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VIA HAND DELIVERY

Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
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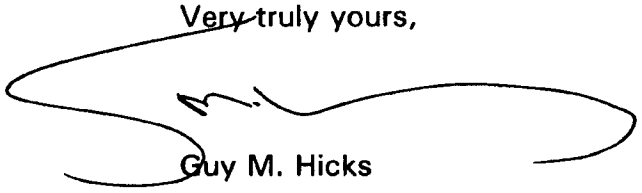
Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Jones:

Enclosed are the original and four copies and a CD ROM of BellSouth's Post-Hearing Brief. Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*

Docket No. 04-00381

BELLSOUTH TELECOMMUNICATIONS, INC.'S POST-HEARING BRIEF

604883

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rejected federal regulatory scheme with an identical state regulatory scheme, under the guise of Section 271. To the extent existing interconnection agreements perpetuate such out-dated obligations that the FCC eliminated in the *TRO* and *TRRO*, those agreements must be revised – finally – to reflect federal law. To that end, BellSouth has proposed contract amendments that accurately implement the requirements of Section 251 of the 1996 Act and the FCC's implementing rules adopted in the *TRO* and the *TRRO*.[13]

ISSUE BY ISSUE ANALYSIS

I. 271-Related Issues (Overview of Issues 8, 14, 17, 18, 22)

The most contentious, and the most important, issue between the CLECs and BellSouth involves the interplay between Section 271 and de-listed UNEs. This is the common theme for all five of the 271-related issues discussed in Section I of this brief.

Stated simply, the CLECs have developed their argument as a way to coax state commission to ignore the FCC's national policy decisions and continue the discredited UNE-P regime. The CLECs' proposed contract language and testimony seek to perpetuate UNE-P at a price at least as favorable as they previously had, if not a better price.[14]

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[13] BellSouth requests in this proceeding that, in the Authority's order, it approve *specific contractual language* that can be promptly executed by BellSouth and the CLECs (subject to the individual carrier negotiations, as applicable) While the Authority may need to address policy matters and issue statements of policy in doing so, it is important that this proceeding end with actual contract language in place BellSouth stands ready to assist the Authority in doing so, to the extent that staff or any party requires Microsoft Word versions of BellSouth's Pre-Filed Testimony of Pamela Tipton, Exhibits PAT-1, 2, and 5. BellSouth will furnish copies of these documents upon request (indeed, BellSouth has previously furnished CompSouth with soft copies of its exhibits in its ongoing efforts to narrow through negotiations the issues to be resolved by the Authority)

[14] Gillan Deposition, Hearing Exhibit 4 at 68 in this deposition, Mr Gillan claims that, because CompSouth is willing to agree to "interim" 271 rates that are consistent with the transitional rates set in the *TRRO*, he is not actually advocating lower Section 271 prices than Section 251 prices This is simply unbelievable, given that "interim" rates, in the normal sense, are subject to later true up, and Mr Gillan's belief is that a Section 271 price could be lower than a Section 251 price. Thus, even if the Authority accepted Mr Gillian's testimony (it should not) and applied its "interim" rate from Docket No 03-00119 here, it would not foreclose CompSouth from seeking a lower rate at some unspecified future date As BellSouth explains herein, it vigorously opposes the expansion of the "interim" rates set in Docket No 03-00119 here

In fact, the CLEC's witness and consultant (and the likely architect of the entire 271-based campaign to retain UNE-P), Mr. Gillan, has been blatant in his contention that, no matter what the FCC has done, the CLECs should be able to keep UNE-P forever. A talented witness, however, Mr. Gillan tried to sidestep when asked on cross examination whether the CLECs actually contend that they are entitled to get, through 271 back-door, exactly what the FCC had eliminated:

> Q. Okay. Now, Mr. Gillan, you have testified – and in fact one of the documents I passed out to you was some testimony you had filed with the Authority before in the TRO cases. Do you have that, sir? It's just an excerpt. It's your surrebuttal testimony from the state TRO cases.
>
> A. Yes.
>
> Q. And in that testimony it's your position that there's a UNE-P – I'm paraphrasing – but a Section 271 UNE-P ***indefinitely***, sir?
>
> A. Let's call it UNE Prime. (emphasis added).[15]

Even Mr. Gillan appears to be wary of destroying his credibility by suggesting (in person, rather than in his written TRO testimony) that the CLECs should retain UNE-P forever, so he tries to hide the absurdity of the position by calling UNE-P by another name. With apologies to Mr. Shakespeare, a UNE-P "by any other name" still smells like a de-listed UNE from the FCC's perspective.

Mr. Gillan also attempts to create confusion by suggesting that BellSouth's own counsel had suggested that there is a 271 obligation to provide UNE-P.[16] BellSouth's counsel is, not surprisingly, being misquoted. Mr. Lackey's actual statement was about the obligation regarding unbundled switching and BellSouth's willingness to provide a commercial product.[17] In fact,

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[15] Gillan Cross, *Tr* Vol IV at 89
[16] *Id*
[17] March 20, 2004, Transcript of Proceedings, Dockets 03-00491, 03-00526 and 03-00527, at 18-19

that is exactly what BellSouth is doing today through commercial agreements with other CLECs – just as the FCC intended.

The entire 271-based argument is nonsense, and would completely undermine the FCC's prior policy findings about the damage the UNE-P has done to competition. Consequently, even if the TRA had the jurisdiction to address the 271 issues or establish "271 rates" sought by the CLECs, the TRA should stick with the FCC's decision to end UNE-P – not undermine that decision by creating a surrogate for that rejected regime. The bottom line is that, even if the TRA ***could*** do as the CLECs urge (which it cannot legally, as discussed below), it ***should*** not, for all the same legal, factual, and policy reasons that compelled the FCC to end the UNE-P regime. The TRA should keep in mind that this is not an academic or theoretical discussion about the TRA's jurisdiction. Rather, the CLECs (and their paid consultants) have concocted this argument in order to minimize the impact of the *TRO* and *TRRO*. Accepting the CLECs' position would place the TRA squarely at odds with the FCC's decision to ***change*** – not ***perpetuate*** – the regulatory nature of the telecom market in order to incent real, facilities-based competition.

Further, the FCC, federal courts, and the majority of state commissions all recognize that the law does not permit a state commission to compel the inclusion of section 271 network elements (and thereby dictate the rates, terms, and conditions applicable to section 271 network elements) in a section 252 interconnection agreement. Similarly, a state commission cannot legally mandate that BellSouth include network elements pursuant to state law authority in section 252 interconnection agreements.

With respect to each of the 271-related issues, the CLECs have argued that the TRA's 2-1 decision in the DeltaCom case establishing an interim switching rate supports their argument

that the TRA may assert jurisdiction over 271 elements. Their reliance on that case is overreaching.

First, the DeltaCom case addressed the issue of the market rate for unbundled switching when it is not required by 251. BellSouth argued that the "market rate" is the negotiated rate to which DeltaCom had agreed previously. DeltaCom, arguing based on the "just and reasonable" standard applicable to 271 elements, sought a lower, cost-based rate analogous to the UNE rate, asserting that the Authority should ignore the "market" in market-rate and instead mandate a rate. The Authority deliberated the issue on June 21, 2004 when Director Tate made the following comments and motion:

> DIRECTOR TATE: I have thought through this a lot, but in order to, I think, be true to my requests and my philosophies about market-based rates, what I would like to propose is – because from my reading of the record, the only rate that has ever been negotiated was the $14 rate, and I would propose that we accept that, that we continue the present rate on an interim basis and subject to true up or true down as the case might be. And I believe I said on an interim basis until this Authority or the FCC or there is another rate negotiated by the parties. I believe that that would be most consistent with my previous request by the parties and my philosophy regarding market-based rates.[18]

After further deliberations, Director Miller asked Director Tate to consider amending her motion to accept, instead of the negotiated rate, the DeltaCom proposed rate as an interim rate. Importantly, Director Miller noted that his approach was based on the fact that these issues were subject to further development at the federal level, noting:

> DIRECTOR MILLER: I believe this approach to keep negotiations ongoing in light of – this is the best approach to keep negotiations ongoing in light of the continued uncertainty at the FCC. In addition, I believe this approach will allow all interested parties to have input into the final rate adopted, and since it's impossible to predict either what will happen or when it will happen, assigning an interim rate will provide ITC DeltaCom with some level of relief and certainty while the true up will ensure that the current negotiation – negotiating position of

[18] Transcript of Proceedings, Monday, June 21, 2004, Docket No 03-00119, In Re Petition for Arbitration of ITC DeltaCom Communications, Inc , with BellSouth Telecommunications, Inc , page 3, lines 9-21

> the parties remains intact, neither benefiting nor penalizing either party through the establishment of an interim rate.[19]

While Director Tate did not agree to the motion to the extent it set a rate other than the negotiated rate, Directors Miller and Jones agreed, in a 2-1 vote, to set an interim rate based on DeltaCom's FBO.[20] BellSouth, believing that Director Tate's view was the correct approach and consistent with the FCC's rulings and policy, has sought FCC pre-emption. The FCC has not yet acted on BellSouth's petition.

Nearly one year after the DeltaCom case, the issue of "271 jurisdiction" to set rates under the just and reasonable standard again arose – this time in the efforts of CLECs seeking to avoid the FCC's deadline for adding new UNE-Ps ("No New Adds" deadline). Again, CLECs argued that the Authority should act pursuant to 271 to require BellSouth to continue providing new UNE-P to CLECs after the FCC's deadline. Initially, the TRA, on a 2-1 vote, ordered some alternative relief in an attempt to further negotiations. Director Kyle dissented from that decision, and specifically rejected the CLECs' 271 theory saying:

> DIRECTOR KYLE: Both Cinergy and MCI assert that section 271 of the Federal Act independently supports the right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the agreement. Therefore, they argue that even if BellSouth were empowered by the *TRRO* to unilaterally change their rights to obtain UNE-P pursuant to section 251(c)(3), BellSouth would not be entitled to change the unbundling and UNE rate sections of their agreements unilaterally. In addition, MCI argues that BellSouth must continue to provide UNE-P under Tennessee law. I disagree. In my opinion, Section 271 of the Federal Act does

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[19] Transcript of Proceedings, Monday, June 21, 2004, Docket No 03-00119, In Re Petition for Arbitration of ITC DeltaCom Communications, Inc , with BellSouth Telecommunications, Inc , page 6, lines 17-25 to page 7, lines 1-5

[20] The TRA has not yet convened a generic docket on a permanent rate, and the DeltaCom order is the subject of an FCC petition to preempt This illustrates the fallacy of CompSouth's position – to the extent the TRA established an "interim" rate in DeltaCom, Mr Gillan suggests the TRA can just extend that interim rate to the entire CLEC community *See* Gillan Rebuttal at 35 The TRA's initial "interim" rate would soon mushroom into something that doesn't resemble anything "interim" at all In addition, although Mr. Gillan suggests that BellSouth has prevented him from suggesting permanent rates (Gillan Rebuttal at 35), that certainly did not prevent him from filing an FCC affidavit on behalf of one of his member companies in which he recommended a higher Section 271 rate than the Authority's interim Section 271 rate which further illustrates the absurdity of his position. *Tr* Vol IV at 86-87.

> not allow a network element obtained pursuant to that section to be combined with any other 251 UNE. Section 271(c)(1)(B) contains the competitive checklist that specifies the network elements that are required to be provided by ILECs to CLECs. The list includes local loop transmission unbundled from local switching or other services, local transport unbundled from switching or other services and local switching unbundled from transport, local loop transmission or other services. Clearly, these network elements are to be provided unbundled from other services or network elements. The FCC did not require that these elements be made available combined with other services or elements. While I believe BellSouth is required to provide section 271 network elements to CLECs, BellSouth is only required to provide them at rates that are just and reasonable and unbundled from other services and network elements. Therefore, BellSouth is not required to provide combinations of 271 and 251 elements pursuant to paragraph 584 of the *TRO*.[21]

The following month, the TRA considered the situation again, as the negotiating period established by the majority's alternative relief order was due to expire. At that time, the majority found that the alternative relief had not resulted in a negotiated solution and should end and specifically ordered that:

> Effective May 16, 2005, BellSouth is no longer required to provide New Adds and may reject any and all new orders for the de-listed UNEs, including new orders to serve the CLECs' embedded base of customers.[22]

Director Kyle did not vote for the *Order* because she had opposed the earlier "alternative relief"; however, taking both orders together, it is clear that every member of this panel voted to implement the FCC's No New Adds deadline, over the CLECs' 271-based objection.

Together, these decisions demonstrate that the TRA has not already adopted the policy of acting under 271 in the fashion the CLECs suggest. Instead, it is clear that the TRA in this very

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[21] *Dissent of Director Sara Kyle to Order Granting Alternative Relief*, Docket No 04-00381, *In Re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, pages 2-3 (footnotes omitted)

[22] *Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations*, Docket No 04-00381, *In Re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, at 4

docket has already correctly rejected precisely the same 271-based argument when it ruled that BellSouth was no longer required to provide new UNE-P adds.[23]

The DeltaCom case does not represent the dispositive precedent the CLECs cast it to be. The decision was not unanimous and one of the two votes in favor of setting the interim rate was made in clear recognition of the potential for further development on the issue at the federal level. ***Importantly, the very CLEC who sought and obtained that interim rate ruling – DeltaCom – has withdrawn its testimony in this case, with the exception of Mr. Watts' testimony on Issue 31.***

In short, the DeltaCom case does not mandate that the TRA accept the CLECs' position on 271. Rather, the No New Adds decision and Director Kyle's dissent from the earlier alternative relief order demonstrate that the TRA has already rejected that position.

Even after it was rejected in the context of the No New Adds issue, CompSouth and other CLECs in this case seek to perpetuate the Section 251 unbundling regime under the guise of Section 271. In exact contrast to the language of Director Kyle quoted above, the CLECs erroneously contend that BellSouth must include Section 271 "combination" or "commingling" obligations or state law unbundling obligations in interconnection agreements that are arbitrated before, filed with, and approved by state commissions and thereby continue providing de-listed UNEs under the terms of those agreements.

It would be exceedingly odd for all of the FCC's decisions, deliberations, and conclusions about the adverse impact of the de-listed UNEs on competition to be rendered moot by reference to 271. Yet that is exactly what the 271 argument is all about – ignoring the FCC's national policy. This disregard for the law renders the CLECs' proposed interconnection

[23] Order July 25, 2005, Docket 04-00381

agreement language on each of the 271-related issues fatally flawed, and the Authority must summarily reject such terms.

A. **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?*

Relevant Contract Provisions: PAT-1 Section 1.1 and PAT-2 Section 1.1 (limiting BellSouth's unbundling obligations to those that BellSouth offers to CLECs in accordance with BellSouth's obligations under Section 251(c)(3) of the Act).[24]

1. **State Law**

The Authority need not expend significant resources analyzing the theory of state law unbundling because no CLEC presented testimony supporting the contention that BellSouth has state law unbundling obligations that are different from federal unbundling obligations. Indeed, in Georgia, the CLECs made clear that they were "not requesting" the Georgia Commission to exercise state law authority in a parallel proceeding there.[25] As discussed above, the Authority has already seen and rejected this argument when it was raised in the context of the *Emergency Motion* on No New Adds. It should be likewise rejected here.[26]

2. **Section 271 – Summary of Argument**

Faced with the FCC's decision that the UNE-P regime was not providing the right incentives for real facilities-based competition and should be end, the CLECs have scrambled to find a way to avoid the consequence of that decision. Stated simply, they will say anything to continue to get UNE-P as if nothing has changed. The 271 argument is their attempt to do just that. It is a blatant end run attempt to avoid the FCC's decision to de-list UNEs. If there were

[24] For ease of reference, BellSouth uses the exhibit identifiers noted in Ms Tipton's pre-filed testimony in this brief because those references were used in communications and discovery throughout the region.

[25] *See* October 21, 2005 Joint CLEC Post-Hearing Brief, filed in Docket No 19341-U

[26] *Dissent of Director Kyle to Order Granting Alternative Relief*, July 13, 2005, 04-00381, *Order Terminating Alternative Relief*, July 25, 2005, 04-00381

any merit to the notion that all the changes the FCC created in the *TRO* and *TRRO* could be wiped away or ignored by reference to a federal law – a law with which the FCC is intimately familiar – then the FCC would surely have saved itself the trouble of all of its work on these issues. The 271 argument is nothing more than a last ditch effort to obtain from the state commissions what the CLECs were unable to obtain from the FCC and federal courts. The argument should be met with a high degree of skepticism because it seeks to render the FCC's work on UNEs in the *TRO* and *TRRO* meaningless.

Not only is the 271 argument at odds with the FCC's ultimate and underlying decisions about impairment and competition, it is also unpersuasive as a matter of statutory interpretation. The CLECs' argument on Section 271 starts with language contained within Section 271, which refers to agreements under Section 252. From that reference, the CLECs concoct an argument that ***presumes*** that because state commissions arbitrate and approve ***Section 251*** obligations in the context of a Section 252 agreement, they must take similar steps concerning Section 271.

This argument cannot withstand logical scrutiny because, although Section 271 refers to Section 252, the simple fact is that Section 252 explicitly ***limits*** the rate-setting and arbitration powers of state commission to ***Section 251*** elements. This express limitation precludes the Authority from requiring BellSouth to include Section 271 elements in a Section 252 agreement.

The Authority cannot read one portion of the statute but ignore the remainder as the CLECs do. Section 252 never refers to Section 271, yet it contains express references to Section 251. Although the CLECs ignore this express limitation ("[i]t is immaterial that § 252 does not refer to § 271 ..."),[27] the Authority cannot. There is no statutory authority for state commission

[27] *Joint CLECs' Response to BellSouth's Motion for Summary Judgment*, filed in Docket No 04-00381, July 1, 2005, p 8 ("*CLECs' SJ Response*")

Section 252 rate-setting, negotiation, arbitration, and approval process over Section 271 obligations, and the Authority must adhere to the federal law limitations.

It is not as if the FCC just forgot about 271. Rather, the FCC discussed its role on these issues in the *TRO*, explaining that

> [w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry ***that the [FCC] will undertake*** in the context of a BOC's application for [S]ection 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6).[28]

Indeed, when the FCC first addressed the interplay between section 251(c) and the competitive checklist network elements of section 271 in its *UNE Remand Order,* it FCC was very clear that "the prices, terms, and conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271."[29] The FCC has also stated that, once long distance authority has been granted, "[S]ection 271(d)(6) grants the Authority enforcement authority to ensure that the BOC continues to comply with the market opening requirements of [S]ection 271."[30] The FCC made no mention whatsoever of a state commission role in this process; the regulatory agency charged with Section 271 oversight is the FCC.[31]

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[28] *TRO* ¶ 665 (emphasis added)

[29] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 469 (1999) ("*UNE Remand Order*"), *petitions for review granted, Unites Telecom Ass'n v FCC*, 290 F.3d 415 (D C. Cir 2002), *cert denied*, 123 S Ct. 1571 (2003). The Commission very clearly stated that

> [i]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a)

UNE Remand Order at 470

[30] *TRO* ¶ 665

[31] *See also TRO* at ¶ 663 ("The Supreme Court has held that the last sentence of section 201(b), which authorized the [FCC] 'to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' empowers the [FCC] to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996 Section 271 is such a provision ") (citations omitted)

The weight of authority confirms that the FCC, and not state commissions, has exclusive oversight over Section 271 obligations. Federal courts in Kentucky, Mississippi, and Montana, and state commissions in Alabama, Idaho, Iowa, Kansas, Massachusetts, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington have addressed Section 271. These decisions have all concluded, in some fashion, that the FCC is charged with Section 271 authority. Despite this authority (indeed, despite the FCC's guidance in the *TRO*), the CLECs' primary witness claims the ***only*** way that BellSouth can satisfy its Section 271 obligations is through a state approved interconnection agreement or an SGAT.[32] This claim is flatly contradicted by federal and state commission decisions.

As noted above, the CLECs continually return to the TRA's 2-1 decision in the DeltaCom case to set an interim rate for switching in the DeltaCom Arbitration last year, but Director Kyle's statements on No New Adds and Director Tate's statements in the DeltaCom deliberation cut to the heart of the matter. The FCC has set a clear course toward market rates negotiated by companies and away from traditional, old-style rate-making by state commissions. The CLECs' 271 argument is intended to reverse that course. If accepted by the TRA, the 271 argument would result in CLECs leaving the negotiating table and heading instead to the commissions to resurrect the very rate-making from which the FCC has turned away.

Finally, the CLECs' proposed contract language and positions must be reconciled with reality. The FCC has explained that unbundling at cost-based rates is only required in situations where CLECs are genuinely impaired without access to particular network elements. When unbundling is not required it means that a market is "suitable for competitive supply" and means also that "competition is possible" without access to UNEs.[33] Likewise, courts have recognized

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[32] Gillan Deposition, Hearing Exhibit 4, pp 60 – 61
[33] *USTA II*, 359 F 3d at 571

that unnecessary unbundling imposes costs.[34] In practical terms, the CLECs' positions and proposed language in this proceeding simply extend the transitional pricing of the *TRRO* indefinitely, and retains all other terms and conditions for de-listed UNEs.[35] However, where unbundling is not required, and Section 271 access is required, the terms of independent Section 271 access are imposed under "less rigid accompanying conditions."[36] De-listing means that CLECs can and should compete using alternative, market-based arrangements, rather than under a state-imposed Section 271 regime that is designed to mirror the Section 251 framework, which is what CompSouth advocates. As Director Kyle noted in her motion on the No New Adds issue,

> [a]ction of this sort would introduce unnecessary delay into a process the FCC intended to more swiftly. Such delay would do nothing more than hinder the rapid advancement of facility-based competition the FCC intended.[37]

After more than a decade of synthetic competition, the Authority must ensure that the transition to sustainable facilities based competition is unhampered by CLEC created hurdles aimed at extending indefinitely a specified transition period. BellSouth explains more fully below each of these points.

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[34] *Id* at 572, *USTA I,* 290 F 3d at 428

[35] CompSouth's witness, Mr Gillan, is quite explicit on this point, claiming "the Commission should require that § 271 offerings should be identical – except as to price – to the § 251 offerings they replace " Gillan Direct at 48 Concerning price, Mr. Gillan alleges that § 271 prices are "potentially" different. *Id* at 4 CompSouth glibly suggests that the Authority's interim prices in DeltaCom could serve as "interim" § 271 pricing, until an undetermined future time, relying on a Missouri Order that is the subject of an active appeal in federal district court *See Southwestern Bell Telephone, L P d/b/a SBC Missouri v Missouri Public Service Commission,* Case No. 4 05-CV-01264-CAS, United State District Court, Eastern District of Missouri Setting aside the numerous deficiencies with Mr Gillan's arguments, BellSouth does not agree that "interim" Section 271 rates are either legitimate or acceptable In this regard, the Ninth Circuit vacated and remanded a district court order that denied Verizon's preliminary injunction request to set aside interim TELRIC rates in *Verizon Cal, Inc v Peevey,* 413 F.3d 1069 (9th Cir 2005) Moreover, the Authority lacks authority to set such rates as explained herein

[36] *TRO* at ¶ 658

[37] *Motion* at 2

3. Issue 8(a): There Is No Legal Basis For A State Commission To Force BellSouth to Include Section 271 Network Elements In A Section 252 Interconnection Agreement.

Conspicuously absent from the "testimony" of CompSouth's lay witness (or from CompSouth's prior legal briefs on this topic) is any acknowledgement that state commissions' authority to arbitrate Section 252 agreements is limited ***to ensuring the contracts comply with Section 251*** That is because, pursuant to the Act, when BellSouth receives "a request for interconnection, services, or network elements ***pursuant to Section 251,***" it is obligated to "negotiate in good faith ***in accordance with Section 252*** the particular terms and conditions" of agreements that address those Section 251 obligations. Thus, interconnection agreements address Section 251 obligations, and those obligations are the ***only topics that are required to be included in a Section 252 interconnection agreement.*** The resulting Section 251/252 agreements are submitted to state commissions for approval under Section 252(e). A state commission's authority is explicitly limited to those agreements entered into "pursuant to Section 251" and, when arbitration occurs, state commission's must ensure that agreements "meet the requirements of Section 251."[38]

Consequently, upon receiving a request for "network elements pursuant to section 251," an ILEC may negotiate and enter into an agreement voluntarily, or an ILEC may enter into an agreement after compulsory arbitration.[39] An ILEC is ***not required,*** however, to negotiate, in the context of a Section 252 agreement, any and all issues CLECs may wish to discuss, such as access to elements ILECs may be required to provide under Section 271. Without doubt, an ILEC may voluntarily agree to negotiate things that would normally be outside the purview of its Section 251 obligations. When it does so, such matters may properly be considered by the state

[38] 47 U.S C. § 252(e)(2)(B)
[39] 47 U S C § 252(a), (b)

commissions under prevailing law. However, where an ILEC chooses not to negotiate more than is required by Section 251, that is its right, and it cannot be forced to do more. BellSouth has steadfastly refused to negotiate the inclusion of Section 271 elements in Section 252 agreements and there was no testimony or record evidence that suggested otherwise here. Consequently, the interconnection agreement amendments that result from this proceeding must be limited to Section 251 obligations.

The law is quite clear that Section 251 obligations form the basis of Section 252 agreements. As the Eleventh Circuit has recognized, "The scheme and text of [the Act] ... lists only a limited number of issues on which incumbents are mandated to negotiate."[40] The Fifth Circuit also recognized this distinction, explaining that ***"[a]n ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to § 251 and 252."***[41] Congress did not grant state commission any authority to arbitrate compliance with the requirements of Section 271. That decision resolves this issue – state commissions have authority to arbitrate Section 252 agreements, but only so far as such agreements comply with Section 251. Neither the CLECs nor the Authority can force BellSouth to include Section 271 obligations in Section 252 agreements.

4. Issue 8(a): Section 252 Limits State Commission Rate-Setting Authority to Section 251 Elements.[42]

The CLECs' purpose in arguing for the TRA to engage in 271 rate-setting is to avoid precisely what the FCC has set in motion – a move away from commission rate-making and

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[40] *MCI Telecom Corp et al v BellSouth Telecommunications, Inc at al*, 298 F 3d 1269, 1274 (11th Cir 2002)

[41] *Coserv Limited Liability Corp v Southwestern Bell Telephone Co*, 350 F 3d 482, 488 (5th Cir 2003) (emphasis added)

[42] Although Issue 8(b) also addresses rate-setting for Section 271 that sub-issue presumes that the answer to the threshold question – does a state commission have authority to require BellSouth to include Section 271 network elements in a Section 252 interconnection agreement – is affirmative As BellSouth explains herein the answer is negative in all respects, including rate-setting.

toward market negotiation. The bottom line on all of the 271-related arguments is the common-sense reality that if the CLECs were to prevail on this argument, then the CLECs will have effectively used the TRA to override the FCC's decisions about market-based, real competition. That simply cannot be the right answer.

Despite the express limitations contained in Section 252, the CLECs in this case suggest the Section 252 negotiation, arbitration, and approval process applies equally to Section 251 elements and Section 271 elements. This suggestion is misplaced. CompSouth ignores that ***there is no language in Section 252 that refers to Section 271*** Congress allowed states to "set" rates only "for the purposes of subsection (c)(3) of such Section [251]" and to arbitrate agreements to "ensure that such resolution and conditions meet the requirements of Section 251 ...."

State commissions do not have the authority to set rates for Section 271 elements. This is clear because the language in Section 252 limits state commission rate-setting authority to Section 251 elements. Section 252(d)(1) provides that state commissions may set rates for network elements ***only*** "for purposes of subsection (c)(3) of such Section [251]." The FCC has stated that this Section "is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required under Section 271."[43] This express limitation in Section 252(d)(1) on state commission pricing authority in arbitrations cannot be blindly brushed aside by the CLECs.

Even if there could be any legitimate question about how to read these statutes, the FCC has already answered the question. In addition to the express language of Section 252, the FCC has confirmed that Section 251's pricing standards (over which the state commissions have

[43] *TRO* at ¶ 657

authority) do not apply to checklist elements under Section 271.[44] It "clarif[ied] that the FCC will determine whether or not the applicable pricing standards are met," either in the context of a Section 271 application for long distance authority or, thereafter, in an enforcement proceeding.[45] ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Sections 201 and 202" is a fact-specific inquiry that the [FCC] will undertake in the context of a BOC's application for Section 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6)").[46]

Finally, the FCC held that "[w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to ***Section 271*** and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements."[47] The FCC went on to hold that "[s]ection 252(d)(1) provides the pricing standard 'for network elements for purposes of [Section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under Section 271."[48]

The FCC has further held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 – statutes applied and enforced by the FCC.[49]

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[44] *TRO*, at ¶¶ 662, 664

[45] *Id*

[46] The FCC further explains that BellSouth might meet its burden of proof in such a proceeding by demonstrating that the rate for a Section 271 element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist Alternatively, a BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate

TRO at ¶ 664 As Ms Blake made clear, BellSouth has entered into over 150 commercial agreements (Blake Rebuttal at 3). Ms Blake also explained that BellSouth satisfies its 271 obligations to provide de-listed loops and transport through its special access and private line tariffs *Tr* at 99

[47] *TRO* at ¶ 656 (emphasis added)

[48] *Id* at ¶ 657 (brackets in original)

[49] *See TRO* at ¶¶ 656, 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake "), also *TRO* at ¶

Courts, moreover, uniformly have held that claims based on Sections 201(b) and 202(a) are within the FCC's jurisdiction. Section 201(b) speaks in terms of "just and reasonable" which are determinations that "Congress has placed squarely in the hands of the [FCC]."[50] As the D.C. Circuit noted in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996), Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory." The idea of FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. The Supreme Court has determined that Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act" and required that state commission regulation be guided by FCC regulations.[51]

The CLECs will likely contend that while the FCC spoke of itself as the "regulator" in charge of compliance with the Section 271 just and reasonable standard, that "It did not, however, establish itself as the agency in charge of arbitrating the rate levels when they are in dispute."[52] The distinction the CLECs may attempt to draw is one without a difference. It is merely an excuse for continuing to rely on commissions to set rates rather than participating in market-based negotiation and business.

The entity charged with "regulating" the rates (which in this case the CLECs admit is the FCC) is by definition the entity that must resolve the issue when the rates "are in dispute."

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665 ("In the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271 ")

[50] *In Re Long Distance Telecommunications Litigation,* 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp v National Association of Recycling Industries, Inc* , 449 U.S 609, 612 (1981)), *see also Total Telecommunications Services Inc v American Telephone & Telegraph Co* , 919 F Supp 472, 478 (D D C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd* , 99 F 3d 448 (D C Cir 1997)

[51] *AT&T Corp v Iowa Utilities Board*, 525 U S 366, 378 n 6 (1999), *Indiana Bell Telephone Company, Inc v Indiana Utility Regulatory Commission*, 359 F 3d 493 (7th Cir 2004)

[52] *See, e g , CLECs' SJ Response* at 31

Starting from a presumption of old-style, pre-competition rate-setting, the CLECs assume that a regulatory body must set the rates in the first instance, but that is not the case in today's competitive market. Instead, rather, the provider sets the rates in accordance with the just and reasonable standard, and the ***FCC*** resolves any disputes that arise surrounding those rates.[53] In a competitive market, regulators should not step in until there is a need, but the CLECs want the regulators to step in and over-ride the market that has produced both intermodal competition and more than 150 negotiated commercial agreements between CLECs and BellSouth.

The FCC is right to treat 271 elements differently. It makes sense that the FCC rules regarding Section 271 elements (*i.e.*, that the provider can set the rate initially as opposed to the regulator) are – and should be – less stringent than those under Section 251. Section 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without which a CLEC is legally "impaired" within the meaning of Section 251(c)(1). Congress thus ensured that state commissions have authority to arbitrate the rates, terms and conditions of access to these elements. ***Conversely, the FCC has determined that CLECs are not impaired without access to Section 271 elements that no longer meet the Section 251 test.*** The FCC's conclusions cannot – and should not – be brushed aside. The FCC has reached these conclusions. It has done so based on an evidentiary finding that competitive alternatives for such elements are readily available in the marketplace.[54] Congress did not

[53] CompSouth has implied that BellSouth's ability to change its special access prices requires state commission action under Section 271 CompSouth is wrong While the FCC did not accept ILECs' arguments concerning the availability of special access as an alternative to UNEs in situations in which CLECs are impaired (*see, e g , TRRO* at ¶ 59), when Section 251 UNEs are no longer available "a competitor is not impaired in its ability to offer services without access to that element" and it would be "counterproductive to mandate that the incumbent offers the element at forward-looking prices Rather, the market price should prevail, as opposed to a regulated rate . " *UNE Remand Order* at ¶ 473 Indeed, in the *TRRO* the FCC clearly contemplated that CLECs could transition to special access services and commercial agreements. *TRRO* at ¶¶ 142, 195, 228

[54] *See e g , UNE Remand Order* at ¶ 471 (where a checklist item is no longer required under Section 251, a competitor is "not impaired in its ability to offer services without access to that element," which can be "acquire[d] in the marketplace at a price set by the marketplace ")

subject access to these 271 elements to the same regulatory scrutiny. Rather, consistent with Congress's overriding intent to "reduce regulation," parties should be allowed to contract freely as to those items without state regulatory interference.[55]

To make their case, the CLECs ignore all of the express limitations on state commission authority in Section 252 and the relevant case law; instead, they rely on Section 271(c)(1)'s reference to "agreements that have been approved under Section 252."[56] By its terms, however, that Section expressly refers *only* to "approv[al]" of agreements under Section 252. ***It says nothing about state commission arbitration or rate-setting authority.*** The limitations on rate-setting and arbitration are directly relevant here because the CLECs want the Authority to arbitrate issues around, and set rates for, the Section 271 elements. The issue before the Authority, therefore, goes far beyond the scope of the Authority's authority to approve agreements, yet that is the extent of the statutory provision in Section 271 upon which the CLECs rely.

Just as the TRA is bound to heed the General Assembly's limits on its jurisdiction, the FCC (and the state commissions when the FCC or Congress delegates duties to them) must heed carefully the words of Congress. The CLECs' argument utterly disregards the words that expressly limit state rate-setting authority. Crucially, Congress made no mention of including Section 271 elements in negotiations under Sections 251(c)(1) and 252(a)(1), arbitration under Section 252(b), or state commission resolution of open issues under Section 252(c). Most importantly for present purposes, Congress did not give state commissions ***any*** rate-setting

[55] *Id* Under these circumstances, the FCC concluded that "it would be counterproductive to mandate that the incumbent offer[] the element" at forward looking prices " Instead, "the market price should prevail, as opposed to a regulated rate"

[56] Gillan Direct at 44.

authority for Section 271 requirements in Section 252(d)(1). On the contrary, ***all*** of those Sections are explicitly linked – and limited – to implementation of Sections 251(b) and (c).

Mr. Gillan also cites to Section 271(c)(1) for the proposition that "checklist items [must] be offered through interconnection agreements approved under Section 252 of the Act. "[57] Section 271(c)(1) says nothing of the sort. Section 271(c)(1) provides that to comply with Section 271, a BOC must meet the requirements of either subparagraph (A) or (B). Subparagraph (A), in turn, provides that a BOC meets the requirements of the Section if it "has entered into one or more binding agreements that have been approved under Section 252 ...." The reference to Section 252 agreements refers to agreements that incorporate the required Section 251 elements – nothing is said about Section 271 elements. Section 271(c)(1) only requires approved Section 252 agreements or an SGAT to obtain Section 271 authority; it does not require Section 271 elements incorporated into Section 252 agreements (nor would it, because such a requirement would conflict with the express limitations in Section 252 addressed above).

5. Issue 8(a): The FCC Has Exclusive Authority Over the Enforcement of Section 271 Elements.

States have no authority to regulate access to network elements provided pursuant to Section 271, including any attempt to require the inclusion of Section 271 elements in a Section 252 interconnection agreement. Section 271 vests authority in the ***FCC*** to regulate network elements provided pursuant to that section. Thus, to obtain long distance relief, a BOC may apply to the ***FCC*** for authorization to provide such services, and the ***FCC*** has exclusive authority for "approving or denying" the requested relief.[58] Once a BOC obtains Section 271 authority (as

[57] Gillan Direct at 44, Gillan Deposition, Hearing Exhibit 4 at 60
[58] 47 U S C § 271(d)(1),(3)

BellSouth has throughout its region), continuing enforcement of Section 271 obligations rests solely with the FCC under Section 271(d)(6)(A) of the Act.

The FCC made clear in the *TRO* that the prices, terms, and conditions of Section 271 checklist item access, and a BOC's compliance with them, are within the FCC's exclusive purview in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).[59] Section 271 vests authority exclusively in the FCC to "regulate" network elements provided pursuant to that section and for which no impairment finding has been made.[60] The role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271-approval process.[61] State commissions' authority to approve interconnection agreements entered into "pursuant to section 251," to impose arbitrated results under Section 251(c)(1) in order to ensure that any agreements "meet the requirements of section 251," and to set rates under Section 252 "for purposes of" the interconnection and access to network elements required by 251(c)(2) and (c)(3) are specifically limited by the terms of the statue to implementing Section 251 obligations, not Section 271 obligations. Moreover, the FCC refused to graft Section 251 pricing and combination

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[59] *See TRO* at ¶ 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake "), also *TRO* at ¶ 665 ("In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271") Nothing in *USTA II* or in the *TRRO* disturbed this FCC ruling

[60] 47 U.S C. § 271 For example, Section 271(d)(1) provides that to obtain interLATA relief, a BOC "may apply to the [FCC] for authorization to provide interLATA services" Congress gave the FCC the exclusive authority for "approving or denying the authorization requested in the application for each State." 47 U.S.C §271(d)(3) "It is," the Commission has determined, "the [FCC's] role to determine whether the factual record supports a conclusion that particular requirements of 271 have been met" *Application of BellSouth Corporation, et al Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No 97-208, *Memorandum Opinion and Order*, 13 FCC Rcd 539, 555, ¶ 29 (1997) And once a BOC obtains Section 271 authority (as BellSouth has in each of the 9 states in which it provides telephone service), continuing enforcement of Section 271 obligations, by the express terms of the statute, rest solely with the FCC 47 U S C § 271(d)(6)

[61] 47 U S C § 271(d)(2)(B)

requirements onto Section 271 in its *TRO*,[62] a decision upheld by the *USTA II* court, which characterized the cross-application of Section 251 to Section 271 as "erroneous."[63] In sum, Section 252 grants state commissions authority only over the implementation of Section 251 obligations, not Section 271 obligations.[64]

Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do so. That choice must be respected. As the FCC has explained, Congress intended that a single federal agency, not 51 separate bodies, exercise "exclusive authority" over "the Section 271 process."[65] In the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BOC compliance with Section 271.[66] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section.

If there is an issue of whether BellSouth is meeting its Section 271 obligations through approved agreements or otherwise, Congress was explicit as to what body should address whether BellSouth is in compliance. Section 271(d) authorizes the FCC, not the Authority, both to approve 271 applications and to determine post-approval compliance. If the CLECs are concerned about BellSouth's Section 271 compliance, the place to raise that concern is the FCC,

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[62] *TRO* at ¶¶ 656 – 664

[63] *USTA II*, 359 F 3d at 590

[64] *See also MCI Telecomm Corp* , 298 F.3d at 1274 (requirement that ILEC negotiate items outside of Section 252 is "contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate "), *and* 47 U S C §§ 251(b), (c) (setting forth the obligation of all local exchange carriers and incumbent local exchange carriers, respectively)

[65] *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, NSD-L-97-6, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, 14401, ¶ 18 (1999) (*"InterLATA Boundary Order"*)

[66] *SBC Communications Inc v FCC*, 138 F 3d 410, 416-17 (D C Cir 1998)

not the Authority. In the FCC's words, that federal agency has "***exclusive authority***" over the entire "Section 271 process."[67]

The CLECs have previously attempted to distinguish what they concede to be the FCC's exclusive enforcement authority over Section 271 from what they call the state commission's "Section 252 authority."[68] The obvious flaw in the CLECs' argument is that, as demonstrated above, Section 252 does not confer any jurisdiction over Section 271 elements to the state commissions – in fact, it expressly limits state commission authority to set rates and arbitrate to ***Section 251*** obligations.

Furthermore, the arrangement advocated by the CLECs would be unworkable as a practical matter. Under the CLECs' argument, Section 252 interconnection agreements would contain both Section 251 and 271 elements. The CLECs concede, however, that the state commission has no enforcement authority over Section 271 elements.[69] Thus, under the CLECs' theory, state commissions would enforce certain parts of an interconnection agreement (*i.e.*, the 251 elements) and the FCC would enforce other parts (*i.e.*, the 271 elements) of the same contract. That scenario, of course, makes no sense.[70]

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[67] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999) (emphasis added), see also this Commission's Order dated May 25, 2005, *In re Competitive Carriers of the South, Inc*, in Docket No 29393, at p 18 (" ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission ")

[68] *See, e g , CLECs' SJ Response* at 29

[69] *See CLECs' SJ Response* at 26 ("The Joint CLECs do not contend that if the Section 271 checklist items are not in the ICA that the Authority has the enforcement authority to revoke BellSouth's long distance entry or otherwise sanction BellSouth")

[70] It is also inconsistent with the FCC's statements in the *UNE Remand Order* that "*the prices, terms, and conditions* set forth in sections 251 and *252* do not presumptively apply to the network elements on the competitive checklist of section 271 " *UNE Remand Order* at ¶ 469 (emphasis supplied)

6. Issue 8(a): Federal Decisions and State Commission Decisions Confirm the FCC's Exclusive Authority Over Section 271 Elements.

Despite federal decisions and state commission decisions, CompSouth contends that the Authority has the authority to make BellSouth include its Section 271 obligations in Section 252 interconnection agreements. As outlined above, however, CompSouth ignores completely that interconnection agreements result from a Section 251 request and are evaluated to ensure compliance with Section 251. Indeed, decisions from Washington to Mississippi demonstrate that state commissions have no Section 271 regulatory authority.

a. Federal Court Decisions

Three recent federal decisions address this issue. First, on appeal from a decision from the Mississippi Public Service Commission, the United States District Court explained:

> Even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may (i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company ... or (iii) suspend or revoke such company's approval to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.[71]

Second, the United States District Court in Kentucky confirmed:

> While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.[72]

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[71] *BellSouth Telecommunications, Inc v Mississippi Public Serv Com'n et al*, Civil Action No 3 05CV173LN, *Memorandum Opinion and Order* (S D Miss Apr. 13, 2005) ("*Mississippi Order*"), *2005 U S Dist LEXIS 8498*, p 17 of slip opinion

[72] *BellSouth Telecommunications, Inc v Cinergy Communications Co, et al*, Civil Action No 3 05-CV-16-JMH, *Memorandum Opinion and Order*, (E D Ky Apr 22, 2005) ("*Kentucky Order*"), p 12 of slip opinion, The foregoing decisions are consistent with *Indiana Bell v Indiana Utility Regulatory Com'n et al*, 359 F 3d 493, 497 (7th Cir 2004) ("*Indiana Bell*"), in which the Seventh Circuit described a state commission's role under Section 271 as "limited" to "issuing a recommendation." Consequently, when the Indiana Commission attempted to "parlay

Third, on June 9, 2005, a federal district court in Montana held that Section 252 did not authorize a state commission even to approve a negotiated agreement for line sharing between Qwest and Covad. It reasoned that Section 252 did not apply to this "commercial agreement" because line sharing "is not an element or service that must be provided under Section 251."[73] This decision squarely conflicts with Mr. Gillan's contention that, under Section 271(c)(2)(A), Section 271 elements ***must*** be contained in a Section 252 interconnection agreement.[74] That is because if a state commission cannot even approve a negotiated agreement that does not involve Section 251 items, it certainly cannot ***arbitrate*** terms that are not mandated by Section 251, where, as discussed above, Congress expressly limited the state commissions' authority to implementing Section 251.

b. State Commission Decisions

In addition to the foregoing federal decisions, a plethora of state commissions have given proper effect to the federal statutory scheme. Most directly on point are a series of arbitration decisions involving one of CompSouth's members, Covad, in which the question of whether a state commission can include Section 271 obligations in Section 252 interconnection agreements has been answered "no" time and again. In addition, in cases involving Covad and other CompSouth members, state commissions from Kansas, Massachusetts, Pennsylvania, Texas, and Rhode Island have also addressed this issue directly. Other state commissions have also confirmed the FCC, rather than state commissions, is charged with Section 271 oversight,

its limited role in issuing a recommendation under section 271" into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service, the Seventh Circuit preempted that attempt

[73] *Qwest Corp v Schneider, et al*, 2005 U S Dist LEXIS 17110, CV-04-053-H-CSO, at 14 (D Mont June 9, 2005)

[74] Gillan Direct at 43

although these cases do not specifically address the inclusion of Section 271 obligations in Section 252 interconnection agreements. The relevant decisions are detailed below.[75]

Washington Utilities and Transportation Commission

The Washington Utilities and Transportation Commission ("Washington Commission") explained that "state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271."[76] With respect to Section 252 in particular, the Washington Commission found that even if the parties agreed to negotiate the issue of including Section 271 elements in a Section 252 arbitration proceeding (which BellSouth has not done), the parties could ***not*** confer state commission authority over this exclusively federal aspect of the Act. Thus, the Washington Commission held that

> requiring Qwest to include Section 271 elements in the context of arbitration under Section 252 would conflict with the federal regulatory scheme in the Act, as Section 271 of the Act provides authority only to the FCC and not to state commissions.

Utah Public Service Commission

In an analogous arbitration proceeding, the Utah Public Service Commission ("Utah Commission") held that "Section 252 was clearly intended to provide mechanisms for parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251

[75] Of the state commission orders referenced in this section, the CLECs have appealed the Texas order referenced herein, and various parties have appealed order preceding the Pennsylvania decision cited below

[76] *In re Petition for Arbitration of Covad with Qwest*, Docket No UT-043045, Order No 06 (Feb 9, 2005), *2005 Wash UTC LEXIS 54* Hereinafter "Washington Covad/Qwest Decision"

obligations via incorporation by reference to access obligations under Section 271 or state law."[77] The Utah Commission reasoned that

> Section 271 on its face makes quite clear that the FCC retains authority over the access obligations contained therein. Furthermore, Section 271 elements are distinguishable from Section 251 elements precisely because the access obligations regarding these elements arise from separate statutory bases. The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case for us to do so.[78]

Iowa Utilities Board

The Iowa Utilities Board issued a similar ruling on May 24, 2005. That commission acknowledged a state commission has only "a consulting role" in addressing Section 271. The Iowa commission concluded it lacked "jurisdiction or authority to require that Qwest include [Section 271] elements in an interconnection agreement arbitration brought pursuant to § 252."[79]

Idaho Public Utilities Commission

On July 18, 2005, the Idaho Public Utilities Commission entered its arbitration order between Covad and Qwest in Case No. CVD-T-05-1.[80] The Idaho Commission concluded "that the Commission does not have the authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement."[81]

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[77] *In re Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No 04-2277-02 (Feb 8, 2005), *2005 Utah PUC LEXIS 16* ("Utah Covad/Qwest Decision")

[78] *Id*

[79] *In re Petition for Arbitration of Covad with Qwest,* Iowa Utilities Board, Docket No ARB-05-1 (May 24, 2005), *2005 Iowa PUC LEXIS 186* ("Iowa Covad/Qwest Decision")

[80] Order No 29825; *2005 Ida PUC LEXIS* 139

[81] Hereinafter "Idaho Covad/Qwest Decision"

South Dakota Public Service Commission

The South Dakota Public Service Commission acted in a consistent manner, finding it

> does not have the authority to enforce Section 271 requirements within this section 252 arbitration. Section 252(a) provides that interconnection negotiations are limited to requests for interconnection, services, or network elements pursuant to section 251 .... In addition ... section 252(c)(1) requires the Commission to ensure that [its] resolution of open issues meet the requirements of section 251 of this title, including the regulations prescribed by the FCC pursuant to section 251 of this title .... The language in these sections clearly anticipates that section 252 arbitrations will concern section 251 requirements, not section 271 requirements.[82]

Oregon Public Utility Commission, Minnesota Public Utilities Commission

On September 6, 2005, the Oregon Public Utility Commission adopted an arbitrator's decision, which found, in relevant part, that:

> Every state within the Qwest operating region that has examined [the Section 271] issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and [the Oregon Commission] adopt[s] the legal conclusions that they all hold in common ....[83]

The Oregon Commission expressly adopted the following legal conclusions reached by an arbitrator and confirmed by the Minnesota state commission:

> There is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement over Qwest's objection ... both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271.[84]

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[82] *In re Petition for Arbitration of Covad with Qwest,* South Dakota Public Service Commission Docket No TC05-056 (July 26, 2005), *2005 S D PUC LEXIS 137 (*"South Dakota Covad/Qwest Decision")

[83] *In re Petition for Arbitration of Covad with Qwest,* Oregon Public Utility Commission, Order No 05-980, ARB 584 (Sept 6, 2005), *2005 Ore PUC LEXIS 445* ("Oregon Covad/Qwest Decision")

[84] The Minnesota Public Service Commission issued its Order Resolving Arbitration Issues in Docket No P-5692, 421/IC-04-549 on March 14, 2005 in which it adopted, in part, the December 16, 2004 Arbitrator's Report in that docket

Pennsylvania Public Utility Commission

In addition to the arbitration decisions between Covad and Qwest, other state commissions have issued similar rulings on Section 271. On June 10, 2005, the Pennsylvania Commission ruled Verizon was not obligated to file state tariffs including its Section 271 obligations because:

> [T]he enforcement responsibilities of Section 271 compliance lies with the FCC. Therefore, the Commission will not oblige Verizon PA to produce tariff amendments that reflect its Section 271 obligations. However, the Commission will continue to monitor Verizon PA's compliance with its Section 271 obligations and, if necessary, initiate appropriate complaint proceedings before the FCC. [85]

Massachusetts Department of Telecommunications and Industry

On July 14, 2005, the Massachusetts Department of Telecommunications and Industry entered its Arbitration Order in Docket No. D.T.E. 04-33.[86] The Massachusetts Commission held that

> our authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements.[87]

Kansas Corporation Commission

The Kansas Corporation Commission entered its Order No. 15: Commission Order on Phase II UNE Issues addressing a prior recommendation of an arbitrator in Docket Nos. 05-

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[85] *See 2005 Ore PUC LEXIS 445* at *32 ("Pennsylvania Tariff Decision")

[86] *Pennsylvania Public Utility Commission v Verizon Pennsylvania Inc, et al,* R-00049524, R-00049525, R-00050319, R-00050319C0001, Docket No P-00042092, 2005 Pa. PUC LEXIS 9 (June 10, 2005) In the Pennsylvania decision, the Commission referred to various appeals of prior orders pending the United States District Court, Middle District of Pennsylvania

[87] *In re Petition of Verizon New England, Inc d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* D T E 04-33, Arbitration Order (July 14, 2005) ("Massachusetts Arbitration Order")

BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005.[88] In relevant part, the Kansas Commission held that "the FCC has preemptive jurisdiction over 271 matters."[89]

Public Utility Commission of Texas

On June 17, 2005, the Texas Commission issued an order in which it declined to include terms and conditions for provisioning of UNEs under Section 271 in an interconnection agreement. The Texas Commission explained that it

> declines to include terms and conditions for provisioning of UNEs under FTA § 271 in this ICA. The Commission finds that the FTA provides no specific authorization for the Commission to arbitrate Section 271 issues; § 271 only gives states a consulting role in the 271 application approval process.[90]

Rhode Island Public Utilities Commission

The Rhode Island Commission addressed Section 271 in connection with proposed tariff changes made by Verizon. In a July 28, 2005 order in Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18,*[91] that commission rejected CLEC attempts to include obligations arising under "applicable law" such as Section 271 in Verizon's wholesale tariff. The commission explained "Section 271 is a federal statute and it is inherently logical to have the FCC interpret the statute." The Rhode Island Commission concluded that "[a]t this time, it is apparent to the Commission that at the bistro serving up the BOCs' wholesale obligations, the kitchen door numbered 271 is for 'federal employees only.'"

Alabama, North Carolina, New York

In addition to the foregoing decisions, other state commissions have addressed Section 271 obligations more generally. For example, the Alabama Commission has also concluded that

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[88] Hereinafter "Kansas Order"

[89] See ** 7 – 8

[90] Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas P U C Docket No 28821* (June 17, 2004) ("Texas Order") The Texas Order has been appealed to the United States District Court, Western District of Texas

[91] Hereinafter "Rhode Island Order"

the responsibility for overseeing BellSouth's obligations under Section 271 remains with the FCC, not the Commission. In an order in Docket No. 29393, which involved a petition filed by CompSouth – a party to these proceedings – seeking emergency relief in connection with the "No New Adds" controversy, the Alabama Commission said:

> With regard to MCI's argument that BellSouth has an independent obligation to provision UNE-P switching pursuant to § 271 of the Telecommunications Act of 1996, we conclude, as did the court in [the *Mississippi Order*, infra n. 14], that given the FCC's decision "to not require BOCs to combine § 271 elements no longer required to be unbundled under § 251, it (is) clear that there is no federal right to § 271 based UNE-P arrangements. This conclusion is further bolstered by the fact that the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission. MCI's argument that there is an independent obligation under § 271 to provide UNE-P is accordingly rejected.[92]

Similarly, in Docket P-55, Sub 1550, the North Carolina Utilities Commission, when also considering various emergency petitions concerning the recent "No New Adds" controversy, addressed a similar claim by MCI, saying:

> MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.[93]

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[92] *Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief*, Alabama Public Service Commission Docket No 29393 (May 25, 2005) ("May 25, 2005 Order"), at p 18 (footnotes omitted) ("Alabama No New Adds Order")

[93] *Order Concerning New Adds, In re Complaints Against BellSouth Telecommunications, Inc Regarding Implementation of the TRRO*, North Carolina Public Service Commission Docket No P-55, Sub 1550 (Apr 25, 2005) ("North Carolina No New Adds Order")

Likewise, the New York Commission recognized that "[g]iven the FCC's decision to not require BOCs to combine 271 elements no longer required to be unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements."[94]

All of these decisions, which hold that it is the FCC that has jurisdiction over matters related to Section 271 elements, are obviously correct as a matter of law. States have no authority to regulate access to network elements provided pursuant to Section 271, including any attempt to require the inclusion of Section 271 elements in a Section 252 interconnection agreement. Section 271 vests authority in the FCC to regulate network elements provided pursuant to that section. Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do so. That choice must be respected. As the FCC has explained, Congress intended that a single federal agency, not 51 separate bodies, exercise "exclusive authority" over "the Section 271 process."[95] In the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BOC compliance with Section 271.[96] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section. Moreover, in light of *USTA II*, it is obvious that when Congress assigns a certain responsibility to the FCC, the FCC, and not state commissions, must make the relevant determinations.

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[94] *See also Ordinary Tariff Filing of Verizon New York Inc to Comply with the FCC's TRO on Remand*, New York Public Service Commission Case No 05-C-0203 (March 16, 2005) ("New York Order")

[95] Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, NSD-L-97-6, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, 14401, ¶ 18 (1999) (*"InterLATA Boundary Order"*).

[96] *SBC Communications Inc v FCC*, 138 F.3d 410, 416-17 (D C Cir 1998)

Decisions Previously Relied Upon by CompSouth Are Clearly Distinguishable

CLECs have previously cited to dicta contained in a one federal case – *Qwest Corporation v. Minnesota Public Service Commission,* 2004 WL 1920970 (D. Minn. 2004) – as support for the claim that Section 271 elements belong in Section 252 agreements. That decision, however, is clearly distinguishable because the FCC, ruling on the same fact pattern, reached a different conclusion about Section 252 in the *Qwest ICA Order.* In the *Qwest ICA Order*, the FCC found that "***only*** those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under [Section] 252(a)(1)."[97] The FCC reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under Section 252(a)(1)," "settlement contracts that ***do not affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed.***"[98] This finding is consistent with the FCC's Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations.[99] More importantly, the *Qwest Corp. v. Minnesota Public Service Commission* case predates the 2005 federal court decisions in Mississippi, Kentucky, and Montana.

CompSouth also attempted previously to distinguish the recent federal decisions in Kentucky and Mississippi on this issue – any such attempt should be rejected by the Authority. Both the Kentucky and Mississippi courts specifically held that decisions regarding 271

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[97] *Qwest Communications International Inc Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* Memorandum Opinion and Order, 17 FCC Rcd 19337, n 26 (2002) ("Qwest ICA Order") (emphasis added)

[98] Qwest ICA Order, ¶ 12 (emphasis added), *see also Id,* ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in Sections 251(b) and (c)" must be filed under Section 252)

[99] *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture,* File No EB-03-IH-0263, FCC 04-57 (2004)

obligations rested with ***the FCC***.[100] An attempt by a state commission to set rates or terms and conditions for Section 271 elements would directly conflict with federal court precedent.

In terms of state commission authority, CompSouth's witness cited to a July 11, 2005 arbitration order from the Missouri Public Service Commission.[101] The Missouri decision has been appealed to United States District Court, Eastern District of Missouri; indeed, the CLECs ***agreed*** to the entry of a preliminary injunction which ***prevented*** CLECs from adding new switching arrangements under purported Section 271 authority.[102]

To the extent that CompSouth relies in its post-hearing brief to decisions from Maine, Oklahoma, Illinois, and Vermont, such reliance is misplaced. Verizon has appealed the Maine decision; SBC Illinois has appealed the Illinois decision, the Oklahoma commission has apparently delayed taking action on an arbitrator's decision that CompSouth has cited to previously, and the Vermont commission has **not** acted on a recommended order pending before that commission.[103]

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[100] *Mississippi Order*, p 17 of slip opinion, *Kentucky Order*, p 12 of slip opinion

[101] *See* Gillan Direct at 47

[102] *See* Sept 9, 2005, Preliminary Injunction Order, *Southwestern Bell Telephone, L P d/b/a SBC Missouri v Missouri Public Service Commission,* Case No 4.05-CV-01264-CAS, ¶ 1 (the "PSC's July 11, 2005 Arbitration Order as well as related orders approving interconnection agreements are hereby enjoined to the extent they require SBC Missouri to fill new orders for unbundled local switching or UNE-P pursuant to the Federal Telecommunications Act of 1996").

[103] *See, e g , Verizon New England Inc v Public Utilities Commission of Maine et al ,* Case No 1 05-CV-53 (U S Dist Ct D Me) There are two appeals pending against orders of the Illinois Commission, *Illinois Bell Telephone Co v Edward C Hurley et al ,* Case No 05-C-1149 (U S. Dist. Ct E D Ill), and an appeal to the appellate court of the Fourth Judicial District BellSouth believes the latter appeal may be the direct appeal of the case cited in the *CLECs' SJ Response,* p 16. In CompSouth's Georgia brief, it implied the Vermont Commission had issued a favorable 271 decision without providing any support for that statement BellSouth believes this is incorrect

B. **Issue 8(b): Section 271 and State Law:** *If the answer to part (a) is affirmative in any respect, does the Authority have the authority to establish rates for such elements?*

Relevant Contract Provisions: PAT-1 Section 1.1; PAT-2 Section 1.1

As explained above, state commissions have no authority in any respect to force BellSouth to include Section 271 network elements or network elements unbundled under state law in Section 252 interconnection agreements. Consequently, if the Authority gives proper effect to the existing limitations on its authority under federal law, this sub-issue is easily addressed – the Authority need not discuss it at all. Moreover, for all the reasons discussed above, even if the TRA ***could*** legally set rates, it ***should*** not. Engaging in commission-driven rate setting would be flatly inconsistent with the FCC's decisions in the *TRO* and *TRRO*.

It is important to recognize that Section 271 rate-setting has particular legal ramifications. That is, even if a state commission were to construe Section 271 as requiring an agreement to be approved by a state commission under Section 252, the scope of that a state commission approval is expressly limited to ensuring agreements comply with ***Section 251*** and, state commissions clearly have no authority to establish rates for such elements, which underscores that state commissions have no authority to require inclusion of the Section 271 elements to begin with.

Section 271 "establish[es] a comprehensive framework governing Bell operating company (BOC) provision of 'interLATA service'" and, as shown above, provides only an extremely limited role for state commission participation within that framework.[104] In addition, section 271 arose out of the Modification of Final Judgment (MFJ),[105] and "the states had no

[104] *E g* , Memorandum Opinion and Order, *Petition of SBC Communications for Forbearance,* 19 FCC Rcd 5211, ¶ 7 (2004)

[105] *see TRO* at ¶ 655 *at* n 1986,

jurisdiction" over the implementation of the MFJ.[106] And the FCC has already ruled that it is ***federal*** law – namely, sections 201 and 202 – that established the standard that BOCs must meet in offering access to 271 elements.[107]

State commissions, therefore, cannot assert state law authority to regulate Section 271 elements, which "are a purely federal construct."[108] In particular, state commissions cannot rely on state law to expand the list of Section 271 elements or to regulate the rates, terms, and conditions under which BOCs must provide access to those elements.

The FCC has held that, in Section 271, Congress identified a limited set of specific network elements to which BOCs must provide access irrespective of whether their competitors would be impaired without access to those elements as UNEs.[109] Congress also expressly prohibited the FCC from "extend[ing] the terms used in the competitive checklist" to include additional network elements.[110] It necessarily follows that any decision by a state commission purporting to create new Section 271 obligations under state law or to regulate them in any way, including setting rates, conflicts with Congress's determination and, therefore, is preempted.[111]

More generally, any efforts by state commissions to regulate the prices of Section 271 elements are preempted because they are inconsistent with the FCC's determination (affirmed by the D.C. Circuit) that Sections 201 and 202 establish the standard for assessing the rates, terms, and conditions under which BOCs must provide access to 271 elements.[112] As the FCC has

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[106] *InterLATA Boundary Order*, 14 FCC Rcd 14392, 14401, ¶ 16

[107] *See TRO* at ¶ 656, *UNE Remand Order* at ¶ 470, *USTA II*, *359 F 3d* at 588-90

[108] *InterLATA Boundary Order*, 14 FCC Rcd 14392, 14401, ¶ 18

[109] *See TRO* at ¶ 653

[110] 47 U.S.C. § 271(d)(4), *see also* 47 U S C § 160(a), (d) (permitting the FCC to eliminate the obligation to provide Section 271 elements once "it determines that th[e] requirements [of section 271] have been fully implemented")

[111] *See, e g Buckman Co v Plaintiffs' Legal Comm*, *531 U S 341, 353 (2001)*, *International Paper Co v Ouellette*, 479 U S 481, 494 (1987)

[112] *See TRO* at ¶ 656, *UNE Remand Order* at ¶ 470; *USTA II*, 359 F 3d at 588-90

explained, this means that, for Section 271 elements, "the market price should prevail."[113] Thus, a BOC satisfies that federal law standard when it offers Section 271 elements at market rates, terms, and conditions, such as where it has entered in "arms-length agreements" with its competitors.[114] Rate-setting by commissions is the opposite of the development of market-based prices discussed in the *USTA II* decision. The two concepts of "market-based" rates on the one hand and "commission-set" rates on the other, are fundamentally at great odds, and this common-sense understanding was precisely what Director Tate discussed in making her motion on the market rate for switching in Docket 03-00119. In that case, Director Tate noted the months of calls to negotiate from then Chairman Powell at the FCC and from the TRA itself and went on to conclude that the only course consistent with those calls was to look to the rate that had actually been negotiated:

> DIRECTOR TATE: This dates back to I think Chairman Powell's first request for the parties to do that, and then I tried to do that as well. Mr. Walker admonished me not to undermine the FBO process, although it is really not very much in my nature because, and you-all know, I really as much more of a mediator.
>
> I have played with cutting the numbers in half. I have thought through this a lot, but in order to, I think, be true to my requests and my philosophies about market-based rates, what I would like to propose is – because from my reading of the record, the only rate that has ever been negotiated was the $14 rate, and I would propose that we accept that, ...[115]

Moreover, the failure by certain CLECs to reach an agreed rate – in contravention of the FCC's calls for commercial agreements – should not be rewarded. By engaging in any form of state-based, TRA-run rate making, the CLECs are rewarded with the same out-dated regulatory regime rejected by the FCC. Director Kyle's motion to deny the CLECs' emergency motion (on No New Adds) recognized that, in order to effectuate the FCC's decisions, the CLECs had to be

[113] *UNE Remand Order* at ¶ 470, *USTA II*, 359 F 3d at 588-90
[114] *TRO* at ¶ 664
[115] 03-00119, *DeltaCom Arbitration*, Transcript of Proceedings, June 21, 2004, at 3

told "no". The CLECs' cries for more time and for TRA intervention were rightly rejected. As Director Kyle noted:

> DIRECTOR KYLE: I am of the opinion that when the *TRRO* is read in total, there are no rates, terms or conditions to be negotiated concerning new adds because the FCC expressly prohibited new adds after March 11, 2005, which has passed. In short, there is nothing to negotiate in those instances where new adds are involved and where the FCC has found CLECs are not impaired if a UNE is not provided by the incumbent. This applies to mass market switching everywhere and also to DS1 & DS3 transport, dark fiber transport and high capacity loops in cases where the FCC has determined no impairment exists. To implement the commission's rules Bellsouth may withdraw access to new adds, where no impairment exists, anytime after March 11, 2005.[116]

Permitting "state law to determine the validity of the various terms and conditions agreed upon" by BOCs and their wholesale customers "will create a labyrinth of rates, terms and conditions" that "violates Congress's intent in passing the Communications Act."[117] This potential for "patchwork contracts" resulting from "the application of fifty bodies of law" "... conflicts with Section 202's prohibition on providing advantages or preferences to customers based on their 'locality.'"[118] Section 201, moreover, "demonstrates Congress's intent that ***federal law*** determine the reasonableness of the terms and conditions" of 271 elements.[119]

The FCC has clearly recognized this limitation, stating unequivocally that it has "exclusive authority" over "the section 271 process."[120] Moreover, clear precedent establishes that the FCC has the power to preempt state determinations where a facility is used both for interstate and intrastate purposes and it is not practicable to regulate those components separately.[121] As the FCC has stated to the Supreme Court, that analysis applies directly to the

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[116] Docket No 04-00381, Motion of Sara Kyle on April 11, 2005 (attached).

[117] *Boomer v AT&T Corp*, 309 F 3d 404, 420 (7th Cir 2002), *see also TRO* at ¶ 664 (question whether BOC's provision of Section 271 element satisfies sections 201 and 202 requires "a fact-specific inquiry")

[118] *Boomer*, 309 F 3d at 418-19

[119] *Id* at 420 (emphasis added)

[120] *See US West Order*, 14 FCC Rcd at 14401-02, ¶ 18.

[121] *See Louisiana PSC v FCC*, 476 U S 355, 375 n 4 (1986), *Illinois Bell Tel Co v FCC*, 883 F 2d 104, 114-15 (D C. Cir 1989), *North Carolina Utils Comm'n v FCC*, 552 F 2d 1036, 1045-46 (4th Cir 1977)

pricing of facilities that must be provided by ILECs under the 1996 Act. The FCC explained to the Court that it had concluded in the *Local Competition Order* that

> it would be economically and technologically nonsensical ... for the FCC and the state commissions to treat the rates for interconnection with and unbundled access to [ILEC] facilities like retail rates, such that the ultimate rate a competing carrier must pay an incumbent LEC would reflect a combination of an 'intrastate' rate set by a state commission and an 'interstate' rate set by the FCC.[122]

Accordingly "***the [FCC] may ensure effective regulation of the interstate component ... by preempting inconsistent state regulation of the matter in issue.***"[123] The Supreme Court agreed that the FCC had the authority to resolve such matters under the 1996 Act and thus to "draw the lines to which [state commissions] must hew."[124]

This limitation on state rate-making authority must be given effect. If Congress had wanted state commissions to set rates for "purposes of subsection (c)(3) of such section [251]" ***and*** separately for purposes of the competitive checklist contained in subsection (c)(2)(B) of section 271, it could easily have said so. It said nothing of the kind. As the Supreme Court has explained in a related context involving the relationship between Sections 251 and 271, "Congress' decision to omit cross-references [is] particularly meaningful" in this context, given that such cross-references are plentiful elsewhere in the relevant provisions.[125]

Indeed, ***nowhere*** in the federal statute are states authorized to impose any obligations, much less to set rates, to ensure compliance with section 271 – a provision that, as the FCC and

("NCUCII") *See also Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No 03-251, released March 25, 2005 ("*DSL Preemption Order*") (The FCC recently described its preemption power, explaining, in paragraph 19, that "in addition to section 251(d)(3) jurisdiction in the 1996 Act, Congress accorded to the [FCC] direct jurisdiction over certain aspects of intrastate communications pursuant to section 251 of the 1996 Act We conclude that the plain language of section 251 and of the *Triennial Review Order* empowers the [FCC] to declare whether a state commission decision is inconsistent with or substantially prevents implementation of the Commission's unbundling rules ")

[122] *Opening Brief for the Federal Petitioners*, FCC v Iowa Utils. Bd., No. 97-831, at 36-37 (U S filed Apr 3, 1998) ("FCC S Ct. Brief")

[123] *Id* at 36 (emphasis added)

[124] *Iowa Utils Bd* , 525 U S at 378 n 6

[125] *Id*

the D.C. Circuit have emphasized, contains obligations that are independent of section 251.[126] Rather, as confirmed by the ***limited*** authority granted to the states by section 252, all authority to implement those separate requirements in section 271 is vested with the FCC.

Therefore, even if state commissions had authority to require ILECs to include Section 271 elements in an Section 252 interconnection agreement (which they do not), the state commissions, as a matter of law, have no authority to set rates for those elements. Perhaps most importantly, the TRA, even if it ***could***, ***should*** not be fooled into accepting the CLECs' invitation to set rates that the FCC has decided should be set by the market.

C. **Issue 8(c): Section 271** *If the answer to 8(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?*

Relevant Contract Provisions: PAT-1 Section 1.1; PAT-2 Section 1.1

Based upon the language in the Act, the applicable federal court decisions, and the majority of state commission decisions, there is no basis whatsoever to require BellSouth to include language addressing Section 271 obligations in Section 252 interconnection agreements over BellSouth's objection. BellSouth's proposed contract language properly recognizes that its unbundling obligations are performed "in accordance with its obligations under Section 251(c)(3) of the Act."[127] Because the Authority cannot legally answer issues 8(a) and (b) in the affirmative, this subpart (c) must be resolved in BellSouth's favor.

The Authority cannot and should not address the rates, terms, and conditions that govern BellSouth's Section 271 obligations, and what the CLECs speciously propose to do – extend the "interim" rates established in the DeltaCom Arbitration to the general CLEC community –

[126] *See Id* at 17385-86, ¶ 655 ("section 251 and 271 operat[e] independently"), *USTA II*, 359 F 3d at 588 ("The FCC reasonably concluded that checklist items four, five, six, and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52 ")

[127] PAT-1, Section 1 1

cannot pass muster. The CLECs seek to extend the FCC's transitional rates – rates that unequivocally end at a date certain – beyond their ending date until some unknown rate setting proceeding occurs and permanent state commission 271 rates are ordered. Moreover, the CLECs cannot justify their "interim" rate proposal by claiming that the FCC's transitional rates are close to the DeltaCom rates or by relying on testimony Bellsouth filed in South Carolina (this testimony was never even entered into the evidentiary record). The FCC has addressed various CLEC "just and reasonable" rate claims in its appellate papers filed in the D.C. Circuit Court of Appeals and explained:

> The CLECs dispute the [FCC's] finding that unbundled mass market switching creates investment disincentives. They contend that TELRIC rates are much higher than the [FCC's] analysis suggests. The CLECs' characterization of TELRIC rates is just not credible. If (as the CLECs assert) TELRIC switching rates are at or above "the upper end" of a "just and reasonable range", then presumably CLECs would have stopped paying high UNE rates and started serving their mass market customers with the switches they had already purchased and deployed to serve enterprise customers.
>
> * * * *
>
> The CLECs question the reasonableness of *any* rate increase. They assert that rates for unbundled switching were already at or above the "high end" of "the just and reasonable range" before the FCC prescribed the interim rate increase ... The CLECs' own conduct is inconsistent with their claim that TELRIC-based switching rates are high or excessive. THE CLECs continued to pay TELRIC rates even though the could have served their mass market customers with non-ILEC switches that they had already purchased and deployed to serve enterprise customers. Competitors' persistent reliance on UNE-P - even after extensive deployment of competitive switches – provides powerful evidence that TELRIC-based switching rates were not even close to "the high end" of the permissible range of rates under the "just and reasonable" standard of section 201(b).[128]

As the FCC makes clear, using rates that are at, or close to TELRIC, are not to perpetuate the investment disincentives that existed under the UNE-P regime. CompSouth's attempt to obtain such rates shows that it wishes to evade the regulatory changes mandated by the *TRRO*.

[128] *Brief of the FCC,* Respondents, United States District Court of Appeals, District of Columbia Circuit, Case No 05-1095, pp 32, 36 (citations omitted), *oral argument scheduled* Feb 26, 2006

Just as the CLECs tried to avoid the definitive start date of the *TRRO,* this is simply an attempt to circumvent the ending date, in an effort – in the words of the Eleventh Circuit – "to cram as many new customers as possible before they are forced to bow to the inevitable."[129] This clinging to the former regulatory regime also undermines the results of BellSouth's commercial negotiations – negotiations that have resulted in over one hundred and fifty agreements.[130] The Authority cannot and should not allow such an outcome.

The TRA has recognized that the FCC meant what it said about the No New Adds date, and it must likewise recognize that the FCC's end date for imposing transitional rates is equally important. It is clear that the FCC intended that those rates convert to market rates at that point. Had the FCC intended the transitional rates to last until replaced by state-set rates, it would have said so. It did not say so, because that is not what the law requires. Having recognized that the de-listed UNEs should not be required to be provided at the rates previously in place, due to their adverse impact on competition, the FCC set a firm end date to its transition plan, which states must not ignore.

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

Relevant Contract Provisions: PAT-1 Section 1.11, PAT-2 Section 1.11

BellSouth allows ***real*** commingling, but that's not what the CLECs are seeking. The CLECs attempt to shoe-horn their UNE-P theory into commingling in order to preserve what the FCC clearly intended to end. In contrast, as Ms. Tipton's testimony makes clear,

[129] *Eleventh Circuit Order* at * 13
[130] Blake Rebuttal at 3

BellSouth's proposed contract language properly implements the FCC's commingling definition.[131]

The CLECs have tried to hide the ball on this issue by dressing up their 271 argument as a commingling argument, but the TRA Staff's questions to BellSouth's witness Ms. Tipton, by Colleen Edwards, clearly cut through the CLECs' subterfuge:

> Q. Okay. Help me with commingling a little bit. I'm trying to understand exactly what BellSouth's position is. Is it BellSouth's position that with regard to commingling do you have an objection to a CLEC commingling UNE-T1s with special access transport or visa versa?
>
> A. No, we do not.
>
> Q. Not an issue?
>
> A. Not at this issue.
>
> Q. How about do you have an issue with commingling UNE loops with stand-alone switching?
>
> A. Yes, we do, because – except as offered in a commercial arrangement, which we are doing via our commercial agreement – our DSO platform agreement, but because switching has been eliminated as a UNE whether stand-alone or offered in combination as a 271 element the check list is very clear that we have no obligation to combine that with a loop or anything else. So when offered under – as a 271 element we certainly have a commercial opportunity to do that and we are doing it because we like to keep carriers on our network, but the FCC did not eliminate UNE or UNE-P in particular as a 251 element just to have it re-created.
>
> Q. What about switching not combined, just commingled? Would you make – let's try to illustrate this so it makes sense. Hypothetically speaking, if I was a CLEC and I was collocated but I didn't have a switch in the area and I wanted to go ahead and buy a stand-alone switching and I was going to combine that, would you be able to go ahead and take that switch port and put it someplace where I could go ahead and I could combine it directly to the loop that I ordered?
>
> A. Oh, absolutely yes. In that scenario you described, we still deliver unbundled switching to a collocation cage as we have always done, so a carrier could combine those two elements themselves.

[131] Tipton Direct at 47 – 51, Tipton Rebuttal at 39 – 40

Q. Okay, Excellent.[132]

As demonstrated by these questions and answers, BellSouth is providing commingling to the extent of its obligations.

CompSouth's contract language cannot and should not be adopted by the Authority. CompSouth's language would improperly assert state commission authority over Section 271 obligations and would resurrect UNE-P, which is completely inappropriate, as discussed above in response to Issue 8. To the extent that CompSouth's language includes commingling of Section 251 loops or transport UNEs with Section 271 loops or transport checklist items, the CLECs' proposed terminology is simply a red herring, designed to deflect attention from the CLECs' attempt to resurrect UNE-P under the guise of commingling.

The overreaching problem with CompSouth's proposed contract language is that it improperly asserts state commission regulation over Section 271 obligations. As discussed extensively in connection with Issue 8, above, the Authority cannot regulate the terms by which BellSouth complies with its Section 271 obligations. Because the FCC alone has that authority, the Authority must reject out of hand any suggestion that Section 271 services must be commingled with other UNEs.

Even if the Authority had some Section 271 authority (which it does not), a careful review of commingling indicates BellSouth has no obligation to commingle 251 services with 271 services. Although the FCC enacted its federal commingling rule in connection with the *TRO,* the term "commingling" was first used in the FCC's *Supplemental Order on Clarification*, FCC 00-183, CC Docket No. 96-98 (rel. June 2, 2000) ("*SOC*"). There, the FCC discussed commingling as combining loops or loop-transport combinations with ***tariffed special access services***

[132] *Tr* Vol IV, at 10-11

> We further reject the suggestion that we eliminate the prohibition on "commingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above."[133]

By using the phrase "i.e.", which commonly means, "that is," the FCC in the *SOC* understood commingling as referring to a service combination that expressly included tariffed access services.

The FCC's discussion of commingling in the *TRO* was ultimately consistent with its discussion in the *SOC* as explained more fully below. In the *TRO*, the FCC explained that commingling meant

> the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the ***combining*** of a UNE or UNE combination with one or more such wholesale services.[134]

Thus, despite the CLEC attempts to create a distinction between an ILEC's commingling obligation and the combination obligation,[135] the FCC used the terms interchangeably.[136]

The FCC was very clear that BellSouth and other RBOCs have no obligation to combine 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act. ("We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251."). [137] This aspect of the FCC's ruling was upheld on appeal; the appellate court explained that the FCC

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[133] *SOC* at ¶ 28

[134] *TRO*, ¶ 579 (emphasis added)

[135] *See* Gillan Direct at 49-51.

[136] Mr Gillan's testimony on this point is illogical. He describes the FCC's use of the terms combining and commingling as a matter of "semantic construction," claims BellSouth is "not technically required to 'combine' § 271 elements," then claims BellSouth has an obligation to "connect § 271 elements " Gillan Direct at 49 Mr. Gillan's word choice – connect, instead of combine – is of no consequence The definition of commingling at 47 C F R §51 5 includes "the combining of an unbundled network element . with one or more such facilities or services " Since Mr Gillan testifies that BellSouth is not required to "combine" § 271 elements, and the definition of commingling includes the obligation of combining a UNE with other facilities or services, Mr Gillan effectively concedes BellSouth has no obligation to commingle § 271 network elements with UNEs

[137] *See TRO* at ¶ 655, n 1989 The *TRO*, as originally issued, had this language at note 1990 After the *TRO Errata* the footnotes were renumbered, and the remaining language appears at note 1989

had "decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements."[138]

The strained argument of the CLECs on this point is telling. In an effort to cloud this issue, CLECs make a "double-strike" argument that cannot pass muster. The argument centers on two deletions from the *TRO,* which deletions were made in the *TRO Errata.* Prior to its *Errata,* the FCC originally stated,

> [a]s a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements ***unbundled pursuant to section 271*** and any services offered for resale pursuant to section 251(c)(4) of the Act.[139]

Notably, when the *Errata* was issued however, the phrase "unbundled pursuant to section 271" ***was deleted.***[140] Thus, the language of the *TRO,* as corrected by the *Errata,* requires

> incumbent LECs [to] permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements and any services offered for resale pursuant to section 251(c)(4) of the Act.

Hence, the first "strike."

The second "strike" also occurred in the *TRO Errata.* At the same time the FCC deleted the phrase "unbundled pursuant to Section 271" from its discussion of commingling in paragraph 584 of the *TRO,* it also deleted the sentence, "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to these checklist items" from its discussion in the section 271 portion of the *TRO.*[141] The CLECs make the absurd argument that, read together, the two deletions were intended to correct any potential conflict. That argument cannot stand – had the FCC desired to impose some type of commingling, or

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[138] *USTA II,* 359 F 3d at 589 Significantly, the Section 271 checklist obligates BellSouth to provide local loop transmission *"unbundled from local switching and other services",* local transport *"unbundled from switching or other services",* and switching *"unbundled from transport, local loop transmission or other services "*

[139] *TRO* at ¶ 584 (emphasis supplied)

[140] *TRO Errata,* at ¶ 27

[141] *See TRO,* n 1989 (prior to the *TRO Errata,* this was footnote 1990).

combining obligation on BellSouth it would have only needed to delete the language at footnote 1990, yet retain its original language in paragraph 584, which, as originally issued, appeared to impose an obligation to commingle UNEs with Section 271 network elements. That was not the course the FCC took – it made two deletions, one of which clearly removed any commingling of Section 251 UNEs with Section 271 network elements.

Ultimately, by making its deletions, the federal commingling rule issued by the *TRO* became entirely consistent with the discussion of commingling in the *SOC*. That is because the words wholesale services are repeatedly referred to as tariffed access services. Thus, when the CLECs attempt to ignore the FCC's deletion and focus on the words "wholesale services" their reliance cannot stand. Although the CLECs contend wholesale services must include Section 271 obligations, the FCC clearly intended to limit the types of wholesale services that are subject to commingling. This is because, in describing wholesale services in the *TRO*, the FCC referred only to ***tariffed access services,*** just as it had in the *SOC,* explaining, in relevant part, as follows. First,

> We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff).

Next,

> Competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff).

Third,

> We do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g* , a ... circuit at rates based on special access services and UNEs).

Then,

> We require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.

Finally,

> Commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services.[142]

The foregoing passages, along with the deletion of Section 271 in the description of commingling in the *Errata,* show clearly that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 UNEs. Moreover, language within the *TRRO,* read in conjunction with the *TRO,* is consistent. In addressing conversion rights in the *TRO,* the FCC referred to "wholesale services," concluding, "Carriers may both convert UNEs and UNE combinations to ***wholesale services*** and convert wholesale services to UNEs and UNE combinations ...."[143] Then, when describing this conversion holding in the *TRRO*, the FCC explicitly limited its discussion to the conversion of ***tariffed services*** to UNEs: "We determined in the *TRO* that competitive LECS may convert ***tariffed incumbent LEC services*** to UNEs and UNE combinations ...."[144] It is clear, therefore, that the FCC narrowly interprets "wholesale services" as limited to tariffed services, and it does not expect or require BellSouth to combine or commingle Section 271 network elements with Section 251 network elements.[145]

Any other interpretation of BellSouth's commingling obligation would undermine the FCC's findings in the *TRRO* that decline to require unbundling of UNE-P due to the investment

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[142] *TRO at* ¶¶ 579 – 581, 583

[143] *TRO* at ¶ 585 (emphasis supplied)

[144] *TRRO* at ¶ 229 (emphasis supplied)

[145] Because BellSouth satisfies its Section 271 loop and transport obligations through its tariffed access services, BellSouth combines a Section 251 loop with tariffed transport, which transport happens to serve as BellSouth's Section 271 offering That is why the CLECs' listing of loop and transport commingling arrangements they propose to include in contracts is a red herring The CLECs know full well that BellSouth already connects 251 UNEs with tariffed access services Indeed, CLECs have no need for any "retroactive" commingling language for that reason

disincentives previous unbundling rulings had created.[146] Significantly, if BellSouth is required to combine or commingle 251 elements – such as loops – with services BellSouth provides only pursuant to Section 271 – such as switching – the result will be to effectively recreate UNE-P under the guise of commingling. The FCC made clear in the *TRRO*, however, that there is "no section 251 unbundling requirement for mass market local circuit switching nationwide."[147] And, both the New York Public Service Commission as well as the Mississippi Federal District Court have indicated that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to 271-based UNE-P arrangements.'"[148] UNE-P is abolished and state commissions cannot recreate it disguised as a Section 271 commingling obligation.

The North Carolina Utilities Commission Panel has recently addressed this issue in a proceeding between BellSouth and NuVox in Docket No. P-772, Sub 8, finding:

> The Commission believes that ... the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.[149]

The Florida Commission reached the same conclusion in an analogous arbitration:

> In paragraph 584 of the *TRO*, the FCC said "as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to Section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." The FCC's errata to the TRO struck the portion of paragraph 584 referring to '... any network elements unbundled pursuant to Section 271 ....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also

[146] *TRRO* at ¶ 218

[147] *TRRO* at ¶ 199

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

[149] *See* NCUC Docket No P-772, Sub 8, *Recommended Arbitration Order* at 24.

required to be unbundled under section 251(c)(3) of the Act. ***Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271.***[150]

The Florida Commission reasoned that the elimination of UNE-P justified adopting BellSouth's position on commingling:

> Further, we find that connecting a section 271 switching element to a section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential recreation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition.[151]

In reaching this conclusion, the Florida Commission explained:

> COMMISSIONER EDGAR * * * *
>
> So ... I think we need to do is look at in the larger context, and that the language at issue should be interpreted within the larger context of FCC decisions and direction, and in keeping with this Commission's recognition of that direction.
>
> Recreating UNE-Ps or UNE-P type service provisions, I believe, is in contradiction to the goals of the FCC and the direction that they have laid out in the TRO and as followed through with the errata that came after than. I also don't believe that the CLECs are significantly disadvantaged by removing 271 services from those services that must be commingled with UNEs or with UNE combinations. 271 services will continue to be available from BellSouth through special access tariffs or commercial agreements. [152]

[150] FPSC Order No PSC-05-0975-FOF-TP at 19 (October 11, 2005) (emphasis added)

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

[152] Florida Commission Transcript of Aug 30, 2005 Agenda Conference, Docket No 040130-TP, released Sept 16, 2005

The Kansas Commission also addressed commingling, ruling: (1) Southwestern Bell Texas ("SWBT") was "not under the obligation to include 271 commingling provisions in successor agreements"; (2) "271 commingling terms and conditions had ***no home*** in [interconnection] agreements"; and (3) if it ordered SWBT to provide commingling and SWBT refused the commission "would have no enforcement authority against SWBT because that authority ... resides with the FCC."[153] The Authority should reach the same conclusion here.

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

Relevant Contract Provisions: EF-1 Section 3.1.2

The FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004.[154] The TRA has also clearly ruled on the line sharing issue finding that the FCC's transition plan is determinative of BellSouth's obligations.[155] The CLECs seek to have the TRA reverse both its own course (established by the unanimous order in the Covad Arbitration)[156] and the FCC's course.

BellSouth asks the Authority to implement this aspect of the *TRO* and require CLECs to either eliminate line sharing from their interconnection agreements entirely if a CLEC has no line sharing arrangements in place, or to include language that implements the *TRO's* binding transition mechanism for access to the high frequency portion of the loop ("HFPL") if a CLEC

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[153] *See Kansas Order* at ¶¶ 13-14 (emphasis added) BellSouth acknowledges the Kentucky Public Service Commission in its region, and other state commissions outside it region have required commingling of Section 251 UNEs and Section 271 obligations BellSouth has asked the Kentucky Commission to rehear and correct its ruling, which is contrary to law. Also, some states, although they have properly recognized their lack of Section 271 authority have nonetheless erroneously determined that ILECs must allow requesting carriers to commingle Section 251(c)(3) UNEs with Section 271 elements *E g , Washington Covad/Qwest Decision, Massachusetts Arbitration Order*

[154] Fogle Direct at 5, *citing TRO* at ¶¶ 199, 260-252, 264-265

[155] Docket No 04-00186, *Order* dated July 20, 2005 Director Tate properly declined to support Covad's request that this *Order* be reconsidered. (*Tr* Agenda Conference, August 22, 2005, p 12)

[156] *Order*, July 20, 2005, 04-00186

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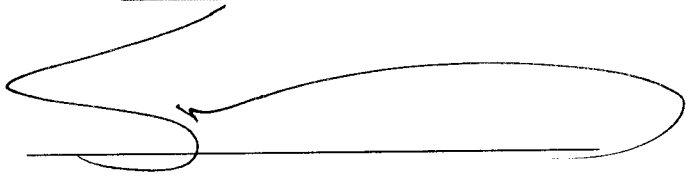

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