JP

BELLSOUTH

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November 17, 2006

VIA HAND DELIVERY

filed electronically in docket office on 11/20/06

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *General Docket to Establish a Rate for Switching Provided Pursuant to Requirements Other Than 47 U.S.C. 251*
Docket No. 06-00080

Dear Chairman Kyle:

Enclosed are an original and four copies of BellSouth's Brief on Legal Issues and Appendix.

A copy of the enclosed has been provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:nc

602036

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: *GENERIC DOCKET TO ESTABLISH A RATE FOR SWITCHING PROVIDED PURSUANT TO REQUIREMENTS OTHER THAN 47 U.S.C. 251*

Docket No. 06-00080

BELLSOUTH'S BRIEF ON LEGAL ISSUES

BellSouth Telecommunications Inc. ("BellSouth") files this Brief on Legal Issues, as provided in the Scheduling Order issued by the Hearing Officer in this docket, and respectfully shows the Authority as follows:

INTRODUCTION

Before the TRO, local switching was an integral part of the "UNE-P" service upon which many CLECs based their business models. The FCC, upon finding that local switching was available to CLECs in the market, de-listed switching as a §251 UNE, and, since that time, some CLECs have sought to obtain from state commissions what the FCC took away. That effort is misguided and undermines the FCC's effort to refine its national policies to incent more true, facilities-based, competition.

Momentum Telecom (the lone CLEC participating in this docket to obtain a non-commercial rate for switching) did not seek to open this docket. Rather, DeltaCom raised the issue of a TRA-mandated rate for non-251 local switching in its arbitration. DeltaCom has, since that time, negotiated a commercial agreement to obtain switching and has not intervened in this docket.

As a result of the litigation in the DeltaCom Arbitration, the Tennessee Regulatory Authority established this docket for the purpose of setting a rate for switching provided by BellSouth other than under §251 of the Telecom Act. BellSouth provides this Brief to address various legal issues and important developments related to this matter, which have occurred since the TRA decided to proceed in this docket.

I. NEW FEDERAL DECISIONS

Since the Authority issued its decision to open this docket, new federal legal decisions have been issued, and Federal Courts have consistently ruled that state commissions lack jurisdiction to set rates under 271.

When the TRA considered the "271 jurisdiction" issue in the DeltaCom case, few courts had yet considered the issue. That is no longer the case. Several federal courts have now taken up the issue of whether state public service commissions may establish rates pursuant to Section 271, and their holdings uniformly support BellSouth's position that the TRA should not proceed to set rates on the basis of Section 271. In light of the consistent holdings of these federal courts, the TRA should consider whether it would constitute legal error to proceed with this docket.

Multiple federal courts have now explained that, with respect to state commissions' authority to set rates, § 252 is "quite specific" and "*only* applies for the purposes of implementation of section 251(c)(3)." *Triennial Review Order* ¶ 657 (emphasis added); *see also* Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *31-*32 (contrasting § 271, which "does not contain an express provision for rate-making or rate-making authority," with § 252); Florida Decision, 2006 U.S. Dist. LEXIS 73511, at *11-*14 (same); Illinois Decision, 2006 U.S. Dist. LEXIS 70221, at *39 (same).

The legal question presented is whether Congress empowered state commissions to engage in 271-based rate setting. In accord with the statutory language in the Telecom Act, both the FCC and the courts have repeatedly recognized that Congress granted "*sole authority* [to the FCC] to administer ... section 271." *InterLATA Boundary Order* ¶¶ 17-18 (emphasis added); *see id.* ¶ 18 (finding that Congress intended that the FCC exercise "*exclusive authority* ... over the section 271 process") (emphasis added); *see also* Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *32-*33 (relying on *InterLATA Boundary Order* to support holding that state commission could not mandate unbundling under § 271). As the federal court in Mississippi succinctly explained last year, "it is the prerogative of the FCC ... to address any alleged failure by [a Bell company] to satisfy any statutorily imposed conditions to its continued provision of long distance service." *BellSouth*, 368 F. Supp. 2d at 566; *see also Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) (holding that a state commission may not "parlay its limited role" in consulting with the FCC on a BOC's application for long-distance relief to impose substantive requirements).

Indeed, in four separate cases decided in just the past few months, federal courts have again confirmed that state commissions have no federal-law authority to impose requirements (such as commission-mandated rates) to implement § 271. These cases provide new, clear legal guidance, which was not available to the TRA when it first considered the switching issue in the DeltaCom arbitration.

For instance, the Missouri commission decided last year to set rates for facilities that must be provided only under §271. *See* Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *27. That decision was appealed to federal court. On review of that decision, the federal district court reversed the state commission, concluding that "[t]he text of § 271 gives the FCC exclusive jurisdiction over the enforcement of that section"; that the state commission's "only role" is to "act as consultant to the FCC during the application process"; and that "the statute places exclusive enforcement of any ongoing obligations with the FCC." *Id.* at *31. The Missouri federal court further explained, that "Section 252 provides that the state commission's duty in arbitrating and approving agreements is limited to ensuring that the agreement 'meets the requirements of section 251,' and does not mention any role for the state commission under § 271." *Id.* at *32 (quoting 47 U.S.C. § 252).

The federal district court for the Northern District of Illinois likewise recently rejected the conclusion of the Illinois Commerce Commission that the Commission had the power under § 271 to require an ILEC to provide a CLEC with access to the incumbent's network elements at regulated rates. *See* Memorandum Opinion and Order at 23-25, *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149 (N.D. Ill. Sept. 28, 2006). In that case, the federal court rejected the Commission's contention that it was not attempting "to *enforce* Section 271's requirements" and refused to permit the Commission "to accomplish through indirect means what it is clearly prevented from doing directly." *Id.* The court also rejected reasoning in a Maine district court decision (that case is further discussed below).

Also in line with these decisions from Missouri and Illinois, the federal district court for the Northern District of Florida recently affirmed the Florida Public Service Commission's decision that it has no jurisdiction to require access to network elements under § 271. *See* Order on Merits, *Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n*, No. 4:06cv72-RH/WCS (N.D. Fla. Sept. 12, 2006) (holding that § 271 "assigns state commissions no role in the process" other than consulting with the FCC "prior" to the FCC's decision, and that it "is correct ... that any complaint by Covad that BellSouth's failure to provide [a certain form of network access] will violate § 271 is an issue for the FCC, not for the Florida Commission"). The court stressed that, "any complaint" that a Bell company was not in compliance with § 271 "is an issue for the FCC"; and it concluded that "[t]he Florida Commission thus had it right. It has no authority to enforce §271." *Id.* slip op. at 9-11; *see also id.* slip op. at 10 n.7 (also rejecting the analysis in the Maine decision).[1]

[1] Although the court noted that the competitive local exchange carrier in that "apparently ha[d] acquiesced in this conclusion," *Dieca Communications*, slip op. at 11, the court also made clear that it was affirming the Florida Commission's jurisdictional holding on the merits, *see id.* slip op. at 1 (noting that the Florida Commission held "that it has no authority to enforce" § 271 and that the court "uphold[s] the Florida Commission's decision" on that ground); *see also id.* slip op. at 9-11 (evaluating jurisdictional issue in light of "the plain terms of the statute" and relevant precedent). It is therefore clear that the Florida decision does not turn on the argument that CLECs

Echoing these federal cases, the federal district court for the District of New Hampshire recently reversed the New Hampshire Public Utilities Commission's attempt to assert jurisdiction under § 271. *See* Memorandum and Order, *Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n*, No. 05-cv-94-PB, 2006 WL 2433249 (D.N.H. Aug. 22, 2006). In that decision, the court highlighted the state commissions' "limited role in the § 271 application process," *id.* at *3; it emphasized the limitations that the FCC has placed on requiring access to network elements, *see id.* at *5-*6; it held that the New Hampshire commission had "failed to identify" a source of authority to set rates under § 271, *id.* at *8; and it further held that in any event the commission's decision conflicted with and was preempted by the FCC's unbundling determinations, *see id.* at *8 n.33. *See also id.* at *7 n.29 (declining to follow the Maine decision).

In fact, ***no federal court has held that state commissions have authority to implement § 271 under federal law.*** In an attempt to distract commissions from this clear and uniform legal authority, CLECs have consistently raised one decision, *Verizon v Maine PSC*, 441 F.Supp. 2d 147 (D.ME. 2006), as support for the position rejected by every federal court to consider the 271 issue. Yet, even that case offers no support for state commissions setting rates under § 271 and instead relies on Maine's state law to support the action of the Maine Commission. *Id.* at 152. Moreover, in that case, it appears that these state law issues were not

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in Florida failed to preserve an argument. Instead the case plainly agreed on the merits with the Florida Commission that it had no jurisdiction to act under § 271.

adequately addressed by the parties - further underscoring the need for the parties in this case to be told what legal basis the TRA relies upon to act in this docket.

In addition to the Courts' decisions discussed above, the overwhelming majority of state commissions that have addressed the issue – 26, according to BellSouth's most recent count – have also agreed that they do not have authority to implement § 271 obligations. As the Rhode Island commission put it, "at the bistro serving up the BOCs' wholesale obligations, the kitchen door numbered 271 is for 'federal employees only.'"[2] Notably, three out of every four commissions who have considered the issue have chosen to refrain from acting under § 271. Those commissions in the minority, which have chosen to assert 271 jurisdiction, chose to do so ***before*** the federal courts issued the decisions above.

Attached for the TRA's convenience is an overview of every state commissions action on this issue as well as copies of the four federal court decisions discussed above. These materials clearly demonstrate that federal legal precedent has rejected the arguments supporting the assertion by state commissions of 271 jurisdiction and also show that state commissions have overwhelmingly taken that lesson to heart.

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[2] Report and Order, *Verizon-Rhode Island's Filing of February 18, 2005 To Amend Tariff No. 18*, Docket No. 3662, 2005 RI PUC LEXIS 26, at *16 (R.I. Pub. Utils. Comm'n July 28, 2005).

II. DELTACOM NO LONGER NEEDS A TRA-SET SWITCHING RATE

DeltaCom, the CLEC whose Arbitration served as the catalyst for this docket now obtains switching via an agreed, negotiated commercial agreement.

Not only does DeltaCom no longer need the ruling anticipated from this docket, but many other CLECs today operate under commercial agreements. While counsel for Momentum seeks to suggest that CLECs have agreed to commercial agreements only as a last resort and are suffering under this regime, the fact that so few CLECs have taken any interest in this docket, to date, flies in the face of this assertion. Moreover, the availability of the other options available to CLECs to obtain switching ***has already been decided by the FCC***, and Momentum's arguments) that it chose to obtain commercial switching from BellSouth only as a "last resort") cannot be reconciled with the FCC's contrary national public policy finding – the very finding on which the de-listing of switching is based.

The TRA never intended to mandate commission-set rates that were not needed in light of negotiated rates set by the market, and the rates at issue here have now been established by successful commercial negotiations evidenced by commercial agreements. In fact, Director Miller was clear that the interim rate set in the DeltaCom case would only be needed in the event no negotiated rate could be established, as demonstrated from his discussion of the purpose of this docket:

> Director Miller: Right. It would be -- the purpose of the generic docket is to set a rate applicable to every--however if in the interim the FCC intervenes and sets rules and pre-empts that, then that will end the true up period ***or if commercial negotiations are successful and they come up with a rate on their own.***

June 21, 2004, Tr. at 9 (emphasis added). Clearly, the TRA did not intend to establish rates that would supplant the rates in negotiated commercial agreements, but that is precisely what Momentum (which itself negotiated a commercial agreement) seeks here.

It would be an illogical result if the TRA were to engage in rate-setting after the market has already acted and established negotiated commercial rates. Given the TRA's continued emphasis on encouraging negotiation and commercial agreements, it is unreasonable for any party (and especially a party who has entered into a commercial agreement for switching) to argue that those negotiated rates should be rejected in favor of rates set by a commission.

III. DUE PROCESS AND ADMINISTRATIVE PROCEDURE

If the TRA were to proceed in this generic docket, the docket must comport with the fundamental requirements of state law.

A. Due process requires that parties have notice and a meaningful opportunity to be heard before decisions that affect them are made by this Authority. Consequently, the Authority must identify the legal requirements that will govern the outcome of the docket.

In this case, the Authority has not identified the relevant law or the requirements of that law before beginning this docket. Because this matter is proceeding on the motion of the Authority, rather than on a complaint by a party, the Authority must state clearly the legal basis upon which it intends to establish a rate. The Order establishing this docket says only what law does not apply, not what law does apply. While parties in previous dockets have identified 271 as potentially governing and the Authority itself in its brief to the FCC has suggested that even state law could be applicable, there is no clear direction for parties about what the actual requirements of the law are, because no law has been identified. Of course, the Authority filed its brief prior to the issuance of the four federal court decisions summarized above.

The Court of Appeals has recently noted that the TRA abuses its discretion when it "applies an incorrect legal standard or reaches a decision which is against logic or reasoning and which causes an injustice to a complaining party."[3] In the present case, injustice would clearly be done if the Authority proceeded in a rate setting case without first establishing the legal basis and framework for establishing that rate. As a practical matter, the Authority must anticipate that, without setting such guidelines, the parties' testimony and discovery could be far ranging, and the hearing officer would have no legal guidance to govern decisions on discovery disputes or objections as to relevance of evidence.

Momentum, the only CLEC who has intervened supported the setting of a rate by regulatory mandate, has argued that the standard to be applied to any rate setting in this docket is the "just and reasonable" standard applicable to a §271 network element. If, in fact, the TRA's interest in this docket is to engage in §271-based rate setting under the federal statute,[4] then the TRA would be obligated to follow federal law, including the FCC's decisions on §271.

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[3] *See, Consumer Advocate Division v. Tennessee Regulatory Authority*, 2005 Tenn. App. Lexis 745 *28, (reversing the TRA's decision as abuse of discretion and citing *Doe v. Roman Catholic Diocese of Nashville* , 154 S.W.3d 22, 42 (Tenn. 2005))

[4] As discussed herein, BellSouth respectfully maintains that state commissions lack the authority to engage in §271 rate-making. This view is supported by the federal courts who have considered the issue as discussed above.

In its *Triennial Review Order*,[5] the FCC expressly determined that a Bell Operating Company ("BOC") can demonstrate that a rate at which it offers a §271 network element is just and reasonable "by showing that it has entered into arms-length agreements with others, similarly situated purchasing carriers to provide the element at that rate." Given this clear statement, the relevant inquiry under 271 is whether BellSouth (1) has negotiated commercial agreements with other CLECs and (2) whether the CLEC complaining is "similarly situated" to those CLECs with agreements. This FCC's precedent clearly establishes only two relevant criteria for evaluating whether the rate at which BellSouth offers commercial switching is just and reasonable. Consequently, the only relevant evidence to be considered in establishing whether a rate is "just and reasonable" is evidence of other agreements with CLECs and evidence about whether the complaining CLEC is distinguishable.

The TRA is already well aware that BellSouth has commercial agreements in place with many CLECs. Perhaps most importantly, BellSouth has successfully negotiated commercial agreements with both DeltaCom and Momentum. Moreover, based on the evidence presented by BellSouth in FCC Docket EB-05-MD-029 *In re Momentum Telecom, Inc.*[6], it is clear that Momentum is "similarly-

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[5] 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, ¶664 (2003) (*"Triennial Review Order"*), *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*"USTAII"*), *cert. denied, NARUC v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

[6] It is telling that Momentum chose, in the face of the evidence before the FCC, to withdraw the complaint it filed, before the FCC reached a decision. *See* Order of Dismissal, *Momentum*

situated" to many other carriers that have entered into a commercial agreement to purchase BellSouth's DSO Wholesale Local Voice Platform Service.[7]

Cost studies simply are not relevant to the standard established by the FCC because evidence about BellSouth's costs do not relate to the criteria established by the FCC. The insistence by Momentum of the need to present "cost-studies" or evidence of cost is telling. It reveals that Momentum's real intent is to obtain a rate based upon the methodology used for setting rates under §251 -- rather than the intent to test the justness of a commercial rate using the criteria established by the FCC under §271. The FCC's precedent is clear that rates for 271-mandated elements will be judged by what is happening in the commercial market at the negotiating table, and the evidence of that activity is the commercial agreements that have actually been negotiated. Commercial negotiation has been the hallmark of the changes brought about by the TRO and TRRO. Momentum's efforts to turn this docket into an old-fashioned, cost-based rate setting exercise flies in the face of the FCC's precedent and its clear national policy to require commercial negotiation for de-listed UNEs.

B. This generic docket, if it is to bind all parties in the future, should proceed as a rulemaking rather than a contested case.

The Tennessee Court of Appeals has ruled that the use of rulemaking, rather than the use of contested cases, is the correct process for establishing new policy

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Telecom, Inc. f/k/a Momentum Business solutions, Inc. v. BellSouth Telecommunications, Inc., 21 FCC Rcd 2247 (2006).

[7] BellSouth continues to maintain that Momentum failed to state a cause of action in its case before the FCC under §271 of the 1996 Act based on Momentum's failure to request negotiations for a "stand-alone" switch port.

and standards to be applied generally in the future. In contrast, contested cases are the procedure used for resolution of a particular case on particular facts. [8]

As reflected by the transcript quoted above, the present docket was originally convened in association with a single CLEC's arbitration. That CLEC, DeltaCom, has negotiated a commercial rate for switching, and consequently, this docket is no longer needed. If, however, the Authority intends to use this docket to provide a generally applicable wholesale rate standard for non-251, switching then the Authority must use the proper procedural framework under state law. If the Authority intends to achieve generic future application of a rate established in this docket, and given the fact that this proceeding is not one that the TRA has been directed to engage in by the FCC, the TRA must use the correct state law format -- a rulemaking to develop and implement a new TRA policy regarding wholesale rates for UNEs not required under 251. To attempt to implement new, generally-applicable regulatory policy without a rulemaking would run afoul of the Court of Appeals ruling in *Cable TV Ass'n v. Tennessee Public Service Commission.*

CONCLUSION

For the reasons discussed above, BellSouth respectfully urges the Authority to close this docket. Since the Authority decided to convene this proceeding, circumstances have fundamentally changed – additional CLECs, including DeltaCom and Momentum, have successfully negotiated commercial agreements with

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[8] *See, Tennessee Cable Television Ass'n v. Tennessee Public Service Com.*, 844 S.W.2d 151 (holding that TRA abused its discretion by using contested case rather than rule-making).

BellSouth for switching, and a number of federal courts have recently ruled that state commissions have no jurisdiction to set rates for delisted UNEs.

In the alternative, BellSouth urges the Authority, if it does proceed (which BellSouth opposes), to proceed through a rulemaking and to clarify the basis in law on which it will formulate a rate in this docket. Specifically, BellSouth urges that any rate set in this docket must be set based on a review of the negotiated commercial rates available in the market today and in recognition of the FCC's determination that switching is generally available in the market as this was the reason for delisting the switching UNE.

Finally, the TRA should reject Momentum's thinly veiled attempt to turn this docket into a state "end-run" around the federal decision to de-list switching as a 251 UNE. The TRA must reject the use of "cost studies" or other evidence of cost, as such evidence is relevant only to 251 rate-setting and not to evaluation of rates under 271 as determined by the FCC.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2006, a copy of the foregoing document was served on the following, via the method indicated:

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APPENDIX

1. State Commission Decisions
2. Federal Cases Cited

State Commission Decisions Rejecting Claim of Authority to Implement Section 271

- Alabama: Order Dissolving Temporary Standstill, *Competitive Carriers of the South, Inc.*, Docket 29393, 2005 Ala. PUC LEXIS 126, at *42-*43 (Ala. PUC May 25, 2005) ("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 *Mississippi PSC*, 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.").

- Arkansas: Memorandum Opinion and Order, *Petition of Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Arkansas 271 Agreement ("A2A")*, Docket No. 05-081-U, 2005 Ark. PUC LEXIS 432, at *3-*4 (Ark. PSC Oct. 31, 2005) ("ICA arbitrations are limited to establishing the rates, terms and conditions to implement the obligations of 47 USC § 251. This Commission's obligations under Section 271 of the Act are merely advisory to the FCC. . . . Although SBC should provide the items specified in Section 271 and the *TRO*, this Commission has no jurisdiction to enforce Section 271.").

- Delaware: Arbitration Award, *Petition of Dieca Communications Inc. et al for an Amendment to Interconnection Agreements with Verizon Delaware Inc., Pursuant to Section 252(b) of the Communications Act of 1934, as amended, the Triennial Review Order and the Triennial Review Remand Order*, Docket Nos. 05-164 & 04-68, at 111-12 (Del. PSC Mar. 24, 2006) ("This arbitration proceeding involves the ICAs changes necessary to implement changes in Verizon's obligations resulting from the TRO and TRRO. For the most part, these changed obligations are subject to the provisions of § 251 of the Act. Furthermore, there is no clear indication in either the TRO or TRRO that the FCC expected the states to address any issues beyond that scope, such as potential § 271 obligations, as part of the subsequent § 252 process. As a result, it is not necessary to address the questions of state authority over § 271 matters in order to resolve the matters that are within the basic scope of the present arbitration proceeding. Therefore, the ICAs should not include anything related to any claimed § 271 entitlements."), *available at* http://www.state.de.us/delpsc/dockets/0468award.pdf.

- Florida: Order on Generic Proceeding, *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, Order No. PSC-06-0172-FOF-TP, at 52 (Fla. PSC Mar. 2, 2006) ("Upon thorough analysis of FCC orders, the Act, case law, and the record in this proceeding, we find that this Commission does not have authority to require BellSouth to include in § 252 interconnection agreements § 271 elements. We acknowledge that this is a complex issue, the resolution of which is burdened by the lack of a clear declaration by the FCC and the existence of a significant, yet inconsistent body of law. However, we find that the regulatory framework set forth by the FCC in both the *TRO* and the *TRRO* leads reasonably to the conclusion that jurisdiction over § 271 matters lies with the FCC rather than this Commission."), *available at* http://www.floridapsc.com/library//FILINGS/06/01842-06/01842-06.PDF.

- Idaho: Order No. 29825, *Petition of Dieca Communications, Inc., d/b/a Covad Communications Co. for Arbitration of an Interconnection Agreement with Qwest Corp.*, Case No. CVD-T-05-1, 2005 Ida. PUC LEXIS 139, at *9 (Idaho PUC July 18, 2005) ("We conclude that the Commission does not have authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement.").

- Illinois: Arbitration Decision, *Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order*, Docket 05-0442, at 60 (Ill. Commerce Comm'n Sept. 15, 2005) ("We note that the Commission has no jurisdiction to enforce the provisions of Section 271 absent an agreement. General jurisdiction would lie only with the FCC. . . . The Commission rejects CLECs' proposal to update underlying agreements requiring SBC to provide new rates, terms, and conditions for Section 271 elements, apart from any terms agreed to in the underlying agreement."). *But see XO Illinois Petition for Arbitration of an Amendment to an Interconnection agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended,* Docket No. 04-0471, Amendatory Arbitration Decision, at 66-67 (Ill. Commerce Comm. Oct. 28, 2004); *Cbeyond Communications et al. v. Illinois Bell Telephone Company*, Case No. 05-0154, Order, at 24-27 (Ill. C.C. June 2, 2005).

- Indiana: Order, *Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communication Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order*, Cause No. 42857, at 35 (Indiana URC Jan. 11, 2006) (joined "the many courts and commissions that have already held that Section 271 obligations have no place in Section 251/252 interconnection agreement[s] and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271."), *available at* http://www.in.gov/iurc/portal/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b631800a6212.

- Iowa: Arbitration Order, *Arbitration of Dieca Communications, Inc., d/b/a Covad Communications Co. v. Qwest Corp.*, Docket No. ARB-05-1, 2005 Iowa PUC LEXIS 186, at *10 (Iowa Util. Bd., May 24, 2005) ("Clearly, the provisions that are at issue in this arbitration are unbundling obligations pursuant to § 271, rather than § 251 obligations. Therefore, the Board lacks jurisdiction or authority to require that Qwest include these elements in an interconnection agreement arbitration brought pursuant to § 252.").

- Kansas: Order No. 13: Commission Order on Phase I, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P d/b/a SBC Kansas Under Section 252(b)(1) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB, at 2 (KCC May 16, 2005) ("Where a checklist item is no longer subject to section 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the 'just and reasonable' standard established under sections 201 and 202," which "provide no authority to state commissions to establish prices for services required to be provided pursuant to section 271.").

- Louisiana: Order U-28131 Consolidated With Order U-28356, *In re: Petition to establish generic docket to consider amendments to Interconnection Agreements resulting from changes of law*, Docket Number U-28356, at 3 (Louisiana PSC Feb. 22, 2006) ("The Commission declines to order BellSouth to include Section 271 elements in Section 252 agreements and further declines to set rates for Section 271 elements."), *available by searching for order number at* http://204.196.11.47/Workplace/Search.jsp.

- Maryland: Order No. 79893, *Petition of AT&T Communications of Maryland, Inc. and TCG Maryland for an Order Preserving Local Exchange Market Stability*, Case No. 9026, at 8 (Md. PSC Apr. 8, 2005) ("With respect to whether Section 271 provides an independent basis for continued provisioning of switching . . . at TELRIC rates, the Commission notes that Verizon's fulfillment of its Section 271 obligations do not necessitate the provision of Section 251 elements at Section 251 rates.").

- Massachusetts: Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers*, D.T.E. 03-60, at 55-56 (Mass. D.T.E. Dec. 15, 2004) (Section 271 elements "should be priced, not according to TELRIC, but rather according to the 'just and reasonable' rate standard of Sections 201 and 202 of the Act. . . . [T]he FCC has the authority to determine what constitutes a 'just and reasonable' rate under Section 271, and the FCC is the proper forum for enforcing Verizon's Section 271 unbundling obligations. . . . [W]e do not have authority to determine whether Verizon is complying with its obligations under Section 271.").

- Montana: Final Order, *Petition of Dieca Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. D2005.4.51, Order No. 6647a, 2006 Mont. PUC LEXIS 11, at *4-*7 (Mont. PSC Jan. 8, 2006) ("Although § 271 makes passing references to certain provisions of §§ 251 and 252, there is no indication that § 271 was intended to be part of the §§ 251/252 arbitration regime. . . . Covad is effectively precluded from using a § 252 arbitration to obtain an unbundling of § 271 network elements . . . . [T]o the extent that Qwest has not fulfilled this [§ 271] obligation, Covad may pursue its administrative remedies with the FCC."), *available at* http://www.psc.state.mt.us/eDocs/DocketsAndOrders/D2005-4-51_6647a.pdf.

- New Jersey: Telecommunications Order, *Petition of Verizon New Jersey Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers in New Jersey Pursuant to Section 252 of the Communications Act of 1934, as Amended, the Triennial Review Order and the Triennial Review Remand Order*, Docket No. TO05050418, at 14 (New Jersey BPU Mar. 16, 2006) ("The Board declines to require separate unbundling under sections 251, 252 and 271 of the Act, . . . and disagrees with the need to institute any additional rate review proceedings at this time."), *available at* http://www.nj.gov/bpu/wwwroot/telco/TO05050418_20060327.pdf.

- North Carolina: Order Concerning Changes of Law, *Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law*, Docket No. P-55, SUB 1549, at 86 (North Carolina Util. Comm'n Mar. 1, 2006) ("The Commission after careful consideration concludes that the Commission lacks the authority to compel BellSouth to include Section 271 UNEs in its Section 251/252 ICAs, nor does the Commission believe it has the authority to establish rates for such elements."), *available at* http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=MBAAAA06060B.

- North Dakota: Order, *Dieca Communications, Inc. Interconnection Arbitration*, Case No. PU-05-165, 2006 N.D. PUC LEXIS 3, at *22-*23 (ND PUC Feb. 8, 2006) ("We find that we do not have the authority under the Act to impose unbundling obligations under Section 271. The FCC has the exclusive authority to determine whether Qwest has complied with the substantive provisions of Section 271 including the checklist provisions. Enforcement of Section 271 requirements is also clearly under the exclusive jurisdiction of the FCC. State commissions have only a consulting role under the Act.").

- Ohio: Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand,* Case No. 05-887-TP-UNC, at 27 (Ohio PUC Nov. 9, 2005) (rejecting CLEC arguments that "they are entitled to purchase § 271 checklist items pursuant to § 252 agreements," and holding that "these obligations should be addressed in the context of carrier-to-carrier agreements, and not § 252 interconnection agreements, inasmuch as the components will not be purchased as network elements").

- Oregon: Order Adopting Arbitrator's Decision, *Covad Communications Co. Petition for Arbitration of an Interconnection Agreement with Qwest Corp.*, ARB 584, 2005 Ore. PUC LEXIS 445, at *36 (Ore. PUC Sept. 6, 2005) ("Every state within the Qwest operating region that has examined this 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 I adopt the legal conclusions that they all hold in common.").

- Pennsylvania: Opinion and Order, *Verizon Pennsylvania Inc. Tariff No. 216 Revisions*, Docket No. P-00042092, 2005 Pa. PUC LEXIS 9, at *42 (Pa. PUC June 2, 2005) ("We believe that the 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.").

- Rhode Island: Report and Order, *Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*, Docket No. 3662, 2005 R.I. PUC LEXIS 26, at *15-*16 (R.I. PUC July 28, 2005) ("The FCC has not clearly indicated what role, if any, a state utility commission plays in the Section 271 process other than providing a consultation to the FCC on a Bell Operating Company's ('BOC') initial application to enter the long distance market. In fact, the FCC recently indicated it has the authority to enforce Section 271. In addition, the FCC has clearly stated that it will undertake a 'fact-specific inquiry' as to whether a BOC's rates for Section 271 facilities are just and reasonable under Section 201 and 202. At 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.'").

- South Carolina: Commission Directive, *Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-316-C (SC PSC Feb. 28, 2006) (Commission vote to accept following motion: "The first category of issues would be the 271-related issues: With regard to Issue 8 (a), I move that we adopt the BellSouth position, along with the proposed Office of Regulatory Staff reporting requirements. Disputes regarding 271 issues would be reported to both the Commission and ORS. Issues 8 (b) and 8 (c) would then be declared moot. I further move that we adopt BellSouth's reasoning for Issues 14, 17, 18, and 22."), *available at* http://dms.psc.sc.gov/attachments/B6C82725-D7D8-9648-DE003D8F79E35898.pdf.

- South Dakota: Arbitration Order, *Petition of DIECA Communications, Inc. D/B/A Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket TC05-056, at 6 (South Dakota PUC July 26, 2005) ("With respect to the section 271 issue, the Commission finds that it does not have the authority to enforce section 271 requirements within this section 252 arbitration. . . . The language in [section 252] clearly anticipates that Section 252 arbitrations will concern section 251 requirements, not section 271 requirements."), *available at* http://www.state.sd.us/puc/commission/orders/telecom/2005/tc05-056ao.pdf.

- Texas: Arbitration Award – Track II Issues, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, at 18-19 (Tex. PUC June 17, 2005) (holding that that the 1996 Act "provides no specific authorization for the Commission to arbitrate section 271 issues;" that "Section 271 only gives states a consulting role in the 271 application/approval process"; that a state commission "does not have direct oversight over section 271 network elements; and that and the "review of section 271 pricing" is limited to "proceedings at the FCC, as well").

- Utah: Arbitration Report and Order, *Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Docket No. 04-2277-02, at 20-21 (Utah PSC Feb. 8, 2005), *available at* http://www.psc.state.ut.us/telecom/05orders/Feb/04227702aro.htm ("[W]e differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the 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 obligations via incorporation by reference to access obligations under Section 271 or state law.").

- Vermont: Order, *Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements*, Docket No. 6932, at 247, 264 (Vermont PSC Feb. 27, 2006) ("As Verizon points out, enforcement of Section 271 obligations rests largely with the FCC. Thus, for issues related to whether Verizon still complies with a particular checklist item, recourse would be to the FCC. . . . However, to the extent that Verizon made specific commitments to the state of Vermont during the Section 271 process, and asked the state to rely upon those commitments, the Company's agreement represents a binding arrangement enforceable by the Board."), available at http://www.state.vt.us/psb/orders/2006/files/6932fnl.pdf.

- Washington: Arbitrator's Report and Decision, *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 17, at 25 (Wash. U.T.C. July 8, 2005) (holding that, because "[t]he FCC has the exclusive authority to act under Section 271," state commissions "ha[ve] no authority under Section 252 or Section 271 of the Act to require inclusion of Section 271 unbundling obligations in the parties' interconnection agreements," and "[a]n order requiring [such] inclusion . . . would conflict with the federal regulatory scheme"), *aff'd*, Final Order, *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 18 (Wash. UTC Sept. 22, 2005).

- Washington, D.C.: Order, *Petition of Verizon Washington, D.C. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, TAC-19, at 34 (D.C. PSC Dec 15, 2005) ("[T]hroughout the *TRO*, the FCC limits its discussion of the section 252 interconnection agreement process to apply to implementing section 251. The FCC has also determined that the section 271 unbundling obligations are independent of the unbundling obligations of section 251. Thus, there is no requirement that section 271 network elements be addressed in interconnection agreements negotiated and arbitrated pursuant to section 252."), *available at* http://www.dcpsc.org/pdf_files/commorders/orderpdf/orderno_13836_TAC-19.pdf.

State Commission Decisions Accepting Claim of Authority to Implement Section 271

- Arizona: Opinion and Order, *Petition of Dieca Communications, Inc., dba Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corp.*, Docket No. T-03632A-04-0425, Decision No. 68440, at 20 (Arizona Corp. Comm'n Feb. 2, 2006) ("When read in conjunction with the entirety of the Telecom Act, the Section 271 obligations described above must be considered the type of interconnection and access requirements contemplated under Section 252. . . . We believe that our ongoing oversight and monitoring role may be exercised in any appropriate proceeding before the Commission, including this Section 252 arbitration matter . . . ."), *available at* http://images.edocket.azcc.gov/docketpdf/0000040183.pdf.

- Colorado: Order, *Qwest Corp. v. Public Util. Comm'n of Colorado*, No. 04-D-02596-WYD-MJW, 2006 WL 771223 (Colo. PUC. Mar. 24, 2006) (finding that a commercial agreement covering 271 elements (switching and shared transport) had to be filed with the state commission under § 252).

- Georgia: Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271, *Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc's. Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, at 4 (Georgia PSC Jan. 17, 2006) ("[T]he Commission concludes that it is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs pursuant to Section 271 of the Federal Telecom Act."), *available at* ftp://www.psc.state.ga.us/19341/89229.doc.

- Missouri: Arbitration Order, *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Case No. TO-2005-0336, at 30 (Missouri PSC July 11, 2005) ("The Arbitrator's decision with respect to both CLEC Coalition Pricing Issues A-2 and A-3 was that 'The Arbitrator agrees that the ICA must include prices for § 271 UNEs.' However, the Arbitrator failed to specify what those rates would be. . . . [T]he Commission concurs that the Coalition's compromise position – rates patterned on the FCC's transition period rates for declassified UNEs – constitutes a suitable interim rate structure for § 271 UNEs."), *available at* http://www.psc.mo.gov/orders/2005/07115336.htm.

- Maine: Order, *Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, 2005 Me. PUC LEXIS 267, at *28-*29 (Me. PUC Sept. 13, 2005) ("As stated earlier, the FCC has determined that the appropriate pricing standard for Section 271 UNEs is 'just and reasonable' and we have determined that until Verizon files prices for our approval or submits FCC-approved rates, Verizon must continue to provision all Section 271 UNEs at TELRIC prices."), *available at* http://mpuc.informe.org/easyfile/cache/easyfile_doc169297.DOC, *preliminary injunction denied in Verizon New England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 403 F. Supp. 2d 96, 102 (D. Me. 2005) ("[T]he authority of state commissions over rate-making and its applicable standards is not pre-empted by the express or implied content of § 271. Furthermore, Verizon has failed to direct the Court to any order of the FCC interpreting § 271 to provide an exclusive grant of authority for rate-making under § 271.").

- Michigan: Order, *In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC MICHIGAN and VERIZON*, Case No. U-14447, at 16 (Mich. PSC Sept. 20, 2005) ("The Commission is still convinced that obligations under Section 271 should be included in interconnection agreements approved pursuant to Section 252. However, the Joint CLECs must negotiate with SBC concerning terms and conditions, seeking Commission arbitration if necessary. If the CLECs experience problems with obtaining items available pursuant to Section 271, they may take appropriate enforcement action.").

- Minnesota: *In the Matter of a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Docket p-421/CI-05-1996, Notice and Order for Hearing, at 3 (Minn. P.U.C. May 4, 2006). *But see* Minnesota: Arbitrator's Report, *Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement With Qwest Corporation*, MPUC Docket No. P-5692, 421/IC-04-549, OAH Docket No. 3-2500-15908-4, at 15 (Minn. PUC Dec. 15, 2004) ("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.").

- New Hampshire: Order No. 24,598, Order Classifying Wire Centers and Addressing Related Matters, *Verizon New Hampshire Wire Center Investigation*, DT 05-083 (March 10, 2006), at 45-46 (holding that Verizon must offer certain 271 network elements at FCC transition rates until such time as new rates are established and approved by the NHPSC, and relying on Order No. 24,442, *Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions), Petition for Declaratory Order re Line Sharing*, DT 03-201, DT 04-176 (March 11, 2005), at 49-50 ("We are continuing our oversight of Verizon's section 271 obligations. . . . we do not foreclose the possibility that Verizon may turn to the FCC regarding rates but we conclude that, unless or until the FCC acts, pricing is an area of concurrent jurisdiction and an example of cooperative federalism. Accordingly, as a state agency and being closest to the issues, if and when Verizon files changes to rates [for Section 271 network elements], we will review such proposed changes in the normal course.")), *available at* http://www.puc.state.nh.us/Regulatory/Orders/2006orders/24598t.pdf and http://www.puc.state.nh.us/Regulatory/Orders/2005orders/24442t.pdf.

- Oklahoma: *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma under Section 252(B)(1) of The Telecommunications Act of 1996*, Cause No. PUD 200400497, Written Report of the Arbitrator at 199 (Okla. Corp. Comm. May 2005); Final Order, at 9 (June 1, 2005). *But see* Final Order on Motions for Clarification and Reconsideration of Order No. 522119, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma Under Section 252(b)(1) of the Telecommunications Act of 1996*, Cause Nos. PUD 200400497, 200400496, Order No. 523439, 2006 Okla. PUC LEXIS 56, at *3 (Okla. Corp. Comm'n April 18, 2006) ("2. 271 Related Elements. The Commission decision is reaffirmed. This Commission finds that it is not necessary to determine whether the Commission has jurisdiction over Section 271 elements because Section 271 elements are not included within the ICA. 3. TELRIC Rates for Section 271 Services. The Commission decision is reaffirmed. This Commission finds that it is not necessary to determine whether the Commission has jurisdiction over the pricing of Section 271 elements because Section 271 elements are not included within the ICA.").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a SBC MISSOURI,	)	
Plaintiff,	)	
v.	)	No. 4:05-CV-1264 CAS
THE MISSOURI PUBLIC SERVICE COMMISSION, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This action was filed by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC") seeking declaratory and injunctive relief under the Federal Telecommunications Act of 1996.[1] The matter is before the Court on a motion to dismiss for lack of subject matter jurisdiction, two motions to strike, and motions for summary judgment filed by SBC and defendants Sprint Communications Company, L.P. and Charter Fiberlink-Missouri, LLC. The Court concludes that it has subject matter jurisdiction over this action, the motions to strike should be denied, plaintiff SBC's motion for summary judgment should be granted in part and denied in part, defendant Sprint Communications Company, L.P.'s motion for summary judgment should be granted, and defendant Charter Fiberlink-Missouri, LLC's motion for summary judgment should be denied.

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[1]The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

After this action was filed, SBC Communications, the parent company of plaintiff Southwestern Bell Telephone, L.P., merged with AT & T Corp. to form AT & T Inc. Plaintiff now does business as AT & T Missouri.

I.

Introduction and Regulatory Framework.

By enacting the Telecommunications Act of 1966 (the "Act"), "Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive scheme of telecommunications regulation administered by the Federal Communications Commission." Indiana Bell Tel. Co. v. Indiana Utility Regulatory Comm'n, 359 F.3d 493, 494 (7th Cir. 2004). While state utility commissions have a role in carrying out the Act, the Supreme Court of the United States has stated that the Act "unquestionably" took "regulation of local telecommunications competition away from the States." AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 n.6 (1999).

The Supreme Court has described the fundamental change effected by the Act in telephone markets as follows:

> Until the 1990's, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC),[2] which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. Technological advances, however, have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies.
>
> The Telecommunications Act of 1996 . . . fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) to share its network with competitors. Under this provision, a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of

[2]"Local exchange carriers are companies that provide local telephone service." Global NAPs, Inc. v. Verizon New England, Inc., 454 F.3d 91, 93 n.1 (2d Cir. 2006).

> the incumbent's network "on an unbundled basis"; and it can interconnect its own facilities with the incumbent's network. When an entrant seeks access through any of these routes, the incumbent can negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or § 251(c). See § 252(a)(1). But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder.

AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371-73 (1999) (footnote added).

"To facilitate the entry of competing carriers into the market for local [telephone] service, the Act requires that incumbent carriers provide 'interconnection' and other wholesale services to the competing carriers on a non-discriminatory basis." Indiana Bell, 359 F.3d at 495. "Sections 251 and 252 of the Act lay out a process for reaching 'interconnection agreements' by which competing carriers can gain interconnection with the incumbent carrier's networks, facilities and services." Id.

Among the duties that apply to incumbent local exchange carriers ("ILECs")[3] is the obligation to lease certain parts of their networks to competitors at regulated rates. See 47 U.S.C. § 251(c)(3). Before a network facility is required to be made available under this provision, however, the Federal Communications Commission ("FCC") must determine that competitors are "impaired" without access to it. Id., § 251(d)(2). A facility that the FCC has determined must be made available under this provision is known in the telecommunications industry as an "unbundled network element," or "UNE."[4]

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[3]ILECs are those dominant local exchange carrier companies that "were providing local phone service in an area on February 8, 1996, the date the Telecommunications Act became law." Competitive Telecommc'ns Ass'n v. FCC, 117 F.3d 1068, 1071 (8th Cir. 1997); see 47 U.S.C. § 251(h)(1). SBC is the ILEC in Missouri.

[4]The Act defines "network element" as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or

UNE components include "loops," "switches," and "transport facilities." Loops are copper wires that connect a home or business to the local phone company switch. A switch is a device, usually software, that routes a call from a home or office to the intended recipient. Transport facilities are devices such as copper wires or fiberoptic cables that transport calls between switches. A UNE Platform is a combination of all the network elements required to provide local telephone service, required to be offered in a pre-packaged form that permits competing local exchange carriers ("CLECs") to provide telephone service with no actual switching, loop or transport facilities of their own. See Peter W. Huber, et al., Federal Telecommunications Law §2.7.4 at 123 (2d ed. Cum. Supp. 2004).

Rates that ILECs can charge for UNEs must be based on cost. 47 U.S.C. § 252(d)(1). The FCC has implemented this directive by a pricing methodology known as "total element long-run incremental cost," or TELRIC. See Local Competition Order,[5] 11 F.C.C.R. at 15,844, ¶ 672. TELRIC allows access to UNEs at very low rates, and has been upheld by the Supreme Court as the pricing methodology used under certain portions of the Act. Verizon Commc'ns Inc. v. FCC, 535 U.S. 467, 489 (2002).

The duties of § 251 are implemented through "interconnection agreements" between ILECs and CLECs. See 47 U.S.C. § 252. The Act requires ILECs and CLECs to negotiate in good faith

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other provision of a telecommunications service." 47 U.S.C. § 153(29). "The term 'unbundled' means that the incumbent LEC must 'give separate prices' for the competitor's use of each element instead of charging the competitor one price for the entire basket of network elements that it uses." Sprint's Mem. Supp. Mot. Summ. J. at 3, nn. 2-3 (internal punctuation omitted) (citing AT & T Corp., 525 U.S. at 394).

[5]First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15,499 (1996) ("Local Competition Order") (subsequent history omitted).

the terms and conditions of agreements to fulfill the duties described in §§ 251(b) and (c). Id., § 251(c)(1). If negotiations are unsuccessful, either party may ask the appropriate state public utility commission to arbitrate "any open issues" the parties have been unable to resolve. See id., § 252(b). In deciding these "open issues," the state commission must adhere to the requirements of the statute and the FCC's implementing regulations. Id., § 252(c).

The Eleventh Circuit recently described the history of the FCC's efforts to implement a regulatory scheme under the Act, which ultimately resulted in the FCC's Triennial Review Remand Order ("TRRO").[6] Under the TRRO, the FCC no longer required unbundled access to certain network elements under § 251 and established a transition plan for the telecommunications industry to implement the new regulations:

> For eight years, the FCC tried and failed to implement a regulatory scheme that, after review by federal courts, satisfied the 1996 Act. For most of those eight years, the FCC required unbundling on the theory that it enhanced competition. The FCC required ILECs and CLECs to enter "voluntary" agreements to provide unbundled access to local telephone networks. If the parties could not agree, an agreement was provided either by the FCC or by state commerce commissions. States were given the authority to oversee voluntary agreements and arbitrate disputes arising from those agreements. 47 U.S.C. § 252(a), (b).
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> . . . .
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> In 2004, in a challenge to the FCC scheme filed by ILECs, the D.C. Circuit vacated the second attempt of the FCC to implement the directive of Congress regarding local phone service. See U.S. Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004). The D.C. Circuit concluded, in part, that the unbundling regime enacted by the FCC was not based on a rational analysis of whether "CLECs are impaired in the mass market without unbundled access to ILEC switches." Id. at 569. The D.C. Circuit also expressed some frustration regarding the "failure [of the FCC], after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to

[6]Order on Remand, In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 F.C.C.R. 2533 (2005).

> prior judicial rulings." Id. at 595. In response to the ruling of the D.C. Circuit, the FCC issued interim rules that preserved the status quo ante while the FCC wrote new rules, and the FCC established a transition period, ending in early 2005, in which only existing customers could be served through UNEs.
>
> In February 2005, the FCC released its Triennial Review Remand Order (TRRO), which stated that the unbundling of certain "UNE-Platform" (UNE-P) elements harmed competition by discouraging innovation. To redress that harm, the FCC stated that ILECs would no longer be obliged to provide CLECs "with unbundled access to mass market local switching," and the FCC provided more limited relief from unbundling for loops and transport. The FCC stated that existing, or "embedded," customers could continue to have access to UNE-Ps for up to twelve months, although at higher rates. The FCC also required CLECs to submit orders within one year to convert embedded UNE-P customers to "alternative arrangements." During the transition period, the FCC banned new orders for unbundled access to local mass market switching: "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching." The FCC required both ILECs and CLECs to negotiate, under the change-of-law provisions in their contracts, any "necessary" changes to the interconnection agreements: "We expect that [carriers] will implement [our] findings . . . . Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order . . . . Thus, [carriers] must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." Based on the "need for prompt action," the FCC stated that the TRRO was effective on March 11, 2005.

Bellsouth Commc'ns, Inc. v. MCIMetro Access Trans. Servs., LLC, 425 F.3d 964, 967 (11th Cir. 2005).

1. Section 271 Requirements.

In Section 271, the Act imposes a separate set of affirmative duties on the Bell Operating Companies ("BOCs") that were divested from AT & T in the consent decree entered in the anti-trust suit brought in the 1970s by the U.S. Department of Justice. See United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom Maryland v. United States, 460 U.S. 1001 (1983) ("AT & T case"). These duties were imposed by Congress as a condition of removing the ban in the final judgment in the AT & T case which prohibited BOCs from providing long distance services. "Section 271 sets out the factors the FCC evaluates in deciding whether to grant the application of an [ILEC] carrier to enter the long-distance market." Indiana Bell, 359 F.3d at 495. "Part of the process is directed at ensuring that the applicant is facilitating competition in the market for local services before it is allowed to enter the long-distance market." Id.

Among the § 271 obligations is a list of fourteen competitive "checklist" items that BOCs must provide to CLECs to ensure that the market for local services is irreversibly open to competition. See 47 U.S.C. § 271(c)(2)(B).[7] The checklist items include: "Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services," id., § 271(c)(2)(B)(iv); "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services," id., § 271(c)(2)(B)(v); and "[l]ocal switching unbundled from transport, local loop transmission, or other services." Id., § 271(c)(2)(B)(vi).

Under § 271, if BOCs such as SBC wish to offer long-distance service, they must provide CLECs with access to certain of their network elements even though they may no longer be required to provide those elements to the CLECs under § 251. Section 271 creates an obligation for BOCs to make network elements available to competitors which is independent of the ILECs' obligations under § 251. A key difference between the unbundling obligations of § 251 and the checklist obligations of § 271 is the price that CLECs must pay for the network elements: Under § 271,

[7]"Section 271 of the Telecommunications Act appears in a section entitled 'Special Provisions Concerning Bell Operating Companies,' 47 U.S.C. §§ 271 to 276, which applies only to Bell Operating Companies (BOCs), all of which were formerly part of AT & T. Section 271 concerns the authority of BOCs to provide long distance services and provides, in general, that a BOC can only provide long distance services if it first meets certain requirements relating primarily to interconnection. 47 U.S.C. § 271(c)." Bellsouth Telecommc'ns, Inc. v. Mississippi Public Serv. Comm'n, 368 F.Supp.2d 557, 566 n.10 (S.D. Miss. 2005).

network elements are to be provided at a "just and reasonable rate," rather than at the low, cost-based TELRIC required by § 251. See Triennial Review Order ("TRO"), 18 F.C.C.R. at 17,389, ¶ 664.[8]

2. Role of State Public Utility Commissions.

The Act specifically delegates certain responsibilities to state public utility commissions such as the Missouri Public Service Commission ("MPSC"). The Act requires that "the participation of state commissions in the new federal regime be guided by federal-agency regulations." Indiana Bell, 359 F.3d at 494 (citing AT & T Corp., 525 U.S. at 378 n.6). Relevant to this case, "state commissions have a role in helping to negotiate and arbitrate interconnection agreements if private negotiations fail to produce a complete agreement within a specific period of time." Id.; 47 U.S.C. § 252(a), (b). "Before any interconnection agreement may be implemented, the state commission must approve it." Id., § 252(e)(1). State commissions are also authorized to establish rates for interconnection, services or network elements for purposes of §§ 251(c)(2) and (3). See 47 U.S.C. §§ 252(c), (d).

In addition, § 271(d) requires the FCC to "consult" with state commissions to verify a BOC's compliance with § 271(c) competitive checklist items. See 47 U.S.C. §§ 271(c) and (d). "The state commission makes a recommendation, which is merely advisory, as to whether the BOC has satisfied the requirements. The Act reserves to the FCC the authority to decide whether to grant a section 271 application." Indiana Bell, 359 F.3d at 495.

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[8]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 F.C.C.R. 16,978 (2003) (subsequent history omitted) ("TRO").

3. Factual and Procedural Background.

In 2001, plaintiff SBC, the incumbent Local Exchange Carrier ("ILEC") in Missouri, offered a standard interconnection agreement to its competitors. A number of the competitors entered into the standard agreements, which were approved by the MPSC pursuant to 47 U.S.C. § 252(e). The standard interconnection agreements were set to expire in March 2005. In late 2004 SBC attempted to negotiate new agreements with its competitors, but the parties were unable to reach complete agreement on all issues. As required by the Act, SBC petitioned the MPSC to arbitrate the agreements pursuant to § 252.

The arbitrator filed a Final Arbitrator's Report on June 21, 2005, consisting of some 2,075 pages. SBC and some of the CLECs filed comments and objections to the Final Arbitrator's Report on June 24, 2005. The MPSC heard oral arguments on the comments on June 29 and 30, 2005, and issued an Arbitration Order (the "Arbitration Order") on July 11, 2005. The Arbitration Order adopted the Final Arbitrator's Report as the MPSC's decision on each unresolved issue, except to the extent the Arbitration Order specifically modified the Final Arbitrator's Report. On July 19, 2005, SBC sought rehearing of the Arbitration Order, asserting that it was contrary to federal law in certain respects. On August 3, 2005, as required by the Arbitration Order, SBC and the CLECs submitted interconnection agreements that conformed to the terms of the Arbitration Order. The MPSC approved these agreements, but in doing so did not address the issues raised by SBC in its rehearing petition.

SBC then filed this action, citing 47 U.S.C. § 252(e)(6), 28 U.S.C. § 1331, the Supremacy Clause of the United States Constitution, and 28 U.S.C. § 1367 as the bases for jurisdiction. The defendants are the MPSC, its individual members in their official capacities, and a number of competing local exchange carriers. SBC contends the Arbitration Order requires it to provide competitors with access to SBC's telecommunications network well beyond the access authorized by FCC regulations. SBC contends the Arbitration Order is preempted by applicable FCC regulations because the MPSC has ordered it to provide network elements in contravention of the FCC's binding regulations, and because the MPSC cannot require that terms and conditions for § 271 checklist items be included in SBC's interconnection agreements with CLECs.

SBC moved for a preliminary injunction to enjoin the Arbitration Order to the extent it authorizes CLECs to place new UNE Platform orders in violation of the "nationwide bar" on such new orders contained in the FCC's TRRO. Rather than contesting SBC's motion, but without conceding its validity, the MPSC and the defendant CLECs stipulated to the entry of a preliminary injunction pending further orders of the Court. See Doc. 43.

II.

Motion to Dismiss for Lack of Subject Matter Jurisdiction.

As a preliminary matter, the Court must address its jurisdiction to hear this matter. The MPSC moves to dismiss this case for lack of subject matter jurisdiction on the basis that it does not arise under the laws or Constitution of the United States as required for federal question jurisdiction under 28 U.S.C. § 1331. The MPSC contends that SBC's alleged statutory basis for jurisdiction, 47 U.S.C. § 252(e)(6), is not applicable in this case because § 252(e)(6) of the Act provides federal jurisdiction only where a state commission makes a determination under *that section*, and the Arbitration Order at issue here was not a determination under § 252 of the Act, but rather under §§ 271-72.

SBC responds that MPSC's position is directly contrary to the Supreme Court's holding in Verizon Maryland, Inc. v. Public Service Commission, 535 U.S. 635 (2002), which establishes that federal district courts have jurisdiction under 28 U.S.C. § 1331 over complaints such as SBC's, containing claims that a state commission violated the Act and FCC rulings. The MPSC did not file a reply memorandum.

The Court concludes that it has jurisdiction over this action. In Verizon Maryland, the Supreme Court held that 28 U.S.C. § 1331 gave the federal district court a basis for jurisdiction to review a claim that a State commission violated federal law in determining that an interconnection agreement included calls placed to Internet Service Providers as local calls subject to a reciprocal arrangement. Verizon Maryland, 535 U.S. at 643-44. The Court declined to address whether 47 U.S.C. § 251(e)(6) gives federal courts power to review state commissions' interpretation of an interconnection agreement, but held that because the plaintiff's complaint alleged the state commission "violated the [Telecommunications] Act and [an] FCC ruling" and sought declaratory and injunctive relief against the state commission's decision, "federal courts have jurisdiction under § 1331 to entertain such a suit." Id. at 642. The Court explained that when a party seeks relief from a state commission order "on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail . . . its claim thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." Verizon Maryland, 535 U.S. at 642 (internal quotation marks and citation omitted).

Subsequent Eighth Circuit decisions have held that under Verizon Maryland, federal district courts have subject matter jurisdiction "to determine whether a state administrative agency correctly interprets federal law, in this case the Telecommunications Act and the FCC regulations interpreting the Act." Rural Iowa Indep. Tel. Ass'n v. Iowa Utilities Bd., 362 F.3d 1027, 1030 (8th Cir. 2004) (citing Verizon Maryland, 535 U.S. at 643-44); see also Iowa Network Servs., Inc. v. Qwest Corp., 363 F.3d 683, 691-92 (8th Cir. 2004) (citing Verizon Maryland in support of the conclusion that jurisdiction exists under § 1331 to review state commission orders for compliance with federal law). Because SBC alleges that the MPSC's decisions violate federal Law, see Complaint ¶¶ 43, 49-51, this Court has subject matter jurisdiction under 28 U.S.C. § 1331.

Motions to Strike.

The MPSC filed two motions to strike portions of pleadings as immaterial, one directed to SBC's complaint, and the other directed to the counterclaim/cross-claim filed by defendant Charter Fiberlink-Missouri, LLC ("Charter").

MPSC asserts that nineteen paragraphs in SBC's complaint and eighteen paragraphs in Charter's counterclaim/cross-claim violate the "simple, concise and direct" requirement of Rule 8(e)(1), Federal Rules of Civil Procedure, because these pleadings contains "several long and intricate legal arguments that are appropriately raised in a dispositive pleading or brief." Mots. to Strike, ¶ 2. MPSC cites no case law in support of its motions and does not provide any further information concerning the contents of the paragraphs at issue.

Under Federal Rule of Civil Procedure 12(f), a court may "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are not favored and are infrequently granted, because they propose a drastic remedy. Stanbury Law Firm v. Internal Revenue Service, 221 F.3d 1059, 1063 (8th Cir. 2000). Nonetheless, resolution of such a motion lies within the broad discretion of the Court. Id. Matter will not be stricken unless it clearly can have no possible bearing on the subject matter of the litigation. 2 James

W. Moore, et al., Moore's Federal Practice §12.37[3] (3rd ed. 2006). If there is any doubt whether the matter may raise an issue, the motion should be denied. Id. If allegations are redundant or immaterial, they should be stricken only if prejudicial to the moving party. Id.

In this case, MPSC has not met its burden to establish that the challenged paragraphs have "no possible bearing" on the subject matter of the litigation. In addition, MPSC has not alleged, must less established, that any of the paragraphs it seeks to strike are prejudicial to it. MPSC's motions to strike should therefore be denied.

III.

SBC's Motion for Summary Judgment.

SBC's motion for summary judgment raises some but not all of the claims asserted in its complaint.[9] SBC asks the Court to vacate the MPSC's orders to the extent they require SBC to (1) provide access to unbundled switching and the UNE Platform pursuant to § 271 of the Act; (2)

[9]Because this is an administrative appeal, the Court is sitting as an appellate tribunal reviewing the decision of an agency, rather than performing its traditional role as a trial level court. Optimal Data Corp. v. United States, 17 Cl. Ct. 723, 727 (1989). In an administrative appeal, the burden of proof is on the plaintiff to demonstrate that the administrative ruling is erroneous. Ringsred v. Dole, 828 F.2d 1300, 1302 (8th Cir. 1987). In an appeal where, as here, the issues are to be decided on briefs, SBC was required to make its case in its initial brief. Disabled American Veterans v. Gober, 234 F.3d 682, 688 (Fed. Cir. 2000) (in an administrative appeal, an issue not raised by the plaintiff in its opening brief is waived). To the extent SBC has not moved for summary judgment on other claims asserted in its complaint, those claims are abandoned and denied. See GTE South Inc. v. Morrison, 6 F.Supp.2d 517, 526 (E.D. Va. 1998) ("To secure summary judgment, a party must assert the grounds alleged in the complaint; otherwise, they are deemed abandoned."), aff'd 199 F.3d 733 (4th Cir. 1999); see also MCI Telecommc'ns Corp. v. GTE Northwest, Inc., 41 F.Supp.2d 1157, 1186 (D. Or. 1999) (claims not briefed deemed abandoned). The applicable Case Management Order provided that SBC "will file a motion for summary judgment on all issues raised in its complaint . . . ."). See Doc. 83 at 2, ¶ 6. Moreover, SBC expressly agreed to present a motion for summary judgment "on all issues" raised in its complaint, and acknowledged, as did all parties, that denial of its motion for summary judgment would resolve its claim. See First Amended Joint Proposed Scheduling Order, ¶ 4 [Doc. 82].

provide unbundled access to high-capacity loops and transport, dark fiber loops and sub-loops, and entrance facilities under § 271 of the Act, in circumstances where the FCC has held that these facilities need not be unbundled pursuant to § 251(c)(3) the Act; and (3) treat interexchange calls as subject to reciprocal compensation rather than access charges, where the calls originate in the "Internet Protocol" format. SBC asserts that the MPSC should be enjoined from imposing or enforcing these same obligations in any other agreements involving SBC.

SBC challenges the MPSC's Arbitration Order in two principal areas. First, SBC asserts that the Arbitration Order violates binding FCC decisions limiting the network facilities that state commissions can require incumbent carriers such as SBC to provide at regulated rates to their competitors. Simply put, SBC contends that the network-access requirements imposed by the MPSC have been deemed unlawful by the FCC. SBC also asserts that the MPSC purported to act pursuant to a statutory provision over which the FCC has exclusive authority, 47 U.S.C. § 271, and therefore exceeded its jurisdiction. The defendants responds that the MPSC acted within its jurisdiction under § 271 to include the network-access requirements challenged by SBC.

Second, SBC asserts that the MPSC erred in determining the compensation that applies when SBC and its competitors exchange traffic that a competitor has converted from an Internet Protocol format to standard analog format. SBC contends the MPSC's analysis on this issue is directly contrary to federal law and is completely unreasoned, as the MPSC offered no substantive rationale in support of its decision. The defendants respond that the MPSC correctly determined that reciprocal compensation applies to such calls rather than higher-fee access charges, and adequately explained its reasoning.

1. Standard of Review.

In actions such as this one, federal district courts apply de novo review to state commissions' interpretation and application of federal law, and apply a deferential "arbitrary and capricious" review standard to the commissions' factual determinations and mixed questions of law and fact. See WWC License, L.L.C. v. Boyle, No. 05-1725, 2006 WL 2419162, *6, __ F.3d __ (8th Cir. Aug. 23, 2006) (citing cases). SBC's challenges to the MPSC's actions primarily allege that the MPSC misinterpreted or misapplied federal law, and therefore are subject to de novo review.

2. Discussion.

A. MPSC Jurisdiction Over § 271 Elements.

In the Arbitration Order, the MPSC recognized that under binding FCC regulations, ILECs such as SBC are no longer required under § 251 to offer CLECs unbundled access to local switching, high-capacity loops, dedicated transport, OCn and dark fiber loops, and dark fiber and feeder subloops.[10] Nonetheless, the MPSC required SBC to provide CLECs with unbundled access to certain of these network elements under § 271. The Arbitration Order recognized that while unbundled access to these UNEs was proper at TELRIC rates under § 251, access to the same UNEs under § 271 is proper only at the "just and reasonable" rate standard established under §§ 201 and 202 of the Act. The MPSC concluded that it had authority to enforce the FCC's "just and reasonable" pricing standard for § 271 UNEs, and adopted rates patterned on the FCC's transition period rates for declassified § 251 UNEs, on an interim basis. See Arbitration Order at 28-30.

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[10]"Dark fiber consists of unused fiber within an existing fiber optic cable that has not been activated through optronics to make it capable of carrying communications services. Users of unbundled dark fiber loops furnish their own electronic equipment to activate the dark fiber strands to provide voice and data services." Verizon New England Inc v. Maine Public Util. Comm'n, No. 05-53-B-C, 2006 WL 2007655, *3 n.8 (D. Me. July 18. 2006).

The gravamen of SBC's complaint is that the MPSC erroneously concluded it had the jurisdiction and authority to order § 271 unbundling obligations to be included in an interconnection agreement arbitrated pursuant to § 252, where SBC had not agreed to negotiate access to these facilities pursuant to § 251. SBC contends that the statute gives jurisdiction over enforcement of § 271 exclusively to the FCC. SBC also contends that the Arbitration Order requires it to provide CLECs with the UNE Platform in direct contravention of the FCC's ruling in the TRRO, and therefore creates a substantive conflict with federal law and is preempted. Finally, SBC asserts that even if the MPSC had jurisdiction to issue the rulings concerning UNEs, it did not have the authority to set regulated rates, as "just and reasonable" rates contemplate a market price arrived at through negotiations between SBC and the CLECs.

The MPSC and the Coalition defendants[11] separately respond that the MPSC properly exercised its duties under §§ 271 and 272 of the Act and correctly ordered SBC's interconnection agreements with CLECs to include terms and conditions for the § 271 checklist items SBC is required to make available to its competitors – local switching, local loops and local transport. The Coalition defendants contend that SBC's obligation to make portions of its network available to CLECs on an unbundled basis exists under two distinct sections of the Act, § 251 and § 271, and note that § 271 explicitly requires the § 271 checklist items to be included in § 252 interconnection agreements. The Coalition defendants contend that approval of terms and conditions for § 271 checklist elements does

[11]The Coalition defendants are defendants Big River Telephone Company, LLC, Nuvox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., Xspedius Management Co. of Kansas City, LLC, and Xspedius Management Co. Switched Services, LLC. Separately, defendant WilTel Local Network, LLC joined in the Coalition defendants' opposition memorandum. See Doc. 100.

not constitute "enforcement" of SBC's § 271 elements by the MPSC, and that the MPSC's Arbitration Order is therefore not preempted by the FCC's regulatory scheme.

As stated in the introductory section of this opinion, the Act completely changed the primarily state system of regulation of local telephone service and created a comprehensive, federally-administered scheme of telecommunications regulation. See Indiana Bell, 359 F.3d at 494. The Act took "regulation of local telecommunications competition away from the States," AT & T Corp., 525 U.S. at 378 n.6, as "Congress transferred broad authority from state regulators to federal regulators, even while it left corners in which the states had a role." Indiana Bell, 359 F.3d at 497. "The new regime for regulating competition [under the Act] is federal in nature . . . and while Congress has chosen to retain a significant role for state commissions, the scope of that role is measured by federal, not state, law." Southwestern Bell Tel. Co. v. Connect Commc'ns Corp., 225 F.3d 942, 947 (8th Cir. 2000).

The issue here is whether the MPSC's action is permissible under the Act, or whether the MPSC has overstepped its prescribed role. For the following reasons, the Court concludes that the MPSC's actions were without jurisdiction and are preempted by the Act.

The text of § 271 gives the FCC exclusive jurisdiction over the enforcement of that section. Section 271 provides that BOC applications to provide long-distance services are submitted to the FCC, which has sole authority to grant the applications. See §§ 271(b)(1), (d)(1), (d)(3). The only role Congress delegated to state commissions under § 271 is to act as consultant to the FCC during the application process. See § 271(d)(2)(B). Where a BOC has already received approval to provide long-distance services, the statute places exclusive enforcement of any ongoing obligations with the FCC. Id., § 271(d)(6). If the FCC determines that a BOC is no longer meeting § 271's requirements, it may order the BOC to correct any deficiencies, impose a penalty, or suspend or revoke the BOC's § 271 approval. 47 U.S.C. § 271(d)(6)(A).

Section 271 does not contain an express provision for rate-making or rate-making authority, but provides that a BOC must provide the competitive checklist items of § 271(c)(2)(B) at "just and reasonable rates." In contrast, § 252 explicitly authorizes state commissions to set "just and reasonable" rates for interconnection and network element charges under §§ 251(c)(2) and (3). Section 252 provides that the state commission's duty in arbitrating and approving agreements is limited to ensuring that the agreement "meets the requirements of section 251," and does not mention any role for the state commission under § 271. See 47 U.S.C. §§ 252(c)(1), (3)(2)(B).

In a different context than presented by this case, the FCC has recognized that Congress granted "sole authority to the [FCC] to administer . . . section 271." InterLATA Boundary Order, 14 F.C.C.R. at 14,400-01, ¶¶ 17-18.[12] Two federal district courts have commented, also in a different context, that enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first, and that federal courts are not the appropriate forum to address such issues in the first instance. See BellSouth Telecommc'ns, Inc. v. Mississippi Public Serv. Comm'n, 368 F.Supp.2d 557, 565 (S.D. Miss. 2005); BellSouth Telecommc'ns, Inc. v. Cinergy Commc'ns Co., 2006 WL 695424, No. 03:05-CV-16-JMH, slip op. at 12 (E.D. Ky. 2005).

A third federal district court recently concluded that the New Hampshire public utilities commission lacked the authority to set rates for § 271 UNE elements, and that the commission's use of TELRIC rates for these elements directly conflicted with the FCC's rulings. See Verizon New

[12]In the Matter of Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U.S. West Petitions to Consolidate LATAs in Minnesota and Arizona, 14 F.C.C.R. 14,392 (1999) ("InterLATA Boundary Order").

England, Inc. v. New Hampshire Public Util. Comm'n, No. 05-CV-94-PB, slip op. at 24-29 & n.33 (D.N.H. Aug. 22, 2006). Unlike the MPSC in the present case, the New Hampshire state commission did not argue that federal law authorized it to set § 271 rates. Rather, it contended that Verizon agreed to submit its § 271 rates to the commission. Id. at 25-26. The court rejected this factual contention and concluded that the commission had exceeded its jurisdiction in setting rates under § 271. Id. at 26-29. But see Verizon New England, Inc. v. Maine Public Utilities Comm'n, 403 F.Supp.2d 96, 102-03 (D. Me. 2005) (holding that Maine law authorized the state commission to require ILEC to offer network elements under § 271 and to set the prices of such offerings).

Although the decisions of state public utility commissions are not unanimous, numerous state commissions have concluded that they lack jurisdiction or authority to include § 271 checklist items or to order § 271 unbundling as part of arbitrated interconnection agreements, or to set rates for these items. See SBC Reply, Ex. 2 [Doc. 103].

The MPSC and the CLEC defendants rely on § 271(c)(1) and (c)(2) as providing authority for the MPSC's inclusion of § 271 elements and rate-setting for these elements in the interconnection agreements. Subsections (c)(1) and (c)(2) provide that to obtain initial § 271 approval, a BOC must show that it is providing the relevant services under "one or more binding agreements that have been approved under section 252." 47 U.S.C. § 271(c)(1)(A). The CLEC defendants' argument is based on the Act's requirements that: (1) terms and conditions for § 271 checklist items must be contained in an approved interconnection agreement, (2) such interconnection agreements must be approved under § 252, and (3) § 252 approval is granted exclusively by state commissions as part of the statutory negotiation and arbitration process. The CLECs therefore argue that "[i]nclusion of the 'approved under section 252' language means that the agreements incorporating § 271 checklist elements are subject to the § 252 state commission arbitration process if the parties do not reach agreement, as well as subject to state commission review and approval if negotiated by the parties." CLEC Defs.' Mem. Opp. to SBC's Mot. for Summ. J. at 13.

Section 271(c)(1) does not, however, provide authority to state commissions to arbitrate disputed terms or to set rates during an arbitration. Instead, the statute limits state commission arbitration and rate-setting authority to items required under § 251. SBC argues persuasively that it could satisfy the requirements of § 271(c)(1)(A) by pointing to a single, voluntarily negotiated agreement, approved by a state commission, pursuant to which SBC would make available the items on the competitive checklist, including switching, at a just and reasonable rate. Therefore, the limited statutory reference to state commission approval under § 252 cannot vest authority in the MPSC to set the rates for all § 271 checklist items, and is not properly understood as an implied grant of arbitration or rate-making authority.

For these reasons, the Court concludes that the MPSC lacks the jurisdiction and authority to order § 271 unbundling obligations to be included as part of an interconnection agreement arbitration pursuant to § 252, where SBC has not agreed to negotiate access to these facilities pursuant to § 251. The Court declines to follow Verizon New England, Inc. v. Maine Public Utilities Comm'n, which concluded that state commissions have the authority to require § 271 elements in interconnection agreements and to set rates under § 271. See 403 F.Supp.2d at 102. The decision cites no federal-law grant of authority to support its conclusion, but rather implies it from § 271's silence with respect to rate-making authority and relies on Maine law as a source of authority. This reasoning is contrary to the FCC's rulings and the decisions of most state commissions, and fails to adequately acknowledge the Act's transfer of the regulation of local telecommunications competition from the states to the FCC. AT & T Corp., 525 U.S. at 378 n.6. Under the current regulatory scheme, "while Congress has chosen to retain a significant role for state commissions, the scope of that role is measured by federal, not state, law." Southwestern Bell, 225 F.3d at 947.

The Court concludes that the Arbitration Order's requirement that SBC include § 271 unbundling obligations in its interconnection agreements is beyond the jurisdiction of the MPSC. This aspect of SBC's motion for summary judgment should therefore be granted.

B. Unbundled Switching and UNE Platform.

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

As stated in the introduction of this opinion, the FCC in its 2005 Triennial Review Remand Order ("TRRO") prohibited the mandatory leasing of unbundled switching, which is necessary for the UNE Platform, at TELRIC rates. The FCC explained that competitors were not impaired without unbundled switching and further determined that the availability of the UNE Platform hindered genuine competition. TRRO, 20 F.C.C.R. at 2653, ¶¶ 218, 220. The FCC adopted a "nationwide bar" on the mandatory unbundling of local switching. Id. at 2644, ¶ 204. Because of the "need for prompt action," the FCC made its new rules effective on March 11, 2005. Id. at 2666, ¶ 235.

The FCC also created a twelve-month transition period, beginning on that same effective date, during which CLECs could continue to use unbundled mass market switching, and thus the UNE Platform, but only to serve existing mass market customer lines. See id. at 2659-61, ¶¶ 226-28.

CLECs were not permitted to place new orders for unbundled switching and the UNE Platform as of the TRRO's March 11, 2005 effective date. Id. at 2641, ¶ 199. During the twelve-month transition period, ILECs were to receive an additional dollar per line per month over prior UNE Platform rates. Id. at 2660, ¶ 228 n.630. These transition rules and the transition rate applied "only to the embedded [i.e., existing] customer base" and did "not permit competitive LECs to add new UNE Platform arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)." TRRO at 2659-60, ¶ 227.

The FCC also held that facilities which are required only under § 271, unlike UNEs required under § 251, need not be provided in combined, pre-packaged form. See Triennial Review Order,[13] 18 F.C.C.R. at 17,386, ¶ 655 n.1990 ("We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."), vacated in part and remanded in part by United States Telecom Ass'n v. FCC, 359 F.3d 554, 589-90 (D.C. Cir.) ("USTA II") (affirming FCC's finding that the no-combination ruling was an "important respect[]" in which § 251 and § 271 differ), cert. denied, 543 U.S. 945 (2004).

The Arbitration Order permits CLECs to use the same combination of facilities which comprise the UNE Platform, without limitation and at the same transitional rates the FCC held should apply only to the embedded customer base. See Arbitration Order at 28-30. The Arbitration Order therefore conflicts with substantive restrictions the FCC has placed on UNE access, and accordingly is preempted. See 47 U.S.C. §§ 251(d)(3), 261(b)-(c) (precluding state commission actions that are not "consistent" with federal law).

[13]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 F.C.C.R. 16978 (2003) (subsequent history omitted) ("TRO").

The analysis does not change because the MPSC purported to act pursuant to § 271 rather than § 251. The FCC has held that if a state commission decision in substance reimposes an unbundling decision that the FCC found improper under § 251, that decision is preempted regardless of whether the commission purports to be imposing a § 251 obligation. See Memorandum Opinion & Order, BellSouth Telecommc'ns, Inc. Request for Declaratory Ruling, 20 F.C.C.R. 6830, ¶¶ 25-26 (2005) (state commission's decision to require unbundled access to a network element that the FCC expressly declined to unbundle directly conflicted with and was inconsistent with the FCC's rules and policies implementing § 251 and was preempted).

Therefore, the Court concludes that the Arbitration Order conflicts with and is preempted by federal law to the extent it requires SBC to provide unbundled access to switching and the UNE Platform.

C. Unbundled Access to Other Network Facilities.

The Arbitration Order requires that SBC provide CLECs with unbundled access to other network facilities – high capacity loops, dedicated transport, OCn and dark fiber loops, and dark fiber and feeder subloops – in circumstances where the FCC has said these facilities may not be required pursuant to § 251. As with unbundled switching discussed above, the MPSC ordered access to these facilities pursuant to § 271 of the Act. See Final Arbitrator's Report § I(A) at 1-3, 87-90; § III at 33, 47-48, 59; id. at 44 (loops); id. at 55 (dark fiber transport, dark fiber loops); id. at 68-69 (subloops).

SBC asserts that these aspects of the MPSC's Arbitration Order exceed the MPSC's jurisdiction and conflict with binding FCC rules for the reasons discussed above in connection with unbundled switching. The Court agrees. The MPSC lacks jurisdiction or authority to include § 271 checklist items or to order § 271 unbundling as part of arbitrated interconnection agreements, or to set rates for these items. In addition, the MPSC's decision to require unbundled access to these facilities, in circumstances where the FCC has said they may not be unbundled under § 251, creates a substantive conflict with federal law and is accordingly preempted.

SBC's motion for summary judgment should also be granted on the issue of unbundled access to other network facilities no longer required under § 251, on the basis that the MPSC lacked jurisdiction to require the inclusion of these elements in SBC's interconnection agreements, and the Arbitration Order is contrary to federal law.

D. Access to Entrance Facilities Under Section 251(c)(2).

SBC asserts that the Arbitration Order also contravenes the FCC's rulings in the TRRO by requiring SBC to provide CLECs with entrance facilities at TELRIC rates, although CLECs are no longer impaired with respect to entrance facilities and therefore are not entitled to these facilities as UNEs under § 251(c)(3). Defendant Sprint contends in its cross-motion for summary judgment that the MPSC correctly ruled that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities. The Court agrees with Sprint's position.

An entrance facility is a transmission facility that connects CLEC networks with ILEC networks. See TRRO, 20 F.C.C.R. at 2609, ¶ 136. In the TRRO, the FCC held that CLECs are not impaired without access to entrance facilities, and therefore CLECs are not entitled to entrance facilities as unbundled network elements (UNEs) under § 251(c)(3). See 20 F.C.C.R. at 2609-12, ¶¶ 136-41. The TRRO is clear, however, that the FCC's "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service." Id. at 2611, ¶ 140. "Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." Id.

In the Arbitration Order, the MPSC acknowledged the FCC's ruling that CLECs are not entitled to entrance facilities as UNEs, but required SBC to allow access to these same facilities pursuant to 47 U.S.C. § 251(c)(2), which requires ILECs to provide "interconnection" to CLECs. See Final Arbitrator's Report, § IV at 16, 31-35; § V at 16. The Court concludes that the MPSC's Arbitration Order correctly implements the FCC's rulings on this issue as set forth in the TRRO and the TRO. See TRRO, 20 F.C.C.R. at 2611, ¶ 140; TRO, 18 F.C.C.R. at 17,202-04, ¶¶ 365-66.

In the context of ILEC-CLEC network arrangements, carriers can use entrance (transmission) facilities for at least two distinct purposes: (1) to provide a final link in the dedicated transmission path between a CLEC's customer and the CLEC's switch, and (2) as interconnection facilities to exchange traffic between ILEC and CLEC switches. In the first situation, a CLEC does not use entrance facilities for interconnection purposes, but rather to carry traffic to and from its own end users, a process known as "backhauling." In the second situation, a CLEC uses entrance facilities to interconnect with the ILEC's network, to provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks. See TRO, 18 F.C.C.R. at 17202-03, ¶¶ 365-66; see also Ex. 9 to Sprint's Mem. Supp. of Cross-Mot. for Summ. J. (schematic drawing).

The FCC determined that when a CLEC uses entrance facilities to carry traffic to and from its own end users (situation (1) above), the CLEC is not entitled to obtain entrance facilities from ILECs as § 251(c)(3) UNEs. See TRRO, 20 F.C.C.R. at 2610-12, ¶¶ 136-41. The FCC reaffirmed its earlier determination, however, that if a CLEC needs entrance facilities to interconnect with an ILEC's network (situation (2) above), the CLEC has the right to obtain such facilities from the ILEC, at cost-based rates, under § 251(c)(2) of the Act. Id. at 2611, ¶ 140; TRO, 18 F.C.C.R. at 17,202-04, ¶¶ 365-66.

The Court rejects SBC's contention that the TRRO only requires an ILEC to allow CLECs to interconnect with its network and does not require that it lease the interconnection facilities themselves to CLECs. The FCC has interpreted "interconnection" to mean "the physical linking of two networks for the mutual exchange of traffic." Local Competition Order, 11 F.C.C.R. at 15,590, ¶ 176. In implementing this requirement, the FCC has held that CLECs have a "right . . . to obtain interconnection facilities pursuant to section 251(c)(2) . . . at cost-based rates . . . ." TRRO, 20 F.C.C.R. at 2611, ¶ 140 (emphasis added). The term "interconnect" refers to "'facilities and equipment,' not to the provision of any service." AT & T Corp. v. FCC, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (interpreting the term "interconnect" in § 251(a)(1)); see Competitive Telecommc'ns Ass'n v. FCC, 117 F.3d 1068, 1071 (8th Cir. 1997) (stating of § 251(c)(2), "By its own terms, this reference is to a physical link between the equipment of the carrier seeking interconnection and the LEC's network."). Based on the foregoing, the Court concludes that SBC is required under the Act and FCC regulations to provide access to entrance facilities necessary for interconnection.

The MPSC made a factual determination that the SBC entrance (transmission) facilities provided under its agreement with Sprint would be used solely for interconnection purposes within the meaning of § 251(c)(2). See Final Arbitrator's Report, § IV, at 33-35; id. § V, at 15-16. This factual determination was supported by the record evidence. See Direct Testimony of Don Price at 135-36 (Sprint Ex. 7); Rebuttal Testimony of Peter Sywenki at 8-11 (Sprint Ex. 4); Direct Testimony of Edward J. Cadieux at 73-75 (Sprint Ex. 5); Rebuttal Testimony of Edward J. Cadieux at 28-29 (Sprint Ex. 6). Accordingly, the MPSC's factual determination is not arbitrary or capricious and should be affirmed.

The Arbitration Order requires SBC to allow access to entrance facilities at the same cost-based TELRIC rates that apply to UNEs, when the entrance facilities are used for interconnection purposes under § 251(c)(2). See Final Arbitrator's Report, § IV at 16, 31-35; § V at 16. Although SBC challenges use of the TELRIC rate, the Court concludes the Arbitration Order's requirement correctly implements the FCC's rulings.

The FCC stated in the TRRO that the Act mandates cost-based rates for network interconnection. See TRRO, 20 F.C.C.R. at 2611, ¶ 140. Section 251(c)(2)(D) requires ILECs to provide interconnection facilities on the "rates, terms and condition" that comply with the requirements of § 252. 47 U.S.C. § 251(c)(2)(D). Section 252(d)(1), in turn, provides that "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251" shall be cost-based. Id., § 252(d)(1)(A)(i). In implementing this rate provision, the FCC established the TELRIC methodology. See Local Competition Order, 11 F.C.C.R. at 15,844, ¶ 672; see also 47 C.F.R. §§ 51.501(a)-.505 (2005) (applying TELRIC to the pricing of interconnection). The FCC concluded that Congress intended to apply the same pricing rules to interconnection and UNEs, based on the plain language of §§ 251(c)(2), (c)(3), and § 252(d)(1). See Local Competition Order, 11 F.C.C.R. at 15, 816, ¶ 628. The Arbitration Order correctly adhered to the FCC's mandate when it directed the use of TELRIC rates for entrance facilities provided by SBC under the Sprint Agreement for use as interconnection facilities.

For these reasons, the Arbitration Order should be affirmed to the extent it determined that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities. SBC's motion for summary judgment should therefore be denied with respect to the entrance facilities issue and Sprint's cross-motion for summary judgment should be granted.

E. Compensation for IP-PSTN Traffic.

The final issue in SBC's motion for summary judgment challenges the MPSC's determination that SBC and the CLECs should exchange reciprocal compensation for Internet Protocol ("IP") to public switched telephone network ("PSTN") traffic, instead of higher switched access charges for this traffic. SBC contends that reciprocal compensation for IP-PSTN traffic is contrary to the Act and the FCC's rules. SBC also contends that this aspect of the Arbitration Order is arbitrary and capricious and results from a failure to engage in reasoned decision-making.[14]

The defendants respond that the MPSC's determination is consistent with the Act and the FCC's current intercarrier compensation rules, and should be affirmed. The defendants assert that all IP-PSTN traffic is eligible for reciprocal compensation under the Act, and is exempt from access charges under longstanding FCC precedent which insulates providers of "enhanced services" from the access charges that would apply to carriers providing basic long distance service. The Court agrees with the defendants.

Background.

1. Reciprocal Compensation.

Section 251(b)(5) of the Act imposes upon LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5); Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 881 (8th Cir. 2005). "Reciprocal compensation is payment from the carrier who originates a call to the carrier who terminates or

[14]In the proceedings before the MPSC, SBC argued that access charges should apply to all IP to PSTN traffic. In the case before the Court, SBC limits its argument, asserting that access charges should apply only to "interexchange" IP to PSTN traffic. This difference is immaterial, because the Court concludes that all IP-PSTN traffic is eligible for reciprocal compensation under the Act.

receives a call. Reciprocal compensation is intended to permit the carrier for the customer who receives a call to recoup from the caller's carrier those expenses incurred for terminating the call or sending it to its final destination." WWC License, L.L.C. v. Boyle, No. 05-1725, 2006 WL 2419162, *2 , __ F.3d __ (8th Cir. Aug. 23, 2006) (citing Ace Tel., 432 F.3d at 878, and 47 U.S.C. § 252(d)(2)(A)(i) (stating that reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier.")).

The FCC's definition of the scope of reciprocal compensation has changed over time. In 1996, the FCC initially limited the application of reciprocal compensation to the exchange of "local" traffic, Local Competition Order, ¶¶ 1033-1034, 1040, and defined "local" traffic for reciprocal compensation purposes as traffic that "originates and terminates" in the same local calling area. 47 C.F.R. § 51.701(b)(1) (1996), vacated, Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

In 2001, the FCC examined whether reciprocal compensation should apply to traffic directed to Internet Service Providers ("ISP traffic"). In connection with that particular inquiry, it abandoned the prior focus on whether traffic was "local." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 F.C.C.R. 9151, ¶¶ 8, 30, 36 n.64, 39, 42 (2001) ("ISP Remand Order"). Instead, the FCC determined that reciprocal compensation should apply to all traffic that is not encompassed by § 251(g) of the Act, which preserved pre-Act rules for "exchange access, information access, and exchange services for such access." 47 U.S.C. § 251(g).

The ISP Remand Order was appealed to the D.C. Circuit, which reversed the FCC's interpretation of § 251(g). WorldCom, Inc. v. FCC, 288 F.3d 429, 433-34 (D.C. Cir. 2002). The Court concluded that "[o]n its face, § 251(g) appears to provide simply for the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations.'" Id. at 432. The Court stated that while § 251(g) preserves pre-Act obligations under a "regulation, order, or policy of the Commission," it does not authorize the FCC to "override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations." Id. at 433. Section 251(g) did not empower the FCC to exempt ISP-bound traffic from reciprocal compensation because "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic." Id. Although the D.C. Circuit found no basis for the FCC's action, it chose not to "make . . further determinations" regarding the validity of the ISP Remand Order and left the Order in place and remanded it to the FCC for further proceedings consistent with the Court's decision. Id. at 434. To date, the FCC has not yet issued another comprehensive order governing intercarrier compensation for ISP traffic.

2. Access Charges.

Access charges are part of an intercarrier compensation regime established in the 1980s to govern long distance calls. See Iowa Network Servs. Inc., 363 F.3d at 686; Bell Atlantic Tel. Cos., 206 F.3d at 7-8. "Exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). "Telephone toll service" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." Id. § 153(48). Access charges historically have included "significant implicit subsidies" and by definition have been well above cost. See In re Access Charge Reform, 12 F.C.C.R. 15,982, ¶¶ 39-40 (1997) ("Access Charge Reform Order"); Competitive Telecommc'ns Ass'n v. FCC, 309 F.3d 8, 14-15 (D.C. Cir. 2002) (describing "implicit subsidies" for universal service that remain "embedded in access charges."). As a result, an incumbent carrier that collects access charges for terminating traffic receives more money than it would if it exchanged reciprocal compensation for the same traffic.

3. Enhanced Services and Information Services.

In 1980, the FCC distinguished between "basic service," i.e., regular telephone service, and "enhanced service," i.e., computer-processing service offered over telephone lines. See National Cable & Telecommc'ns Ass'n v. Brand X Internet Servs., 545 U.S. 967, 125 S. Ct. 2688, 2696 (2005). A basic service was a "transparent transmission . . . that enabled the consumer to transmit an ordinary-language message to another point, with no computer processing or storage of the information . . . ." Id. at 2697; see also In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.R. 384, ¶¶ 94-96 (1980) ("Computer II Order"). In contrast, an "enhanced service" was defined as "service in which computer processing applications [were] used to act on the content, code, protocol, and other aspects of the subscriber's information, such as voice and data storage services, as well as protocol conversion (i.e., ability to communicate between networks that employ different datatransmission formats)." Brand X Internet Servs., 125 S. Ct. at 2697 (alteration in original; internal citation omitted); see also Computer II Order, ¶¶ 97, 99.

Prior to the Act, telecommunications traffic was regulated based on the distinction between "basic" and "enhanced" services. Basic services were heavily regulated, Brand X Internet Servs., 125 S. Ct. at 2697, and could be subject to compensation rules such as the access charge regime. Enhanced services generally were outside the scope of common-carrier regulation. Id. "The

Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the fast-moving, competitive market in which they were offered." Id.

In 1988, the FCC excluded providers of enhanced services from the obligation to pay access charges imposed on interexchange carriers exchanging long distance traffic. In re Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 F.C.C.R. 2631, ¶ 17 (1988) ("ESP Exemption Order"). The FCC did not directly exempt enhanced service providers ("ESPs") from interstate access charges, but rather defined ESPs as "end users." See ACS of Anchorage, Inc. v. FCC, 290 F.3d 403, 409 (D.C. Cir. 2002). As end users, ESPs obtain access to other carriers' networks by purchasing a local business line (and paying tariffed rates for use of those lines). Id. at 409. The FCC recognized that ISP-bound traffic was interstate access, but treated such traffic as though it were local. BellSouth Telecommc'ns, Inc. v. ITC Deltacom Commc'ns, Inc., 62 F.Supp.2d 1302, 1313 (M.D. Ala. 1999). Although the exemption for ESPs was described as a temporary means to avoid "unduly" burdening the developing IP industry, ESP Exemption Order, ¶ 2, it remains in effect. See In re Developing a Unified Intercarrier Compensation Regime, 20 F.C.C.R. 4685, ¶ 1 n.2 (2005) (noting continued existence of ESP exemption); In re Amendments of Part 6 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers, 6 F.C.C.R. 4524, ¶ 60 (1991) (retaining exemption for policy reasons); BellSouth Telecommc'ns, Inc., 62 F.Supp.2d at 1313 (noting FCC's continued maintenance of ESP exemption).

The Act defines two classes of telecommunications traffic – "information service" and "telecommunications service" – which are analogous to the pre-Act distinction between enhanced and basic services. 47 U.S.C. §§ 153(20), 153(46); see Brand X Internet Servs., 125 S. Ct. at 2697. A "telecommunications service" is "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." 47 U.S.C. § 153(46). The Act defines an "information service" as the offering of a capability "for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*." Id., § 153(20) (emphasis added). "Telecommunications" is defined as the "*transmission*, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id., § 153(43) (emphasis added).

4. VoIP Telecommunications.

Voice Over Internet Protocol ("VoIP") technologies enable real-time delivery of voice and voice-based applications. Petition for Declaratory Ruling that AT & T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, 2004 WL 856557, 19 F.C.C.R. 7457, at ¶ 3 (Order April 21, 2004) ("AT & T Access Charge Order"). "When VoIP is used, a communication traverses at least a portion of its path in an IP packet format using IP technology and IP networks." Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc., 2005 WL 2033416, *2 (E.D. Mo. Aug. 23, 2005) (citing AT & T Access Charge Order). "VoIP can be transmitted over the public Internet or over private IP networks, using a variety of media." Id.

VoIP "had not emerged from the labs in any meaningful way" at the time the Act was enacted. Remarks of Michael K. Powell, then-Chairman, Federal Communications Commission, at 1, Oct. 19, 2004 (Ex. B. to MCI Communications Services, Inc.'s Mem. in Opp. to SBC Mot. for Summ. J.). The FCC has not yet issued regulations exclusively addressing the classification and treatment of VoIP traffic, although there are ongoing FCC proceedings concerning VoIP. See In the Matter of IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC No. 04-28, 19

F.C.C.R. 4863 (F.C.C. Mar. 10, 2004) ("IP Rulemaking Notice"). Among the issues on which the FCC is seeking comment are (1) "the extent to which access charges should apply to VoIP and other IP-enabled services," and (2) how to classify the providers of these services. Id. at ¶ 61. See generally VarTec Telecom, Inc., 2005 WL 2033416, at *4 (noting lack of FCC rules concerning VoIP service). Nonetheless, "[i]t is obvious from continuing debates over the proper classification of broadband and VoIP services that the purported 'bright line' between basic and enhanced services . . . increasingly is becoming blurred and subject to confusion." Frontier Tel. of Rochester, Inc. v. USA Datanet Corp., 386 F.Supp.2d 144, 150 (W.D.N.Y. 2005) (quoting Richard S. Whitt, A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model, 56 Fed. Comm. L.J. 587, 652 (May 2004); (alteration in original).

Although the FCC has not yet issued regulations addressing VoIP, existing rules and orders establish how VoIP and other IP services should be treated in the interim. In a 1998 report to Congress, In re Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R. 11,501 (1998) ("Universal Service Report"), the FCC first articulated standards to aid the communications industry in applying its existing definitions to various configurations of VoIP technologies. The FCC concluded that "computer-to-computer" IP telephony, in which phone service is provided over broadband facilities using non-traditional customer premises equipment such as a computer, would likely would be an "information service." Universal Service Report, ¶ 87. The FCC also discussed "phone-to-phone" IP telephony, which does not require customers to use equipment different from that used to place an ordinary touch-tone call, and "transmits customer information without a net change in form or content." Id., ¶ 88. The record suggested that phone-to-phone IP telephony was not an information service, and might be subject to access charges. Id., ¶ 91.

The FCC has issued two recent orders addressing specific VoIP services and a third order addressing it in the context of another statute. In the first order, the FCC concluded that "computer-to-computer" VoIP offered by Pulver.com constituted an "information service" because Pulver.com offered its customers the capability of "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information." In re Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, 19 F.C.C.R. 3307, ¶¶ 4, 12, 26 (2004) ("Pulver Order").

In the second order, the FCC addressed a petition by AT & T regarding the regulatory classification of its "phone-to-phone" IP telephony service, which uses IP inside the long distance carrier's network to more efficiently provide transmission for voice calls that both originate and terminate as regular phone calls over the traditional telephone network. The FCC reasoned that the AT & T offering is a "telecommunications service" under the Act because, inter alia, it involves no "net protocol conversion" and uses "ordinary customer premises equipment (CPE) with no enhanced functionality." AT & T Access Charge Order, ¶ 1. The FCC emphasized that this rule applied only to AT & T's specific services and VoIP services that shared all of the characteristics which supported its determination that AT & T's service was a telecommunications service.[15] Id., ¶¶ 1, 11, 13, 15.

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[15]The FCC described AT & T's VoIP service under consideration as: "an interexchange service that: (1) uses ordinary customer premises equipment with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." AT & T Access Charge Order, ¶ 1. "No net protocol conversion occurs [during this particular type of VoIP service] because the telephone transmissions begin and end as ordinary telephone calls." Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc., 2005 WL 2033416, at *2, n.7 (E.D. Mo. Aug. 23, 2005).

"To avoid placing AT&T at a competitive disadvantage, the FCC ruled that all interexchange carriers providing IP telephony are required to pay access charges for calls that 'begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN.' [AT & T Access Charge Order]

In the third order, the FCC addressed the petitions of several law enforcement agencies to clarify the scope of the Communications Assistance for Law Enforcement Act ("CALEA")[16] with respect to whether providers of broadband Internet access and VoIP services are regulable as "telecommunications carriers" under CALEA. In re Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, 2005 WL 2347765, 20 F.C.C.R. 14,989, ¶¶ 15-16 (2005) ("CALEA Order"). Although the CALEA Order interprets a different statute, it is useful because the FCC examined the nature of VoIP services, offered its interpretation of aspects of the Act, and discussed significant differences between the statutory language of CALEA and that of the Act.

As relevant here, the FCC stated that the Act's definitions of "telecommunications service" and "information service" are mutually exclusive categories. CALEA Order, ¶¶ 15, 16. The Act's definition of "telecommunications" is "narrow" and only includes transmissions that do not alter the form or content of the information as sent and received. Id.; see 47 U.S.C. § 153(43). The FCC described VoIP as a hybrid service that contains both "telecommunications" and "information" components. CALEA Order, ¶¶ 39-45; American Council on Educ. v. FCC, 451 F.3d 226, 229 (D.C. Cir. 2006). The FCC stated that the Act requires it to "classify an integrated service offering as solely a telecommunications service or solely an information service depending on 'the nature of the functions that the end user is offered'." CALEA Order, ¶ 16. The FCC ruled that the telecommunications component of an integrated information service offering falls exclusively within the Act's information service category:

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at ¶ 18. This rule applies whether the interexchange carrier provides its own IP voice services or contracts with another provider to do so. Id." VarTec Telecom, Inc., 2005 WL 2033416, at * 2.

[16] 47 U.S.C. §§ 1001-1010.

> a single entity offering an integrated service combining basic telecommunications transmission with certain enhancements, specifically "capabilities for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," offers only an information service, and not a telecommunications service, for purposes of the [Telecommunications] Act if the telecommunications and information services are sufficiently intertwined.

CALEA Order, ¶ 15; see id., ¶ 17.

These orders offer some guidance but also leave unanswered questions concerning the proper regulatory framework for services and applications that use the Internet to deliver voice and voice-based applications, including IP-PSTN. A key question is the application of the FCC's definitions of "information services" or "enhanced services" to these IP-based technologies. IP Rulemaking Notice, ¶¶ 35-36.

5. The MPSC's Ruling on IP-PSTN Traffic.

The Final Arbitrator's Report contained two separate, conflicting rulings concerning IP-PSTN traffic. The first ruling resolved MCI's issue concerning the terms and condition applicable to intrastate interexchange switched access traffic. The Arbitrator ruled in favor of MCI that IP-PSTN traffic should be charged at reciprocal compensation rates instead of switched access rates, because IP-PSTN traffic is an "enhanced service" that "falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition." Final Arbitrator's Report at 21-22.

The second ruling addressed both PSTN-IP-PSTN and IP-PSTN, and resolved numerous issues presented by SBC, AT & T and several CLECs. The CLEC Coalition argued that the MPSC should refrain from incorporating any provisions concerning IP-PSTN and VoIP in the interconnection agreements until the FCC issued governing regulations. The Arbitrator proceeded to address the issues and after a lengthy recitation of the parties' positions ruled in favor of SBC that interexchange switched access traffic, including interexchange IP-PSTN traffic, is subject to switched access charges "for the reasons offered by SBC." Final Arbitrator's Report at 34-50.

The CLEC Coalition filed comments on the Final Arbitrator's Report, requesting clarification of the inconsistent rulings concerning IP-PSTN. In its comments on the Final Arbitrator's Report, SBC argued that it was arbitrary for the MPSC to adopt MCI's IP-PSTN proposal while excluding other carriers' IP-PSTN traffic from reciprocal compensation. In the Arbitration Order, the MPSC resolved the conflict by concluding that IP-PSTN traffic is subject to reciprocal compensation rather than access charges.

Discussion.

The Court concludes that the MPSC's decision subjecting IP-PSTN traffic to reciprocal compensation is consistent with the Act and the FCC's rules, and is not arbitrary or capricious. The decision is consistent with the FCC's orders because (1) federal law does not exempt IP-PSTN traffic from reciprocal compensation obligations, and (2) federal access charges are inapplicable to IP-PSTN traffic because such traffic is an "information service" or an "enhanced service" to which access charges do not apply.

1. Reciprocal Compensation.

The Act requires carriers to exchange reciprocal compensation for all "telecommunications," 47 U.S.C. § 251(b)(5), unless that particular form of telecommunications was regulated under a pre-Act compensation regime expressly preserved by § 251(g) of the Act. Id., § 251(g). Read together, these sections establish that carriers must exchange reciprocal compensation to transport and terminate telecommunications unless a separate pre-Act rule prescribed a different form of compensation for that form of communications. See WorldCom, Inc., 288 F.3d at 433.

The reciprocal compensation obligation applies to IP-PSTN traffic because when a CLEC acts as a VoIP provider it uses "telecommunications" to transmit IP-PSTN traffic to the network of the carrier that provides service to the called party. The Act defines "telecommunications" as the "*transmission*, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (emphasis added). After the CLEC has converted a call that originates in IP format to Time Division Multiplex ("TDM") format,[17] it transmits voice communications from its network to the network of the called party's telecommunications provider. See IP-PSTN Service Diagram (Ex. D to MCI's Mem. Opp. to SBC's Mot. for Summ. J.). From that point forward, the communication is sent and received in TDM format, and involves no further change in form or content.

Because IP-PSTN is a new service developed after the Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable. Cf. WorldCom, Inc., 288 F.3d at 433-34 (Section 251(g) could not apply to ISP-bound traffic because there was no pre-Act regime specially governing compensation for that service). As a result, IP-PSTN traffic falls within the statutory mandate that reciprocal compensation be used to compensate carriers for transporting traffic between calling and called parties that subscribe to different carriers.

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[17]"Time Division Multiplexing, or 'TDM,' occurs when calls are digitized and broken up into segments. These segments are sent in order, with segments from other telephone calls placed in between, then reassembled at the other end." SightSound.com, Inc. v. N2K, Inc., 185 F.Supp.2d 445, 459 (W.D. Pa. 2002).

A significant change in format – net-protocol conversion – occurs at an earlier stage of IP-PSTN communications. See MCI Ex. D. As will be discussed infra, that net-protocol conversion makes IP-PSTN an information service eligible for a special exemption to the payment of access charges.

SBC argues that 47 C.F.R. § 51.701(b)(1) exempts three categories of traffic from reciprocal compensation and that "interexchange IP-PSTN" falls within the exemption because it is a non-local "interexchange" call. SBC Mem. at 25-26, 28. Although the FCC's ISP Remand Order initially interpreted § 251(g) as excluding the three categories of traffic from federal reciprocal compensation requirements, the D.C. Circuit reversed that interpretation, explaining that § 251(g) preserves only pre-Act compensation rules for those services. WorldCom, Inc., 288 F.3d at 432-33; see also Atlas Tel. Co. v. Oklahoma Comm'n, 400 F.3d 1256, 1262-63 (10th Cir. 2005) (explaining operation of § 251(g)). Following the D.C. Circuit's ruling, the FCC abandoned its prior view and subsequently "disagreed with [the] assertion that every form of traffic listed in section 251(g) should be excluded from section 251(b)(5) reciprocal compensation."[18] In re Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc. and for Expedited Arbitration, 17 F.C.C.R. 27,039, ¶ 261 (2002).

SBC's assertion that reciprocal compensation can only apply to "local" traffic, SBC Mem. at 26, is not supported by current law. As discussed above, the FCC's 1996 Local Competition Order focused on calls' jurisdictional status as "local." In 2001, however, the FCC relinquished its prior reliance on a call's jurisdictional status as "local" or "long distance" as a basis for determining its eligibility for reciprocal compensation. ISP Remand Order, ¶¶ 34-35; Southern New England Tel.

[18]Neither § 251(g) nor the corresponding FCC regulation identifies "interexchange traffic" as a category of traffic for which pre-existing rules are preserved. Instead, the three categories are exchange access, information access, and services for the provision of exchange or information access. SBC does not argue in its Memorandum that IP-PSTN traffic is exchange access or information access. Even if SBC's interpretation of § 251(g) were correct, it would not support SBC's contention that all traffic between end users in different exchanges is by definition excluded from reciprocal compensation.

Co. v. MCI WorldCom Commc'ns, Inc., 353 F.Supp.2d 287, 298 (D. Conn. 2005). Thus, IP-PSTN traffic's status as a "local" call does not control whether it is subject to reciprocal compensation.

2. Access Charges.

SBC also argues that interexchange IP-PSTN traffic is subject to access charges and therefore is outside the reciprocal compensation regime. SBC Mem. at 28. This argument fails because federal access charges are inapplicable to an "information service" or "enhanced service." AT & T Access Charge Order, ¶ 4; see also Brand X Internet Servs., 125 S. Ct. at 2696. Although the FCC has not yet ruled whether IP-PSTN is such a service, the orders it has issued lead to the conclusion that IP-PSTN is an "information service."[19]

As discussed supra, the FCC's "ESP exemption" excuses providers of "enhanced services" from paying access charges. See ESP Exemption Order, ¶ 2; see also Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas, 208 F.3d 475, 487 n.19 (5th Cir. 2000) (acknowledging ESP exemption). The ESP Exemption Order classifies enhanced service providers ("ESPs") as end users of telecommunications service. ACS of Anchorage, Inc., 290 F.3d at 409. Because only "carriers" are subject to access charges, being an "end user" means that ESPs do not pay those charges. ESPs' status as end users places them outside the access charge regime "even for calls that appear to traverse state boundaries." See Access Charge Reform Order, ¶ 342. Although the ESP exemption

[19]It is important to note that IP-PSTN traffic's status as an "information service," and not a "telecommunications service," does not take it beyond the scope of the "telecommunications" to which reciprocal compensation applies. By definition, information services are provided "*via telecommunications*." 47 U.S.C. § 153(20) (emphasis added). Further, as previously discussed, CLECs provide telecommunications as part of their VoIP offerings because they transmit the communications to the LEC's network after the net-protocol conversion has occurred. The telecommunications feature does not subject the traffic to access charges because, as will be discussed, FCC rules exempt carriers from paying access charges when they offer information services.

was enacted as an interim measure, it remains in effect. See ITC Deltacom Commc'ns, Inc., 62 F.Supp.2d at 1313. Consequently, if IP-PSTN traffic is an enhanced or information service, then the MPSC correctly ruled that CLECs should not pay access charges when they originate or terminate IP-PSTN traffic.

Now known as "information services," Brand X Internet Services, 125 S. Ct. at 2706, "enhanced services" are "services in which computer processing applications [were] used to act on the content, code, protocol, and other aspects of the subscriber's information, such as voice and data storage services, as well as protocol conversion (*i.e.*, ability to communicate between networks that employ different data-transmission formats)." Id. at 2697 (alteration in original; internal citations omitted); see also 47 C.F.R. § 64.702(a); IP Rulemaking Notice, ¶ 27 n.94. The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

Net-protocol conversion is a determinative indicator of whether a service is an enhanced or information service. See In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 F.C.C.R. 21,905, ¶ 104 (1996). A net-protocol conversion occurs when "an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol." Id. That conversion "transforms" information, and therefore provides an "enhanced" and an "information" service. Id., ¶¶ 105–06.

IP-PSTN traffic is an information service within the meaning of the Act because it offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[20] 47 U.S.C. § 153(20); see Universal Service Report, ¶ 39. IP-PSTN also alters the form and content of the information sent and received, see Brand X Internet Services, 125 S. Ct. at 2697; 47 U.S.C. § 153(43), because it involves a net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN. Vonage, 290 F.Supp.2d at 1000; see Price Test. at 118. The communication originates at the caller's location in IP protocol, undergoes a net change in form and content when it is transformed at the CLEC's switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient's location in TDM. Vonage, 290 F.Supp.2d at 1000; see Ex. D to MCI's Mem. Opp. to SBC's Mot. Summ. J. Without this protocol conversion from IP to TDM, the called party's traditional telephone could not receive the VoIP call.[21] See IP Rulemaking Notice, ¶ 8 (noting that IP transmits data "in a manner fundamentally different than the way in which signals transit a circuit-switched service" on the PSTN). For these reasons, IP-PSTN is an information service. See Vonage, 290 F.Supp.2d at 1000 (holding that computer-to-phone VoIP is an "information service" rather than a "telecommunications service" under the Act).

The conclusion that IP-PSTN is an information service is supported by the FCC's orders addressing related issues. The FCC determined that AT & T's PSTN-IP-PSTN traffic is a telecommunications service because no net protocol conversion occurs, as the traffic begins and ends on the conventional telephone network. AT & T Access Charge Order. In contrast, IP-PSTN service

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[20] "[T]he FCC recognized that the architecture of information services would be built on top of existing telecommunications services infrastructure, but, in terms of regulation, would still remain separate for strong policy purposes." Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n, 290 F.Supp.2d 993, 1001 (D. Minn. 2003).

[21] It does not matter that there is a "voice" at both ends of an IP-PSTN call. The same is true of voicemail, which the FCC has long recognized is an information service. See In re Schools and Libraries Universal Service Support Mechanism, 18 F.C.C.R. 9202, ¶ 29 n.49 (2003).

involves a net protocol conversion from IP format to TDM format. The FCC determined that a "computer-to-computer" VoIP service constituted an "information service" because it offered customers the capability of "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information." Pulver Order. IP-PSTN is computer-to-phone VoIP, but also offers customers the capability of "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information." As such, IP-PSTN also constitutes an information service. Finally, the FCC described VoIP as a hybrid service which has both telecommunications and information components and stated that under the Act, such an offering combining basic telecommunications with "capabilities for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" falls exclusively within the information service category if the telecommunications and information services are sufficiently intertwined. CALEA Order, ¶ 15. IP-PSTN has both information and telecommunications components, which are intertwined to permit telephone communication between computer users and PSTN users.

For these reasons, the Court concludes that the Arbitration Order's decision subjecting IP-PSTN traffic to reciprocal compensation rather than access charges is consistent with federal law and should be affirmed.

3. Adequacy of Decision Making.

SBC also contends that the MPSC's final decision on the IP-PSTN issue was arbitrary and capricious and resulted from a failure to engage in reasoned decision making. SBC contends that the MPSC resolved the Arbitrator's conflicting rulings regarding IP-PSTN traffic on the sole basis that the traffic "should be treated consistently" and without any explanation why the MPSC thought one approach was preferable to the other. SBC Mem. at 29 (citing Arbitration Order at 36); SBC Reply at 14.

The Court disagrees with SBC. The MPSC did more than simply state that the two rulings concerning IP-PSTN should be consistent. It articulated the carriers' competing positions and the basis for the Arbitrator's initial adoption of SBC's proposal that IP-PSTN should be subject to access charges. Arbitration Order at 35. It discussed the Coalition's arguments that (1) the AT & T Access Charge Order relied on by the Arbitrator holds only that access charges should apply to PSTN-IP-PSTN traffic, and (2) IP-PSTN traffic is qualitatively different from PSTN-IP-PSTN because it is an enhanced service involving a net-protocol change and therefore should be charged at reciprocal compensation rates. Arbitration Order at 34-35. The MPSC then explained that the Arbitrator had adopted MCI's proposal because "IP-PSTN traffic . . . falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition and is therefore appropriately charged at reciprocal compensation rates instead of switched access rates." Id. at 36. The MPSC further stated that all IP-PSTN traffic should be treated similarly, and modified the Final Arbitrator's Report to provide that the Coalition CLECs' interconnection agreements should provide that IP-PSTN traffic would be subject to reciprocal compensation rather than access charges. Id. at 36.

The MPSC's discussion of the conflicting rulings indicates its recognition that IP-PSTN traffic is an information service and is qualitatively different than PSTN-IP-PSTN traffic, which is a telecommunications service. This fulfilled the MPSC's obligation to base its decision on "a consideration of the relevant factors." National Wildlife Fed'n v. Whistler, 27 F.3d 1341, 1344 (8th Cir. 1994); see also Southern New England Tel. Co. v. Connecticut, Dep't of Public Util. Co., 285 F.Supp.2d 252, 258 (D. Conn. 2003) ("A reviewing court may uphold an agency decision of 'less than ideal clarity if the agency's path may reasonably be discerned."). By modifying the Arbitrator's ruling to apply reciprocal compensation to IP-PSTN traffic under the interconnection agreements, the MPSC indicated that it found the rationale for adopting MCI's proposal more persuasive than SBC's position. The MPSC's decision was therefore not arbitrary or capricious.

Conclusion.

For the foregoing reasons, the Court concludes that the Arbitration Order neither violates federal law nor constitutes an arbitrary and capricious determination of the facts with respect to the issue of reciprocal compensation for IP-PSTN traffic. Accordingly, the Arbitration Order should be affirmed and SBC's motion for summary judgment should be denied on this issue.

IV.

Charter Fiberlink-Missouri, LLC's Motion for Summary Judgment.

Defendant Charter Fiberlink-Missouri, LLC ("Charter") moves for summary judgment on its Counterclaim/Cross-claim ("cross-claim"). Charter's cross-claim challenges the MPSC's determination that exchange access charges, rather than the lower reciprocal compensation charges, apply to regular telephone calls that travel outside the local calling areas established by the state commission, even if the calls do not travel outside the originating carrier's local calling area for billing purposes. Charter would like to compete against SBC in the retail market by offering its customers a larger local calling area than SBC does, but under the Arbitration Order, Charter would be required to pay access charges to SBC for certain calls that travel outside SBC's local calling area even though the calls would not travel outside Charter's local calling area and Charter would not collect a toll from its customers on the calls.

SBC and the MPSC oppose Charter's motion for summary judgment. For the following reasons, Charter's motion should be denied.

Background.

As previously discussed, the Act imposes a duty on all telecommunications carriers to interconnect their networks either directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. § 251(a). The Act also imposes a duty on local exchange carriers (LECs) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Id., § 251(b)(5). "Reciprocal compensation is payment from the carrier who originates a call to the carrier who terminates or receives a call. Reciprocal compensation is intended to permit the carrier for the customer who receives a call to recoup from the caller's carrier those expenses incurred for terminating the call or sending it to its final destination." WWC License, L.L.C., No. 05-1725, 2006 WL 2419162, *2 (citations omitted); 47 U.S.C. § 251(b)(5).

To facilitate compliance with the congressional mandate requiring interconnection and reciprocal compensation, the FCC issued rules requiring "reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers." 47 C.F.R. § 51.701(a). The obligation to pay reciprocal compensation applies to all telecommunications traffic except for "interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1). All of these items are "access services" which "connect calls that travel to points – both interstate and intrastate – beyond the local exchange." ISP Remand Order, 16 F.C.C.R. 9168, ¶ 37. At issue on this motion are interstate and intrastate exchange service, commonly referred to as long-distance or toll calls. These calls are subject to "access charges," which are significantly higher than reciprocal compensation charges.

Under the access charge scheme, an inter-exchange or intra-exchange carrier pays the LEC for its use of the LEC's local network facilities. See, e.g., 47 C.F.R. § 69.124.[22]

Proceedings Before the MPSC.

As part of the arbitration proceedings before the MPSC, Charter and SBC submitted an issue concerning the definition of mandatory local calling areas. For purposes of their interconnection agreement, Charter and SBC disagreed as to whether the local calling areas defined in SBC's MPSC-approved local exchange tariffs should control whether reciprocal compensation or access charges are appropriate for completing particular calls.

Charter proposed that the distinction between toll and local traffic for purposes of intercarrier compensation would be defined by the local calling area of the company that originates the call. Charter's proposed contract language provided in relevant part:

> For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an end user physically located in one local exchange and delivered for termination to an end user physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling area as defined in the originating party's local exchange tariffs on file with the applicable state commission). (Emphasis added).

In contrast, SBC proposed that the distinction between toll and local traffic for purposes of intercarrier compensation would be defined by SBC's mandatory local calling area in its local exchange tariffs filed with the MPSC. SBC's proposed contract language provided in relevant part:

> For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an end user physically located in one local exchange and delivered for termination to an end user physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling

[22]"Information access" generally refers to calls from ILEC subscribers to dial-up Internet Service Providers served by a CLEC. This type of access is not at issue in Charter's motion for summary judgment.

area as defined in SBC 13-STATES's local exchange tariffs on file with the applicable state commission). (Emphasis added).

After discussing each party's position, the Arbitrator adopted SBC's proposed language and stated that Charter's proposed language was "in conflict with applicable law and would be unworkable in practice." See Final Arbitrator's Report, § VI at 15-21. Charter challenged the arbitrator's decision on this issue, but the Arbitration Order did not modify the Final Arbitrator's Report and therefore the MPSC adopted the Final Arbitrator's Report as its decision on the issue. See Arbitration Order at 9.

Discussion.

Charter argues that this aspect of the Arbitration Order is plain error under controlling federal law and must be reversed. Charter contends that the Arbitration Order violates 47 C.F.R. § 51.701(b)(1), which defines telecommunications traffic for purposes of reciprocal compensation as "telecommunications traffic exchanged between a LEC and a telecommunications carrier . . ., except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1). Charter states that reciprocal compensation is the "default case," i.e., that any type of traffic exchanged between two LECs should be subject to reciprocal compensation unless it is (1) interstate or intrastate exchange access, or (2) information access or exchange services for information access.

Charter states that the Act defines "exchange access" as referring only to the use of LEC services or facilities for the purpose of originating or terminating "telephone toll service," 47 U.S.C. § 153(16), which in turn is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." See 47 U.S.C. § 153(48). Charter contends that except in situations where it is asking SBC to terminate an actual toll call – i.e., a call for which Charter has charged its own customer a toll and then hands the call off to SBC – SBC is not providing "exchange access" on the call and reciprocal compensation applies.

Charter argues that the MPSC erred in relying on a superseded version of 47 C.F.R. § 51.701(b)(1), as interpreted by the FCC in the 1996 Local Competition Order, 11 F.C.C.R. at 16,013-14, ¶ 1035, in ruling that the MPSC had the authority to decide which carrier's calling area governs for purposes of reciprocal compensation. The key clause of this section defines which traffic is subject to reciprocal compensation. The version of 47 C.F.R. § 51.701(b)(1) in effect from 1996 through 2001 stated:

> Telecommunications traffic between a LEC and a telecommunications carrier other than a [wireless service provider] that originates and terminates within a local service area established by the state commission. (Emphasis added).

The current version of 47 C.F.R. § 51.701(b)(1) states:

> Telecommunications traffic between a LEC and a telecommunications carrier other than a [wireless service provider], except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access. (Emphasis added).

Charter argues that while the MPSC's ruling would be correct under the old rule, which applied reciprocal compensation only to traffic that began and ended within a state-defined, geographic local service area, it is incorrect under the new rule, which makes no mention of geography or state commissions and provides that reciprocal compensation applies to all traffic except for exchange access and information access.

A similar argument to Charter's was squarely rejected in Global NAPs, Inc. v. Verizon New England, Inc., 454 F.3d 91 (2d Cir. 2006). In Global NAPs, the Second Circuit was required to determine, inter alia, whether the Vermont Public Service Board "overstepped its authority in concluding that Board-determined calling areas govern whether traffic is subject to reciprocal compensation or access charges." Id. at 96-97. Global NAPs contended that "access charges are appropriate only in circumstances where a carrier imposes separate charges for long-distance calls," and because Global NAPs did not impose a separate charge for certain calls, access fees for those calls were inappropriate.[23] Id. at 97. The dispute in Global NAPs, as in this case, concerned which calling area provides the relevant framework for determining proper intercarrier compensation: the ILEC's calling area as determined by the public service commission, or the calling area as determined by the local, originating carrier. Id.

The Second Circuit concluded that despite the "monumental changes" Congress made in telecommunications law, the FCC has indicated its intent to leave authority over defining local calling areas within the jurisdiction of the state commissions:

> Prior to 1996, the state public service commissions defined the boundaries of all local calling areas. See [Local Competition Order], 11 F.C.C. Rcd. 15,499, 16,013-14, ¶ 1035 (1996). With the introduction of competition, however, the state boards were required to consider how to realign the local market to govern competitive entry. The FCC, in its voluminous Local Competition Order, explicitly declined to address the issue of carrier-determined local calling areas, noting that the "state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation . . . consistent with state commissions' historical practice of defining local service areas for wireline LECs." Id. Importantly, the FCC concluded that it lacked sufficient information to address the issue of expanded local calling area plans but "expect[ed] that this issue [would] be considered, in the first instance, by the state commissions." Id. Thus, despite the monumental changes Congress had made in telecommunications law, the FCC early indicated that it intended to leave authority over defining local calling areas where it always had been--squarely within the jurisdiction of the state commissions.

Global NAPs, 454 F.3d at 97.

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[23]Global NAPs treated all calls within the State of Vermont as local for billing purposes. Global NAPs, 454 F.3d at 97.

The Second Circuit rejected the argument that a call could not be subject to access charges unless the originating carrier imposed a separate toll charge:

> Global argues that the 1996 Act does not permit the Board to reserve the authority to define local calling areas for intercarrier compensation purposes. It centers its argument on the "separate charge" language in the statutory definition of "telephone toll services" (which in turn defines exchange access, which in turn determines whether access charges apply). Global reasons that, since the regulations prescribe that a charge separate from the applicable service contracts is necessary to make a call a "toll" call and since Global imposes no separate toll charges, its traffic is not subject to access fees, regardless of how the Board defines local calling areas. This argument attributes far too much significance to the term "separate charge."
>
> The underlying statute (which we must remember was originally drafted in 1934) draws sharp distinctions between services known popularly as "local" and "long-distance." See, e.g., 47 U.S.C. § 153(47)-(48). It seems likely that the "separate charge" language in the statute was written to underscore that "tolls" applied exclusively to long-distance service and were charged separately. But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers. Thus, Global's argument that since it imposes no separate fee, its traffic cannot be considered toll traffic, is beside the point.

Global NAPs, 454 F.3d at 98.

The Court affirmed the public service board's conclusion that the calling areas it had established were determinative for purposes of intercarrier compensation, based on the FCC's rulings and congressional intent as expressed in the Act:

> Accordingly, we decline to challenge the Board's conclusion that the calling areas it has established are determinative for the purposes of intercarrier compensation. In fact, the FCC has stated "that state commissions have authority to determine whether calls passing between LECs should be subject to access charges or reciprocal compensation for those areas where the LECs' service areas do not overlap." See In the Matter of Petition of Worldcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes, 17 F.C.C. Rcd. 27,039, 27,307, ¶ 549 & n.1824 (2002) [Virginia Arbitration Order]. Although much of the Local Competition Order has been superseded, we find nothing in the thousands of pages the FCC has issued on topics relating to local calling areas that clearly and consistently indicates that it intended to preempt the state

> commissions' authority to define local calling areas for the purposes of intercarrier compensation. Our understanding, which is consistent with conclusions that other courts have reached, is that the FCC has not disturbed the states' traditional authority to define local calling areas. See, e.g., Iowa Network Servs. v. Qwest Corp., 385 F.Supp.2d 850, 858-59 (S.D. Iowa 2005); Sprint-Fla. Inc. v. Jaber, 885 So.2d 286, 293-94 (Fla. 2004). This understanding also appears to be consistent with Congress's intent in the 1996 Act. See, e.g., 47 U.S.C. § 261(b)-(c) ("[n]othing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after February 8, 1996, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part" and "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part").

Global NAPs, 454 F.3d at 98-99.

Finally, the Second Circuit expressed concern that if competing carriers were permitted to define local calling areas for purposes of intercarrier compensation, ILECS would eventually be required to absorb all of the infrastructure costs while CLECs reaped all of the profits:

> Allowing the state-commission-determined local calling areas to govern intercarrier compensation also makes good practical sense. Carriers may prescribe markedly different local calling areas in accordance with marketing considerations. This diversity may promote consumer choice and ultimately be beneficial to consumers. But, if carriers were free to define local calling areas for the purposes of intercarrier compensation, the door would be open to overweening conduct by the CLECs. ILECs are currently fixed in state-commission-imposed regimes and, in that framework, provide the infrastructure for CLECs. Local calling areas defined by CLECs would permit such areas to be so broad as to eliminate all intercarrier compensation for ILECs. Permitting CLECs to define local service areas and thereby set the rules for the sharing of infrastructure would eventually require ILECs to absorb all the costs and allow CLECs to reap all the profits.

Id., 454 F.3d at 99.

The Court finds the Second Circuit's reasoning persuasive, particularly in light of the FCC's 2002 ruling that state commissions retain the authority to determine whether access charges or reciprocal compensation apply when LECs' service areas do not overlap. See Virginia Arbitration

Order, 17 F.C.C.R. at 27,307, ¶ 549. In addition, in the 2001 ISP Remand Order that precipitated the rule amendment on which Charter relies, the FCC stated that reciprocal compensation is not due for "access services," which uniformly "connect calls that travel to points – both interstate and intrastate – beyond the local exchange." ISP Remand Order, 16 F.C.C.R. at 9168, ¶ 37 (emphasis added). Further, as SBC notes, the ISP Remand Order and the rule amendment were prompted by a completely different problem not at issue here – the abuse of reciprocal compensation by CLECs marketing largely to Internet Service Providers.[24] See ISP Remand Order, 16 F.C.C.R. at 9183, ¶ 71. The ISP Remand Order was intended to address this specific problem consistent with a prior federal court remand, and not to undermine long-standing state commission authority in the manner Charter suggests. The Virginia Arbitration Order ruling makes clear that neither the ISP Remand Order nor the amendment to 47 C.F.R. § 51.701(b)(1) deprives state commissions of the authority to establish local calling areas for purposes of reciprocal compensation and access charges.

Conclusion.

For these reasons, the Court concludes that the MPSC's decision to use the local calling areas defined in SBC's MPSC-approved local exchange tariffs to determine whether reciprocal compensation or access charges are appropriate for completing particular calls does not conflict with federal law. The Arbitration Order should therefore be affirmed on this issue and Charter's motion for summary judgment should be denied.

[24]Internet Service Providers ("ISPs") normally receive calls from, but do not place calls to, their dial-up customers, and those calls tend to last for long periods of time. By targeting ISPs as customers, but not ordinary private callers, CLECs could receive enormous and unearned reciprocal compensation windfalls from ILECs, which the FCC described as undermining "the operation of competitive markets" and hindering "viable, long-term competition." ISP Remand Order, 16 F.C.C.R. at 9183, ¶ 71.

V.

Summary and Conclusion.

For the foregoing reasons, the Court concludes that (1) it has subject matter jurisdiction over this matter and the Missouri Public Service Commission's motion to dismiss for lack of subject matter jurisdiction should be denied; (2) the MPSC's motions to strike should be denied; (3) Southwestern Bell Telephone, L.P.'s motion for summary judgment should be granted in part and denied in part as set forth in this Memorandum and Order; (4) Sprint Communications Company, L.P.'s motion for summary judgment should be granted; and (5) Charter Fiberlink-Missouri, LLC's motion for summary judgment should be denied.

Accordingly,

IT IS HEREBY ORDERED that the Missouri Public Service Commission's motion to dismiss for lack of subject matter jurisdiction is **DENIED**. [Doc. 48]

IT IS FURTHER ORDERED that the Missouri Public Service Commission's motions to strike directed to portions of Southwestern Bell Telephone, L.P.'s Complaint and portions of Charter Fiberlink-Missouri, LLC's Counterclaim/Cross-claim are **DENIED**. [Doc. 50, 73]

IT IS FURTHER ORDERED that plaintiff Southwestern Bell Telephone L.P.'s motion for summary judgment is **GRANTED in part** and **DENIED in part**; the motion is **GRANTED** with respect to SBC's contention that the MPSC lacks jurisdiction to order § 271 unbundling obligations to be included as part of interconnection agreements arbitrated pursuant to § 252, and that the Arbitration Order is preempted by federal law in this regard (Issue 1); the motion is **DENIED** with respect to (1) SBC's claims concerning access to entrance facilities for interconnection purposes at TELRIC rates pursuant to 47 U.S.C. § 251(c)(2) (Issue 2); (2) SBC's claims concerning reciprocal compensation for IP-to-PSTN traffic (Issue 3); and (3) all claims asserted in SBC's Complaint which were not included in its motion for summary judgment. [Doc. 84]

IT IS FURTHER ORDERED that defendant Sprint Communications Company, L.P.'s cross-motion for summary judgment is **GRANTED** on ¶¶ 50.h., 50.j., and 50.k. of SBC's Complaint. [Doc. 91]

IT IS FURTHER ORDERED that defendant/counter-claimant/cross-claimant Charter Fiberlink-Missouri, L.L.C.'s motion for summary judgment is **DENIED**. [Doc. 85]

IT IS FURTHER ORDERED that the Missouri Public Service Commission's Arbitration Order dated July 11, 2005 is contrary to federal law and preempted to the extent that it orders 47 U.S.C. § 271 unbundling obligations to be included as part of Southwestern Bell Telephone, L.P.'s interconnection agreements arbitrated pursuant to 47 U.S.C. § 252, including the requirements that SBC (1) fill new orders for unbundled local switching or the network elements which together comprise the UNE Platform, and (2) continue offering unbundled access to de-listed network elements.

IT IS FINALLY ORDERED that the Arbitration Order dated July 11, 2005 is otherwise **AFFIRMED**.

An appropriate declaratory judgment and permanent injunction will accompany this memorandum and order.

Charles A. Shaw

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 14th day of September, 2006.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS BELL TELEPHONE COMPANY, Plaintiff, vs. ERIN M. O'CONNELL-DIAZ, LULA M. FORD, ROBERT F. LIEBERMAN, and KEVIN K. WRIGHT, in Their Official Capacities as Commissioners of the Illinois Commerce Commission and Not as Individuals Defendants, and ACCESS ONE, INC., et al., Intervenors.	)	Case No. 05 C 1149 Judge Joan B. Gottschall

MEMORANDUM OPINION AND ORDER

Illinois Bell Telephone Company ("SBC")[1] has brought suit challenging determinations made by the Illinois Commerce Commission ("ICC") that require SBC to provide its competitors with access to certain portions of SBC's network. SBC claims that the ICC's regulations are

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[1] After SBC filed suit, Illinois Bell Telephone Company's parent corporation merged with AT&T Communications, Inc. As a result, Illinois Bell now refers to itself as "AT&T Illinois." Nevertheless, the plaintiff has continued to refer to itself in this litigation as "SBC." For consistency, the court will follow the same practice for the purposes of this order.

preempted by federal law. The parties agree that there are no disputed factual issues and have filed cross-motions for summary judgment. For the reasons that follow, the parties' motions are granted in part and denied in part.

DISCUSSION

I. Background

The central question at issue in this litigation is whether the federal Telecommunications Act of 1996 ("the Act," "the 1996 Act"), 47 U.S.C. § 151 *et seq.*, preempts certain provisions of the Illinois Public Utilities Act ("IPUA," "the Illinois Act"), 220 ILCS § 5/1-101, *et seq.* Answering this question requires an understanding of the two statutes, as well as the implementing regulations issued by the FCC and the ICC. This task is complicated, however, by several factors, foremost among which is the 1996 Act itself. As the Supreme Court has noted, it "would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999). Nor have the FCC's attempts to interpret the 1996 Act always helped to clarify matters. Indeed, the FCC's regulations have been reversed and remanded on several occasions, both by the Supreme Court and the D.C. Circuit. Meanwhile, the ICC has attempted to interpret the IPUA based on the FCC's varied reinterpretations of the 1996 Act's requirements. Because the parties' arguments presuppose familiarity with this thicket of statutes, cases, and regulations, the court provides the following background.

A. Federal Telecommunications Act of 1996

Until the 1990s, local phone service generally was regarded as a natural monopoly. *See, e.g.*, *Iowa Utilities*, 525 at 371. Under this early regime, states typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC). These LECs owned the network facilities, which included the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constituted a local exchange network. The rates charged by such companies typically were regulated by each state's public utility commission (PUC).

Technological advances, however, have opened up the possibility of competition among providers of local telephone service. In an effort to promote such competition, Congress passed the 1996 Act. A central feature of the Act is its so-called "unbundling" obligations, which require incumbent local exchange carriers ("ILECs") to provide new market entrants ("competing local exchange carriers" or "CLECs") with access to certain portions of the ILECs' networks at a fair price. As the Seventh Circuit has explained, "Congress recognized that without allowing new entrants to use the incumbents' local exchange networks and other technology and services, the incumbents would maintain a stranglehold on local telephone service: no new entrant could realistically afford to build from the ground up the massive communications grid the incumbents had developed through years of monopolistic advantage." *Indiana Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 382 (7th Cir. 2004).

1. Section 251 of the 1996 Act

Incumbents' general unbundling obligations are set forth in Section 251 of the 1996 Act. Section 251(d) charges the FCC with determining which network elements should be unbundled. In making these determinations, Congress instructed the FCC to "consider, at a minimum, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2). The latter requirement is often referred to as the "impairment requirement."

The FCC has made several efforts to specify incumbents' unbundling obligations. The Commission issued its first unbundling order in August 1996. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("First Local Competition Order"). There, the FCC interpreted the "impairment" standard "as requiring the Commission and the states . . . to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network." *Id.* ¶ 285. In addition, the FCC decided that *any* increase in cost or decrease in quality, regardless of degree, constituted impairment. In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), however, the Supreme Court held that the FCC had interpreted the impairment requirement too broadly. Specifically, the Court found that the Commission had failed to take into account whether CLECs could provide the network elements themselves, or acquire the requested element from a third party. Indeed, the Court stated that under the FCC's standard it was "hard to imagine when the incumbent's failure to give access to the element would not constitute an 'impairment.'" *Id.* at 389.

On remand from *Iowa Utilities*, the Commission offered a new interpretation of the impairment requirement. Specifically, the FCC held that a market entrant would be impaired if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999). Once again, however, the FCC's interpretation was deemed inadequate. Specifically, in *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*"), the D.C. Circuit found the FCC's revised definition unreasonable because, among other reasons, the Commission had failed to "differentiate between those cost disparities that a new entrant in *any* market would be likely to face and those that arise from market characteristics linked (in some degree) to natural monopoly . . . that would make genuinely competitive provision of an element's function wasteful." *Id.* at 562-63 (internal quotation marks omitted).

On remand from *USTA I,* the Commission made yet another attempt to interpret the impairment requirement. *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978 (2003) ("Triennial Review Order," "TRO"). The FCC now determined that a CLEC would be "impaired when lack of access to an incumbent LEC network element posed a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." *Id.* ¶ 84. The FCC also made blanket determinations that CLECs were impaired without access to certain network elements, at the same time delegating to state commisions the authority to perform more "nuanced" and "granular" impairment determinations.

The D.C. Circuit once again rejected many of the FCC's findings. *United States Telecom Association v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2002) ("*USTA II*"). In particular, *USTA II* held that the FCC's new impairment standard was overly vague. The court also found that the FCC could not delegate to state commissions the responsibility for making more detailed findings in response to the FCC's blanket determinations of impairment.

On February 4, 2005, the FCC issued its response to *USTA II*. *See In the Matter of Unbundled Access to Network Elements, Order on Remand*, 20 F.C.C.R. 2533 (2005) ("TRO Remand Order," "TRRO"). In relevant part, the TRRO stated that ILECs no longer have an obligation to provide CLECs with unbundled access to certain network elements. TRO Remand Order ¶ 199. The FCC found that removal of the unbundling requirement was justified because newer, more efficient switching technologies were now widely available and continued dependence on the ILECs infrastructure negatively affected incentives to invest in new technologies. *Id.* The TRRO's holdings recently were upheld by the D.C. Circuit in *Covad Communications Co. v. F.C.C.*, 450 F.3d 528 (D.C. Cir. 2006).

B. The Illinois Communications Commission

Prior to the passage of the 1996 Act, Illinois, like a number of other states, had already taken steps of its own to promote local telephone competition. Originally, SBC had been regulated by the state using a traditional "rate of return" framework, which capped the rates SBC could charge at an amount necessary to recoup costs and provide a "reasonable" rate of return on SBC's equity. SBC later petitioned for an alternative form of regulation with fewer earnings restrictions to enable it to respond to the advent of new local competition. In exchange for this alternative regulation, SBC agreed to make portions of its network available to its new competitors. Section 13-801 of the Illinois Public Utilities Act contains the requirements to which ILECs that have opted for alternative regulation status are subject. On June 11, 2002, the ICC issued an order further specifying SBC's obligations under Section 13-801. *See* Ill. Bell. Filing to Implement the Public Utils. Act, Doc. No. 01-0614, 2002 Ill. PUC LEXIS 564 (Ill. Comm. Comm'n June 11, 2002). Importantly, for the purposes of this litigation, the Illinois Act, unlike the 1996 Act, embodies no impairment requirement. Illinois' unbundling requirements therefore differ from the unbundling requirements announced by the FCC.

C. Procedural History of the Present Dispute

After Section 13-801 of the IPUA took effect in June 2001, the ICC initiated proceedings to implement the law. In June 2002, the ICC issued its final order. In August 2002, SBC filed suit challenging Section 13-801 and the June 2002 Order. The gravamen of the complaint was that Illinois law and the ICC's regulations were preempted by the 1996 Act and the FCC's regulations. After SBC filed suit, a number of competing local exchange carriers ("the Competing Carriers") were granted leave to intervene.[2]

At the time the litigation was first initiated, the FCC was preparing to issue its *Triennial Review Order*. SBC therefore filed a motion, which the court later granted, to suspend briefing in the case until the TRO had been issued. When the TRO was finally issued, the ICC asked the court to remand the case so that the ICC could reconsider its interpretation of Section 13-801 in light of the TRO's new unbundling rules. The court granted the remand in May 2004.

The ICC subsequently issued two decisions: the *Phase I Remand Order*, issued in April 2005, and the *Phase II Remand Order*, issued in November 2005. The *Phase I Order* addressed the

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[2] The Competing Carriers include Globalcom, Inc., Covad Communications Co., Access One, Inc., CIMCO Communications, Inc., Forte Communications, Inc., Mpower Communications Corporation, Data Net Systems, L.L.C., TruComm Corporation, and Illinois Public Telecommunications Association.

ramifications of the FCC's TRO, while the *Phase II Order* addressed the implications of the TRRO. Generally speaking, the orders did not substantially change the state law requirements. Indeed, the ICC took great pains to emphasize that its powers were limited, and that it was unable to reinterpret Illinois law so as to avoid a conflict with federal law.

> As a creature of statute, the Commission has no general powers except those expressly conferred by the legislature. Moreover, the Illinois Supreme Court has long instructed that an administrative agency can neither limit nor extend the scope of its enabling legislation. . . . The Commission must follow and implement the statute's plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. . . . There are areas where the plain language of the statute conflicts with recent pronouncements of the TRO and USTA II. In those instances, we have no ability to substitute language consistent with federal law to avoid a conflict.

Phase I Order at 61-62.

In February 2005, SBC filed suit once again in this court and moved for a preliminary injunction. While noting that SBC had demonstrated a likelihood of success on the merits, the court concluded that the threat of irreparable injury was greater to the Competing Carriers than to SBC, and that the public interest favored maintenance of the status quo and militated against entry of a preliminary injunction. *See llinois Bell Telephone Co. v. Hurley*, No. 05 C 1149, 2005 WL 735968 (N.D. Ill. Mar. 29, 2005). Thereafter, the parties filed the cross-motions for summary judgment presently before the court.

D. The Current Complaint

SBC's current complaint challenges several requirements under Illinois law. These are as follows:

- The ICC's determination that, under Illinois law, SBC must unbundle certain network elements, viz.: (1) local circuit switching; (2) switching related elements; (3) Ocn-level loops and dedicated transport; (4) dark fiber loops; (5) entrance facilities; (6) feeder subloops; (7)

DS1 and DS3 loops and dedicated transport; and (8) dark fiber transport.

- Illinois' so-called combination requirements (i.e., requirements that SBC allow competing carriers to locate and install their own equipment on SBC's premises).
- Illinois' "collocation requirements." Collocation refers to a competing carrier locating and installing its own equipment on an ILEC's premises.
- Illinois' requirements with respect to "splitters" (i.e., devices that separate the high- and low-frequency portions of a copper loop, allowing for the simultaneous transfer of high-speed DSL data transmission and single line telephone service).
- The ICC's ruling regarding "terminating switching" (i.e., a competitor's use of an SBC switch to complete delivery of a call from that carrier's customer to an SBC customer).

SBC argues that each of these Illinois requirements conflicts with, and therefore is preempted by, the 1996 Act and the accompanying FCC regulations. The court examines the parties' arguments with respect to each of the requirements.

II. Standard of Review

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the court must view the record and any inferences to be drawn from it in the light most favorable to the party opposing summary judgment. *See Grifin v. Thomas*, 929 F.2d 1210, 1212 (7th Cir. 1991). The party opposing summary judgment may not rest upon the pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. Network Elements

The court first examines the parties' arguments with respect to whether SBC must unbundle a specific group of network elements: local circuit switching, switching-related elements, OCn-level loops, dedicated transport, dark fiber loops, entrance facilities, feeder subloops, DS1 loops, DS3 loops, DS 1 transport, DS3 transport, and dark fiber transport.

A. SBC's Argument

The form of SBC's argument is relatively straightforward: it simply identifies various network elements with respect to which the federal and Illinois requirements conflict and argues that the latter are preempted by the former. Specifically, SBC looks to FCC decisions declining to require the unbundling of particular network elements. Since Illinois law requires these very same elements to be unbundled, SBC argues, Illinois law is preempted. Of course, it might seem that a decision by the FCC *declining to require* that a particular network element be unbundled does not amount to a ruling that states may not require unbundling of those elements if they so choose. However, the FCC's own remarks on this point demonstrate otherwise:

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment - and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) - or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

TRO ¶ 195. In other words, a finding by the FCC that CLECs are not impaired without access to particular network elements is tantamount to a finding that incumbents cannot be required to unbundle those elements.

It is unnecessary to examine in great detail SBC's arguments with respect to each of the individual network elements, since, to a large extent, the Competing Carriers and the ICC do not dispute that federal law and Illinois law differ in the manner that SBC asserts. Instead, as shown below, the defendants focus their efforts on attempting to show that, for a variety of reasons, the differences between the two bodies of law do not warrant a finding of preemption. The court therefore briefly considers SBC's arguments with respect to various kinds of network elements, and then moves on to a more thorough consideration of the issues raised by the Competing Carriers and the ICC.

The network elements in question fall roughly into one of two groups: the first group consists of those elements for which the FCC has made a nationwide finding of non-impairment (or, as SBC puts it, with respect to which the FCC has announced a nationwide bar on orders requiring unbundling); the second group consists of elements the unbundling of which the FCC has held may be required under certain circumstances (i.e., elements that, if not unbundled, may impair CLECs' ability to compete).

The first group consists of local circuit switching, switching-related elements, OCn-level loops, dedicated transport, dark fiber Loops, entrance facilities, and feeder subloops. SBC convincingly shows that the FCC has declined to require the unbundling of each of these elements, based on a nationwide finding that CLECs will not be impaired in the absence of such unbundling. SBC also shows that Illinois law, as interpreted by the ICC, requires the unbundling of these same elements, without regard to any finding of impairment. Hence, the court concludes that SBC has made at least a provisional showing that Illinois law with respect to these elements may be preempted by the 1996 Act.

The second group consists of DS1 and DS3 loops, DS 1 transport, DS3 transport, and dark fiber transport. As SBC acknowledges, the FCC has held that the unbundling of these elements may be required under certain circumstances. Nonetheless, SBC maintains that Illinois regulations with respect to these elements are preempted because Illinois requires these elements to be unbundled irrespective of particular circumstances. The court is not persuaded. The parties have not explained whether the conditions requiring or permitting unbundling under federal law are present in this litigation. If those conditions are present, federal and state law will coincide in the same practical result, even if the criteria underlying the two bodies of law differ. Moreover, if the conditions requiring unbundling under federal law are present here, it is unclear how the Illinois requirements might negatively affect competition or interfere with the purposes underlying the 1996 Act. In short, the parties have not given the court enough information to decide whether these elements are preempted. As a result, all of the parties' motions for summary judgment are denied with respect to DS1 loops, DS3 loops, DS 1 Transport, DS3 transport, and Dark Fiber transport

Having made these initial determinations, the court turns to a consideration of the Competing Carriers' and the ICC's arguments.

B. The ICC's and the Competing Carriers' Arguments

Rather than confronting directly SBC's contention that Section 13-801 conflicts with Section 251, the Competing Carriers and the ICC begin by mounting peripheral attacks, coming together in a kind of pincer movement. On the one hand, the Competing Carriers argue that SBC's preemption argument fails because SBC has voluntarily subjected itself to the regulations it seeks to challenge. Because SBC can withdraw itself from the offending regulations at any time, the Competing Carriers assert, SBC is precluded from challenging the regulations. On the other hand, the ICC argues that SBC's preemption argument fails because, regardless of the unbundling requirements imposed by

Section 251, SBC is subject to the same requirements by virtue of Section 271. The court examines the Competing Carriers' and the ICC's arguments in turn.

1. The Competing Carriers: Preemption and Voluntariness

The Competing Carriers' lead argument is premised on the fact that SBC voluntarily petitioned to be subject to the state regulations of which it now complains. Because SBC can remove itself from the regulations, the Competing Carriers claim, it cannot claim that the regulations are preempted. For several reasons, the court finds the Competing Carriers' position unpersuasive.

a. Voluntariness

As an initial matter, it is doubtful whether the Competing Carriers are correct in asserting that SBC can voluntarily withdraw from alternative regulations. This question gave the court pause when it confronted SBC's motion for a preliminary injunction, and the court later directed the ICC to provide additional briefing on the extent to which SBC could voluntarily withdraw from alternative regulation. The ICC's briefing makes clear that SBC cannot unilaterally remove itself from alternative regulation. While it is true that SBC may *petition* the ICC to withdraw, the ICC has the final say regarding whether or not to rescind its approval of SBC's alternative regulation plan. Moreover, the statute directs the ICC to consider a number of specific conditions in determining whether to rescind an alternative regulation plan, and the ICC may rescind if, after holding a hearing, it determines that the conditions are no longer satisfied. 220 ILCS 5/13-506.1(b).[3] The Commission

[3] Those conditions are whether the plan: (1) is in the public interest; (2) will produce fair, just, and reasonable rates for telecommunications services; (3) responds to changes in technology and the structure of the telecommunications industry that are, in fact, occurring; (4) constitutes a more appropriate form of regulation based on the Commission's overall consideration of the policy goals set forth in the statute; (5) specifically identifies how ratepayers

may rescind if it finds that the conditions no longer can be satisfied. Hence, it is a gross oversimplification to claim that SBC may remove itself from alternative regulation simply by filing a petition. Although SBC voluntarily petitioned to be subject to the alternative regulations, it does not follow that SBC can voluntarily remove itself from those regulations, or that ICC approval of a petition by SBC to withdraw is a *fait accompli*.[4]

b. Preemption and Alternative Regulation

While the court is not convinced by the Competing Carriers' contention that SBC can voluntarily withdraw from alternative regulation, the court need not rest its holding on that ground. For even if SBC could voluntarily remove itself from the regulations in question, the Competing Carriers' argument still fails. While the Competing Carriers spend several pages recounting the history of SBC's attempts to obtain the alternative regulation, they never succeed in demonstrating precisely why SBC should be precluded from asserting that the regulations are preempted. The Competing Carriers claim that the doctrine of preemption does not apply to voluntarily assumed obligations. As authority for this contention, the Competing Carriers cite only two cases – *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and *Association of Intern. Auto. Mfrs., Inc. v. Commissioner, Mass. Dept. of Environmental Protection*, 208 F.3d 1 (1st Cir. 2000) – neither of

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will benefit from any efficiency gains, cost savings arising out of the regulatory change, and improvements in productivity due to technological change; (6) will maintain the quality and availability of telecommunications services; and (7) will not unduly or unreasonably prejudice or disadvantage any particular customer class, including telecommunications carriers. 220 ILCS 5/13-506.1(b).

[4]The Competing Carriers point out that SBC has not even attempted to withdraw. However, the ICC need not wait for SBC to petition; the IPUA explicitly provides that the ICC can rescind approval of an alternative regulation plan on its own initiative. 220 ILCS 5/13-506.1(e). The fact that SBC has not petitioned to withdraw is therefore of little significance.

which supports their theory. *Cippollone* and *Association of Intern. Auto. Manufacturuers* stand only for the proposition that federal preemption is generally confined to formal state laws and regulations and is not applicable to contracts and other private or voluntary agreements. The alternative regulations to which SBC is subject, however, are not contracts or private agreements.

The court found few other cases addressing the application of the preemption doctrine to voluntarily assumed legal obligations; any cases even remotely relevant, however, undermine the Competing Carriers' theory. The Ninth Circuit, for example, recently addressed a similar issue in *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006). There, the City of Seattle entered into two contracts with the Olympic Pipe Line Company to provide safety oversight of a hazardous liquid pipeline within the city's boundaries. *Id.* at 874. A section of the pipeline later exploded, and Seattle maintained that it would shut down the portion of Olympic's pipeline within Seattle's city limits if Olympic refused to comply with a list of safety demands. *Id.* Olympic sued, arguing that Seattle's attempt to impose safety regulations pursuant to the parties' contracts was preempted by the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60101 *et seq.* ("PSA"). *Id.* The court held that the City's regulations were indeed preempted. *Id.* at 882. The City argued that Olympic was nevertheless precluded from raising the preemption argument because Olympic had voluntarily entered into its agreements with the City. *Id.* The court rejected the argument, stating, "Federal preemption is the allocation of power and decision-making authority between the federal government and the state and local governments, based on the Supremacy Clause of the Constitution. Preemption is a power of the federal government, not an individual right of a third party that the party can 'waive.'" *Id.* 882-83 (internal citation omitted).

Similarly, SBC interprets the Competing Carriers' argument as asserting that parties are estopped from challenging the constitutionality of statutes from which those parties benefit. In this connection, SBC cites the Seventh Circuit's decision in *Alliant Energy Corp. v. Bie*, 330 F.3d 904 (7th Cir. 2003), as holding that, so long as the challenged provision is severable from the rest of the statute, SBC is not foreclosed from challenging Section 13-801. *Id.* at 909. SBC makes a convincing showing that the provision is severable. Specifically, SBC points to the presumption under Illinois law that statutory provisions are severable; the fact that Section 13-506.1, the general alternative regulation statute, existed for several years prior to the enactment of Section 13-801; and finally, the fact that the sponsors of Section 13-801 in the Illinois General Assembly specifically expressed their intention that the provision be severable from the rest of the statute. *See* Ill. General Assembly, H.R. Tr. of Debate on H.B. 2900, at 178 (May 31, 2001) ("[I]t is clear that this General Assembly intends for House Bill 2900 to be a severable Act should a court determine that any Section or subdivision of any Section violate State or Federal law or is preempted under Federal law."). The Competing Carriers' retort to SBC's argument is wholly inadequate, consisting of a solitary, bald assertion that the provisions are not severable. Competing Carriers' Reply in Opp. to Summ. Judgment at 6.

c. Preemption: Congressional Objectives

Next, the Competing Carriers argue that the Section 13-801's requirements are not preempted because, regardless of whether the requirements have been voluntarily assumed, they do not conflict with or otherwise undermine Congress's purpose in passing the 1996 Act. The Competing Carriers make several arguments on this point, all of which fail.

The Competing Carriers first contend that the ICC's regulations are not preempted because the 1996 Act disavows "implied preemption." Specifically, Section 601, an uncodified provision of the Act, provides that the "Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152. The Competing Carriers argue that the state laws and regulations at issue in this litigation cannot be preempted because the 1996 Act nowhere expressly declares such laws and regulations to be preempted.

This argument founders on a separate preemption provision contained in Section 251 itself. That provision states:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--
> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section; and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(2). In short, the Competing Carriers appear fundamentally to misapprehend SBC's position: SBC does not argue that the Illinois regulations are preempted because of some implicit contradiction between Section 13-801 and the 1996 Act. Rather, SBC contends that the Illinois requirements are preempted because they fail to comport with the specific criteria expressly listed in Section 251.

The Competing Carriers further argue that Illinois requirements are not preempted by Section 251's preemption provision because Illinois' requirements are consistent with the 1996 Act and do not substantially prevent the Act's requirements and purposes. Specifically, the Competing Carriers argue that Section 13-801 has the same overriding purpose as the 1996 Act – namely, that of "promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub .L. No. 104-104, 110 Stat. 56, 56 (1996). While it is true that both the 1996 Act and the IPUA are aimed at promoting competition in the telecommunications industry, the Competing Carriers' position is much too facile. For, as judicial decisions interpreting both the 1996 Act and the FCC's regulations make clear, unbundling *simpliciter* does not necessarily promote competition. As the D.C. Circuit observed in *USTA I*, "the [Supreme] Court's opinion in *Iowa Utilities Board* . . . plainly recognized that unbundling is not an unqualified good." 290 F.3d at 429. Rather, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* (citing *Iowa Utilities Board*, 525 U.S. at 428-29) (Breyer, J., concurring in part and dissenting in part)). Hence, the fact that Illinois' requirements make no provision for impairment and embody no limiting standard can very well mean that they frustrate the 1996 Act's goals.

The Competing Carriers's remaining arguments need not be considered at length. For instance, the Competing Carriers claim that the FCC's decision not to require the unbundling of a particular network element does not mean that the FCC has *forbidden* states from imposing those requirements. This argument, however, runs afoul of the FCC's own pronouncement in the *Triennial Review Order* that "[i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission . . . declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime." TRO ¶ 195. The Carriers apparently ignore the fact that the FCC did not merely decline to require ILECs to unbundle the network elements; rather, the FCC imposed a nationwide bar on such unbundling.

The Competing Carriers go on to argue that there is no conflict between federal and state law – and hence no preemption of the latter by the former – because it is entirely possible for SBC simultaneously to comply with both bodies of law. Indeed, the Carriers point out that SBC has entered into voluntary agreements with CLECs for certain of the network elements at issue in this litigation. This, the Competing Carriers conclude, shows that there is no conflict between the FCC's nationwide bar on the unbundling of network elements and SBC's providing those elements to CLECs. But this argument is confused: the point is not whether SBC can comply with both state and federal regulations; the question, rather, is whether there is a conflict between the FCC requirements, which maintain that certain requirement *cannot* be imposed, with the Illinois requirements, which impose precisely those requirements. When properly understood, the conflict is obvious.

d. Ripeness

The final arrow in the Competing Carriers' quiver is based on language in the D.C. Circuit's recent opinion in *Covad Communications Co. v. F.C.C.*, 450 F.3d 528 (D.C. Cir. 2006). Near the end of the opinion, the court briefly took up an objection to the FCC's regulations made by the New Jersey Division of the Ratepayer Advocate ("NJDRA"). The court stated:

> Finally, we address a miscellaneous claim, raised only in NJDRA's petition, that the FCC cannot preempt state public utility commissions from regulating telecommunications carriers. . . .
>
> Again, the Ratepayer Advocate's argument is meritless. NJDRA's claim boils down to the proposition that the Act's preemptive force is unconstitutional *as applied,* notwithstanding the fact that the Act has *not been applied.* Given that we have already held that any preemption challenge must be raised (if at all) only after the FCC attempts to preempt a state commission's unbundling authority, and given that the *Order* under review does not contain any reference to the Commission's preemptive authority (much less does it actually preempt anything), NJDRA's legal arguments are unripe at best.

Id. 550-51 (emphasis in original). The Competing Carriers argue on the basis of this dictum that the FCC has not preempted any state laws and that, as a result, SBC's claims are not ripe.

The court does not accept the Competing Carrier's contention. It is clear that the FCC has not declared any specific regulation to have been preempted. But the court does not agree that, as the Competing Carriers argue, the court can make no finding of preemption unless and until the FCC makes such a finding. As SBC argues, such an interpretation would fly in the face of clearly established Supreme Court precedent. For example, the Supreme Court has explicitly rejected the notion that an agency must specifically announce its intention to preempt state laws or regulations. *See, e.g., Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 885 (2000) ("The dissent would require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists. . . . [T]he Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. . . . To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended."). Indeed, with respect to the 1996 Act itself, the Supreme Court has indicated that federal courts have jurisdiction to entertain preemption questions. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002) ("Verizon seeks relief from the Commission's order 'on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail,' and its claim 'thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.'") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96, n. 14 (1983)). The court therefore rejects the Competing Carriers' position that under *Covad*, the preemption issue cannot be reached.

e. **Summary**

None of the foregoing considerations is to deny that the Competing Carriers' theory possesses a certain intuitive appeal. The fact that SBC challenges the very alternative regulations for which it lobbied so aggressively may well seem mendacious. Nonetheless, the Competing Carriers have failed to identify any doctrinal basis for their position regarding preemption. Indeed – as SBC repeatedly has pointed out – the ICC has not joined or otherwise expressed any support to the Competing Carriers' argument. The court declines to grant the Competing Carriers' motion for summary judgment on this asserted ground.[5]

2. **The ICC: Section 271**

The ICC's chief argument is that, irrespective of SBC's obligations under Section 251, SBC has an independent obligation to unbundle the elements in question under a separate provision of the Act, *viz.*, Section 271. Section 271 applies to Bell Operating Companies ("BOCs"), subsidiaries of AT&T that were divested as part of a 1984 consent decree which settled the United States' antitrust suit against AT&T. *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 165 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Under the consent decree, BOCs were forbidden from providing long-distance telephone services. *Id*; *see also AT&T Corp. v. F.C.C.*, 369 F.3d 554, 556 (D.C. Cir. 2004) (summarizing relevant history). The 1996 Act now allows BOCs to apply to the FCC for authorization to provide long-distance services originating

[5] While the Competing Carriers argue that SBC's voluntary participation in the alternative regulation entitle them to summary judgment, they also argue, somewhat contradictorily, that summary judgment should be denied because it is unclear whether the ICC would grant a request by SBC to withdraw from the alternative regulations. Because the court holds that the Competing Carriers' argument fails even on the assumption that the regulations were voluntarily entered into, the court finds no bar to summary judgment.

in any in-region state. In exchange, however, BOCs are subject to certain requirements. Specifically, Section 271 sets forth a fourteen-item "competitive checklist" consisting of the minimum requirements that a BOC must meet in order to obtain approval to provide long-distance service. Among these requirements is the obligation to unbundle loop, switching, and transport elements. In contrast to Section 251, Section 271's obligations do not require a finding of impairment. Since SBC is a BOC and has obtained approval to provide in-region long-distance service, the ICC claims that SBC is subject to Section 271's requirements. And since Section 271 requires SBC to unbundle without making any finding of impairment, the ICC argues that Section 13-801 does not require SBC to do anything more than is already required of SBC under the Act. Hence, the ICC contends, the Illinois requirements are not preempted.

SBC advances a barrage of responses to the ICC's argument. SBC's core contention, however, is that Section 271 is part of a regulatory framework that is entirely separate from the framework to which Sections 251 and 252 framework belong. SBC points out that state commissions are given no authority to enforce Section 271's requirements. Rather, the part of the Act that includes Section 271 is to be administered exclusively by the FCC. Additionally, SBC argues that a state must comply with Section 251's preemption provision regardless of whether the state's regulations are consistent or compliant with Section 271. Specifically, Section 251's preemption provision allows for the preservation of state regulations that are consistent "with the requirements of *this section*" (i.e., Section 251) and do not "substantially prevent implementation of the requirements of *this section*" (i.e., Section 251). In other words, SBC contends, the ICC cannot rely on Section 271 to justify Section 13-801's requirements or to save the regulations from preemption.

The arguments on both sides possess a certain amount of suasive force, and both sides are able to cite case authority for their positions. *Compare Bellsouth Telcomms., Inc. v. Miss. PSC*, 368 F. Supp. 2d 557, 565-66 (D. Miss. 2005) ("[I]n light of the FCC's decision to not require BOCs to combine section 271 elements no longer required to be unbundled under section 251, it [is] clear that there is no federal right to 271-based UNE-P arrangements. . . . [E]ven 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 . . . [so that] 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.") (internal citations and quotations omitted) *with Verizon New England, Inc. v. Maine Public Utilities Com'n*, 403 F. Supp. 2d 96, 102 (D. Me. 2005) ("Plaintiff states that in the Act, 'Congress gave the Federal Communications Commission ... exclusive jurisdiction to establish, interpret, price, and enforce these network access obligations under Section 271.' This assertion is overbroad and not supported by the provisions of § 271 of the Act. The central, vital predicate for this argument is that federal law preempts state regulation of § 271 obligations. It is clear that the statute is not intended to have any such effect.") (internal citation omitted).

Although the question is a close one, the court concludes that SBC has the better argument. The structure of the Act strongly suggests Congress's intent to separate Sections 251 and 252 from Section 271, as well its intent to confine state authority to the former provisions. The ICC argues that its regulations are not an attempt to *enforce* Section 271's requirements. Nevertheless, the ICC purports to rely on Section 271, and in so doing, is attempting to accomplish through indirect means what it is clearly prevented from doing directly. Moreover, although the Seventh Circuit has not definitively pronounced on the question, to the extent that it has addressed state authority *vis a vis* Section 271, its position supports SBC. *Cf. Indiana Bell Telephone Co.,Inc. v. Indiana Utility Regulatory Com'n.*, 359 F.3d 493, 495 (7th Cir. 2004) ("The state commission makes a recommendation, which is merely advisory, as to whether the BOC has satisfied the requirements. The Act reserves to the FCC the authority to decide whether to grant a section 271 application.") (citing *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000)).

The court further notes that, in addition to the small number of courts that have confronted the question of Section 271's import, a number of state utility commissions have opined on the matter. While the decisions are once again divided, a greater number of decisions can be cited in support of SBC's position. *See, e.g., In re Arbitration of Dicea Communications, Inc. d/b/a/ Covad Communications Co. v. Qwest Corp.*, No. ARB-05-1, 2005 Iowa PUC LEXIS 186, at *10 (May 24, 2005), ("Clearly, the provisions that are at issue in this arbitration are unbundling obligations pursuant to § 271, rather than § 251 obligations. Therefore, the Board lacks jurisdiction or authority to require that Qwest include these elements in an interconnection agreement arbitration brought pursuant to § 252."); *Dieca Communications, Inc. Interconnection Arbitration*, Case No. PU-05-165, 2006 N.D. PUC LEXIS 3, at *22-*23 (Feb. 8, 2006) ("We find that we do not have the authority under the Act to impose unbundling obligations under Section 271. The FCC has the exclusive authority to determine whether Qwest has complied with the substantive provisions of Section 271 including the checklist provisions. Enforcement of Section 271 requirements is also clearly under the exclusive jurisdiction of the FCC. State commissions have only a consulting role under the Act."); *In re Petition of Dieca Communications, Inc. d/b/a Covad Communications Co. for Arbitration of an Interconnection Agreement with Qwest Corp.*, Case No. CVD-T-05-1, 2005 Ida.

PUC LEXIS 139, at *9 (July 18, 2005) ("[T]he 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." Order No. 29825); *but see In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc's. Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, 2006 Ga. PUC LEXIS 21, at *2-*3 (Mar. 8, 2006) ("Section 271 requires that the BOC provide access to unbundled network elements ("UNEs") on the competitive checklist set forth within the statute at just and reasonable rates. The Section 271 competitive checklist items (i) and (ii) make explicit reference to compliance with provisions in Sections 251 and 252. Therefore, the Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271. As such, it is logical to conclude that obligations under Section 271 must be included in a Section 252 interconnection agreement.") (citations omitted).

In sum, the court declines to grant the ICC's motion for summary judgment to the extent that it is premised on Section 271.[6]

3. Summary

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[6] As a final piece of evidence, the ICC points to a passage in a brief submitted by the FCC urging the Supreme Court not to grant certiorari in *USTA II*. There, the FCC remarked:

> NARUC is wrong to suggest that the FCC's pricing proposal forecloses the States from setting rates for facilities or services that are provided solely to comply with Section 271. In the *Triennial Order*, the FCC expressed no opinion as to precisely what role the States would play in establishing rates under Section 271. Until the Commission expressly addresses that question, the matter is not suitable for judicial review.

Brief for the Federal Respondents in Opposition at 21, National Ass'n of Regulatory Utility Com'rs v. United States Telecom Ass'n, *petition for cert. denied*, 73 U.S.L.W. 3234 (U.S. Oct. 12, 2004) (No. 04-15). The court finds this isolated remark, adopted within the context of a specific litigation, to be of limited relevance here: it is but a single statement – and one that, inasmuch as it is merely an expression of agnosticism, undermines the ICC's position as much as it supports it. Furthermore, to the extent that the FCC suggests that the matter is not suitable for judicial review, the FCC's argument again undermines the ICC's position.

The court concludes that Illinois' requirements with respect to the unbundling of local circuit switching, switching-related elements, OCn-level loops, dedicated transport, dark fiber Loops, entrance facilities, and feeder subloops are in conflict with the corresponding federal unbundling regulations. However, the court is unable to determine the extent to which Illinois requirements regarding the unbunding of DS1 loops, DS3 loops, DS 1 transport, DS3 transport, and dark fiber transport are incompatible with federal unbundling regulations. The court is unpersuaded by the Competing Carriers' and the ICC's arguments that Illinois law with respect to these network elements is not preempted. Hence, the court concludes that Illinois regulations are preempted insofar as they require the unbundling of of local circuit switching, switching-related elements, OCn-level loops, dedicated transport, dark fiber Loops, entrance facilities, and feeder subloops. With respect to the preemption of Illinois' requirements regarding the unbunding of DS1 loops, DS3 loops, DS 1 transport, DS3 transport, and dark fiber transport, the court declines to issue a definitive ruling.

Having considered the parties' arguments with respect to the unbundling of the various network elements, the court now turns to an examination of whether other requirements imposed by Section 13-801 are preempted by the 1996 Act.

IV. Combination Requirements

In addition to their dispute over the network elements themselves, the parties disagree over whether SBC must furnish CLECs with pre-existing *combinations* of network elements. According to SBC, federal law requires incumbents to provide combinations only of those network elements that are required to be unbundled under Section 251 of the 1996 Act. Because it is not required to unbundle the individual elements for its competitors, SBC argues, it also cannot be required to provide combinations of those elements to competitors. Section 13-801 of the IPUA, however, requires SBC to combine network elements for CLECs. SBC therefore contends that Illinois' combination requirements conflict with federal law and are preempted.

In response, the ICC once again attempts to rely on Section 271. Specifically, the ICC claims that Section 13-801 merely requires the combination of elements that SBC is required to unbundle pursuant to Section 271 (as opposed to those that must be unbundled under Section 251). And while the ICC acknowledges that the *FCC* has declined to require ILECs to combine the elements that incumbents were required to unbundle under Section 271, the ICC insists that the FCC did not preclude *states* from requiring ILECs to combine those elements.

The court finds the ICC's argument strained and unconvincing. At bottom, the ICC's argument with respect to the combination requirements is essentially the same as its argument with respect to the unbundling of the network elements themselves. The court already has found the ICC's attempt to rely upon Section 271 unavailing. The court reaches the same conclusion here. Because Illinois' combination requirements are inconsistent with the Act, the court holds that they are preempted. With respect to this issue, therefore, the court grants summary judgment in SBC's favor and denies the ICC's and the Competing Carriers' motions for summary judgment.

V. Splitters

A "splitter" is a device that separates the high- and low-frequency portions of a copper loop so that the loop may be used simultaneously for high-speed DSL data transmission and single line telephone service. All of the parties appear to agree that splitters are not "network elements" under federal law and that, accordingly, federal law does not require SBC to unbundle splitters.[7] However, the parties draw different conclusions from this fact. According to the ICC, the fact that splitters are not network elements means that there is no federal requirement with which Illinois law might conflict, and hence no respect in which by which Illinois law might be preempted. SBC, on the other hand, argues that Congress restricted the universe of items that ILECs can be required to unbundle to those constituting "network elements" under the Act. Hence, SBC argues, if an item is not a network element within the meaning of the Act, an ILEC cannot be required to unbundle it.

The parties have not directed the court to any case authority on this question; nor has the court been able to find any decisions explicitly confronting the issue. To the extent that courts have addressed related issues, however, they appear to assume that states are *without power* to regulate items that have not been deemed network elements. *See, e.g., MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286, 1294 (N.D. Fla. 2000) (if state commission correctly determined that dark fiber was not a "network element" under the Act, the incumbent would not be required to provide its competitor with access to dark fiber). The court concludes that Illinois' unbundling requirement with respect to splitters is preempted by the 1996 Act.

The ICC claims that a finding of preemption on this point would run counter to the fact that

[7] SBC's position is somewhat ambiguous. At some places in its opening brief, SBC indicates that splitters are not network elements. *See* SBC Mot. Summ. Judgment at 14 ("The ICC thus recognized ...that the splitter is not a 'network element' as defined by federal law."). At other places, however, SBC suggests a contrary view. For example, in the chart summarizing various federal and state requirements *vis a vis* various network elements, splitters are listed as a network element. *Id.* at 16.

the Act intended to preserve much of the authority that states traditionally have exercised in the area of telecommunications. However, the extent to which the Act was designed to keep state authority intact is uncertain. Clearly, Congress did not intend to strip states of all authority in the area. Nevertheless, it is beyond question that the Act brought about a fundamental restructuring of the federal-state relationship with respect to telecommunications regulation. As the Supreme Court stated in *AT&T*:

> [T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange. . . . This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.

525 U.S. at 378 n.6.

In short, the court rejects the ICC's assertion of plenary authority over items not considered network elements under the Act, and concludes that Illinois' regulations requiring SBC to unbundle splitters are preempted. Summary judgment on this point is granted in favor of SBC.; correlatively, the ICC's and the Competing Carriers' motions for summary judgment are denied.

VI. Terminating Switches

As SBC explains, in order to complete a long-distance call from one of its customers to a customer of one of its competitors, a carrier serving the calling party must deliver the call over the terminating switch that serves the other party at the terminating end of the call. Typically, this requires a carrier to purchase "terminating access service" from the carrier that owns the terminating switch by paying a "terminating access charge" for using that switch. The dispute over whether SBC may charge access termination fees is similar to the dispute over whether SBC must unbundle splitters. For although not defined as a network element under federal law, the ICC has found that the terminating switch *is* a network element under Illinois law and has held that it must be unbundled.

As it argued in the case of splitters, the ICC argues that it is precisely because the terminating switch is not a network element under federal law that there is no conflict between state and federal law on this point. SBC again draws the exact opposite conclusion: the fact that terminating access has not been deemed a network element means that states' attempts to regulate the subject in any way are verboten.

Given the similarity of the arguments, the court can see no reason why it should not reach the same conclusion with respect to terminating access as it reached with respect to splitters. Indeed, the court finds that there is even greater support for a finding of preemption here, for the ICC's own earlier pronouncements belie its current position. Specifically, in its *Phase I Remand Order*, the ICC stated:

> We agree . . . that Section 13-801(d)(4) prevents SBC from charging for terminating access. State and federal law undoubtedly clash in this instance. We are unable to reconcile the plain language of our state law with the recent directives in federal law. As we have previously determined, Section 13-801(d)(4) allows requesting carriers to use a network elements platform to provide telecommunications services. The state statute defines a network element rather broadly. Thus, a terminating switch port, while never deemed an unbundled network element under federal Section 251 by the FCC, is a network element under Section 13-216 of the PUA. We therefore find that SBC may not charge CLECs for terminating access when the CLECs are using unbundled local switching with shared transport to provide local service. The Commission <u>cannot</u> gloss over the disparity between state and federal law. We can only highlight this conflict and leave it to the District Court to resolve the inconsistency.

Phase I Remand Order ¶ 119 (emphasis in original). In short, despite the dismissive position it has now taken, the ICC itself clearly realized that the Illinois law conflicted with the 1996 Act and that the conflict gave rise to serious concern about preemption.

In response, the ICC argues that it never specifically admitted that Illinois law was preempted on this point. Rather, the ICC claims, it merely noted that Illinois and federal law differed with respect to terminating access. This attempt at reinterpretation is implausible. Regardless of whether the ICC ever used the word "preemption," its concern over the issue is palpable in the passage above.[8] The court concludes that SBC is entitled to summary judgment with respect to the ICC's regulations regarding terminating access; the ICC's and the Competing Carriers' motions for summary judgment are correspondingly denied.

VII. Collocation Requirements

Collocation refers to an arrangement under which a competing carrier locates and installs its own equipment on an ILEC's premises. *See, e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004). It is undisputed that both Illinois law and federal law require ILECs to allow collocation by their competitors. SBC contends, however, that when the two bodies of law are examined more closely, a conflict arises. Specifically, SBC points out that, under federal law, collocation is required only where necessary to connect the competitor to the ILEC's network; Section 13-801's collocation requirement, however, embodies no such criterion. As a result, SBC argues, Illinois law is preempted. For its part, the ICC argues that

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[8] Of course, the mere fact that the ICC espoused this position at an earlier point does not necessarily mean that its current position is incorrect. The fact that the ICC itself found SBC's position convincing, however, does underscore the general persuasiveness of SBC's view. SBC argues that, having asserted the earlier view, the ICC cannot adopt a different position for the purposes of this litigation. Because the ICC's position warrants rejection on other grounds, he court declines to take a position on SBC's argument with respect to the latter issue.

nothing in the Act prevents Illinois from imposing requirements that exceed those imposed under federal law. In other words, in the ICC's view, the federal "necessity" requirement represents a floor, not a ceiling, where the issue of collocation is concerned.

On this point, the court finds that the ICC has the better argument. In particular, the ICC points to FCC decisions and orders that lend direct support to the ICC's position. For example, the FCC's 1999 Collocation Order stated that the "collocation rules set forth in the Order serve as minimum standards, and permit any state to adopt additional requirements," and that "states will continue to have the flexibility to respond to specific issues by imposing additional requirements." *Deployment of Wireline Services Offering Advanced Telecommunications Capability* ("Collocation Order"), 14 FCC Rcd 4761 (1999) ¶¶ 8, 23. Similarly, in its Local Competition Order of 1996, the FCC stated that "the states should have flexibility to apply additional collocation requirements that are otherwise consistent with the 1996 Act and our implementing regulations." *In re Implementation of the Local Competition Order Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15783-84 (1996). It is true that both of these FCC orders are comparatively old and that both have been vacated and remanded with respect to certain of their specific holdings. Nevertheless, SBC has made no showing that the FCC's announcements with respect to collocation have been disturbed by later developments. Hence, with respect to collocation, the court grants summary judgment in favor of the ICC and the Competing Carriers. [9]

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[9] The parties have addressed the requirements at issue in the litigation more or less separately from one another. As a result, they have not discussed the practical effect of the court's upholding certain of the Illinois requirements while rejecting others. For example, the parties have not advised the court of any logistical or technological difficulties that might arise from the court's holding that SBC is required to allow collocation by its competitors but is not required to unbundle the various network elements at issue in the litigation. The court therefore assumes that no such difficulties will impede implementation of the court's order.

CONCLUSION

For the foregoing reasons, the parties' cross-motions for summary judgment are granted in part and denied in part. Specifically, SBC is granted summary judgment with respect to the following Illinois requirements: (1) local circuit switching, switching-related elements, OCn-level loops, dedicated transport, dark fiber loops, entrance facilities, and feeder subloops; (2) combination requirements; (3) splitters; and (4) access fee termination. The court grants the ICC and the Competing Carriers summary judgment with respect to Illinois' collocation requirements. With respect to DS1 and DS3 loops, DS 1 transport, DS3 transport, and dark fiber transport, the court denies all parties' motions for summary judgment.

ENTER:

/s/____________________________________
JOAN B. GOTTSCHALL
United States District Judge

Dated: September 28, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

DIECA COMMUNICATIONS, INC., etc.,

Plaintiff,

v. CASE NO. 4:06cv72-RH/WCS

FLORIDA PUBLIC SERVICE COMMISSION et al.,

Defendants.

_________________________________/

ORDER ON MERITS

This is a challenge to a decision of the Florida Public Service Commission based on alternative holdings first, that it has no authority to enforce the federal statute setting forth the terms on which a Bell Operating Company may enter the market for interLATA services, and second, that in any event, that statute does not require a Bell Operating Company to allow competitors unbundled access to the high frequency portion of a local loop. I uphold the Florida Commission's decision on both grounds.

I
Background—The Statutory Framework

Historically, telephone service in the United States, both local exchange service and interexchange service, was provided on a monopoly basis, primarily by American Telephone & Telegraph Company ("AT&T") and its subsidiaries. AT&T subsidiaries that later came to be known as "Bell Operating Companies" or "BOCs" provided local exchange service in most (but not all) of the country.

Eventually, other carriers attempted to enter the interexchange market, not always without resistance. The government brought an antitrust action against AT&T. One of the allegations was that the company had used its BOC subsidiaries' admittedly lawful monopolies in local markets to restrict competition in the interexchange market; interexchange carriers needed the local network to originate and terminate interexchange calls. A settlement agreement required AT&T to divest the BOCs. *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983). Under the settlement agreement as ultimately implemented, a BOC could provide service within a Local Access and Transport Area, that is, "intraLATA service," but BOCs were prohibited from providing *inter*LATA service. In essence, the BOCs were to remain local exchange carriers, not interexchange carriers, thus eliminating the incentive to use the local bottleneck to restrict competition in the interexchange market .

More than a decade later, Congress adopted the Telecommunications Act of 1996. Among the Act's purposes were to take back oversight in this area from the antitrust court and, more fundamentally, to foster competition for local as well as interexchange services. The Act imposes on local exchange carriers, as a matter of federal law, various duties designed to foster competition. The Act allows state commissions the option of taking a major role in implementing the Act's requirements. The Florida Commission has accepted that invitation.

The federal duties imposed on each "incumbent local exchange carrier"—that is, on each carrier who previously provided local service on a monopoly basis—include the obligation to sell local services at wholesale to any competing carrier for resale by the competing carrier to customers; the obligation to allow competitors to interconnect with the incumbent's facilities for the purpose of providing services to the competitor's own customers; and, of importance in the case at bar, the obligation to make certain "network elements"—parts of the incumbent's telecommunications system—available to competing carriers for their use in providing service to their own customers. The Act directs the Federal Communications Commission to determine which network elements must be made available to competitors and to consider, in making that determination, whether access to a proprietary network element is "necessary" and failure to provide access would "impair" the ability of the competitive carrier to provide services. 47 U.S.C. §251(d)(2).[1]

Separate and apart from the duties imposed on all incumbent local exchange carriers under §251, the Act prohibits BOCs from providing interLATA services, unless and until they obtain authorization from the FCC. *See* 47 U.S.C. §271. The Act set forth specific prerequisites to any such authorization. Among the prerequisites is a 14-item checklist. *See* 47 U.S.C. §271(c)(2)(B). The Act requires the FCC to consult with state commissions prior to making any determination on this but otherwise gives state commissions no role in the process. *See* 47 U.S.C. §271(d)(2)(B).

II
Background—The Case at Bar

As noted above, under the 1996 Act, incumbent local exchange carriers, including defendant BellSouth Telecommunications, Inc. ("BellSouth"), must make elements of their networks meeting specified criteria available to competitors

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[1] These duties are described in greater detail in an ever growing list of judicial decisions. *See, e.g., AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286 (N.D. Fla. 2000). A comprehensive review of early FCC and judicial interpretations of the "necessary and impair" standard is set forth in Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 19020 (2003).

for their use in providing telecommunications services to their own customers. *See* 47 U.S.C. §251. One element that must be made available is the local loop—ordinarily consisting of copper wire—that connects the incumbent's central office to a customer's premises.

A local loop has a low frequency portion, primarily used to provide traditional telephone service carrying voice transmissions, and a high frequency portion, ordinarily used for access to the internet or other data transmission through what is commonly referred to as "digital subscriber line" or "DSL" service.

Plaintiff Dieca Communications, Inc. d/b/a Covad Communications Company ("Covad") is a competitive carrier whose principal business is providing DSL services to customers over the high frequency portion of local loops owned by incumbent carriers, including BellSouth.

It is undisputed that a competitive carrier (such as Covad), is entitled to obtain any entire local loop from an incumbent (such as BellSouth) at an appropriate price. Very much disputed, however, is whether a competitive carrier is entitled to obtain only the high frequency portion of a loop, without also buying access to the remainder of the loop. The FCC required incumbents to allow this practice, commonly referred to as "line sharing," beginning in 1999,[2] but its

[2] *See* Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the*

decision on this was vacated on judicial review,[3] and in 2003 the FCC reversed course and concluded that requiring incumbents to allow line sharing is anti-competitive.[4]

Prior to the FCC's reversal of course, BellSouth and Covad entered an agreement under 47 U.S.C. §252 under which BellSouth allowed Covad access to the required network elements, including local loops. The Florida Commission approved the agreement. The agreement provided for line sharing, consistent with the prevailing FCC view that line sharing was a requirement under §251.

When the FCC changed course and concluded line sharing was not a §251 requirement, BellSouth petitioned the Florida Commission for relief from its agreement with Covad. In response, Covad admitted that line sharing was no longer required under §251, but Covad asserted that §271—the provision addressing the entry of BOCs into the interLATA market—still required BellSouth to allow line sharing. BellSouth had sought and obtained FCC authorization to provide interLATA services and thus was (and is) duty bound to comply with the

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Local Competition Provisions of the Telecommunications Act of 1996, 14 FCC Rcd 20912 (1999), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[3] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[4] *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003), *aff'd in relevant part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

requirements of §271.

The Florida Commission ruled in BellSouth's favor on two separate grounds. First, the Florida Commission determined that its authority over agreements of this type between carriers is limited to enforcing the requirements of §251 and that it lacks authority to compel BellSouth to comply with separate §271 requirements. Second, the Commission determined that line sharing is not a §271 requirement, so that even if the Commission could consider the §271 issue on the merits, BellSouth still would be entitled to relief from the line sharing provision of its agreement with Covad.

Covad filed this action for review of the Florida Commission's decision. Defendants are BellSouth, the Florida Commission, and individual Commissioners.[5] By agreement of both sides, the matter has been submitted based on the record compiled in the Florida Commission and appellate-style briefs.[6] In its brief, Covad did not address the first of the Florida Commission's alternative holdings—that it lacked authority to compel compliance with §271 requirements.

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[5] The Florida Commission has not sought to be dismissed as a defendant based on Eleventh Amendment immunity. Whether the Commission itself remains a defendant or is dismissed, leaving the action to proceed only against individual Commissioners (and BellSouth), makes no difference.

[6] Covad also has requested judicial notice of two letters written by FCC staff that are appended to Covad's initial brief as exhibits 26 and 28. The letters are not part of the administrative record and will not be judicially noticed. Even if noticed, they would not affect the decision announced in this order.

At oral argument, Covad made clear that it indeed does not challenge that decision. Covad asserts, however, that it properly can go forward with its challenge to the Florida Commission's alternative holding, and that this court should review that holding on the merits. Defendants assert that Covad's failure to challenge the Florida Commission's determination that it lacks authority to compel compliance with §271 should end the matter. Defendants also have addressed the Florida Commission's alternative holding on the merits.

III
Standard of Review

The issues presented in this action are legal issues on which no deference is due the decision of the Florida Commission. I thus review the issues *de novo*. *See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286, 1290-92 (N.D. Fla. 2000) (explaining that proper standard of review in actions brought under 47 U.S.C. §252(e)(6) is *de novo* (for issues regarding the meaning and import of the Telecommunications Act) and the arbitrary and capricious standard (for state commission determinations of how to implement the Act as so construed)).

IV
Florida Commission Authority To Enforce §271

The Telecommunications Act of 1996 prohibits BOCs from entering the market for interLATA services unless and until authorized by the FCC on the basis of meeting specified conditions. After a BOC obtains authorization, it must continue to comply with the conditions. A person, including a competitor, who asserts a BOC has failed to comply with the conditions may file a complaint with the FCC. *See* 47 U.S.C. §271(d)(6)(B). The FCC must act on such a complaint within 90 days (unless the parties agree otherwise). *Id.*

The Act requires the FCC to consult with the relevant state commission prior to making any determination on these matters but otherwise assigns state commissions no role in the process. It thus is correct, precisely as the Florida Commission determined, that any complaint by Covad that BellSouth's failure to provide line sharing will violate §271 is an issue for the FCC, not for the Florida Commission.

That the Florida Commission has authority under §252 over agreements between carriers implementing the requirements of §251 does not change this result. The procedures set forth in §252 commence with a request by one carrier to another for "interconnection, services, or network elements *pursuant to section 251*." 47 U.S.C. §252(a)(1) (emphasis added). If the carriers fail to agree, the state commission may resolve "any open issues" through "arbitration" and may impose conditions on the carriers. Under the law of the circuit, "any open issues" means issues arising under §251. *See MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002). And under the plain terms of the statute, the state commission's resolution of open issues and imposition of conditions must be based on §251; the statute directs the state commission to "ensure that such resolution and conditions meet the *requirements of section 251* of this title, including the regulations prescribed by the [FCC] *pursuant to section 251* of this title." 47 U.S.C. §252(c)(1) (emphasis added).[7]

The Florida Commission thus had it right. It has no authority to enforce

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[7] In asserting the contrary, Covad cites *Verizon New England Inc. v. Maine Public Utilities Commission*, 2006 WL 2007655 (D. Me. July 18, 2006). There the court upheld a state commission's authority to establish the price at which Covad was entitled to acquire from a BOC the high frequency portion of the local loop. In doing so, the court rejected the contention that only the FCC could address this issue. The court said the commission had authority to establish this price under state law and that the BOC had not challenged the commission's state law authority to do so. Whatever might be said of a commission's authority to establish a price under state law, in the case at bar there is no issue of price, only of the BOC's obligation to provide the service at all, and the Florida commission claims no authority to address this issue under state (or federal) law. In this circuit, a state commission's authority in a §251 arbitration is only to address issues arising under §251, *see MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002), and Covad neither challenges the Florida Commission's implicit holding that it has no state law authority in this area, nor could it properly do so in this court. *See, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 79 L. Ed. 2d 67(1984) (holding that the Eleventh Amendment bars any claim for injunctive relief based on state law against a state or against a state officer in his or her official capacity).

§271. Covad apparently has acquiesced in this conclusion. This, standing alone, would be sufficient to require affirmance of the Florida Commission's decision.[8]

V
Line Sharing Under §271

The very foundation of the government's original demand in its antitrust action against AT&T for divestiture of the BOCs was the concern that their local monopolies had been and would continue to be used as improper leverage in the market for interstate and other services. The settlement agreement in the antitrust action required divestiture of the BOCs and prohibited them from entering the interLATA market, at least initially, thus removing the major motivation for misuse of the local monopoly.

The Telecommunications Act of 1996 speak to this same concern in three respects. First, the Act seeks to open the local markets to competition, adopting requirements applicable not just to the BOCs but to all incumbent local exchange carriers. *See* 47 U.S.C. §§251-52. Second, the Act authorizes BOCs to enter the

[8] The provisions cited in the text make clear that if Covad were today seeking to enter an agreement with BellSouth for the first time and this same dispute over line sharing arose, the Florida Commission would have no authority to impose a line sharing requirement. Covad has made no claim that the result should be different on the ground that an agreement with a line sharing requirement already is in place and BellSouth seeks to end that requirement. I thus have no occasion to address that issue.

market for interLATA services originating *outside* their respective areas, that is, in areas where they have never had a local monopoly to misuse. *See* 47 U.S.C. §271(b)(2). Third, the Act provides a method by which BOCs can obtain FCC authorization to enter the market for interLATA services originating *within* their respective areas, if and only if specified conditions are met. *See* 47 U.S.C. §271(c). The conditions all focus on the opening of the local market to competition. *See* 47 U.S.C. §271(c)(1) & (2).

Included among the conditions is a 14-item checklist that requires a BOC to offer other carriers access to and interconnection with the BOC's network including each of the following:

> (i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.
>
> (ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.
>
> (iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.
>
> (iv) *Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.*
>
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
>
> (vi) Local switching unbundled from transport, local loop

transmission, or other services.

(vii) Nondiscriminatory access to--

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

47 U.S.C. §271(c)(2)(B) (emphasis added).

The issue in the case at bar is whether checklist item 4—"[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services"—requires a BOC not only to make available to a competitor any entire local loop, but also to make separately available the high frequency portion of the loop, unbundled from the remainder of the loop.

For three reasons, I conclude that the answer is no.

First, the plain language of this provision supports this conclusion. By making available an entire local loop, a BOC provides local loop transmission from the central office to the customer's premises. On its face, that is all the statute requires. To be sure, the statute does speak to unbundling—but only unbundling of the local loop from local switching or other services. Nothing on the face of the statute suggests a BOC must unbundle the different portions of the local loop from one another.

Second, the overriding purpose of §271 supports this conclusion. That overriding purpose is to prevent BOCs from improperly leveraging their monopolies in the local market into the interLATA market. That purpose is what led to the original prohibition on BOCs entering the interLATA market at the time of their original divestiture from AT&T. It explains the 1996 Act's separate treatment of interLATA services originating *outside* a BOC's area (where a BOC has no monopoly to leverage) and interLATA service originating *within* a BOC's area (where a BOC historically had a monopoly). And it explains the 1996 Act's decision to allow a BOC to enter the market for interLATA services originating within its area if and only if it meets a long list of conditions—all focused on ensuring that the *local* market has been opened to competition.

Allowing competitors unbundled access to the high frequency portion of a loop may or may not be good telecommunications policy and may or may not promote competition in the market for high speed access to the internet and other data transmissions (that is, the "broadband" market). Competition in the broadband market is an important issue that the FCC appropriately may address in a variety of ways, including when deciding which network elements an incumbent local exchange carrier must make available to competitors under §251. But whether competitors are afforded unbundled access to the high frequency portion of a local loop has very little to do with whether the *local* market is or is not open to competition as required prior to entry of a BOC into the market for interLATA services originating in its own area. Whether competitors are afforded unbundled access to the high frequency portion of a local loop has very little to do with whether a BOC can misuse its position in the local market to restrict competition in the market for *interLATA services*. In light of the overriding statutory purpose embodied in §271 and the checklist, the most appropriate construction of checklist item 4 is that it requires a BOC to allow access to an entire local loop, without any additional requirement to provide unbundled access to the high frequency portion of the loop.

Third, even if one assumes that the FCC would be free to interpret checklist item 4 as requiring unbundled access to the high frequency portion of the loop, it is by no means clear that the FCC ever made a considered decision so to interpret checklist item 4, and even less clear that the FCC so interprets it now.[9]

The FCC first required such unbundled access or "line sharing" in 1999, when the FCC issued its "Line Sharing Order."[10] That order imposed the line sharing obligation not just on BOCs but on all incumbent local exchange carriers.

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[9] One reasonably could argue both sides of the question whether the FCC could, if it chose, properly construe checklist item 4 to require unbundled access to the high frequency portion of the loop. *Compare* 47 U.S.C. §271(d)(4) (prohibiting the FCC from limiting or extending the terms in the checklist) with *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (requiring deference to an agency's reasonable interpretation of a statute it is charged with administering).

[10] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

The authority for doing so was 47 U.S.C. §251(c)(3); the FCC determined that the high frequency portion of the loop was a network element to which incumbents were required to provide access under that section. The FCC's Line Sharing Order was vacated on review in the District of Columbia Circuit.[11] On remand, the FCC determined that the high frequency portion of a local loop is *not* a network element that incumbent local exchange carriers must make available to competitors under §251(c)(3).[12]

The FCC never required a BOC to provide line sharing prior to the effective date of the Line Sharing Order. The FCC has never explicitly required a BOC to provide line sharing since the Line Sharing Order was vacated. There is thus no explicit indication of whether the FCC does or does not regard line sharing as an independent obligation under §271, separate and apart from any line sharing obligation under §251(c)(3). Both sides do, however, cite FCC orders as support for their respective positions.

Under §271 checklist item 2, a BOC must provide nondiscriminatory access to network elements "in accordance with the requirements of sections 251(c)(3)." The FCC's determination that line sharing was a §251(c)(3) requirement

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[11] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[12] *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003), *aff'd in relevant part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

(applicable to all incumbents, not just BOCs) thus also meant line sharing was a §271 requirement (applicable to BOCs providing interLATA services originating in their own areas). While the Line Sharing Order was in effect, the FCC sometimes referred to line sharing as a requirement not just under §251(c)(3) and §271 checklist item 2, but also under checklist item 4.[13] Checklist item 4 is an independent §271 obligation not dependent on anything in §251.[14] Covad says the FCC's description of line sharing as a checklist item 4 requirement thus shows that the FCC regarded line sharing as an independent obligation under §271. But the references to checklist item 4 never made a difference, and they thus provide little support for the assertion that the FCC made a considered decision that BOCs that provide interLATA services originating in their own areas should be required to provide line sharing as an independent obligation under §271 and checklist item 4,

[13] *See, e.g.,* Memorandum Opinion and Order, *In re Application of Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 9079, ¶163 (2001).

[14] This is undisputed. Covad sets up and then knocks down a straw man, saying the Florida Commission misunderstood this principle and incorrectly concluded that when a network element is removed from the list of elements an incumbent must make available under §251, this automatically means the element need not be made available by a BOC under §271. But the Florida Commission expressed no such view. It plainly is correct, as Covad emphasizes, that a network element that an incumbent need no longer make available under §251 may still be required under §271. But it is equally true that an element that has been included and then removed from the list of required elements under §251 might *not* be an independent §271 element. That an element is included and then removed from the list of §251 elements simply does not resolve one way or the other the issue of whether the element is independently required under §271.

separate and apart from any obligation of all incumbents to provide line sharing under §251.

For its part, BellSouth asserts the FCC actually held, without explicitly saying, that line sharing is *not* a §271 requirement. In orders granting BOC applications for authority to provide interLATA services originating in New York and Texas, respectively, the FCC required BOCs to allow line sharing but deferred implementation of the obligation until the effective date of the Line Sharing Order.[15] The 1996 Act does not itself indicate whether any given network element must be made available to competitors under §251(c)(3); instead, the Act requires the FCC to make that determination. *See* 47 U.S.C. §251(d)(2). The requirement to make line sharing available under §251(c)(3) thus arose only when the FCC said it did. Any independent obligation to make line sharing available under §271, on the other hand, would have existed from the effective date of the Act itself. The FCC's decision to delay line sharing in New York and Texas until the effective date of the Line Sharing Order thus is some indication, albeit weak, that the FCC

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[15] *See* Memorandum Opinion and Order, *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3967, ¶31 n.70 (1999), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000); Memorandum Opinion and Order, *In re Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region InterLATA Services in Texas*, 15 FCC Rcd 18354, 18367-68, ¶28, 18370, ¶33, 18514, ¶321 (2000).

did not view line sharing as an independent §271 obligation. Still, DSL was still an emerging issue in 1999, and the FCC often exercises its discretion to phase in new decisions. The FCC never explicitly said the New York and Texas decisions were based on any view that line sharing was not an independent §271 requirement.

BellSouth also cites the FCC's statement, in another order granting a BOC application for authority to provide interLATA services, that line sharing is required under §251(c)(3) "and, *thus*, checklist items 2 and 4 of section 271."[16] This, BellSouth says, is a recognition by the FCC that line sharing was required under §271 only because it was required under §251(c)(3). But like the references to line sharing as a checklist item 4 requirement on which Covad relies, this is language not addressing any dispute on this issue. There is little reason to believe this language gives any real indication of the FCC's view on this.

These authorities thus do not establish one way or the other whether the FCC ever viewed line sharing as an independent §271 requirement separate and apart from any obligation under §251(c)(3). A more recent FCC decision provides strong support for the conclusion that the FCC does *not* now view line sharing as an independent §271 requirement, if indeed it ever did. The FCC now has said, in

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[16] Memorandum Opinion and Order, *In re Application of Verizon New England Inc. et al. for Authorization To Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 9079, ¶163 (2001) (emphasis added).

no uncertain terms, that line sharing is not a §251(c)(3) requirement. *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carries*, 18 FCC Rcd 16978 (2003), *aff'd in relevant part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). The FCC reached this result based on its strongly expressed determination that requiring line sharing in today's market would be anticompetitive, *see* Report and Order, ¶¶ 258-63, and "would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." Report and Order, ¶ 261.[17] The FCC phased in its decision, so that ongoing business would not be disrupted, but the FCC made clear that line sharing was to end. *See*, *e.g.*, Report and Order, ¶266 ("It is entirely appropriate to fashion a transition period of sufficient length to enable competitive [local exchange carriers] to move their customers to alternative arrangements and modify their business practices and operations going forward."). The FCC decision on this did not explicitly address the BOCs or §271, but the entire discussion plainly contemplated the decision's application to the BOCs (who have the lion's share of the local markets); if intended to address only the much

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[17] The FCC reached this conclusion in part by emphasizing the availability of line *splitting*, that is, the ability of a DSL provider (like Covad) to partner with a competitive local exchange carrier, to acquire from an incumbent (like BellSouth) an entire local loop, and to split the line so that the competitive local exchange carrier and DSL provider serve the same customer.

smaller portion of the market comprised of others, the FCC's analysis was woefully incomplete to the point of being nonsensical.[18] One cannot read this Report and Order and still have any doubt about the FCC's current disapproval of any line sharing requirement, including for BOCs who provide interLATA services originating in their own areas.[19]

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[18] Moreover, the FCC explicitly reinstated certain rules relating to the high frequency portion of the loop. See Report and Order, ¶268. The FCC said it was doing so "[i]n order to implement the line sharing transition plan." *Id.* Had the FCC intended the BOCs to remain subject to line sharing under §271 checklist item 4, the FCC presumably would have said not that it was reinstating the rules to implement the transition plan, but that it was reinstating the rules because the overwhelming majority of the market would remain subject to the line sharing requirement forever.

[19] Another FCC decision cited by BellSouth is less compelling. *See* Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*, 19 FCC Rcd 21496 (2004). There the FCC addressed petitions of BellSouth and other BOCs for forbearance from §271 requirements with respect to broadband services. Although BellSouth's petition referred generally to broadband, a term that in common understanding includes DSL services provided over the high frequency portion of a copper local loop, the FCC's decision explicitly referred only to fiber and specific services available through fiber. The FCC's analysis emphasized the importance of encouraging BOCs to invest in fiber—a goal unrelated to line sharing. BellSouth says the FCC decision nonetheless should be read to encompass DSL services provided over copper wire (that is, line sharing), not just fiber. BellSouth also says its petition was explicitly granted in full and should be deemed granted in full anyway (because petitions on which the FCC does not render a timely decision are deemed granted by default). BellSouth's reliance on this order is perhaps a stretch; neither BellSouth in its petition, nor the FCC in its order, brought the line sharing issue into the open. Two commissioners wrote separately and noted in passing their conflicting opinions on whether the order did or did not extend to line sharing. The bottom line: this forbearance decision gives little explicit guidance on the line sharing issue.

In sum, based on the language of §271 checklist item 4, its purpose, and the absence of any basis for concluding the FCC construes the item differently, I conclude that line sharing is not a §271 checklist item 4 requirement.[20]

VI
Conclusion

The Florida Public Service Commission correctly concluded that it lacks authority to enforce 47 U.S.C. §271 and that, in any event, §271 does not require BellSouth to provide Covad unbundled access to the high frequency portion of the local loop. Accordingly,

IT IS ORDERED:

The decision of the Florida Public Service Commission is affirmed. The clerk shall enter judgment accordingly and close the file.

SO ORDERED this 12th day of September, 2006.

s/Robert L. Hinkle
Chief United States District Judge

[20] In reaching this decision, I have not overlooked *Verizon New England Inc. v. Maine Public Utilities Commission*, 2006 WL 2007655 (D. Me. July 18, 2006), which reaches the opposite result. For the reasons set forth in text, I respectfully disagree with that decision.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Verizon New England, Inc.

v. Case No. 05-cv-94-PB
Opinion No. 2006 DNH 094

N.H. Public Utilities Commission, et al.

MEMORANDUM AND ORDER

Verizon New England, Inc. ("Verizon") challenges orders of the New Hampshire Public Utilities Commission ("PUC") requiring Verizon to provide its competitors with access to certain elements of its network at rates determined by the PUC. The principal issue before me on cross-motions for summary judgment is whether the PUC has the power to set the rates that Verizon seeks to challenge. Because the PUC has failed to offer a satisfactory response to Verizon's contention that it lacks the power to set the rates in question, I grant Verizon's motion and deny the PUC's motion.

I. BACKGROUND

A. Regulatory framework

Congress passed the Telecommunications Act of 1996 (the "Act"), Pub. L. No. 104-104, 110 Stat. 56, to promote competition in the telecommunications market and end the former state-sanctioned monopolies on local telephone service. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999). The Act imposes certain duties on incumbent[1] local exchange carriers ("ILECs") such as Verizon[2] in order to facilitate competitors' entry into the market. Id. Among these duties is the obligation to allow competing carriers, known as competitive local exchange carriers ("CLECs"), to interconnect with an ILEC's established infrastructure. See 47 U.S.C. § 251(c).

The Act sets forth procedures through which carriers can enter the local and long-distance telephone markets. Sections 251 and 252 provide processes for CLECs to enter the local market by accessing portions of an ILEC's network. Section 271 requires descendants of the former AT&T monopoly (known as Bell operating companies or "BOCs") to obtain the FCC's approval to provide long-distance telephone service.

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[1] A carrier is "incumbent" with respect to a service area if it provided telephone exchange service in that area when the Act took effect in 1996.

[2] Verizon is a successor to New England Telephone and Telegraph Company ("NET"), which was the local exchange carrier for most of New Hampshire when the Act became effective in 1996. NET was one of the telephone companies that spun off from AT&T Corporation in 1984.

1. **Section 251 unbundling requirements**

Section 251 of the Act requires ILECs to provide unbundled access to certain elements of their networks, known as "unbundled network elements" ("UNEs"). 47 U.S.C. § 251(c)(3); see 47 C.F.R. § 51.319 (specific unbundling requirements).[3] The FCC alone has the authority to determine which network elements must be made available as UNEs.[4] United States Telecom Ass'n v. FCC, 359 F.3d 554, 568 (D.C. Cir. 2004) ("USTA II") (holding that the FCC may not "delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements"). In determining whether a network element must be provided on an unbundled basis, the FCC must consider whether an ILEC's failure to provide access to a non-proprietary element would "impair" a

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[3] The specific elements at issue here are high-capacity interoffice transmission facilities ("IOF"), line sharing, dark fiber channel terminations and dark fiber feeder sub-loops.

[4] The FCC's early attempts to define which network elements must be unbundled were invalidated by the Supreme Court, see AT&T, 525 U.S. at 375, 387-92, and the U.S. Court of Appeals for the D.C. Circuit, United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"). The FCC's current unbundling requirements are set forth in its Triennial Review Order ("TRO"), Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16978 (2003), vacated in part by USTA II, 359 F. 3d 554, and the Triennial Review Remand Order ("TRRO"), Unbundled Access to Network Elements, 20 F.C.C.R. 2533 (2005).

CLEC's ability to compete, or, if the element is proprietary in nature, whether access to it is "necessary." 47 U.S.C. § 251(d)(2); 47 C.F.R. § 51.317.

Section 252 of the Act sets forth the processes through which CLECs can connect to an ILEC's network through interconnection agreements. If the carriers fail to negotiate an agreement, either party may ask the state commission to participate in the negotiation as a mediator or arbitrator. 47 U.S.C. §§ 252(a), (b). The state commission must approve all interconnection agreements before they are implemented, regardless of whether they are established through negotiation or arbitration.[5] Id. § 252(e)(1). A negotiated agreement can be rejected only on the grounds that it "discriminates against a telecommunications carrier not a party to the agreement" or its implementation "is not consistent with the public interest, convenience, and necessity." Id. § 252(e)(2)(A). An arbitrated agreement, in contrast, can be rejected if it fails to meet the FCC's unbundling requirements or pricing standards. Id. §

[5] The FCC can preempt the state commission's jurisdiction and assume responsibility for review of an interconnection agreement if the state commission fails to carry out its responsibility. 47 U.S.C. § 252(e)(5).

252(e)(2)(B).[6]

Determinations by a state commission of the "just and reasonable rate" for § 251 UNEs must be based on the cost of providing the network element, "without reference to a rate-of-return or other rate-based proceeding." Id. § 252(d)(1). The Act created "a hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates." Verizon Communications Inc. v. FCC, 535 U.S. 467, 489 (2002); see also AT&T Corp., 525 U.S. at 385 (holding that the FCC has jurisdiction under § 201(b) of the Act to design a pricing methodology for § 251 UNEs). The FCC has determined that prices for § 251 UNEs must be based on the "total element long-run incremental cost" ("TELRIC") of providing the elements. See 47 C.F.R. § 51.505(b)(1). TELRIC essentially equates the value of an existing network "with the cost the [ILEC] would incur today if it built a local network that could provide all the services its current network provides

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[6] The state commission may also review interconnection agreements for compliance with state law, as long as it does not have the effect of "prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a); see id. § 252(e)(3).

. . . using the least-cost, most-efficient technology currently available."[7] TRO, 18 F.C.C.R. at 17391-92, ¶ 669.

Under section 252(f), BOCs may fulfill their § 251 obligations by filing with the appropriate state commission a "statement of the terms and conditions that such company generally offers within that State," known as a Statement of Generally Available Terms ("SGAT"). 47 U.S.C. § 252(f)(1). The state commission must review the SGAT to determine whether it complies with § 251's unbundling requirements.[8] Id. § 252(f)(2). However, filing an SGAT does not relieve the BOC of its duty to negotiate interconnection agreements upon a CLEC's request. Id. § 252(f)(5). The state commission's authority to review the SGAT continues after the SGAT has taken effect. Id. § 252(f)(4).

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[7] ILECs generally disfavor TELRIC pricing because it is a forward-looking methodology that does not take into account their actual investments in capital assets. See Verizon, 535 U.S. at 496. For a more complete discussion of historical and forward-looking pricing methodologies, see Jonathan E. Nuechterlein & Philip J. Weiser, Digital Crossroads, American Telecommunications Policy in the Internet Age app. A (2005).

[8] The state commission may also review an SGAT for compliance with state law, as long as it does not have the effect of prohibiting the carrier's ability to provide telecommunications services. 47 U.S.C. §§ 252(f)(2), 253(a).

2. **Section 271 unbundling requirements**

Under the Act, ILECs that are former BOCs must apply to the FCC for approval to offer interstate[9] long-distance services. 47 U.S.C. § 271(d)(1). To obtain § 271 approval, a BOC must demonstrate that it has either an approved interconnection agreement or an SGAT filed with the state commission. Id. § 271(c)(2)(A). The BOC must also comply with the "competitive checklist," which imposes unbundling requirements in addition to those required under § 251(c)(3).[10] Id. § 271(c)(2)(B); see TRO, 18 F.C.C.R. at 17384, ¶ 652 ("BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates."). Specifically, BOCs must provide access to "[l]ocal loop transmission from the central office to the customer's premises,

[9] The Act actually refers to interLATA (local access transport area) services. 47 U.S.C. § 271(a). The terms "interstate" and "interLATA" may be used interchangeably when referring to the New Hampshire market because the state has only one LATA, which is roughly contiguous with the 603 area code.

[10] Section 271 approval is also contingent on compliance with § 272 of the Act, which provides "regulatory 'safeguards' to deter a BOC from leveraging its local market power into long-distance markets." AT&T Corp. v. FCC, 369 F.3d 554, 557 (D.C. Cir. 2004).

unbundled from local switching or other services," "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services" and "[l]ocal switching unbundled from transport, local loop transmission, or other services." 47 U.S.C. §§ 271(c)(2)(B)(iv)-(vi).

State commissions have only a limited role in the § 271 application process. The FCC consults with the state commission to verify that a BOC has an approved interconnection agreement or SGAT that comports with the competitive checklist's requirements. Id. § 271(d)(2)(B). Although a state commission may recommend § 271 approval, the FCC ultimately has the authority to approve or reject a BOC's application. Id. § 271(d)(3). The FCC also has the authority to enforce the competitive checklist's requirements after a § 271 application is approved. Id. § 271(d)(6)(A); see BellSouth Telecomms., Inc. v. Miss. PSC, 368 F. Supp. 2d 557, 566 (S.D. Miss. 2005) (noting that "it is the prerogative of the FCC . . . to address any alleged failure by [a BOC] to satisfy any statutorily imposed conditions to its continued provision of long distance service"). If the FCC determines that a BOC no longer meets § 271's requirements,[11] it may order the company to correct any deficiencies, impose a penalty, or suspend or revoke the BOC's § 271 approval. 47 U.S.C. § 271(d)(6)(A).

The FCC has determined that TELRIC pricing is not required for § 271 UNEs. TRO, 18 F.C.C.R. at 17386, ¶ 656 ("TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by statute nor necessary to protect the public interest."); see also USTA II, 359 F.3d at 589. Instead, prices must be based on the "just, reasonable, and nondiscriminatory rate standard . . . that has historically been applied under most federal and state statutes," as codified in §§ 201 and 202 of the Act. TRO, 18 F.C.C.R. at 17389, ¶ 663. Whether a particular rate satisfies this standard is a "fact-specific inquiry that the [FCC] will undertake in the context of a BOC's application . . . or in an enforcement proceeding brought pursuant to section 271(d)(6)." Id. at 17389, ¶ 664. One way a BOC might satisfy this standard with regard to a particular CLEC is by demonstrating that "it has entered into

[11] The FCC has noted that the conditions for § 271 approval may change over time, consistent with changes in the law. TRO, 18 F.C.C.R. at 17390, ¶ 665.

arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." Id.

B. PUC Proceedings and Orders

Verizon's predecessor filed an SGAT with the PUC in 1997, which was approved in part in 2001.[12] Bell Atlantic, Order No. 23,738, 86 N.H. PUC 419, 2001 WL 1002726 (July 6, 2001). The SGAT provided unbundled access to, among other elements, interoffice transmission facilities at DS1, DS3, STS-1, OC-3 and OC-12 speeds; the high-frequency portion of existing copper loops through line sharing arrangements; and dark fiber loops at existing spare facilities. NH SGAT §§ 5.3, 5.14, 5.16. The PUC's review of the SGAT included numerous hearings concerning the appropriate pricing for the offered UNEs. See Verizon New England Inc., 17 F.C.C.R. 18660, 18674-78 (2002) ("NH § 271 Order").

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[12] Although the cover page of the SGAT stated that it was filed "under sections 251, 252 and 271 of the Telecommunications Act of 1996," see R. at 11, the PUC determined that the SGAT must be reviewed independently of § 271's requirements. The PUC noted that although the existence of an approved SGAT or interconnection agreement is a prerequisite to consideration of a § 271 application, "approval of an SGAT neither requires nor demonstrates proof that the SGAT functions in conformance with the § 271 competitive checklist." Pl.'s Mem. of Law in Supp. of Mot. Summ. J. Ex. 2 (PUC Order No. 23,738, dated July 6, 2001).

In July 2001, Verizon began the process of obtaining § 271 approval by formally asking the PUC to review its compliance with the Act's requirements. Id. at 18663. The PUC conditioned its recommendation for § 271 approval in part on Verizon's agreement to convert its SGAT into a wholesale tariff. Id. at 18663, ¶ 6; R. at 7. The tariff would allow CLECs to "directly order anything contained in the SGAT, without the need to negotiate an interconnection agreement." R. at 7. In a letter to the PUC dated June 5, 2002, Verizon agreed to "convert its Statement of Generally Available Terms (SGAT) to a tariff by year-end 2002 and incorporate the interconnection, UNE, and resale provisions of the SGAT into Tariff No. 84." Id. at 1. Verizon also agreed to "promptly file modifications to its SGAT and tariff to reflect changes in the services and network elements required by the Act, as determined by the FCC or the courts." Id. at 2.

The FCC, relying in part on the PUC's recommendation, approved Verizon's § 271 application in September 2002. NH § 271 Order at 18661-62, ¶¶ 1, 3. In reviewing Verizon's compliance with its § 251 unbundling obligations, the FCC found that despite "serious concerns as to whether the [PUC] applied the proper interpretation of the TELRIC methodology in its SGAT proceeding," Verizon's subsequent UNE rate reductions fell "within the range that a reasonable TELRIC-based rate proceeding would produce." Id. at 18683-84, ¶ 37. In a section entitled "Section 271(d)(6) Enforcement Authority," the FCC stated that it had "a responsibility not only to ensure that Verizon is in compliance with section 271 today, but also that it remains in compliance in the future." Id. at 18756-57, ¶ 172. It further stated that "cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Verizon's entry into the New Hampshire" long-distance market. Id. at 18757, ¶ 174.

On December 19, 2002, Verizon filed an "illustrative" wholesale tariff that reflected the rates, terms and conditions of the SGAT. Am. Compl. ¶ 33. The tariff included a provision that allowed Verizon to discontinue, upon thirty days written notice, "the provision of any . . . service, facility, arrangement or benefit" to the extent permitted by "any judicial, regulatory or other governmental authority with jurisdiction over the subject matter." PUC Tariff No. 84, Part A, § 1.4.3.

1. TRO amendments

While Verizon's tariff was pending, the FCC issued the TRO, which revised the prior unbundling rules that the FCC had set forth in its "UNE Remand Order," Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 F.C.C.R. 3696 (1999). The FCC determined in the TRO that the § 251 impairment standard is met when "lack of access to an [ILEC] network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." TRO, 18 F.C.C.R. at 17035, ¶ 84. Accordingly, in making its unbundling determinations, the FCC considered "whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have." Id.

The FCC made multiple impairment findings with respect to dedicated interoffice transmission facilities ("IOF" or "dedicated transport") based upon their capacity level or speed.[13] See USTA II, 359 F.3d at 573. The FCC found that on a

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[13] Dedicated IOF are "facilities dedicated to a particular competitive carrier that the carrier uses for transmission between or among [ILEC] central offices and tandem offices, and to connect its local network to the [ILEC]'s network." TRRO, 20 F.C.C.R. at 2576, ¶ 67. In the TRO, the FCC excluded entrance facilities, which connect ILEC and CLEC locations, from its definition of dedicated transport. See TRO, 18 F.C.C.R. at 17203, ¶ 366 (defining dedicated transport to include only "transmission facilities between incumbent LEC switches.") The USTA II court found that this ruling appeared to violate the

national level, CLECs are not impaired without unbundled access to high-capacity optical carrier level ("OCn") transport facilities. TRO, 18 F.C.C.R. at 17200, ¶ 359. With respect to DS1, DS3 and dark fiber transport,[14] the FCC found that CLECs are impaired without access to these facilities on a national level, despite the availability of alternatives in some locations. Id. at 17226, ¶ 398. Because the record before the FCC did not identify the locations of alternative facilities, the FCC delegated to the state commissions "a fact-finding role to determine on a route-specific basis where alternatives to the [ILEC's] networks exist such that competing carriers are no longer impaired."[15] Id.

The FCC also eliminated line sharing[16] as a UNE based upon

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statutory definition of "network element" and remanded the matter to the FCC for further consideration. USTA II, 359 F.3d at 586.

[14] Dark fiber is "fiber optic cable that has been deployed by a carrier but has not yet been activated through connections to optronics that 'light' it, and thereby render it capable of carrying communications. Once activated, dark fiber transport is used by carriers for the same purposes as lit dedicated transport." TRRO, 20 F.C.C.R. at 2607, ¶ 133 (footnote omitted).

[15] This delegation of authority to the states was reversed by USTA II, 359 F.3d at 574.

[16] Line sharing allows CLECs to provide digital subscriber line ("DSL") service over the high frequency portion of a copper loop while the ILEC uses the low frequency portion of the loop to

the availability of the entire copper loop as an unbundled element and the difficulty in allocating costs between portions of the loop. Id. at 17135-36, ¶¶ 260-63. In order to avoid disruption of DSL service to existing customers, the FCC temporarily grandfathered all existing line sharing arrangements as long as the CLEC continued to provide DSL service to the same end-user customer. Id. at 17137-38, ¶ 264. For new line sharing arrangements, the FCC established a three-year transition plan that allowed CLECs to access the high frequency portion of the loop at a gradually increasing percentage of established recurring rates "for stand-alone copper loops for that particular location." Id. at 17138, ¶ 265.

Verizon subsequently filed amendments to its SGAT eliminating the following elements as UNEs: (1) new orders for OC3, OC12 or STS1 interoffice transmission facilities ("IOF");[17] (2) new line sharing arrangements;[18] and (3) new orders for dark

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provide voice (telephone) service. TRO, 18 F.C.C.R. at 17132, ¶ 255.

[17] Existing OC3, OC12 and STS1 IOF would be discontinued on December 16, 2003, except as otherwise required under existing interconnection agreements. R. at 25.

[18] Existing line sharing arrangements would be grandfathered at existing rates for carriers that began providing DSL service to an end-user customer prior to October 2, 2003, and only for so

fiber between the CLEC's collocation arrangement and its central office or point of presence ("dark fiber channel terminations," a form of entrance facilities) and between the CLEC's collocation arrangement and outside plant remote terminal locations ("dark fiber feeder sub-loop").[19] R. at 24-36. The New Hampshire Office of the Consumer Advocate and several CLECs objected to the SGAT amendments. See R. at 105 (NHISPA), 106 (BayRing), 111 (Revolution Networks), 149 (Great Works Internet), 150 (segTEL), 162 (Covad Communications), 188 (MCI), 204 (Conversent).

In January 2004, the PUC preliminarily approved Verizon's request to cease offering the IOF and dark fiber UNEs to new customers pending the outcome of the PUC's review of the revised SGAT. Id. at 270. The PUC denied Verizon's request to eliminate new line sharing arrangements and directed Verizon to continue accepting new orders for line sharing without requiring CLECs to negotiate separate agreements. Id. at 271. Verizon subsequently

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long as the carrier continues to provide DSL service to that customer at the same location. R. at 27.

[19] Existing dark fiber channel termination and dark fiber feeder sub-loop arrangements would be discontinued on December 16, 2003, except as otherwise required under an effective interconnection agreement. R. at 28.

filed revised SGAT pages that reflected the PUC's order. Id. at 393.

On June 18, 2004, the PUC approved the terms of the wholesale tariff[20] that Verizon had filed in December 2002, which did not incorporate the TRO amendments. Id. at 16-20 (PUC Order No. 24,337). On January 28, 2005, Verizon filed revisions to the wholesale tariff to eliminate new orders for line sharing as of October 1, 2004.[21] Id. at 337-38. Orders placed between October 2, 2003 and October 1, 2004 would be priced in accordance with the TRO's transition rules and would be discontinued as of October 1, 2006. Id. at 338-39.

2. TRRO amendments

In February 2005, the FCC released the TRRO, which further refined the § 251 unbundling requirements for mass market switching, dedicated transport and high capacity loops. TRRO, 20 F.C.C.R. at 2536-37, ¶ 5. The FCC imposed "no section 251

[20] The PUC actually approved two tariffs: Tariff No. 84 is a "wholesale tariff of UNEs, interconnection and collocation available to CLECs;" Tariff No. 86 is a "resale tariff of retail products available at discount to CLECs." R. at 398.

[21] The PUC combined the dockets for Verizon's line sharing amendments with segTEL's petition for an order directing Verizon to continue accepting new line sharing orders. R. at 340.

unbundling requirement for mass market local circuit switching nationwide" based upon a finding that CLECs had "deployed a significant, growing number of their own switches . . . to serve the mass market in many areas." Id. at 2641, ¶ 199. The FCC adopted a transition plan that required CLECs to convert their local circuit switching customers to alternative arrangements within twelve months.[22] Id. The FCC also adopted transitional pricing set at "TELRIC plus one dollar." Id.

With respect to dedicated IOF, the FCC found that CLECs are not impaired without unbundled access to (1) DS1 transport on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators or at least 38,000 business lines, and (2) DS3 and dark fiber transport on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Id. at 2575-76, ¶ 66. The FCC also found that CLECs are not impaired on a national level with respect to entrance facilities. Id. at 2610, ¶ 138.

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[22] CLECs typically use local circuit switching in combination with ILEC loops and shared transport in an arrangement known as the unbundled network element platform ("UNE-P"). TRRO, 20 F.C.C.R. at 2642, ¶ 200. CLECs were thus required to transition their UNE-P customers to alternative arrangements within twelve months. Id. at 2641, ¶ 199.

With respect to high capacity loops, the FCC found that CLECs are not impaired without unbundled access to (1) DS1-capacity loops at any location within the service area of an ILEC wire center containing at least 60,000 business lines and at least four fiber-based collocators and (2) DS3-capacity loops at any location within the service area of a wire center containing at least 38,000 business lines and at least four fiber-based collocators. Id. at 2614, ¶ 146. The FCC also found that CLECs "are not impaired without access to unbundled dark fiber loops in any instance." Id.

The FCC adopted a twelve-month transition period for existing customers of DS1 and DS3 transport and loops and an eighteen-month transition period for dark fiber transport and loops. Id. at 2612, ¶ 142; 2639, ¶ 195. The FCC also imposed moderate price increases during the transition period that would help mitigate "the rate shock that could be suffered by [CLECs] if TELRIC pricing were immediately eliminated for these network elements." Id. at 2614, ¶ 145.

Verizon subsequently filed further tariff revisions to implement the TRRO unbundling rules, which took effect on March 11, 2005. R. at 552-79. The revisions eliminated access to mass market local circuit switching, dark fiber loops, certain DS1 and DS3 loops, and certain DS1, DS3 and dark fiber dedicated transport as of the effective date of the TRRO. Id. at 552-55. Existing customers would be able to continue leasing the elements under the FCC's mandated transition periods and rates. Id. at 554.

3. PUC's § 271 unbundling orders

On March 11, 2005, the PUC issued an order denying Verizon's proposed TRO revisions to its SGAT and tariff. Id. at 390-443. After reviewing the TRO, TRRO and the NH § 271 order, the PUC determined that "Verizon remains obligated to have a wholesale tariff on file with our agency and an FCC decision to remove a UNE as a section 251 requirement does not automatically eliminate it as an unbundled element that Verizon must offer in its wholesale tariff." Id. at 431. The PUC concluded that it had "the authority to determine whether Verizon's wholesale tariff, including any changes proposed by Verizon, remains in compliance with the obligations Verizon voluntarily undertook in exchange for" § 271 approval.[23] Id. at 432. Although the PUC did not

[23] Verizon contested the PUC's authority to interpret or enforce § 271 requirements throughout the proceedings at issue here. See, e.g., R. at 123-24, 226-29, 342-58.

purport to "assert independent authority to define the scope of Verizon's section 271 obligations," it viewed itself as "the initial arbiter of disputes over whether Verizon continues to meet the specific commitments previously made to this Commission." Id. at 433.

The PUC then examined each of Verizon's proposed tariff revisions "in the context of the section 271 checklist, to determine whether Verizon remains obliged to offer them in its wholesale tariff." Id. The PUC found that checklist item four,[24] which requires BOCs to provide unbundled access to local loop transmission, encompasses all functionalities of the loop, including dark fiber feeder subloop and access to the high frequency portion of the loop through line sharing. Id. at 435-36. Likewise, the PUC found that checklist item five,[25] which requires BOCs to provide unbundled access to local transport, encompasses OCn and STS transport and dark fiber channel terminations. Id. at 438.

The PUC concluded that "Verizon must continue to provide line sharing, dark fiber feeder subloop, dark fiber channel

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[24] 47 U.S.C. § 271(c)(2)(B)(iv).

[25] 47 U.S.C. § 271(c)(2)(B)(v).

terminations and IOF as part of its wholesale tariff," and, "if and when Verizon files changes to rates under its wholesale tariff, [the PUC] will review such proposed changes in the normal course."[26] Id. at 439, 441. Until then, "Verizon shall offer these section 271 elements at existing Tariff 84 rates."[27] Id. at 441.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.

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[26] The PUC also vacated its January 2004 decision that had allowed Verizon to cease offering the IOF and dark fiber UNEs on a temporary basis. R. at 441.

[27] The PUC issued a subsequent order on April 22, 2005, approving Verizon's tariff revisions with respect to mass market local circuit switching and denying its amendments pertaining to dark fiber loops. R. at 808-09. On March 10, 2006, the PUC issued an order addressing wire centers at which Verizon is no longer required to provision DS1 and DS3 loops and dedicated dark fiber transport. NH PUC Order No. 24,598, at 45. Verizon challenges that order to the extent that it is required to continue offering de-listed elements through its wholesale tariff at the FCC-prescribed transition rate of "TELRIC plus 15%." See id. at 46. I refer collectively to the March 11, 2005, April 22, 2005, and March 10, 2006 orders as the "§ 271 unbundling orders."

56(c). "Cross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Adria Int'l Group, Inc. v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).

III. ANALYSIS

Verizon argues that the PUC's § 271 unbundling orders are invalid to the extent that they require Verizon to submit its § 271 UNE rates to the PUC for approval. According to Verizon, the PUC lacks the power to set its § 271 UNE rates because Verizon's obligation to offer the UNEs stems exclusively from § 271, which grants primary oversight responsibility for § 271 UNE rates to the FCC rather than the PUC.

The PUC does not claim that federal law authorizes it to set § 271 UNE rates.[28] Nor has it made a developed argument that its

[28] The PUC claimed in its § 271 unbundling orders that the FCC's order approving Verizon's § 271 application delegated to the PUC the power to determine whether Verizon remains in compliance with its § 271 obligations. R. at 431-33. Contrary to the PUC's argument, the FCC's order does not delegate any oversight authority to the PUC, nor does it alter the PUC's limited consultative role under § 271. NH § 271 Order, 17 F.C.C.R. at 18757, ¶ 174. In any event, the PUC made only a passing reference to the FCC's order in its brief, see PUC's Br.

rate setting power is derived from state law.[29] Instead, it argues only that Verizon is estopped from challenging its authority to set § 271 UNE rates because Verizon allegedly agreed

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at 19, and did not claim during oral argument on the summary judgment motions that the FCC delegated its § 271 rate-setting responsibility to the PUC. Accordingly, the PUC has waived any argument that it might have made that the PUC was acting pursuant to a delegation of power by the FCC.

[29] Judge Carter recently concluded in a similar case that Maine law gives that state's PUC the power to set § 271 UNE rates. Verizon New Eng., Inc. v. Me. PUC, Civil No. 05-53-B-C, 2006 WL 2007655, at *2 (D. Me. July 18, 2006). Unlike the Maine PUC, however, the New Hampshire PUC did not claim when it issued the § 271 unbundling orders that it was acting pursuant to state law. R. at 439 n.13. Nor did it argue in its summary judgment brief that it was empowered by state law to set § 271 UNE rates. PUC's Br. at 16-19. During oral argument on the summary judgment motions, the PUC's representative suggested for the first time that the PUC's plenary authority under state law to regulate intrastate network elements extends to § 271 UNEs. Tr. at 57-62. He did not explain his position, however, except to state in a conclusory way that there is "a return of some state law authority under Section 271 that may have been taken away from [the PUC by] Section 251." Id. at 61. When I asked him for textual support for his position, he responded that "my only comeback to that would be that unfortunately this is a very complicated regulatory regime that has been created through the clash of competing policy imperatives and political forces, and so some of this is less logical and coherent than either the Court or the PUC would like it to be." Id. at 62. The PUC's argument is difficult to understand because it presumes that Congress conferred greater power on local PUCs to set § 271 UNE rates than it did to set § 251 UNE rates, even though § 251 assigns express rate-setting responsibilities to local PUCs but § 271 does not. In any event, I decline to consider this novel argument because it has not been properly briefed.

to submit its § 271 UNE rates to the PUC for approval in exchange for the PUC's support of its § 271 application before the FCC.[30] I reject this argument because the undisputed evidence demonstrates that Verizon agreed to submit only its § 251 UNE rates for approval by the PUC. Because the UNEs in question are required under § 271 rather than § 251, Verizon's agreement does not grant the PUC the power it claims.

The only documents in the record that bear directly on this issue are Verizon's June 5, 2002 letter to the PUC and the PUC's June 14, 2002 response. Verizon's letter provides in pertinent part that

> Verizon NH will convert its Statement of Generally Available Terms ("SGAT") to a tariff by year-end 2002 and incorporate the interconnection, UNE, and resale provisions of the SGAT into Tariff No. 84. While the significant reorganization and reformatting effort is underway, Verizon NH will treat the existing SGAT like a tariff, making it available to all CLECs without the need to

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[30] The PUC also argues that Verizon is collaterally estopped from obtaining a judgment in this case because it unsuccessfully litigated the same issues against the Maine PUC. I reject this argument. Collateral estoppel applies only where the issues to be determined in both cases are identical. Gonzalez-Pina v. Rodriguez, 407 F.3d 425, 430 (1st Cir. 2005). In the Maine case, Judge Carter based his decision on a determination that Maine law gave that state's PUC the power to set § 271 UNE rates. Verizon New Eng., 2006 WL 2007655, at *2. Obviously, Judge Carter's ruling has no bearing on this case, which turns on other issues.

> enter [into] a specific agreement. Verizon NH will promptly file modifications to its SGAT and tariff to reflect changes in the services and network elements required by the Act, as determined by the FCC or the courts. Verizon NH also will continue to negotiate interconnection agreements with requesting carriers, in accordance with the Act.

R. at 1-2.[31] The PUC's response notes its decision to recommend approval of Verizon's § 271 application by the FCC and describes Verizon's agreement "to explicitly convert the existing SGAT into a CLEC tariff from which competitors may directly order anything contained in the SGAT, without the need to negotiate an interconnection agreement." Id. at 7.

What these documents describe is merely an agreement by Verizon to include rates in Tariff No. 84 for those UNEs that it is obligated to make available to its competitors pursuant to § 251. We know this to be true because the only elements that Verizon agreed to include in the tariff were the elements identified in the SGAT. An SGAT contains "the terms and conditions that [a BOC] generally offers within that State to

[31] Verizon also stated in the letter that it "reserves all rights to request modifications to its SGAT or the tariff . . . , such as seeking to cease providing or modifying new UNE-P combinations, as a result of a court or FCC decision that new combinations, or any individual UNE that the combination comprises, no longer are subject to the unbundling requirement." R. at 2-3.

comply with the requirements of section 251." 47 U.S.C. 252(f). An SGAT does not include elements that must be made available on an unbundled basis only pursuant to § 271. Moreover, as Verizon's June 5, 2002 letter to the PUC demonstrates, Verizon agreed to convert the SGAT into a tariff so that CLECs could "directly order anything contained in the SGAT, without the need to negotiate an interconnection agreement." R. at 7; see id. at 2. The tariff itself makes no reference to § 271 and instead states that it "sets forth the terms, conditions, and pricing under which . . . [Verizon] will provide access to unbundled network elements . . . consistent with Section 251 of the Act." Tariff No. 84, § 1.4.1(A) (emphasis added). Thus, the record in this case clearly demonstrates that Verizon agreed to include UNE rates in the tariff only to the extent that they were required under § 251.

Viewing the record as a whole, the PUC has failed to identify any persuasive evidence that supports its position that Verizon agreed to include § 271 UNEs in its wholesale tariff.[32]

[32] The PUC points to the SGAT's cover page, which states that the document sets forth the "terms and conditions for . . . access to unbundled network elements . . . under sections 251, 252 and 271 of the Telecommunications Act of 1996." R. at 11 (emphasis added). This notation, which Verizon contends was made in error, is not sufficient to give rise to a triable issue as to

Because the PUC has failed to identify an alternative source for its power to set § 271 UNE rates, I agree with Verizon that the PUC lacks the power to set those rates.[33]

IV. CONCLUSION

Verizon's motion for summary judgment (Doc. No. 11) is granted and the PUC's motion for summary judgment (Doc. No. 12)

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whether Verizon later agreed to tariff its § 271 unbundling obligations.

[33] The PUC's § 271 unbundling orders are invalid even if the PUC has the power to set § 271 UNE rates because it has used its purported power in a way that conflicts with federal law. State actions are preempted by federal law "either when compliance with both state and federal regulations is impossible or when state law interposes an obstacle to the achievement of Congress's discernible objectives." Grant's Dairy-Maine, LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res., 232 F.3d 8, 15 (1st Cir. 2000); see also Global NAPs, Inc. v. Verizon New England, Inc., 444 F.3d 59, 71 (1st Cir. 2006) (recognizing that federal agency actions may preempt conflicting state regulation). Here, the PUC's § 271 unbundling orders, which require Verizon to make § 271 UNEs available to competitors at TELRIC rates, are in direct conflict with the FCC's determination that TELRIC pricing is not appropriate for § 271 UNEs. See TRO, 18 F.C.C.R. at 17386, ¶ 656; id. at 17387, ¶ 659; UNE Remand Order, 15 F.C.C.R. at 3906, ¶ 473. It is not an answer to this conflict preemption problem to argue, as the PUC does, that its orders do not conflict with federal law because they merely require the use of TELRIC rates on an interim basis. PUC's Br. at 20-21. The FCC established transition rates for de-listed UNEs in the TRO and the TRRO and the PUC's § 271 unbundling orders are in direct conflict with these orders. Thus, the orders cannot stand even if the PUC has the limited authority to set § 271 UNE rates.

is denied. The PUC is enjoined from enforcing its March 11, 2005, April 22, 2005, and March 10, 2006 Orders to the extent that they require Verizon to continue offering unbundled access to de-listed network elements through its wholesale tariff. The clerk is instructed to enter judgment accordingly.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

August 22, 2006

cc: Thomas J. Donovan, Esq.
Daniel J. Mullen, Esq.