COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	))))))	CASE NO. 2004-00427

O R D E R

This proceeding was initiated by BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") to consider how to amend the parties' interconnection agreements to be consistent with the Federal Communications Commission's ("FCC") Triennial Review Order[1] and Triennial Review Remand Order.[2] On November 1, 2004, AT&T Kentucky filed its petition to establish a generic docket to consider amendments to interconnection agreements. On November 9, 2004, AT&T Kentucky filed proof that it had served 330 competitive local exchange carriers ("CLECs") that may be affected by this proceeding. The Attorney General and all CLECs served by AT&T Kentucky

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) ("Triennial Review Order" or "TRO"), vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

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

were made parties to this proceeding. The Commission held a formal hearing on October 11, 2005. AT&T Kentucky, Competitive Carriers of the South, Inc. ("CompSouth"),[3] and SouthEast Telephone, Inc. ("SouthEast") filed post-hearing briefs.

On March 9, 2006, the Commission issued an Interim Order indicating that its pricing determinations would be issued at a future date. By that Order, the Commission also mandated that the parties herein true-up their pricing arrangements as of March 11, 2006.

On September 18, 2007, the United States District Court for the Eastern District of Kentucky entered an Opinion and Order in BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et al., 2007 WL 2736544, slip opinion (E.D. Ky., Sept. 18, 2007), which has implications for the jurisdictional issues pending in this proceeding. In that Opinion and Order, the Eastern District found that the Commission has no authority to enforce 47 U.S.C. § 271 or to set rates pursuant to 47 U.S.C. § 271.[4] According to the Court, "Congress granted sole enforcement authority to the FCC and only gave state commissions an advisory role."[5] The Court's Opinion and Order relates to litigation between AT&T Kentucky and SouthEast, but it clearly affects decisions rendered herein.

[3] CompSouth's members participating include Access Point, Inc.; Cinergy Communications Company; Dialog Telecommunications; DIECA Communications, Inc. d/b/a Covad Communications Company; IDS Telecom, LLC; InLine; ITC^DeltaCom; LecStar Telecom, Inc.; MCI; Momentum Telecom, Inc.; Navigator Telecommunications, LLC; Network Telephone Corp.; NuVox Communications, Inc.; Supra Telecom; Talk America; Trinsic Communications, Inc.; and Xspedius Communications, LLC.

[4] BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et al., 2007 WL 2736544, slip opinion (E.D. Ky., Sept. 18, 2007).

[5] Id. at 20.

The Commission, having considered testimony presented at the hearing, pleadings and discovery, arguments of counsel, all appropriate matters of record, and pronouncements of our federal court, reaches the decisions set forth herein.

GENERAL STATUTORY AUTHORITY

Before we turn to the individual issues pending in this proceeding, we first discuss our statutory authority granted by the Kentucky Legislature and left intact by federal law.

Under KRS Chapter 278 and under 47 U.S.C. § 151 et al., the Federal Telecommunications Act of 1996, state commissions are authorized to set terms and conditions for interconnection and access to network elements. KRS 278.030 provides that every utility may receive fair, just, and reasonable rates for the services rendered to any person and every utility shall furnish adequate, efficient, and reasonable service. KRS 278.170 provides that no utility shall, as to rates or service, give any unreasonable preference or subject any person to any unreasonable prejudice. The same section also prohibits any utility from establishing or maintaining any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions. KRS 278.250 authorizes the Commission, when necessary in performance of its duties, to investigate and examine the condition of any utility. KRS 278.260 provides the Commission with original jurisdiction over any complaints as to rates or service of any utility. Such complaints may be brought by any person who is directly interested or may be brought by the Commission on its own motion. The purpose of the complaint is to determine whether a rate is unreasonable or unjustly discriminatory; whether a regulation or

practice or act affecting service is unreasonable, unsafe, inefficient, or unjustly discriminatory; or whether service is inadequate. KRS 278.270 provides that when the Commission finds, pursuant to KRS 278.260, that a rate is unjust, unreasonable, inefficient, or unjustly discriminatory, the Commission shall, by Order, prescribe a just and reasonable rate. Similarly, KRS 278.280 provides that whenever the Commission finds that the rules, regulations, practices, facilities, or service of a utility are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate, and sufficient rules and practices to be observed by the utility and enforced by the Commission's Order or regulation. KRS 278.280 also provides that any person may come to the Commission and seek that a utility be compelled to make any reasonable extension of its service.

This Commission has historically overseen issues involving local interconnection of telecommunications networks related to facilities located in Kentucky and intrastate service. KRS 278.542(1)(a) and (b), recently enacted, specifically retain to the Commission jurisdiction over "[a]ny agreement or arrangement between or among ILECs" and "[a]ny agreement or arrangement between or among ILECs and other local exchange carriers."

In addition to the state statutory authority for Commission oversight of local interconnection arrangements, 47 U.S.C. §§ 251 and 252 prescribe standards for state commission oversight of terms, rates, and conditions for interconnection and access to network elements. 47 U.S.C. § 252(h) mandates that state commissions shall make copies of each approved interconnection agreement available to the public, whether the terms were negotiated or arbitrated.

Moreover, 47 U.S.C. § 271 requires AT&T Kentucky to provide access and interconnection pursuant to at least one interconnection agreement or to offer access and interconnection through a statement of generally accepted terms.[6] 47 U.S.C. § 271 competitive checklist items 1 and 2 refer to compliance with provisions of 47 U.S.C. §§ 251 and 252. Accordingly, the 47 U.S.C. § 252 arrangements, reviewable and enforceable by this Commission, are the vehicles through which AT&T Kentucky demonstrates compliance with 47 U.S.C. § 271 to the FCC.

Given these general state and federal statutory guidelines, we turn now to specific issues over which the parties disagree.

COMMISSION AUTHORITY REGARDING 47 U.S.C. § 271 ELEMENTS AND RELATED ISSUES (ISSUES 8, 14, 17, 18, AND 22)

> Issue 8: Does the Commission have authority to require AT&T Kentucky to include in its interconnection agreements any network elements other than those required to be provided pursuant to 47 U.S.C. § 251? If so, may the Commission establish rates for such elements? What language should be included in the interconnection agreements regarding rates, terms, and conditions for these network elements?

Having considered this matter, for reasons more fully set forth below, the Commission concludes that obligations pursuant to 47 U.S.C. § 271 are additional interconnection requirements specific to AT&T Kentucky and that, therefore, interconnection agreements that contain such provisions must be filed with the Commission pursuant to 47 U.S.C. § 252(e)(1).

47 U.S.C. § 271(c)(2) clearly contemplates the need for agreements relating to specific interconnection requirements of a Bell Operating Company ("BOC") in concert

[6] 47 U.S.C. § 271(c)(2)(A)(i).

with 47 U.S.C. § 251 requirements involving the general duties of telecommunications carriers, the obligations of all local exchange carriers ("LECs"), and additional obligations of incumbent local exchange carriers ("ILECs"). According to 47 U.S.C. § 271(c)(2)(A), a BOC must provide for access and interconnection pursuant to existing agreements,[7] and "such access and interconnection" must meet the requirements of 47 U.S.C. § 271(c)(2)(B), the "competitive checklist." 47 U.S.C. § 271(c)(2)(B) unequivocally states that "[a]ccess or interconnection provided. . .by a Bell operating company to other telecommunications carriers meets the requirements of [the competitive checklist] if such access and interconnection includes each of the [specific competitive checklist interconnection requirements]." There can be no mistake that 47 U.S.C. § 271(c)(1)(A) requires AT&T Kentucky to enter into "binding agreements that have been approved under Section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities" and that 47 U.S.C. § 271(c)(2)(B) requires that "such access and interconnection includes each of the [competitive checklist requirements in Section 271(c)(2)(B)(i) through (xiv)]."

Thus, the language of 47 U.S.C. § 271, on its face, demonstrates the continued role of the Commission in approving binding agreements per 47 U.S.C. § 252 which are the means for AT&T Kentucky to fulfill its obligations regarding access and interconnection. AT&T Kentucky entered into binding agreements which were approved

[7] 47 U.S.C. § 271(c)(1)(A). Alternatively, a BOC could offer such access and interconnection by a statement of generally available terms and conditions described in 47 U.S.C. § 271(c)(1)(B). This alternative of a general statement of terms was not available to AT&T Kentucky because it had binding agreements for access and interconnection with facilities-based competitors.

by this Commission under 47 U.S.C. § 252. Portions of these binding agreements were negotiated, and portions were arbitrated by this Commission.

It is these binding agreements, in which AT&T Kentucky has entered, that formed part of the basis for the FCC's justification in opening AT&T Kentucky's in-region interLATA market.[8] Moreover, pursuant to 47 U.S.C. § 271(c)(2)(A), these very agreements regarding access and interconnection must also include each element of the competitive checklist. The terms and conditions for each checklist item, as specified in 47 U.S.C. § 271(c)(2)(B), must be included in binding agreements approved under 47 U.S.C. § 252. The Commission approved, pursuant to state statutes and 47 U.S.C. § 252, binding agreements which contain access and interconnection arrangements, local loop transmission, local transport, and local switching.

This Commission has general authority and jurisdiction over intrastate facilities used to provide intrastate service.[9] Arrangements regarding the facilities and services requested by the CLECs are appropriately contained in interconnection agreements. Pursuant to 47 U.S.C. § 252, arrangements between and among ILECs and CLECs that relate to interconnection, services, or network elements must be contained in interconnection agreements and filed with the state commission. Regardless of whether these interconnection agreements are adopted by negotiation or by arbitration, the

[8] See in general Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, FCC 02-260, WC Docket No. 02-150 (Sept. 18, 2002) ("BellSouth Section 271 Order").

[9] KRS 278.030, KRS 278.040, KRS 278.170, KRS 278.260, KRS 278.270, KRS 278.280, KRS 278.542.

agreements, including those containing 47 U.S.C. § 271 obligations, must be submitted to the state commission pursuant to 47 U.S.C § 252(e). A state commission may reject negotiated agreements if those agreements or any portions of those agreements discriminate against a telecommunications carrier not a party to the agreement, or if the implementation of the agreement or a portion of the agreement is not consistent with the public interest, convenience, or necessity.[10] Moreover, the Commission may reject agreements adopted by arbitration if the Commission finds the agreement does not meet the requirements of 47 U.S.C. § 251 or the pricing standards contained in 47 U.S.C. § 252(d).[11]

CompSouth requests that the Commission require AT&T Kentucky to file agreements containing network elements which are no longer required under 47 U.S.C. § 251. The same issue of whether 47 U.S.C. § 252's filing obligation applies to network elements not required by 47 U.S.C. § 251 has been addressed in Qwest Corporation v. Public Utilities Commission of Colorado.[12] That court found that agreements which relate to mass market switching and shared transport are agreements for network elements, even if provided under 47 U.S.C. § 271. If agreements set forth ongoing obligations that relate to interconnection and access to network elements, they must be filed under 47 U.S.C. § 252. The Qwest Corporation court held that contracts containing ongoing obligations related to interconnection, that is "the physical linking of

[10] 47 U.S.C. § 252(e)(2)(A).

[11] 47 U.S.C. § 252(e)(2)(B).

[12] Qwest Corporation v. Public Utilities Commission of Colorado, 479 F.3d 1184 (10th Cir. 2007).

two networks," must be filed with state commissions as interconnection agreements.[13] The court also determined that contracts containing an ongoing obligation relating to a network element, that is, "a facility or equipment used in the provision of telecommunications service," must also be on file with state commissions as interconnection agreements.[14] The court said that "the filing obligation in Section 252 covers agreements reached following a request for interconnection," even if those agreements include items which are not required to be provided pursuant to 251.[15] In reaching its determination, the court noted that "Congress chose three terms with broad meanings – 'interconnection, services or network elements' [in describing Section 252 agreements with state filing requirements] – rather than the more specific and narrow language it used in Section 251."[16] Finally, the court held that "the Section 252 filing requirement is driven by concerns for the public interest and the interests of other non-parties" and includes "the class of network elements whose provision on favorable terms could discriminate or impact the public interest."[17]

In order that the Commission may discharge its duty to the public to ensure that arrangements relating to ongoing obligations, including 47 U.S.C. § 271 obligations, are fair, just, and not discriminatory, the Commission finds that such interconnection agreements containing ongoing obligations relating to interconnection, services, or

[13] Id. at 1192.

[14] Id. at 1192-1193.

[15] Id. at 1195-1196.

[16] Id. at 1196.

[17] Id.

access to network elements shall be filed with and maintained at the Commission and made available to the public.[18]

The Commission has continuing oversight of AT&T Kentucky's obligations. However, as the United States District Court for the Eastern District of Kentucky has held, AT&T Kentucky may seek from the FCC determinations regarding its rates.[19] Though relevant matters are pending before the FCC, it has not yet determined rates for 47 U.S.C. § 271 elements,[20] and this Commission is not authorized by federal law to do so. The Commission therefore urges negotiated settlements regarding 47 U.S.C. § 271 element rates.

The Commission has reviewed CompSouth's request for us to establish rates for those network elements which are no longer required to be provided pursuant to 47 U.S.C. § 251. These elements include, among others, mass market switching. The Commission finds, as a matter of Kentucky statutory law, that AT&T Kentucky must

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[18] Such agreements or arrangements relating to network elements include all of the elements contained in the definition of Network Elements, 47 U.S.C. § 153(29):

> The term "network element" means 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 other provision of a telecommunications service.

[19] BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et al., 2007 WL 2736544, slip op. at 20-21 (E.D. Ky., September 18, 2007).

[20] Two matters are pending before the FCC. See BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245, filed July 8, 2004, and Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates, WC Docket No. 06-90 filed April 18, 2006.

furnish adequate, efficient, and reasonable service to its customers, including its wholesale customers such as the CLECs.[21] Moreover, AT&T Kentucky must provide these elements at fair, just, and non-discriminatory rates.[22]

The Commission has authority, pursuant to state law, to establish these rates requested by CompSouth. In establishing what rates would be fair, just, and non-discriminatory, this Commission gives weight to relevant legislative findings and determinations. Pursuant to KRS 278.512, the Kentucky Legislature found and determined that "[c]ompetition and innovation have become commonplace in the provision of certain telecommunications services in Kentucky and the United States." Moreover, in KRS 278.546, the Kentucky Legislature found and determined that "[s]treamlined regulation in competitive markets encourages investment in the Commonwealth's telecommunications infrastructure" and "[c]onsumers in the Commonwealth have many choices in telecommunications services because competition between various telecommunications technologies such as traditional telephony, cable television, Internet and other wireless technologies has become commonplace," and, finally, "[c]onsumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical services." Based on these findings, this Commission concludes that the fair, just, and non-discriminatory rates for these network elements, which are no longer required to be provided pursuant to 47 U.S.C. § 251, are rates which are market based. AT&T Kentucky has asserted that the rates contained in its commercial agreements are

[21] KRS 278.030.

[22] KRS 278.030 and KRS 278.170.

market based. In order for the Commission to discharge its duty to ensure that AT&T Kentucky's obligations are fulfilled and its rates are fair, just, and not discriminatory, these agreements must be available to the public by being placed on file at the Commission.

> Issue 14: What is the scope of commingling allowed under the FCC's rules, and what language should be included in the interconnection agreements to implement commingling?

The Commission previously determined that AT&T Kentucky is required to "commingle" unbundled network elements ("UNEs") or combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to 47 U.S.C. § 271.[23] No party has successfully challenged this determination.

47 C.F.R. §§ 51.309(e) and (f) support the Commission's decision. Rule 51.309(e) states that "an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC." Rule 51.309(f) provides that "upon request an incumbent shall perform the functions necessary to commingle [a UNE or UNE combinations] with one or more facilities or services obtained at wholesale from an incumbent." The question to be decided is

[23] Case No. 2004-00044, Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement With BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, As Amended, Orders dated September 26, 2005 at 9-10 and March 14, 2006 at 7-12.

whether a 47 U.S.C. § 271 obligation is a facility or service that is obtained at wholesale from an incumbent.

47 U.S.C. § 271(c)(2) lists the access and interconnection requirements which AT&T Kentucky had to fulfill in order to be granted entrance into the in-region interLATA market. In the Triennial Review Order, the FCC defined "commingling" as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any other method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[24] CLECs seek to link UNEs or combinations of UNEs with local switching (checklist item 6). AT&T Kentucky asserts that, since local switching is no longer a UNE and is not a wholesale service, it has no obligation to commingle switching with elements otherwise required to be provided.

For reasons delineated herein, the Commission again finds that 47 U.S.C. § 271 offerings constitute wholesale services within the meaning of the commingling rule. Accordingly, AT&T Kentucky remains obligated to make these 47 U.S.C. § 271 elements available to CLECs on a commingled basis with 47 U.S.C. § 251 UNEs.

AT&T Kentucky argues that 47 U.S.C. § 271 elements are not wholesale services. However, it has produced no statute, rule, or order in support of its assertion. The FCC has repeatedly framed the issue of commingling as that which "a requesting

[24] TRO at ¶ 579.

carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act."[25]

AT&T Kentucky argues that in the TRO Errata order, the FCC eliminated certain phrases from the TRO. Originally, the FCC required that "incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act."[26] In the TRO Errata Order, the FCC changed the sentence to eliminate the phrase "any network element unbundled pursuant to section 271."[27] Although AT&T Kentucky asserts that this deletion is dispositive, the Commission disagrees. This portion of the TRO addresses ILECs' resale obligations only. Network element unbundling was irrelevant to resale and thus was eliminated from this paragraph. Its elimination in no way affects AT&T Kentucky's 47 U.S.C. § 271 obligations.

The TRO does address the unbundling of 47 U.S.C. § 271 obligations. The TRO Errata Order also deleted footnote 1990 from the section of the TRO addressing 47 U.S.C. § 271 issues.[28] The deleted sentence is: "We also decline to apply our commingling rule, set forth in part VII.A. above, to services that must be offered pursuant to these checklist items." The footnote was attached to ¶ 655 of the TRO, which states, "As such, BOC obligations under Section 271 are not necessarily relieved

[25] Id.

[26] Id. at ¶ 584.

[27] TRO Errata at ¶ 27.

[28] Id. at ¶ 31.

based on any determination we make under the Section 251 unbundling analysis." The deletion of footnote 1990 supports our determination that the FCC did not prohibit the commingling of 47 U.S.C. § 271 elements with 47 U.S.C. § 251 elements. With the removal of this language, the FCC plainly intended to continue enforcing the requirement that BOCs must commingle 47 U.S.C. § 251 elements with 47 U.S.C. § 271 elements.[29]

If the FCC's intent was that commingling obligations for wholesale service only referred to switched and special access tariffed services, it would not have used the language regarding wholesale obligations pursuant to 47 U.S.C. § 271. The FCC stresses that the commingling definition refers to any service obtained at wholesale by a method other than unbundling under 47 U.S.C. § 251.

Thus, the Commission requires AT&T Kentucky to commingle UNEs or combinations of UNEs with any element that competitive carriers receive at wholesale, including 47 U.S.C. § 271 elements. AT&T Kentucky cannot point to any law relieving it of its obligation to provide 47 U.S.C. § 271 elements at wholesale and commingling them pursuant to 47 C.F.R. § 51.309(e). The FCC nowhere prohibits the commingling of 47 U.S.C. § 271 elements. The FCC, instead, requires commingling with any element obtained through wholesale. The FCC does list tariffed services as examples of these elements but nowhere states that only tariffed services are available for

[29] Despite AT&T Kentucky's contention that 47 U.S.C. § 271 elements are not wholesale obligations, the FCC, in an Opinion and Order issued December 2, 2005, repeatedly uses the term "Section 271(c) wholesale obligations" and makes reference to "wholesale access to loops, transport and switching" pursuant to checklist items 4-6 as independent and ongoing obligations for BOCs. See Qwest Communications International Inc.'s Petition for Forbearance under 47 U.S.C. § 160(c), at ¶¶ 68, 100, 103, and 105.

commingling. The very purpose of 47 U.S.C. § 271, which is to require AT&T Kentucky to provide access to local switching, local transport, and local loops, would be undermined by such a prohibition on commingling these elements with UNEs. 47 U.S.C. § 271 exists to require access to, and facilitate the competitive use of, these elements. Restricting commingling would undermine this competitive policy.

Accordingly, AT&T Kentucky shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to 47 U.S.C. § 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under 47 U.S.C. § 251(c)(3).

AT&T Kentucky's requirement to commingle UNEs or UNE combinations with facilities or services that a requesting carrier has obtained at wholesale from an ILEC is also a continuing obligation relating to interconnection and access to network elements. As such, these commingled UNEs and wholesale facilities and services must be contained in interconnection agreements and filed with the Commission pursuant to 47 U.S.C. § 252.

> Issues 17 and 18: Is AT&T Kentucky obligated to provide line sharing to new CLEC customers after October 1, 2004? What is the appropriate manner for CLECs to transition from existing line sharing arrangements if transition is required?

Line sharing is "the process by which a requesting telecommunications carrier provides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high

frequency portion of the loop."[30] CompSouth argues that AT&T Kentucky is obligated to provide access to line sharing under 47 U.S.C. § 271, even though line sharing is no longer considered by the FCC to be a UNE required to be available under 47 U.S.C. § 251. The competitive carriers assert that the pricing standard is different. The pricing should now be determined on just and reasonable standards and not the total element long line incremental cost ("TELRIC") standards of 47 U.S.C. § 251. AT&T Kentucky, on the other hand, asserts that the change of law means that it no longer has an obligation under 47 U.S.C. § 251 to provide line sharing and that it also has no obligation under 47 U.S.C. § 271 to provide line sharing.

The Commission has already entered two Orders regarding line sharing in Case No. 2004-00259.[31] The Commission initially found that AT&T Kentucky has no continuing obligation to provide line sharing arrangements.[32] The Commission's determination was based on United States Telecom Association v. Federal Communications Commission ("USTA II"), 359 F.3d 554 (D.C. Cir. 2004) at 584. The D.C. Circuit Court of Appeals upheld the FCC's determination that no impairment would be suffered by competitive carriers from a lack of separate access to the high frequency portion of the loop. Although the USTA II court found that line sharing need not be a 47 U.S.C. § 251 unbundling obligation, it did determine that the FCC reasonably

[30] 47 C.F.R. § 51.319(a)(1)(I).

[31] Case No. 2004-00259, Petition of Dieca Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Agreement Amendment With Bellsouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996.

[32] October 18, 2004 Order at 4.

concluded that checklist item 4 of 47 U.S.C. § 271 imposed requirements for elements independent of the unbundling obligations imposed by 47 U.S.C. § 251.[33]

The Commission also found, in its October 18, 2004 Order, that, pursuant to 47 U.S.C. § 271, AT&T Kentucky has an obligation to unbundle local loop transmission from the central office to the customer's premises. The Commission, however, disagreed with DIECA Communications, Inc. d/b/a Covad Communications Company's ("Covad") definition of loop transmission, finding that AT&T Kentucky is obligated to provide the whole loop but not obligated to provide any portion of the loop on a separate and unbundled basis. Thus, the Commission held that AT&T Kentucky's obligations pursuant to the competitive checklist item 4 of 47 U.S.C. § 271 did not include line sharing arrangements, as line sharing was not a separate loop type.[34]

Upon motion for reconsideration of the Commission's Order, Covad asserted that the Commission based its decision on the intent of the FCC, and the release on October 27, 2004 of an FCC Order called into question that intent.[35]

The Commission determined that, based on conflicting statements made by FCC commissioners regarding the continuing obligation of AT&T Kentucky to provide line sharing under 47 U.S.C. § 271, rehearing should be granted. The Commission then determined that the matter would be held in abeyance pending appropriate clarification

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[33] Id. at 588.

[34] October 18, 2004 Order at 5.

[35] Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), Memorandum Opinion and Order, FCC 04-254, WC Docket No. 01-338 (rel. Oct. 27, 2004). This Memorandum Opinion and Order also addresses BellSouth Telecommunications, Inc.'s Petition for Forbearance under 47 U.S.C. § 160(c), WC Docket No. 04-48.

and guidance from the FCC. The Commission determined that AT&T Kentucky should continue to provide line sharing to Covad pending clarification and guidance from the FCC.[36] Case No. 2004-00259 was in abeyance from November 2004 until the parties in that proceeding recently submitted a settlement.

In the Commission's review of BellSouth's application for entry into the in-region long-distance market, the Commission found that line sharing was necessary in order for BellSouth to comply with checklist Item 4. Moreover, when the FCC reviewed BellSouth's application for provision of in-region interLATA services in Kentucky and four other states, it found that BellSouth's provision of line sharing was part of its compliance with checklist Item 4 regarding the availability of unbundled local loops. The FCC noted that the state commissions, including Kentucky, found that BellSouth offered non-discriminatory access to the high-frequency portion of the loop, or HFPL.[37]

From a technical point of view, there is no distinction between the provision of line sharing and line splitting. AT&T Kentucky argues that line sharing (where it provides the voice service) should not be required but does not contest the availability of line splitting (where a CLEC provides the voice service). Given the technical similarities in these network elements and the lack of clear direction from the FCC, this Commission has thus far required AT&T Kentucky to provide line sharing. After the parties in Case No. 2004-00259 settled their dispute, they requested that their petition be withdrawn. The Commission ordered AT&T Kentucky and Covad, parties to that

[36] November 30, 2004 Order at 3.

[37] BellSouth Section 271 Order at ¶ 248.

proceeding, to file a copy of their contract resolving this matter, as these matters relate to ongoing obligations of AT&T Kentucky which affect interconnection and access to network elements. That contract is publicly available. Thus, the Commission will take no more action regarding these issues, except to require AT&T Kentucky to make available to other CLECs, on a non-discriminatory basis, the same line sharing arrangements it made available to Covad.

> Issue 22: What is the appropriate interconnection agreement language, if any, to address access to call-related databases?

The FCC has determined that competitive carriers that deploy their own switches are not impaired in any market without access to ILEC call-related databases, with the exception of the 911 and E911 databases.[38] Based on this finding, AT&T Kentucky asserts that interconnection agreements should not contain any language regarding the provisions of unbundled access to call-related databases other than 911 and E911 databases.[39]

CompSouth, however, urges the Commission to require interconnection agreements to include language that makes call-related databases accessible pursuant to the Section 271 competitive checklist Item 10. It further argues that, like other 47 U.S.C. § 271 checklist items, call-related databases must be made available to CLECs by AT&T Kentucky on a non-discriminatory basis on just and reasonable rates, terms, and conditions.[40]

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[38] TRO at ¶ 551.

[39] AT&T Kentucky Brief at 61.

[40] CompSouth Brief at 81 and 82.

For reasons already stated herein, the Commission finds that AT&T Kentucky's requirement to make available to requesting carriers call-related databases constitutes a continuing obligation relating to interconnection and access to network elements. As such, call-related database availability must be contained in interconnection agreements and filed with the Commission pursuant to 47 U.S.C. § 252.

WHAT IS THE APPROPRIATE MANNER IN WHICH TO TRANSITION TO POST-TRRO ARRANGEMENTS (ISSUES 2, 3, 4, 5, 9, 10, 11, AND 32)?

> Issue 2: What is the appropriate language to implement the transition plan for (1) switching, (2) high-capacity loops, and (3) dedicated transport?

AT&T Kentucky asserts that the TRRO requires CLECs to work cooperatively for an orderly transition, as evidenced by the requirement that adequate time be allowed to perform "the tasks necessary to an orderly transition."[41] AT&T Kentucky also asserted that it was entitled to time in advance of March 10, 2006 so that it could migrate to alternative fiber arrangements. AT&T Kentucky further states that no basis exists for transitioning from UNEs to state-regulated 47 U.S.C. § 271 services.[42]

With regard to local switching and UNE-P, AT&T Kentucky argued that CLECs should be ordered to identify their embedded base via spreadsheets and submit orders as soon as possible or convert or disconnect their embedded base of UNE-P and stand-alone local switching. AT&T Kentucky would then have adequate time to work with CLECs to ensure embedded base elements are identified. If a CLEC failed to give AT&T Kentucky adequate time to convert, then AT&T Kentucky would convert

[41] TRRO at ¶¶ 143, 196, and 227.

[42] AT&T Kentucky Brief at 62.

remaining UNE-P lines to the resale equivalent no later than March 11, 2006. Remaining stand-alone switch ports would be disconnected.[43]

AT&T Kentucky states that the Commission is bound by the FCC's rules on transitional rates.[44] 47 C.F.R. § 51.319(d)(2)(iii) requires transitional rates of the higher of the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or the rate the state public utility commission establishes, if any, between June 16, 2004 and the effective date of the TRRO for that combination of network elements, plus one dollar.

Regarding high-capacity loops and dedicated transport, AT&T Kentucky asserted that the Commission should require CLECs to convert their de-listed high-capacity loops and transport facilities to alternative serving arrangements. According to AT&T Kentucky, if a CLEC fails to provide notice to convert high-capacity loops and transport facilities, then AT&T Kentucky would convert any remaining embedded or access high-capacity loops and interoffice transport to a tariff service offering. For wire centers that are considered unimpaired, where the FCC's competitive thresholds are met, AT&T Kentucky proposes that CLECs submit information as soon as possible identifying the embedded base and the access DS1 and DS3 loops and transport circuits to be either disconnected or converted to other AT&T Kentucky services.[45]

Regarding dark fiber, AT&T Kentucky proposed that CLECs identify their embedded dark fiber base to be either disconnected or converted to other services by

[43] Id. at 63-64.

[44] Id. at 64.

[45] Id. at 65.

June 10, 2006. If this is not done, then by September 11, 2006, AT&T Kentucky would convert any remaining dark fiber loops or embedded base dark fiber transport to tariff service offerings.[46]

AT&T Kentucky also proposed that pricing during the transition period for each de-listed UNE apply retroactively to March 11, 2005. AT&T Kentucky believes the transition rates should be effective even without a contract amendment, but that once an agreement is amended, the rate must be trued up as of March 11, 2005.[47]

CompSouth proposed that contract language should provide for the availability of 47 U.S.C. § 271 checklist elements which must remain available even where 47 U.S.C. § 251(c)(3) UNEs have been de-listed by the FCC. CompSouth asserted that existing interconnection agreements must be amended to incorporate 47 U.S.C. § 271 checklist items in them. The CLECs also contended that, until March 10, 2006, they were entitled to the transition rate for any UNE that was de-listed. CompSouth believed that its cooperation with AT&T Kentucky to transition the de-listed UNEs should not have resulted in a rate change prior to March 11, 2006.[48]

CompSouth asserted that if AT&T Kentucky was entitled to transition rates for de-listed UNEs retroactive to March 11, 2005, then AT&T Kentucky must make Enhanced Extended Links ("EEL") eligibility criteria, commingling, and conversion rights effective the same date.

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[46] Id. at 65-66.

[47] Id. at 67.

[48] CompSouth Brief at 5-7.

The first question within this issue pertains to what terms and conditions CLECs may transition to when they transition from UNEs. CompSouth argues that the transition should be to 47 U.S.C. § 271 checklist elements, for which it claimed the Commission had jurisdiction under 47 U.S.C. § 271 to set just and reasonable rates for de-listed UNEs. The Commission finds that the transition plan set forth in the TRRO for switching, high-capacity loops, and dedicated transport should apply during the transition period. After the transition period, the rates ordered by the Commission shall apply. As previously discussed, the Commission must set fair, just, and non-discriminatory rates, and, based on legislative findings, these are market rates.

The second question within this issue pertains to whether there should have been some point prior to the end of the transition period beyond which CLECs could no longer order conversions. AT&T Kentucky stated that conversions should have been ordered far enough in advance of March 11, 2006 to enable it to have processed all orders by that date. CompSouth argued that CLECs should have been allowed to order conversions for the entire year. The clearest indication of the FCC's intent is in ¶ 227 of the TRRO discussing the transition plan for mass market local switching. The FCC stated that "[w]e require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of the Order." Given that the FCC set an express deadline for the submission of orders, it is not prudent for this Commission to imply that an earlier deadline than the FCC's expressed wish for an orderly transition would have been appropriate. The FCC could have specified that CLECs must submit their orders by some earlier date to ensure that all customers would have been converted as of March

10, 2006. The FCC declined to take such action. Instead, the FCC stated that CLECs had one year from the effective date to submit the necessary orders.

In the context of high-capacity loops, the FCC stated that "[a]t the end of the twelve-month period, requesting carriers must transition all of their affected high capacity loops to alternative facilities or arrangements."[49] This references the obligation of the requesting carriers; therefore, it must be assumed that the FCC was referencing any actions that the requesting carriers must have taken, such as ordering a conversion. The CLEC did not control when an ILEC would act on its order; therefore, the FCC cannot reasonably be construed to have obligated the CLECs to submit orders prior to the one-year anniversary in anticipation of the time necessary for the ILEC to process the order. The language in ¶ 143 of the TRRO, with respect to the transition period for dedicated interoffice transport, is the same as that for high-capacity loops.

The three factors that need to be reconciled are: (1) that CLECs had until 12 months after the effective date of the TRRO to order conversions; (2) that ILECs only had to provide unbundled local switching and dedicated loop and transport for 12 months from the effective date of the TRRO;[50] and (3) that processing the conversions took time.

The Commission finds it reasonable that CLECs had until March 11, 2006 to order conversions from AT&T Kentucky. To the extent that it took AT&T Kentucky beyond March 11 to process these orders, AT&T Kentucky is entitled to a true-up of the difference between the TELRIC rate and the market rate AT&T Kentucky could have

[49] TRRO at ¶ 196.

[50] See 47 C.F.R. § 51.319(d)(iii).

charged after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

An additional question within this issue concerns high-capacity loops for which the FCC found impairment in the TRRO, but which may in the future meet the thresholds for non-impairment. Consistent with footnote 519 of the TRRO, the Commission requires the parties to negotiate appropriate transition mechanisms through the 47 U.S.C. § 252 process.

> Issue 3: How should existing interconnection agreements be modified to address AT&T Kentucky's obligation to provide network elements that the FCC has found are no longer 47 U.S.C. § 251(c)(3) obligations?

AT&T Kentucky's arguments address generally how change-of-law issues should be addressed in interconnection agreements and, specifically, the impact of abeyance agreements on this process. The TRRO at ¶ 233 obligates carriers to execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. Therefore, AT&T Kentucky argued, CLECs should be ordered to implement promptly the changes of law that are the subject of this proceeding.[51] For issues that are currently the subject of arbitrations, AT&T Kentucky urged the Commission to address change-of-law issues in this proceeding and apply its conclusions in those arbitrations.

AT&T Kentucky also addresses the "abeyance agreement" issue with regard to NuVox Communications, Inc. ("NuVox") (one of the CompSouth members) and

[51] AT&T Kentucky Brief at 68.

Xspedius. With the release of the rehearing order in Case No. 2004-00044 on March 14, 2006, this issue was rendered moot.

CompSouth contends that interconnection agreements should have only been modified regarding the disputed issues within the scope of the TRO and TRRO. If these matters were not addressed by the FCC's orders, then the current contract language addressing that issue should likewise not have been affected by this Commission's decisions. According to CompSouth, AT&T Kentucky's proposed new Attachment 2 is inappropriate, given that many of the items addressed there are not disputed in this proceeding. CompSouth asks this Commission not to address matters unrelated to matters disputed in this proceeding.

Issue 3(a) asks how existing interconnection agreements should have been modified to address AT&T Kentucky's obligation to provide network elements that the FCC had found were no longer 47 U.S.C. § 251(c)(3) obligations. The purpose of this docket was to respond to the TRO and the TRRO and not to every change of law that may be the subject of negotiations pursuant to the relevant provisions of the interconnection agreements. The Commission will limit its consideration in this proceeding to those issues that resulted from the TRO and TRRO. The implementation of other changes of law should not be the subject of this limited proceeding. This conclusion does not prohibit parties from acting pursuant to the change-of-law provisions in their interconnection agreements to address changes in law unrelated to the TRO or TRRO.

The Commission also finds that parties are bound by the decisions in this limited proceeding, unless they have entered into an agreement with AT&T Kentucky that

indicates otherwise. Parties have been, and are still, free to negotiate interconnection agreements that provide for alternative arrangements.

In connection with the three scenarios set forth in CompSouth's brief, the Commission agrees with CompSouth on the first two. However, the Commission does not agree with the process set forth by CompSouth for its third scenario. If there is a pending arbitration and no agreement among the parties to resolve an issue outside of this generic proceeding, then the parties should incorporate the result of this docket into the interconnection agreement they submit for approval.

> Issue 4: What is the appropriate language to implement AT&T Kentucky's obligation to provide unbundled access to high-capacity loops and dedicated transport, and how should the following items be defined: (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route?

To implement its Section 251 unbundling obligations, AT&T Kentucky has proposed contract language which cites federal rules and incorporates the FCC's impairment thresholds. AT&T Kentucky recognizes that it has obligations to provide unbundled DS1 loops and transport, as well as unbundled DS3 loops and transport, except in instances in which the FCC's impairment tests have been satisfied.[52]

The parties' dispute centers around effectuating the FCC's impairment tests, including how certain terms should be defined.[53] All parties assert that they have no disagreement regarding how business lines should be defined in Kentucky.[54]

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[52] AT&T Kentucky Brief at 71.

[53] Id. at 72.

[54] CompSouth Brief at 14.

CompSouth and AT&T Kentucky agree on the method for identifying fiber-based collocators. The point of disagreement appears to be the manner in which collocations are counted when owned by affiliate companies.[55] AT&T Kentucky proposes that interconnection agreements should quote 47 C.F.R. § 51.5 and not add any additional language. CompSouth, on the other hand, proposes additional language.[56]

AT&T Kentucky argued that the Commission should strike CompSouth's proposed addition to the FCC's definition of "fiber-based collocator" that would result in counting carriers that had not finalized mergers as one collocator.[57] The practical impact of CompSouth's proposal was that AT&T and Southwestern Bell Corporation would be counted as one fiber-based collocator.[58]

CompSouth proposed that the term "fiber-based collocator" should apply to carriers that have entered into merger or other consolidation agreements. These carriers will be treated as affiliates and therefore as one collocator; provided, however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement should not be counted as a fiber-based collocator.

AT&T Kentucky also urged the Commission to reject CompSouth's proposed language about counting the network of fiber-based collocators separately. AT&T Kentucky discussed gaming of the routes as a CLEC connecting links from a Tier 1 or

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[55] Id. at 15.

[56] AT&T Kentucky Brief at 73.

[57] Id. at 72-73.

[58] Id. at 74.

Tier 2 wire center in a Tier 3 wire center.[59] CompSouth argued that state commissions are not bound to determine fiber-based collocator counts as of March 10, 2005, the beginning of the TRRO transition period. CompSouth emphasizes that AT&T Kentucky has not cited to any authority for why the Commission must count fiber-based collocators as of March 10, 2005.[60]

The issue in defining the term "fiber-based collocator" hinges on the date that the impairment test must be applied. AT&T Kentucky cited to language that CompSouth has proposed that would expand the definition of "fiber-based collocator" to address planned mergers. In doing so, CompSouth essentially sought to apply the impairment test at a later date because it was accounting for situations in which the number of fiber-based collocators in existence as of the date of the analysis was more than would have been available a short while after the analysis was completed.

The December 29, 2006 FCC order approving the merger of BellSouth and AT&T contains, as a merger condition, the method in which the AT&T/BellSouth fiber-based collocations are to be counted. Thus, this matter has been resolved by the merger agreement. As stated below:

> 2. AT&T/BellSouth shall recalculate its wire center calculations for the number of business lines and fiber-based collocations and, for those that no longer meet the non-impairment thresholds established in 47 CFR §§ 51.319(a) and (e), provide appropriate loop and transport access. In identifying wire centers in which there is no impairment pursuant to 47 CFR §§ 51.319(a) and (e), the merged entity shall exclude the following: (i) fiber-based collocation arrangements established by AT&T or its affiliates; (ii) entities that do not operate (i.e., own or manage the optronics on the fiber) their own fiber into and out of their own collocation

[59] Id. at 72.

[60] CompSouth Brief at 16.

> arrangement but merely cross-connect to fiber-based collocation arrangements; and (iii) special access lines obtained by AT&T from BellSouth as of the day before the Merger Closing Date.[61]

For these reasons, the Commission will apply the definition of "fiber-based collocators" set forth in the TRRO and federal rules and the AT&T/BellSouth Merger Order.

The Commission adopts CompSouth's "reasonable telecommunications person" standard for the term "building." The only difference between CompSouth and AT&T Kentucky regarding this definition is the inclusion of the word "telecom." This difference would allow buildings to be defined by how they are seen for network engineering purposes. CompSouth represented that there was no further dispute on routes; therefore, the Commission adopts AT&T Kentucky's definition of route.

> Issue 5: Does the Commission have authority to determine whether AT&T Kentucky's application of the FCC's 47 U.S.C. § 251 non-impairment criteria for high-capacity loops and transport is appropriate?

AT&T Kentucky asserted that state commissions are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the TRRO.[62] The Commission must resolve the parties' disputes concerning the wire centers in Kentucky that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition UNEs to alternative arrangements.[63] AT&T

[61] In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control, FCC 06-189 (rel. Mar. 26, 2007) at 149.

[62] TRRO at ¶ 234.

[63] AT&T Kentucky Brief at 70.

Kentucky requested that the Commission order CLECs to transition existing 47 U.S.C. § 251 loops and transport (as applicable) in two wire centers in Kentucky to alternative serving arrangements.[64] AT&T Kentucky further requested the Commission to conclude that CLECs could not self-certify to obtain 47 U.S.C. § 251 loops and transport in the future. AT&T Kentucky also proposed that, when wire centers were found to have met the FCC's non-impairment criteria, it would notify CLECs by a carrier notification letter that would be effective 10 business days thereafter.[65]

CompSouth argued that state commissions have authority to determine whether AT&T Kentucky has followed FCC mandates on how to designate non-impaired wire centers.[66] CompSouth believed that it was most efficient for the Commission to settle disputes on the front end.[67] An orderly process should be established to determine future changes in the wire center list. The process of reclassifying a wire center would be synchronized with the routine filing of Automated Reporting Management Information Systems ("ARMIS") 43-08.[68]

The TRRO provides that CLECs will "be able to challenge the incumbent's estimates in the context of section 252 interconnection agreement disputes."[69] State

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[64] The two wire centers in Louisville, Kentucky at issue are LSVLKYAP (Armory Place) and LSVLKYBR (Bardstown Road).

[65] AT&T Kentucky Brief at 76.

[66] CompSouth Brief at 18.

[67] Id.

[68] Id. at 19; however, AT&T Kentucky does present an alternative. See AT&T Kentucky Brief at 77.

[69] TRRO at ¶ 100.

commissions have the authority to resolve disputes arising under 47 U.S.C. § 252 agreements. Therefore, state commissions have the authority to determine whether an ILEC's estimates are accurate. CompSouth's proposed method of having AT&T Kentucky file its ARMIS data and allowing time for the CLECs to review it, with a scheduled date for a Commission decision, is reasonable. The Commission will begin by allowing AT&T Kentucky to designate future wire centers on an annual basis. The Commission will monitor how this process works and will make necessary and appropriate changes as needed.

> Issue 9: What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's embedded bases of switching, high-capacity loops, and dedicated transport?

To support its views, AT&T Kentucky relied on an unreported District Court opinion in the appeal of the Georgia Commission's order, which stated, "The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ted]' to place new orders."[70] AT&T Kentucky argued that moving a customer's service to a different location would require the placement of a new order for service and that, therefore, the transition period would not apply.[71]

AT&T Kentucky stated that changes to existing orders did not require a new service order and that it would process orders accordingly to modify an existing customer's service by adding or removing vertical features during the transition period.[72]

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[70] AT&T Kentucky Brief at 78, quoting, BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission, April 5, 2005, at 4.

[71] AT&T Kentucky Brief at 78.

[72] Id. at 79.

Pursuant to the TRRO, CLECs could self-certify that they were entitled to unbundled access to a requested element, and AT&T Kentucky must have processed this request. AT&T Kentucky could have challenged the order only after the fact. AT&T Kentucky asserted that, at the conclusion of this proceeding, the Commission should confirm the Kentucky wire centers that satisfy the FCC's impairment tests.[73] Doing so will eliminate the situation in which a CLEC would self-certify.

With regard to high-capacity loops and dedicated transport, CompSouth identified the only issue as being whether moves of de-listed UNE loops or dedicated transport on behalf of a customer that was served by the CLEC as of March 11, 2005 should have been permitted.[74] The TRRO stated that the transition plans should have applied only to the embedded customer base, and it did not refer to embedded lines or circuits.[75]

With regard to UNE-P, CompSouth argued that AT&T Kentucky should have been obligated to continue to process adds, changes, and moves for CLECs at the request of customers that were served through UNE-P arrangements as of March 11, 2005.[76] Again, the transition period applied to the customer base, not to the circuits or lines.[77]

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[73] Id.

[74] CompSouth Brief at 51.

[75] Id.

[76] Id.

[77] Id.

The Commission concludes that a CLEC should not have used facilities that had already been provided to serve existing customers who move to a new location and that the transition period did not apply to moving, adding, or changing orders. To have done so would have required a new order. The United States District Court for the Eastern District of Kentucky has prohibited such action.[78] The Court determined that the TRRO mandated a ban on orders for new unbundled switching and certain loops and transport, and that ban was effective as of the date of the TRRO. The Commission is bound by the District Court's interpretation.

> Issue 10: What rates, terms, and conditions should govern the transition of existing network elements that AT&T Kentucky is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements or other services?

AT&T Kentucky incorporated its arguments from Issue 2 into its position for rates, terms, and conditions for elements de-listed by the TRRO and which would have had a designated transition period.[79] CLECs had 2 years' notice of the TRO decision that certain elements no longer needed to be unbundled. Therefore, with the exception of entrance facilities, AT&T Kentucky was authorized to disconnect or convert such arrangements upon 30 days' written notice absent a CLEC order to disconnect or convert such arrangements.[80]

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[78] BellSouth Telecommunications, Inc. v. Cinergy Communications Company, 2006 WL 695424 (E.D. Ky. 2006).

[79] AT&T Kentucky Brief at 80.

[80] Id.

CompSouth incorporated into its position on this issue its positions on both Issues 2 and 8.[81] The FCC did not provide a specific transition plan for every type of UNE. Such UNEs were not covered by the transition plan covered in Issue 2.[82] For example, DS1 "enterprise" unbundled switching and OCN loops and transport are UNEs that AT&T Kentucky was no longer obligated to provide pursuant to 47 U.S.C. § 251(c)(3). AT&T Kentucky had proposed a 30-day period for the submission of orders to convert UNEs, or AT&T Kentucky could have disconnected or converted.[83]

CompSouth argued that although CLECs knew since the TRO that certain UNEs were de-listed, no agreement had been reached as to how the transitions or conversions were to have been completed.[84] The CLECs argued for at least 30 days from receipt of notice to submit orders to convert or disconnect such circuits or dispute the identification of circuits.[85]

CompSouth incorporated its arguments on Issues 2, 4, and 5 into this issue. The FCC did not adopt a default transition process for UNEs that were found to have met the non-impairment standard after March 11, 2005. Therefore, the parties should have agreed on a transition period. The 90-day Subsequent Transition Period proposed by AT&T Kentucky was not adequate.[86]

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[81] CompSouth Brief at 52.

[82] Id.

[83] Id. at 52-53.

[84] Id. at 53.

[85] Id.

[86] Id. at 54-55.

In order to have completed the work necessary to identify and create a spreadsheet to convert the de-listed circuits to alternative circuits, CompSouth proposed a maximum of 12 months and minimum of 180 days for the Subsequent Transition Period. CompSouth argued that AT&T Kentucky should have been obligated to provide written notice to the CLECs' point of contacts contained in the notice provision of the interconnection agreement and that merely posting the notice on the Web site was unacceptable.[87]

To the extent that resolution of this issue involves other issues in this proceeding, the Commission adopts the conclusions it reached on those other issues. The Commission finds that a 30-day transition period for UNE-P and a 60-day transition period for everything else is reasonable. While it is true that CLECs were on notice for 2 years, there had been no agreement on how the parties would have moved forward.

The Subsequent Transition Plan applied to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards. The Commission finds that a 120-day Subsequent Transition Period was reasonable, which is a compromise between the parties' positions on this issue.

Finally, the Commission finds that AT&T Kentucky should have provided actual written notice to the point of contact in the parties' interconnection agreements. If a party did not have a point of contact identified in the agreement, then posting constructive notice on the Web site is deemed to have been reasonable.

[87] Id. at 55-56.

Issue 11: What rates, terms, and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006?

AT&T Kentucky argued that CLECs must transition their entire embedded base by March 10, 2006. AT&T Kentucky requested that CLECs identify their embedded base UNE-P as soon as possible and submit orders to disconnect or convert the embedded base and to complete the transition process by March 10, 2006. If CLECs did not submit timely orders, then AT&T Kentucky wanted to be able to convert or disconnect the remaining embedded base lines after March 10, 2006.[88]

For high-capacity loops, AT&T Kentucky asked that the CLECs submit spreadsheets by December 9, 2005, or as soon as possible, to identify and designate transition plans for their embedded base of these de-listed UNEs. If the CLEC failed to submit such a plan, then AT&T Kentucky wanted to identify such elements and transition such circuits to corresponding AT&T Kentucky tariffed services no later than March 10, 2006 and to have charged applicable disconnection charges and tariffed non-recurring charges.[89]

CompSouth argued that CLECs had a right to pay no more than the FCC's transition rates for Section 251 network elements subject to non-impairment findings. The process for transitioning should not have resulted in denial of transition pricing for CLECs during the FCC's transition period.[90]

[88] AT&T Kentucky Brief at 81.

[89] Id. at 82.

[90] CompSouth Brief at 56.

CompSouth argued that if a CLEC had not converted a circuit "de-listed" under 47 U.S.C. § 251 by the end of the transition period, the 47 U.S.C. § 271 checklist element rate should apply because (1) all TRRO de-listed UNEs must be provided by AT&T Kentucky pursuant to 47 U.S.C. § 271, and (2) 47 U.S.C. § 271 terms and conditions will be similar to those of the de-listed UNEs.[91]

This issue has been resolved for the most part by other issues the Commission addressed in this docket. The Commission has already concluded that the CLECs had until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that were not completed until after March 11, 2006. For conversions that were completed prior to March 10, 2006, the Commission orders AT&T Kentucky to true-up the difference. The Commission has decided to set rates based on market pricing. Therefore, market rates are the CLECs' suitable transition rates. For local switching, the Commission finds that AT&T Kentucky should have been able to convert CLECs' UNE-P arrangements to a market rate beginning March 11, 2006, unless parties agree to alternative arrangements. Finally, the Commission finds that AT&T Kentucky shall not take any action with regard to wire centers in dispute until such disputes are resolved by the Commission.

> Issue 32: How should the determinations made in this proceeding be incorporated into existing 47 U.S.C. § 252 interconnection agreements?

AT&T Kentucky has requested that the Commission find that this Order is binding upon all CLECs, including those who have chosen not to participate in this docket.

[91] Id.

AT&T Kentucky further argued that: the deadlines not be extended beyond March 10, 2006; the Commission give the parties no more than 45 days from the date of the Order to execute compliant amendments; and, if an amendment is not executed within the time frame, the Commission's approved language should go into effect for all CLECs that have not signed an agreement.[92]

CompSouth takes no position on whether the Order should bind non-parties. As to the impact on existing agreements, CompSouth argues that the Order should not upend existing agreements that address how such changes of law should be incorporated into existing and new 47 U.S.C. § 252 interconnection agreements, and that the Commission should not approve language on issues that were not within the scope of this proceeding.[93]

The Commission provided notice of the proceeding and the issues to be addressed in this proceeding to all CLECs. Moreover, a carrier may not avoid its obligations by choosing not to participate in a proceeding. As a condition of serving Kentucky customers, these LECs must comply with orders of this Commission. This Order applies to all CLECs registered in Kentucky. In the event that parties have entered into separate agreements with AT&T Kentucky that may impact the implementation of changes of law, the parties are to be bound by those agreements. The Commission also finds that it is appropriate to limit its consideration in this docket to those issues that are within the scope of the proceeding.

[92] AT&T Kentucky Brief at 82-83.

[93] CompSouth Brief at 109-110.

SERVICE-SPECIFIC ISSUES (ISSUES 13, 15, 16, 29, AND 31)

Issue 13: Should network elements delisted under 47 U.S.C. § 251(c)(3) be removed from the Service Quality Measurement Plan?

The plan consisting of service quality measures ("SQM"), performance measurement and analysis platform ("PMAP"), and self-effectuating enforcement measures ("SEEM") was established prior to AT&T Kentucky gaining permission to provide in-region interLATA service pursuant to 47 U.S.C. § 271. The FCC required this plan as a condition of entry into the in-region interLATA service market for BOCs to show they had adequate operational support systems ("OSS").

AT&T Kentucky maintained that elements that are no longer required to be unbundled pursuant to 47 U.S.C. § 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan. AT&T Kentucky also opined that the competitive marketplace should determine any penalties associated with failure to provide UNEs which are no longer required to be unbundled pursuant to 47 U.S.C. § 251(c)(3). AT&T Kentucky also stated that the Georgia Public Service Commission adopted a stipulation agreement that would remove all DS0 wholesale platform circuits provided by AT&T Kentucky to a CLEC pursuant to a commercial agreement from the Tier 1 and Tier 2 payments starting with the May 2005 data and that this would occur region-wide.[94]

CompSouth did not believe that de-listed elements should have been removed from the SQM/PMAP/SEEM plan because the de-listed elements are still required to be provided pursuant to 47 U.S.C. § 271. CompSouth asserts that the SQM/PMAP/SEEM plan was established to measure compliance with 47 U.S.C. § 271 obligations.

[94] AT&T Kentucky Brief at 84.

As the Commission has established herein, AT&T Kentucky is still obligated to provide the de-listed elements pursuant to KRS 278.030 and KRS 278.170 to ensure adequate and efficient service to its CLEC customers. Therefore, AT&T Kentucky must continue to include the de-listed elements in its SQM/PMAP/SEEM plan.

> Issue 15: Is AT&T Kentucky required to provide conversion of special access circuits to UNE pricing, and, if so, what rates, terms, and conditions should apply?

The parties agree that conversions of special access circuits to UNE pricing should be allowed; however, they disagree on the rates, terms, and conditions. AT&T Kentucky proposed that for the first single DS1 or lower-capacity loop conversion on a local service request ("LSR"), the rate should have been $24.96 and $3.52 per loop for additional conversions on that LSR. For a project consisting of 15 or more loops submitted on a single spreadsheet, the rate should have been $26.44 for the first loop and $5.01 for each additional loop on the same LSR. For DS3 and higher-capacity loops and for interoffice transport conversions, the rate should have been $40.26 for the first single conversion on the LSR and $13.51 per loop for additional single conversions on that LSR. For a project consisting of 15 or more such elements in a state submitted on a single spreadsheet, AT&T Kentucky proposed $64.05 for the first loop and $25.52 for each additional loop conversion on the same spreadsheet. The Commission-ordered rate of $8.98 should apply for EEL conversions until new rates are issued. If physical changes to the circuit are required, the activity should not be considered a conversion, and the full non-recurring and installation charges should apply.

CompSouth proposed that the applicable non-recurring "switch-as-is" rates for conversions should apply. CompSouth's proposal also provided that a conversion

should be considered termination for purposes of any volume or term commitments or grandfathered arrangements between a CLEC and AT&T Kentucky, and that any change from a wholesale service to a network element that required a physical rearrangement would not be considered to be a conversion for purposes of the interconnection agreement. CompSouth also opposed the proposed AT&T Kentucky rates because AT&T Kentucky has not submitted a cost study to support the rates in this proceeding. CompSouth would like the opportunity to review the cost studies before any new rates are approved for conversions.

The Commission finds that AT&T Kentucky should submit cost studies of the proposed rates for Commission review. They should be submitted by petition in a new proceeding. AT&T Kentucky should also inform the Commission of any negotiated rates that have been established since the submission of its testimony in this case. All affected parties will have an opportunity to review the proposed rates once AT&T Kentucky files them.

> Issue 16: What are the appropriate rates, terms, conditions, and effective dates, if any, for conversion requests pending on the effective date of the TRRO?

The parties dispute the date on which the new terms of the TRO decisions were to have been effective in the interconnection agreements. AT&T Kentucky maintained that the conversion rights, rates, terms, and conditions are not retroactive and become effective once an interconnection agreement is amended. CompSouth maintained that once the conversion language reflecting the TRO is included in the interconnection agreement, the parties should treat conversions pending as of the 2003 effective date of the TRO.

The Commission finds that the contract language as it existed in a CLEC's interconnection agreement with AT&T Kentucky's predecessor at the effective date of the TRO governs the appropriate rates, terms, conditions, and effective dates for conversion requests that were pending at that time. Moreover, conversion rights, rates, terms, and conditions should not be implemented retroactively but should become effective once an interconnection agreement is amended.[95]

> Issue 29: What is the appropriate interconnection agreement language to implement AT&T Kentucky's EEL audit rights under the TRO?

AT&T Kentucky and the Commission previously have litigated AT&T Kentucky's audit rights.[96] On November 1, 2005, the United States District Court for the Eastern District of Kentucky entered its Memorandum Opinion and Order. The Court upheld the Commission's determination that AT&T Kentucky had complied with its interconnection agreement regarding audit conditions, that AT&T Kentucky had demonstrated its concern by asserting that AT&T Kentucky remained the local service provider for 15 of NuVox's EELs, and that AT&T Kentucky had professed by affidavit the independence of its chosen auditor. The Court further determined that NuVox could point to no violation of its agreement or any FCC order to support its contention that the Commission should have required AT&T Kentucky to provide more evidence of its concern and should have undertaken greater efforts to ensure that AT&T Kentucky's auditor was independent.

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[95] TRO at ¶ 589.

[96] NuVox Communications, Inc. v. BellSouth Telecommunications, Inc.; Kentucky Public Service Commission; Mark David Goss, in his official capacity as Chairman of the Kentucky Commission; and W. Gregory Coker, in his official capacity as Commissioner of the Kentucky Commission, Civil Action No. 05-cv-41-JMH, United States District Court, Eastern District of Kentucky.

Based on the determinations of the Court, the Commission would have decided that AT&T Kentucky need only state that it has concern and give reasons why it has concern. It would have been unnecessary for AT&T Kentucky to provide actual documentation of that concern prior to initiating an audit. The CLEC would have been able to object to the audit after it had been performed but would not have been able to prevent its initiation once AT&T Kentucky asserted that it had adequate documentation to support an audit. AT&T Kentucky would have had a right to audit EELs to verify a CLEC's compliance with the significant local usage requirements. The audit would have been limited to those circuits over which AT&T Kentucky initially raised concern. The findings of the audit, if disputed, would have been addressed by the Commission.

However, these decisions appear to have been supplanted by a term in the AT&T/BellSouth merger agreement. BellSouth and AT&T agreed to commit to certain conditions for approval of the merger; these commitments were effective on December 31, 2006, the merger closing date. Contained in Appendix F to the FCC's March 26, 2007 merger order is a commitment that reads as follows:

> 3. AT&T/BellSouth shall cease all ongoing or threatened audits of compliance with the Commission's EELs eligibility criteria (as set forth in the Supplemental Order Clarification's significant local use requirement and related safe harbors, and the Triennial Review Order's high capacity EEL eligibility criteria), and shall not initiate any new EELs audits.[97]

This commitment by AT&T/BellSouth renders Issue 29 moot. The parties should have no difficulty agreeing on any language that should be necessary in their interconnection agreements related to AT&T Kentucky's right to audit EELs.

[97] In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, FCC 06-189, WC Docket No. 06-74 (rel. Mar. 26, 2007) Appendix F.

Issue 31: What language should be used to incorporate the FCC'S ISP Remand Core Forbearance Order into interconnection agreements?

Neither AT&T Kentucky nor CompSouth has proposed specific contract language regarding implementation of the FCC's ISP Core Forbearance Order.[98] This order regards removing certain restrictions on competitive carriers' right to receive reciprocal compensation, especially regarding "new markets" and "growth cap" restrictions imposed in 2001.

AT&T Kentucky states that there are choices available in this FCC order which allow CLECs to elect different rate structures and, thus, the imposition of uniform contract language on all carriers would be inappropriate.[99] AT&T Kentucky recommends that it resolve this issue on a carrier-by-carrier basis.[100]

CompSouth states that the guiding principle in addressing this issue should be that all references to "new markets" and "growth cap" restrictions be eliminated from all interconnection agreements.[101]

The Commission finds that references to "new markets" and "growth cap" restrictions should be removed from interconnection agreements and that any additional issues should be negotiated on a carrier-by-carrier basis.

[98] CC Docket No. 99-68, In the Matter of Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001).

[99] AT&T Kentucky direct testimony (Tipton) at 70 and 71.

[100] AT&T Kentucky Brief at 91.

[101] CompSouth Brief at 108.

NETWORK ISSUES (ISSUES 6, 19, 23, 24, 26, 27, AND 28)

Issue 6: Are HDSL[102]-capable copper loops the equivalent of DS1[103] loops for the purpose of evaluating impairment?

CompSouth argued that DS1 loops are not equivalent to HDSL-capable loops for the purpose of evaluating impairment, relying on the FCC's unbundling rule for DS1 loops that clearly describes a DS1 loop as "a digital local loop having a total digital signal speed of 1.544 mega[bit]s[104] per second"[105] and, therefore, CompSouth concluded, such a loop must transmit signals at 1.544 mbps. CompSouth maintains that because the equipment necessary to obtain 1.544 mbps is not included with an unbundled HDSL-capable copper loop, the loop cannot, and should not, be considered a DS1 loop.

Conversely, AT&T Kentucky asserted that the FCC's definition of DS1 loops specifically includes "two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services."[106] AT&T Kentucky argued that, based on this portion of the definition, an HDSL-capable copper loop is a DS1 loop.

[102] High-bit rate Digital Subscriber Line.

[103] Digital Signal Level 1.

[104] The FCC, at 47 C.F.R. § 51.319(a)(4)(i), mistakenly uses the term "megabytes" rather than "megabits" to describe the industry standard signal level for DS1 of 1.544 megabits per second ("mbps").

[105] 47 C.F.R. § 51.319(a)(4)(i).

[106] Id.

CompSouth advised that the Commission need not consider how to count business lines for the purpose of determining impairment because neither party is currently contesting the availability of DS1 loops as UNEs. AT&T Kentucky apparently agreed and is not seeking relief from the obligation to provide DS1 loops. However, AT&T Kentucky maintains that because HDSL-capable loops are DS1 loops, they should be counted as 24 business lines when evaluating subsequent wire centers.

The Commission finds that the difference between an unbundled HDSL-capable copper loop and a DS1 loop, although subtle, is significant. A DS1 loop may consist of a variety of loop transmission technologies along with the electronic equipment needed to achieve a 1.544 mbps digital signal speed; whereas, an HDSL-capable loop is a raw copper pair meeting the necessary specifications to support an HDSL-compatible information stream and specifically excludes any consideration of the electronics required to provide service to end-users. This distinction is more clearly explained in the CLEC information packages provided by AT&T Kentucky to CLECs. AT&T Kentucky explains that for an HDSL-compatible loop it does not provide "Enhanced Electronics" "or any other electronics with the unbundled ADSL or HDSL Compatible Loops."[107] Moreover, "BellSouth does not guarantee a particular bit rate associated with these loops" because "[t]he bit rate speed is dependent upon the CLEC's equipment."[108] AT&T Kentucky states that an unbundled DS1 loop "enables full duplex 1.544 Mbps

[107] BellSouth Unbundled ADSL/HDSL Compatible Loop, CLEC Information Package, Version 5, dated May 31, 2006. See page 5, Section 5, Service Capabilities. Available here: http://wholesale.att.com/reference_library/guides/unedocs/adsl_hdsl.doc

[108] Id. See page 6, Section 6.2, Technical Requirements – HDSL Compatible Loop.

digital transmission" and "will include any repeaters or other electronics to provide this loop type."[109] AT&T Kentucky further advises CLECs that a "DS1 Loop may be provisioned over a variety of loop transmission technologies including copper, HDSL-based technology or fiber optic transport systems."[110] Based on the distinctions promoted by AT&T Kentucky in its own product descriptions, it is clear to the Commission that it would be inappropriate to consider any and all unbundled HDSL-capable/compatible loops to be equivalent to unbundled DS1 loops for the purpose of evaluating impairment. Therefore, the Commission finds that unbundled HDSL-capable/compatible loops shall be counted the same as other unbundled copper loops and not as unbundled DS1 loops.

> Issue 19: What is the appropriate interconnection agreement language to implement AT&T Kentucky's obligations regarding line splitting?

The parties disagree about whether or not an unbundled loop in a line-splitting arrangement may be commingled with local switching provided pursuant to 47 U.S.C. § 271. CompSouth relies on the Commission's determination of Issue 4 to resolve this matter, while AT&T Kentucky argues that allowing commingling of line splitting on an unbundled loop with local switching provided pursuant to 47 U.S.C. § 271 results in a UNE-P arrangement which has been removed as an ILEC Section 251 obligation. AT&T Kentucky further argues that it should not be obligated to provide splitters

[109] BellSouth Unbundled DS1 Loop, CLEC Information Package, Version 5, dated April 22, 2005. See page 6, Section 5 – Service Description
Available here:
http://wholesale.att.com/reference_library/guides/unedocs/unb_dsl1_loop.pdf

[110] Id. See page 7, Section 7 – Technical Requirements.

between CLECs utilizing a line-splitting arrangement and believes, instead, that splitters should be provided by CLECs. Finally, the parties disagree over what OSS modifications are "necessary" to support the provisioning of line-splitting arrangements. AT&T Kentucky maintains that nothing is required of it in a line-splitting arrangement and, therefore, no OSS modifications are needed.

The Commission finds, consistent with its determination in Issue 4, that commingling of any wholesale service, including local switching provided pursuant to 47 U.S.C. § 271, with a Section 251 element is allowed. The Commission notes that the FCC's rules allow the ILEC to "maintain control over the loop and splitter equipment" and require ILECs to provide compatible "loop **and splitter** functionality" to requesting telecommunications carriers.[111] Based on this FCC requirement, the Commission further finds that AT&T Kentucky shall provide the splitter functionality upon request and consistent with the FCC's rules. Furthermore, AT&T Kentucky shall establish the necessary processes in its OSS to facilitate a CLEC's ability to engage in such line-splitting arrangements.

> Issue 23: What is the appropriate language to implement AT&T Kentucky's obligation to offer unbundled access to newly deployed or "greenfield" fiber loops, including fiber loops deployed to the minimum point of entry?

The parties fundamentally disagree on the appropriate interpretation of the FCC's rules and guiding principles regarding the availability of unbundled access to loops where fiber facilities are the first and only telecommunications facilities to be deployed by the ILEC. In these new build or "greenfield" situations, the parties agree that the

[111] 47 C.F.R. § 51.319(a)(1)(v) (emphasis added).

FCC has prescribed rules limiting access to the fiber facilities; however, the parties dispute the availability of DS1 and DS3 loops provisioned over the fiber facilities in the "enterprise market."

AT&T Kentucky claims that CompSouth ignores the clear and unambiguous language in the FCC's rules that specifically relieves an ILEC of the requirement to "provide nondiscriminatory access to a fiber-to-the-home ["FTTH"] loop or a fiber-to-the-curb ["FTTC"] loop on an unbundled basis" in new build situations.[112] AT&T Kentucky contends that if the FCC had intended to limit unbundling relief to "mass market" loops, it would have specifically stated so in its codified rules.

CompSouth asserts that the FCC clearly intended to limit relief of ILEC obligations to provide unbundled access in new build situations to "mass market" loops and not "enterprise" loops. CompSouth cites Section VI.A.4.a.(v) of the TRO and the associated heading that reads, "Specific Unbundling Requirements for Mass Market Loops." CompSouth argues that since the FTTH/FTTC rules relied upon by AT&T Kentucky are derived from this section of the TRO, the availability of DS1 and/or DS3 loops must adhere to the FCC's overarching rationale and rulings regarding the "enterprise market" as contained in Section VI.A.4.b of the TRO.[113] CompSouth provides numerous references to the FCC's rulings where it makes clear distinctions

[112] 47 C.F.R. § 51.319(a)(3)(ii).

[113] Although some aspects of the TRO were remanded by the D.C. Circuit and reconsidered in the TRRO, it is significant that the FCC's determinations regarding FTTH loops were upheld. (See TRRO at 12.)

between the unbundling requirements of the "mass market" and the "enterprise market" when considering impairment.[114]

The Commission notes the FCC's guidance when it first began its consideration of unbundling requirements for individual network elements, including loops. Specifically, the FCC stated that it focused "on specific market and customer characteristics as informed by the various loop types and capacities that typically serve these markets and customers to undertake the granular inquiry necessary to determine where loop impairment exists."[115] The FCC went on to explain that it conducted "separate loop impairment analyses based on loop types and capacity levels, which also consider two relevant customer classes – the mass market and the enterprise market."[116]

The absence of specific market distinctions relating to the unbundling of FTTH/FTTC loops in the FCC's formal rules is neither conclusive nor dispositive of CompSouth's assertion that ILECs remain obligated to provide DS1/DS3 loops where there is a finding of impairment. Moreover, neither party contends that the full capacity and capability of a FTTH/FTTC loop must be unbundled pursuant to the general requirements for local loops in 47 C.F.R. § 51.319(a).[117] Rather, CompSouth argues

[114] CompSouth Brief at 87-88.

[115] TRO at 197.

[116] Id.

[117] 47 C.F.R. § 51.319(a) defines the local loop network element as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises" including "all features, functions, and capabilities of such transmission facility" and "all electronics, optronics, and intermediate devices."

that in those circumstances where impairment exists, ILECs are obligated to unbundle DS1 or DS3 loops pursuant to 47 C.F.R. § 51.319(a)(4) and (5), regardless of the type of facilities deployed by the ILEC to provide service. The Commission agrees. The FCC's discussion and organization in the TRO clearly distinguish between "mass market" and "enterprise market" unbundling requirements. The Commission finds that AT&T Kentucky is obligated to unbundle DS1/DS3 loops consistent with 47 C.F.R. § 51.319(a)(4) and (5), regardless of the loop medium employed.

> Issue 28: What is the appropriate language to address access to overbuild deployments of fiber-to-the-home and fiber-to-the-curb facilities?

The parties seem to disagree about the appropriate procedures and provisioning methods for accessing copper facilities that remain after the deployment of fiber facilities to an area. In these "overbuild" situations, the ILEC must maintain and provide non-discriminatory access to the copper loop on an unbundled basis. However, where the ILEC does not have to "incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access. . .in which case the incumbent LEC shall restore the facility to serviceable condition upon request."[118]

AT&T Kentucky's proposed language appears to be consistent with the FCC provisions except where AT&T Kentucky has limited its obligation to restore the copper loop to serviceable condition only "if technically feasible." The Commission reminds AT&T Kentucky of its burden to prove that access to an unbundled element is not technically feasible. AT&T Kentucky must show the Commission, prior to denying

[118] 47 C.F.R. § 51.319(3)(iii)(B).

access, that a request for interconnection is not technically feasible, and such a determination cannot be made unilaterally. Therefore, the Commission finds that AT&T Kentucky shall remove the clause "if technically feasible" from its proposed language. As modified, the language will appropriately describe arrangements for access to copper loops in overbuild situations.

> Issue 24: What is the appropriate interconnection agreement language to implement AT&T Kentucky's obligation to provide unbundled access to hybrid loops?

Similar to Issue 8, this issue concerns the availability of "hybrid loops" pursuant to 47 U.S.C. § 271 and whether or not such arrangements should be included in interconnection agreements. The Commission reiterates that it maintains jurisdiction regarding arrangements between and among LECs.[119] Also, such arrangements relating to ongoing obligations about access to interconnection and network elements must be filed with the Commission as interconnection agreements. As discussed infra, these non-Section 251 arrangements should be priced at market rates.

To the extent that a dispute remains regarding the unbundling requirements for hybrid loops where there is impairment, the Commission finds that 47 C.F.R. § 51.319(a)(2) shall be incorporated into the agreement in its entirety.

[119] KRS 278.542(1)(b).

ROUTINE NETWORK MODIFICATION ISSUES (ISSUES 26 AND 27)

> Issues 26 and 27: What is the appropriate interconnection agreement language to implement AT&T Kentucky's obligation to provide routine network modifications? What is the appropriate process for establishing a rate to allow for the cost of routine network modification?

The parties disagree over how line conditioning should be defined, what AT&T Kentucky's obligations are with respect to it, whether line conditioning should be limited to copper loops of 18,000 feet or less, and under what terms and rates AT&T Kentucky should be required to perform line conditioning to remove bridged taps.

The CLECs assert that line conditioning should be defined by 47 C.F.R. § 51.319(a)(iii)(A), arguing that line conditioning is a 47 U.S.C. § 251(c)(3) obligation which was expanded, not eliminated, by the TRO. The TRO states that "loop conditioning is intrinsically linked to the local loop and included within the definition of loop network element."[120] Moreover, the FCC indicates that "line conditioning does not constitute the creation of a superior network."[121] Instead, loop conditioning enables a requesting carrier to use the basic loop.[122]

AT&T Kentucky, on the other hand, asserts that it is obligated to perform line conditioning only on the same terms and conditions that it provides to its own customer. Quoting the TRO at ¶ 643, "incumbent LECs must make the routine adjustments to

[120] TRO at ¶ 643.

[121] Id.

[122] UNE Remand Order, 15 CC Record at 3775, ¶ 173.

unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves."[123]

The Commission previously found that line conditioning is a routine network modification and does not result in the creation of a superior network.[124] Therefore, AT&T Kentucky must provide line conditioning when requested by the CLECs as specified in 47 C.F.R. § 51.319(a).

Similarly, AT&T Kentucky asks that the interconnection agreements limit the availability of line conditioning to copper loops of 18,000 feet or less. AT&T Kentucky argues that it has no obligation to remove load coils in excess of 18,000 feet at TELRIC for CLECs because AT&T Kentucky does not remove load coils on such long loops for its own customers. AT&T Kentucky asserts that, if it is requested to remove load coils on loops in excess of 18,000 feet, it should do so pursuant to special construction charges contained in its tariff.

Despite indicating that it does not remove load coils on loops in excess of 18,000 feet, AT&T Kentucky routinely removes load coils on such loops in order to provide T1 circuits. Based on the provision of load coil removal for such long loops for the provision of T1 circuits, and based on AT&T Kentucky's assertion that it seeks to provide its services at parity, the Commission finds that, when requested by a CLEC to do so, AT&T Kentucky should remove load coils on loops in excess of 18,000 feet at the existing TELRIC rates.

[123] AT&T Kentucky Brief at 104, quoting TRO at ¶ 643.

[124] Case No. 2004-00044, Order dated September 26, 2005 at 11.

Finally, the CLECs propose that AT&T Kentucky perform line conditioning, including the removal of bridged taps at TELRIC rates, arguing that AT&T Kentucky's attempt to assess tariffed rates for the removal of bridged taps beyond the combined level of 2,500 feet is contrary to federal law. The CLECs argue that, pursuant to 47 C.F.R. § 51.319(a)(1)(iii), AT&T Kentucky is required to perform line conditioning, including the removal of bridged taps at TELRIC rates.

AT&T Kentucky contends that the removal of bridged taps is not required to preserve non-discrimination obligations and that line conditioning at TELRIC rates, including the removal of bridged taps, is only required to the extent that AT&T Kentucky provides such functions to itself. AT&T Kentucky states that it does not routinely remove bridged taps that result in a combined level of less than 2,500 feet for its own customers, and, thus, such a request results in providing CLECs with a "superior network."

The Commission finds that the removal of bridged taps should be performed at TELRIC rates. The fact that AT&T Kentucky utilizes loops that contain greater combined levels of bridged tap links is immaterial to the capability being sought by the CLECs. TELRIC rates, by definition, recover the incremental costs plus a profit for the function being performed. Therefore, AT&T Kentucky should be adequately compensated by these rates for performing these functions. Moreover, AT&T Kentucky offered no evidence to support its position that generic special construction rates were appropriate.

In reaching its decision, the Commission focused on the parity of the functionality AT&T Kentucky performs for competitors with the functionality that AT&T Kentucky

provides itself. The Commission could not and did not attempt to compare the actual services rendered by AT&T Kentucky to its customers versus the services to be provided by competitors.[125] Whether AT&T Kentucky elects to provide line conditioning to copper loops greater than 18,000 feet for itself is not the focus.[126] Instead, it is a fact that AT&T Kentucky routinely conditions copper loops in order to provide service to end-users. It is undisputed that AT&T Kentucky routinely removes load coils and terminates bridged taps for itself. Accordingly, the Commission finds that AT&T Kentucky must provide these same functions for competitors as directed and at a reasonable level of additional compensation.

The Commission's decision also focused on whether the modification to the network sought by the CLECs "is of the sort that the ILEC routinely performs, on demand, for its own customers."[127] The Commission focused on the functionality which AT&T Kentucky provides to its customers, rather than any specific service or specific condition of that functionality. The line conditioning obligations of AT&T Kentucky were not altered by the TRO, nor were the line conditioning rules or the routine network modification rules altered by the TRRO. Thus, language proposed by CompSouth should be incorporated into the parties' interconnection agreements.

[125] Regardless of the condition of the loop, the actual services rendered will necessarily depend and vary based on the electronics utilized by a service provider and the product levels supported.

[126] AT&T Kentucky's decision to limit deployment of digital subscriber line ("DSL") technologies to loops of 18,000 feet or less (and thereby avoid the need to condition loops of longer lengths) is a business decision consistent with its product offerings but does not constitute an absolute technical limitation applicable to all carriers.

[127] USTA II at 578.

IT IS THEREFORE ORDERED that:

1. AT&T Kentucky and CompSouth members shall follow the dictates contained herein.

2. Within 45 days of the date of this Order, AT&T Kentucky shall publicly disclose by filing with the Commission all interconnection arrangements as defined herein.

3. All telecommunications carriers shall comply with the decisions contained herein, unless alternative arrangements are negotiated.

4. Within 45 days of the date of this Order, parties shall submit for Commission review any disputes regarding the implementation of pricing determination true-ups.

5. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 12th day of December, 2007.

By the Commission

Commissioner Clark Abstains.

ATTEST:

Executive Director