**COMMONWEALTH OF KENTUCY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

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| INVESTIGATION CONCERNING THE | ) | |
| PROPRIETY OF INTERLATA SERVICES | ) | |
| BY BELLSOUTH TELECOMMUNICATIONS INC., | ) | CASE NO. 2001-105 |
| PURSUANT TO THE | ) | |
| TELECOMMUNICATIONS ACT OF 1996 | ) | |

**BELLSOUTH'S REPLY TO THE RESPONSE OF CLEC'S TO BELLSOUTH'S MOTION TO MODIFY SEEM PLAN**

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files its Reply to the Response of DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), AT&T Communications of the Southern States, Inc. ("AT&T"), and MCImetro Access transmission Services, Inc. ("MCI") (collectively "CLECs") to BellSouth's Motion to Modify SEEM Plan, and states the following:

1. The CLECs' Response to BellSouth's Motion to remove the penalty for line sharing from the SEEM Plan does not dispute the fact that the FCC has found that line sharing does not meet the impairment standard set forth in Section 251(b)(2)(d), and, is, therefore, not subject to the unbundling requirements of Section 251(c)(3). It is not surprising that the CLECs would (at least implicitly) concede this point, since the clarity of the FCC's ruling really leaves them no choice. Instead, the CLECs argue that this Commission should require the continued payment of penalties relating to line sharing, even though it is no longer a UNE, based on (1) the jurisdiction of the Commission to prevent anti-competitive behavior, and (2) public policy.

These two related arguments both fail for precisely the same reason. They are both premised upon a completely fabricated view of the current competitive market that has no basis in reality.

2. The CLECs also make the illogical argument that even as the FCC removed the unbundling requirement for line sharing (pursuant to Section 251), it also determined that Section 271 applies to, in effect, counteract that removal. In other words, the CLECs argue that the FCC went to great lengths to make the explicit pronouncement that line sharing need not be unbundled, but at the same time, buried within the Triennial Review Order[1] language which should be read, by implication, to achieve precisely the opposite result. On its face, this contention is nonsensical. BellSouth will explain below in more detail why the language of the TRO does not support this contention.

3. The CLECs' argument that the imposition of penalties for line sharing is required by "Kentucky law" (Response, p2) draws no support from the actual language of any statutory provision, the Orders of this Commission, or the Orders of the FCC. The CLECs do not support their reliance on state law by citing to any statutory provision. Indeed, there is no explicit requirement in the Kentucky Statutes that a performance assessment plan be developed (with or without penalties). There is, likewise, no explicit requirement that line sharing be offered on an unbundled basis. In fact, the FCC has made it clear that if there were a state requirement to unbundle UNEs in a way that contradicts the federal scheme, it would be pre-empted. The FCC stated the following in the Triennial Review Order:

> Where appropriate, based on the record before us, we adopt uniform rules that specify the network elements that must be unbundled by incumbent LECs in all markets and the network elements that must not be unbundled, in any market, pursuant to Federal law. In doing so, we exercise our authority

[1] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* CC Docket No. 01-338, *et al.,* FCC 03-36 (rel. Aug 21, 2003) ("Triennial Review Order" or "TRO").

> pursuant to Sections 201(b) and 251(d) of the Act. As we explain in this Order, we find that setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers including small entities. We find that states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations.

(¶ 187) (emphasis added).

4. Again, the CLECs have cited to no state law that requires either unbundling of line sharing or the imposition of penalties for line sharing. Instead, the CLECs have cited to a very general statement in the Order in which this Commission found that BellSouth is 271 compliant[2] to the effect that competition should be encouraged to "thrive and grow" in Kentucky, and that BellSouth should continue to comply with Section 271.

Beyond this, the CLECs note in passing that the Commission stated in this Order that "BellSouth's line sharing policy may raise questions of competitive discrimination in the future." (Advisory Opinion, p25) (emphasis added) The CLECs, however, do not mention the fact that this statement was made in the specific context of a discussion of whether BellSouth provided line sharing at that time "in compliance with the requirements of the FCC Line Sharing Order and Line Sharing Reconsider[ation] Order". (*Id*, p24). These are, of course, the Orders in which the FCC imposed the obligation to unbundle line sharing pursuant to Section 251. This is the same obligation that the FCC explicitly removed in the TRO.[3]

Thus, there is no support in any state law, statutory or otherwise, for the notion that line sharing must be offered on an unbundled basis or subject to penalties, which means that the CLECs' "state law" argument and their policy argument are ultimately identical. Each is

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2 *Advisory Opinion*, Case No. 2001-00105, April 26, 2002, p7.

3 The FCC specifically stated that it "disagree[s] with the Commission's prior finding that competitive LECs are impaired without unbundled access to the HFPL …" (TRO, ¶ 255).

dependent upon the unsupported (and unsupportable) contention that there will necessarily be an anticompetitive result if penalties are not paid for line sharing.

5. The CLECs' approach is to imply that BellSouth is a monopolist (CLEC Reply, pp. 6-7), and to argue that BellSouth would not offer line sharing if it were not required to, and that CLECs must obtain line sharing from BellSouth on nondiscriminatory terms to compete. This argument proves nothing other than the CLECs' stubborn refusal to acknowledge the reality of the current competitive market. The plain fact is that local competition exists. After a process that spanned several years, this Commission recommended that BellSouth receive Section 271 authority, because (among other reasons) <u>the local market is open to competition</u>. The FCC specifically endorsed this decision, and also ruled that the local market is, in fact, open to competition. Moreover, perhaps more important in the context of line-sharing is the fact that BellSouth has only a fraction of the data market. As the FCC explicitly held, CLECs (and other providers) can and do compete in the data market, and do not need access to ILEC facilities to do so. Thus, the CLECs' contention that they need line sharing to compete is not only incorrect, it does not even focus on the data market, which is the more relevant market to line sharing.

6. Further, the CLECs' contention that the removal of penalties for line sharing would have an anti-competitive effect is totally unsupported. The CLECs' "public interest" argument consists of little more than a general claim that the SEEM Plan is required to prevent anti-competitive behavior. The CLECs state that " as long as BellSouth is obligated to provide parity treatment to its competitors and its competitors' customers, plans like the SEEM Plan are required to enforce that obligation." (CLEC Response, p. 7). The real issue here, however, has nothing to do with whatever general competitive benefits (if any) there may be to having a SEEM Plan. The pertinent, specific question is whether line sharing should continue to be a part

of the SEEM plan. The FCC's removal of line sharing from the list of UNEs that must be offered pursuant to Section 251 has clearly answered that question in the negative.

7. The argument that the CLECs now make--that they must obtain line sharing from BellSouth to compete in the local market--was also made by these very same CLECs to the FCC. The FCC rejected this argument in the TRO and found that competitive alternatives exist. In fact, the FCC found that there are available alternatives to line sharing based, in part, on the activity of two of the CLECs that filed the instant Response. Specifically, the FCC stated the following:

> Moreover, we can no longer find that competitive LECs are unable to obtain the HFPL from other competitive LECs through line splitting. For example, the largest nonincumbent LEC provider of xDSL service, <u>Covad</u>, recently announced plans to offer ADSL service to 'more of <u>AT&T's fifty million consumer customers'</u> through line splitting.

(¶ 259) (emphasis added).

8. The FCC also noted that the above-quoted information was contained in a press release by Covad, which stated "that this agreement will enable more of <u>AT&T's 50 million consumer customers to obtain xDSL service through Covad's network, which itself covers more than 40 million households and businesses nationwide</u>." (fn 767) (emphasis added). Given this, the FCC stated that it did "not find credible Covad's argument that the Commission's previous finding, that there are no third party alternatives to the incumbent LECs' HFPL, remains valid." (<u>Id.</u>).

9. Moreover, the FCC found that a continued unbundling requirement for line sharing could very well have an <u>anti-competitive</u> effect. As noted in BellSouth's Motion, the FCC specifically found the following:

> . . . [R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather

> than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets.

(¶ 261).

10. In sum, the CLECs' state law and policy arguments are dependent entirely upon their unsupported contention that the application of a SEEM penalty to line sharing is necessary to ensure competition. This contention completely ignores the facts that a competitive market for local services currently exists, that line sharing has been found to be competitively available (based in substantial part, upon the competitive activity of AT&T and Covad), and that the FCC has also found that continuing to require the offering of unbundled line sharing under the standards that apply under Section 251 could well have an anti-competitive effect. Clearly, the CLECs' position is at odds with any reasonable assessment of the current competitive reality.

11. In the only portion of the Response in which the CLECs make an actual (albeit incorrect) legal argument, they contend that, even in the wake of the FCC's removal of Section 251 unbundling requirements for line sharing, BellSouth still has precisely the same obligation to provide nondiscriminatory, unbundled access pursuant to Section 271. This argument, however, is misplaced because BellSouth has no obligation to offer line sharing pursuant to Section 271. Further, as stated in BellSouth's Motion, the SQM and SEEM Plans were created to ensure BellSouth's compliance with its obligations under Section 251. Thus, the CLECs are arguing for a dramatic expansion of the Plan beyond its intended purposes, which BellSouth would obviously oppose. To rule upon BellSouth's Motion, however, the Commission does not need to

consider the relation of the Plan to Section 271 because there is no requirement in Section 271 to offer unbundled line sharing.

12. It is plain to see that the CLECs' interpretation of the Section 271 discussion in the Triennial Review Order is at odds with common sense. The TRO contains no explicit statement that line sharing must be offered on an unbundled, nondiscriminatory basis pursuant to Section 271. The TRO does, however, explicitly state that line sharing is no longer required to be provided on an unbundled basis pursuant to Section 251. Thus, the CLECs argue that the FCC has, after a lengthy analysis, explicitly determined that line sharing is no longer subject to the unbundling obligation of Section 251, then reimposed precisely the same unbundling obligation through the unarticulated implication of the TRO's discussion of Section 271. It is difficult to understand why the FCC would devote several pages of analysis to the question of whether line sharing should be unbundled, answer the question in the negative, then reverse its decision in another portion of the TRO. However, if the FCC had intended this illogical result, then surely it would have stated this intention. Instead, the TRO's eighteen-paragraph-long discussion of Section 271 issues never mentions the words "line sharing," "the high frequency portion of the loop" or "HFPL." Nevertheless, the CLECs eschew a common sense reading of the TRO, and contend that the Section 271 discussion in the TRO reimposes an unbundling obligation.

13. To the contrary, while the TRO does discuss Section 271, there is nothing in the discussion from which one could reasonably conclude that the TRO ordered the provision of line sharing pursuant to Section 271. The TRO states that four of the checklist items for Section 271 compliance relate specifically to network elements that have been deemed to be UNEs subject to the standards of Section 251(c)(3). These include local transport, local switching, access to

databases and associated signaling and "local loop transmission from the central office to the customer's premise," i.e., checklist items 4, 5, 6 and 10 (¶ 650). The CLECs make the simplistic assertion that since line sharing (i.e., the high frequency portion of the loop) is part of the loop, then the checklist item four requirement to provide loops must apply. This contention, however, flies in the face of the entire analytical framework that prevails, both in the *Line Sharing Order*[4] and in the TRO.

14. The FCC decided almost four years ago in the *Line Sharing Order* to designate the high frequency loop spectrum as an unbundled network element, i.e., separate from the loop UNE. Specifically, the FCC stated in the *Line Sharing Order* that, "we conclude that access to the high frequency spectrum of a local loop meets the statutory definition of a network element and satisfies the requirements of Sections 251(d)(2) and (c)(3)." (¶ 25).[5] Despite the FCC's designation of the loop and the HFPL as separate UNEs, the CLECs argue that the TRO's discussion of loop unbundling in the context of Section 271 applies equally to the HFPL UNE. The CLECs' argument, however, cannot be reconciled with the FCC's decision to treat the loop and HFPL as separate UNEs. In other words, since the FCC ruled that the loop and the HFPL are separate UNEs, there is no basis for the CLECs to argue that a discussion of <u>loop</u> unbundling in the TRO also applies to the separate HFPL UNE, which was <u>not</u> <u>even</u> <u>mentioned</u> in this discussion.

15. Further, there are clear indications of the separate treatment of loops and HFPL throughout the TRO. The FCC found that requesting carriers of stand alone copper loops are

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[4] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 20912 (1999) ("Line Sharing Order"), *vacated and remanded*, USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[5] This decision was specifically referenced in the TRO in the context of the FCC's decision that line sharing no longer meets the impairment test (¶ 259).

generally impaired on a national basis (¶ 248), while, at the same time, finding that carriers that request HFPL are not impaired under any circumstances. Again, it makes no sense to conclude, as the CLECs do, that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two separate UNEs together without any distinction. This conclusion makes even less sense when one considers that the FCC specifically found line sharing to be competitive (i.e., not to meet the impairment test), while reaching a different conclusion regarding whole loops.

16. Finally, the CLECs attempt to support their illogical position that the FCC has treated line sharing differently for Sections 251 and 271 purposes, by contending that "a long line of FCC 271 Orders confirms the <u>continuing</u> obligation of BellSouth companies to offer unbundled access to HFPL loop transmission after Section 271 approval." (Reply, p. 4). In support of this contention, the CLECs cite to four 271 applications, all of which were <u>filed</u> before the current unbundling rules went into effect on October 2, 2003, and three of which were <u>issued</u> before that date.

17. Paradoxically, the CLECs specifically cite to the pronouncement in the TRO that "BOCs must continue to comply with any conditions required for [271] approval consistent with the changes in the law," but, at the same time, ignore the obvious intent of that language, i.e., that Section 271 requirements are based on the <u>current law</u> at any given point in time. In the portion of the TRO that the CLECs quote, the FCC went on to explain this approach as follows:

> While we believe that Section 271(d)(6) established an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that 'the conditions required for such approval' would not change with time. Absent such a reading, the Commission would be in a position where it was imposing different backsliding requirements on BOCs solely based on date of Section 271 entry, rather than based on the law that currently exists. <u>We</u>

> reject this approach as antithetical to public policy because it would require the enforcement of out-of-date or even vacated rules.

(¶ 665) (emphasis added).

Thus, the particular standards that the Commission applied for Section 271 purposes prior to the effective date of the TRO are different from the standards that will apply with the advent of the TRO.

18. Although the CLECs cite to four Section 271 applications, they base their argument on this point almost entirely on a single Section 271 application approval that occurred on October 15, 2003, thirteen days after the date that the TRO became effective.[6] The CLECs quote from this Order at great length, and argue that the references in this Order to line sharing prove definitively that, even in the aftermath of the TRO, line sharing continues to be considered as part of the loop for purposes of checklist 4 analysis. Unfortunately, the CLECs' contention reflects a less than thorough reading of the Order upon which they rely.

19. In the SBC Order, the Commission acknowledges that it adopted new unbundling rules as part of the Triennial Review on October 2, 2003 (¶ 10). The Commission then stated that for purposes of this application, it would apply the former rules. (¶ 11). Specifically:

> As the Commission found in the *Bell Atlantic New York Order*, we believe that using the network elements identified in the former unbundling rules as a standard in evaluating SBC's application, filed during the interim period between the time the rules were vacated by the DC Circuit and the effective date of the new rules, is a reasonable way to ensure that the application complies with the checklist requirements.

(Id.).

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6 *Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin,* Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, issued October 15, 2003 ("SBC Order").

Thus, the FCC applied, based in substantial part on the date the application was filed, the old unbundling rules rather than the new rules. This means that, contrary to the CLECs' assertion, the SBC case does not demonstrate that line sharing remains under the umbrella of checklist item 4, even after the TRO became effective.

20. Further, the SBC Order demonstrates that, even under the old unbundling rules, the loop and the HFPL were treated as separate elements. In the SBC Order, the FCC stated specifically that "one part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules concerning UNEs." (¶ 10). The FCC then listed seven UNEs that incumbent LECs are obliged to provide. The first UNE on the list is "local loops and subloops." The seventh UNE on this list is the "high frequency portion of the loop." (Id.). Thus, it is clear that, contrary to the CLECs' contention, the FCC has specifically separated the local loop UNE from the HFPL UNE. This separation first appeared in the *Line Sharing Order* and it continues to apply. Thus, even if Section 271 could be read to include a loop unbundling obligation, this obligation does not extend to the separate HFPL UNE.

## CONCLUSION

21. Perhaps the most important aspect of the CLECs' Response is not what it contends, but rather what it concedes, that the FCC has removed line sharing from the unbundling obligations of Section 251. This removal provides the most compelling reason that the penalty for line sharing should be removed from the SEEM Plan. The CLECs' arguments to the contrary are based on a misreading of the TRO that would render the TRO patently illogical. Beyond this, the CLECs also rely on a state law/policy argument that is only valid if one accepts the CLECs' unsupported implication that BellSouth is a monopolist, and the equally unsupported contentions that there is no competition in the local market, and that line sharing specifically is

not competitive. Both this Commission (in the case of the first two assertions) and the FCC (in the case of all three) have specifically rejected these arguments. Moreover, the FCC's finding that line sharing is competitively available was based, in part, upon the market activity of the same CLECs that now contend to the contrary. Given this, the CLECs' unsupported contention that removing the penalty for line sharing from the SEEM Plan would be anticompetitive must fail.

WHEREFORE, BellSouth respectfully requests the entry of an Order granting all relief requested in its Motion.

Respectfully submitted this 19th day of November, 2003.

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