STATE OF ALABAMA

ALABAMA PUBLIC SERVICE COMMISSION
P.O. BOX 304260
MONTGOMERY, ALABAMA 36130-4260

MOMENTUM TELECOM, INC.; ITC^DELTACOM COMMUNICATIONS, INC.; and BELLSOUTH TELECOMMUNICATIONS, INC.,

Joint Petitioners

IN RE: Petition Regardi ıg the Establishment of a Generic Pro ːeeding on Change of Law and Nondiscriminatory Pricing for UN Es.

DOCKET 29543

FINAL ORDER RESOLVING DISPUTED ISSUES

BY THE COMMISSION:

I. INTRODUCTION AND BACKGROUND

The proceedings in this cause are the result of a Joint Petition filed by Momentum Tele ːom, Inc. ("Momentum") and ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") on September 29, 2)04, and a separate Petition filed by BellSouth Telecommunications, Inc. ("BellSouth") on November 2, 2004. In general, Momentum, ITC^DeltaCom and BellSouth sought the establishment of this generic pr ːceeding for purposes of clarifying issues related to the legal and regulatory changes that resulted from th Federal Communications Commission's ("FCC's") issuance of the *Triennial Review Order*, the decision o the U.S. Court of Appeals for the D. C. Circuit in *USTA II*[1] and the FCC's *Triennial Review Remand Orde* entered in response to the *USTA II* decision.

The Commission voted to establish this cause at its meeting of December 13, 20)4. The Commission's jurisdiction over this matter is derived from the provisions of §§ 251 and 2 2 of the

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[1] Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 U nbundling 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) ("*USTA II*"), *cert. denied, NARUC v. United States Telecom Ass'n,* 125 S. Ct. 313 (2004).

[2] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Ob gations 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"*).

Telecommunications Act of 1996[3] as well as the general jurisdictional authority set forth in the *Code of Alabama* 1975, § 37-2-1(*et seq.)*.

By Joint Motion filed on May 27, 2005, the Competitive Carriers of the South, Inc. ("CompSouth")[4] and BellSouth urged the Commission to adopt the procedural schedule jointly agreed to by those parties. Said Motion was granted pursuant to Commission Order entered in this cause on June 15, 2005.

In addition to the foregoing parties, Centurytel of Alabama, LLC and Sprint Communications Company, LP petitioned to intervene in the proceedings in this cause. Both of those petitions were granted.

Pursuant to the procedural schedule established in the Commission's June 15, 2005 Order in this cause, a hearing was held on October 6, 2005. Following said hearing, both BellSouth and CompSouth submitted Post Hearing briefs that were considered by the Commission. The Commission herein addresses the specific issues that remain in dispute between the parties.

II. FINDINGS AND CONCLUSIONS REGARDING DISPUTED ISSUES

A. 271 Related Issues (Issues 8, 14, 17, 18 and 22)

1. Issue 8. Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to § 252, network elements under either state law, or pursuant to § 271 or any other federal law other than § 271?

a. The Position of BellSouth

BellSouth argues that the Commission does not have the requisite authority to require it to offer de-listed unbundled network elements ("UNEs") at rates, terms and conditions found just and

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[3] The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, Codified at 47 U.S.C. § 151 *et seq.* the "*Act*"). The frequent cites herein to §§ 251, 252 and 271 are cites to the "Act" at Title 47 of the *United States Code*

[4] CompSouth's members participating in this docket include the following companies: 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., MCImetro Access Transmission Services, LLC ("MCI"), Momentum Business Solutions, Inc., Navigator Telecommunications, LLC, Network Telephone Corp., NuVox Communications, Inc., Supra Telecom, Talk America, Trinsic Communications, Inc., and Xspedius Communications, LLC.

reasonable under § 271 or under state law. With regard to state law, BellSouth points out that no CLEC presented testimony supporting the contention that BellSouth has state law unbundling obligations that are different from federal unbundling obligations.[5] BellSouth also notes that the Commission has already recognized that it may not invoke state law to require additional unbundling beyond that required under federal law by virtue of *Code of Alabama* 1975, § 37-2(A)-4(b)(1) which precludes the Commission from imposing unbundling requirements that differ in degree or kind from those imposed by the FCC.[6]

With respect to federal law, BellSouth argues that there is no legal basis for a state commission to force BellSouth to include § 271 network elements in a § 252 interconnection agreement because § 252 limits state commission authority to the consideration of § 251 elements. BellSouth indeed argues that the FCC has exclusive authority over the enforcement of all § 271 related matters including § 271 elements.[7]

b. The Position of CompSouth

CompSouth contends that the Commission may require the inclusion of § 271 elements in interconnection agreements pursuant to state law authority, but does not request that the Commission exercise such authority.[8] CompSouth instead contends that there is ample federal authority for requiring BellSouth to include in its § 252 interconnection

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[5] BellSouth Post Hearing Brief at p. 8.
[6] *Id., citing Order Dissolving Temporary Standstill Order and Granting in Part and Denying in Part Petitions for Emergency Relief,* Docket No. 29393 (May 25, 2005), p. 18.
[7] BellSouth Post Hearing Brief at pp. 12-23.
[8] CompSouth Post Hearing Brief at p. 34.

agreements the availability and pricing of network elements under § 271.[9]

According to CompSouth, the language of § 271 itself points to the § 252 process as a means to implement BellSouth's § 271 unbundling obligations. CompSouth asserts that just as state commissions have the authority to arbitrate and approve rates for § 251 network element unbundling in the § 252 process, state commissions also have the authority to arbitrate and approve just and reasonable rates for § 271 unbundled network elements.[10] CompSouth further contends that the Commission's approval of rates, terms and conditions for § 271 checklist elements does not constitute "enforcement" of BellSouth's § 271 obligations.[11]

c. The Findings and Conclusions of the Commission

In *USTA II*, the U.S. Court of Appeals for the D.C. Circuit specifically addressed the FCC's analysis in the *TRO* as to whether the § 271 checklist items specifically at issue in this cause independently incorporate the unbundling requirements imposed by §§ 251 and 252. Indeed, the *USTA II* Court specifically upheld the FCC's determination that § § 271(c)(2)(B)(iv), (v), (vi), and (x)[12] do not incorporate the requirements of §§ 251 and 252 that are made applicable to other items in the § 271 checklist by specific reference.[13] Given the fact that the Commission's sole authority to review interconnection agreements is

[9] *Id.* at p. 35.
[10] *Id.* at pp. 35-36.
[11] *Id.* at pp. 41-44.
[12] These checklist items are commonly referred to as checklist items 4, 5, 6 and 10 – loop, transport, switching and call related databases/signaling.

derived from § 252 and the interplay between §§ 251 and 25[illegible], it does not appear that the Commission has the requisite jurisdiction to compel the inclusion of the § 271 elements in dispute in this proceeding in interconnection agreements that are submitted to the Commission for its review pursuant to § 252. Further, there appears to be no express or implied obligation on the part of BellSouth to negotiate the terms and conditions regarding § 271 elements.[14]

2. **Issue 14. What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in interconnection agreements to implement commingling (including rates)?**

a. The Position of BellSouth

BellSouth asserts that the Commission must reject out of hand any CompSouth suggestion that § 271 services must be commingled with other UNEs because the FCC alone has § 271 authority.[15] Even if the Commission had § 271 authority, BellSouth asserts that a careful review of the evolution of the FCC's commingling requirements clearly indicates that BellSouth has no obligation to commingle § 251 services with § 271 services.[16] BellSouth's argument in this regard is largely based on its contention that the FCC only requires commingling of loops or loop-transport combinations with "wholesale services" which BellSouth contends the FCC has interpreted to exclusively mean "tariffed services."[17]

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[13] *See TRO* at ¶¶ 656-654 and *USTA II* at pp. 588-590.
[14] The Commission's findings and conclusions regarding this issue moot further consideration of Issues 8(b) and 8(c) that were contingently submitted by the parties.
[15] BellSouth Post Hearing Brief at p. 43.

b. The Position of CompSouth

CompSouth asserts that the FCC authorized commingling in the *TRO* in 2003 and required Incumbent Local Exchange Carriers ("ILECs") like BellSouth to permit commingling of UNEs and UNE combinations with other wholesale facilities and services. CompSouth maintains that "wholesale services" as defined by the FCC include elements unbundled pursuant to § 271, tariffed services offered by BellSouth and resold services.[18] CompSouth urges the Commission to review the FCC orders as they were written and affirm that the commingling obligations established by the FCC do not exclude the commingling of wholesale facilities and services offered pursuant to the § 271 competitive checklist.[19]

c. Findings and Conclusions of the Commission

The TRO obligates BellSouth to, upon request, "perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under § 251(c)(3) of the Act."[20] Further, the FCC implemented 47 C.F.R. § 51.309(f) which specifies that "upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting

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[16] *Id.*
[17] *Id* at p. 47.
[18] CompSouth Post Hearing Brief at p. 70.
[19] *Id.*
[20] *See TRO* at ¶579.

telecommunications carrier has obtained at wholesale from an incumbent LEC."

Based on the foregoing and our review of the other prevailing orders of the FCC as discussed in detail in the pleadings, we herein reject BellSouth's contention that the FCC narrowly interprets "wholesale services" as being limited to "tarriffed services." We thus find that BellSouth should be required to perform the functions necessary to commingle § 251(c)(3) UNEs with other wholesale services including § 271 elements.

As recognized by the Commission previously, however, we do not dispute that the *TRO* does not require BellSouth to combine two § 271 elements.[21] Further, the Commission is not herein attempting to establish the terms and conditions for the commingling of § 271 elements as that duty is recognized herein. To do so would be counter to the § 271 jurisdictional limitations outlined in our findings and conclusions regarding Issue 8(a).

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

Issue 18 **If the answer to Issue 17 is negative, what is the appropriate language for transitioning all of the CLECs' line sharing arrangements?**

a. The Position of BellSouth

BellSouth argues that the FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004. In an effort to avoid implementing the FCC's

[21] *See Order Dissolving Part and Denying in Part Petitions on Emergency Relief*, Docket No. 29393, May 24, 2005.

conclusions in this regard, however, BellSouth asserts that CLECs contend that line sharing is a § 271 obligation pursuant to item 4 of the § 271 checklist.[22] Said checklist provision requires BellSouth to offer "local loop transmission, unbundled from local switching and other services."[23]

BellSouth represents that it meets its checklist item 4 obligations by offering access to unbundled loops and the "transmission" capability on those facilities. BellSouth argues that the high frequency portion of the loop utilized to provide line sharing does not constitute the entire "transmission path" which BellSouth is required to provide pursuant to item 4 of the § 271 checklist.[24]

BellSouth further asserts that CompSouth's § 271 claim with regard to line sharing is defeated by the FCC's decision in the *Broadband Forbearance Order*[25] and the concurring statement of FCC Chairman (then Commissioner) Martin attached thereto. Even if line sharing could be construed as a § 271 network element, BellSouth contends that the Commission has no authority to require BellSouth to include such a § 271 element in a § 252 interconnection agreement.[26]

a. The Position of CompSouth

CompSouth asserts that line sharing is indeed a § 271 checklist network element that BellSouth remains obligated to provide. Interestingly, CompSouth also cites the FCC's *Broadband Forbearance*

[22] BellSouth Post Hearing Brief at p. 51.
[23] 47 USC § 271(c)(2)(B)(iv)
[24] BellSouth Post Hearing Brief at p. 51.
[25] *Petitions for Forbearance of Verizon, SBC, Qwest and BellSouth*, W.C. Docket No. 01-338, *et seq.*, Memorandum Opinion and Order (Rel. October 27, 2004) ("*Broadband Forbearance Order*").

Order as support for its position. CompSouth particularly asserts that the statement of then Chairman Powell that was subsequently included as part of that order made it clear that line sharing is a § 271 element for which the FCC has not granted forbearance relief to BellSouth.[2]

c. The Findings and Conclusions of the Commission

In assessing this issue, it appears to the Commission that the high frequency portion of the loop is just that, a portion of the loop that does not comport to the plain reading of a "local loop" as defined by the FCC and checklist item 4 of § 271. It further appears to the Commission that although there are "dueling statements" from FCC Commissioners regarding the impact of the *Broadband Forbearance Order* on the line sharing obligations of BellSouth and the other petitioning Regional Bell Operating Companies, the legal arguments set forth in the statement of Commissioner Martin and asserted in this cause by BellSouth are the most legally sound. It further appears to the Commission that the position set forth by Commissioner Martin in his statement is most consistent with the overall competitive policies established by the FCC.

Based on the foregoing, the Commission is of the opinion that under the existing status of the law and the regulations of the FCC, BellSouth has no obligation to add new line sharing arrangements after October 1, 2004. In order to properly transition existing line sharing arrangements, we are of the opinion that those CLECs with line sharing customers should amend their interconnection agreements to incorporate both the line sharing transition plan contained in the FCC's

[26] BellSouth Post Hearing Brief at p. 52.

rules at 47 C.F.R. § 51.319(a)(1)(i) and language that requires CLECs to pay the stand-alone loop rate for line sharing arrangements added after October 1, 2004.[28]

2. **Issue 22. What is the appropriate interconnection language, if any, to address access to call related data bases?**

a. The Position of BellSouth

BellSouth asserts that since CLECs no longer have access to unbundled switching pursuant to the holdings of the FCC and the D.C. Circuit in *USTA II*, CLECs have no unbundled access to call related databases. BellSouth maintains that its legal obligation is expressly limited to providing databases only in connection with switching provided pursuant to the FCC's transition plan.[29]

BellSouth further asserts that the CompSouth reliance on § 271 to obtain access to call related databases is misplaced. BellSouth maintains that it is patently unreasonable to assume that the FCC and the D.C. Circuit eliminated unbundling requirements for databases only to have such obligations resurrected pursuant to § 271. BellSouth also points out that the Commission has no authority over § 271 elements.[30]

b. The Position of CompSouth

CompSouth asserts that checklist item 10 of § 271 requires BellSouth to provide "[n]nondiscriminatory access to databases and

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[27] CompSouth Post Hearing Brief at pp. 86-88.
[28] We must, however, note that our conclusions regarding line sharing are subject to further clarification from the FCC. Should the FCC indeed clarify with certainty that line sharing is a § 271 element for which BellSouth has not been granted forbearance relief, that decision would obviously control.
[29] BellSouth Post Hearing Brief at p. 62.
[30] *Id.* at pp. 62-63.

associated signaling necessary for call routing and completion."[31] CompSouth therefore contends that BellSouth must continue to make call related databases available at just and reasonable rates, terms and conditions[32]

c. The Findings and Conclusion of the Commission

The FCC held in the *TRO* 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 911 and E-911 databases.[33] In such instances where switching remains a UNE, however, the FCC held that competing carriers purchasing the switching UNE will have access to signaling and the call related databases that the signaling network permits carriers to access.[34] The FCC's holdings in this regard are codified at 47 C.F.R. § 51.319(b)(4)(i)(B) and have been upheld by the D.C. Circuit in the *USTA II* decision.[35] The cited FCC rule shall accordingly control with respect to this issue.[36]

B. Transitional Issues (Issues 2, 3, 4, 5, 9, 10, 11 and 32)

1. **Issue 2.** ***TRRO* Transition Plan - *What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?***

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

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[31] 47 USC § 271(c)(2)(B)(x)
[32] CompSouth Brief at p. 90.
[33] *TRO* at ¶ 5.
[34] *Id.*
[35] *See USTA II* at pp. 587-588.
[36] We note, however, that our conclusion herein is subject to any further § 271 obligations the FCC may impose in the future on Regional Bell Operating Companies regarding call related databases as pure § 271 elements.

a. The Position of BellSouth

BellSouth asserts that the Commission should impose contract language that allows for an orderly transition of switching, high capacity loops and dedicated transport and makes clear that CLECs are not entitled to UNE rates after they have migrated from § 251 UNEs to other serving arrangements. BellSouth predictably objects to the inclusion of any contract language that would allow CLECs to transition from UNEs to state regulated § 271 services due to the fact that the Commission has no authority to dictate the rates, terms and conditions of BellSouth's § 271 obligations.[37]

b. The Position of CompSouth

CompSouth argues that contrary to the assertions of BellSouth, the Commission should adopt provisions requiring an orderly transition to § 271 checklist elements that must remain available even where § 251 (c)(3) UNEs have been de-listed by the FCC.[38] Further, CompSouth asserts that the FCC has made clear that CLECs may submit their conversion orders at any time prior to March 11 and/or September 11, 2006, and thus obtain the FCC established transitional rates for the duration of the applicable transition periods established in the *TRRO*. CompSouth also asserts that BellSouth is not entitled to a ruling that all conversions must be completed by the end of the FCC prescribed transition periods.[39]

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[37] BellSouth Post Hearing Brief at pp. 63-64.
[38] CompSouth Post Hearing Brief at p. 5.

c. The Findings and Conclusions of the Commission

At this late juncture, CLECs should have already submitted conversion orders for local circuit switching and high capacity loops and transport as the transition period for such elements has expired. CLECs should now strive to identify their embedded customer base of dark fiber loops and transport and submit conversion orders prior to the expiration of the FCC established transition period of September 10, 2006. For CLECs that failed to identify their embedded base by March 10, 2006 (for local circuit switching, high capacity loops and transport) and, fail to do so by September 10, 2006 (for dark fiber loops and transport), BellSouth will be permitted to identify and convert such arrangements itself and assess CLECs the "switch as is" charge discussed below. BellSouth will further be allowed to assess such CLECs the applicable recurring resale or wholesale tariffed rate for the affected services beginning with the aforementioned conversions. Pursuant to the *TRRO* however, the "transitional rates" discussed below are (or were) applicable through March 10, 2006 (for local circuit switching, and high capacity loops and transport), and September 10, 2006 (for dark fiber loops and transport) regardless of when those arrangements were or are converted.

As established in the *TRRO,* the transitional rates are the higher of the rate the CLEC paid for the element or combination of elements in question on June 15, 2004, or, if applicable, the rate the Commission ordered for that element or combination of elements between June 16, 2004 and March 11, 2005, plus the established additive of

[39] *Id.* at pp. 5-7.

$1.00 for local circuit switching and 15% for high capacity loops and transport and dark fiber. The transition rate for DS0 level capacity switching for customers subject to the 4 or more line carve out is the rate in existing contracts. The *TRRO* transitional rates for de-listed UNEs shall be effective at the time of interconnection agreement amendments. Said transitional rates are subject to true up back to March 11, 2005.

With regard to the "switch as is" rate discussed above, it should be noted that the only specific conversion charge proposed by BellSouth that has been established by the Commission relates to Enhanced Extended Link ("EEL") conversions. Because the vast majority of the de-listed UNE conversions resulting from the *TRO* and *TRRO* involve administrative functions that are similar to those encountered in converting EELs, the Commission herein establishes that the EEL conversion rate of $5.59 shall be applied to all de-listed UNE conversions resulting from this Docket unless and until the Commission receives a duly filed petition to establish different "switch as is" rates and there is a final determination on such a petition by the Commission.[40]

It should be noted, however, that in situations where requested conversions require physical changes to circuits, such activity should not be considered a mere conversion. Accordingly, any applicable, nonrecurring and installation charges previously approved by the Commission shall apply in situations requiring physical changes to circuits.

[40] Indeed, BellSouth's current Statement of Generally Available Terms and Conditions ("SGAT") mirrors the $5.59 rate established for EEL conversions for "as is" switches on a number of elements and/or services.

2. **Issue 3.** **Modification and Implementation of Interconnection Agreement Language:** ***(a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer § 251 (c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer § 251(c) (3) obligations.***

a. The Position of BellSouth

BellSouth contends that the Commission should order all CLECs that have not yet executed a *TRO* and *TRRO* compliant amendment to their interconnection agreement to promptly execute an amendment with Commission-approved contract language following the issuance of the Commission's order in this cause. For interconnection agreements that are currently the subject of arbitrations, BellSouth asserts that the Commission should impose the change of law conclusions reached in this Docket. BellSouth asserts that the same rationale should apply to agreements that are being negotiated, but for which no arbitration has yet been filed.[41]

b. The Position of CompSouth

CompSouth asserts that unless parties have specifically agreed otherwise, the interconnection agreements necessitated by the final order of the Commission in this proceeding should be completed in a timely manner after the conclusion of this proceeding. CompSouth maintains, however, that existing interconnection agreements should only be modified regarding disputed issues that are within the scope of this proceeding. If an issue covered by an existing interconnection agreement is not in dispute in this proceeding or was not affected by the

FCC's *TRO* or *TRRO* rulings, then the current contract language addressing that issue should not be affected by the decisions in this proceeding.[42]

CompSouth agrees with BellSouth's position that issues resolved in this proceeding that are disputed in pending arbitrations should govern the resolution of the issues in question in those pending arbitrations. If an issue resolved in this proceeding is not an unresolved issue in a pending arbitration and the parties to that arbitration have agreed that they will abide by their negotiated resolutions notwithstanding the results in this case, CompSouth asserts that those resolutions should be honored. Absent such a specific agreement, CompSouth maintains that either party to the arbitration should be able to invoke the change of law provisions of the interconnection agreement once the agreement is approved by the Commission.[43]

c. The Findings and Conclusions of the Commission

The Commission concludes that existing interconnection agreements must be amended to reflect the *TRO* and *TRRO* mandated changes to BellSouth's obligation to provide unbundled network elements pursuant *to* § 251(c)(3). Amendments to new interconnection agreements pending arbitration shall also be based on the Commission's decisions in this docket unless there is a specific agreement to the contrary by the parties to such an arbitration.

3. Issue 4. High Capacity Loops and Dedicated Transport: *What is the appropriate language to implement BellSouth's obligation to provide § 251 unbundled*

[41] BellSouth Post Hearing Brief at p. 69.
[42] CompSouth Post Hearing Brief at pp. 10-11.
[43] *Id.* at p. 11.

access to high capacity loops and dedicated transport and how should the following terms be defined: (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

a. The Position of BellSouth

BellSouth recognizes its § 251 obligation to provide unbundled DS1 loops and transport and unbundled DS3 loops and transport except in instances in which the FCC's impairment tests are satisfied.[44] BellSouth contends, however, that it has no obligation to provide unbundled access to entrance facilities and asserts that the CLECs do not contend otherwise.[45]

BellSouth further contends that no party disputes that the federal rules provide the applicable definition of routes. BellSouth maintains, however, that to the extent that a CLEC orders transport from a Tier III wire center to each of two or more Tier I or Tier II wire centers, and connects those links together in another Tier III wire center, the CLEC has created a route between unimpaired wire centers which should be disallowed as gaming.[46]

With regard to the definition of the remaining terms other than a "building", BellSouth asserts that the prevailing rules of the FCC should be incorporated. BellSouth specifically asserts that CompSouth's proposed fiber based collocator language should be rejected in favor of the faithfully interpreted FCC rule found at 47 C.F.R. § 51.5.[47] BellSouth

[44] BellSouth Post Hearing Brief at p. 70 *citing* Testimony of Witness Tipton at pp. 323-330.
[45] *Id. citing* Testimony of Witness Tipton at Tr. p. 327.
[46] *Id. citing TRRO* at ¶ 106.
[47] BellSouth Post Hearing Brief at p. 71.

lastly urges the Commission to adopt its "reasonable person" definition of a building as that term is not defined in the federal rules.[48]

b. The Position of CompSouth

CompSouth asserts that the FCC rules adopted in the *TRRO* for purposes of determining nonimpairment for high capacity loops and transport are controlling. CompSouth maintains that the parties have little disagreement with respect to the definition of the two key terms analyzed in determining nonimpairment -- "business lines" and "fiber based collocators."[49] CompSouth notes, however, that there is serious dispute between the parties regarding the proper interpretations of those definitions.

CompSouth particularly disputes BellSouth's interpretation of "business line." CompSouth maintains that BellSouth interprets the FCC's business line definition found at 47 C.F.R. § 51.5 in an internally inconsistent manner which results in BellSouth improperly including UNE loops in its calculation of business lines. Perhaps more importantly, CompSouth asserts that BellSouth improperly accounts for HDSL-capable lines at their full capacity even when such facilities are not used to that extent for the provision of switched access services. CompSouth contends that BellSouth's disjointed reading of the business line definition produces dramatically inflated results which adversely impact nonimpairment determinations for CLECs.[50]

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[48] *Id.*
[49] CompSouth Post Hearing Brief at pp. 11-12.
[50] *Id.* at pp. 13-23.

CompSouth maintains that its calculation of business lines is straightforward and does not include inflated counts that improperly incorporate data and spare capacity. CompSouth alleges that its methodology is simple and assumes that the average CLEC utilization of CLEC high capacity lines equals BellSouth's average utilization. CompSouth asserts that this methodology removes inappropriate nonswitched retail lines and nonswitched capacity from the business line counts used to determine impairment.[51]

CompSouth maintains that there is general agreement among the parties regarding the correct methodology to identify fiber based collocators. Indeed, CompSouth reflects that the parties do not have an open issue involving the relevant number of fiber based collocators in Alabama.[52]

With regard to the definition of building, CompSouth urges the Commission to adopt its "reasonable telecom person" definition. CompSouth asserts that its proposed definition will ensure that the deciding factor in defining a building is that the area is served by a single point of entry for telecom services.[53]

With regard to the definition of a route, CompSouth asserts that said term is clearly defined by the FCC in 47 C.F.R. § 51.319(e). CompSouth represents, however, that it is important for the Commission to note that a route is defined in relation to the two wire centers between

[51] *Id.* at p. 24.
[52] *Id.* at p. 25.
[53] *Id.* at p. 26.

which a CLEC is requesting transport, not wire centers beyond or subtending either of those two wire centers.[54]

c. The Findings and Conclusions of the Commission

The parties apparently do not disagree that BellSouth is required to provide nondiscriminatory access to unbundled loops and transport pursuant to the findings and conclusions of the FCC in the *TRO* and *TRRO*. We note with particularity that the FCC rules provide that requesting telecommunications carriers may continue to obtain access to the following:

- Unbundled DS1 loops to any building not served by a wire center with at least 60,000 business lines and 4 or more fiber-based collocators.[55]
- Unbundled DS3 loops to any building not served by a wire center with at least 38,000 business lines and 4 or more fiber-based collocators.[56]
- A maximum of ten unbundled DS1 loops or one DS3 loop to any single building in which such loops are still subject to unbundling requirements.[57]
- DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines.[58]
- DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines.[59]

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[54] *Id.* at p. 27.
[55] *TRRO* Appendix B, p. 147.
[56] *Id.* at p. 147.
[57] *Id.* at p. 147.
[58] *Id.* at p. 152.
[59] *Id.* at p. 152.

In addition:

- Dark fiber loops are no longer subject to unbundling requirements.[60]
- CLECs are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance.[61]

With regard to the definition of the terms in question we adopt the following definitions:

(i) Business line: shall be defined pursuant to the provisions of 47 C.F.R. § 51.5. Based on the interpretations of this rule by the FCC in the *TRO* and *TRRO*, business lines shall include UNE-P business lines, UNE-L lines and HDSL-capable lines at their full capacity unless otherwise determined by the Commission in a future order.[62]
(ii) Fiber-based collocation: shall be defined pursuant to the requirements of 47 C.F.R. § 51.5. In particular, the number of fiber-based collocators in Alabama is herein determined to be consistent with the agreement reached between BellSouth and CompSouth which is attached hereto as Appendix "A."
(iii) Building: given that there is no definition of building in the FCC's rules and little or no guidance provided by the *TRO* or the *TRRO*, it appears that the most reasonable definition of a building is "a permanent physical structure including, but not limited to, the structure in which people reside, conduct business or work on a daily basis and through which there is one centralized point of entry through which all telecommunication services must transit". Accordingly, two or more physical areas served by individual points of entry through which telecommunications services must transit shall be considered separate buildings.
(iv) Route: shall be defined pursuant to the provisions of 47 C.F.R. § 51.319(e). In interpreting this definition, a route shall be determined in relation to the two wire centers for which a CLEC seeks transport.

With regard to the issues raised concerning DS3 Transport and Dark Fiber Transport, we conclude as follows:

- CLECs are not entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers.
- CLECs are not entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers.

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[60] *Id.* at p. 148.
[61] *Id.* at p. 150.
[62] *See* the Findings and Conclusions of the Commission regarding Issue 5 *Infra* for further discussion of this issue.

4. **Issue 5.** **Unimpaired Wire Centers: (a) *Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's § 251 nonimpairment criteria for high-capacity loops and transport is appropriate? (b) What procedures should be used to identify those wire centers that satisfy the FCC's § 251 nonimpairment criteria for high-capacity loops and transport? (c) What language should be included in agreements to reflect the procedures identified in (b)?***

a. The Position of BellSouth

BellSouth concedes that state commissions are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO.*[63] BellSouth accordingly asserts that the Commission must resolve the parties' disputes concerning the wire centers in Alabama that meet the FCC's impairment test so that all parties have a common understanding of wire centers from which CLECs must transition UNEs to alternative arrangements.[64]

BellSouth indicates that it seeks relief in a very limited number of wire centers. In fact, BellSouth notes that it does not seek relief anywhere in Alabama for high capacity loops nor does it seek relief for DS1 transport.

Pursuant to the tests established by the FCC, however, BellSouth asserts that it should be relieved of its unbundling obligation for DS3 transport on a single route in Alabama. BellSouth requests that the Commission order CompSouth and other CLECs to transition existing § 251 DS3 transport on that route to alternative serving arrangements and further requests that the Commission make clear that

[63] BellSouth Post Hearing Brief at p. 74 *citing USTA II* at p. 574.
[64] *Id.* at p. 74 *citing* Testimony of Witness Tipton at Tr. pp. 333-334.

CLECs have no basis to "self certify" to obtain § 251 DS3 transport in the future on that route.[65]

BellSouth maintains that the only live dispute between the parties regarding the application of the FCC's impairment test relates to the application of the FCC's rule defining business lines. BellSouth defends its interpretation of the FCC's business line definition as being entirely consistent with the FCC's interpretations in the *TRO* and *TRRO* which indicate that the FCC seeks to capture the maximum revenue opportunities in a given wire center.[66]

With regard to the identification of wire centers in the future that satisfy the FCC's impairment test, BellSouth proposes to notify CLECs of the identity of such wire centers in carrier notification letters with the nonimpairment designation becoming effective 10 business days after the posting of such carrier notification letters. Beginning on said effective date, BellSouth proposes that it no longer be obligated to offer high capacity loops and dedicated transport as UNEs in such wire centers except pursuant to the FCC established self certification process.[67]

BellSouth proposes that high capacity loop and transport UNEs in service at the time of any such Subsequent Wire Center determination of nonimpairment be made available as UNEs for 90 days after the effective date of the impairment designation. BellSouth further proposes that no later than 40 days from the effective date of the nonimpairment designation, affected CLECs must be required to submit spreadsheets

[65] *Id.* at p. 75.
[66] *Id.* at pp. 76-78 *citing* the *TRRO* at ¶¶ 22-25 and 104.
[67] *Id.* at p. 81

identifying their embedded base of UNEs to be converted to alternative Bellsouth services or to be disconnected.[68]

BellSouth recognizes that CompSouth has proposed a different means for identifying future wire centers that would resolve any disputes relating to BellSouth's Subsequent Wire Center identification within 90 days after BellSouth's initial filing. BellSouth represents that it has no conceptual objection to the Commission resolving such future disputes. BellSouth maintains, however, that it is unwilling to agree to a process that limits its right to designate future wire centers to an annual window as nothing in the federal rules supports such a limitation.[69]

b. The Position of CompSouth

CompSouth represents that there is no question that the Commission has the jurisdiction to determine whether or not BellSouth's application of the FCC's § 251 nonimpairment criteria for high capacity loops and transports is appropriate. CompSouth stresses its belief that it is more efficient for the Commission to resolve any disputes regarding nonimpairment criteria at the front end of the process rather than at the back end of a dispute.[70]

CompSouth proposes an annual procedure for the designation of nonimpaired wire centers tied to the filing of updated ARMIS 43-08 business line data filed by BellSouth.[71] CompSouth believes that these

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[68] *Id.* at pp. 81-82.
[69] *Id.*
[70] CompSouth Post Hearing Brief at pp. 27-28.
[71] *Id.*

annual filings by BellSouth are the most prudent and efficient method of making impairment assessments.[72]

c. The Findings and Conclusions of the Commission

As noted above, Compsouth and BellSouth agree that the Commission has the appropriate jurisdiction to determine whether or not BellSouth's application of the FCC's § 251 nonimpairment criteria for high-capacity loops and transports is appropriate. Further, BellSouth and the CLECs recognize that challenges concerning wire center classifications are to be resolved in the context of § 252 interconnection agreements. As the arbiter of § 252 agreements, the Commission has the flexibility to adopt conforming language for such interconnection agreements and to determine the most efficient process to resolve disputes.

With regard to the procedures that should be used to identify the wire centers that satisfy the FCC's § 251 nonimpairment criteria for high-capacity loops and transport, the parties agree that 47 C.F.R. § 51.5 controls. The parties do not agree however, regarding the interpretation of the aforementioned rule with respect to the appropriate methodology for counting business lines in a wire center.[73]

BellSouth asserts that it is proper to include all UNE loops in the number of business lines calculated in affected wire centers, including UNE loops used to service residential customers. With respect to ISDN and other digital access lines within its wire centers, BellSouth represents that it is appropriate to account for such facilities at their full

[72] *Id.*

system capacity; that is, each 64 kbps-equivalent of those facilities is to be counted as one line. As noted in more detail in the Findings and Conclusions regarding Issue 4 herein, CompSouth asserts that BellSouth's aforementioned treatment of residential UNE loops and ISDN and other digital access facilities is inconsistent with the rules of the FCC and improperly inflates the number of business lines in BellSouth's wire centers.

Unfortunately, the wording of the FCC rule in question does not provide clarity with regard to the correct interpretation between the parties. It does appear however, that the FCC, in the *TRO* and *TRRO*, made references that tend to support the more generous business line count methodology that BellSouth seeks to apply in this proceeding.[74] Additionally, there is no evidence of record that would adequately support a different determination of the applicable business line counts. We accordingly conclude that the nonimpaired wire center determination submitted by BellSouth as part of witness Tipton's prefiled testimony (Exhibit PAT-4) is hereby adopted as the current nonimpairment determination of the Commission.[75] The Commission does, however, reserve the right to further investigate the issue of business line counts in the event that there is further clarification on this issue from the FCC.

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[73] With regard to future designations of nonimpaired wire centers, see the recommendation regarding Issue 10 *Infra*.
[74] *See TRRO* at pp. 22-25 and 105.
[75] Said exhibit is attached hereto as Appendix B.

5. **Issue 9. Conditions Applicable to the Embedded Base:** ***What conditions if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?***

a. The Position of BellSouth

Although BellSouth argues that it had no obligation to accept or process orders adding new de-listed UNEs during the transition period established by the FCC for switching, high capacity loops and transport, BellSouth noted that it had abided by the Commission's prior rulings in Docket 29393, *In re: Petition of the Competitive Carriers of the South for an Emergency Declaratory Ruling* with respect to such moves, adds and changes. BellSouth does, however, urge the Commission to confirm with certainty the wire centers that satisfy the FCC's impairment test and specify that once confirmed, CLECs have no basis whatsoever to "self certify" orders for high capacity loops and dedicated transports in the confirmed wire centers.[76]

b. The Position of CompSouth

CompSouth asserts that the *TRRO* provides support for the CompSouth position that the FCC intended CLECs to be able to serve their existing customers as of March 11, 2005, by providing adds, moves or changes to the existing customers during the transition period. CompSouth notes that the FCC's intentions were confirmed by the Commission in its orders in Docket 29393.[77]

c. The Findings and Conclusions of the Commission

The Commission's prior rulings in *Docket 29393* specified the terms and conditions imposed on moves, adds and/or change orders to a CLEC's embedded customer base during the FCC established transition period for local circuit switching, and high-capacity loops and transport. Given the fact that the transition period for those elements expired on March 10, 2006, and the fact that BellSouth apparently processed moves, adds and/or change orders associated with unbundled switching, high capacity loops and dedicated transport during the transition period in accordance with the Commission's previous Orders in *Docket 29393*, this issue appears moot at this juncture.

6. **Issue 10. Transition of De-listed Network Elements To Which No Specified Transition Period Applies:** ***What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as § 251 UNEs to non-§ 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's nonimpairment standards at this time, but that meet such standards in the future?***

a. The Position of BellSouth

BellSouth asserts that the FCC removed significant unbundling obligations in the *TRO* and *TRRO* with respect to entrance facilities, enterprise DS1 level switching, OCN loops and transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching. With the exception of entrance facilities which BellSouth has agreed to allow CLECs to transition to with their embedded base and

[76] BellSouth Post Hearing Brief at pp. 83-84.

excess dedicated transport, BellSouth asserts that it should be authorized to disconnect or convert de-listed service arrangements upon 30-days' written notice absent a CLEC order to disconnect or convert such arrangements. BellSouth sought permission to impose all applicable nonrecurring charges to all default conversions and/or disconnections.[78]

b. The Position of CompSouth

For existing network elements that BellSouth is no longer required to provide as § 251 elements, and that are not covered by the FCC's *TRRO* transition rules (or an agreement to subject them to such transition rules), CompSouth asserts that BellSouth should be obligated to identify, by circuit identification numbers, the specific service agreements or services that it insists be converted to non-§ 25 network elements or other services. CompSouth maintains that CLECs should have 30 days from the receipt of such notice to submit orders to convert or disconnect the circuits in question or dispute the circuits identified on BellSouth's list. CompSouth asserts that BellSouth should not be able to disconnect a specific service arrangement or service that has been properly disputed by a CLEC.[79]

CompSouth stresses that any necessary conversions should be seamless without any customer disruptions or adverse effects to service quality. CompSouth further asserts that such conversions should be

[77] CompSouth Post Hearing Brief at pp. 58-61.
[78] BellSouth Post Hearing Brief at pp. 85-86.
[79] CompSouth Post Hearing Brief at p. 62.

accomplished with no service order, labor, disconnection, project, management or other nonrecurring charges being imposed.[80]

With respect to UNEs which meet the nonimpairment standards established by the FCC in the future, CompSouth notes that the FCC did not adopt a specific default transition process, but instead conveyed its expectation that incumbent LECs and requesting carriers would negotiate appropriate transition mechanisms through the § 252 process.[81]

CompSouth, therefore, asserts that the period and/or process by which a CLECs' subsequent "embedded base" must be transitioned and the rates for such "embedded base" during that transition must be mutually agreed to by BellSouth and the CLEC or established in an arbitration proceeding. CompSouth proposes a maximum of 12 months for subsequent transitions with a minimum of no less than 180 days. CompSouth further proposes that such conversions be subject to existing UNE conversion rates.

CompSouth further urges the Commission to require BellSouth to provide actual written notice of pending wire center nonimpairment findings through the point of contacts designated in each CLECs' interconnection agreement. CompSouth opposes the mere posting of carrier notification letters containing such information claiming that such a process is insufficient and contrary to the general terms and conditions of most interconnection agreements.[82]

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[80] BellSouth Post Hearing Brief at pp. 62-63.
[81] *Id.* at pp. 62-63, *citing TRRO* ¶¶ 142, note 399, ¶ 196, and note 519.
[82] *Id.* at pp. 64-65.

c. The Findings and Conclusions of the Commission

In the event that CLECs have de-listed *TRO* elements or arrangements in place after the effective date of a change of law amendment, we conclude that BellSouth shall be authorized to disconnect or convert such services 30 days after the delivery of a written notice identifying, by circuit identification numbers, the specific service arrangements that BellSouth insists must be converted to non-§ 251 network elements. CLECs are required to submit orders to convert or disconnect the identified circuits and/or services or submit a written dispute regarding the identification of the circuits questioned by BellSouth. If CLECs do not submit the requisite orders or dispute the services and/or circuits identified during the 30-day period, BellSouth shall be allowed to transition such circuits and/or services, at the surrogate "switch as is" rate established herein, to equivalent BellSouth tariffed services.[83] The recurring charges as established in the applicable BellSouth tariff will apply upon such conversion.

With regard to the requirements for transitions that become necessary in the future due to wire centers meeting the FCC's established nonimpairment criteria, we conclude as follows:

(1) BellSouth should identify and post on its website Subsequent Wire Centers meeting the nonimpairment criteria set forth in the *TRRO* in a carrier notification letter ("CNL").

(2) CLECs shall have 30 calendar days following the CNL to dispute a nonimpaired wire center claim by BellSouth. During the 30 days, rates for de-listed UNEs shall not change.

(3) 30 calendar days after the CNL, BellSouth shall no longer have an obligation to provide unbundling of new de-listed UNEs, as applicable, in the wire centers listed on the Subsequent Wire

[83] *See Supra* p. 14.

Center list. Should a CLEC dispute a specific nonimpaired wire center claim with a UNE order within 30 calendar days following the CNL, BellSouth will provision the CLEC's ordered UNE. BellSouth may, however, review the CLEC claim and seek dispute resolution through the Commission if needed. During the dispute resolution period, the applicable UNE rates will not change unless ordered by the Commission. Upon the Commission's resolution of the dispute, the rates will be trued up, if necessary, to the time BellSouth provisioned the CLEC's order.

(4) The Subsequent Transition Period for DS1 and DS3 loops and transport in a wire center identified on the Subsequent Wire Center List shall be 180 calendar days and begins on the 30th day following issuance of the CNL; the Subsequent Transition Period for dark fiber transport is 270 calendar days beginning on the 30th day following issuance of the CNL.

(5) The Subsequent Transition Period applies to the Subsequent Embedded Base (all de-listed UNE arrangements in service in a wire center identified on the Subsequent Wire Center List on the thirtieth day following issuance of the CNL).

(6) The transition rates to apply to the Subsequent Embedded Base throughout the Subsequent Transition Period should be the rate paid for that element at the time of the CNL posting plus 15 percent.

(7) CLECs shall be required to submit spreadsheets identifying the Subsequent Embedded Base of circuits to be disconnected or converted to other BellSouth services no later than the end of the Subsequent Transition Period (210 days following the CNL for DS1 and DS3 loops and transport and 300 days following the CNL for dark fiber transport). A projected schedule for the conversion of these affected circuits shall be negotiated between the parties.

(8) For the Subsequent Embedded Base circuits identified by the end of 210 days for DS1 and DS3 high-capacity loops and transport (300 days for dark fiber transport) following the CNL, BellSouth shall convert the applicable circuits at the "switch as is" surrogate rate established herein.[84] Any applicable recurring tariff charges will apply beginning on the first day following the end of the Subsequent Transition Period.

(9) If CLECs do not submit the spreadsheets for all of their Subsequent Embedded Base by the end of the Subsequent Transition Period, BellSouth will be permitted to identify the remaining Subsequent Embedded Base and transition the circuits to the equivalent BellSouth tariffed services subject to the surrogate "switch as is" charge established herein.[85]

(10) For the Subsequent Embedded Base circuits, the applicable recurring tariff charges should apply beginning on the first day

[84] *See Supra* p. 14.
[85] *See Supra* p. 14.

following the end of the Subsequent Transition Period whether or not the circuits have been converted.

7. **Issue 32. Binding Nature of Commission Order:** ***How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?***

a. The Position of BellSouth

BellSouth notes that the Commission provided all CLECs with liberal opportunities to intervene throughout the course of the proceedings in this matter. BellSouth accordingly urges the Commission to reaffirm that the outcome of this docket will be binding on both active parties and upon those CLECs that have been provided with notice of this proceeding, but have elected not to actively participate.

In order to ensure a smooth transition, BellSouth urges the Commission to issue an order requiring all CLECs with approved interconnection agreements in Alabama to execute promptly, but no later than 45 days from the issuance of said order, complying amendments to their interconnection agreements. BellSouth further requests that the Commission make it clear that if an amendment is not executed within the allotted timeframe, the Commission's approved language will go into effect for all CLECs in the State of Alabama regardless of whether an amendment is signed.[86]

b. The Position of CompSouth

CompSouth took no position as to whether the Commission's orders in this docket can or should bind nonparties. CompSouth urges the Commission, however, not to upend existing agreements that

[86] *Id.* at p. 88.

address how changes of law should be incorporated into existing new and § 252 interconnection agreements.[87] CompSouth additionally requests that the Commission specify that any decisions rendered in this cause apply only to the disputed issues addressed in this proceeding.[88]

c. The Findings and Conclusions of the Commission

Given the broad notice provided by the Commission in this cause and the comprehensive manner in which the issues raised in this proceeding have been addressed nationally, it appears that the findings and conclusions reached by the Commission regarding the disputed issues in this cause shall be binding not only on the parties participating in this cause, but on nonparties as well. We herein note, however, that the Commission is only mandating contract revisions concerning the disputed issues in this matter for which decisions have been rendered by the Commission.

All interconnection agreement amendments necessitated by the Commission's findings and conclusions herein shall be submitted to the Commission within 30 days of the effective date of this Order. If an amendment is not executed and submitted within the allotted timeframe, the language approved herein by the Commission will go into effect regardless of whether an amendment is signed.

C. Service-Specific Issues (Issues 13, 15, 16, 29, 31)

1. Issue 13. Performance Plan: *Should network elements de-listed under § 25[illegible](c)(3) be removed from BellSouth's SQM/PMAP/SEEM?*

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[87] CompSouth Post Hearing Brief at p. 117.
[88] *Id.*

a. The Position of BellSouth

BellSouth contends that elements it is no longer required to unbundle pursuant to § 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan as such plans were designed to ensure that BellSouth continues to provide non-discriminatory access to elements required to be unbundled under § 251(c)(3) following its approval to provide in region interlata service. Given the FCC's revised unbundling rules and the reasoning behind the FCC's relaxed requirements, BellSouth asserts that the market place should now be the source of BellSouth's performance incentives.[89]

BellSouth notes that it recently reached a stipulation in Georgia that has been endorsed by a number of CLECs including AT&T, Covad, MCI and DeltaCom, all of whom are CompSouth members. BellSouth accordingly maintains that there is no legitimate reason that de-listed UNEs should be apart of a UNE performance measurements and penalty plan. BellSouth represents that a failure by the Commission to remove such de-listed UNEs from those plans would be anti-competitive and unfair to BellSouth.[90]

b. The Position of CompSouth

CompSouth asserts that the SQM/PMAP/SEEM performance measurements were instituted to confirm BellSouth's compliance with its § 271 obligations. Because CompSouth maintains that BellSouth will still be required to provide meaningful nondiscriminatory access to switching, loop and transport network elements pursuant to the § 271 competitive

checklist, CompSouth asserts that the provisions in BellSouth's SQM/PMAP/SEEM addressing those elements should be left in place to ensure that BellSouth does not backslide with regard to its § 271 obligations.[91]

c. The Findings and Conclusions of the Commission

The issue of whether any de-listed elements that are nonetheless required to be made available pursuant to § 271 should remain subject to BellSouth's SQM/PMAP/SEEM is a question which the CLECs should raise with the FCC. Absent a contrary ruling by the FCC, all elements that are no longer required to be made available pursuant to § 251 should be removed from BellSouth's SQM/PMAP/SEEM.[92]

2. Issue 15. Conversion of Special Access Circuits to UNEs: *Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?*

a. The Position of BellSouth

BellSouth indicates that it will convert special access services to UNE pricing subject to the FCC's service eligibility requirements and limitations on high-cap EELs once a CLEC's contract incorporates the terms approved by the Commission on this issue. BellSouth also indicates a willingness to convert UNE circuits to special access services

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[89] BellSouth Post Hearing Brief at p.89.
[90] *Id.* at pp. 89-90.
[91] CompSouth Post Hearing Brief at pp. 67-69.
[92] We note that the Commission recently approved a Joint Stipulation between BellSouth and numerous CLECs regarding BellSouth's SQM/PMAP/SEEM in Docket 25835, *In Re: Petition for Approval of a Statement of Generally Available Terms and Conditions Pursuant to § 252 (f) of the Telecommunications Act of 1996 and Notification of Intention to File a Petition for In-Region Interlata Authority with the FCC Pursuant to § 271 of the Telecommunications Act of 1996*, pursuant to order entered on November 22, 2005. The stipulation approved by the Commission was represented to be regional in nature and is not with this order, automatically amended by the Commission.

subject to the stipulation that any special access to UNE conversions should be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangement.[93]

BellSouth proposes that the rate for single element conversions in Alabama be $24.89 and $26.37 for projects consisting of 15 or more loops submitted on a spreadsheet. BellSouth proposes that the Commission ordered rate of $5.59 remain applicable for EEL conversions. BellSouth further notes that conversions requiring a physical change to circuits are not really conversions and should result in the imposition of all applicable non-recurring and installation charges.[94]

b. The Position of CompSouth

CompSouth notes that BellSouth is required to provide conversion of special access circuits to UNE pricing pursuant to the straight forward procedures established by the FCC. CompSouth asserts that such conversions should be handled on a "switch as is" basis in accordance with the Total Element Long Run Incremental Cost ("TELRIC") rates established by the Commission.[95]

CompSouth agrees with BellSouth's contention that any such conversions should be considered a termination for purposes of any volume and/or term commitments and/or grandfathered status between the CLEC and BellSouth. CompSouth further agrees that any change from a wholesale service to a network element that requires a physical

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Accordingly, the disputed provisions of BellSouth's SQM/PMAP/SEEM plans will remain in place until a specific amendment is requested and approved by appropriate order in *Docket 25835*.

[93] BellSouth Post Hearing Brief at p.90.

[94] *Id.*

[95] CompSouth Post Hearing Brief at p. 87.

rearrangement should not be considered to be a conversion for purposes of interconnection agreements.[96]

CompSouth raises objections; however, to the conversion rates proposed by BellSouth noting that the FCC specifically concluded in the *TRO* that the conversion activity in question involves "largely a billing function".[97] In particular, CompSouth notes that the FCC concluded that "termination charges, reconnect and disconnect fees, or nonrecurring charges associated with establishing a service for the first time may not be applied to conversions and would violate the non-discrimination provisions of § 202 of the Communications Act".[98] CompSouth lastly maintains that the Commission should not give any final approval to any of the increased conversion rates proposed by BellSouth until the parties have had an opportunity to review and question the underlying cost studies and to present arguments regarding those studies to the Commission.[99]

c. **The Findings and Conclusions of the Commission**

BellSouth does not dispute that it is required to convert special access services to UNE pricing subject to the FCC's established service eligibility requirements. BellSouth also agrees with the CLECs that it will convert UNE circuits to special access services with such conversions to be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangement. We find the concurring positions of the parties on these issues to be appropriate and controlling.

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[96] *Id.*
[97] *Id.* at p.78 *citing TRO*, ¶¶ 587 and 588.
[98] *Id.*

The dispute between the parties regarding this issue relates to the rates for the applicable conversions. BellSouth proposed various charges for such conversions which were not supported by cost studies or any other evidence of record. The CLECs assert that BellSouth should charge applicable nonrecurring "switch as is" rates for the conversions in question. We find that the surrogate nonrecurring "switch as is" rate established herein should be applied for UNE-special access conversions.[100] That rate appears to be most consistent with the findings and conclusions of the FCC in the *TRO*. We also note that any requested conversion discussed herein that requires a physical rearrangement will not be considered a mere conversion and will thus be subject to all applicable non-recurring and installation charges.

3. **Issue 16. Pending Conversion Requests:** ***What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?***

a. The Position of BellSouth

BellSouth asserts that the contractual language contained in a CLEC's interconnection agreement at the time the *TRO* became effective governs the appropriate rates, terms and conditions and effective dates for conversion requests that were pending on the effective date of the *TRO*. BellSouth maintains that rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended. BellSouth accordingly disputes the testimony of CompSouth witness Gillan who claims that conversion language and rights must be retroactive to March 11, 2005, the effective date of the *TRRO*. BellSouth

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[99] *Id.* at p.79.

asserts that such a position is incorrect and plainly inconsistent with the *TRO* and the *TRRO*.[101] BellSouth further contends that the retroactive true-up that it seeks as a result of the elements de-listed by the *TRRO* is explicitly contained in the orders and rules of the FCC.[102]

b. The Position of CompSouth

CompSouth asserts that the rates, terms and conditions for conversions pending on the effective date of the *TRO* should be those that reflect the FCC's decisions in the *TRO*. Once conversion language reflecting the *TRO* is included in an interconnection agreement, CompSouth asserts that the parties to the agreement should treat conversions pending as of the 2003 effective date of the *TRO* based on the FCC's forward-looking conversion procedures that were established in the *TRO*.[103]

c. The Findings and Conclusions of the Commission

It is recommended that any conversions to standalone UNEs pending on the effective date of the *TRRO* be effective with the date of an amendment or interconnection agreement that addresses such conversions. Such conversions shall, however, be governed by the rates, terms and conditions that existed prior to the *TRO*. The rates, terms and conditions for all other conversions in the amended agreements that will result from this proceeding shall be retroactive to October 2, 2003, the effective date of the *TRO*.

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[100] *See* p.14 *Supra*.
[101] BellSouth Post Hearing Brief at pp. 91-92.
[102] *Id.* at pp. 92-93 citing *TRRO* notes 408, 524, 630 and 47 C.F.R., § 51.319(a)(4)(iii), § 51.319(d)(2)(iii), § 51.319(e)(2)(ii)(C).
[103] CompSouth Post Hearing Brief at p.79 *citing TRO* ¶ 589.

4. **Issue 29. Enhanced Extended Link ("EEL") Audits:** ***What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?***

a. The Position of BellSouth

BellSouth favors the adoption of EEL audit language that allows BellSouth to audit CLECs on an annual basis to determine their compliance with the qualifying service eligibility criteria. BellSouth concedes that it would be required to obtain and pay for the independent auditors utilized to conduct EEL audits pursuant to the American Institute for Certificate Public Accountants ("AICPA") standards.[104]

In the event that an auditor determines that CLECs are in noncompliance, BellSouth proposes that such CLECs be required to true-up any difference in payments, convert noncompliant circuits and make correct payments on a going-forward basis. BellSouth additionally proposes that CLECs determined by an auditor to have failed to comply with the service eligibility requirements would be required to reimburse BellSouth for the cost of the auditor.[105]

BellSouth objects to any language that would require it to show cause prior to the commencement of an audit, list acceptable auditors in interconnection agreements, or require the agreement of the parties on auditors. BellSouth considers such provisions unworkable and inefficient.[106]

b. The Position of CompSouth

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[104] BellSouth Post Hearing Brief at p. 93.
[105] *Id.*
[106] *Id.* at p. 94.

CompSouth asserts that BellSouth's rights to conduct EEL audits were intended by the FCC to be limited and based upon cause.[107] CompSouth thus asserts that BellSouth should be required to provide some basis for audits prior to their commencement. CompSouth accordingly proposes that BellSouth provide CLECs with prior notification of proposed audits and set forth therein the basis for any audit requested.[108]

CompSouth emphasizes the importance of auditor independence and maintains that the most simple and straightforward way to decide the independence of an auditor is to require mutual agreement of the parties with respect to auditor selection. CompSouth asserts that such a process would prevent conflicts prior to the commencement of an audit. CompSouth represents, however, that a preapproved list of entities from which BellSouth may select auditors does not solve the problem of auditor independence given that an auditor's circumstances can change over time.[109]

With regard to the issue of audit cost reimbursement, CompSouth notes that the FCC established a requirement that ILECs reimburse CLECs for audit costs to the extent that an audit finds material compliance by a CLEC. Similarly, CompSouth notes that the FCC established a materiality threshold in order for BellSouth to recover the cost of an audit from a CLEC. To the extent there is material noncompliance, CompSouth concedes that the affected CLEC must

[107] CompSouth Post Hearing Brief at p. 111 *citing TRO* ¶ 622.
[108] *Id.* at p. 113.
[109] *Id.* at p. 114.

reimburse BellSouth for audit related costs. To the extent there is not material noncompliance, however, BellSouth must reimburse the CLEC for the audit related costs.[110]

c. The Findings and Conclusions of the Commission

Based on the foregoing, it is ordered that EEL Audits be performed in accordance with the standards of the American Institute of Certified Public Accountants by an independent third party auditor selected by BellSouth. BellSouth shall be required to provide a 30-day notice of any such audit with said notice to provide a statement from BellSouth as to the reasons for the audit requested and the identity of the auditor selected. BellSouth shall not, however, be required to obtain the consent of the CLEC being audited with respect to the selection of the auditor. CLECs may, however, challenge the legal qualifications of the auditor selected by filing an objection to that effect with the Commission within 10 days of receiving BellSouth's notice of a pending audi wherein the auditor selected by BellSouth is identified. CLECs may dispute any portion of the findings of an audit by petitioning the Commission for a review within 20 days of receiving the reported findings of the auditor.

To the extent that the independent auditor's report concludes that a CLEC failed to comply with applicable service eligibility criteria, the CLEC will be required to true-up any difference in payments, convert all noncompliant circuits to the appropriate service and make the correct payments on a going-forward basis. To the extent that an independent auditor's report concludes that a CLEC failed to comply with the

[110] *Id.* at p. 115 *citing TRO* ¶¶ 627-628.

applicable service and eligibility criteria in all material respects, the CLEC shall be required to reimburse BellSouth for the cost of the independent auditor. In the event that the independent auditor concludes that the CLEC in question did comply with the service eligibility criteria in all material respects, BellSouth shall be required to reimburse the CLEC for its reasonable and demonstrable costs associated with the audit. The Commission finds that the foregoing criteria are most consistent with the findings and conclusions of the FCC.[111]

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

a. The Position of BellSouth

BellSouth asserts that the Commission should order BellSouth to resolve this issue on a carrier by carrier basis depending on factually specific circumstances. BellSouth maintains that it is concerned with the generic implementation of language regarding this issue based on the choices available in the FCC's *ISP Remand Core Forbearance Order*[112] which allow CLECs to elect different rate structures. BellSouth thus maintains that a "one size fits all" approach is not appropriate for implementation of the *Core Forbearance Order.*[113]

b. The Position of CompSouth

CompSouth asserts that generic contractual changes are necessary to implement the *Core Forbearance Order* in order to delete all references to the "new markets" and "growth cap" restrictions in

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[111] *TRO* ¶¶ 622-628.
[112] *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, FCC 01-131 (re Apr. 27, 2001) (*"ISP Remand Core Forbearance Order"* or *"Core Forbearance Order."*).
[113] BellSouth Post Hearing Brief at p. 95.

existing interconnection agreements. CompSouth further maintains that the contractual changes necessary to implement such forbearance will only slightly differ among various CLECs. CompSouth asserts that the Commission can address BellSouth's concerns that generic implementation of the *Core Forbearance Order* would prevent CLECs from choosing among reciprocal compensation options by merely requiring that all existing interconnections that include the restrictions overturned by the *Core Forbearance Order* be amended to remove those restrictions.[114]

c. The Findings and Conclusions of the Commission

We conclude that all existing interconnection agreements which have references to the "growth caps" and/or the "new markets" rule stricken by the FCC in the *Core Forbearance Order* should be amended to strike such references as part of this proceeding. However carriers seeking to amend additional intercarrier compensation provisions in their respective interconnection agreements must approach such amendments on a case-by-case basis.

D. Network Related Issues (Issues 6, 19, 23, 24, 26, 27, 28)

1. Issue 6 HDSL-capable Cooper Loops: *Are HDSL-capable cooper loops the equivalent of DS1 loops for the purpose of evaluating impairment?*

a. The Position of BellSouth

BellSouth asserts that CLECs are not entitled to order UNE HDSL loops in wire centers that satisfy the FCC's thresholds for DS1 loop relief because of the FCC's decision to define DS1 loops as including "two wire and four wire copper loops capable of providing high

[114] CompSouth Post Hearing Brief at pp. 115-116.

bit rate digital subscriber line services, such as two-wire or four-wire HDSL compatible loops."[115] BellSouth asserts that the CLECs attempt to circumvent the application of the FCC's clear and unambiguous definition of DS1 loops as set forth in the above-quoted rule by citing general FCC language addressing HDSL-capable loops. By defining DS1 loops as including two wire and four wire HDSL loops, BellSouth asserts that the FCC expressly removed any obligation to provide such loops in unimpaired wire centers. Additionally, BellSouth maintains that there has been very little interest in its UNE HDSL product since only 178 such loops were in service to all CLECs in Alabama as of June 2005.[116]

With regard to the process for calculating UNE HDSL loops for purposes of impairment thresholds, BellSouth asserts that UNE HDSL loops can and should be counted as 24 business lines pursuant to the findings of the FCC in the *TRO*.[117] Since the FCC has declared that a DS1 loop and a T-1 are equivalent in speed and capacity and has further declared that UNE HDSL loops are used to deliver T-1 services, BellSouth contends that it is obvious that BellSouth's UNE HDSL loops must be counted for purposes of determining business lines in an office on a 64 kbps equivalent basis, or as 24 business lines.[118]

b. The Position of CompSouth

CompSouth asserts that HDSL-capable copper loops are not the equivalent of DS1 loops for purposes of evaluating impairment. CompSouth maintains that an HDSL-capable copper loop is a loop that

[115] BellSouth Post Hearing Brief at p. 96 *citing* 47 C.F.R. § 51.319(a)(4).
[116] *Id.* at p. 10.
[117] *Id. citing TRO* note 634.

does not include the electronics on both ends of the loop that provide the means for the loop to be used to provide DS1 services. CompSouth further represents that a loop qualifies as a DS1 loop for purposes of impairment analysis only if it includes the electronics that permit the loop to provide a service featuring speeds of 1.544 megabytes per second.[119]

CompSouth maintains that the definitions established by the FCC provide that various types of copper loops can be used to provide 1.544 megabit per second signal speeds including HDSL-capable loops. CompSouth asserts, however, that the definitions of the FCC do not convert every copper loop that meets the characteristics of being HDSL-capable into a DS1 loop. In summary, CompSouth asserts that without electronics attached, an HDSL-capable copper loop is nothing more than a span of copper cable and is not a loop capable of delivering 1.544 megabits per second service.[120]

CompSouth argues that BellSouth should still be required to provision the "plain" copper loop without the associated electronics as such loops do not constitute a DS1 loop. CompSouth further maintains that CLECs should still be permitted to attain access at TELRIC rates to an HDSL-capable loop (without electronics) so that CLECs can add their own electronics and provide a DS1 level service to a customer. CompSouth alleges that if BellSouth is permitted to withdraw HDSL-capable copper loops, BellSouth will have precluded CLECs not only from using UNE DS1 loops, but from creating a DS1 service using

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[118] *Id.*
[119] CompSouth Post Hearing Brief at p. 29 *citing* 47 C.F.R. § 51.319(a)(4)(i).
[120] *Id.*

CLEC provided electronics on a BellSouth copper loop. CompSouth asserts that such an outcome is not consistent with the findings of the FCC in the *TRO* and *TRRO*.[121]

CompSouth also represents that BellSouth's contention that HDSL-capable copper loops should be counted as DS1 lines for purposes of determining if a wire center has sufficient "business lines" to qualify for high capacity or interoffice transport de-listing is inappropriate. CompSouth asserts that because BellSouth counts every DS1 line as 24 lines, counting all HDSL-capable loops as DS1 lines would vastly inflate the business line count in BellSouth's wire centers in an inappropriate manner.[122]

c. The Findings and Conclusions of the Commission

The arguments presented by the parties on this issue somewhat expanded the scope of the question presented beyond its original parameters. In addition to the presented issue regarding the treatment of HDSL-capable loops for purposes of determining impairment, the parties also addressed the issue of whether BellSouth has an unbundling obligation with respect to HDSL-capable loops in wire centers deemed nonimpaired absent access to DS1 loops.

After consideration of the arguments presented by the parties, we conclude that HDSL-capable loops (*i.e.* BellSouth's two-wire or four-wire high bit rate digital subscriber compatible loop offering are the equivalent of DS1 loops for purposes of evaluating impairment. It appears that counting such loops as 24 voice grade equivalents is the

[121] *Id.* at pp. 30-31 *citing TRRO* ¶ 163 note 454.

approach most consistent with the findings and conclusions of the FCC in the *TRO* and *TRRO* because such an approach better addresses the competitive "revenue opportunity" criteria relied upon by the FCC.[123]

We resolve the issue of whether BellSouth is required to offer HDSL-capable loops in wire centers deemed nonimpaired by requiring BellSouth to provide CLECs with access to cooper loops and to condition cooper loops upon request. BellSouth is not, however, obligated to offer preconditioned/prepackaged loop offerings designed for a specific service type. Further, unbundled cooper loop, nondesigned (with or without conditioning) should be counted as one voice grade equivalent for each two-wire (*e.g.* one voice grade equivalent for a two-wire loop and two voice grade equivalent for a four-wire loop).

2. Issue 19. Line Splitting: *What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?*

a. The Position of BellSouth

BellSouth points out that no witness provided testimony concerning line splitting. BellSouth notes, however, that CompSouth has proposed the adoption of language which would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to § 271. BellSouth asserts that the loop described by CompSouth does not exist and is not required by the FCC. BellSouth further asserts that the Commission does not have the

[122] *Id.* at pp. 31-32.
[123] *TRO* at n. 634, *TRRO* at ¶¶ 43-45, 146.

requisite jurisdiction and should under no circumstances su pport the reincarnation of UNE-P as proposed by CompSouth.[124]

BellSouth also objects to CompSouth's proposal that BellSouth be obligated to provide splitters between data and voice CLEC that are splitting UNE-L. BellSouth urges the Commission not to obli gate it to provide CLECs with splitters when they are utilizing UNE-L a s CLECs can readily provide this function for themselves.[125]

BellSouth recognizes that the rules of the FCC require BellSouth to make modifications to its OSS that are necessary for line splitting. BellSouth maintains however, that the plan which is pro posed by CompSouth would require BellSouth to make modifications tc its OSS that are beyond the FCC's requirements.[126]

b. The Position of CompSouth

CompSouth maintains that the question of whether lin e splitting can involve the commingling of § 251 and 271 elements will be resolved by the Commission's determinations regarding issue nur ber 14, commingling. CompSouth raises additional concerns, however, regarding the inclusion of language requiring CLECs to ndemnify BellSouth for "claims" or "claims and actions" arising out of actic ns by the other CLECs involved in line splitting arrangements. Com South is fearful that the inclusion of such broad terms might give r se to an obligation for CLECs to defend and indemnify BellSouth aga st entire actions or suits rather than the specific claims made against BellSouth

[124] BellSouth Post Hearing Brief at pp. 98-99.
[125] *Id.*
[126] *Id.*

which do not involve accusations, proof of misconduct or gross negligence.[127]

c. The Findings and Conclusions of the Commission

In accordance with 47 C.F.R. § 51.319(a)(1)(ii), BellSouth's obligation with regard to the line splitting is to provide nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements. The CLECs requesting a line splitting arrangement are obligated to purchase the whole loop and provide their own splitter to be collocated in the applicable central office. Further, CLECs requesting line splitting arrangements will be required to indemnify, defend and hold BellSouth harmless against any and all claims, loss or damage except where arising from, or in connection with, BellSouth's gross negligence or willful misconduct.

3. **Issue 23. Greenfield Areas:** ***(a) What is the appropriate definition of minimum point of entry ("MPOE")? (b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit ("MDU") that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?***

Issue 28. Fiber to the Home: ***What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?***

a. The Position of BellSouth

BellSouth asserts that there are only 2 substantive differences in the positions of the parties regarding language that addresses issues 23 and 28. According to BellSouth, the major disagreement between the

[127] CompSouth Post Hearing Brief at p.89.

parties relates to the extent to which BellSouth is required to unbundle fiber. In particular, BellSouth strongly disagrees with the CompSouth contention that BellSouth is required to offer CLECs unbundled fiber to the home/fiber to the curb to provide a DS1 loop in any wire center where BellSouth is required to provide access to DS1 loop facilities. BellSouth asserts that such a requirement would be inconsistent with the orders and rules of the FCC.[128]

BellSouth points out that the FCC first granted ILECs fiber unbundling relief in the *TRO* noting that requesting carriers are not impaired without access to fiber to the home loops in new construction and overbuild situations unless the ILEC in question elects to retire existing copper loops in overbuild scenarios. In such cases, fiber loops must be unbundled for narrowband services only[129]. BellSouth further asserts that the FCC clearly stated in the *TRO* that an ILEC's unbundling obligations and limitations for the fiber loops in question "do not vary based on the customer to be served".[130]

According to BellSouth, the FCC also made it quite clear in its subsequent *MDU Reconsideration Order* that BellSouth is not obligated to unbundle fiber loops serving predominantly residential multiple dwelling units and that such loops are governed by the fiber to the home rules.[131] BellSouth maintains that the FCC further stated that the

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[128] BellSouth Post Hearing Brief at pp. 100-101 *citing* 47 C.F.R. § 51.319(a)(3).
[129] *Id.* at pp. 101-102 *citing TRO* ¶ 273.
[130] *Id.* at p.102 *citing TRO* ¶ 210.
[131] *Id. citing Order on Reconsideration in the Matter of Review of § 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket 01-338, FCC 04-191, at ¶4 (August 9, 2004) *("MDU Reconsideration Order")*.

existence of businesses in MDUs does not exempt such buildings from the fiber to the home unbundling framework established in the *TRO*.[132]

Following the issuance of the *MDU Reconsideration Order*, BellSouth notes that the FCC again addressed the topic of fiber loops in its "*FTTC Reconsideration Order*".[133] According to BellSouth, the FCC therein defined fiber to the curb loop as a "fiber transmission facility connecting to fiber distribution plant that is not more than 500 feet from the customer's premises." BellSouth further notes that the FCC went on to conclude that "requesting carriers are not impaired in greenfield areas and face only limited impairment without access to fiber to the curb loops where fiber to the curb loops replace pre-existing loops."[134]

BellSouth thus surmises that CompSouth has no legitimate basis to insert further limitations on the fiber unbundling relief extended by the FCC with respect to fiber to the home and fiber to the curb. BellSouth argues that the discussion of the FCC in the *TRO* and its subsequent orders addressing broadband unbundling make it abundantly clear that the FCC did not intend to limit the fiber unbundling relief granted to ILECs as claimed by CompSouth.[135]

b. The Position of CompSouth

CompSouth acknowledges that the FCC adopted reduced, unbundling obligations for fiber to the home, fiber to the curb, and fiber to predominately residential MDUs. CompSouth also maintains that it has

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[132] *Id.* at p.102
[133] *Order on Reconsideration in the Matter of Review of § 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338,FCC 04-248, at ¶¶ 1-9 (October 18, 2004)("FTTC Reconsideration Order").*
[134] *Id.* at p. 102-103 *citing FTTC Reconsideration Order* at ¶¶ 10-11.
[135] *Id.* at p.102 *citing TRO* at ¶ 273.

no dispute with BellSouth regarding the definition of Minimum Point Of Entry ("MPOE") or the ownership of inside wiring from the MPOE to end users. CompSouth notes, however, that it does have a significant fundamental disagreement with BellSouth regarding the scope of the reduced broadband unbundling obligations implemented by the FCC.[136]

CompSouth asserts that BellSouth's position is that BellSouth can deny access to § 251 UNE DS1 loops, even in areas the FCC has found remain "impaired" for purposes of § 251. More particularly, CompSouth represents that BellSouth's position is that anywhere BellSouth extends loop fiber or replaces existing copper loop fiber, it may refuse to provision § 251 DS1 loops. CompSouth argues that BellSouth was granted broadband unbundling relief by the FCC only in circumstances where the loops in question are used to serve the mass market, not for all fiber and hybrid loops as BellSouth claims.[137]

CompSouth asserts that the *TRO* is replete with references which clearly indicate that the broadband, unbundling relief granted to ILECs therein by the FCC was confined to mass market loops and was not intended to impact the FCC's impairment analysis for DS1 and DS3 enterprise loops. CompSouth maintains that the FCC's policy in this regard was clarified and reaffirmed in the orders of the FCC that were promulgated subsequent to the *TRO* including the *FTTC Reconsideration Order*, the *MDU Reconsideration Order* and the *Broadband Forbearance Order.*[138] CompSouth additionally cites

[136] CompSouth Post Hearing Brief at p. 91.
[137] *Id.* at pp. 91-92.
[138] *Id.* at pp. 92-94, 98.

language in a brief filed by the FCC with the D.C. Circuit Court of Appeals in *Allegiance Telecom, Inc et al v. FCC*[139] as support for its position that BellSouth may not refuse to unbundle fiber to the home and fiber to the curb loops for the provisioning of DS1 and DS3 loops in wire centers that remain impaired.[140]

CompSouth thus emphasizes that the FCC's rules and decisions regarding broadband unbundling were not intended to constitute a blanket exemption as BellSouth argues. CompSouth asserts that BellSouth remains obligated to provide access to carriers serving enterprise customers even when the CLEC in question cannot otherwise gain access to the loop facilities in that wire center to serve a mass market customer.[141]

c. The Findings and Conclusions of the Commission

As the parties do not dispute the definition of MPOE, a specific finding by the Commission on this issue is not a necessity. We note, however, that MPOE is clearly defined in the rules of the FCC at 47 C.F.R. § 68.105.

As to the remaining questions specifically raised herein under issue 23, we conclude that pursuant to the prevailing orders of the FCC, BellSouth is required to unbundle "greenfield" fiber to the home/fiber to the curb loops to predominantly commercial MDUs.[142] BellSouth has no

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[139] *Allegiance Telecom, Inc., et al v. FCC*, D.C. Cir. No. 03-1316, Opposition of the Federal Communications Commission to Allegiance Telecom's Motion for Stay Pending Review (filed October 31, 2003); *See* CompSouth Hearing Exhibit 6.

[140] CompSouth Post Hearing Brief at p. 102.

[141] *Id* at p.100.

[142] We further note that pursuant to 47 C.F.R. § 51.319(b)(2), ILECs are required to provide a requesting telecommunications carrier with nondiscriminatory access to the subloop for access to multiunit premises wiring on