COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

BELLSOUTH TELECOMMUNICATIONS INC.'S RESPONSE IN OPPOSITION TO CINERGY COMMUNICATIONS COMPANY'S EMERGENCY MOTION FOR DECLARATORY RULING AND CROSS-MOTION FOR DECLARATORY RULING

INTRODUCTION

There is no dispute that the permanent unbundling rules resulting from the FCC's Triennial Review Remand Order ("TRRO") identified a number of former Unbundled Network Elements ("UNEs"), such as switching, for which there is no 47 U.S.C. § 251 ("Section 251") unbundling obligation.[1] The law is equally clear that currently BellSouth and other regional Bell Operating Companies ("RBOCs") must provide certain services under 47 U.S.C. § 271 ("Section 271") of the Act[2] and that the FCC, not state commissions, has exclusive authority to enforce Section 271. Despite that reality, and ignoring completely the recent order from the United States District Court for the Western District of Kentucky finding that "[t]he enforcement

[1] In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) (*"TRRO"*).

[2] The Telecommunications Act of 1996 amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* References to "the Act" refer collectively to these Acts.

authority for § 271 unbundling duties lies with the FCC and must be challenged there,"[3] Cinergy invites this Commission to disregard the intent of the FCC to eliminate certain UNEs through the TRRO and applicable law that establishes the FCC retains sole jurisdiction over Section 271 network elements. This Commission should reject Cinergy's invitation. Instead, this Commission should heed the district court and applicable law by declaring that it will not address, and indeed, has no authority to address, Section 271 network elements, whether under federal or state law.

BACKGROUND

On August 21, 2003, the Federal Communications Commission ("FCC") released its Triennial Review Order ("TRO"),[4] in which it modified BellSouth's legal obligations under section 251. Following the *TRO,* various legal challenges ensued with subsequent orders further clarifying the scope of BellSouth's section 251 unbundling obligations. These orders culminated in the permanent unbundling rules released with the TRRO on February 4, 2005. In many instances, the FCC has removed significant unbundling obligations formerly placed on incumbent local exchange carriers and has adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements. BellSouth has been able to negotiate successfully with many CLECs, changes to interconnection agreements necessitated by these changes of law, while negotiations continue with other CLECs. It is clear, however, that as to certain issues, BellSouth and CLECs have diametrically opposed views of the applicable law,

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[3] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.,* Civil Action No. 3:05-CV-16-JMH, Memorandum Opinion and Order, (E.D. Ky. Apr. 22, 2005); *accord, BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.,* Civil Action No. 3:05CV173LN, Memorandum Opinion and Order (S.D. MS. Apr. 13, 2005).

[4] 18 FCC Rcd 16978, 17145, *corrected by Errata,* 18 FCC Rcd 19020, *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,* 125 S. Ct. 313 (2004) (referred to, interchangeably, as the *Triennial Review Order* or the *TRO*).

and have been unable to reach mutually agreeable terms. One of the most contested issues involves Section 271.

Pursuant to the Act, when BellSouth receives "a request for interconnection, services, or network elements *pursuant to Section 251"* it is obligated to "negotiate in good faith *in accordance with Section 252* the particular terms and conditions" of agreements that address those Section 251 obligations. Before a Section 251 unbundling obligation exists, the FCC must make an affirmative finding of impairment. 47 U.S.C. § 251(d)(2)(B). The resulting Section 251/252 agreements are submitted to state commissions for approval under Section 252 (e).[5] A state commission's authority is explicitly limited to those agreements entered into "pursuant to Section 251" and, when arbitration occurs, state commission's must ensure that agreements "meet the requirements of Section 251." 47 U.S.C. § 252(e)(2)(B).

Consequently, upon receiving a request for "network elements pursuant to section 251," an ILEC may negotiate and enter into an agreement voluntarily, or an ILEC may enter into an agreement after compulsory arbitration. 47 U.S.C. § 252(a), (b). An ILEC is *not required,* however, to negotiate, in the context of a Section 252 agreement, any and all issues CLECs may wish to discuss, such as access to services provided under Section 271. Instead, as the Eleventh Circuit as recognized, "the scheme and text of [the Act] . . . lists only a limited number of issues on which incumbents are mandated to negotiate." *MCI Telecom.Corp. et al. v. BellSouth Telecommunications, Inc. at al.,* 298 F.3d 1269, 1274 (11th Cir. 2002). The Fifth Circuit also recognized this distinction explaining "[a]n ILEC is clearly free to refuse to negotiate any issues

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[5] BellSouth has separately explained why commercial agreements – contractual arrangements voluntarily entered into between it and CLECs that do not result from a Section 251 request – do not need to be filed with, or approved by, state public service commissions pursuant to Section 252. *See* BellSouth's *Brief in Response to the Commission's March 30, 2005 Order,* filed April 19, 2005.

other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to § 251 and 252." *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 488 (5th Cir. 2003).

Because an ILEC cannot be forced to negotiate issues beyond those set forth in Section 251 for inclusion in a Section 252 agreement, a state commission cannot assert its regulatory authority without limitation. Any contrary result would mean "there is effectively no limit on what subjects the incumbent must negotiate." *MCI Telecom.Corp.* 298 F.3d at 1274. Consequently, only where the parties have *voluntarily* included in Section 252 negotiations issues other than those duties required by an ILEC by § 251 (b) and (c) are such issues subject to compulsory arbitration under 252(b)(1). *Coserv,* 350 F.3d 487. In this way, a party petitioning for arbitration may not compel arbitration of issues that were not the subject of negotiations. *Id.* BellSouth does not voluntarily negotiate issues relating to Section 271 for inclusion in Section 252 interconnection agreements.[6] Cinergy ignores this reality by seeking to force BellSouth to negotiate and arbitrate access to Section 271 services for inclusion in Section 252 interconnection agreements under the guise of its "emergency" motion. This Commission must reject CLECs' attempts to illegally expand its jurisdiction over federal Section 271 obligations.

[6] That the parties have agreed upon a preliminary issues list in this docket that includes a question about this very question -- whether a state commission has the authority to require BellSouth to include in Section 252 interconnection agreements, network elements under either state law or pursuant to Section 271 -- does not mean that BellSouth is willing to negotiate or has actually negotiated access to Section 271 elements in a Section 252 agreement. Indeed, in *Coserv,* the Fifth Circuit recognized that Southwestern Bell Telephone had "refused to negotiate" a particular issue even though the other side included it as an arbitration question. The Texas Public Utility Commission correctly refused to arbitrate that issue. *Coserv,* 350 F.3d at 488. Moreover, CLECs cannot circumvent the Act's limitations by simply proposing counter-language to BellSouth's Section 252 interconnection agreement amendments that include references to Section 271. BellSouth refuses to include such language in its Section 252 agreements, and, in no way "voluntarily" negotiates by declining the CLECs' terms.

DISCUSSION

A. The FCC Has Exclusive Regulatory Authority Over Section 271.

States have no authority to regulate access to network elements provided pursuant to Section 271. Section 271 vests authority in the FCC to regulate network elements provided pursuant to that section. Thus, to obtain long distance relief, a BOC may apply to the *FCC* for authorization to provide such services, and the FCC has exclusive authority for "approving or denying" the requested relief. 47 U.S.C. § 271(d)(1),(3). Once a BOC obtains Section 271 authority (as BellSouth has throughout its region), continuing enforcement of Section 271 obligations rests solely with the FCC under Section 271(d)(6)(A).

The FCC made clear in the *Triennial Review Order* that the prices, terms and conditions of Section 271 checklist item access, and a BOC's compliance with them, are within the FCC's exclusive purview in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).[7] Section 271 vests authority exclusively in the FCC to "regulate" network elements provided pursuant to that section and for which no impairment finding has been made.[8] The only role that Congress gave the state

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[7] *See TRO,* ¶ 664 ("[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake . . . ."); *also TRO* ¶ 665 ("[i]n the event a BOC has already received section 271 authorization, section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271").

[8] 47 U.S.C. § 271. For example, Section 271(d)(1) provides that to obtain interLATA relief, a BOC "may apply to the Commission for authorization to provide interLATA services." The "Commission" refers to the FCC. Congress gave the FCC the exclusive authority for "approving or denying the authorization requested in the application for each State." 47 U.S.C. §271(d)(3). "It is," the Commission has determined, "the [FCC's] role to determine whether the factual record supports a conclusion that particular requirements of 271 have been met." *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, *Memorandum Opinion and Order*, 13 FCC Rcd 539, 555, ¶ 29 (1997). And once a BOC obtains Section 271 authority (as BellSouth has in each of the 9 states in which it provides telephone service) continuing enforcement of Section 271 obligations, by the express terms of the statute, rest solely with the FCC. 47 U.S.C. § 271(d)(6).

commissions in Section 271 is a consultative role during the Section 271-approval process.[9] State commissions' authority to approve interconnection agreements entered into "pursuant to section 251," to impose arbitrated results under Section 251(c)(1) in order to ensure that any agreements "meet the requirements of section 251," and to set rates under Section 252 "for purposes of" the interconnection and access to network elements required by 251(c)(2) and (c)(3) are specifically limited by the terms of the statue to implementing Section 251 obligations, not Section 271 obligations. Moreover, the FCC refused to graft Section 251 pricing and combination requirements onto Section 271 in its *Triennial Review Order*,[10] a decision upheld by the *USTA II* court, which characterized the cross-application of § 251 to § 271 as "erroneous."[11] In sum, Section 252 grants state commissions' authority only over the implementation of Section 251 obligations, not Section 271 obligations.[12]

Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do so. That choice must be respected. As the FCC has properly explained, Congress intended that a single federal agency, not 51 separate bodies, exercise "exclusive authority" over "the Section 271 process."[13] In the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the

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[9] 47 U.S.C. § 271(d)(2)(B).

[10] *Triennial Review Order,* ¶¶ 656-664.

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

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

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

State commissions," with assessing BOC compliance with Section 271.[14] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section.

It is unlawful for a state commission to ignore such findings by relying upon self-conferred Section 271 authority. A state may not apply its own policies in establishing rates, terms, and conditions for facilities that must be provided solely under the authority of Section 271; any such conclusion would be inconsistent with Congress's evident intent to give this Commission "exclusive" decision-making authority under Section 271.[15] Allowing 51 different regulatory entities to impose their own disparate views on broadband, for instance, would "create a labyrinth of rate, terms, and conditions" that "violates Congress's intent in passing the Communications Act."[16]

B. Recent Decisions Demonstrate Unequivocally that State Commissions Have No Authority to Regulate Section 271 Elements.

In light of the clear statutory language, it is not surprising that in recent decisions addressing this issue, both state commissions and federal courts alike have confirmed the FCC's exclusive regulatory oversight over Section 271. Indeed, decisions from Washington to Mississippi demonstrate state commissions have no Section 271 regulatory authority.

In an arbitration decision involving Qwest and Covad, for example, the Washington Utilities and Transportation Commission ("Washington Commission"), explained that "state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271." *In re: Petition for Arbitration of Covad with Qwest,* Docket No.

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

[15] *SBC Communications Inc.*, 138 F.3d at 416-17.

[16] *Boomer v. AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002).

UT-043045, Order No. 06 (Feb. 9, 2005). The Washington Commission distinguished the *Maine Order*[17] that Cinergy attached to its emergency motion, finding the Maine commission had relied on Verizon's commitments to the state commission and to the FCC to file a tariff in the context of a Section 271 proceeding.[18]

With respect to Section 252 in particular, the Washington Commission found that even if the parties agreed to negotiate the issue of including Section 271 elements in a Section 252 arbitration (which BellSouth has not done), the parties could *not* confer state commission authority over this exclusively federal aspect of the Act. Thus, the Washington Commission held "requiring Qwest to include Section 271 elements in the context of arbitration under Section 252 would conflict with the federal regulatory scheme in the Act, as Section 271 of the Act provides authority only to the FCC and not to state commissions."

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

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[17] *Order,* Docket No. 2002-682, Maine Public Service Commission (Mar. 17, 2005) ("Maine Order").

[18] In Verizon's territory, the New Hampshire Commission followed the reasoning of the *Maine Order,* explaining "like our Maine counterparts, we do not assert independent authority to define the scope of Verizon's section 271 obligations nor its compliance with those obligations under that section. We are performing our duty as the initial arbiter of disputes over whether Verizon continues to meet the specific commitments previously made to this Commission as a condition for its recommendation that Verizon receive section 271 interLATA authority." *In re: Proposed Revisions to Tariff NHPUC* No. 84, DT 03-201, 04-176, *Order Following Briefing,* New Hampshire Public Utilities Commission (Mar. 11, 2005). Similarly, the Pennsylvania Public Utility Commission ruled it was without authority to permit certain tariff provisions to Verizon's wholesale tariff absent FCC guidance, noting that "the state commission's role [with respect to Section 271] is consultative and that the ultimate adjudicative authority lies with the FCC." Opinion and Order, Pennsylvania Public Service Commission Docket R-00038871C00001 (July 8, 2004). In contrast, the Rhode Island Commission accepted Verizon's proposed *TRO* revisions to its wholesale tariff, holding the FCC should make determinations as to what is required under Section 271 and that it should not exercise its authority when it was likely to be preempted. *In re: Verizon-Rhode Island's Filing of October 2, 2003 to Amend Tariff No. 18,* Rhode Island Public Utilities Commission Docket No. 3556 (Oct. 12, 2004).

requirements, and certainly neither section anticipates the additional of new Section 251 obligations via incorporated by reference to access obligations under Section 271 or state law." *In re: Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005). The Utah Commission reasoned that "Section 271 on its face makes quite clear that the FCC retains authority over the access obligation contained therein. Furthermore, Section 271 elements are distinguishable from Section 271 elements precisely because the access obligations regarding these elements arise from separate statutory bases. The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case for us to do so." *Id.*

Of course, the decisions of the Washington and Utah commissions are fully consistent with recent federal district court rulings in BellSouth's region. Indeed, on appeal from a decision from the Mississippi Public Service Commission, the court explained:

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

BellSouth v. Mississippi Public Serv. Com'n et al., Civil Action No. 3:05CV173LN (Apr. 13, 2005) (citations and quotations omitted).

Similarly, on appeal from an earlier decision rendered by this Commission, a Kentucky district court confirmed:

> While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the

> proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.

BellSouth v. Cinergy et al., Civil Action No. 3:05-CV-16-JMH (Apr. 22, 2005).

The decisions in Washington, Utah, Mississippi and Kentucky are also consistent with *Indiana Bell v. Indiana Utility Regulatory Com'n et al.,* 359 F.3d 493, 497 (7th Cir. 2004) (*"Indiana Bell"*), in which the Seventh Circuit described a state commission's role under Section 271 as "limited" to "issuing a recommendation." Consequently, when the Indiana Commission tried to "parlay its limited role in issuing a recommendation under section 271" into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service, that decision of the state commission was preempted.[19]

C. The Act and FCC Decisions Preempt State Regulation of Section 271 Elements Under State Law.

Cinergy cannot realistically avoid the impact of the clear statutory language by relying upon state law. In enacting the 1996 Act, "Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission." *Indiana Bell,* 359 F.3d at 494. As the Supreme Court has held, Congress "unquestionably" took regulation of local telecommunications competition away from the States" on all "matters addressed by the 1996 Act." *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 378 n.6 (1999). Section 271, moreover, "establish[es] a comprehensive framework governing Bell operating

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[19] *See also Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand,* New York Public Service Commission Case No. 05-C-0203 (March 13, 2005) ("[g]iven the FCC's decision to not require BOCs to combine 271 elements no longer required to be unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements") *and* Order Concerning New Adds, *In re: Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order,* North Carolina Public Service Commission Docket No. P-55, Sub 1550 (Apr. 25, 2005) ("[t]he Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.").

company (BOC) provision of "interLATA service" and, as shown above, provides only an extremely limited role for state commission participation within that framework. *E.g.*, Memorandum Opinion and Order, *Petition of SBC Communications for Forbearance,* 19 FCC Rcd 5211, ¶ 7 (2004). In addition, section 271 "is the direct progeny of the Modification of Final Judgment (MFJ)," *Triennial Review Order* ¶ 655n. 1986, and "the states had no jurisdiction" over the implementation of the MFJ, *InterLATA Boundary Order* ¶ 16. And the FCC has already ruled that it is *federal* law – namely, sections 201 and 202 – that established the standard that BOCs must meet in offering access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order*[20] ¶ 470; *USTA II, 359 F.3d* at 588-90.

State commissions, therefore, cannot assert state law authority to regulate 271 elements, which "are a purely federal construct." *InterLATA Boundary Order* ¶ 18. In particular, state commissions cannot rely on state law to expand the list of 271 elements or to regulate the rates, terms, and conditions on which BOCs provide access to those elements.

The FCC has held that, in section 271, Congress identified a limited set of specific network elements to which BOCs must provide access irrespective of whether their competitors would be impaired without access to those elements as UNEs. *See Triennial Review Order* ¶ 653; Congress also expressly prohibited the FCC from "extend[ing] the terms used in the competitive checklist" to include additional network elements. 47 U.S.C. § 271(d)(4); *see also* 47 U.S.C. § 160(a), (d) (permitting the FCC to eliminate the obligation to provide 271 elements once "it determines that th[e] requirements [of section 271] have been fully implemented"). It necessarily follows that any decision by a state commission purporting to create new 271

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

obligations under state law authority conflicts with Congress's determination and, therefore, is preempted. *See, e.g. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 353 (2001)*; *International Paper Co. v. Ouellette,* 479 U.S. 481, 494 (1987).

This is especially true with respect to those network elements as to which the FCC has found no impairment and that Congress did not require BOCs to provide as 271 elements. Section 271 "does not gratuitously reimpose the very same requirements that" section 251 "has eliminated." *Triennial Review Order* ¶ 659. Nor does it permit return to "virtually unlimited . . . unbundling, based on little more that faith that more unbundling is better." *Id.* ¶ 658. Therefore, once the FCC has concluded that such elements need not be provided as UNEs, state commissions (or, for that matter, the FCC, *see* 47 U.S.C. § 271(d)(4)) have no authority to require BOCs to provide unbundled access to those elements.

State commission efforts to regulate the rates, terms, and conditions for 271 elements – like state efforts to regulate 271 access -- are also preempted. As an initial matter, there can be no serious dispute that state commissions are precluded from requiring BOCs to provide access to 271 elements at TELRIC, or substantially equivalent rates. The FCC has already determined that "TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute *nor necessary to protect the public interest.*" *Triennial Review Order ¶ 656 (emphasis added)*. The FCC's conclusion is consistent with its earlier recognition that, where the FCC has found "that a competitor is not impaired in its ability to offer services without access to [an] element," "it would be *counterproductive* to mandate that the incumbent offers the element at forward-looking prices." *UNE Remand Order* ¶ 473 (emphasis added).

Any state law purporting to permit a state commission to require forward-looking rates for 271 elements – whether TELRIC rates or otherwise – is therefore preempted. Cinergy, consequently, cannot seriously suggest that this Commission should set "interim" Section 271 rates at "TELRIC plus one dollar" under some misguided application of non-existent state law authority. Under the Supremacy Clause, "[t]he statutorily authorized regulations of a [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."[21] The FCC's conclusion that TELRIC pricing does not—and should not – apply to 271 elements constitutes "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute" and thus preempts inconsistent state regulation.[22] State law, therefore, can provide no "back door" for the reimposition of TELRIC rate for network elements that the FCC has determined BOCs should not be required to make available at forward-looking prices. There is no plausible basis on which state commissions could justify "inflict[ing] on the economy the sort of costs" associated with forced sharing at TELRIC rates where a no impairment finding makes it indisputable that there is "no reason to think doing so would bring on a signifying enhancement of competition." *United States Telecom Ass'n v. FCC,* 290 F.3d 415, 429 (D.C. Cir. 2002).

More generally, state laws purporting to permit state regulation of 271 elements are preempted because they are inconsistent with the FCC's determination (affirmed by the D.C. Circuit) that sections 201 and 202 establish the standard for assessing the rates, terms, and

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[21] *City of New York v. FCC,* 486 U.S. 57, 64 (1988); *see Geier v. American Honda Motor Co.,* 529 U.S. 861, 872, 881 (2000) (states may not depart from "deliberately imposed" federal standards); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 155 (1982) (federal) regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the flexibility' given it by [federal law]").

[22] *Bethlehem Steel Co. v. New York State Labor Relations Bd.,* 330 U.S. 767, 774 (1947); *United States v. Locke,* 529 U.S. 89, 110 (2000).

conditions on which BOCs provide access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 470; *USTA II,* 359 F.3d at 588-90. As the FCC has explained, this means that, for 271 elements, "the market price should prevail." *UNE Remand Order* ¶ 470; *USTA II,* 359 F.3d at 588-90. Thus, a BOC satisfies that federal law standard when it offers 271 elements at market rates, terms, and conditions, such as where it has entered in "arms-length agreements" with its competitors. *Triennial Review Order* ¶ 664. Permitting "state law to determine the validity of the various terms and conditions agreed upon" by BOCs and their wholesale customers "will create a labyrinth of rates, terms and conditions" that "violates Congress's intent in passing the Communications Act." *Boomer v. AT&T Corp.,* 309 F.3d 404, 420 (7th Cir. 2002); *see also Triennial Review Order* ¶ 664 (question whether BOC's provision of 271 element satisfies sections 201 and 202 requires "a fact-specific inquiry"). This potential for "patchwork contracts" resulting from "the application of fifty bodies of law" "conflicts with Section 202's prohibition on providing advantages or preferences to customers based on their 'locality.'" *Boomer,* 309 F.3d at 418-19. Section 201, moreover, "demonstrates Congress's intent that *federal law* determine the reasonableness of the terms and conditions" of 271 elements. *Id.* at 420 (emphasis added).[23]

Indeed, state law regulation of 271 elements would be contrary to the FCC's expressed preference for commercial agreement with respect to 271 elements. *See UNE Remand Order,* ¶

[23] *See also* Order on Reconsideration, *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 215 (b) of the Communications Act of 1934, as Amended,* 7 FCC Rcd 4123, ¶¶ 14-18 (1992) (preempting state law based, in part, on its finding that rulings "in numerous jurisdictions around the country almost certainly would produce varying and possibly conflict determinations," thereby "frustrating [Congress's] objectives of certainty and uniformity").

473; *Triennial Review Order,* ¶ 664.[24] As an initial matter, the possibility of state commission review and potential modification of voluntary commercial agreements will encourage parties to attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing the parties' ability to lock one another in at the bargaining table. The FCC recognized this in the *Qwest Declaratory Ruling,* explaining that subjecting commercial agreements to the same procedural requirements that Congress specifically applied only to agreements implementing section 251(b) and (c) would raise "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Qwest Declaratory Ruling* ¶ 8. In addition, most competitors operate in multiple states and typically seek to negotiate multi-state agreements with incumbents. If the rates, terms, and conditions for provision of 271 elements in such agreements were subject to diverging and potentially conflicting regulation by each state commission, the ability of carriers to reach commercial agreements would also be severely undermined. In this regard, it is noteworthy that BellSouth has been able to enter into over 100 agreements to obtain switching as a 271 element, without any regulation by state commissions. As the FCC recognized, there has been "no adverse effect" on competitors – let alone any "perverse policy impact" – from BOCs provision of these 271 elements without state regulation. *Triennial Review Order* ¶ 661.

D. Neither Section 271 Nor Section 252 Authorizes State Commissions To Establish Rates for Access to Facilities That Must Be Offered Solely Under Section 271

Given the clear language of section 271, Cinergy's reliance upon a single decision from Maine to support its claim about the "obviousness" of state commission authority should not be

[24] *See also, e.g.,* Press Statement of chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review New Steps (Mar. 31, 2004) ("The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace.").

taken seriously. Cinergy's motion is devoid of any *federal* or FCC authority that suggests state commissions may impose obligations to ensure section 271 compliance. On the contrary, both federal courts and the FCC have stated unequivocally that the FCC has "exclusive authority" over "the section 271 process."[25] Moreover, clear precedent establishes that the FCC has the power to preempt state determinations where a facility is used both for interstate and intrastate purposes and it is not practicable separately to regulate those components.[26] As the FCC has stated to the Supreme Court, that analysis applies directly to the pricing of facilities that must be provided by ILECs under the 1996 Act. The FCC explained to the Court that it had concluded in the *Local Competition Order* that "it would be economically and technologically nonsensical . . . for the FCC and the state commissions to treat the rates for interconnection with and unbundled access to [ILEC] facilities like retail rates, such that the ultimate rate a competing carrier must pay an incumbent LEC would reflect a combination of an 'intrastate' rate set by a state commission and an 'interstate' rate set by the FCC."[27] Accordingly "*the [FCC] may ensure effective regulation of the interstate component . . . by preempting inconsistent state regulation of the matter in issue.*"[28] The Supreme Court agreed that the FCC had the authority to resolve such matters under the 1996 Act and thus to "draw the lines to which [state commissions] must hew."[29]

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

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

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

[28] *Id.* at 36 (emphasis added).

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

The Supreme Court's decision and the FCC's statements provide a full response to any claims that the FCC cannot strip state commissions of local authority over 271 or, put differently, that the FCC could not preempt state authority. Contrary to any possible CLEC arguments, there are established federal policies here. First, any argument that low rates – e.g., TELRIC plus one dollar -- do not conflict with federal policy is specious. Imposing on section 271 facilities forward-looking prices of the kind required under section 251 is no different from mandating section 251 unbundling in the absence of the statutorily required impairment finding. Such a result conflicts with both the statutory scheme, which makes impairment the "touchstone" of section 251 unbundling,[30] and with the FCC's conclusion, affirmed in *USTA II*, that "gratuitously reimpos[ing]" low TELRIC rates under section 271 would be the same as an unlawful adoption of "a virtually unlimited standard to unbundling, based on little more than faith that more unbundling is better."[31]

Even beyond the issue of low rates, there is also an established federal policy that, when unbundling is not required under section 251, "the market price should prevail" instead of a "regulated rate" and that "it would be *counterproductive* to mandate" specific rates in the first instance.[32] State attempts to set rates in such circumstances also necessarily violate this established federal policy. Indeed, it bears repeating that BellSouth has successfully employed commercial negotiations to establish rates for facilities (such as switching) that need not be

[30] *USTA I*, 290 F.3d at 425.

[31] *Triennial Review Order*, 18 FCC Rcd at 17387-88, ¶¶ 658-659.

[32] *UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473 (emphasis added).

unbundled under section 251(c)(3). The FCC has concluded that there has been "no adverse effect" or "perverse policy impact" from reliance on such a market-based approach.[33]

To be sure, the FCC has stated that specific commitments *the BOC may have made to a state commission*, or *specific performance monitoring and enforcement mechanisms imposed by a state commission*, should be directed to that state commission.[34] However, such statements are irrelevant to relief requested by Cinergy. Cinergy is not requesting emergency relief arising from specific voluntary commitments that BellSouth has made to a state commission during the section 271 process, nor does it involve a performance monitoring mechanism that BellSouth consented to have imposed by a state commission. Indeed, the fact that the FCC *limited* its discussion of state authority under section 271 to those discrete areas where a BOC has made a commitment to a state commission or agreed to performance standards demonstrates that the states have no *general* authority to impose any obligations, including rates, to ensure continuing compliance with the competitive checklist.[35]

Moreover, Cinergy has not cited any precedent establishing that state commissions are authorized to apply section 201 generally, much less that they can apply section 201 to ensure

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[33] *Triennial Review Order*, 18 FCC Rcd at 17388, ¶ 661.

[34] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4176-77, ¶ 452 (1999), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (emphasis added).

[35] *See Indiana Bell*, 359 F.3d at 497 (7th Cir. 2004) (concluding that a state commission decision was contrary to the 1996 Act where the state agency "parlay[ed] its limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service").

compliance with section 271. By contrast, multiple cases establish that compliance with section 201 is a matter that "'Congress has placed squarely in the hands of [this] Commission.'"[36]

Cinergy's reliance on the references in section 271(c)(1)(A) and 271(c)(2)(A) to agreements "approved under section 252" do not change this result. By their terms, none of the cited subsections of section 271(c) supports the notion that state commissions have authority to establish rates and other terms and conditions to ensure continued compliance with section 271, which of course is the issue here. On the contrary, by referring back to section 252, these subsections confirm that state commissions do *not* have that authority. Section 252 could not be clearer in limiting state authority to set rates to UNEs that must be unbundled under section 251(c)(3). Section 252(d)(1) empowers state commissions to set rates only for "purposes of subsection (c)(3) of such section [251]." As the FCC has stated, that section "is quite specific in that it only applies for the purposes of implementation of section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required only under section 271."[37]

This limitation on state rate-making authority must be given effect. If Congress had wanted state commissions to set rates for "purposes of subsection (c)(3) of such section [251]" *and* separately for "purposes of the competitive checklist contained in subsection (c)(2)(B) of

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[36] *In Re: Long Distance Telecommunications Litigation,* 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F.3d 448 (D.C. Cir. 1997). As the D.C. Circuit noted in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996), Sections 201(b) and 202(a) "authorized the Commission to establish just and reasonable rates, provided that they are not unduly discriminatory." These decisions show, that, courts uniformly have held that claims based on Sections 201(b) and 202(a) are within the FCC's jurisdiction.

[37] *Triennial Review Order*, 18 FCC Rcd at 17386-87, ¶ 657.

section 271" it could easily have said so. It said nothing of the kind. As the Commission has explained in a related context involving the relationship between sections 251 and 271, "Congress' decision to omit cross-references [is] particularly meaningful" in this context, given that such cross-references are plentiful elsewhere in the relevant provisions.[38]

Indeed, *nowhere* in the federal statute are states authorized to impose any obligations, much less to set rates, to ensure compliance with section 271 – a provision that, as the FCC and the D.C. Circuit have emphasized, contains obligations that are independent of section 251.[39] Rather, as confirmed by the *limited* authority granted to the states by section 252, all authority to implement those separate requirements in section 271 is vested with the FCC. And as the D.C. Circuit made plain in *USTA II*, when Congress assigns a certain responsibility to the FCC, it is this federal agency, and not 51 separate state bodies, that must make the relevant determinations.

It would be equally unavailing for CLECs to try to expand the language in section 252 concerning state commission resolution of all "open issues" in an arbitration beyond clear statutory limits. Again, the Eleventh Circuit has addressed this issue and properly explained that, the reference to "any open issues" subject to arbitration must be understood to encompass only those issues that incumbents must negotiate to fulfill sections 251(b) and (c). *See MCI Telecomms. Corp.*, 298 F.3d at 1274. As that court stated, a rule that required arbitration of "any issue raised by the moving party" would be "contrary to the scheme and text of th[e] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate." *Id.*

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[38] *Id.*

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

(citing section 251(b) and (c), which, the court noted, "set[] forth the obligations of all local exchange carriers and incumbent local exchange carriers, respectively").

The Eleventh Circuit's understanding is well grounded in the statute and leads to the only plausible result. The 1996 Act specifically restricts a state commission's authority to arbitrate to the discrete obligations imposed by section 251(b) and (c). Section 252(c) provides that the state commission's duties in "resolving . . . open issues" are limited to (1) ensuring that the conditions it imposes on the parties "meet the requirements of section 251" and this Commission's regulations that are prescribed "pursuant to section 251"; (2) establishing rates "according to [section 252(d)]," which in turn provides pricing rules only for items that must be offered under section 251; and (3) establishing a "schedule for implementation." Nowhere did Congress authorize state commissions to arbitrate disputes as to duties that do not involve section 251(b) and (c).[40] Likewise, under section 252(e)(2)(B), a state commission may only reject arbitrated portions of an agreement if it does not "meet the requirements of section 251" or the pricing rules "set forth in subsection (d)" of section 252. In sum, as the FCC has explained in the *Qwest Declaratory Ruling*[41] "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)" are "interconnection agreement[s]" that are subject to the procedures detailed in section 252.[42]

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[40] Although state commissions do have authority to impose, in appropriate circumstances, additional state requirements in approving agreements, *see* 47 U.S.C. § 252(e)(3), those obligations have to be consistent with federal law and not substantially prevent implementation of the purposes of the 1996 Act. *See id.* §§ 251(d)(3), 261.

[41] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

[42] *Qwest Declaratory Ruling*, 17 FCC Rcd 19340-41, ¶ 8 & n.26.

Indeed, the conclusion that the 1996 Act permits arbitration of any disputed issue, regardless of whether it implicates section 251(b) or (c), would lead to absurd results that Congress could not have intended. If, the open issues that state commissions must arbitrate go beyond the requirements of section 251, there is no logical reason that they should be limited to arbitrating additional obligations imposed under section 271. Under this reasoning, state commissions would be authorized (indeed, required) to arbitrate an unlimited number of issues that CLECs could raise that have nothing to do with the specific statutory obligations that Congress imposed. And, because such obligations have no grounding in the requirements of section 251(b) and (c) (or in the FCC's regulations implementing that statutory section), there would be no governing legal standard for a state commission to apply in resolving such questions. Accordingly, to accept this theory, one would have to assume that Congress directed state agencies to decide an unlimited number of issues – issues Congress did not consider important enough to address in the federal statute – without providing *any* guidance as to how the relevant decision should be made. There is no reason to conclude that Congress intended to impose such a limitless and nonsensical obligation.

E. Cinergy is Not Entitled to Commingle Section 271 network elements with Section 251 UNEs.

This Commission cannot regulate the terms by which BellSouth complies with its Section 271 obligations. Because the FCC alone has that authority, as detailed above, this Commission must reject out of hand Cinergy's suggestion that "Section 271 UNEs constitute an alternative means of service that must be made available, commingled with other services, *to replace BellSouth's prior Section 251 obligations in the parties' interconnection agreements.*"

More significantly, however, the *Triennial Review Order,* and its *Errata,* demonstrates BellSouth has no obligation to commingle Section 271 elements with 251 elements.[43] The FCC has defined commingling as "the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services."[44] In discussing commingling, the FCC originally stated that "[a]s a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements *unbundled pursuant to section 271* and any services offered for resale pursuant to section 251(c)(4) of the Act."[45] Later, however, when the FCC issued its *Errata,* it deleted the phrase "unbundled pursuant to section 271."[46] Thus, the language of the *TRO,* as corrected by the *Errata*, requires "incumbent LECs [to] permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements and any services offered for resale pursuant to section 251(c)(4) of the Act."

There is no other discussion of 271 elements in the commingling section of the *TRO.* In the Section 271 section of the *TRO,* however, the FCC made clear that "[w]e decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be

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[43] *See*, *TRO* at ¶ 655, n. 1990; *also USTA II*, 359 F.3d at 589-90.

[44] 47 C.F.R. §51.5.

[45] *TRO,* ¶ 584 (emphasis supplied).

[46] *TRO Errata,* at ¶ 27.

unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of 'combining' and . . . do not refer back to the combination requirement set forth in section 251(c)(3)."

The dispute BellSouth has with Cinergy, and other CLECs, centers on the meaning of the term "wholesale," and is exacerbated to some degree, because of the deletions of certain phrases in the *TRO's Errata.* Specifically, at the same time the FCC deleted the phrase "unbundled pursuant to Section 271" from its discussion of commingling in that portion of the *TRO,* it also deleted the sentence, "[w]e also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to these checklist items" from its discussion in the section 271 portion of the *TRO.* Thus, the dispute is whether the wholesale services referred to in the federal commingling rules include Section 271 services. The federal rules do not expressly define "wholesale services" in the context of the commingling obligation.

The FCC clearly intended, however, to limit the types of wholesale services that are subject to commingling. This is clear, because, in describing wholesale services in the *TRO*, the FCC referred only to *tariffed access services,* explaining, in relevant part, as follows. First, "[w]e therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff)." Next, "competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff)." Third, "we do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.*, a . . . circuit at rates based on special access services and UNEs)." Then, "we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly

permit connections with UNEs and UNE combinations." Finally, "commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services."[47]

The foregoing passages, along with the deletion of Section 271 in the description of commingling in the *Errata,* show clearly that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 elements. Moreover, language within the *TRRO,* read in conjunction with the *TRO,* is consistent. In addressing conversion rights in the *TRO,* the FCC referred to "wholesale services," concluding "carriers may both convert UNEs and UNE combinations to *wholesale services* and convert wholesale services to UNEs and UNE combinations . . . . ."[48] Then, when describing this conversion holding in the *TRRO*, the FCC explicitly limited its discussion to the conversion of *tariffed services* to UNEs: "[w]e determined in the *Triennial Review Order* that competitive LECS may convert *tariffed incumbent LEC services* to UNEs and UNE combinations . . . ."[49] It is clear, therefore, that the FCC narrowly

[47] *TRO,* ¶¶ 579 – 581, 583.

[48] *TRO,* ¶585 (emphasis supplied).

[49] *TRRO* at ¶ 229 (emphasis supplied).

interprets "wholesale services" as limited to tariffed services, and does not expect nor require BellSouth to combine Section 271 network elements with Section 251 network elements.[50]

Any other interpretation of BellSouth's commingling obligation would undermine the FCC's findings in the *TRRO* declining to require unbundling of UNE-P due to the investment disincentives previous unbundling had created.[51] This is because, under Cinergy's view of the law "Section 271 . . . independently supports" its right to obtain UNE-P at just and reasonable rates." *See* Cinergy's Feb. 28, 2005 Emergency Petition. As the federal district court has already explained, however, the enforcement authority for Section 271 unbundling lies with the FCC, and Cinergy cannot reasonably blind itself to applicable law.[52]

CONCLUSION

This Commission must reject Cinergy's invitation to flout federal law, and should instead declare unambiguously that any issues concerning Section 271 must be addressed by the FCC.

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[50] State commissions have reached different conclusions on this issue. Of the decisions that BellSouth is aware of, Utah and Illinois correctly determined that BellSouth has no obligation to commingle Section 271 elements with Section 251 elements. *See In re: Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005) ("ILECs are required to commingle wholesale elements obtained by means other than Section 251(c)(3), *except for Section 271 elements.*") *and In re: XO Illinois, Inc.*, 04-0371 Ill. C.C., 2004 WL 3050537 at 15 (Oct. 28, 2004) ("SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271. The FCC specifically removed that requirement from the TRO 584 when it issued its TRO Errata."). In contrast, however, the Washington Commission, although it properly recognized its lack of Section 271 authority, erroneously determined that "BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale services, such as Section 271 elements." In addition, apparently the Illinois Commerce Commission reached a different conclusion in *In re: Metro Access Transmission Services, Inc.*, Docket No. 04-0469, although it is not clear how it reconciled its early *XO* decision, as did the Colorado state commission.

[51] *TRRO,* ¶ 218.

[52] *See* cases cited at n. 3, and n. 19, *infra.*

Respectfully submitted, this 10th day of May, 2005.

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