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 MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR DECLARATORY RULING

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, submits this Motion, which BellSouth asks that the Commission treat either in part or whole as a Motion for Summary Judgment and Motion for Declaratory Ruling. This motion is intended to resolve, without hearing, a number of the issues the parties have raised in this proceeding and to declare what the law is with respect to other issues. Doing so will allow for the efficient and timely resolution of the issues raised in this proceeding.

This case began when BellSouth filed a Petition to Establish Generic Docket to consider amendments to interconnection agreements resulting from changes of law. BellSouth's petition sought to require the amendment of existing interconnection agreements to effectuate the FCC's *Triennial Review Order*[1] and the FCC's *Triennial Review Remand Order*[2] and to resolve any

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[1] 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*").

[2] *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) (referred to, interchangeably, as the "*Triennial Review Remand Order*" or "*TRRO*").

disputes arising out of such orders that may be raised in pending negotiations or arbitrations. In many instances the disputes between the parties involve legal questions that can and should be resolved as a matter of law prior to a hearing. In other instances, by declaring what the law is, the Commission can provide needed guidance to BellSouth and CLECs, which the parties can use to implement interconnection agreement amendments. By resolving the issues that are matters of law, and by declaring the law where the parties have disputed interpretations, the Commission will make the most efficient use of its own resources, and the limited resources of the parties.

The issues that have been identified to date are listed on Exhibit 1, attached to this motion. BellSouth and a group of CLECs have jointly identified and negotiated the wording of these issues.[3] The issues that BellSouth will address in this Motion are highlighted in Exhibit 1 for ease of reference.

In resolving this motion, BellSouth is not asking the Commission to adopt specific contractual language. Rather, in each instance BellSouth asks that the Commission address the legal question underlying the issue, and either resolve the issue completely, or provide a clear statement of the law, after which the parties can implement the Commission's decision. Even if the parties are unable to reach mutually agreed upon language for a particular issue after this Commission addresses the legal questions, a preliminary ruling is vital to efficient proceedings. That is because the hearing can then focus on the precise area of disagreement, which should revolve around the language needed to implement the law, rather than a dispute about what the

[3] BellSouth believes this issue list should be used in each pending change of law proceeding in the Southeastern region. To date, BellSouth understands that CompSouth has agreed to use this list in Florida only, and has indicated to BellSouth that it may have minor wording changes to some of the issues. No such changes have been identified to BellSouth since May 2, 2005, which is the date when BellSouth indicated to CompSouth its willingness to use this list.

law requires. Witnesses can explain the basis for their proposed contractual language based on what the law is, rather than based on what their opinion of the law should be, and the Commission will not be subjected to resolving different contractual language based on competing legal theories at the hearing.

BellSouth anticipates that, in response to its motion, some or all of the other parties to this proceeding will claim that this Commission should refrain from addressing any issues until after a hearing on the merits. The Commission should reject any such argument. The inherent fallacy in the argument of the other parties is their assertion that "the parties are well aware of the law."[4] If the parties were "well aware" of the law then presumably the fundamental legal disagreements between certain parties would not exist. The reality, of course, is that the parties have diametrically opposed views of the law in many instances, and those disagreements prevent resolution of certain issues. The CLECs' only remedy to reconciling these disparate views of the law is to have this Commission consider each issue on Exhibit 1 – and the parties have jointly agreed that additional issues may need to be added to Exhibit 1 -- only after a full evidentiary hearing with witness testimony. This would mean longer hearings with witnesses opining on a number of legal issues and attempting to support contract language based on that party's interpretation of the law, which may be completely wrong. No one disputes that these issues must ultimately be addressed, but the most logical course to resolution should minimize unnecessary time in the hearing room and eliminate cross-examinations that debate legal principles. There is simply no need to subject this Commission to protracted hearings on disputed topics that can and should be addressed as a matter of law now.

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[4] *See* CompSouth's May 6, 2005 Letter filed in Florida Public Service Commission Docket No. 014269-TP in which CompSouth opined that none of the identified issues are strictly legal, attached as Exhibit 2.

BACKGROUND

On August 21, 2003, the Federal Communications Commission ("FCC") released its *Triennial Review Order*, in which it modified BellSouth's legal obligations under Section 251 of the Act.[5] 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 *Triennial Review Remand Order* 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. The *TRRO* explicitly requires change of law processes and certain transition periods to be completed by March 11, 2006.[6]

To date, BellSouth has not yet successfully modified all of its interconnection agreements with certified CLECs in Kentucky to reflect the current state of the law. While there are those CLECs with whom BellSouth has successfully negotiated the changes necessitated by the *TRO* and the *TRRO,* there are other CLECs with whom discussions continue. Still other CLECs have ignored BellSouth's repeated efforts to modify interconnection agreements. It is clear from the negotiations that have occurred thus far, however, that BellSouth and certain CLECs interpret the law differently, which differences prevent the negotiation of mutually agreeable contractual language.

In many instances, the differences between BellSouth and CLECs result from divergent positions concerning the subjects that must be included within interconnection agreements. This

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[5] 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.

[6] *See TRRO*, ¶¶ 143, 144, 196, 197, and 227.

difference impacts many of the issues presented in this proceeding and is purely a question of law. The inclusion of Section 271 elements in a Section 252 agreement, which BellSouth will discuss in more detail later, is a prime example of the type of disagreement over the law that should and can be resolved as a matter of law.[7] BellSouth asserts that state commissions do not have the authority to order the inclusion of Section 271 elements in a Section 252 interconnection agreement. Evidently some CLECs believe differently. There is, however, no factual dispute for the Commission to consider. Either a state commission has the legal authority to force BellSouth to include Section 271 elements in a contract or it does not.

If the Commission fails to resolve questions of law in advance of the hearing, BellSouth and the other parties will be forced to address a number of other issues, such as whether the state commissions can establish "just and reasonable rates" for Section 271 elements, and what the language to implement the inclusion of Section 271 elements in a Section 252 agreement should be. If the Commission refuses to address the preliminary legal issue, the parties will have to prepare, and the Commission will have to hear, testimony on these issues unnecessarily. If the Commission defers making the legal determination regarding its jurisdiction until after the matter is heard, and then concludes that the Commission does not have the legal authority to require that Section 271 elements be included in a Section 252 agreement, the time and resources spent on the related issues have simply been wasted.

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[7] BellSouth acknowledges that this Commission already has sought briefs on whether commercial agreements; that is, contractual arrangements voluntarily entered into between it and CLECs that do not result from a Section 251 request, should be required to be filed before this Commission . BellSouth incorporates by reference its previous brief on these points herein. *In the Matter of: Petition to Establish Generic Docket and Consider Amendments to Interconnection Agreements Resulting from Changes of Law,* K.P.S.C. Case No. 2004-00427, BellSouth's April 19, 2005, Brief in Response to the Commission's March 30, 2005, Order, [filing of commercial agreements]. BellSouth also addressed "271 issues" and incorporates by reference those briefs as well. BellSouth's May 10, 2005, Response in Opposition to Cinergy's Communications Company's Emergency Motion for Declaratory Ruling and Cross-Motion for Declaratory Ruling and BellSouth's June 1, 2005, Reply to Covad's Opposition to BellSouth's Cross-Motion for Declaratory Ruling.

Similarly, there are other issues where the parties agree that they need to arrive at language to include in the interconnection agreement, but have differing views of what the law requires and therefore have completely different views of what the language should be. These issues vary from the type of issue discussed in the prior paragraph in which the legal question can be answered and the issue is then resolved in its entirety. In contrast, this second type of issue involves determining what the law requires, and then determining what language should be drafted to implement the law. An example of this type of issue relates to "commingling." That issue asks what the scope of "commingling" is, and then asks what language should be used to implement "commingling," including rates. The scope of "commingling" is a legal issue that the Commission can resolve. Implementing "commingling" once it is legally defined, and setting the rates for "commingling," would involve factual determinations that would be properly considered in a hearing.

For clarity and efficiency, BellSouth will group the issues in this Motion into two separate sections. The first section will address the issues that can be completely resolved as a matter of law -- the issues upon which BellSouth seeks summary judgment. The second section will include those issues that have mixed questions of law and fact. With the second group of issues, BellSouth asks the Commission to state what the law is – either by granting partial summary judgment or by issuing a declaratory ruling -- so that a proper context can be established for resolving any factual disputes.

DISCUSSION

Legal Standard

The Kentucky Rules of Civil Procedure, CR 56.03, provide that when a party moves for summary judgment, the judgment "shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56 mandates summary judgment "if there is no genuine issue as to any material fact." *Welch v. American Publ'g Co.,* 3 S.W.3d 724, 729 (Ky. 1999) (quoting CR 56.03). When there is a *complete failure of proof concerning an essential element* of the nonmoving party's case, there can be "no genuine issue of material fact" because such a failure "*necessarily renders all other facts immaterial.*" *Celotex v Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (emphasis supplied). "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Hallahan v. The Courier-Journal,* 138 S.W.3d 699, 705 (Ky. 2004) (citing *Welch v. American Publ'g Co.,* 3 S.W. 3d 724, 730 (Ky. 1999)). Pursuant to CR 56.03, a party is entitled to summary judgment if it can establish there are no material issues of fact and the non-movant will not be able to produce evidence at trial warranting judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Although the standard for summary judgment established by *Steelvest* is exacting, that decision "does not preclude summary judgment" in the proper case. *Hoke v. Cullinan*, 914 S.W.2d 335, 337 (Ky. 1995); *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992) ("'impossible' is used in a practical sense, not in an absolute sense.")

A vast number of published appellate cases since 1995 that have applied *Steelvest* have affirmed summary judgment. *See, e.g., Swatzell v. Nat'l. Resources & Envt'l. Protec.*, 996 S.W.2d 500, 505 (Ky. 1999) (Party opposing summary judgment must present some "affirmative evidence" of a genuine issue of material fact.); *Simpson v. Laytart*, 962 S.W.2d 392, 396 (Ky.

1998); *Nelson Steel Corp. v. McDaniel*, 898 S.W.2d 66, 67 (Ky. 1995); *Johnson v. Lone Star Steakhouse & Saloon*, 997 S.W.2d 490, 492 (Ky. App. 1999); *Myers v. Kentucky Medical Insurance Co.*, 982 S.W.2d 203, 210 (Ky. App. 1997); *Kentucky Hosp. Ass'n. Trust v. Chicago Ins. Co.*, 978 S.W.2d 754, 756 (Ky. App. 1998); *Hibbits v. Cumberland Valley Nat'l Bank & Trust Co.*, 977 S.W.2d 252, 253 (Ky. App. 1998); *Buchholtz v. Dugan*, 977 S.W.2d 24, 27 (Ky. App. 1998); *Daniels v. Louisville Gas and Elec. Co.*, 933 S.W.2d 821, 824 (Ky. App. 1996).

I. ISSUES THAT SHOULD BE RESOLVED, IN THEIR ENTIRETY, AS A MATTER OF LAW

Issue 6: HDSL Capable Copper Loops: -- *Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?*

In determining in which wire centers CLECs are not impaired without access to BellSouth's high capacity loops and dedicated transport, the FCC has established certain "thresholds." Specifically, as a condition precedent to a finding of "no impairment," a wire center must have a certain number of "business lines" or a certain number of "fiber-based collocators" or some combination of the two. In defining "business line," the FCC stated in Rule 51.5, that:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

It could not be clearer that each DS1 line in a wire center is to be counted as 24 "business lines" for the purpose of determining how many "business lines" there are in a wire center. The import of this is that even though a particular DS1 loop may only have 10 of the 24 channels actually activated, the entire capacity of the loop, 24 channels, is to be counted.

What Issue 6 raises is the question of whether an HDSL-capable copper loop should be treated as a DS1 for the purpose of counting business lines. That is, should an HDSL-capable copper loop be counted, for the purpose of determining the number of business lines in a wire center, as one business line, or should it be counted on a 64 kbps equivalency, which means it should be counted as 24 business lines. BellSouth's position is that, as a matter of law, the FCC has declared that an HDSL loop is the equivalent of a DS1 loop, and therefore each HDSL loop must be included in the "business line" count at its full capacity, 24 channels. The basis for BellSouth's legal position is found in the *TRO*, where the FCC said:

> We note throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. Carriers frequently use a form of DSL service, i.e., High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers. We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps.

TRO, n. 634. Since the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity, and since the FCC declared that HDSL loops are used to deliver T1 services, it follows as night follows day, that HDSL loops must be counted, for the purpose of determining business lines in an office, on a 64 kbps equivalent basis, or as 24 business lines.

<u>Issue 7: High Capacity Loops and Transport – Changed Circumstances:</u> -- *Once a determination is made that CLECs are not impaired without access to high capacity loops or dedicated transport pursuant to the FCC's rules, can changed circumstances reverse that* *conclusion, and if so, what process should be included in Interconnection Agreements to implement such changes?*

Issue 7 asks whether a wire center, once determined to be "not impaired" for the purposes of unbundling high capacity loops and dedicated transport, can revert to an "impaired" wire center if circumstances change. The unambiguous answer is that the *TRRO* and the applicable federal rules expressly state that changed circumstances cannot reverse the classification of unimpaired wire centers. *See TRRO,* ¶ 167 (at n. 466); 47 C.F.R. §§ 51.319(a)(4); 51.319(a)(5); 51.319(e)(3). Specifically, for DS1 and DS3 loops, "[o]nce a wire center exceeds [certain] thresholds, *no future DS1 [or DS3] loop unbundling will be required in that wire center.*" 47 C.F.R. §51.319(a)(4) and (a)(5) (emphasis supplied). Likewise, for dedicated transport in Tier 1 or Tier 2 wire centers, the federal rules make clear "[o]nce a wire center is determined to be a Tier 1 [or Tier 2] wire center, that wire center is not subject to later reclassification." 47 C.F.R. §51.319(e)(3). The FCC explained that any other result "could be disruptive as applied to a dynamic market if modest changes in competitive conditions resulted in the reimposition of unbundling obligations." *TRRO,* n. 466. Consequently, this Commission should enter an order finding that changed circumstances cannot cause a wire center to revert, once a determination has been made that CLECs are not impaired without access to certain UNEs in that wire center.

Issue 8(a): Section 271 and State Law: -- *Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?*

BellSouth has presented the issues for which summary judgment in its entirety is appropriate in numerical sequence in order to efficiently present the issues. However, Issue 8(a) is clearly the most important of the issues for which summary judgment is appropriate. The FCC has determined that CLECs are not impaired anywhere without access to unbundled ILEC switching. This means that the combination of network elements referred to as a UNE-P is simply no longer available under the federal rules. No one, including the CLECs, actually disputes that the FCC has effectively put an end to the UNE-P.

Nevertheless, some CLECs are desperately seeking to avoid making the investments in switching facilities so that the Act's primary purpose – "genuine, facilities-based competition"[8] - can occur. The CLECs have created two schemes to attempt to subvert the clear purpose of the Act and the direction that the FCC has provided. The first machination involves a claim by CLECs that they are entitled to have Section 271 network elements included in Section 252 interconnection agreements, that these Section 271 elements, which must be priced at "just and reasonable rates" under the terms of Section 271, should be priced at TELRIC, and that BellSouth is required to combine remaining Section 251(c)(3) UNEs with Section 271 network elements. If the CLECs could prevail on this argument, they would have recreated the UNE-P exactly as it was before.

The second theory the CLECs advance is that switching can be made an unbundled network element under state law, rather than federal law, can be priced at TELRIC under state law, and somehow included in a federally-mandated Section 252 interconnection agreement. Then, the CLECs reason, BellSouth can be required to combine 251(c)(3) UNEs (say the loop for instance), with this state law mandated unbundled network element, and *voila*, the CLECs have once again created the very UNE-P that the FCC has eliminated.

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[8] *USTA II*, 359 F.3d at 576 ("[a]fter all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition--preferably genuine, facilities-based competition.").

Both schemes are absolutely contrary to the law, and the Commission should find, as a matter of law, that neither theory has any legal basis.[9]

A. THERE IS NO LEGAL BASIS FOR A STATE COMMISSION TO COMPEL THE INCLUSION OF SECTION 271 NETWORK ELEMENTS IN A SECTION 252 INTERCONNECTION AGREEMENT.

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. Stated simply, interconnection agreements address Section 251 obligations, and those obligations are the only topics that must be included in a Section 252 interconnection agreement. The resulting Section 251/252 agreements are submitted to state commissions for approval under Section 252 (e). A state commission's authority is explicitly limited to those agreements entered into "pursuant to Section 251" and, when arbitration occurs, state commissions 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 elements ILECs may be required to provide under Section 271. Without doubt, an ILEC may voluntarily agree to negotiate things that would normally be outside the purview of its Section 251 obligations, if it chooses to do so, and when it does that,

[9] Issue 3, which asks how existing interconnection agreements or agreements pending in arbitration should be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations, relates to this issue. That is, if the Commission agrees with BellSouth's motion and finds that Section 252 interconnection agreements are limited to Section 251 obligations, then the parties should have the necessary direction to resolve Issue 3.

such matters may properly be considered by the state commissions under prevailing law. However, where an ILEC refuses to negotiate more than is required by Section 251, that is its right, and it cannot be forced to do more. BellSouth has steadfastly refused to negotiate the inclusion of Section 271 elements in any of the "change of law" negotiations that have lead to this generic proceeding.

The law is quite clear on this point. As the Eleventh Circuit has 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. et 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 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).

In addressing this issue, BellSouth asks the Commission to follow the applicable law, which clearly provides that while BellSouth and other regional Bell Operating Companies ("RBOCs") must currently provide certain services and elements under 47 U.S.C. § 271 ("Section 271") of the Act, it is the FCC, not state commissions, that has exclusive authority to enforce Section 271 and that it is not proper to include Section 271 elements in a Section 252 agreement.

While the Eleventh and Fifth Circuits have made general pronouncements on this subject, there are other federal court decisions significantly, including one from the eastern district of Kentucky, and also state commission decisions that bear directly on this point. Indeed, decisions from Washington to Mississippi demonstrate state commissions have no Section 271 regulatory authority.

In an arbitration decision involving Qwest and Covad, as the United States District Court for the Eastern District of Kentucky has 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.[10]

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. UT-043045, Order No. 06 (Feb. 9, 2005). The Washington Commission distinguished a contrary opinion from Maine,[11] 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.[12]

While not directly on point, the Alabama Public Service Commission has also concluded that the responsibility for overseeing the ILECs' obligations under Section 271 remain with the FCC, not the state commissions. In its recently released order in Docket 29393, which involved

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[10] *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) ("*No New Adds Injunction Order*").

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

[12] 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).

a petition filed by CompSouth - a party to these proceedings - seeking emergency relief in connection with the "no new adds" controversy, the Alabama Public Service Commission said:

> With regard to MCI's argument that BellSouth has an independent obligation to provision UNE-P switching pursuant to §271 of the Telecommunications Act of 1996, we conclude, as did the court in Mississippi PSC, that given the FCC's decision "to not require BOCs to combine §271 elements no longer required to be unbundled under §251, it (is) clear that there is no federal right to §271 based UNE-P arrangements. This conclusion is further bolstered by the fact that the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of §271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission. MCI's argument that there is an independent obligation under §271 to provide UNE-P is accordingly rejected.[13]

Similarly, in Docket P-55, Sub 1550, the North Carolina Utilities Commission, when also considering various emergency petitions concerning the recent "no new adds" controversy, addressed a similar claim by MCI, saying:

> MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.[14]

Of course, the decisions of the Washington, Utah, Alabama and North Carolina commissions are fully consistent with the several district court orders that touch on this subject including the above-cited decision of the United States District Court for the eastern district of Kentucky. Also consistent is the decision of the United States District Court for the southern district of Mississippi:

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[13] *Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief*, Alabama Public Service Commission Docket No. 29393 (May 25, 2005) (footnotes omitted).

[14] *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).

> [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.

Mississippi Order.[15]

The decisions in Kentucky, Washington, Utah, Alabama, North Carolina, and Mississippi also are 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.[16]

All of these decisions, which hold that it is the FCC that has jurisdiction over matters related to Section 271 elements, are obviously correct as a matter of law. States have no authority to regulate access to network elements provided pursuant to Section 271, including any attempt to require the inclusion of Section 271 elements in a Section 252 interconnection agreement. 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

[15] *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) ("*Mississippi Order*").

[16] *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").

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 *TRO* 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).[17] 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.[18] The only role Congress gave the state commissions in Section 271 is a consultative role during the Section 271-approval process.[19] 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 statute to implementing Section 251 obligations, not Section 271

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[17] *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").

[18] 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).

[19] 47 U.S.C. § 271(d)(2)(B).

obligations. Moreover, the FCC refused to graft Section 251 pricing and combination requirements onto Section 271 in its *TRO*,[20] a decision upheld by the *USTA II* court, which characterized the cross-application of § 251 to § 271 as "erroneous."[21] In sum, Section 252 grants state commissions authority only over the implementation of Section 251 obligations, not Section 271 obligations.[22]

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."[23] In the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BOC compliance with Section 271.[24] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section.

In seeking to make an end run around the statutory language, CLECs have suggested that references in section 271(c)(1) to agreements "approved under section 252" support a state commission's assertion of authority over Section 271 rates and terms. Such arguments cannot withstand scrutiny. The statutory language the CLECs have previously relied on does not

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

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

[22] *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 statute, 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).

[23] 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).

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

purport to grant states authority to set rates. And, by tying state authority to section 252, that language confirms that states *cannot* establish prices for facilities unless they are subject to unbundling under section 251(c)(3). That is because section 252(d)(1) of the Act expressly limits state rate-setting authority to items that must be offered "under subsection (c)(3) of that section [251]." More importantly, however, CLECs have not previously cited to any statement by either a federal court indicating that state commissions may impose obligations to ensure section 271 compliance. Moreover, in light of *USTA II,* it is obvious that when Congress assigns a certain responsibility to the FCC, the FCC, and not state commissions, must make the relevant determinations.

B. <u>THERE IS NO LEGAL BASIS FOR A STATE COMMISSION TO FORCE BELLSOUTH TO INCLUDE DELISTED NETWORK ELEMENTS IN A SECTION 252 INTERCONNECTION AGREEMENT BASED ON SUPPOSED STATE LAW AUTHORITY.</u>

In addition to the spurious argument that state commissions can somehow require that BellSouth include Section 271 network elements in a Section 252 interconnection agreement, certain CLECs also advance the theory that state commissions can require ILECs to offer UNEs created under state law that are identical to the federally delisted UNEs, and to include these so-called state UNEs in a federally-mandated Section 252 interconnection agreement. There are any number of reasons why this theory is completely devoid of any legal support, and cannot provide the basis for requiring BellSouth to include now delisted UNEs in its Section 252 interconnection agreements.

First, the plain language of the Act defeats this claim. 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.

Stated simply, interconnection agreements address Section 251 obligations, and those obligations are the only topics that must be included in a Section 252 interconnection agreement. The resulting Section 251/252 agreements are submitted to state commissions for approval under Section 252 (e). A state commission's authority is explicitly limited to those agreements entered into "pursuant to Section 251" and, when arbitration occurs, state commissions must ensure that agreements "meet the requirements of Section 251." 47 U.S.C. § 252(e)(2)(B). There is no authority to include in such Section 252 agreements, other network elements that might be available under state law. As the Fifth and Eleventh Circuits have plainly stated, the ILECs' duty to negotiate a Section 252 interconnection agreement is not unlimited, and in fact, absent voluntary agreement by the ILEC, is limited to the ILEC's Section 251 obligations. Clearly there is no room in a Section 252 interconnection agreement for a state law-mandated UNE.

Second, and perhaps more compelling, is that any attempt to include switching in a Section 252 interconnection agreement under some state law theory, would simply be inconsistent with federal law. CLECs 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).

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." *TRO* ¶ 659. Nor does it permit return to "virtually unlimited . . . unbundling, based on little more than 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.

Indeed, the Georgia Commission has already recognized that any decision to require unbundling under state law would likely be preempted. In the DeltaCom arbitration, in response to Issue 11a that held as follows:

> The Commission has the authority to order local exchange companies 'to provide additional interconnection services and unbundling.' O.C.G.A. 46-5-164(g). *This authority does not include the authority to impose unbundling requirements 'without regard to the federal scheme.'"* (TRO, at para. 194). The FCC explained that where it has found a network element need not be unbundled, a state requirement to unbundle the same network element would likely 'substantially prevent' implementation of the federal regime. *Id.* at 195. To the extent that a state commission order does not conflict with, or substantially prevent implementation of the federal regime, it is binding upon the parties, and this authority should be referenced in the interconnection agreement.

Thus, CLECs have no basis to rely upon state law to obtain former unbundled network elements because such an order would directly conflict with federal law on the issue. Therefore, the Commission should find, as a matter of law, that BellSouth cannot be compelled, based on state law, to include UNEs that the FCC has delisted, in its Section 252 interconnection agreements.

<u>Issue 8(b): Section 271 and State Law:</u> -- *If the answer to part (a) is affirmative in any respect, does the Commission have the authority to establish rates for such elements?*

Issue 8(b) asks, if the state commissions find some basis (which they cannot) to require the inclusion of Section 271 network elements (or network elements unbundled under state law) in a Section 252 interconnection agreement, do the state commissions have the authority to set rates for those elements. While the state commission may well have the authority to establish rates to network elements unbundled under state law, provided that there ever could be any, the answer with regard to Section 271 elements is clearly that the state commissions have no such authority, which also demonstrates state commissions do not have the authority to require inclusion of the Section 271 elements in the first place.

Section 271 "establish[es] a comprehensive framework governing Bell operating 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. The FCC already has 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*[25] ¶ 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

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[25] *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).

would be impaired without access to those elements as UNEs. *See TRO* ¶ 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 obligations under state law or to regulate them in any way, including setting rates, 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).

More generally, any effort on the part of state commissions attempting to regulate the prices of Section 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 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).[26]

The FCC has clearly recognized this limitation. The FCC has stated unequivocally that the FCC has "exclusive authority" over "the section 271 process."[27] 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.[28] 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."[29] Accordingly "*the [FCC] may ensure effective regulation of the interstate component . . . by*

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[26] *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 conflicting determinations," thereby "frustrating [Congress's] objectives of certainty and uniformity").

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

[28] *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").

[29] *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").

preempting inconsistent state regulation of the matter in issue."[30] 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."[31]

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 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.[32]

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.[33] 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.

Therefore, even if state commissions had authority (which they do not) to require ILECs to include Section 271 elements in a Section 252 interconnection agreement, the state commissions, as a matter of law, have no authority to set rates for those elements, and this Commission should so find.

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

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

[32] *Id.*

[33] *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.").

Issue 17 –Line Sharing: -- *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?*

There should be no dispute that the *Triennial Review Order* establishes a binding transition mechanism for access to the high frequency portion of the loop ("HFPL"). In fact, the FCC articulated, as clearly as it could, the ILECs obligation to provide new line sharing to the CLECs, at paragraph 265 of the *TRO*:

> The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state- approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary.

How much clearer could the FCC have been? The CLECs were allowed to add new line sharing customers during the first year following the effective date of the TRO. *See also* 47 C.F.R. § 51.319(a)(1)(i)(B). Under this transition, the FCC established specific limitations on CLEC access to the HFPL and specific rates that CLECs must pay in those limited instances where they can still obtain the HFPL.[34] There is no legal question about the FCC's line sharing plan, nor any factual issue that prevents a conclusive answer to this issue.[35]

Notwithstanding this clear statement of what the law requires, certain CLECs have refused to include the FCC's transition plan in Section 252 interconnection agreements, thus necessitating a resolution of this issue before state commissions. The CLECs' argument is that, notwithstanding the clear language of the FCC in its TRO, CLECs can obtain the HFPL indefinitely and at rates other than the ones the FCC specifically established in its transition plan simply by requesting access to those facilities under section 271 instead of section 251.[36] This Commission can and should resolve this line sharing question now.[37] The CLECs' position is deeply illogical and inconsistent with both the statutory scheme and the FCC's binding decisions.

First, if for no other reason, the CLECs' argument must fail for the same reason that it fails in response to Issue 8 (a). Even if line sharing could be construed to be a Section 271 network element, the state commissions have no authority to require an ILEC to include Section

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[34] *See Triennial Review Order* ¶ 265.

[35] Even if Covad argues that, under *Coserv*, there is a factual question as to whether BellSouth has voluntarily negotiated access to line sharing (which BellSouth disputes and which is contrary to Covad's filings in other dockets), such an argument presupposes that BellSouth has a legal obligation– outside of the FCC's limited transition plan – to provide line sharing (which it does not). Thus, Covad cannot defeat a ruling on the legal question by relying upon *Coserv*.

[36] While many CLECs have interconnection agreements that contain line sharing language that needs to be amended, less than ten CLECs have active line sharing arrangements in place in BellSouth's region, and of those CLECs, only Covad has actively pursued continued entitlement to line sharing under Section 271 in other dockets, including one in Kentucky discussed below in fn 37. Consequently, BellSouth frequently refers to Covad as opposed to CLECs in this portion of its pleading.

[37] In so doing, the Commission will also address the Covad-BellSouth line sharing dispute in Case No. 2004-00259. In that docket, the Commission, on reconsideration, held in abeyance the line sharing issue until the FCC provided "clarification and guidance." *Order on Rehearing,* November 30, 2004, p. 2. For the reasons discussed below, no party can credibly argue that the FCC has found that line sharing is available as a Section 271 element, and the Commission should confirm its finding that "BellSouth is obligated to provide the whole loop, but not obligated to provide any portion of it on a separate and unbundled basis." *Order,* dated October 18, 2004, p. 5. On the contrary, a logical reading of FCC decisions can only lead to the conclusion that the FCC does not view Section 271 as an alternative avenue for line sharing.

271 elements in a Section 252 interconnection agreement for all of the reasons discussed above in connection with Issue 8(a).

Second, if that is not sufficient, the CLECs' theory that line sharing is still available as a Section 271 element is illogical because it would render irrelevant the FCC's carefully calibrated scheme to wean CLECs away from the use of line-sharing and to transition them to other means of accessing the FCC's facilities, such as access to whole loops and line-splitting, that do not have the same anti-competitive effects that the FCC concluded are created by line-sharing. As the FCC explained, "access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled *creates better competitive incentives*."[38] Because of the inherent difficulties in pricing access to just the HFPL (difficulties that exist regardless whether access is required under section 251 or 271), allowing competitive LECs to purchase a whole loop or to engage in line-splitting "but *not* requiring the HFPL to be separately unbundled" puts CLECs "in a more fair competitive position."[39]

Indeed, the FCC expressly found continued unlimited access to line-sharing to be anticompetitive and contrary to the core goals of the 1996 Act. Allowing continued line sharing "would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECS' and the competitive LECs' offerings. We find that *such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets*."[40]

There is no basis to conclude that the FCC, having eliminated these anti-competitive consequences under section 251, has allowed these *same* untoward effects to go on unchecked

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[38] *Triennial Review Order* ¶ 260.

[39] *Id.*

[40] *Id.* ¶ 261 (emphasis added).

under section 271. On the contrary, subsequent FCC orders confirm that the federal agency continues to believe that it has required CLECs to obtain a whole loop or engage in line-splitting. Thus, in its very recent *BellSouth Declaratory Ruling Order*[41], the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop." (¶ 35). Moreover, far from suggesting an open-ended section 271 obligation to allow line-sharing, this very recent FCC decision reiterates that line sharing was required "*only* under an express three-year phase out plan." *Id.* ¶ 5 n. 10 (emphasis added). The FCC's statement cannot be squared with the notion that line-sharing is also required indefinitely under section 271.

Moreover, there is not a single mention of line sharing in Section 271. By its plain text, section 271 does not require line-sharing when such access is no longer mandated as a separate UNE (and thus required under section 271 checklist item 2). Instead, checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."[42] The FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises.[43] BellSouth thus meets its checklist item 4 obligation by offering access to complete loops and thus all the "transmission" capability on those facilities. Nothing in checklist item 4 requires more.

But even if section 271 did require line-sharing, the FCC's recent forbearance decision would have removed any such obligation.[44] BellSouth understands that Covad disputes line sharing is included in the relief granted in the *Broadband 271 Forbearance Order*. A review of

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[41] *See Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251 (Mar. 25, 2005) ("BellSouth Declaratory Order").

[42] 47 U.S.C. § 271(d)(2)(B)(iv).

[43] 47 C.F.R. § 51.319(a).

[44] *Memorandum Opinion and Order*, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order*").

the record in that case, however, demonstrates that the relief granted extended to all broadband elements, including the HFPL. As stated by Commissioner Martin:

> While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of section 271 with respect to line sharing [citing *Verizon Petition for Forbearance*]. Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any Section 271 obligation with respect to line-sharing. Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.

Statement of Commissioner Kevin J. Martin, *Broadband 271 Forbearance Order.*[45]

As stated by Commissioner Martin, the Bell Operating Companies, including, BellSouth included line sharing in their Petitions for Forbearance filed with the FCC, and the relief granted therefore also included line sharing. BellSouth's Petition in particular "[sought] forbearance from the same broadband elements as sought by Verizon,"[46] and was patterned after an earlier petition filed by Verizon. Verizon's petition, in turn, asked the FCC to forbear from imposing any 271 obligation on the broadband elements that the FCC had eliminated in the TRO. BellSouth's FCC Petition likewise requested, in relevant part, that:

> [T]o the extent the Commission determines § 271 (c)(2)(B) to impose the same unbundling obligations on BOCs as established by § 251 (c) that the Commission forbear form apply any stand-alone unbundling obligations on broadband elements. *While BellSouth believes that no such obligations exist, it files this Petition in an abundance of caution to ensure that the Commission does not impose such obligations where there is ample evidence to demonstrate that the unbundling obligations required by § 251 are unnecessary to meet the purpose of* § 271. Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 1, 2003.

(emphasis added).

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[45] *Id.*

[46] *Broadband 271 Forbearance Order*, at ¶ 9.

In its forbearance order, the FCC stated that, "[a]lthough Verizon's Petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under section 251(c)." *Broadband 271 Forbearance Order, at ¶ 2, n. 9.* In this regard, the FCC cited to a March 26, 2004 *ex parte* letter filed by Verizon. In relevant part, Verizon's March 26, 2004 letter included a white paper that specifically referred to line sharing. Indeed, referring to *USTA II,* Verizon stated:

> [t]he court reached similar conclusions with respect to *other broadband elements. . . . with respect to line sharing,* the court again concluded that, even if CLECs were impaired to some degree without mandatory line sharing, the Commission had properly concluded given the 'substantial intermodal competition from cable companies' that, 'at least in the future, line sharing is not essential to maintain robust competition in this market.' [47]

BellSouth's request for relief, which relies on the Verizon filing, thus includes line sharing.

Indeed, the only logical conclusion is that the RBOCs included in their petitions for forbearance all of the broadband elements the FCC eliminated in the *Triennial Review Order.* The FCC eliminated unbundling of most of the broadband capabilities of residential loops in the *Triennial Review Order*, and its rationale was consistent for each of these capabilities. It eliminated unbundling of fiber-to the-home loops, the packetized portion of hybrid loops, and packet switching (all broadband elements), based on "the impairment standard and the requirement of section 706 of the 1996 Act to provide incentives for all carriers, including the ILECs, to invest in broadband facilities."[48] It used the same rationale to eliminate the HFPL

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[47] Verizon's March 26, 2004 filing, attached as Exhibit 3.

[48] *Broadband 271 Forbearance Order*, ¶ 7, *citing Triennial Review Order* ¶¶ 242-44.

broadband element.[49] As stated by the D.C. Circuit in affirming these portions of the *Triennial Review Order:*

> [t]he Commission declined to require ILECs to provide unbundled access to most of the broadband capabilities of mass market loops. In particular, it decided … not to require unbundling of the broadband capabilities of hybrid copper-fiber loops, Order ¶¶288-89, or fiber-to-the-home ("FTTH") loops, id. ¶ 273-77, and it also decided not to require ILECs to unbundle the high frequency portion of copper loops, a practice known as "line sharing," id. ¶¶255-63.

359 F.3d 554, at 226.

As noted in the *Broadband 271 Forbearance Order*, the D.C. Circuit expressly upheld the FCC's finding that it was appropriate to relieve the BOCs from the unbundling on a national basis "for the broadband elements at issue."[50] And the D.C. Circuit Court's opinion clearly contemplates that "the broadband elements at issue" included line sharing.[51] There is simply no rational basis for excluding one broadband element – line sharing – from the broadband relief the FCC granted.

Likewise, there is every reason to conclude that the FCC forbore from imposing any Section 271 obligations of each of these broadband elements. The benefits to broadband competition of forbearing from imposing 271 obligations on the fiber loop elements apply equally to forbearance of line sharing arrangements. For example, the FCC held that:

> The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.[52]

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[49] *Triennial Review Order* ¶¶ 258-63.

[50] *Broadband 271 Forbearance Order*, n. 73, *citing USTA II*, 359 F.3d at 578-85.

[51] The D.C. Circuit's discussion of the CLEC challenges to "Unbundling of Broadband Loops" includes hybrid loops, fiber-to-the-home loops, and line sharing. *USTA II* at 578-85.

[52] *Broadband 271 Forbearance Order* ¶ 34.

This holding mirrors the FCC's conclusion about the effect of removing line sharing from the UNE list in the *Triennial Review Order.*[53] The FCC also explained "[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for … wireline broadband service."[54] Finally, the FCC concluded:

> broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.[55]

Just as forbearance from 271 obligations for fiber to the home and fiber to the curb loops is good for broadband competition, so is forbearance from any line sharing obligations.

Even if the FCC's forbearance order did not address line sharing, under Section 160(a), any petition for forbearance not denied within the statutory time period is deemed granted.[56] Thus, as explained by Commissioner (now Chairman) Martin in his concurring statement, "regardless of whether it was affirmatively granted, because the [FCC's] decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by

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[53] *Triennial Review Order*, at ¶ 263 ("we anticipate that the [FCC's] decisions in this Order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options").

[54] *Broadband 271 Forbearance Order* ¶ 22.

[55] *Broadband 271 Forbearance Order* ¶ 29.

[56] 47 U.S.C. § 160(c) ("[a]ny such petition shall be deemed granted if the Commission does not deny the petition…").

default under the statute."[57] Neither Covad nor any other CLEC can identify any place where the FCC denied the forbearance petition as to line-sharing. Thus, as a matter of law, the petition was granted as to that functionality.

Finally, state commission decisions in Rhode Island and Illinois also support BellSouth's position. In Rhode Island, for example, Verizon had previously filed tariffs setting forth certain wholesale obligations. Following the *TRO,* Verizon filed tariff revisions, including a revision that eliminated line sharing from the classification as a UNE. Covad objected to Verizon's revision, claiming, as it did in this docket, that Verizon had a Section 271 line sharing obligation. The Rhode Island Commission rejected Covad's arguments and approved Verizon's tariff modifications.[58] Likewise, the Illinois Commission has rejected CLEC arguments that line sharing is a Section 271 obligation. In relevant part, in an arbitration decision addressing SBC's obligations under the *TRO,* the Illinois Commission held, "as for XO's contention that the ICA should reflect line-sharing obligations under Section 271 and state law, the Commission notes that the HFPL is not a 271 checklist item . . . . [p]atently, no reference to Section 271 obligations belongs in the ICA."[59] Finally, in BellSouth's region, the Tennessee Regulatory Authority ("TRA") in addressing a parallel docket, has determined that the FCC's transition plan

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[57] BellSouth acknowledges that the separate statement of former FCC Chairman Powell – which statement was amended after the FCC issued a press release concerning the adoption of the Broadband 271 Forbearance Order and, as amended -- conflicts with Chairman Martin's statement. Mr. Powell's amended statement, however, does not address section 160(c) of the Act which obligates the FCC to rule on forbearance petitions within fifteen months of the filing date of the petition. Moreover, the FCC did not deny any part of the BellSouth petition that asked for forbearance for all broadband elements delisted under section 251. Consequently, the lack of any additional language that explicitly addresses line sharing means that the FCC must forbear from enforcing any 271 obligations that may exist with respect to line sharing, as recognized by Chairman Martin. Moreover, while Mr. Powell indicated line sharing is excluded from the Broadband 271 Forbearance Order, he did not explain the basis for his conclusion nor did he address the legal argument that the FCC's failure to deny the petitions results in granting forbearance for line sharing as well as the other cited elements.

[58] Report and Order, In re: Verizon-Rhode Island's Filing of October 2, 2003 to Amend Tariff No. 18, Rhode Island Public Utilities Commission, Docket No. 35556 (October 12, 2004).

[59] *In re: XO Illinois*, 2004 WL 3050537 (Ill. C.C. Oct. 28, 2004).

constitutes the only obligation BellSouth has regarding line sharing.[60] This Commission should do the same.

<u>Issue 20 – Sub-Loop Concentration:</u> -- *What is the appropriate ICA language, if any, to address sub loop feeder or sub loop concentration?*

The question raised by this issue, is whether BellSouth has any obligation to provide sub-loop feeder or sub loop concentration as a UNE. By way of background, the local loop can be subdivided into its component "sub-loop" parts: loop distribution, loop concentrator/multiplexor, and loop feeder.[61] The loop distribution component is the line from a customer's premises to the device that gathers several of those lines together, such as the feeder distribution interface ("FDI") or a loop concentrator/multiplexor.[62] At the FDI, the loop distribution lines from customers' premises are gathered or "concentrated" into a smaller number of "loop feeder" lines that carry traffic from that point to the local switch.[63]

The FCC answered this issue very clearly in the *TRO* where it said:

> Consistent with our section 706 goal to spur deployment of advanced telecommunications capability, *we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE.*

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[60] The TRA has not yet issued a written order. BellSouth acknowledges that the Maine commission is currently investigating line sharing under state law and that the New Hampshire commission has determined that Verizon is obligated to continue providing line sharing. *Order No. 24, 442, In re: Proposed Revisions to Tariff NHPUC No. 84* (Statement of Generally available Terms and Conditions) *Petition for Declaratory Order re Line Sharing*, DT 03-201, DT 04-176 (Mar. 11, 2005). The core rationale underlying the New Hampshire (and Maine) decisions was the commissions' belief that Verizon had voluntarily committed to file an intrastate wholesale tariff (and did file such a tariff) embodying the rates, terms and conditions of its wholesale obligations (including line sharing), which commitment was included in the FCC order granting Verizon long distance relief. Indeed, in both cases, the state commissions "[did] not assert independent authority to define the scope of the [RBOC's] section 271 obligations nor its compliance with those obligations under that section." Instead, the commissions purported only to exercise the authority they believed had been conferred upon them by virtue of the filed tariffs. No such state tariff exists here, and these decisions are therefore distinguishable.

[61] *See MCI v. Bell-Atlantic*, 36 F. Supp. 2d 419, 425-426 (D. D.C. 1999).

[62] *Id.*

[63] *Id.*

TRO, ¶ 253 (emphasis added). The FCC continued:

> the rules we adopt herein do not require incumbent LECs to provide unbundled access to their feeder loop plant as stand-alone UNEs, thereby *limiting incumbent LEC subloop unbundling obligations to their distribution loop plant.*

Id. ¶ 254 (emphasis added).

It is clear that the FCC has "delisted" sub-loop feeder. It is equally clear that BellSouth's unbundling obligation is limited to the sub loop distribution. The FCC has expressly stated the unbundling obligation applies only to that portion of the loop necessary to access the end-user's premises. *See* 47 C.F.R. 51.319(b). Consequently, BellSouth has no legal obligation to unbundle sub-loop concentration, which, for simplicity, is that portion of the network between the sub loop feeder and the sub loop distribution. Thus, there is no need for any interconnection agreement to contain language with respect to subloop feeder or sub-loop concentration, and this Commission should so rule as a matter of law.

Issue 21 – Packet Switching: -- *What is the appropriate ICA language, if any, to address packet switching?*

It is clear from the unequivocal language of the TRO that ILECs are not required to provide unbundled packet switching to CLECs, therefore the Commission should find as a matter of law that there should be no language in Section 252 interconnection agreements requiring the unbundling of packet switching.

Packet switching is "routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units" as well as the "functionalities performed by DSLAMs." *TRO*, at ¶ 535.

There is no legal basis to include language regarding packet switching in interconnection agreements. The FCC unequivocally concluded that "on a national basis … competitors are not impaired without access to packet switching, including routers and DSLAMs." *TRO,* at ¶ 537. In making this decision, the FCC specifically repudiated the limited exception set forth in the *UNE Remand Order* regarding situations in which an ILEC had deployed DLC systems. *Id.* The FCC reasoned that its decision was consistent with both the impairment standard of section 251, and with the "goals of section 706 of the 1996 Act." *Id.* The extensive evidence of competitive deployment of packet switches led the FCC to conclude that "there do not appear to be any barriers to the deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching." *TRO,* at ¶ 539. No CLEC appealed the FCC's decision on this element. As such, as a matter of law, this Commission should confirm that interconnection agreements should not include any packet switching language.

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 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?*

In the *TRO,* the FCC determined in the *TRO* that ILECs have no obligation to unbundle fiber to the home ("FTTH") mass market loops[64] serving greenfield areas or areas of new

[64] A FFTH loop is a "local loop consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark fiber, that connects a customer's premises with a wire center (i.e., from the demarcation point at the customer's premises to the central office)." *TRO* at ¶ 273, n. 802.

construction.[65] *TRO* at 275. Subsequent to the *TRO*, the FCC expanded this ruling to include fiber to the curb ("FTTC") loops in its *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-248 at ¶¶ 1, 9 (Oct. 18, 2004) ("*FTTC Reconsideration Order*"). A FTTC loop is a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises." *FTTC Reconsideration Order* at ¶ 10. Thus, the same unbundling framework (including any unbundling relief) established by the FCC in the *TRO* for FTTH loops also applies to FTTC loops.

Additionally, the FCC subsequently determined in *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-191 at ¶ 1 (Aug. 9, 2004) ("*MDU Reconsideration Order*") that the FTTH rules in the *TRO* apply to predominantly residential multiple dwelling units ("MDU"). "General examples of MDUs include apartment buildings, condominium buildings, cooperatives, or planned unit developments." *Id.* at ¶ 4. The FCC further stated that the existence of businesses in MDUs does not exempt such buildings from the FTTH unbundling framework established in the *TRO*. For instance, the FCC stated that "a multi-level apartment that houses retail stores such as a dry cleaner and/or a mini-mart on the ground floor is predominantly residential, while an office building that contains a floor of residential suites is not." *Id.*

Moreover, the FCC in the *MDU Reconsideration Order* established that FTTH loops include any "fiber loops deployed to the minimum point of entry ("MPOE") of predominantly

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[65] The FCC also determined in the *TRO* that ILECs do not have an obligation to unbundled FTTH loops in overbuild situations, except where the ILEC elects to retire existing copper loops in which case the ILEC has to provide unbundled access to a 65 kbps transmission path over the FTTH loop or provide unbundled access to a spare copper loop. *TRO* at ¶ 273, 277.

residential MDUs, regardless of the ownership of the inside wiring." *MDU Order on Reconsideration* at ¶ 10. The FCC has defined MPOE as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.105(b). Consequently, the MPOE is effectively the demarcation point between the inside wire facilities at the MDU and BellSouth's loop facilities.[66] Thus, regardless of whether the ILEC owns or controls the inside wire beyond the demarcation point or MPOE in a MDU, when the fiber portion of a loop extends to a MDU and that fiber connects to in-building copper cable facilities owned or controlled by an ILEC, the ILEC has no obligation to unbundle the fiber portion of the loop.[67] Finally, to avoid any disparate treatment between FTTC loops and FTTH loops, the FCC has held that its rules relating to MDUs apply to both FTTH and FTTC loops. *See FTTC Reconsideration Order* at ¶ 14.

Based on the above, the Commission should find as a matter of law that (1) BellSouth has no obligation to unbundle FTTH or FTTC mass market loops in greenfield areas; (2) BellSouth has no obligation to unbundle FTTH or FTTC mass market loops serving predominantly residential MDUs; (3) BellSouth has no obligation to unbundle fiber loops facilities that are deployed to the MPOE of a MDU, regardless of whether the ILEC owns or controls any cooper cable facilities in the MDU; and (4) the MPOE should be defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." There are no genuine issues of

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[66] Indeed, in describing this section of the *MDU Order on Reconsideration*, the FCC referred to the section as the "MDU Demarcation Point." *MDU Order on Reconsideration* at 10.

[67] In reaching this decision, the FCC specifically addressed BellSouth request for clarification that "'the fiber portion of a loop that extends to a multi-unit building and that connects to in-building copper cable owned or controlled by the LEC, is considered a [FTTH] loop.'" *MDU Order on Reconsideration* at ¶ 10.

material fact for these fundamental principles and, pursuant to the *TRO*, *FTTC Order on Reconsideration*, *MDU Order on Reconsideration*, and FCC Rules, BellSouth is entitled to judgment as a matter of law.

Issue 24 – Hybrid Loops: -- *What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?*

Hybrid loops are "local loops consisting of both copper and fiber optic cable (and associated electronics, such as DCC systems." *TRO*, at fn. 832. The FCC recognized that hybrid loops reflect the network deployment plan pursuant to which ILECS "pursue their construction and network modification projects in incremental ways – first, the deployment of fiber in the feeder plant and associated equipment like DLC systems ... followed by fiber-to-the-curb, followed by FTTH." *TRO*, at ¶ 285.

This Commission should rule that BellSouth is not obligated to unbundle "the next generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market." *TRO*, at ¶ 288.[68] The FCC reached this conclusion based on the fact that requiring ILECs to unbundle next-generation network elements "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities ...." *Id.*

The D. C. Circuit Court of Appeals affirmed the FCC's holding that BellSouth is not obligated to unbundle the broadband capabilities of a hybrid loop. As a general proposition, the D.C. Circuit held that "the [FCC] reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment *USTA II*, at 37. More specifically, the D.C.

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[68] In other words, ILECs are not required to "unbundle any transmission path over a fiber transmission facility ... that is used to transmit packetized information."

Circuit affirmed the FCC's application of that analysis to hybrid loops and concluded that "the [FCC's] decisions not to order unbundling of the broadband capacity of hybrid loops was based on permissible statutory considerations and supported by substantial evidence." *USTA II*, at 41.

Based on these holdings of the FCC and the D.C. Circuit, the Commission should make clear that BellSouth is not obligated to unbundle the next-generation elements of its hybrid loops.

Issue 25: End User Premises: -- *Under the FCC's definition of a loop found in 47 C.F.R. §51.319(a), is a mobile switching center or cell site an "end user customer's premises"?*

The federal rules define the local loop network element as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer's premises." 47 C.F.R. § 51.319(a). Facilities that terminate at a mobile, switching center or cell cite do not fall within this definition. A mobile switching center or cell site is part of the transmission facility used to provide service to a wireless customer. The FCC has determined that such cell sites or base stations should be considered part of the transmission facilities that exist *outside* the incumbent LEC's local network. *TRO* ¶366. Consequently, the FCC denied mobile wireless carriers access to incumbent LECs unbundled dedicated transport. *TRO* ¶ 368. The FCC confirmed this finding in the *TRRO,* where the FCC made it clear CLECs were denied all unbundled access to incumbent LEC network elements for the exclusive provision of mobile wireless service. *TRRO,* n 99. This Commission should rule on this legal issue, and make clear that a mobile switching center or cell site cannot constitute an "end user customer premises."

Issue 30 – Entire Agreement Rule: -- *What is the appropriate language to implement the FCC's "entire agreement" rule under Section 252(i)?*

On July 13, 2004, the FCC replaced the "pick-and-choose" rule with an "all-or-nothing" rule.[69] The modified rule, codified in the federal rules at 47 C.F.R. § 51.809, requires a requesting carrier seeking to avail itself of terms in an interconnection agreement to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement. The FCC reasoned that its new rule would promote more "give-and-take" negotiations, which will produce creative agreements that are better tailored to meet carriers' individual needs. Also, the FCC reiterated its policy objective or advancing facilities based competition.

There can be no debate that, as a matter of law, CLECs can no longer obtain "piecemeal" adoptions of interconnection agreements, or cherry pick certain provisions or terms out of existing agreements. Instead, a CLEC can only adopt an interconnection agreement in its entirety. This Commission should expressly confirm that there are no exceptions to the "all-or-nothing" rule and address this legal issue forthwith.

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

When this Commission issued its December 8, 2004, Order in this docket, the Commission directed that all CLECs that had been served by BellSouth and affected by this docket were made parties to this proceeding. Consequently, the outcome of this docket will be binding upon both active parties and upon those CLECs that have been provided with notice of this proceeding, but have elected not to actively participate.

By including Issue 32 as a question for resolution, BellSouth sought merely to ensure that one proceeding would be conducted to decide all outstanding questions, with one proceeding to derive language with which to amend the interconnection agreements in lieu of expensive and

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[69] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Second Report and Order*, 19 FCC Rcd 13494 (2004).

time-consuming individual negotiations and, possibly, arbitrations. Any CLECs alleged concern with this issue based upon due process concerns have been addressed by this Commission's prior order. BellSouth respectfully requests that the Commission confirm that its orders in this docket shall bind all CLECs in Kentucky, and not just those CLECs that have intervened.[70]

II. PARTIAL SUMMARY JUDGMENT ISSUES, OR ALTERNATIVELY, ISSUES THAT THE COMMISSION CAN ADDRESS BY ISSUING A DECLARATION SETTING FORTH THE APPLICABLE LAW, SO THAT THE PARTIES MAY EFFICIENTLY PRESENT THE FACTUAL DISPUTES SUCH ISSUES PRESENT.

The issues that BellSouth discussed in the preceding section of this Motion were issues that the Commission can decide as a matter of law in their entirety, thus completely disposing of the issue. There are other issues, however, that include questions of law and questions of fact. BellSouth respectfully requests that the Commission address the legal questions posed by the following issues by providing a clear statement of what the law requires, either by issuing partial summary judgment as to each of the following issues, or, alternatively, by issuing a declaratory ruling, from which the parties can frame their factual disputes accordingly.

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 Triennial Review Remand Order, 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,*

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[70] To maximize the benefits to all carriers, at the conclusion of this proceeding BellSouth recommends the Commission should adopt a specific *TRO/TRRO* amendment that sets forth the precise language that should be included in interconnection agreements. The Commission should then order that within 45 days of the written order setting forth the agreement language parties must execute compliant amendments (*i.e.*, those that track the Commission's language unless otherwise mutually agreed to) to their agreements. To ease the administrative burden on the Commission, the Commission also could order that all such compliant amendments are deemed approved by the Commission as of the date of execution.

should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?

These issues, as framed by the parties, ask the Commission to decide upon particular interconnection agreement language. In addressing these issues in this Motion, BellSouth is not asking the Commission to write contract language. Instead, BellSouth asks the Commission to enter an order that finds that the transition periods for former UNEs will end at a date certain.[71] Answering that legal question is straightforward because the FCC detailed transition plans for switching, high capacity loops, and dedicated transport in the *TRRO* and in its rules. *See TRRO*, ¶¶ 143, 144, 196, 197, 227 *and* 47 C.F.R. §§ 51.319(a)(4)(iii); 51.319(a)(5)(iii); 51.319(a)(6)(ii); 51.319(d)(2)(iii); 51.319(e)(2)(ii)(C); 51.319(e)(2)(iii)(C). Specifically, BellSouth is obligated to provide certain loops and access to certain transport routes from March 11, 2005 through March 10, 2006 at 115% of the rate that was in effect on June 15, 2004. For dark fiber loops and transport, BellSouth's obligation continues until September 10, 2006. With respect to local circuit switching, BellSouth is obligated to provide access to the embedded base through March 10, 2006 at the rate that was in effect on June 15, 2004 plus one dollar. In addressing this issue, BellSouth respectfully requests that the Commission enter an order that declares, as a matter of law, that BellSouth's legal obligations to effectuate the FCC's transition plans are exactly as specified in the *TRRO* and the corresponding federal rules, as BellSouth has recited them. BellSouth also requests that the Commission state unequivocally that its transition obligation is

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[71] The FCC has definitively ruled that CLECs must transition from former UNEs to other serving arrangements by March 11, 2006 and September 11, 2006 respectively. *See TRRO*, ¶¶ 143,144, 196, 197, 227 *and* 47 C.F.R. §§ 51.319(a)(4)(iii); 51.319(a)(5)(iii); 51.319(a)(6)(ii); 51.319(d)(2)(iii); 51.319(e)(2)(ii)(C); 51.319(e)(2)(iii)(C). Given the explicit deadlines, there is no legal basis for this Commission to extend additional time to CLECs, and reward CLECs that fail to take steps to convert UNEs in time to meet the federal deadline. This issue is particularly acute considering the number of CLECs that have failed to take any action whatsoever to respond to BellSouth's repeated requests to modify contractual language. Accordingly, this Commission must make clear that CLECs cannot elect to ignore the federal timeframes and effectively extend the FCC's transition plans – if CLECs fail to convert former UNEs, loss of service may result.

limited as a matter of law and that CLECs have no reasonable expectation of receiving a longer or more favorable transition plan than what is specified in the federal rules.

There is nothing factual about this issue – the FCC requires CLECs to elect alternative serving arrangements and also expects transitions to be completed by specified dates. This is a straightforward legal question, with a clear answer. BellSouth's concern is that, absent a Commission ruling that confirms the applicable law, some CLECs may choose inaction, and, as March 11, 2006 approaches, will then file a host of "emergency" petitions in an attempt to disguise or delay the inevitable, thus reprising the recent "no new adds" controversy. By confirming that CLECs cannot game the FCC's rules to obtain a longer transition period, the Commission will stave off future "emergencies" and eliminate arguments to the contrary in witness testimony.

Likewise, the Commission should make clear that CLECs cannot reasonably expect to receive, absent a mutual agreement otherwise, rates that are lower than the rates specified for the transition period. While such a finding may seem perfectly obvious, CLECs have suggested in various pleadings that commissions can set Section 271 rates (BellSouth disagrees), and that current UNE rates would suffice. BellSouth's concern is that CLECs may then try to claim entitlement to rates lower than those established in the *TRRO,* claiming that BellSouth is providing access to former UNEs after March 11, 2005 as Section 271 services. Taking such CLEC arguments to their logical conclusion would mean that potentially *lower* rates would apply during the transition period. While this Commission cannot and should not address Section 271, confirming that CLECs are not entitled to rates lower than the transition rates contained in the federal rules will eliminate any arguments to the contrary -- arguments that lack any legal foundation.

<u>Issue 14 – Commingling</u> -- *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)*?

There are two aspects of this issue that can be resolved as a matter of law. First, there is the question of whether the scope of commingling includes the commingling of Section 251(c)(3) UNEs with Section 271 network elements. Second, there is the question of whether the scope of commingling includes the provision of DSL over UNE-P. Both of these questions can be resolved as matters of law, thus narrowing the breadth of the commingling issue.

A. Section 271 Elements.

As discussed extensively in connection with Issue 8, above, this Commission cannot regulate the terms by which BellSouth complies with its Section 271 obligations. Because the FCC alone has that authority, as detailed *infra*, this Commission must reject out of hand any suggestion that Section 271 services must be commingled with other UNEs.

More significantly, however, the *Triennial Review Order,* and its *Errata,* demonstrates BellSouth has no obligation to commingle Section 271 elements with 251 elements.[72] 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."[73] 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

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

[73] 47 C.F.R. §51.5.

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."[74] Later, however, when the FCC issued its *Errata,* it deleted the phrase "unbundled pursuant to section 271."[75] 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 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 certain 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

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[74] *TRO* ¶ 584 (emphasis supplied).

[75] *TRO Errata*, at ¶ 27.

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."[76]

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 . . . . ."[77] 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

[76] *TRO* ¶¶ 579 – 581, 583.

[77] *TRO* ¶585 (emphasis supplied).

in the *Triennial Review Order* that competitive LECS may convert *tariffed incumbent LEC services* to UNEs and UNE combinations . . . ."[78] It is clear, therefore, that the FCC narrowly 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.[79]

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.[80] This is because certain CLECs claim that Section 271 provides an independent basis to obtain UNE-P at just and reasonable rates. As federal district courts have already explained, however, the enforcement authority for Section 271 unbundling lies with the FCC, and the CLECs cannot reasonably blind themselves to applicable law.[81] Consequently, even if the CLECs claim there is a factual dispute as to whether BellSouth offers Section 271 services as a wholesale service, such a claim presupposes that the Commission can then regulate or enforce Section 271 services, which it clearly cannot. The FCC alone has that responsibility as a matter of law.

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

[79] 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 [in ¶] 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.

[80] *TRRO*, ¶ 218.

[81] *See, e.g.*, No New Adds Injunction Order, footnote 10, and *Mississippi Order*.

B. DSL over UNE-P

In addition to the legal question of whether state commissions can require ILECs to commingle 251(c)(3) UNEs with Section 271 network elements, some CLECs have raised the issue of whether DSL over UNE-P is an allowable form of "commingling." The FCC has put this matter to rest in its *DSL Preemption Order*[82] where it specifically said:

> Based on the language and clear intent of the *Triennial Review Order*, we reject Cinergy's assertion that our commingling rules apply to the provisioning of wholesale DSL services over a UNE loop facility. In the *Triennial Review Order*, the Commission required incumbent LECs to commingle UNEs (and combinations of UNEs) with other incumbent LEC services. The Commission expressly defined commingling as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." Thus, the purpose of this provision is to allow a requesting carrier the opportunity to provide service to its customers by "connecting, attaching or otherwise linking" facilities obtained by UNE offerings and wholesale services. Accordingly, we conclude that the Commission's commingling requirements do not apply where a competitive LEC leases an entire loop facility and seeks to have an incumbent LEC provide services over the competitive LEC's facility.

DSL Preemption Order, ¶ 35. Therefore, BellSouth requests that the Commission find, as a matter of law, that not only is BellSouth not required to allow commingling of Section 251(c)(3) UNEs with Section 271 network elements, but that DSL over UNE-P is not an acceptable form of commingling.

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

Line splitting occurs when one competitive LEC provides narrowband voice service over the low frequency portion of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter. *TRO* at ¶ 251; *Line*

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[82] Memorandum Opinion and Order and Notice of Inquiry in WC Docket No. 03-251, released March 25, 2005 (*"DSL Preemption Order")*.

Sharing Reconsideration Order at ¶ 33.[83] In the *Line Sharing Reconsideration Order*, the FCC held that ILECs "must permit competing carriers providing voice services using the UNE-platform [UNE-P] to either self-provision necessary equipment or partner with a competitive data carrier to provide xDSL service on the same line." *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order on Reconsideration in CC Docket No. 98-147,16 FCC Rcd 2101, FCC 01-26 ("*Line Sharing Reconsideration Order*") at ¶ 16. Accordingly, in the *Line Sharing Reconsideration Order*, the FCC established that UNE-P CLECs could "replace [their] existing UNE-platform arrangement with a configuration that allows provisioning of both data and voice services." *Id.* at ¶ 19.

The FCC, in the *TRO*, expanded its decision in the *Line Sharing Reconsideration Order* by stating that line splitting also applied when the CLEC purchases stand-alone loops: "We find that when competitive carriers opt to take an unbundled stand-alone loop, the incumbent LEC must provide the requesting carrier with the ability to engage in line splitting arrangements." *TRO* at ¶ 251. Regarding line splitting with UNE-P, the FCC further stated in the *TRO* that, so long as UNE-P is available in a particular state, an ILEC must continue to allow line splitting between a UNE-P CLEC and a data LEC ("DLEC"). *Id.* at ¶ 252.

In the *TRRO*, the FCC found that ILECs have no section 251 unbundling obligation to provide mass market local circuit switching. *TRRO* at ¶ 199. As noted by the FCC, "[c]ompetitive LECs have used unbundled local circuit switching exclusively in combination with incumbent LEC loops and shared transport in an arrangement known as the unbundled network element platform (UNE-P)." *Id.* at n. 526. Thus, in the *TRRO*, the FCC held that

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[83] Line splitting differs from line sharing in that, with the former, a competitive carrier provides the voice service and another competitive carrier provides the data service. With line sharing, the ILEC provides the voice service while the competitive carrier provides the data service. Line Sharing Reconsideration Order at ¶ 17.

BellSouth has no obligation to provide UNE-P. The FCC further found that CLECs must convert their embedded base of UNE-P customers to alternative arrangements within a twelve-month transition period (or by March 11, 2006) and that CLECs were prohibited from adding any new UNE-P customers during this transition period. *Id.* at ¶ 199. Recently, federal courts in Georgia, Kentucky, and Mississippi have confirmed the FCC's findings in the *TRRO* regarding UNE-P and unbundled local circuit switching.

Because the *TRRO* established that BellSouth no longer has an obligation to provide UNE-P or unbundled local circuit switching, the Commission should find, as a matter of law, that BellSouth's obligation to permit line splitting is limited to when a CLEC purchases a stand-alone loop and provides its own splitter. The *TRO* recognized that an ILEC's line splitting obligation with regard to UNE-P would be permitted "so long as the unbundled loop-switch combination is permitted in a particular state . . . ." *TRO* at ¶ 252. The *TRRO* made it clear that UNE-P or the "unbundled loop-switch combination" was *not permitted in any state* as it established that there was "no section 251 unbundling requirement for mass market local circuit switching nationwide." *TRRO* at ¶ 199. Thus, the Commission should find that, as a matter of law, BellSouth's line splitting obligations are limited to when a CLEC purchases a stand-alone loop and provides its own splitter and that BellSouth has no obligation to provide line splitting under any other service arrangement.

Issue 22 – Call Related Databases: -- *What is the appropriate ICA language, if any, to address access to call related databases?*

Call-related databases, as defined by the FCC, are "databases that are used in signaling networks for billing and collection or for the transmission, routing or other provision of telecommunications services." *TRO,* at ¶ 549. The specific database requirements included by the FCC in the definition of call-related databases are the Line Information Database ("LIDB"); the Caller ID with Name database ("CNAM"); the Toll Free Calling database; Local Number Portability database ("LNP"); Advanced Intelligent Network database ("AIN"); and E911.

Interconnection agreements should not contain any language regarding the provision of unbundled access to call-related databases other than 911 and E911. Pursuant to the *TRO*, ILECs are not obligated to unbundle call-related databases for CLECs who deploy their own switches. *TRO,* at ¶ 551 ("[w]e find that competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases, with the exception of the 911 and E911 databases as discussed below"). 47 C.F.R. 51.319(d)(4)(i) provides that ILECs must only provide access to signaling, call-related databases, and shared transport facilities on an unbundled basis to the extent that local circuit switching is unbundled. This decision applied on a nationwide basis, both to enterprise and mass-market switching. *TRO,* at ¶ 551.

The D.C. Circuit affirmed the FCC's decision on call-related databases. On appeal, the CLECs argued that the only reason alternatives existed to ILEC databases was because the FCC had previously ordered access to such databases. *USTA II,* at 50. The Court rejected this argument and held that "[a]s it stands, CLECs evidently have adequate access to call-related databases. If subsequent developments alter this situation, affected parties may petition the [FCC] to amend its rule." *Id.* To date, no party has filed such a petition.

Because CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases. Consequently, BellSouth's legal obligation is expressly limited to providing databases only in connection with switching provided under the FCC's transition plan. Therefore BellSouth requests that the Commission determine that as a matter of law, BellSouth's obligation to provide call-related databases on an unbundled basis is limited to the situations where CLECs have access to unbundled switching pursuant to the FCC's transition plan.

Issue 26 – Routine Network Modification: -- *What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?*

BellSouth has an obligation to provide routine network modifications ("RNM") to unbundled loop facilities where the requesting loop facility has already been constructed. *TRO* at ¶ 632; 47 C.F.R. § 51.319(a)(8). The FCC has defined RNMs as "those activities that incumbent LECs regularly undertake for their own customers." *TRO* at ¶ 632. RNMs do not include the construction of new wires (*i.e.* installation of new aerial or buried cable). *Id.* Further, in providing RNMs, BellSouth does not have an obligation to "alter substantially [its] network[] in order to provide superior quality interconnection and unbundled access." TRO at ¶ 630 (quoting, *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997)).

Simply put, under the *TRO*, an ILEC has to make the same RNMs to their existing loop facilities for CLECs that they make for their own customers. *TRO* at 633. As stated by the FCC, "[b]y way of illustration, we find that loop modification functions that the incumbent LEC routinely performs for their own customers, and therefore must perform for competitors, include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer." *Id.* at 634. The FCC described these and other activities that would constitute RNMs as the "'routine, day-to-day work of managing an [incumbent LEC's] network.'" *Id.* at 637.

The D.C. Circuit in *USTA II* interpreted the FCC's RNM requirements in the *TRO,* and its analysis is entirely consistent with BellSouth's position on this issue.

> The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. The FCC has established a clear and reasonable limiting principle: the distinction between a "routine network modification" and a "superior quality" alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for its own customers. While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be "nondiscriminatory."

USTA II, 359 F.3d at 578.

Accordingly, the Commission should find, as a matter of law, that a RNM is an activity that BellSouth regularly undertakes for its own customers on demand. The Commission should further find that BellSouth has no obligation to perform as a RNM any activity that BellSouth does not regularly undertake for its own customers or which results in the substantial alteration of BellSouth's network or in a superior quality network for CLECs.

Concurrent with this finding, the Commission should also find that BellSouth is obligated to perform line conditioning on the same terms and conditions that BellSouth provides for its own customers. In paragraph 643 of the *TRO*, the FCC stated that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." *TRO* at ¶ 643. The FCC went on further to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services *at parity* with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations." *Id.* (emphasis added).

In its discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*: "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LEC currently undertake under our line conditioning rules." *TRO* at ¶ 635. The FCC echoed these sentiments in paragraph 250 of the TRO: "As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service." *TRO* at ¶ 250.

Accordingly, as a matter of law, the Commission should find that BellSouth's obligation to perform line conditioning for CLECs is limited to line conditioning that it regularly undertakes for its own customers. Any other interpretation would result in a finding that BellSouth is obligated to perform line conditioning that exceeds what it provides for its own customers. Such an interpretation not only violates the FCC's express findings in the *TRO* that BellSouth's line conditioning obligations are premised on Section 251(c)(3)'s nondiscrimination obligations but also the FCC's holding in the *TRO* that line conditioning does not result in the creation of a "superior network." *TRO* at ¶¶ 630; 643.

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 fiber to the home ("FTTH") loop is a "local loop consisting entirely of fiber optic cable (and associated electronics), whether lit or dark fiber, that connects a customer's premises with a wire center." *TRO,* at n. 802; *see also* 47 C.F.R. 51.319(a)(3). A fiber-to-the-Curb ("FTTC") loop "brings fiber from the central office to a location near – but not all the way to – the customer's premises." *Order on Reconsideration*, n. 1. In these loops, "fiber is connected to an optical network unit ("ONU") or similar electronics at that location … [a]n ONU typically serves, for example, eight to 12 homes." *Id.*

In response to a Motion for Reconsideration filed by BellSouth, the FCC held that FTTC loops shall be subject "to the same unbundling framework that the [FCC] established for fiber-to-the-home (FTTH) loops." *Order on Reconsideration,* at ¶ 1.[84] Thus, the rules adopted for FTTH loops apply equally to FTTC loops.

With respect to FTTH/FTTC loops, the FCC held that "requesting carriers are not impaired without access to FTTH loops," but further concluded that the level of non-impairment varied depending on whether the FTTH/FTTC loop was a new loop or a replacement of a pre-existing copper loop.

In overbuild situations, where BellSouth is replacing the copper with fiber and elects to retire the copper, BellSouth must offer unbundled access to the fiber loops for narrowband services only. *TRO,* at ¶ 273. In the alternative, BellSouth could choose to keep the existing copper loop connected to the customer after deploying the FTTH/FTTC loop. *TRO,* at ¶ 277.[85] This requirement, however, is "very limited" and "intended only to ensure continued access to a local loop suitable for providing narrowband services to the mass market in situations where an

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[84] See Order on Reconsideration, at ¶ 14 ("we do not require incumbent LECs to provide unbundled access to new mass market FTTC loops for either narrowband or broadband services. In overbuild situations … we conclude that competitive LECs should have continued access to either a copper loop or a 64 kbps transmission path in those situations. Finally, we note that, consistent with our recent MDU Reconsideration Order, FTTC loops serving predominantly residential MDUs will be subject to the same unbundling relief as FTTH loops."

[85] In the event BellSouth maintains the copper facility, BellSouth "need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access … in which case the incumbent LEC shall restore the copper loop to serviceable condition upon request." 47 C.F.R. 51.319(a)(3)(ii)(B).

incumbent LEC has deployed overbuild FTTH and elected to retire the pre-existing copper loops." *TRO,* at ¶ 277.

To capture this requirement, the Commission should order that the parties include language in the interconnection agreement specifying that BellSouth only is obligated to unbundle FTTH/FTTC loops in the limited situation of fiber overbuilds where it retires the copper facility, and only to the extent the CLEC is seeking narrowband access.

BellSouth does "not have to offer unbundled access to newly deployed or 'greenfield' fiber loops." *TRO,* at ¶ 273. BellSouth is not obligated to unbundle either the broadband or the narrowband services in this situation. *TRO,* at ¶ 275. The FCC reached this conclusion because it found that the entry barriers for greenfield situations appear to be the same for both ILECs and CLECs. *TRO,* at ¶ 275. Thus, the FCC concluded that ILECs are "not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to a residential unit that previously has not been served by any loop facility." 47 C.F.R. 51.319(a)(3)(i). For these reasons, the Commission should rule that interconnection agreements should not include any language around unbundling of FTTH/FTTC loops in new or greenfield situations.

<u>Issue 29 – EELS Audits:</u> -- *What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?*

An enhanced extended links ("EEL") consists of a combination of an unbundled loop and unbundled dedicated transport, together with any facilities, equipment, or functions necessary to combine those network elements. 47 C.F.R. § 51.5. A CLEC may obtain an EEL as long as the underlying UNEs (the loop and transport elements) are available under Section 251(c)(3). *TRO* ¶ 575. Under the *TRO,* the FCC established specified eligibility criteria that a CLEC must satisfy to obtain access to high capacity EELs. Eligibility criteria include, but are not limited to: (1) an EEL must have 911 capability; (2) an EEL must terminate in a collocation arrangement; and (3) an EEL must be served by a switch capable of switching local voice traffic. *See* 47 C.F.R. § 51.318. To obtain an EEL, a CLEC must certify that it is using the EEL in compliance with the *TRO*'s eligibility criteria. *TRO* ¶ 623. BellSouth has no ability to challenge a CLEC's certification; instead, the *TRO* provides BellSouth with audit rights to ensure compliance with the EEL eligibility criteria and to prevent gamesmanship. *TRO* ¶ 626.

When the FCC issued the *TRRO* it modified its prior rules, which evaluated access to UNEs (and EELs) using a "qualifying services approach." Under this approach, CLECs could obtain EELs only for the provision of services to compete with core ILEC offerings. CLECs that obtained EELs to provide such "qualifying services" were permitted to use UNEs to provide other services. The FCC amended its framework with the *TRRO* deleting the qualifying services consideration, and replacing it with an absolute prohibition against obtaining UNEs to provide exclusively mobile wireless or interexchange services. 47 C.F.R. § 51.309(b). Except for the change from qualifying services to the prohibition on using UNEs exclusively for wireless or long distance services, the FCC did not otherwise modify its EEL eligibility criteria nor the ILECs audit rights.

As a matter of law, therefore, there can be no dispute that BellSouth has the right to conduct an annual audit to determine whether CLECs have complied with the EELs eligibility requirements. While the parties may desire to negotiate language that implements BellSouth's audit rights, there can be no legitimate dispute that BellSouth has an absolute legal right to conduct an audit to ensure that CLECs satisfy the EELs eligibility criteria. BellSouth requests that, as a matter of law, the Commission declare that BellSouth has an unfettered right to conduct an annual audit of each CLEC it choses to determine whether the CLEC has complied with the EELs eligibility requirements.

CONCLUSION

BellSouth respectfully requests that this Commission address each of the issues discussed above so that all parties can negotiate final language for inclusion in their Section 251/252 interconnection agreements based on a common understanding of the law.

Respectfully submitted,

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