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

RESPONSE IN OPPOSITION TO JOINT CLEC'S CROSS-MOTION FOR SUMMARY JUDGMENT

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, files this response in opposition to the Joint CLEC's July 22, 2005, *Response To BellSouth's Motion For Summary Judgment Or Declaratory Ruling and Joint CLEC's Cross-Motion For Summary Judgment Or Declaratory Ruling* ("Joint CLECs' Cross-Motion").

INTRODUCTION

BellSouth makes three general responses to Joint CLEC's Cross Motion ("CLECs" or "Joint CLECs") and then discusses in more detail two issues, Issue 8 (relating to Section 271), and Issue 17 (Line Sharing).

First, contrary to the Joint CLECs claim,[1] BellSouth's Motion of Summary Judgment ("Motion") does not encourage inefficiency or invite the Commission to do its work twice. On the contrary, deciding the issues raised in BellSouth's Motion *as a matter of law* is the more efficient and less duplicative way to proceed. Pre-filed testimony filed in Georgia illustrates precisely the problem BellSouth urges this Commission to avoid by ruling on those issues

[1] *See* Joint CLECs Cross Motion at 3-4.

involving purely legal issues.[2] That is, the CLECs' witness, Mr. Gillan, has filed testimony replete with legal interpretations and conclusions but lacking in actual support. Deciding the legal issues, as urged by BellSouth, in advance of the hearing will streamline the hearing process, eliminate the need for unproductive and legalistic cross-examination and allow the Commission to focus its limited hearing time on true *factual* issues. Deciding solely legal issues first will facilitate efficient resolution of the issues before the Commission.

Second, the Commission should deny the Joint CLECs' Cross-Motion for Summary Judgment or Declaratory Ruling.[3] While the Joint CLECs make a general reference to a cross motion for summary judgment, they only actually moved for two issues to be decided in summary fashion (line sharing and call-related databases). BellSouth agrees that both of these issues should be resolved as a matter of law and urges the Commission to decide those issues in favor of BellSouth in advance of the hearing.

Third, the vast majority of the issues raised in the Joint CLECs' Cross Motion were fully addressed in BellSouth's Motion. Consequently, BellSouth has chosen not to repeat those arguments here and instead stands on the arguments it already has presented. However, because two issues, Issue 8 (271) and Issue 17 (line sharing), are of such importance and are so fundamental to this case, BellSouth addresses the Joint CLECs' arguments on these two points.

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[2] CompSouth, a coalition of multiple CLECs, pre-filed this testimony in Georgia. Even though CompSouth has not formally intervened in this proceeding, many of the same CLECs that form the CompSouth coalition are participating in this docket.

[3] Of course, filing a cross-motion while at the same time claiming no issues should be resolved now, is inherently inconsistent.

DISCUSSION

A. ISSUE 8: **(a) 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? (b) If the answer to part (a) is affirmative in any respect, does the Commission have the authority to establish rates for such elements? (c) If the answer to part (a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements, and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?**

BellSouth's Motion and the Joint CLECs' Cross Motion have crystallized the issue regarding Section 271 of the Act as follows: Can the Commission require BellSouth to include Section 271 elements in a Section 252 interconnection agreement?[4] The law provides a clear answer to that question, a resounding no.

To fully analyze this issue, the Commission must look not only to Section 271, as the CLECs advocate, but also must look to Section 252 and the interplay between Sections 271 and 252. This examination leads to the inescapable conclusion that, while Congress gave authority to the state commissions under Section 252, authority over Section 271 elements remains with the FCC.

The crux of the CLECs' argument is that because Section 271 references Section 252, the 271 checklist items are thus to be included in Section 252 agreements. *See, e.g., Joint CLECs' Cross Motion,* at 9-10 (The Joint CLECs claim: "§271 checklist obligations must be reflected in ICAs based on cross-references to §252 contained in §271"). The necessary corollary of that argument is that state commissions would have to possess the authority to arbitrate and set the rates, terms, and conditions of Section 271 elements. *See Joint CLECs' Cross Motion,* at 13 (the

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[4] BellSouth recognizes that without forbearance from the FCC, BellSouth has an independent obligation to provide the elements in Section 271(c)(2)(B). The issue is how those elements are provided and which regulatory body has authority over them.

Joint CLECs urge "this [Section 252 process] is the procedural vehicle that must be used to establish the contract terms, conditions and prices for the Section 271 checklist").

The fallacy in this argument is its conflict with the express language of Section 252. *See Joint CLECs' Cross Motion,* at 10 (Joint CLECs claim: "The source of the Commission's authority to act under Section 252 to approve terms and conditions for checklist items comes *directly from the text of Section 271. . .*") (Emphasis added). However, even though Section 271 references Section 252, Section 252 specifically *limits* the rate-setting and arbitration powers of state commissions to *Section 251* elements. This express limitation on state commission authority in Section 252 precludes the conclusion by this Commission that it can require BellSouth to include Section 271 elements in a Section 252 agreement.

Put differently, the CLECs' argument fails because it ignores the clear statutory difference between rate setting and arbitration for Section 251 elements on the one hand, and rate setting and enforcement for Section 271 elements on the other. According to the Joint CLECs, the Section 252 negotiation, arbitration, and approval process applies equally to both. *See Joint CLECs' Cross Motion,* at 10 (Joint CLECs allege: "The Commission is not being asked and does not have to assert authority under Section 271 in order to fulfill its mandate to arbitrate and resolve disputed issues in Section 252 ICAs"). That, however, is not the plan that Congress created. Congress allowed states to "set" rates only "for purposes of subsection (c)(3) of such Section [251]" and to arbitrate agreements to "ensure that such resolution and conditions meet the requirements of Section 251 …." This Commission must adhere to this fundamental limitation set by federal statute.

1. **<u>Section 252 limits state commission rate-setting authority to Section 251 elements.</u>**

State commissions do not have the authority to set rates for Section 271 elements. This is clear because the language in Section 252 limits state commission rate-setting authority to Section 251 elements. Section 252(d)(1) provides that state commissions may set rates for network elements *only* "for purposes of subsection (c)(3) of such Section [251]." Moreover, the FCC has stated that this Section "is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required under Section 271."[5] The express limitation in Section 252(d)(1) on state commission pricing authority in arbitrations is directly on-point and dispositive as to this issue.

In addition to the express language of Section 252, the FCC has confirmed that Section 251's pricing standards, over which state commissions have authority, do not apply to checklist elements under Section 271. *Triennial Review Order,* at ¶¶ 662, 664. The TRO "clarif[ied] that the FCC will determine whether or not the applicable pricing standards are met," either in the context of a Section 271 application for long distance authority or, thereafter, in an enforcement proceeding. *Id.* ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Sections 201 and 202" is a fact-specific inquiry that the [FCC] will undertake in the context of a BOC's application for Section 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6)").[6]

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[5] *Triennial Review Order,* at ¶ 657.

[6] The FCC further explains that BellSouth might meet its burden of proof in such a proceeding by "demonstrating that the rate for a Section 271 element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Triennial Review Order*, at ¶ 664.

Finally, the FCC held that "[w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to *Section 271* and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements." *Triennial Review Order,* at ¶ 656 (emphasis added). The FCC went on to hold that "[s]ection 252(d)(1) provides the pricing standard 'for network elements for purposes of [Section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under Section 271." *Id.* at ¶ 657 (brackets in original).

The FCC has further held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 – statutes applied and enforced by the FCC. *See TRO,* ¶ 656; ¶ 664 ("Whether 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 ("In 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.").

Courts uniformly have held that claims based on Sections 201(b) and 202(a) are within the FCC's jurisdiction. Section 201(b) speaks in terms of "just and reasonable" which are determinations that "Congress has placed squarely in the hands of the [FCC]." *In Re: Long Distance Telecommunications Litigation,* 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D. D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F.3d 448 (D.C. Cir.

1997). As the D.C. Circuit noted in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996), Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory." FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. Congress unquestionably took regulation of local telecommunications competition away from the State on all matters addressed by the 1996 Act and required that state commission regulation be guided by FCC regulations. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999); *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004). Nothing in *USTA II* or in the *TRRO* disturbed the FCC ruling that Section 271 elements are subject to the FCC's jurisdiction. A conclusion by this Commission that it has authority to set rates for Section 271 element would directly conflict with these authorities.

The Joint CLECs argue that that while the FCC spoke of itself as the "regulator" in charge of compliance with the Section 271 just and reasonable standard, that "[i]t did not, however, establish itself as the agency in charge of arbitrating the rate levels when they are in dispute." *Joint CLECs' Cross Motion,* at 33. The Joint CLECs' attempt to distinguish between regulation and resolving rate issues is an unsuccessful effort to create a distinction that does not exist. The entity charged with "regulating" the rates (which in this case the CLECs admit is the FCC) is by definition the entity that must resolve the issue when the rates "are in dispute." Contrary to the Joint CLECs faulty assumption that a regulatory body sets rates in the first instance, the provider sets the rates in accordance with the just and reasonable standard. Any disputes that arise surrounding those rates is then resolved by the FCC.

It makes sense that the FCC rules regarding Section 271 elements (*i.e.,* that the provider can set the rate initially as opposed to the regulator) are less stringent than those under Section

251. Section 251 (b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without which a CLEC is legally "impaired" within the meaning of Section 251(c) (1). Congress thus ensured that state commissions have authority to arbitrate the rates, terms and conditions of access to these elements. Conversely, the FCC has determined that CLECs are not impaired without access to Section 271 elements that no longer meet the Section 251 test. The FCC determination is based on an evidentiary finding that competitive alternatives for such elements are readily available in the marketplace.[7] Congress did not subject access to these 271 elements to the same regulatory scrutiny. Rather, consistent with Congress's overriding intent to "reduce regulation," prices are to be set by market forces, not by state regulators.[8]

2. <u>**Section 252 limits a state commission's authority to arbitrate disputes to Section 251 obligations.**</u>

Section 252, the federal law that empowers state commissions to arbitrate disputes under the Act, expressly limits that authority to disputes arising out of Section 251 obligations. Section 252(c) limits the authority of a state commission in an arbitration to "ensur[ing] that such resolution and conditions meet the *requirements of Section 251 ....*" Congress did not grant the state commissions any authority to arbitrate compliance with the requirements of Section 271. Congress's decision not to grant the state commissions such authority is dispositive of this issue. State commissions have the authority to arbitrate Section 252 agreements, but only so far as such

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[7] *See e.g., FCC's UNE Remand Order,* ¶ 471 (where a checklist item is no longer required under Section 251, a competitor is "not impaired in its ability to offer services without access to that element," which can be "acquire[d] ... in the marketplace at a price set by the marketplace.").

[8] *Id.* Under these circumstances, the FCC concluded that "it would be counterproductive to mandate that the incumbent offer[] the element" at forward looking prices." Instead, "the market price should prevail, as opposed to a regulated rate".

agreements comply with Section 251. It follows that Section 252 agreements must, therefore, be limited to Section 251 elements and obligations.

Federal decisions confirm that a state commission's authority to arbitrate under Section 252 is limited to issues arising out of the ILEC's obligations under Section 251. In *Coserv v. Southwestern Bell Telephone Company*,[9] the U.S. Court of Appeals for the Fifth Circuit held that an ILEC's duty to negotiate under Sections 251 and 252 is limited to those duties necessary to implement Section 251 (b) and (c). As the Court explained, an "ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act," which are "those duties listed in § 251 (b) and (c)."[10] In *Coserv,* Southwestern Bell properly refused to negotiate a non-251 issue for inclusion in an interconnection agreement under Section 251. The Fifth Circuit held that the state commission correctly dismissed a petition for arbitration for lack of subject matter jurisdiction.

As with the directly relevant statutory provisions, the Joint CLECs cannot circumvent the clearly dispositive case law. The Fifth Circuit held that ILECs need not negotiate anything other than "those duties listed in § 251(b) and (c)" and that, if ILECs refuse to negotiate such items, they are not subject to arbitration. That holding applies directly here.

Similarly, the Eleventh Circuit has held that state commissions' arbitration authority is specifically limited to imposing the terms necessary to implement Section 251(b) and (c). In that Court's words, a rule mandating arbitration of items not covered by those parts of Section 251 would be "contrary to the scheme and text of th[e] statute, which lists only a limited number of

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[9] *Coserv v. Southwestern Bell Telephone,* 350 F.3d 482 (5th Cir. 2003).

[10] Id. at 487-88.

issues on which incumbents are mandated to negotiate."[11] Additionally, and as discussed in BellSouth's Motion, other federal courts also have concluded that "the enforcement authority for § 271 unbundling duties lies with the FCC," and any BellSouth conduct under that provision "must be challenged there first."[12] The overwhelming authority supports that Section 252 limits state commission's authority to arbitrate disputes to Section 251 obligations.

Most recently, on June 9, 2005, a federal district court held that Section 252 did not authorize a state commission even to approve a negotiated agreement for line sharing between Qwest and Covad.[13] It reasoned that Section 252 did not apply to this "commercial agreement" because line sharing "is not an element or service that must be provided under Section 251."[14] This decision squarely conflicts with the CLECs' contention that, under Section 271(c)(2)(A), Section 271 elements must be contained in a Section 252 interconnection agreement. If a state commission cannot approve a negotiated agreement that does not involve Section 251 items, it certainly cannot *arbitrate* terms that are not mandated by Section 251, where, as discussed above, Congress expressly limited the state commissions' authority to implementing Section 251.

Instead of addressing the most recent federal court decision, the Joint CLECs cite to *Qwest Corporation v. Minnesota Public Service Commission,* 2004 WL 1920970 (D. Minn. 2004), as support for the claim that Section 271 elements belong in Section 252 agreements.

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[11] *MCI Telecom. Corp. v. BellSouth Telecom., Inc.* 298 F.3d 1269, 1274 (11th Cir. 2002).

[12] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order,* (E.D. Ky. Apr. 22, 2005) ("*Kentucky Order*"), p. 12 of slip opinion. *Accord, BellSouth Telecommunications, Inc. v. Mississippi PSC*, slip op. 17.

[13] The Joint CLECs failed to cite this decision even though the underlying contract in dispute was between Qwest and Covad. Of course, Covad is a signatory to the Joint CLECs' Cross Motion in this docket.

[14] *Qwest Corp. v. Schneider, et al.*, CV-04-053-H-CSO, at 14 (D. Mass. June 9, 2005).

That decision, however, is clearly distinguishable because the FCC, ruling on the same fact pattern, reached a different conclusion about Section 252 in the *Qwest ICA Order*. In the *Qwest ICA Order*, the FCC found that "*only* those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under [Section] 252(a)(1)."[15] The FCC reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under Section 252(a)(1)," "settlement contracts that *do not affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed*."[16] This finding is consistent with the FCC's Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations. *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004).

The Joint CLECs also attempt to distinguish the recent federal decisions in Kentucky and Mississippi on this issue, but this attempt is similarly unavailing. Both of those courts specifically held that decisions regarding 271 obligations rested with *the FCC*.[17] An attempt by a state commission to set rates or terms and conditions for Section 271 elements would directly conflict with federal court precedent.

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[15] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) ("Qwest ICA Order") (emphasis added).

[16] Qwest ICA Order, ¶ 12 (emphasis added); *see also Id*, ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in Sections 251(b) and (c)" must be filed under Section 252).

[17] *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) ("*Kentucky Order*"), p. 12 of slip opinion. *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, Civil Action No. 3:05CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005) ("*Mississippi Order*"), *2005 U.S. Dist. LEXIS 8498*, p. 17 of slip opinion.

Indeed, the Joint CLECs conceded that some state commissions, including the state commissions of Texas and Kansas, have declined to include Section 271 checklist items in Section 252 interconnection agreements. *Joint CLECs' Cross Motion,* at 17, FN 31. The Joint CLECs likewise acknowledged BellSouth previously cited to analogous decisions from commissions in Utah, Washington, North Carolina, and New York (as well as the federal court decisions in Mississippi and Kentucky).[18]

Three more recent decisions also are directly relevant. First, on July 14, 2005, the Massachusetts Department of Telecommunications and Industry entered its *Arbitration Order* in Docket No. D.T.E. 04-33. The *Arbitration Order* addressed a number of issues that are similar to the issues established by this Commission, including Section 271. Specifically, the Massachusetts Commission held that "our authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements." *See* p. 251. Second, the Kansas Corporation Commission entered its *Order No. 15: Commission Order on Phase II UNE Issues* addressing a prior recommendation of an arbitrator in Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005. In relevant part, the Kansas Commission held that "the FCC has preemptive jurisdiction over 271 matters." *See* Lexis pp. 7 – 8. Third, also on July 18, 2005, the Idaho Public Utilities Commission entered an order in an arbitration proceeding between Covad and Qwest in Case No. CVD-T-05-1; Order No. 29825; *2005 Ida. PUC LEXIS* 139. The Idaho Commission concluded "that the Commission does not have the

[18] The Joint CLECs' effort to counter this authority with other decisions is unpersuasive. The decision of the Tennessee Regulatory Authority ("TRA") is the subject of an ongoing preemption petition before the FCC, which petition the TRA recently acknowledged "could provide clarification regarding state authority . . . for 271 elements." Docket No. 04-00186, Order dated July 20, 2005, at p. 7. The commissions in Missouri and Illinois appear to have completely disregarded the federal decisions concerning Section 271; it is likely that both decisions will be subject to further review. The Oklahoma arbitrator decision that the Joint CLECs cite has yet to be reviewed by the full Oklahoma commission.

authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement."

3. **<u>Section 271 does not authorize the Commission to set rates or arbitrate Section 251 elements.</u>**

The Joint CLECs ignore the express limitations on state commission authority in Section 252 and the relevant case law, instead relying on Section 271(c)(2)(A)'s reference to "agreements that have been approved under Section 252." By its terms, however, Section 271(c)(2)(A) expressly refers *only* to "approv[al]" of agreements under Section 252. The Joint CLECs' convoluted argument ignores that Section 271(c)(2)(A) *says nothing about state commission arbitration or rate-setting authority.* The limitations on rate-setting and arbitration are directly relevant here because the Joint CLECs are urging this Commission to arbitrate issues around, and set rates for, the Section 271 elements. The issue before this Commission, therefore, goes far beyond the scope of the Commission's authority to approve agreements, yet that is the extent of the statutory provision in Section 271 upon which the CLECs rely.

The Joint CLECs' argument utterly disregards the provision that expressly limits state rate-setting authority. And, crucially, Congress made no mention of including Section 271 elements in negotiations under Sections 251(c)(1) and 252(a)(1), arbitration under Section 252(b), or state commission resolution of open issues under Section 252(c). Most importantly for present purposes, Congress did not give state commissions *any* rate-setting authority for Section 271 requirements in Section 252(d)(1). On the contrary, *all* of those Sections are explicitly linked – and limited – to implementation of Sections 251(b) and (c).

The Joint CLECs also argue that Section 271(c)(1) requires that the terms and conditions for the checklist items in Section 271 must be in an approved interconnection agreement. *Joint CLECs' Cross Motion,* at 14. On the contrary, Section 271(c)(1) says nothing of the sort.

Section 271(c)(1) provides that to comply with Section 271, a BOC must meet the requirements of either subparagraph (A) or (B). Subparagraph (A), in turn, provides that a BOC meets the requirements of the Section if it "has entered into one or more binding agreements that have been approved under Section 252 …." The Section 252 agreements referenced in that Section refer to agreements that incorporate the required Section 251 elements – nothing is said about Section 271 elements. All that Section 271(c)(1) requires is that the BOC needs either approved Section 252 agreements or an SGAT to obtain Section 271 authority. Section 271(c)(1) says nothing about incorporating Section 271 elements into the Section 252 agreements.[19]

4. **<u>Section 271 vests enforcement over Section 271 elements with the FCC.</u>**

Section 271 itself vests exclusive authority over the enforcement of Section 271 obligations with *the FCC. See Section* 271(d)(6). The Joint CLECs' claim that BellSouth seeks sole control over the terms and conditions that apply to the Section 271 checklist items is bogus. If there is an issue of whether BellSouth is meeting its Section 271 obligations through approved agreements or otherwise, Congress was explicit as to what body should address BellSouth's compliance. Section 271(d) authorizes the FCC, not state commissions, to approve 271 applications and to determine post-approval compliance. If the Joint CLECs are concerned about BellSouth's Section 271 compliance, the place to raise that concern is the FCC, not this Commission. In the FCC's words, that federal agency has **"exclusive authority"** over the entire "Section 271 process."[20]

[19] Of course, as addressed above, such a requirement also would conflict with the express limitations in Section 252.

[20] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona,* 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999) (emphasis added); see also this Commission's Order dated May 25, 2005, *In re: Competitive Carriers of the South, Inc.*, in Docket No. 29393, at p. 18 (". . . 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.")

The Joint CLECs extensive effort to distinguish what they concede to be the FCC's exclusive enforcement authority over Section 271 from what they call the state commission's "Section 252 authority" is unsuccessful. *See Joint CLECs' Cross Motion,* at 28-33. The obvious flaw in the CLECs' argument is that, as demonstrated above, Section 252 does not confer any jurisdiction over Section 271 elements to the state commissions – in fact, it expressly limits state commission authority to set rates and arbitrate to *Section 251* obligations.

Furthermore, the arrangement advocated by the Joint CLECs would be unworkable as a practical matter. Under the Joint CLECs' argument, Section 252 interconnection agreements would contain both Section 251 and 271 elements. The CLECs concede, however, that the state commission has no enforcement authority over Section 271 elements. *See Joint CLECs' Cross Motion,* at 28. Thus, under the CLECs' theory, state commissions would enforce certain parts of an interconnection agreement (*i.e.*, the 251 elements) and the FCC would enforce other parts (*i.e.,* the 271 elements) of the same contract. That scenario, of course, makes no sense.

5. State law does not empower the Commission to include Section 271 elements in a Section 252 agreement.

The Joint CLECs make the incredible argument that "none of the pronouncements of the FCC in the *TRRO* or in the *TRO* demonstrate the federal agency's intent to preempt state law," *Joint CLECs' Response* at 26, and that the Commission can make determinations on § 271 network elements. This argument utterly ignores that fact that Section 252 agreements and Section 271 elements are creatures of *federal law*, not of state law, and thus the obligations surrounding them are set forth in the federal statute. And, as discussed above, the federal statute clearly delineates the state commissions' authority (rate-setting and arbitration for Section 251 elements) and FCC authority (Section 271 enforcement).

Even if the preemption analysis were valid here, which it is not, FCC precedent is explicit that state commissions are not to be involved in rate-setting for Section 271 elements. In the *Triennial Review Order,* the FCC held that "Section 252(d)(1) is quite specific that it only applies for the purposes of implementation of Section 251(c)(3) – meaning only that there has been a finding of impairment with regard to a given network element." *TRO,* at ¶ 657. The FCC recognized that the distinction between Section 251 elements and Section 271 elements was critical because it "allow[ed] [the FCC] to reconcile the interrelated terms of the Act so that one provision (Section 271) does not gratuitously reimpose the very same requirements that another provision (Section 251) has eliminated." *Id.* at ¶ 659. Allowing state commissions to set the rates for Section 271 elements would be "gratuitously reimpos[ing]" the same obligations on elements that are not subject to Section 251 obligations.

ISSUE 17: Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

Rather than respond to all of the Joint CLEC rhetoric, BellSouth will make only three salient points in rebuttal. First, the language of Section 271 does not require line-sharing. Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."[21] 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.[22] BellSouth thus meets its checklist item 4 obligation by offering access to

[21] 47 U.S.C. § 271(d)(2)(B)(iv).

[22] 47 C.F.R. § 51.319(a).

unbundled loops and the "transmission" capability on those facilities.[23] The Joint CLECs argue that because the high frequency portion of the loop ("HFPL") is a complete transmission path, that it constitutes a *form of* 'loop transmission facility' under checklist item 4. To advance this claim, the Joint CLECs ignore the portion of the definition of HFPL that defines HFPL as a "complete transmission path *on the frequency range above the one used to carry analog circuit switched voice transmissions....*" In other words, the HFPL is only part of the facility --- not the entire "transmission path" required by checklist item 4.

A simple but appropriate analogy makes the point --- it is as if one ordered a birthday cake from a bakery but received only the icing. Certainly the buyer would not consider the icing alone a "form" of birthday cake. On the contrary, the requirement was a whole cake, not just a portion of it, just as checklist item 4 requires the entire transmission facility, not just the high frequency portion of the transmission facility.

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[23] The Joint CLECs cite to FCC 271 orders for the proposition that line sharing is a Section 271 obligation, yet offer no explanation for the fact that neither New York nor Texas were required to offer line sharing to obtain Section 271 approval. If line sharing actually had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted Verizon and SBC Section 271 authority. *See In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, 15 FCC Rcd 3953 (Dec. 22, 1999); *In the Matter of Application by SBC Communications, Inc., et al.; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, 15 FCC Rec'd 18354 (June 30, 2000).

Second, the FCC's transition plan demonstrates that the HFPL is not a checklist item 4 requirement.[24] The *Triennial Review Order* establishes a carefully calibrated transition that establishes specific *rates* that CLECs must pay in those limited instances where they can still obtain the HFPL.[25] Under the Joint CLECs' theory, however, the FCC's elaborate and carefully crafted transition applies only to non-BOC ILECs, very few, if any, of whom sell line sharing.[26] It defies logic that the FCC created this transition plan for a mere handful of lines. Moreover, the Joint CLECs argument that they can obtain the HFPL indefinitely and at rates other than the ones specifically established by the FCC simply by requesting access to those facilities under Section 271 instead of Section 251 defies the logic and policy underpinnings of the FCC. The FCC expressly concluded, "access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled *creates better competitive incentives*."[27] The Joint CLECs have provided absolutely no reason to believe that, having required access to the whole loop under Section 251, the FCC has nevertheless authorized access to just the HFPL under Section 271 --

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[24] Indeed, the Joint CLECs' reliance on decisions from Maine, Louisiana and Pennsylvania are misplaced. The decision of the Louisiana commission is the currently being reviewed by that Commission and may change. Even if it does not, it is the subject of an existing appeal (which the Commission has moved to dismiss for the reason that the underlying decision is under review). The Maine decision has been appealed. The Pennsylvania Commission recognized that its role with respect to Section 271 "is consultative and that the ultimate adjudicative authority lies with the FCC" but would not cancel certain tariff obligations. Despite the CLECs' attempt to distinguish the decision of the Rhode Island decision, that commission as well as the commissions in Illinois, Massachusetts, and Tennessee have all required the FCC's transition plan alone to be included in Section 252 interconnection agreements. *See e.g.,* Arbitration Order, *In re: XO Illinois, Inc.*, Illinois Commerce Commission Docket 04-0371 (Oct. 28, 2004) ("the parties' contract should be amended to precisely track and implement these new FCC rules, as SBC Illinois' proposed contract language does. XO's proposed language, on the other hand, falls far short of implementing the TRO's new line sharing rules ..... [f]or instance, XO . . . would require SBC Illinois to provide the HFPL under section 271, even though the HFPL is not a section 271 checklist item . . . and suggests that SBC Illinois might be required to provide the HFPL under state law, even though the FCC . . . made clear that any such requirement would be preempted"); *Arbitration Order* Massachusetts Docket No. D.T.E. 04-33 (July 14, 2005); Order dated July 20, 2005, Tennessee Regulatory Authority Docket No. 04-00186.

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

[26] *Id.,* ¶660 (only approximately 2.5 percent of ILEC switched access lines are served by LECs that are neither BOCs nor rural telephone companies exempt from Section 251 unbundling).

[27] *Triennial Review Order* ¶ 260.

and thus created the very anti-competitive consequences it sought to avoid in the *Triennial Review Order*. There is no basis to conclude that the FCC, having eliminated these anti-competitive consequences under Section 251, would have allowed these *same* untoward effects to go unchecked under Section 271. On the contrary, in its recent *BellSouth Declaratory Ruling Order*, the FCC again stressed that, under its rules, "a competitive LEC officially leases the **entire** loop" [emphasis added]. Moreover, that order specifies that the HFPL is available "*only* under an express three-year phase out plan."[28] *Id.* ¶ 5 n. 10 (emphasis added).

Third, the Joint CLECs argue that, whatever else may be disputed, FCC Chairman Martin's statement regarding line sharing confirms that it is a Section 271 obligation. In a similar vein, the Joint CLECs assert that, by making the forbearance argument at all, BellSouth necessarily concedes that line sharing is a Section 271 element.

There is nothing inconsistent about BellSouth's alternative argument that, if any Section 271 obligation existed, the FCC has granted forbearance. BellSouth has never in any forum conceded that any of the broadband elements included in its Petition for Forbearance are Section 271 elements. In fact, BellSouth affirmatively stated in its Petition that it "believes that no such obligation exist[s]" for "any of the broadband elements" included therein.[29] Rather than engage in lengthy litigation over this issue in multiple states, BellSouth filed its Petition "in an abundance of caution," asking for forbearance of any such obligation, assuming one were to find such an obligation existed. The FCC did not spend any time in its Forbearance Order analyzing or finding that broadband elements are Section 271 elements. This is not surprising, given that there is no need for lengthy debate of this point (either at the FCC or here) if, assuming that they

[28] *Id.* at para. 5, n. 10.

[29] *See* BellSouth Petition for Forbearance, at p. 1.

are 271 elements, the FCC will forbear from enforcing any such 271 obligations. Thus, as Chairman Martin concluded: "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."** [30]

The Joint CLECs further argue that BellSouth's petition did not include line sharing and, thus, was not included in the relief granted. No CLEC argument, however, can obscure the fact that this is precisely what Chairman Martin specifically concluded in his separate statement. Nor does the CLECs' argument in any way rebut BellSouth's discussion in its Motion of the FCC's own conclusions with respect to the scope of the relief requested. The FCC stated in its Forbearance Order that, "Although Verizon's Petition was ambiguous with regard to the exact scope of relief requested, later submissions ... 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)."[31] And with respect to these "later submissions," the FCC cited to the very March 26, 2004 *ex parte* filing upon which BellSouth relies. Thus, the RBOC petitions did include line sharing, and, "while the Commission did not specifically address line sharing in [its] decision," because it was "included in their request for broadband relief and we affirmatively grant their request, ..." the "order also forbears from any Section 271 obligation with respect to line-sharing."[32]

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[30] *See* Separate Statement of Commissioner Kevin Martin.

[31] *See* FCC's Forbearance Order, ¶ 2, n. 9.

[32] *See* Statement of Kevin J. Martin, Broadband Forbearance Order. In any event, and as the commissioner further concluded, "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." The CLECs do not dispute this point other than to claim in the first instance - wrongfully as explained herein - that BellSouth did not request relief for line sharing.

CONCLUSION

For the reasons set forth herein, BellSouth respectfully requests that the Commission deny the Joint CLECs' Cross-Motion for Summary Judgment. This Commission should, instead, grant either summary judgment or a declaratory ruling (as appropriate) in favor of BellSouth on each of the issues set forth in its Motion for Summary Judgment.

Respectfully submitted,

DOROTHY J. CHAMBERS
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40203
(502) 582-8219

R. DOUGLAS LACKEY
MEREDITH E. MAYS
675 W. Peachtree St., NE, Ste. 4300
Atlanta, GA 30375
(404) 335-0750

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

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