BEFORE THE
MISSISSIPPI PUBLIC SERVICE COMMISSION

DOCKET NO. 2005-AD-139

IN RE: ORDER ESTABLISHING GENERIC DOCKET TO CONSIDER CHANGE-OF-LAW TO EXISTING INTERCONNECTION AGREEMENTS

FINAL ORDER

The Mississippi Public Service Commission ("Commission") established this docket by Order dated March 9, 2005, as a generic proceeding[1] to address various change of law issues arising from several decisions of the Federal Communications Commission ("FCC") and the federal courts. The Commission's March 9, 2005, Order directed the Executive Secretary to notify all certificated competitive local exchange carriers ("CLECs") of this docket and of the opportunity to intervene and participate. Fourteen individual CLECs and two separate organizations representing numerous CLECs filed to intervene.[2] The Commission held an

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[1] *See,* Order Establishing Generic Docket, 2005-AD-139 (March 9, 2005). *See*, also Amended Order Establishing Procedural Schedule, Docket 2005-AD-139 (June 23, 2005).

[2] Southern Telecommunications Company, LLC, Telepak Networks, Inc., Xfone USA, Inc. d/b/a eXpeTel Communications, CommuniGroup of Jackson, Inc. d/b/a CommuniGroup, NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Jackson, LLC, KMC Telecom III, LLC ("KMC III"), KMC Telecom V, Inc. (KMC V"), ITC^DeltaCom Communications, Inc., Dixie-Net, Megagate Broadband, Inc., XO Communications, Inc., US LEC of Tennessee Inc. ("US LEC"), Southeastern Competitive Carriers Association ("SECCA"), Sprint Communications Company, L.P., and Competitive Carriers of the South, Inc. ("CompSouth") intervened in this docket. KMC III, KMC V, and US LEC withdrew their respective interventions prior to the evidentiary hearing. CompSouth was the only party to present a live witness at the evidentiary hearing.

evidentiary hearing on October 26, 2005, and the parties subsequently filed post-hearing briefs and proposed orders. Having carefully reviewed the record in this matter and fully considered the applicable law, and being otherwise fully advised in the premises, including having reviewed and considered the recent decisions by other state commissions in the southeast, the Commission enters this order ruling on the issues that are before the Commission in this proceeding.

PROCEDURAL BACKGROUND

On August 21, 2003, the FCC released its *Triennial Review Order ("TRO"),*[3] in which it modified incumbent local exchange carriers' ("ILECs") unbundling obligations under Section 251 of the federal Telecommunications Act of 1996 ("the Act").[4] Subsequent orders further clarified the scope of ILECs' Section 251 unbundling obligations. These orders culminated in the permanent unbundling rules the FCC released with its *Triennial Review Remand Order ("TRRO")* on February 4, 2005.[5] The FCC's new rules removed, in many instances, significant unbundling obligations formerly placed on ILECs, and set forth transition periods for carriers to move the embedded base of these former unbundled network elements ("UNEs") to alternative

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[3] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; and Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98 and 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* 18 FCC Rcd 16978 (2003), corrected by *Errata,* 18 FCC Rcd 19020 (2003), 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*").

[4] 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.

[5] *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 the "*TRRO*").

serving arrangements. The *TRRO* explicitly required change of law processes and certain transition periods to be completed by March 10, 2006.[6]

While some CLECs operating in Mississippi have successfully negotiated the changes necessitated by the *TRO* and the *TRRO*, there are other CLECs with whom discussions continue, and still other CLECs that have not negotiated with BellSouth to modify interconnection agreements to reflect current regulatory policy.

I. Section 271 Related Issues (Issues 8, 14, 17, 18, 22)

The most contentious, and arguably the most important, issues in this generic docket involve the interplay between Section 271 of the Act and delisted UNEs.[7] BellSouth argues that once an element has been delisted, the FCC has exclusive jurisdiction over BellSouth's provisioning of that element. The CLECs, on the other hand, argue that even after an element has been delisted, Section 271 of the Act requires BellSouth to continue providing that element by way of an interconnection agreement that is subject to the negotiation, arbitration, and approval process set forth in Section 252 of the Act. In deciding the 271 related issues, the Commission has carefully considered the relevant federal statutes, FCC Orders, court decisions[8], and other State commission decisions.

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?*

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[6] *See TRRO*, ¶¶ 143, 144, 196, 197, and 227. As noted later herein, all interconnection agreement provisions that are impacted by this Order shall have an effective date as of March 10, 2006.

[7] As used in this Order, "delisted UNEs" refers to elements that, as a result of various FCC decisions, BellSouth is no longer required to offer on an unbundled basis under Section 251 of the Act.

[8] The Commission is particularly cognizant of the April 13, 2005, Order issued by the federal court in Mississippi. *See BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, 368 F.Supp. 2d 557 (S.D. Miss. 2005) ("*Mississippi Order*").

Section 271 of the Act addresses BellSouth's authority to provide interLATA services. This section provides, in relevant part, that BellSouth "meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under Section 252 [of the Act]"[9] The CLECs' rely heavily on this language to support their argument that the negotiation, arbitration, and approval process set forth in Section 252 of the Act applies to delisted UNEs. To resolve the Section 271 related issues, therefore, the Commission must determine what Section 252 of the Act does and does not require in an interconnection agreement.

The Commission first notes that Section 252 makes no reference whatsoever to Section 271 of the Act.[10] Instead, Section 252 of the Act applies when BellSouth "receiv[es] a request for interconnection, services, or network elements pursuant to Section 251 [of the Act]"[11] A State commission is required to approve an interconnection agreement that is reached as a result of negotiations unless the agreement either (1) discriminates against a carrier that is not a party to it; or (2) is not consistent with the public interest, convenience, and necessity.[12] On the other hand, if the Commission is required to arbitrate an interconnection agreement, the Commission must approve the agreement unless it either (1) does not meet the requirements of Section 251 of the Act; or (2) does not meet the standards set forth in Section 252(d) of the Act.[13] Section 252(d), in turn, sets forth pricing standards that apply to: rates for interconnection or network

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9 47 U.S.C. §271(c)(1)(A).

10 The CLECs argue that the fact that Section 252 makes no reference to Section 271 is "immaterial." *See Competitive Carrier's Response to BellSouth's Motion for Summary Judgment or Declaratory Ruling and Competitive Carrier's Cross-Motion for Summary Judgment and Declaratory Ruling* at p. 8. The Commission, however, is not willing to summarily disregard this significant omission.

11 47 U.S.C. §252(a)(1).

12 *Id.*, §252(e)(2)(A).

13 *Id.*, §252(e)(2)(B).

elements required by subsections (c)(2) and (c)(3) of Section 251;[14] BellSouth's compliance with the reciprocal compensation requirements of Section 251(b)(5);[15] and rates for services that are resold pursuant to Section 251(c)(4).[16]

Section 252 also allows a State commission to review any statement of the terms and conditions BellSouth generally offers ("SGAT")[17] to CLECs that BellSouth may file with a State commission, in order to determine whether the SGAT complies with Section 251.[18] Finally, Section 252 provides that if a State commission fails to carry out its duties under Section 252 and the FCC steps in to fulfill those duties, an aggrieved party may bring an action in the appropriate federal court to determine whether the interconnection agreement or SGAT, approved by the FCC, "meets the requirements of Section 251 and this section."[19] Clearly, Congress limited the Section 252 rate-setting, negotiation, arbitration, and approval process to Section 251 obligations.[20]

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[14] *Id.*, §252(d)(1).

[15] *Id.*, §252(d)(2)(A).

[16] *Id.*, §252(d)(3).

[17] These statements often are called SGATs, which stands for "statement of generally available terms."

[18] *Id.*, §252(f)(1),(2).

[19] *Id.*, §252(e)(6).

[20] This conclusion is consistent with the FCC's statement 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." *TRO* at ¶ 656 *See also Id.* at ¶657 (stating 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"). It also is consistent with federal court rulings. *See Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 488 (5th Cir. 2003) ("An 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."); *MCI Telecom. Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (holding that a requirement that an ILEC like BellSouth negotiate items that are outside of Section 251 is "contrary to the scheme

In sharp contrast to Section 252, which authorizes State commissions to make certain decisions regarding Section 251 elements, Section 271 vests authority to address network elements that are provided pursuant to that section exclusively with the FCC. A Bell operating company ("BOC") like BellSouth, for instance, may apply to the FCC for authorization to provide long distance services, and the FCC has exclusive authority for "approving or denying" that authority.[21] Similarly, once a BOC like BellSouth obtains Section 271 authority (as BellSouth has done in Mississippi), continuing enforcement of Section 271 obligations rests solely with the FCC under Section 271(d)(6)(A) of the Act. The plain language that Congress used in the Act, therefore, demonstrates that elements that BellSouth is required to offer pursuant to Section 251 of the Act are subject to the Section 252 process. In contrast, elements that BellSouth is not required to offer pursuant to Section 251, but that it is required to offer pursuant to Section 271, are subject to the exclusive jurisdiction of the FCC.

This conclusion is buttressed by the plain language of various FCC Orders. When the FCC first addressed the interplay between Section 251(c) and the competitive checklist network elements of Section 271 in its *UNE Remand Order,* the FCC made it clear that "the prices, terms, and conditions set forth under Sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of Section 271."[22] Instead, the FCC stated that:

> [I]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in Section 251(d)(2),

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and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.").

[21] 47 U.S.C. § 271(d)(1),(3).

[22] *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, ¶ 469 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

> the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a).[23]

Subsequently, in its *TRO*, the FCC made it clear that the prices, terms, and conditions of Section 271 checklist item elements, 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). In that Order, the FCC stated that "[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"[24] In the FCC's words, it is the FCC that has "exclusive authority" over the entire "Section 271 process."[25] Clearly, the FCC refused to graft the requirements of Sections 251 and 252 onto Section 271 in its *TRO*. The D.C. Circuit Court of Appeals upheld this decision, characterizing the CLEC's suggested cross-application of Section 251 to Section 271 as "erroneous."[26] Moreover, in the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BellSouth's compliance with Section 271.[27]

The FCC also has held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 of the Act, and these sections are applied and enforced by the

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23 *UNE Remand Order* at ¶470.

24 *TRO* at ¶ 665. *See also TRO* at ¶ 663. ("The Supreme Court has held that the last sentence of Section 201(b), which authorized the [FCC] 'to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' empowers the [FCC] to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996. Section 271 is such a provision.") (citations omitted).

25 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).

26 *United States Telecom. Ass'n v. FCC*, 359 F.3d 554, 590 (D.C. Cir 2004).

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

FCC.[28] Section 201, for instance, speaks in terms of "just and reasonable" rates, and those are determinations that "Congress has placed squarely in the hands of the [FCC]."[29] As the D.C. Circuit has noted, Sections 201 and 202 "authorize the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory."[30]

In light of this authority, at least three federal courts have found that it is not appropriate to address Section 271 issues in the context of the Section 252 arbitration process. First, on appeal from a decision made by this Commission on the "new adds" issue, is the decision by the United States District Court in Mississippi, where the Court explained:

> Certain of the intervenors ... argue that BellSouth 'still has to provide [UNE-Platform] under Section 271, regardless of the elimination of [the UNE-Platform] under Section 251.' The New York Public Utilities Commission considered a similar argument by competitive LECs .... The Commission rejected the argument, noting that in light of the FCC's decision 'to not require BOCs to combine section 271 elements no longer required to be unbundled under section 251, it [was] clear that there is no federal right to 271-based UNE-P arrangements.' This court would tend to agree. It would further observe, though, that even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly

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[28] *See TRO* at ¶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* at ¶ 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.").

[29] *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. 1996).

[30] *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996). The idea of FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel, given that the Supreme Court has determined that Congress "unquestionably" took "regulation of local telecommunications competition away from the States" 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).

> 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.[31]

Similarly, the United States District Court in Kentucky confirmed that:

> 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.[32]

Finally, a federal district court in Montana has held that Section 252 did not authorize a State commission even to approve a negotiated agreement for line sharing between Qwest and Covad. The federal court 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."[33] If Section 252 does not allow a State commission to even approve a negotiated agreement that does not involve Section 251 items, it certainly does not allow a State commission to arbitrate terms that are not mandated by Section 251.

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[31] *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, 368 F.Supp. 2d 557, 565-566 (S.D. Miss. 2005).

[32] *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; The foregoing decisions 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 attempted 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, the Seventh Circuit preempted that attempt.

[33] *Qwest Corp. v. Schneider, et al.*, 2005 U.S. Dist. LEXIS 17110, CV-04-053-H-CSO, at 14 (D. Mont. June 9, 2005).

The Commission also notes that several State commissions have concluded, in some form or fashion, that the FCC, rather than State commissions, is charged with Section 271 oversight.[34] Although the Georgia Commission determined that it does have jurisdiction to set rates for Section 271 elements,[35] the Florida, Louisiana, North Carolina, and South Carolina Commissions all ruled that state commissions do not have authority to require BellSouth to include Section 271

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[34] *In re: Petition for Arbitration of Covad with Qwest,* Docket No. UT-043045, Order No. 06 (Feb. 9, 2005), *2005 Wash. UTC LEXIS 54*; *In re: Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005), *2005 Utah PUC LEXIS 16*; *In re: Petition for Arbitration of Covad with Qwest,* Iowa Utilities Board, Docket No. ARB-05-1 (May 24, 2005), *2005 Iowa PUC LEXIS 186;* Order No. 29825; *2005 Ida. PUC LEXIS* 139; *In re: Petition for Arbitration of Covad with Qwest,* South Dakota Public Service Commission Docket No. TC05-056 (July 26, 2005), *2005 S.D. PUC LEXIS 13; In re: Petition for Arbitration of Covad with Qwest,* Oregon Public Utility Commission, Order No. 05-980, ARB 584 (Sept. 6, 2005), *2005 Ore. PUC LEXIS 445; Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc., et al;* R-00049524; R-00049525; R-00050319; R-00050319C0001; Docket No. P-00042092, 2005 Pa. PUC LEXIS 9 (June 10, 2005); *In re: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* D.T.E. 04-33, Arbitration Order (July 14, 2005); Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005; Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas P.U.C. Docket No. 28821* (June 17, 2004) ("Texas Order"); July 28, 2005 order in Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18; Memorandum Opinion and Order,* October 31, 2005, *In re: Petition of Southwestern Bell Telephone L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for Successor Interconnection Agreement to the Arkansas 271 Agreement,* Docket No. 05-081-U; November 9, 2005 *Arbitration Order,* Case No. 05-0887-TP-UNC, Ohio Public Service Commission, at p. 27; *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) ("May 25, 2005 Order"), at p. 18; *Order Concerning New Adds,* North Carolina Utilities Commission, Docket No. P-55, Sub 1550, April 25, 2005, at p. 13; *See also Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's TRO on Remand,* New York Public Service Commission Case No. 05-C-0203 (March 16, 2005).

[35] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006). The Commission notes that this Order and other related Orders issued by the Georgia Commission have been appealed to federal court.

elements in Section 252 interconnection agreements.[36] These decisions are consistent not only with applicable federal law, but also with sound public policy. The FCC and the courts undeniably have found that overbroad unbundling obligations have hindered the innovation and investment that results from sustainable facilities-based competition.[37] It would be exceedingly odd for all of the FCC's decisions, deliberations, and conclusions about the adverse impact of the delisted UNEs on competition under Section 251 of the Act to be rendered moot by allowing CLECs to obtain the exact same arrangements, pursuant to Section 271 of the very same act. This Commission agrees with the majority of the state commissions and finds that it does not have authority to require BellSouth to include Section 271 elements in Section 252 interconnection agreements.

For all of the reasons set forth above, the Commission concludes that the answer to this question presented by Issue 8(a) is "no". The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A, including without limitation Section 1.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi. Appendix A was admitted into evidence as an exhibit to the prefiled testimony of BellSouth witness Pamela A. Tipton.

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[36] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); Louisiana Public Service Commission Docket No. U-28131 consolidated with Docket No. U-28356 (February 22, 2006); North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006) (The Commission also notes that BellSouth has filed for reconsideration with the North Carolina Commission of some aspects of that Commission's ruling.); and South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[37] *See, e.g., TRRO* ¶¶ 2, 8 (*citing to United States Telecom Ass'n v. FCC,* 290 F.2d 415, 418-21 (D.C. Circ. 2002) (*"USTA I"*).

B. **Issue 8(b): Section 271 and State Law:** *If the answer to part (a) is affirmative in any respect, does the Commission have the Authority to establish rates for such elements?*

Given that the Commission has answered part (a) in the negative, this issue is moot. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

C. **Issue 8(c): Section 271** *If the answer to 8(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?*

Given that the Commission has answered 8(a) and (b) in the negative, this issue is moot.

The Commission, therefore, finds that the contract language it has ordered with respect to Issue 8(a) above is sufficient to address this issue. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

D. **Issue 14: Commingling:** *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)?*

The FCC defines "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."[38] The CLECs argue that this rule allows them to purchase a UNE under Section 251 (a loop, for instance), "commingle" it with an element they purchase under Section 271 (switching, for instance), and pay a rate that is established under the Section 252 process for that "commingled" offering. In the context of a loop and a port, this would allow CLECs to continue purchasing the loop-port combination that formerly was called the UNE-P pursuant to interconnection agreements that are subject to the Section 252 process, even though the FCC has found that the UNE-P harms competition and that CLECs are not impaired in their ability to obtain switching ports from other sources. For the reasons set forth below, the Commission finds that the CLECs' arguments are without merit.

First, as explained above, the Commission finds that the FCC has exclusive jurisdiction over elements that BellSouth is required to provide under Section 271. Even if that were not the case, however, a careful review of controlling authority demonstrates that BellSouth has no obligation to commingle Section 251 items with Section 271 items. Although the FCC enacted its federal commingling rule in connection with the *TRO*, the term "commingling" was first used in the FCC's *Supplemental Order on Clarification* ("*SOC*").[39] There, the FCC discussed commingling as combining loops or loop-transport combinations with tariffed special access services.

> We further reject the suggestion that we eliminate the prohibition on "commingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.[40]

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38 47 C.F.R. § 51.5

39 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, ¶28 (2000), aff'd sub nom. *Comptel v.* FCC, 309 F.2d 3 (D.C. Cir. 2002).

40 *SOC* at ¶ 28

By using the phrase "i.e.", which commonly means, "that is", the FCC in the *SOC* understood commingling as referring to a service combination that expressly included tariffed access services.

The FCC's discussion of commingling in the *TRO* was ultimately consistent with its discussion in the *SOC* as explained more fully below. In the *TRO*, the FCC explained that commingling meant:

> 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.[41]

Thus, contrary to the CLECs' argument that there is a distinction between an ILEC's commingling obligation and the combination obligation,[42] the FCC used the terms interchangeably.

The FCC very clearly "decline[d] to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251."[43] This aspect of the FCC's ruling was upheld on appeal, and the appellate court explained that the FCC had "decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements."[44]

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41 *TRO*, ¶ 579.

42 *See* Gillan Direct at pp. 49-51.

43 *See TRO* at ¶ 655, n. 1989. The *TRO*, as originally issued, had this language at note 1990. After the *TRO Errata* the footnotes were renumbered, and the language appears at note 1989.

44 *USTA II*, 359 F.3d at 589. Significantly, the Section 271 checklist obligates BellSouth to provide local loop transmission "*unbundled from local switching and other services*", local transport "*unbundled from switching or other services*", and switching "*unbundled from transport, local loop transmission or other services.*" *See* 47 U.S.C. §271(c)(2)(B)(iv)-(vi).

This conclusion is clear from the history of the language that appears in the *TRO*. As originally issued, the FCC's *TRO* stated:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements *unbundled pursuant to Section 271* and any services offered for resale pursuant to Section 251(c)(4) of the Act.[45]

Had this language remained intact, the CLECs' argument might have merit. The FCC, however, subsequently issued an *Errata* deleting the phrase "unbundled pursuant to Section 271" from this sentence.[46] Thus, the language of the *TRO*, as corrected by the *Errata*, requires:

> Incumbent LECs [to] permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements and any services offered for resale pursuant to Section 251(c)(4) of the Act.

Clearly, ILECs like BellSouth are not required to commingle UNEs with elements that are unbundled pursuant to Section 271.

The Commission notes that at the same time the FCC deleted the phrase "unbundled pursuant to Section 271" from its discussion of commingling in paragraph 584 of the *TRO*, it also deleted the sentence, "We 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*.[47] The CLECs argue that, when read together, the two deletions were intended to correct any potential conflict. The Commission does not agree. Had the FCC desired to impose some type of commingling or combining obligation on BellSouth, it would have only needed to delete the language at footnote 1990, yet retain its original language in paragraph 584, which, as originally issued, appeared to impose an obligation

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45 *TRO* at ¶ 584 (emphasis supplied).
46 *TRO Errata*, 18 FCC Rcd 19020 ¶27 (2003).
47 *See TRO*, n. 1989 (prior to the *TRO Errata*, this was footnote 1990).

to commingle UNEs with Section 271 network elements. That, however, is not what the FCC did.

Ultimately, by making its deletions, the federal commingling rule issued by the *TRO* became entirely consistent with the discussion of commingling in the *SOC*, because the words wholesale services are repeatedly referred to as tariffed access services. Although the CLECs argue that wholesale services must include Section 271 obligations, the FCC clearly intended to limit the types of wholesale services that are subject to commingling. In describing wholesale services in the *TRO*, the FCC referred only to tariffed access services, just as it had in the *SOC*, explaining, in relevant part, as follows.

First:

> We 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.[48]

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 to require ILECs to commingle Section 271 elements with Section 251 UNEs. Moreover, language within the *TRRO*, read in conjunction with the *TRO*, is consistent with this conclusion. 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"[49] Then, when describing this conversion holding in the *TRRO*, the FCC explicitly limited its discussion to the conversion of tariffed services to UNEs: "We determined in the *TRO* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations"[50] Clearly, the FCC narrowly interprets "wholesale services" as limited to tariffed services, and it does not expect or require BellSouth to combine or commingle Section 271 network elements with Section 251 network elements. This conclusion is consistent with decisions of the Mississippi federal district court,[51] the Kansas Commission,[52]

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48 *TRO at* ¶¶ 579 – 581, 583.

49 *TRO* at ¶ 585 (emphasis supplied).

50 *TRRO* at ¶ 229 (emphasis supplied).

51 *BellSouth v. Mississippi Public Serv. Comm'n*, 368 F.Supp. 2d at 565 (stating that the court would agree with the New York Commission's findings that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it clear that there is no federal right to 271-based UNE-P arrangements.'") (quoting).

52 *See Kansas Order* at ¶¶ 13-14 (ruling: (1) Southwestern Bell Texas ("SWBT") was "not under the obligation to include 271 commingling provisions in successor agreements"; (2) "271 commingling terms and conditions had no home in [interconnection] agreements"; and (3) if it ordered SWBT to provide commingling and SWBT refused the commission "would have no enforcement authority against SWBT because that authority resides with the FCC.").

the New York Commission,[53] the North Carolina Commission,[54] the Florida Commission,[55] and the Ohio Commission.[56] The Florida, Tennessee, and South Carolina Commissions have all ruled that BellSouth is not required to commingle Section 251 UNEs with elements provided under Section 271.[57] The Georgia Commission and the North Carolina Commission to a lesser extent, however, have ruled that commingling such elements is required. [58] This Commission will follow the majority view in holding that BellSouth is not required to commingle Section 251 UNEs with Section 271 elements.

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[53] *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (Mar. 16, 2005).

[54] *See* NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 24. ("The Commission believes that ... the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.")

[55] FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005)("The FCC's errata to the TRO struck the portion of paragraph 584 referring to '.... any network elements unbundled pursuant to Section 271 ....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also required to be unbundled under Section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to Section 271.").

[56] *Arbitration Order*, Ohio Case No. 05-0887-TP-UNC at 104 (Nov. 9, 2005) ("the FCC concluded, in footnote 1990 of the *TRO*, that § 271 checklist items that are not UNEs under § 251(c)(3) are not subject to the UNE combination requirements and, in fact in § 271 of the 1996 Act there is no mention of 'combining' and it does not reference back to the combination requirement set forth in § 251(c)(3). Applying the same analysis as applied by the FCC to reach its conclusion not to require combinations of checklist items, we decline to require the commingling of § 271 competitive checklist items with other wholesale services, including but not limited to UNEs. We find that the CLECs in their arguments failed to demonstrate how a combination, which is clearly not required per *TRO* footnote 1990, would be different from a commingled arrangement, as proposed by the CLECs.")

[57] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006) and South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[58] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); and North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The Commission, therefore, finds that BellSouth is not obligated to commingle UNEs that are required by Section 251 with items it is required to offer pursuant to Section 271. The Commission finds that the CLECs' proposed contractual language is inconsistent with this finding and that BellSouth's proposed contractual language is consistent with this finding. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.11, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

E. **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?*

"Line sharing" occurs when a CLEC provides digital subscriber line ("DSL") service over the same line that BellSouth uses to provide voice service to a particular end user, with BellSouth using the low frequency portion of the loop and the CLEC using the high frequency portion of the same loop.[59] The CLECs argue that line sharing is a Section 271 obligation, and BellSouth disagrees. Significantly, there are no line sharing arrangements between BellSouth and any CLEC in Mississippi, and while CompSouth's witness filed contract language addressing the issue, he acknowledges he did not sponsor any testimony to support his proposed contract language.[60]

BellSouth contends that the FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004. BellSouth asks the Commission to implement this aspect of the *TRO* and require CLECs to eliminate line sharing from their interconnection agreements in Mississippi. As a result, BellSouth explains that to the

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[59] *See TRO* at ¶255.

[60] *See* Hearing Exhibit No. 15 (Gillan Deposition) at p.77.

extent a CLEC has a region wide agreement and has line sharing arrangements in place, it would need to include language that implements the *TRO's* binding transition mechanism for access to the high frequency portion of the loop ("HFPL"). The Commission finds that BellSouth's request is both reasonable and appropriate.

The CLECs' argument that line sharing is a Section 271 obligation fails for several reasons. First, the plain 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."[61] Clearly, when line sharing occurs, transmission, local switching, and other services are being provided.[62] Consequently, requiring line sharing as a Section 271 element would conflict with the statutory language.

Moreover, 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.[63] BellSouth thus meets its checklist item 4 obligations by offering access to unbundled loops and the "transmission" capability on those facilities.[64] The Commission rejects the CLECs' argument that because the HFPL is "a complete transmission path," it somehow

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61 47 U.S.C. § 271(c)(2)(B)(iv).

62 *See*, e.g., *TRO* at ¶255 (explaining that the end user in a line sharing arrangement is receiving both voice and DSL service over the same facility).

63 47 C.F.R. § 51.319(a).

64 The CLECs cite to FCC 271 orders for the proposition that line sharing is a Section 271 obligation. *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). However, neither Bell Atlantic (now Verizon) in New York nor SBC in 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.

constitutes "a form of 'loop transmission facility'" under checklist item 4. This argument ignores 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"[65] In other words, the HFPL is only part of the facility – not the entire "transmission path" required by checklist item 4.[66]

The CLECs further argue that despite the clear language of the FCC in its *TRO*, they 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. This position is 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).

Second, the CLECs' argument would render irrelevant the FCC's carefully-calibrated transition plan to wean CLECs away from the use of line-sharing and to transition them to other means of accessing BellSouth'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."[67] Indeed, the FCC expressly found continued unlimited access to line-sharing to be anticompetitive and contrary to the core goals of the Act, because it would:

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[65] *TRO* at ¶ 268.

[66] 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.

[67] *TRO* at ¶ 260.

> 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. [68]

The Commission does not believe that the FCC would have carefully eliminated these anti-competitive consequences under Section 251, only to allow them to continue unchecked under Section 271. On the contrary, subsequent FCC orders confirm that it continues to believe that it has required CLECs, in lieu of line sharing, to obtain a whole loop or engage in line-splitting. Thus, in its very recent *BellSouth Declaratory Ruling Order,*[69] the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop."[70] 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."[71] The FCC's statement cannot be squared with the notion that line-sharing is also required indefinitely under Section 271. Finally, even if Section 271 somehow did require line-sharing, the Commission adopts the analysis which demonstrates that the FCC's recent forbearance decision[72] would have removed any such obligation.

Therefore, the Commission finds that Section 271 does not require BellSouth to provide line sharing. This decision is consistent with decisions of the Tennessee,[73] Massachusetts,[74]

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68 *Id.* at ¶ 261.

69 *See Memorandum Opinion and Order and Notice of Inquiry*, 20 FCC Rcd 6830 WC Docket No. 03-251 (Mar. 25, 2005) ("*BellSouth Declaratory Ruling Order*").

70 (¶ 35).

71 *Id.* at ¶ 5 n. 10.

72 *Memorandum Opinion and Order*, 19 FCC Rcd 21496 WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order*").

73 Docket No. 04-00186, Order dated July 20, 2005.

74 *Massachusetts Arbitration Order*, p. 185.

Michigan,[75] Rhode Island,[76] and Illinois Commissions.[77] The Florida and South Carolina Commissions have also ruled in their change of law proceedings that BellSouth is not obligated to provide line sharing.[78] The Georgia Commission again ruled in the minority, holding that BellSouth is still required to provide line sharing, and it set a rate of $6.50.[79] In North Carolina, DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") filed a Motion for Partial Stay of the Commission's Order Concerning Changes of Law with respect to line sharing, while Covad petitioned the FCC regarding the issue. The North Carolina Commission denied Covad's Motion for Stay, ruling that line sharing is no longer a Section 251 UNE, except insofar as the provision of the FCC's transitional plan applies to existing customers. The North Carolina Commission also ruled that the issue of line sharing should be before the FCC and not the state commission and directed Covad to present its arguments at the federal level.[80] This Commission finds consistent with the majority of commissions that BellSouth is not required to provide line sharing. The Commission further finds that the CLECs' proposed contractual language is inconsistent with this decision and that BellSouth's proposed contractual language is consistent with it. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix

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[75] *In re: Application of ACD Telecom, Inc. against SBC Michigan for its Unilateral Revocation of Line Sharing Service in Violation of the Parties' Interconnection Agreement and Tariff Obligations and For Emergency Relief*, 2005 Mich. PSC LEXIS 109, Order Dismissing Complaint * 12-13 (Mar. 29, 2005).

[76] *Report and Order*, 2004 R.I. PUC LEXIS 31, *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).

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

[78] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); and South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[79] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

[80] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 23, 2006)

B to this Order, including without limitation Section 3.1.2, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

F. **Issue 18: Line Sharing – Transition:** *If the answer to Issue 17 is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?*

Having answered Issue 17 in the negative, the Commission finds that the FCC clearly articulated the transitional plan for line sharing 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.

BellSouth has no obligation to add new line sharing arrangements after October 2004. The North Carolina Utilities Commission concluded that interconnection agreements should only contain language for line sharing while transitioning from CLEC's existing Section 251 line sharing arrangements.[81] The South Carolina Commission concluded that unless a CLEC and BellSouth had negotiated different language, BellSouth's proposed language shall be included in

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[81] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

interconnection agreements.[82] This Commission agrees with the conclusion of the South Carolina Commission. Accordingly, it is appropriate to properly transition existing line sharing arrangements to other arrangements.

Accordingly, the Commission finds that Mississippi CLECs with region wide interconnection agreements and that have line sharing customers must amend their interconnection agreements to incorporate both the line sharing transition plan contained in the federal rules and language that requires CLECs to pay the stand-alone loop rate for arrangements added after October 1, 2004. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language and rates addressing this issue as set forth in Appendix B and C to this Order shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi. Appendices B and C were admitted into evidence as exhibits to the prefiled testimony of BellSouth witness Eric Fogle.

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

Pursuant to the *TRO*, BellSouth is not obligated to unbundle call-related databases for CLECs who deploy their own switches.[83] The FCC's rules require BellSouth to provide access to signaling, call-related databases, and shared transport facilities on an unbundled basis only to the extent that local circuit switching is unbundled.[84] This decision applies on a nationwide basis, both to enterprise and mass-market switching.[85] Consequently, interconnection

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[82] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[83] *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").

[84] 47 C.F.R. 51.319(d)(4)(i).

[85] *TRO* at ¶ 552.

agreements should not contain any language regarding the provision of unbundled access to call-related databases other than 911 and E911.

The D.C. Circuit affirmed the FCC's decision on call-related databases. On appeal, the CLECs argued that the only reason that alternatives existed to ILEC databases was because the FCC had previously ordered access to such databases.[86] 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."[87] Because CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases. BellSouth's legal obligation is expressly limited to providing databases only in connection with switching provided under the FCC's transition plan.

The CLECs argue that BellSouth must include language concerning Section 271 access to call-related databases in its interconnection agreements.[88] As noted above, however, the FCC has exclusive Section 271 authority. Moreover, it is unreasonable to assume that the FCC and D.C. Circuit eliminated unbundling requirements for databases only to have such obligations resurrected through Section 271. The Florida Commission determined that BellSouth is obligated to offer all CLECs unbundled access to 911 and E911 call-related databases.[89] The commissions in Georgia and Tennessee have ordered that BellSouth must provide call-related databases at just and reasonable rates.[90] The North Carolina Commission concluded that it does not have authority to require BellSouth to include call-related databases in Section 252 interconnection

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86 *USTA II* at 587.

87 *Id.* at 587-88.

88 Revised Exhibit JPG-1 at p. 50.

89 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

90 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); and Tennessee Regulatory Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

agreements.[91] The South Carolina Commission similarly ruled that unless a CLEC and BellSouth had negotiated different language, BellSouth's proposed language shall be included in interconnection agreements.[92] This Commission agrees, and concludes that BellSouth's proposed language is appropriate.

BellSouth's proposed contract language concerning callrelated databases appropriately ties BellSouth's obligation to provide unbundled access to call related databases to BellSouth's limited obligation to provide switching or UNE-P.[93] The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 7, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

II. Transition Issues (2, 3, 4, 5, 9, 10, 11, 32)

The overriding disputes between BellSouth and the CLECs concerning the FCC's transition plan include establishing contract language for an orderly transition and determining whether CLECs can pay UNE rates after they have migrated from Section 251 UNEs to other serving arrangements.[94] In addition, the CLECs seek contract language that would allow them to transition from Section 251 UNEs to Section 271 checklist items.

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91 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

92 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

93 *See* PAT-1, Section 7.1; Tipton Direct at pp. 62-63.

94 In addition to these disputes, BellSouth and the CLECs dispute which wire centers in Mississippi are not impaired pursuant to the FCC's impairment tests. We will address which wire centers satisfy the FCC's test in connection with Issue 5, and we will discuss the appropriate fiber-based collocation definition in our discussion of Issue 4.

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

Based on the FCC's rulings, the Commission finds that CLECs should not have waited until the eleventh hour to work cooperatively with BellSouth to establish an orderly transition. The FCC has stated that the transition timeframes it established provide: (1) adequate time to perform "the tasks necessary to an orderly transition";[95] and (2) "the time necessary to migrate to alternative fiber arrangements."[96] The Commission further finds that once CLECs have migrated from UNEs to alternative serving arrangements, the rates, terms, and conditions of such alternatives apply. The *TRRO* specifically states that the transition rates will apply only while the CLEC is leasing the delisted element from the ILEC during the relevant transition period.[97] The Commission finds that all interconnection agreements impacted by this Order shall be effective as of March 10, 2006, and CLECs will have fourteen (14) days from the date of this Order in which to appropriately convert any remaining former UNEs with BellSouth. If CLECs fail to do so, BellSouth shall be authorized to make the conversions subject to applicable nonrecurring charges. The transition rates will apply during the time the former UNEs were leased from BellSouth and will end no later than March 10, 2006 (or September 10, 2006, for dark fiber). BellSouth will be entitled to the rates applicable to alternative arrangements ordered by impacted CLECs, retroactive to March 11, 2006.

I. **Local Switching and UNE-P**

In establishing transitional language, the Commission will require CLECs to identify their embedded base via spreadsheets and submit orders as soon as possible, but in no event

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95 *TRRO* at ¶ 143 (DS1/3 transport); ¶ 196 (DS1/3 loops); ¶ 227 (local switching).

96 *TRRO* at ¶ 144 (dark fiber transport); ¶ 198 (dark fiber loops). Tipton Direct at pp. 5–6.

97 *See TRRO* at ¶¶ 145, 198 and 228.

more than 15 days after the date of this Order, to convert or disconnect their embedded base of UNE-P or standalone local switching.[98] This will give BellSouth time to work with each CLEC to ensure all embedded base elements are identified, negotiate project timelines, issue and process service orders, update billing records, and perform all necessary cutovers. If a CLEC fails to submit orders to convert UNE-P lines to alternative arrangements in a timeframe that allows the orders to be completed within fourteen (14) days after the effective date of this Order,then BellSouth is authorized to convert any such remaining UNE-P lines to the resale equivalent beginning 14 days after the effective date of this Order. For any remaining stand-alone switch ports, BellSouth is authorized to disconnect these arrangements beginning 14 days after the effective date of this Order, as there is no other tariff or wholesale alternative for stand-alone switch ports. Resale rates, if applicable, shall not apply as of March 11, 2006.

The Commission finds that the transition plan also must include the transitional rates contained in the FCC's rules.[99] These rules make clear that transitional switching rates would be determined based on the higher of the rate the CLEC paid for that element or combinations of elements on June 15, 2004, or the rate the State commission ordered for that element or combination of elements between June 16, 2004, and the effective date of the *TRRO*.[100] In most, if not all instances, the transitional rate will be the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the transitional additive ($1 for UNE-P/Local Switching). For UNE-P, this includes those circuits priced at market rates for the FCC's four or more line carve-out established in the *UNE Remand Order* and affirmed in the *TRO,* n. 1376. To the extent that contracts include a market based price for switching for "enterprise" customers

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[98] This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

[99] *See* 47 C.F.R. 51.319(d)(2)(iii).

[100] Tipton Rebuttal at p. 6.

served by DS0 level switching that met the FCC's four or more line carve-out, these terms and rates were included in the interconnection agreements and were in effect on June 15, 2004.[101]

The Commission rejects the CLECs' suggestion that TELRIC rates plus $1 apply to such customers, as the FCC was very clear that for the embedded base of UNE-Ps, the CLECs would pay either the higher of the rates that were in their contracts as of June 15, 2004, or the rates that the State commissions had established between June 16, 2004, and the effective date of the TRRO, plus $1.[102] The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 4.2, 4.4.2, and 5.4, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

2. DS1 and DS3 High Capacity Loops and Dedicated Transport

For unimpaired wire centers where the FCC's competitive thresholds are met[103] or impaired wire centers where the FCC's caps apply,[104] the Commission will require CLECs to submit spreadsheets as soon as possible, but in no event more than 15 days after the date of this

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[101] Although BellSouth has the legal right to the transitional additive in addition to the rate in existing interconnection agreements ((Tipton Rebuttal at 6); 47 C.F.R. § 51.319(d)(2)(iii)), BellSouth has elected not to apply the additional $1 to previously established market rates for switching.

[102] *Id.*

[103] The identification and discussion of the wire centers that satisfy the FCC's competitive thresholds is addressed in relation to Issue 4.

[104] BellSouth and other active parties have agreed that the DS1 transport cap applies to routes for which there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport.

Order, identifying the embedded base and excess DS1 and DS3 loops and transport circuits to be disconnected or converted to other BellSouth services.[105]

If a CLEC does not provide notice in a timely manner to accomplish orderly conversions within fourteen (14) days after the effective date of this Order, then BellSouth is authorized to convert any such remaining embedded or excess high capacity loops and interoffice transport to the corresponding tariff service offerings. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.4 and 6.2, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

3. Dark Fiber Loops and Dedicated Transport

The Commission will require CLECs to submit spreadsheets to identify their embedded base dark fiber to be either disconnected or converted to other services within 15 days after the date of this Order. [106] If CLECs do not submit orders in a timely manner so that conversions can be completed within 15 days after the date of this Order, BellSouth is authorized to convert any remaining dark fiber loops or embedded base dark fiber transport to corresponding tariff service offerings. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.8.4 and 6.9.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

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[105] This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

[106] This deadline applies unless a CLEC and BellSouth agree to a different time frame.

4. Transition Rates, Term, and Conditions

The Commission finds that it is appropriate to take steps in addition to requiring CLECs to identify their embedded base of customers and adopting timely and orderly steps to effectuate the transition from UNEs to alternative services. CLECs that added new local switching arrangements, UNE-P arrangements, high capacity loops, or high capacity transport in unimpaired wire centers or in excess of the caps for their customers existing as of March 11, 2005, will be considered part of the embedded base. CLECs must transition these arrangements by the end of the transition period unless a CLEC and BellSouth negotiate different language. The Commission rejects CompSouth's proposed language that would allow CLECs to add other delisted UNEs during the transition period.[107]

As explained above in connection with switching, the transition rate is the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the FCC's prescribed transitional additive for that particular element.[108] For UNE switching, the additive is $1.00.[109] For UNE high capacity loops and transport, the additive is 15% of the rate paid (*i.e.*, a rate equal to 115% of the rate paid as of June 15, 2004).[110] Transition period pricing applies for each delisted UNE retroactively to March 11, 2005.[111] Facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon amendment of the interconnection agreements.[112] The transition rates will not go into effect without a contract amendment but once the agreement is amended, the transition rate must be trued-up to the March

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107 *See* Tipton Rebuttal at p. 16.
108 *Id* at p. 6.
109 *Id.*
110 *Id.*
111 *Id.* at p. 11.
112 *TRRO* n. 408, 524, 630.

11, 2005, transition period start date.[113] The transition rates apply only while the CLEC is leasing the delisted element from BellSouth during the transition period.[114] Once the delisted UNE is converted to an alternative service, the CLEC will be billed the applicable rates for that alternative service going forward; and for those conversions that took place after March 10, 2006, the rates for the alternative service apply as of March 11, 2006.[115]

CompSouth suggests that its members are entitled to transitional rates through March 10, 2006, even if they convert to alternative arrangements before that date. The Commission disagrees.[116] This decision is consistent with a decision of the Illinois Commerce Commission, which found:

> The Commission disagrees with CLECs that the transition rate should remain in effect for the entire transition period, even if transition is completed before the deadline. The terms of an agreement go into effect at the time the agreement says it does . Once the transition has been completed, the agreement takes over with all of its rates, terms, and conditions. The transition rates default only to those UNEs that have not transitioned to an alternate service arrangement.
>
> The Commission does not see how the imposition of agreement rates prior to the expiration of the deadline would somehow adversely affect an otherwise orderly transition. CLECs' argument, that SBC would have the incentive to overstate and exaggerate implementation challenges so as to convert as many UNEs as early as possible, defies logic.[117]

The Florida Commission determined that the TRRO transition rates will be based on the higher of the rates the Commission ordered for that element or combination of elements, and that transitional pricing ends March 10, 2006, and September 20, 2006, respectively for the affected

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113 *Id.*

114 *See* Tipton Rebuttal at p. 11.

115 *Id.*.

116 CompSouth's members and BellSouth are free to agree to such an arrangement, but CompSouth's members cannot compel BellSouth to enter such an arrangement.

117 Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision*, November 2, 2005, p. 78.

delisted arrangements, whether or not the former UNEs have been converted.[118] The Georgia Commission determined that CLECs had until March 11, 2006, to order conversions from BellSouth, and that BellSouth is entitled to true-up any rate differences.[119]

The North Carolina Commission concluded that the transition should require the identification and physical reconfiguration of affected UNEs as soon as practicable, and it imposed transition rates throughout the transition period.[120] The South Carolina Commission likewise held that CLECs should identify their embedded base via spreadsheet and submit orders to BellSouth as soon as possible. The South Carolina Commission also ordered that unless a CLEC and BellSouth have negotiated other language, BellSouth's language on this issue should be included in interconnection agreements.[121] The Tennessee Regulatory Authority affirmed that the transition plan should be in accordance with 47 C.F.R. sections 51.319(a), (d), (e) and that CLECs should submit a spreadsheet to BellSouth by March 10, 2006.[122]

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

In its *TRRO*, the FCC directed that carriers "implement changes to their interconnection agreements consistent with [the FCC's] conclusions [in the *TRRO*]."[123] Accordingly, carriers

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[118] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

[119] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

[120] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[121] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[122] Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

[123] *TRRO* at ¶ 233.

must execute amendments to their interconnection agreements to remove the availability of all delisted UNEs. Over 96 CLECs in Mississippi have amended or entered into new interconnection agreements to implement the changes in law that are the subject of this proceeding.[124] The Florida Commission concluded that all Florida CLECs who have interconnection agreements with BellSouth are bound by the decisions in its change of law proceeding effective upon the issuance of the final order, and that modification and implementation of interconnection agreement language should be based on the TRRO obligations.[125] The Georgia Commission determined that parties are obligated to negotiate the necessary changes and are bound by the decisions in its generic docket.[126]

The North Carolina Utilities Commission ordered that BellSouth and CLECs must execute amendments based on the TRRO obligations unless the parties have mutually agreed on other language, and that its decisions in its generic docket will control all pending arbitration proceedings involving BellSouth.[127]

The Commission hereby orders all CLECs that have not yet executed a *TRO*- and *TRRO*-compliant amendment to their interconnection agreement to execute an amendment with Commission-approved contract language promptly following issuance of the Commission's Order approving such language.

Further, the Commission finds that its decisions in this generic docket will apply to interconnection agreements that currently are the subject of arbitrations proceedings before the

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124 *See* Blake Rebuttal at pp. 4-5.

125 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

126 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

127 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

Commission.[128] Proceeding in this manner is most efficient in that the Commission will have to address a given issue only once (which is one reason the Commission opened this generic docket rather than addressing these issues on a case-by-case basis). The same rationale applies to agreements that are being negotiated, but for which no arbitration has yet been filed.

Finally, the Commission is aware that some CLECs have not negotiated with BellSouth in any form or fashion. CLECs cannot circumvent binding federal law through inaction. The Commission orders all CLECs to execute contract amendments or execute new agreements within 45 days of this order, unless BellSouth and the CLEC mutually agree to a different timeframe. If amendments are not executed within this timeframe or the agreed-upon timeframe, the language approved in this order will go into effect regardless of whether an amendment or new contract is executed.

C. **Issue 4: High Capacity Loops and Dedicated Transport:** *What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined: (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route?*

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[128] In Docket No. 2005-AD-138, certain CLECs filed a Joint Petition for Emergency Relief, arguing, among other things, that as a result of their "abeyance agreement" with BellSouth, they should not be required to amend their current interconnection agreements with BellSouth to incorporate the *TRRO* or the Commission's decisions in this generic proceeding. In addressing this issue the federal court in Mississippi did not reach the issue of the "abeyance agreement." *See Mississippi Order*, at n.11. In the March 9, 2005, *Order Establishing Procedure*, however, the Commission ruled that the most efficient means to address change of law issues raised by the FCC's orders was to proceed with this docket. In addition, in Docket No. 2004-AD-094, the Commission's duly appointed Arbitration Panel moved certain *TRO* related - arbitration issues to this proceeding. *See* June 14, 2005, *Order Granting BellSouth Telecommunications, Inc.'s Motion to Move TRO Arbitration Issues to Generic Proceeding.* The Commission hereby makes clear that all CLECs, including NuVox and Xspedius, must execute contract amendments or new agreements within the timeframes set forth in this order. The "abeyance agreement" does not allow NuVox and Xspedius to delay executing contract language until this Commission enters a final order in Docket No. 2004-AD-094.

The Commission finds that the federal rules and any definitions in them should be incorporated into interconnection agreements. To the extent that terms (such as "building") are not defined in those rules, the Commission finds that any disputes regarding the definition of such terms should be addressed on a case-by-case basis and in the context of the actual facts involved in any such dispute. The Commission believes that this approach will lead to better results than any attempt to define such terms in a vacuum.

The Commission rejects CompSouth's proposed fiber-based collocator language because it is not consistent with the applicable FCC rule. That rule, in its entirety, states as follows:

> Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.[129]

CompSouth's proposed language improperly adds the following language to the federal definition:

> For purposes of this definition: (i) carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same, will be treated as affiliates and therefore as one collocator; provided, however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement shall ***not*** be counted as a Fiber-Based Collocator, (ii) a Comparable transmission Facility means, at a minimum, the provision of transmission capacity equivalent to fiber-optic cable with a minimum point-to-point symmetrical data capacity exceeding 12 DS3s; (iii) the network of a Fiber-Based Collocator may only be counted once in making a determination of the number of Fiber-Based Collocators, notwithstanding that such single Fiber-Based Collocator leases its facilities to other collocators in a single wire center; provided, however, that a collocating

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[129] 47 C.F.R. § 51.5.

> carrier's dark fiber leased from an unaffiliated carrier may only be counted as a separate fiber-optic cable from the unaffiliated carrier's fiber if the collocating carrier obtains this dark fiber on an IRU basis.[130]

The Commission also rejects CompSouth's proposed contract language about counting the network of fiber-based collocators separately. It makes sense that a CLEC purchasing fiber from another CLEC can qualify under the federal definition. If one CLEC purchases fiber from another, has terminating fiber equipment, and can use the fiber it purchases to transport traffic in and out of a wire center, it qualifies. CompSouth's proposed definition ignores this reality, and has the potential to lead to "gaming" the process. For example, a CLEC or other party could agree to purchase all of the collocation arrangements in a given wire center for some nominal sum, then lease this space back to the previous owners for a paltry amount in exchange for a percentage of the savings the former owners will accrue by paying cost-based UNE rates instead of special access rates. The Commission does not believe this is what the FCC intended when it adopted its rule.

The Florida Commission determined that a business line should include all business UNE-P and UNE-L lines; that fiber-based collocation should be based on the number of fiber-based collocators present when the count is made; that the definition of a building should be based on "a reasonable telecom person" approach such that a multi-tenant building with multiple telecom entry points is considered multiple buildings; and that the FCC's definition of a route is appropriate.[131]

The Georgia Commission adopted BellSouth's definitions of business line count and route. It further held that it would not be appropriate to include planned mergers in counting

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130 First Revised Exhibit JPG-1 at p. 17.

131 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

fiber-based collocators and it adopted the "reasonable telecom person" standard for the term "building".[132]

The North Carolina Commission simply concluded that the definitions contained in FCC Rule 51.5 are appropriate, and clarified the definitions of "building" and "route" consistent with the orders cited directly above.[133] The South Carolina Commission concluded that the federal rules and any definitions in them should be incorporated into interconnection agreements, and that it would address any disputes on a case-by-case basis.[134] The Tennessee Regulatory Authority concluded that definitions should be pursuant to FCC Rules 51.5 and 51.319(e), and that what constitutes a building will be determined on a case-by-case basis.[135]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.8, 2.1.4, 2.3, 2.8.4, 6.2-6.7, and 6.9, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

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

Relevant Contract Provisions: PAT-1 Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8; PAT-2 Sections 2.1.4.2.1, 2.1.4.2.2, 2.1.4.4, 2.1.4.5, 5.2.2.1, 5.2.2.2, 5.2.2.4, 5.2.2.5

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132 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

133 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

134 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

135 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

1. State Commission Authority

Pursuant to *USTA II*, the FCC may not delegate impairment decisions to State commissions.[136] State commissions, however, are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO*.[137] As a practical matter, therefore, the Commission must resolve the parties' disputes concerning the wire centers that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition former UNEs to alternative arrangements.[138]

2. Mississippi Wire Centers that Currently Satisfy the FCC's Impairment Tests

For the reasons set forth below, the Commission finds that the following BellSouth wire centers in Mississippi satisfy the FCC's impairment tests:[139]

		Transport	
Wire Center	**Total Business Lines**	**Tier 1**	**Tier 2**
JCSNMSCP	40109	X	
HTBGMSMA	12829		X

136 *USTA II* at 574.
137 *TRRO* at ¶ 234.
138 *See* Tipton Direct at pp. 29-30.
139 *See* PAT-4.

The Commission, therefore, orders CLECs to transition existing Section 251 transport in the wire centers listed above to alternative serving arrangements. The Commission further finds that CLECs have no basis to "self-certify" to obtain Section 251 transport in the future in the wire centers listed above.

The dispute between BellSouth and the CLECs over these wire centers concerns the application of the FCC's rule defining business lines.[140] There are two aspects to this dispute. The first is BellSouth's inclusion of certain UNE loops, and the second is BellSouth's treatment of high capacity loops. The Commission finds that BellSouth properly implemented the applicable federal law with regard to both of these aspects of the dispute.

With respect to the inclusion of certain UNE loops, the *TRRO* clearly requires BellSouth to include business UNE-P.[141] BellSouth did so,[142] it did not include residential UNE-P,[143] and the CLECs have not suggested that BellSouth should have included residential UNE-P. Moreover, the text of the FCC's definition of "business line" calls for the inclusion of "***all*** UNE loops,"[144] and BellSouth included all UNE loops in its count (i.e. those loops offered as stand-alone loops or in combination with dedicated interoffice transport). The CLECs apparently take issue with this, arguing that in doing so, BellSouth has wrongly included some UNE loops that serve residential customers in its count of business loops.

The Commission finds that BellSouth's count is appropriate. The federal rule requires that the:

> number of business lines in a wire center [t]o equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that

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140 *See* 47 C.F.R. § 51.5.
141 *TRRO* at ¶ 105.
142 *See* Tipton Direct at p. 33.
143 *See* Tipton Rebuttal at p. 26.
144 47 C.F.R. §51.5 (emphasis added).

> wire center, including UNE loops provisioned in combination with other unbundled elements.[145]

The FCC intentionally required all UNE loops (excepting residential UNE-P) to be included, because doing so gauges "the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs."[146] Moreover, while the CLECs argue that some residential UNE loops may have been mistakenly included in BellSouth's count, their witness Mr. Gillan conceded that he did not think it was worth "correcting" BellSouth's business line count to exclude residential DSO loops because "it's such a small number ... trying to go in to do it correctly wouldn't be worth it." [147] CompSouth witness, Mr. Gillan, also acknowledged that BellSouth has no way of determining whether a given DSO loop is being used to provide business service or residential service.[148] Finally, if the Commission were to disregard completely some portion, estimate, or percentage of UNE loops, it would ignore the "opportunity" present in a particular wire center.

The CLECs also suggest that the Commission should undertake some calculation or estimate to capture "switched" UNE loops. CLEC witness Mr. Gillan, however, concedes there is no source that would provide data concerning which UNE loops are switched as compared to loops that are not switched.[149] Moreover, the FCC clearly intended to capture, with its business line test, an accurate measurement of the revenue opportunity in a wire center.[150] This intent is consistent with the revised impairment standard the FCC adopted in the *TRRO*, which considers,

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145 47 C.F.R. § 51.5
146 *TRO* at ¶ 105.
147 Hearing Exhibit No. 15 (Gillan Deposition) at p. 43.
148 *Id.*
149 Hearing Exhibit No. 15 (Gillan Deposition) at p. 44.
150 *TRRO* at ¶ 104.

in part, whether requesting carriers can compete without access to particular network elements[151] and requires consideration of all the revenue opportunity that a competitor can reasonably expect to gain over facilities it uses, from all possible sources.[152] Finally, the FCC was very clear that it wished to avoid a "complex" test, or a test that would be subject to "significant latitude."[153] The Commission, therefore, declines to undertake the calculation or estimate suggested by the CLECs. This is consistent with decisions reached by the Illinois and Michigan Commissions.[154]

Additionally, the federal rule requires ISDN and other digital access lines, whether BellSouth's lines or CLEC UNE lines, to be counted at their full system capacity; that is, each 64 kbps-equivalent is to be counted as one line.[155] The FCC's rule plainly states that "a DS1 line corresponds to twenty four 64 kbps-equivalents, and therefore to 24 'business lines'."[156] The FCC has made clear its "test requires ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one."[157] The Commission finds that it is appropriate to consider the potential customers CLECs can serve.

3. Identifying Wire Centers in the Future that Satisfy the FCC's Impairment Tests

CompSouth has proposed a means for identifying future wire centers that would resolve disputes relating to BellSouth's subsequent wire center identification within ninety days after

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151 *TRRO* at ¶ 22.

152 *Id.* at ¶24.

153 *TRRO*, ¶ 99

154 Illinois Commerce Commission Docket No. 05-0442, Arbitration Decision, November 2, 2005, p. 30; In re: Commission's own Motion to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon, 2005 Mich. PSC LEXIS 310, Order at * 13.

155 47 C.F.R. § 51.5.

156 *Id.*

157 *See* Sept. 9, 2005, Brief for the FCC Respondents, United States Court of Appeals, D.C. Cir. No. 05-1095.

BellSouth's initial filing.[158] BellSouth has objected to any process that limits its right to designate future wire centers on an annual basis, and the Commission finds nothing in the federal rules that supports any such limitation. Moreover, CompSouth's proposed process inserts a number of qualifications to the data that it seeks from BellSouth, and the Commission can find no basis in the applicable law for such qualifications. The Commission, therefore will not adopt the CLECs' proposed contract language.

Under BellSouth's proposal, if wire centers are later found to meet the FCC's no impairment criteria, BellSouth will notify CLECs of these new wire centers via a "Carrier Notification Letter." The non-impairment designation will become effective 10 business days after posting the Carrier Notification Letter. Beginning on the effective date, BellSouth would no longer be obligated to offer high capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the selfcertification process. This means that if a CLEC self certifies, BellSouth will process the order, subject to its right to invoke the dispute resolution process if BellSouth believes the self-certification is invalid. High capacity loop and transport UNEs that were in service when the subsequent wire center determination was made will remain available as UNEs for 90days after the effective date of the non-impairment designation. This 90 day period is referred to as the "subsequent transition period." No later than 40 days from the effective date of the non-impairment designation, affected CLECs must submit spreadsheets identifying their embedded base UNEs to be converted to alternative BellSouth services or to be disconnected. From that date, BellSouth will negotiate a project conversion timeline that will ensure completion of the transition activities by the end of the 90 day subsequent transition period.

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158 *See* Gillan Direct at pp. 32-33.

The Commission finds that BellSouth's proposal is reasonable and in compliance with applicable law. Moreover, BellSouth's proposal has been agreed to by a number of CLECs.[159] The Florida Commission ruled that it has the authority to resolve an ILEC's challenge to a CLEC self-certification under an interconnection agreement dispute resolution provision; that it would approve the initial wire center lists; that CLEC's should exercise due diligence in making inquiries about the availability of UNEs and must self-certify; and that BellSouth should provision requested UNEs but may bring disputes to the Commission for resolution.[160]

The North Carolina Commission concluded that it has the authority to ascertain whether BellSouth has appropriately categorized its wire centers using the FCC's rules. It further directed BellSouth to use the same utilization factor for CLEC hi-cap UNE-L as exists for BellSouth's hi-cap lines, and it ruled that BellSouth may count the number of lines provided via HDSL, ADSL, UCL-Short and IDSL loops on a one-for-one basis.[161]

The South Carolina Commission found that BellSouth had properly identified the wire centers where no impairment exists. It also concluded that BellSouth's business line count, its treatment of hi-cap loops, and its inclusion of certain UNE loops was properly implemented.[162]

The Tennessee Regulatory Authority determined that it has the authority to resolve disputes concerning wire center impairment tests. It held that BellSouth's counting methodology was correct, with the exception that BellSouth cannot report full system capacity.[163]

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159 *See* Blake Rebuttal at p. 4.

160 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

161 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

162 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

163 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

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

The Commission finds that BellSouth should not be required to accept or process orders adding new delisted UNEs. The *TRRO* expressly bars *all* new UNE-P arrangements, not just those used to serve new customers. When a CLEC orders a new UNE-P line to serve an existing customer, it is ordering new local switching and a new UNE-P, which is prohibited by the plain language of the FCC's order and Rules.[164]

Significantly, the recent decision by the federal district court in Mississippi addresses this matter. In its April 13, 2005, Order, the United States District Court for the Southern District of Mississippi stated:

> [A] comprehensive review of all potentially relevant provisions of the TRRO demonstrates convincingly that the FCC envisioned that the bar on new-UNE-P switching order would be immediately effective on the date established in the order, March 11, 2005, without regard to the existence of change of law provisions in parties' Interconnection Agreements. The TRRO makes clear in unequivocal terms that the transition period applies only to the embedded customer base, and 'does not permit competitive LECs to add new customers using unbundled access to local circuit switching.'[165]

Additionally, a federal district court in Georgia confirmed that BellSouth's position is correct. On April 5, 2005, the United States District Court for the Northern District of Georgia ruled that:

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164 *TRRO* ¶227.

165 *Mississippi Order*, 368 F. Supp. 2d, 557, 560-561. (citations omitted from original) (emphasis added).

> [u]nder the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 months and at higher rates than they were paying previously. The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ed]' to place new orders.[166]

This rationale applies equally to the situation when a CLEC seeks to move a customer's service to a different location, because doing so requires disconnection of the service and the placement of a "new" order for delisted service.

Changes to existing service do not require a new service order. BellSouth, accordingly, agrees that it is required under the *TRRO* to modify an existing customer's service by, for example, adding or removing vertical features, during the transition period.[167]

In order to submit an order for a high-capacity loop or transport UNE, a CLEC must self-certify, based on a reasonably diligent inquiry, that it is entitled to unbundled access to the requested element.[168] BellSouth must process the request.[169] It may only subsequently challenge the validity of such order(s) pursuant to the dispute resolution provision in the parties' interconnection agreement.[170]

In accordance with the *TRRO*, BellSouth has been accepting and processing CLEC orders for new high-capacity loops and dedicated transport even in those wire centers and for those routes that BellSouth has identified as areas where CLECs are not impaired pursuant to the competitive thresholds the FCC set forth in the TRRO.[171] The Commission has confirmed the Mississippi wire centers that satisfy the FCC's impairment tests. CLECs have no basis whatsoever to "self-certify" orders for high capacity loops and dedicated transport in the

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166 *BellSouth Telecoms. Inc. v. MCI Metro Access Transmission Servs. LLC*, 2005 U.S. Dist. LEXIS 9394 (N.D. Ga. Apr. 5, 2005) ("*Georgia Order*") at * 6-7, *aff'd BellSouth Telecoms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964 (11th Cir. 2005) ("*11th Circuit Order*").

167 *See* Blake Direct at p. 9.

168 *TRRO* at ¶ 234.

169 *Id.*

170 *Id.*

171 *Id.*

confirmed wire centers. The Florida Commission held that CLECs may not move existing or add new switching, hi-cap loops or dedicated transport, but that changes to existing service are allowed during the transition period.[172] The North Carolina Commission determined that no conditions should be imposed on moving, adding, or changing orders to a CLEC's embedded base and that BellSouth should not impose disconnection or non-recurring charges when transitioning the delisted Section 251 UNEs to alternate services.[173] The South Carolina Commission referred back to its "No New Adds Order," in which it ruled that BellSouth must accept orders for moves, changes or adds to a CLEC's embedded base and allowed changes at existing locations.[174] The Tennessee Regulatory Authority concluded that CLECs are not allowed new adds in provisioning service to their embedded base customers including moves, adds and changes. BellSouth may reject any and all new orders for delisted UNEs.[175] The Georgia Commission adopted BellSouth's proposed language.[176] The Commission finds that CLECs must abide by the Commission's wire center confirmation to eliminate future disputes.

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 5.4.3.2, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

F. Issue 10: Transition of Delisted Network Elements To Which No Specified Transition Period Applies: *What rates, terms, and conditions should govern the*

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172 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

173 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

174 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

175 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

176 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

The Commission has addressed the rates, terms and conditions for elements delisted by the *TRRO* and which have a designated transition period, including those identified in subpart (b) above, in connection with its discussion of Issue 2. In addition to taking steps to transition away from elements delisted by the *TRRO*, the FCC removed significant unbundling obligations in the *TRO*, including, entrance facilities, enterprise or DS1 level switching, OCN loops and transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching.

The FCC eliminated the ILECs' obligation to provide unbundled access to these elements 2 years ago in the *TRO*. CLECs that still have the rates, terms and conditions for these elements in interconnection agreements have reaped the benefits of unlawful unbundling of these elements for far too long. As such, with the exception of entrance facilities, which BellSouth will agree to allow CLECs to transition with their embedded base and excess dedicated transport, BellSouth is authorized to disconnect or convert such arrangements upon 30 days written notice, absent a CLEC order to disconnect or convert such arrangements earlier.[177] BellSouth should also be permitted to impose applicable nonrecurring charges.[178] To do otherwise would provide an incentive for these CLECs to further delay implementation of the

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177 *See* Tipton Direct at pp. 43-44.

178 *See* Tipton Direct at p. 44.

TRO. The Commission finds that BellSouth's proposed contract language is fully consistent with the *TRO*.

The Florida Commission concluded that after the effective date of the change-of-law amendment, BellSouth is authorized to disconnect or convert delisted elements after a 30-day written notice period. It also ruled that BellSouth should identify and post on its website as a Carrier Notification Letter subsequent determinations that a wire center meets the non-impairment criteria and that BellSouth will no longer have to provide UNEs in such wire center 30-days following the posting of the Carrier Notification Letter. The Florida Commission also found that if a CLEC disputes the non-impairment claim within 30 days, then BellSouth must provision the UNE and review the claim, then upon resolution of the dispute, the rates will be trued-up. [179]

The Georgia Commission adopted a transition period of 30-days for CLECs to submit conversion orders. It also adopted a 120-day transition period for subsequently identified non-impaired wire centers. Finally, the Georgia Commission adopted CompSouth's position and required BellSouth to provide actual written notice of subsequent non-impairment determinations. [180]

The North Carolina Commission determined that any service arrangements delisted as UNEs by the FCC should be removed from interconnection agreements as Section 251 UNE offerings effective with the TRRO amendment. It furthered ordered that BellSouth shall not impose disconnection or nonrecurring charges when transitioning delisted Section 251 UNEs.[181]

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179 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

180 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

181 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The South Carolina Commission ordered that, with the exception of entrance facilities, BellSouth is authorized to disconnect or convert UNEs upon 30-days written notice, and that it may impose applicable non-recurring charges.[182]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.7 and 4.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

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

The *TRRO* requires CLECs to transition their entire embedded base of switching and high capacity loops and transport by March 10, 2006. To accomplish this, and to minimize disruption to end users, BellSouth obviously needs CLECs to timely provide it with information concerning their plans for these services. The Commission has reviewed BellSouth's proposals and finds them to be reasonable.[183]

BellSouth asked that CLECs should identify their embedded base UNE-Ps as soon as possible and to submit orders to disconnect or convert the embedded base in a timely manner so as to complete the transition process by March 10, 2006.[184] BellSouth also asked that if CLECs failed to submit orders in a timely manner, BellSouth should be permitted to identify all such remaining embedded base UNE-P lines and convert them to the equivalent resold services no later than March 10, 2006, subject to applicable disconnect charges and the full nonrecurring

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182 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

183 *See* Tipton Direct at pp. 45-50.

184 *See* Tipton Direct at p. 46.

charges in BellSouth's tariffs.[185] Absent a commercial agreement for switching, BellSouth is authorized to disconnect any remaining stand-alone switching ports within fourteen (14) days after the effective date of this Order.[186] To do otherwise will incent CLECs to simply continue to refuse to act in order to delay implementation of the *TRRO*.

For high capacity loops and dedicated transport, BellSouth requested that CLECs submit spreadsheets by December 9, 2005, to identify and designate transition plans for their embedded base of these delisted UNEs.[187] The Commission will require CLECs to do so as soon as possible, but in no event more than 15 days after the date of this Order.[188] If CLECs fail to comply with this requirement, BellSouth is authorized to identify such elements and transition such circuits to corresponding BellSouth tariffed services within fourteen (14) days after the effective date of this Order, retroactive to March 11, 2006, and also subject to applicable disconnect charges and full nonrecurring charges in BellSouth's tariffs.[189]

For dark fiber, BellSouth requested that CLECs submit spreadsheets to identify and designate plans for their embedded base dark fiber loops and delisted dark fiber transport to transition to other BellSouth services by June 10, 2006.[190] If a CLEC has failed to submit such spreadsheets, BellSouth is authorized to identify all such remaining embedded dark fiber loops and/or delisted dark fiber dedicated transport and transition such circuits to the corresponding

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185 *Id.*

186 *Id.*

187 *See* Tipton Direct at pp. 46-47.

188 This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

189 *See* Tipton Direct at p. 47.

190 *See* Tipton Direct at pp. 47-48.

BellSouth tariffed services no later than 15 days after the date of this Order , subject to applicable disconnect charges and full nonrecurring charges set forth in BellSouth's tariffs.[191]

BellSouth's proposed contract language is fully consistent with the *TRO*. The Florida Commission decided this issue within the context of Issue 2 above.[192] The Tennessee Regulatory Authority did the same. It further ruled that CLECs had 30-days from deliberation to submit their conversion spreadsheets and that if they failed to do so, BellSouth could bring the issue before the Tennessee Regulatory Authority for resolution. Finally, the Tennessee Regulatory Authority ruled that BellSouth could not unilaterally convert CLEC circuits prior to March 10, 2006, nor could it unilaterally disconnect any circuits at any time.[193]

The Georgia Commission determined that CLECs had until March 10, 2006, to submit orders for the transition. It also ordered BellSouth to true-up the difference for conversions completed prior to March 10, 2006. The Georgia Commission ruled that BellSouth could charge CLECs the resale tariffed rate for local switching beginning March 11, 2006. It also concluded that BellSouth should not take any action with regard to wire centers in dispute until the Georgia Commission had resolved the dispute.[194]

The North Carolina Commission found that where BellSouth has tariffed alternatives to a delisted UNE and if a CLEC does not submit a conversion order, BellSouth can convert those UNEs to the appropriate tariffed rate effective on the day following the end of the transition period. No disconnection or nonrecurring charges should apply. For stand alone ports and other services for which no tariffed offering exists, the Commission concluded that BellSouth must

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[191] *Id.*

[192] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

[193] Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

[194] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

provide each CLEC with a list of ports and other services for which no order has been placed, together with a notice that the service will be disconnected on the day after the end of the transition period.[195]

The South Carolina Commission ruled that CLECs must identify their embedded base UNE-Ps and submit orders to disconnect or convert them. If CLECs fail to submit orders, BellSouth may identify and convert them to the equivalent resold service no later than March 10, 2006, subject to applicable disconnect charges and full nonrecurring charges. Absent a commercial agreement, BellSouth is authorized to disconnect any stand alone switching ports which remain in place on March 11, 2006.[196]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 4.2.5, 4.2.6, 5.4.3.5, 5.4.3.6, 2.1.4.11, 2.8.4.7, 6.2.6.9, 6.9.1.9, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi, which interconnection agreements shall be deemed effective as of March 11, 2006.

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

The Georgia Commission clarified that its order in the generic change of law proceedings applies to certificated CLECs. If, however, parties have entered into a separate agreement, they are bound by those agreements.[197] The North Carolina Commission ordered that BellSouth and CLECs with whom it has interconnection agreements currently in effect should execute and file

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[195] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[196] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[197] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

amendments to the interconnection agreements that are consistent with the provisions of their Order, or are mutually agreeable to the parties to the interconnection agreements, by March 10, 2006.[198]

The South Carolina Commission ruled that unless the parties agreed otherwise, BellSouth and all CLECs operating in South Carolina should promptly execute contractual amendments to incorporate language that the Commission adopts so that the FCC's deadlines can be met. The South Carolina Commission also ruled that if a TRO and TRRO related amendment is not signed, then the Commission's approved language goes into effect.[199]

The Tennessee Regulatory Authority determined that companies that fail to execute new interconnection agreements shall be deemed to have done so.[200]

The Commission intends that unless they agree otherwise, BellSouth and all CLECs operating in Mississippi promptly execute contractual amendments to incorporate the language the Commission adopts in this proceeding so that the FCC's transitional deadlines are met. These amendments must be executed no more than 45 days after the date of this Order. If an amendment is not executed within the allotted timeframe, the Commission's approved language will go into effect for all CLECs in the state of Mississippi, regardless of whether an amendment is signed.[201]

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

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[198] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[199] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[200] Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

[201] The Commission notes also that it has previously addressed the "Abeyance Agreement" between BellSouth and CompSouth members Nuvox and Xspedius in its discussion of Issue 3.

A. **Issue 13: Performance Plan:** *Should network elements delisted under Section 251(c)(3) be removed from the SQM/PMAP/SEEM?*

In deciding this issue, the Commission first notes that the Georgia Commission recently entered an *Order Adopting Hearing Officer's Recommended Order*, dated June 23, 2005, in Docket No. 7892-U, in which it approved a Stipulation Agreement reached between BellSouth and several CLEC parties. This stipulation provides, in part:

> 1. All DS0 wholesale platform circuits provided by BellSouth to a CLEC pursuant to a commercial agreement are to be removed from the SQM Reports; Tier 1 payments; and Tier 2 payments starting with May 2005 data.
>
> 2. The removal of DS0 wholesale platform circuits as specified above will occur region-wide.
>
> 3. All parties to this docket [the Performance Measurements docket] reserve the right to make any arguments regarding the removal of any items other than the DS0 wholesale platform circuits from SQM/SEEMs in Docket No. 19341-U [the Generic Change of Law docket] to the extent specified in the approved issues list.[202]

This regional Stipulation was endorsed by a number of CLECs, including AT&T, Covad, MCI and DeltaCom, all of whom are members of CompSouth.

Although this Stipulation is not binding on all parties to this docket, it supports the Commission's finding that elements that are no longer required to be unbundled pursuant to Section 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan. The SQM/PMAP/SEEM plan was established to ensure that BellSouth would continue to provide nondiscriminatory access to elements required to be unbundled under Section 251(c)(3) after BellSouth gained permission to provide in-region interLATA service. If BellSouth fails to meet measurements set forth in the plan, it must pay a monetary penalty to a CLEC and/or to the State. Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLECs to provide

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202 Blake Direct at p. 13.

service and without access to the ILEC's network, the CLEC would be impaired in its ability to do so.

In determining that certain elements are no longer "necessary" and that CLECs are not "impaired" without access to them, the FCC found that CLECs were able to purchase similar services from other providers. These other providers are not required to perform under a SQM/PMAP/SEEM plan. To continue to impose upon BellSouth a performance measurement, and possible penalty, on competitive, commercial offerings is discriminatory and anticompetitive. For commercial offerings, the marketplace, not a SQM/PMAP/SEEM plan, becomes BellSouth's penalty plan. If BellSouth fails to meet a CLEC's provisioning needs, such CLEC can avail itself of other providers of the service and BellSouth is penalized because it losses a customer and associated revenues.[203]

The Florida and South Carolina Commissions both ruled that performance data for services no longer provided under Section 251(c)(3) should be removed from BellSouth's SQM/PMAP/SEEM plans.[204] The Georgia Commission concluded that performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251.[205] The North Carolina Commission determined that the issue was moot as a result of that Commission's approval of the new SQM/SEEM plan in its Docket No. P-100, Sub 133k effective November 15, 2005.[206]

The Commission, therefore, finds that network elements that are delisted under Section 251(c)(3) should be removed from the SQM/PMAP/SEEM plans.

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[203] Blake Direct at p. 11.

[204] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); and South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[205] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

[206] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

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

CompSouth witness, Mr. Gillan, did not file any direct or rebuttal testimony addressing Issue 15.[207] BellSouth, on the other hand, explained that it will convert special access services to UNE pricing, subject to the FCC's service eligibility requirements and limitations on high-cap EELs, once a CLEC's contract has these terms incorporated in its contract.[208] BellSouth also presented testimony that it will convert UNE circuits to special access services and that special access to UNE conversions should be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangements.[209] BellSouth presented evidence that the applicable rates for conversions in Mississippi for the first single DS1 or lower capacity loop conversion on an LSR should be $25.01 and $3.53 per loop for additional loop conversions on that LSR and $26.50 for a project consisting of 15 or more loops submitted on a single spreadsheet, and $5.02 for each additional loop on the same LSR generated via a spreadsheet. For DS3 and higher capacity loops and for interoffice transport conversions, BellSouth presented evidence that the rate should be $40.22[210] for the first single conversion on an LSR and $13.50

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207 Hearing Exhibit No. 15 (Gillan Deposition) at p. 77.

208 Tipton Direct at p. 57.

209 *Id.*

210 BellSouth recently updated the rates for DS3 and higher capacity loops and interoffice transport conversions that it will offer its wholesale customers in its standard interconnection agreement, which is posted at www.interconnection.bellsouth.com. The DS3 rates set forth in Ms. Tipton's testimony mirrored the rates that were in BellSouth's standard interconnection agreement at the time of this proceeding. BellSouth is not precluded from offering CLECs lower rates consistent with its modifications, which the Commission understands are as follows: $36.87 for the first single conversion on an LSR (changed from $40.22), $16.14 per loop for additional single conversions on that LSR (changed from $13.50). For a project consisting of 15 or more such elements in a state submitted on a single spreadsheet,

per loop for additional single conversions on that LSR. For a project consisting of 15 or more such elements in a state submitted on a single spreadsheet, BellSouth proposed $63.98 for the first loop and $25.59 for each additional loop conversion on that same spreadsheet. Finally, BellSouth presented evidence that the Commission-ordered rate of $5.63 should apply for EEL conversions until new rates are issued[211] and that if physical changes to the circuit are required, the activity should not be considered a conversion and the full nonrecurring and installation charges should apply.[212] Based on the evidence presented by BellSouth and the lack of evidence presented by the CLECs, the Commission adopts BellSouth's proposed language.

The Florida Commission determined that BellSouth is obligated to provide conversions of special access to UNE pricing.[213] The Georgia Commission remanded this issue for evidence on the issue of the appropriate conversion rate. In the interim, it adopted a rate of TELRIC plus 15%.[214] The North Carolina Commission determined that BellSouth is required to provide conversion of special access circuits at its proposed "switch-as-is" rate.[215] The South Carolina Commission adopted BellSouth's proposed language.[216]

The Commission notes that nothing precludes BellSouth from offering conversions at rates lower than those specified in this Order as set forth in note 165. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including

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BellSouth is offering $38.36 for the first loop (changed from $63.98) and $17.63 (changed from $25.59).

[211] Tipton Direct at p. 58; *see also note above.*

[212] Tipton Direct at p. 57; *see also note above.*

[213] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

[214] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

[215] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[216] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

without limitation Sections 1.6 and 1.13, shall be included in interconnection agreements between BellSouth and CLECs operating in Mississippi.

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

Relevant Contract Provisions: Neither BellSouth nor CompSouth propose specific language on this issue. The parties' dispute concerns CLECs' unfounded claims for retroactive conversion rights. *See* BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

CompSouth witness, Mr. Gillan, did not file any direct testimony addressing Issue 16.[217] In his rebuttal testimony, Mr. Gillan claimed that conversion language and rights must be retroactive to March 11, 2005, the effective date of the *TRRO*.[218] This Commission disagrees, because retroactive conversion rights were not contemplated in the *TRO*. Instead, the FCC made clear that "carriers [were] to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts."[219] This is the conclusion the Massachusetts and Rhode Island commissions reached when confronted with this issue.[220] The Florida Commission held that any conversions to stand-alone UNEs that were pending on the effective date of the TRO shall be effective with the date of the amendment or interconnection agreement that incorporates conversions.[221] The Georgia Commission concluded that CLECs that submitted

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217 Hearing Exhibit No. 15 (Gillan Deposition) at p. 77.

218 Gillan Rebuttal at pp. 40-41.

219 *TRO* at ¶ 588.

220 *See Massachusetts Arbitration Order*, p. 135; *see also Arbitration Decision*, In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 30 ("Paragraph 589 [of the *TRO*] does not contain any clear FCC mandate that pricing for conversions begin on the effective date of the *TRO*, which was October 2, 2003. Accordingly, the pricing for these conversions does not take effect until the ICA amendment goes into effect").

221 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

legitimate requests for conversions to UNEs or UNE combinations prior to the effective date of the TRO are entitled to UNE pricing as of the date the TRO became effective.[222]

The North Carolina Commission determined that the rates, terms and conditions for conversions should be retroactive to the TRO effective date, and that pending orders should be processed under the conditions that existed prior to the TRO.[223] The South Carolina Commission determined that the language contained in the interconnection agreements at the time the TRO became effective governs the appropriate rates, terms and conditions and effective dates for conversion requests that were pending. It held that conversion rights, rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended.[224]

The Commission, therefore, finds that Mr. Gillan's testimony on this issue is incorrect and that it is inconsistent with the *TRO* and the *TRRO*. The contract language contained in a CLEC's interconnection agreement at the time the *TRO* became effective governs the appropriate rates, terms, conditions and effective dates for conversion requests that were pending on the effective date of the TRO.[225] Conversion rights, rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended.[226]

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

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222 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).
223 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).
224 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).
225 Tipton Direct at pp. 58-59.
226 Tipton Direct at p. 59.

The essential dispute between the parties is that CompSouth claims that BellSouth must show cause to the CLEC before it can begin an audit.[227] The Commission, however, is concerned that this requirement could be used by some CLECs to delay or even evade an appropriate audit. Additionally, an audit often is necessary in order to determine whether there is or is not cause for concern.

Moreover, BellSouth witness Ms. Tipton generally explained that BellSouth has not conducted audits without cause,[228] and the fact that BellSouth's proposed language calls for BellSouth to pay for an audit that does not reveal issues is a deterrent to BellSouth's unreasonably requesting an audit. BellSouth's proposed language allows it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria, and requires BellSouth to obtain and pay for an independent auditor who will conduct the audit pursuant to American Institute for Certified Public Accountants ("AICPA") standards.[229] The auditor determines material compliance or non-compliance.[230] If the auditor determines that CLECs are not in compliance, the CLECs are required to true-up any difference in payments, convert noncompliant circuits, and make correct payments on a going-forward basis.[231] Also, CLECs determined by the auditor to have failed to comply with the service eligibility requirements must reimburse the ILEC for the cost of the auditor.[232]

The Florida Commission held that BellSouth need not identify the specific circuits that are to be audited; that the audit should be performed by an independent, third-party auditor selected by BellSouth; that the audit should be performed according to the standards of the

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227 Hearing Exhibit No. 15 (Gillan Deposition) at p. 84.
228 Tipton Rebuttal at pp. 37-39.
229 Tipton Direct at pp. 64-65.
230 *Id.*
231 *Id.*
232 *Id.*

AICPA; and that the CLEC may dispute any portion of the audit following the standard dispute resolution process in the interconnection agreement after the audit is complete.[233]

The Georgia Commission adopted CompSouth's position and found that BellSouth must have some cause prior to initiating an audit. It held that BellSouth does not have to obtain the agreement of a CLEC with regard to the auditor. It further concluded that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found.[234]

The North Carolina Commission ruled that 30 to 45 days advance notice shall be given to a CLEC prior to an audit and that BellSouth must prepare a Notice of Audit stating its concern that the CLEC has not met the qualification criteria and its concise reasons therefore. BellSouth may select the auditor of its choice without prior approval of the CLEC or the Commission. Finally, the North Carolina Commission found that challenges may be filed with the Commission following the audit. [235]

The South Carolina Commission ruled that, unless a CLEC and BellSouth have negotiated different language, BellSouth's language is accepted. BellSouth is authorized to conduct audits without having to prove cause; that if an auditor determines non-compliance, the CLEC is required to true-up any difference in payments, convert non-compliant circuits and make correct payments going forward; and that CLECs who have been determined by the auditor to fail the service eligibility requirements must reimburse the ILEC for the cost of the audit.[236]

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[233] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

[234] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

[235] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[236] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 5.3.4.3, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

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

Neither BellSouth nor CompSouth has proposed specific contractual language regarding the *Core Order*.[237] Thus, the only language before the Commission is the language proposed by ITC^DeltaCom, which suggests that BellSouth's template agreement should include language implementing the *Core Order*. The *Core Order*, however, provides CLECs with various choices that allow different CLECs to elect different rate structures.[238] Due to these choices, a one-size-fits-all approach is inappropriate.[239] As BellSouth witness Ms. Tipton explained, even if language addressing the *Core Order* were included in an agreement, the parties to each agreement still must identify their desired rate structure. Including standard language, therefore, would not address all scenarios encountered in the implementation of the *Core Order*.[240]

The Florida Commission determined that all affected CLECs are entitled to amend their agreements to implement the ISP Remand Core Forbearance Order and that such amendments shall be handled on a carrier-by-carrier basis.[241] The Georgia Commission ordered that interconnection agreements be amended to remove "new markets" and "growth caps"

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237 *See* First Revised Exhibit JPG-1, p. 63.

238 Tipton Direct at p. 71.

239 *Id.*

240 Tipton Rebuttal at pp. 41-42.

241 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

restrictions, and the North Carolina Commission ruled likewise.[242] The South Carolina Commission ruled that BellSouth should resolve this issue on a carrier-by-carrier basis.[243]

Accordingly, the Commission finds that BellSouth should resolve this issue on a carrier-by-carrier basis depending on the specific facts of each particular situation.

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

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

This issue presents two questions that require Commission resolution, and both of these questions relate specifically to BellSouth's UNE HDSL loop product, rather than to HDSL compatible loops generally. The first question is if, in the future, BellSouth satisfies the FCC's impairment thresholds for DS1 loops, would BellSouth be obligated to provide CLECs with its UNE HDSL loop product? Second, can BellSouth count each deployed UNE HDSL loop as 24 voice grade equivalent lines?

Concerning the first question, the Commission finds that CLECs are not entitled to order UNE HDSL loops in wire centers that satisfy the FCC's thresholds for DS1 loop relief. This conclusion is explicitly supported by the FCC's definition of a DS1 loop. The FCC defined a DS1 loop as including "2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, such as 2-wire and 4-wire HDSL Compatible Loops."[244]

The CLEC witnesses ignore the FCC's definition of a DS1 loop and cite to FCC language addressing HDSL capable loops generally, rather than to the clear and unambiguous

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[242] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); and North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[243] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[244] 47 C.F.R. § 51, 319(a)(4); Fogle Rebuttal at p. 4.

language contained in the rules.[245] The CLECs' position is misplaced because, by defining DS1 loops as including a 2-wire and 4-wire HDSL loops, the FCC expressly removed any obligation to provide these loops in unimpaired wire centers.[246]

In contrast, BellSouth's proposed language implements the applicable federal rules, which, by their terms, extend unbundling relief to UNE HDSL loops in the same wire centers in which BellSouth is not obligated to provide CLECs with DS1 loops. The Commission, therefore, adopts BellSouth's proposed language.

The second question posed by this issue relates to how UNE HDSL loops should be calculated in future determinations of wire centers that satisfy the FCC's impairment thresholds. The Commission finds that UNE HDSL loops can and should be counted as 24 business lines. In the *TRO* the FCC explained:

> 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.[247]

The FCC has also made clear that, for the purposes of calculating business lines, "a DS1 line corresponds to 24 kbps-equivalents, and therefore to 24 'business lines'."[248] Since the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity, and since the FCC declared that UNE HDSL loops are used to deliver T1 services, it is obvious that BellSouth's

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245 Gillan Direct at p. 29.

246 More importantly, however, the CLECs cannot refute the reality that there has been very little CLEC interest in BellSouth's UNE HDSL product at all, as only 178 UNE HDSL loops were in service to *all* CLECs in Mississippi as of August 2005.

247 *TRO*, n. 634 (emphasis supplied).

248 47 C.F.R. § 51.5.

UNE 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.[249] The Florida and North Carolina Commissions determined that HDSL loops are not the equivalent of DS1 loops for evaluating wire center impairment and should not be counted as voice grade equivalents.[250] The Georgia Commission ruled to the contrary, as did South Carolina and Tennessee, which is consistent with BellSouth's position.[251] BellSouth's proposed contract language is fully consistent with the FCC's decisions and, thus, is approved.

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 2.3.6.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

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

No CLEC witness provided any testimony concerning line splitting, which occurs when one CLEC provides narrowband voice service over the low frequency portion of a loop and a second CLEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter.[252] In contrast, BellSouth's witness on this issue, Mr. Fogle, demonstrated the need for BellSouth's contract language, which involves a CLEC purchasing a

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[249] Fogle Rebuttal at pp. 3-4.

[250] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); and North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[251] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006); and Tennessee Regulatory Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

[252] *TRO* at ¶ 251; *Line Sharing Reconsideration Order* at ¶ 33; Hearing Exhibit No. 15 (Gillan Deposition) at pp. 77 – 78.

stand-alone loop (the whole loop), providing its own splitter in its central office leased collocation space, and then sharing the portion of the loop frequency not in use with a second CLEC.[253]

CompSouth's language would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271. As set forth above, however, the Commission does not support the reincarnation of UNE-P and will not require any references to Section 271 in Section 251/252 interconnection agreements. Moreover, the loop described by CompSouth does not exist, is not required by the FCC, and, therefore, should not be included in the section of the ICA that addresses line splitting.[254]

CompSouth also proposes that BellSouth be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L. Mr. Fogle, however, made clear, splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter built into all Asynchronous Digital Subscriber Line ("ADSL") platforms.[255] The CLECs offered no contrary evidence. BellSouth should not be obligated to provide the CLECs with splitters when they are utilizing UNE-L and can readily provide this function for themselves.[256]

The final area of competing contract language concerns CompSouth's proposed OSS language. The dispute between the parties is not over the language contained in the federal rules – clearly, the federal rules require BellSouth to make modifications to its OSS necessary for line splitting. The dispute between the parties revolves around the modifications that are actually

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253 Fogle Direct at pp. 9-11.
254 Fogle Rebuttal at p. 8.
255 Fogle Rebuttal at pp. 8-9.
256 *Id.*

"necessary." The CLECs presented no evidence to suggest that it is necessary for BellSouth to provide them with anything in order to facilitate line splitting.

The Florida Commission determined that BellSouth's language should be limited to when a CLEC purchases a stand-alone loop and that language in the interconnection agreement regarding line splitting should be revised to reflect that the requesting carrier is responsible for obtaining the splitter. The Florida Commission also found that indemnification should remain unaffected and that BellSouth is responsible for all necessary network modifications to accommodate line splitting.[257]

The South Carolina Commission declined to require BellSouth to provide line splitting.[258] The North Carolina Commission determined that line splitting should be allowed on a commingled arrangement of a Section 251 loop and unbundled local switching pursuant to Section 271.[259]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 3, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

C. <u>Fiber and Broadband Unbundling:</u>

1. <u>Greenfield and Fiber to the Home</u>

i. **<u>Issue 23: Greenfield Areas:</u>** *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,*

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[257] Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

[258] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[259] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

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?

ii. **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?*

There are essentially two disagreements regarding these issues. First, CompSouth wants to delete BellSouth's Section 2.1.2.3, which states:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval.

CompSouth did not offer any explanation for its desire to delete this provision,[260] which language appears reasonable on its face. The Commission, therefore, finds that this provision should appear in all interconnection agreements.

The second disagreement largely centers on the extent of fiber unbundling. The core dispute relates to the following language that CompSouth wants to substitute for BellSouth's proposed Section 2.1.2.3:

> Notwithstanding the above, nothing in this Section shall limit BellSouth's obligation to offer CLECs an unbundled DS1 loop (or loop/transport combination) in any wire center where BellSouth is required to provide access to DS1 loop facilities.[261]

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260 *See* Fogle Rebuttal at p. 13.

261 *See* First Revised Exhibit JPG-1 at p. 53.

CompSouth argues that its limitation is supported by the FCC's use of the terms "mass market" at various places in its orders. The Commission, however, finds that CompSouth's proposed language should be rejected because it is not supported by binding federal rules.[262]

The FCC has addressed fiber relief in various orders. In the *TRO,* for instance, the FCC stated at ¶ 273:

> Requesting carriers are not impaired without access to FTTH loops, although we find that the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop. With a limited exception for narrowband services, our conclusion applies to FTTH loops deployed by incumbent LECs in both new construction and overbuild situations. Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loops must be unbundled for narrowband services only. Incumbent LECs do not have to offer unbundled access to newly deployed or "greenfield" fiber loops.

Although the FCC used the terms "mass market" at various other places in the *TRO,* it did not use those words in explaining the scope of its fiber relief, and the FCC was very clear that its "unbundling obligations and limitations for such loops do not vary based on the customer to be served."[263] The FCC recognized clearly that CLECs "are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation."[264]

The FCC extended its fiber relief in subsequent orders. In its *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,*[265] the FCC made clear that BellSouth is not required to unbundle fiber loops serving

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262 *See* 47 C.F.R. § 51.319(a)(3).

263 *TRO* at ¶ 210.

264 *TRO* at ¶ 275.

265 CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) ("*MDU Reconsideration Order*").

predominantly residential multiple dwelling units ("MDUs").[266] The FCC also explained that, to the extent fiber loops serve MDUs that are predominantly residential in nature, such loops are governed by the FTTH rules.[267] "General examples of MDUs include apartment buildings, condominium buildings, cooperatives, or planned unit developments."[268] 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."[269] In its concluding paragraphs, the FCC acknowledged that its rule "will deny unbundling to competitive carriers seeking to serve customers in predominantly residential MDUs" but found that "such unbundling relief was necessary to remove disincentives for incumbent LECs to deploy fiber to these buildings."[270]

Following its *MDU Reconsideration Order*, the FCC next addressed the topic of fiber loops in its *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* ("*FTTC Reconsideration Order*").[271] The FCC defined a FTTC loop as a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises."[272] Then, the FCC granted further unbundling relief, concluding that "requesting carriers are not impaired in greenfield areas and face only limited impairment without access to FTTC loops where FTTC loops replace

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266 *MDU Reconsideration Order* at ¶ 7.
267 *Id.* at 4.
268 *Id.* at ¶ 4.
269 *Id.*
270 *Id.* at 23.
271 CC Docket No. 01-338, FCC 04-248 at ¶¶ 1, 9 (Oct. 18, 2004).
272 *FTTC Reconsideration Order* at ¶ 10.

pre-existing loops."[273] Significantly, the FCC reiterated that CLECs have increased revenue opportunities available with FTTC loops and that the entry barriers for CLECs and ILECs were "largely the same."[274] The FCC again concluded that its rule modification "will relieve the providers of such broadband loops from unbundling obligations under Section 251 of the Act."[275]

CompSouth's proposed contract language would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. The Commission, therefore, finds that CompSouth's proposed language must be rejected because it is inconsistent with FCC's broadband policies, its fiber orders, and the applicable rule. This finding is consistent with decisions of the Michigan,[276] Massachusetts,[277] and Rhode Island[278] Commissions. The Florida Commission determined that BellSouth is under no obligation to offer unbundled access to "Greenfield" FTTH/FTTC loops used to serve residential MDUs. It required BellSouth, in wire centers where impairment exists, to, upon request, unbundle the fiber loop to satisfy a DS1 or DS3 request. The Florida Commission also determined that unbundling requirements of an incumbent carrier with respect to overbuilt FTTH/FTTC loops are limited to either unbundled access to a copper loop or (if the ILEC elects to retire the copper loop) a 64 kbps transmission path over the FTTH/FTTC loop.[279]

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273 *Id.* at 11.

274 *Id.* at 12.

275 *Id.* at 32.

276 *Michigan Order,* p. 6 – 7.

277 *Massachusetts Arbitration Order,* p. 177.

278 *Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 18.

279 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

The Georgia Commission determined that the MPOE is 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. It also held that BellSouth is under no obligation to provide access to Greenfield FTTH or FTTC. The Georgia Commission adopted BellSouth's proposed language with a slight modification. It found that the FCC's FTTH/FTTC rules should apply to all central offices.[280]

The North Carolina Commission determined that BellSouth shall offer CLECs unbundled access to FTTH/FTTC loops serving enterprise customers and predominately business MDUs, and that in greenfield areas, BellSouth is under no obligation to provide access to unbundled FTTH/FTTC. The North Carolina Commission also determined that in the FTTH/FTTC overbuild situations where BellSouth also has copper loops, BellSouth shall make those copper loops available on an unbundled basis pursuant to the requirements of 47 C.F.R. § 51.319(a)(3)(iii). BellSouth's retirement of copper loops or copper sub loops must comply with the requirements of 47 C.F.R. § 51.319(a)(3)(iv). The North Carolina Commission added the caveat that if a loop is from an unimpaired wire center, it does not need to be provided. If, however, it is an impaired wire center, BellSouth has to provide it at TELRIC prices.[281]

The South Carolina Commission adopted BellSouth's proposed language with one exception that being that DS1 loops that are provisioned in impaired wire centers have to be provided at TELRIC prices.[282]

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[280] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

[281] North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[282] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.2, 2.1.2.1, 2.1.2.2, and 2.1.2.3, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

2. **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 defined in the federal rules, and BellSouth and CompSouth do not appear to contest that it is appropriate to include the language contained in such rules in interconnection agreements, whether that language is a shortened version of the rules, as BellSouth proposes, or the federal definition in its entirety.[283] BellSouth, however, opposes CompSouth's proposed language that would require BellSouth to provide access to hybrid loops as a Section 271 obligation.[284] Consistent with its decisions above, the Commission rejects this language and adopts BellSouth's proposed language. The Florida Commission found that BellSouth shall be required to provide CLECs with nondiscriminatory access to the TDM features, functions and capabilities of a hybrid loop, including DS1 and DS3 capabilities under Section 251, where impairment exists, on an unbundled basis to establish a complete transmission path between BellSouth's central office and an end user's premises.[285]

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283 *See* Exhibits PAT-1 and PAT-2.

284 Fogle Rebuttal at pp. 13-14.

285 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

The Georgia Commission adopted BellSouth's language.[286] The South Carolina Commission also did, but with one exception that being that hybrid loops that are provisioned in impaired wire centers have to be provided at TELRIC prices.[287]

The North Carolina Commission found that a hybrid loop is a local loop, composed of both fiber optic cable, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant. The North Carolina Commission determined that BellSouth shall provide unbundled access to hybrid loops pursuant to the requirements of 47 C.F.R. 51.319(a)(2).[288]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.3 shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

D. Routine Network Modification Issues

1. **Issue 26:** *What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?*

2. **Issue 27:** *What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?*

3. **MS Specific Issue:** (a) *How should Line Conditioning be defined in the Agreement? What should BellSouth's obligation be with respect to Line Conditioning?* (b) *Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less?* (c) *Under what rates, terms and conditioning should*

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286 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

287 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

288 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

BellSouth be required to perform line conditioning to Revenue Bridge Taps?

The parties' dispute centers on the relationship between routine network modifications ("RNM") and line conditioning. BellSouth argues that line conditioning is a subset of RNM,[289] and it opposes CompSouth's request to limit BellSouth's cost recovery to TELRIC rates, even if BellSouth performs work that it would not typically perform for its retail customers.

The FCC has defined RNMs as "those activities that incumbent LECs regularly undertake for their own customers."[290] RNMs do not include the construction of new wires (*i.e.* installation of new aerial or buried cable).[291] The FCC, citing the United States Supreme Court, has recognized an ILEC like BellSouth is not required to "alter substantially [its] network in order to provide superior quality interconnection and unbundled access."[292] Thus, an ILEC has to make the same RNMs to their existing loop facilities for CLECs that they make for their own customers.[293] 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.[294]

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'."[295]

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289 Fogle Rebuttal at pp. 14-15.
290 *TRO* at ¶ 632.
291 *Id.*
292 *TRO* at ¶ 630 (quoting, *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997)).
293 *TRO* at ¶ 633.
294 *Id.* at 634 (footnotes omitted).
295 *Id.* at 637.

The D.C. Circuit in *USTA II* interpreted the FCC's RNM requirements in the *TRO*. The Court's analysis is consistent with BellSouth's position on this issue. The Court found that:

> 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.[296]

Clearly, the FCC draws no distinction between line conditioning and RNM. 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."[297] 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."[298]

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

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296 *USTA II*, 359 F.3d at 578 (emphasis added).
297 *TRO* at ¶ 643.
298 *Id.*

LECs currently undertake under our line conditioning rules."[299] 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.[300]

The Florida Commission recently addressed this issue, finding that that BellSouth's RNM and line conditioning obligations were to be performed at parity.[301] Under this ruling, BellSouth is not obligated, to remove at TELRIC rates, load coils on loops greater than 18,000 feet.[302] Likewise, the Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access.[303]

With respect to Issue 27, BellSouth's position is that if BellSouth is not obligated to perform a RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC, it is a commercial or tariffed rate.[304] In contrast, CompSouth's proposed language limits BellSouth's recovery to TELRIC rates, even if the activity the CLEC is requesting was not included in the establishment of that rate.[305] The Commission finds that BellSouth's position is correct. If BellSouth performs non-standard modifications at the request of a CLEC, it is entitled to be compensated for doing so at rates other than TELRIC.

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299 *TRO* at ¶ 635.
300 *TRO* at ¶ 250.
301 *See* Order No. PSC-05-0975-FOF-TP at 24 – 26.
302 *Id.* at 36 – 37.
303 *Id.* at 41.
304 Fogle Direct at p. 28.
305 Fogle Rebuttal at pp. 18-19.

The Florida and Georgia Commissions both concluded that BellSouth must provide the same routing network modifications and line conditioning that it normally provides for its own customers. [306]

The South Carolina Commission concluded that line conditioning is not a routine network modification when a CLEC asks BellSouth to perform non-standard modifications to the network. The South Carolina Commission also determined that line conditioning is a part of routine network modifications for service that BellSouth normally furnishes to its own customers. Line conditioning for non-routine matters should be provided at a tariffed or commercial rate, whereas Routine Network Modifications, including routine line conditioning, should be provided at TELRIC rate. [307]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.10 and 2.5, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

IT IS THEREFORE ORDERED that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.10 and 2.5, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

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[306] Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); and Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

[307] South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

IT IS FURTHER ORDERED that all interconnection agreements, including the rates for UNEs and services covered therein, impacted by the rulings in this Order shall be effective retroactive to March 11, 2006.

IT IS FURTHER ORDERED that this Order shall be effective immediately.

This Order shall be deemed issued on the day it is served upon the parties herein by the Executive Secretary of this Commission who shall note the service date in the file of this Docket.

Chairman Nielsen Cochran voted Aye; Vice Chairman Leonard Bentz voted Aye; and Commissioner Bo Robinson voted Aye.

DATED this the 20th day of October, 2006.

MISSISSIPPI PUBLIC SERVICE COMMISSION

NIELSEN COCHRAN, CHAIRMAN

LEONARD BENTZ, VICE CHAIRMAN

BO ROBINSON, COMMISSIONER

ATTEST: A TRUE COPY

BRIAN U. RAY
Executive Secretary

Effective this 20th day of October 2006.