Commissioner Motion for the resolution of the remaining issues in Docket No. 19341-U.

SUMMARY

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?

(1) BellSouth has argued that state commissions do not have the authority to require it to offer de-listed UNEs at rates terms and conditions found just and reasonable under Section 271. The Commission has already concluded that it does have such authority.

(2) CLECs have until March 11, 2006 to order conversions from BellSouth. To the extent that it takes BellSouth beyond March 11 to process these orders, BellSouth is entitled to a true-up of the difference between the TELRIC rate and the rate BellSouth may charge after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

(3) Parties are required to negotiate appropriate transition mechanisms through the Section 252 process for high-capacity loops for which the FCC found impairment in the *TRRO,* but which may meet the thresholds for non-impairment in the future.

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?

(1) Parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

(2) The Commission adopts CompSouth's position to limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO*.

(3) The Commission adopts BellSouth's position and finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise.

(4) The Commission adopts BellSouth's position and concludes that the Abeyance Agreement does not excuse Cbeyond from implementing the *TRRO* until the parties have a new interconnection agreement.

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; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

(1) Business Line Count: For the counting of business lines, the Commission agrees with BellSouth that the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops. The Commission counts DS1 lines as 24 business lines, provided that those DS1 lines in which all 24 channels are empty shall not be counted at all towards the business line count.

(2) Fiber-Based Collocators: The Commission does not accept CompSouth's proposed language to include planned mergers in the definition of fiber-based collocators. The date certain for counting fiber-based collocators will be the effective date of this Commission's order addressing this issue, and not, as BellSouth proposes, the date the FCC rule became effective.

(3) Building: The Commission adopts CompSouth's "reasonable telecom person" standard for the term "building."

(4) Routes: The Commission adopts BellSouth's definition of route.

Issue 5: TRRO/FINAL RULES:
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)?

The Commission will allow BellSouth to designate future wire centers on an annual basis. The Commission will monitor how this process works and make necessary and appropriate changes moving forward.

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

The Commission adopts BellSouth's position and determines that HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment.

Issue 9 – 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?

Based on the District Court Order granting BellSouth's preliminary injunction, the Commission adopts BellSouth's position and concludes that a CLEC may not use facilities that have already been provided to serve existing customers who move to a new location and that the transition period does not apply to moving, adding or changing orders.

Issue 10 – Transition of Delisted Network Elements To Which No Specified Transition Period Applies – What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as 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?

(1) To the extent that resolution of this issue involves other issues in this proceeding, the Commission acts consistently with its positions on those other issues.

(2) The Commission adopts a transition period of 30 days for CLECs to submit orders to convert UNE-P prior to BellSouth being permitted to disconnect or convert circuits and 60 days for everything else.

(3) The Commission adopts a Subsequent Transition Plan, which applies to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards, of 120 days, which is a compromise between the parties on this issue.

(4) Finally, the Commission adopts CompSouth's position and obligates BellSouth to provide actual written notice to the point of contact in the parties' interconnection agreements. If a party does not have a point of contact identified in the agreement, then posting constructive notice on the website should be deemed acceptable.

Issue 11 - UNEs That Are Not Converted – What rates, terms and condition 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?

(1) In the context of Issue 2, the Commission found that CLECs have until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that are not completed until after March 11, 2006. For conversions that are completed prior to March 10, 2006, the Commission orders BellSouth to true-up the difference.

(2) The Commission has decided to set rates based on the just and reasonable standard in Section 271. Those will be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to charge CLECs the resale tariffed rate beginning March 11, 2006.

(3) The Commission concludes that BellSouth should not take any action with regard to wire centers in dispute until such dispute is resolved by the Commission.

Issue 13 – Performance Plan: -- Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

No. The Commission adopts CompSouth's position and finds that performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251 as opposed to covering only the overlap between Section 271 and Section 251.

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 Commission finds, consistent with CompSouth's position, that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. The FCC has not been clear on this issue. To reach the position advocated by BellSouth appears to require changing the meaning of the plain language of an FCC order; whereas the position advocated by the CLECs does not involve the same obstacle. That is, the FCC has stated that the commingling obligation applies to facilities or services obtained at wholesale. It has not stated that Section 271 facilities or services obtained at wholesale are excluded from this obligation.

This action should not be construed as the recreation of UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that this Commission has concluded that it would be prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P.

Issue 15 – TRO Conversions: 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?

The Commission will remand this issue to a Hearing Officer, or to itself, for evidence on the issue of the appropriate conversion rate. In the interim, the Commission adopts a rate of TELRIC plus fifteen percent based on the Commission's determination of TELRIC.

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?

The Commission finds consistent with CompSouth's position that CLECs that submitted legitimate requests to convert wholesale services 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.

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?

(1) The issue of whether BellSouth is obligated under Section 271 to provide line sharing breaks down to (1) whether line sharing falls under checklist item 4 and (2) whether, if so, the FCC's Forbearance Order relieved BellSouth of this obligation. As to the first issue, the Commission adopts CompSouth's position and concludes that line sharing is a checklist item 4 item. As to the second, individual FCC commissioners issued conflicting statements as to whether its Forbearance Order addressed line sharing. There is more support for the position that it did not address line sharing, but obviously the conflicting statements create ambiguity. Given the Commission's assertion of Section 271 authority, the Commission maintains the status quo by requiring BellSouth to provide line sharing, until the FCC clarifies that it does not have this responsibility.

(2) The Commission's assertion of Section 271 jurisdiction impacts this issue because it means that a Commission finding that line sharing is a checklist item 4 obligation would require BellSouth to provide line sharing as opposed to the determination being purely consultative.

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

Given the Commission's position on Issue 17, this issue is not applicable.

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

(1) For the reasons set forth in the Commission's decision on Issue 14, the Commission finds that line splitting can involve the commingling of Section 251 and Section 271 elements.

(2) Consistent with CompSouth's proposal, the Commission concludes that CLECs should indemnify and defend BellSouth against claims made against BellSouth, but that the indemnification language should relate to specific claims.

(3) The Commission will remand this issue for evidence as to the extent of BellSouth's line splitting obligations.

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

The Commission asserted Section 271 jurisdiction to set just and reasonable rates. Therefore, the Commission orders that BellSouth is obligated to offer call related databases at just and reasonable rates.

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

a) Pursuant to the FCC's definition, 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." 47 C.F.R. 68.105(b).

b) Based on the *Broadband Forbearance Order,* and consistent with BellSouth's position, the Commission concludes that BellSouth is under no obligation to provide access to greenfield Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops.

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

The Commission adopts BellSouth's proposed language because it tracks the following FCC rule:

When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (*where impairment has been found to exist*) on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop. 47 C.F.R. 51.319(a)(2)(ii) *(emphasis added)*

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

(1) The Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

(2) The Commission should order BellSouth to permit inclusion of the CompSouth proposed language on RNMs that mirrors the FCC rule.

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?

(1) Because the Commission has found that BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

(2) The Commission finds that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

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

a) The Commission adopts BellSouth's proposed language as modified below:

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~~.

b) Because the FCC rules on fiber to the home/fiber to the curb, do not include an exclusion based on impairment analysis, the Commission finds that the FCC's fiber to the home/fiber to the curb rules apply to all central offices. This conclusion rejects CompSouth's apparent position that the fiber to the home/fiber to the curb rules do not apply where impairment was found without access to DS1s or DS3s.

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?

(1) The Commission adopts CompSouth's position and finds that it is consistent with the *TRO* to include a requirement that BellSouth have some cause prior to initiating an audit.

(2) The Commission adopts BellSouth's position and does not require BellSouth to obtain the agreement of a CLEC with regard to the auditor.

(3) The Commission adopts BellSouth's position and finds that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. The reimbursement should not be limited to only those circuits for which non-compliance is found.

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

The Commission orders that agreements be amended to remove "new markets" and "growth caps" restrictions in BellSouth's ICA reciprocal compensation provisions. BellSouth has not explained how the distinctions between carrier contracts would render such direction problematic.

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

(1) Consistent with BellSouth's position, the Commission clarifies that its order applies to all certified competitive local exchange carriers.

(2) In the event that parties entered into separate agreements with BellSouth that may impact the implementation of changes of law, the Commission concludes that the parties be bound by those agreements. This issue is also addressed as part of Issue 3.

DISCUSSION

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?

Positions of the Parties

BellSouth

A.

The *TRRO* requires CLECs to work cooperatively for an orderly transition. This is evidenced by the requirement that adequate time be allowed to perform "the tasks necessary to an orderly transition." (*TRRO,* ¶143, 196, 227). Also, BellSouth argues that it is entitled to time in advance of March 10, 2006 so that it may migrate to alternative fiber arrangements. (BellSouth Brief, p. 58). BellSouth adds that there is no basis for transitioning from UNEs to state regulated Section 271 services. *Id.*

B.

Local Switching and UNE-P

BellSouth argues that CLECs should be ordered to identify embedded base via spreadsheets and submit orders as soon as possible or convert or disconnect their embedded base of UNE-P or standalone local switching. (BellSouth Brief, p. 59). BellSouth will then have adequate time to work with CLECs to ensure base elements are identified. If BellSouth is not given adequate time to convert, BellSouth will convert remaining UNE-P lines to the resale equivalent no later than March 11, 2006. *Id.* Remaining stand-alone switch ports will be disconnected. *Id.*

C.

BellSouth states that the Commission is bound by the FCC's rules on transitional rates. (BellSouth Brief, p. 59). 47 CFR 51.319(d)(2)(iii) requires transitional rates of the higher of the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the *TRRO* for that combination of network elements, plus one dollar. TELRIC rates do not apply.

D.

BellSouth urges the Commission to clarify that CLECs may not add new arrangements after March 11, 2005. (BellSouth Brief, p. 61). Any service added after that date must be subject to the appropriate true up. *Id.*

CompSouth

A.

CompSouth's first argument is that CLECs should be able to transition to Section 271 checklist elements. (CompSouth Brief, p. 6). In support of this position, CompSouth states that all of the major Section 251 UNEs that were de-listed by the *TRRO* must remain available to CLECs under Section 271. *Id.*

B.
Ordered vs. Fulfilled.

CompSouth contends that CLECs are entitled to place orders through March 11, 2005. (CompSouth Brief, p. 7). If it takes BellSouth longer to fulfill those orders, CLECs have no control over that part of the process. *Id.*

C.

ICAs must include transition provisions for high capacity loops and transport that BellSouth is currently required to provide under Section 251, but may not have to provide under this statute in the future as a result of growth in either business line counts or fiber-based collocators. (CompSouth Brief, p. 9). The *TRRO* states that when a high capacity loop for which there is currently impairment meets the standards for non-impairment, the FCC "expect[s] ILECs and CLECs to negotiate appropriate transition mechanisms through the section 252 process." *TRRO* ¶ 196, fn. 519.

CompSouth requests that the Commission declare that "BellSouth is obligated to provide for transition of high capacity loops and transport when in the future it is relieved of the obligation to provide them in and between particular wire centers pursuant to Section 251." (CompSouth Brief, p. 10).

Discussion

The first question within this issue pertains to what terms and conditions CLECs may transition to when they must transition away from UNEs. CompSouth argues that the transition should be to Section 271 checklist elements. The Commission has asserted jurisdiction under Section 271 to set just and reasonable rates for de-listed UNEs. The transition plan set forth in the *TRRO* for switching, high capacity loops and dedicated transport should apply during the transition period. After the transition period, the rates ordered by the Commission shall apply subject to the response of the FCC to the Commission's petition.

The second question within this issue pertains to whether there is some point prior to the end of the transition period beyond which CLECs may no longer order conversions. BellSouth states that conversions must be ordered far enough in advance of March 11, 2006, to enable it to process all orders by that date. CompSouth argues that CLECs are allowed to order conversions for the entire year.

The clearest indication of the FCC's intent is in paragraph 227 of the *TRRO* discussing the transition plan for mass market local switching. The FCC states that "We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of the Order." Given

that the FCC set an express deadline for the submission of orders, it is not prudent for this Commission to imply an earlier deadline from the FCC's expressed wish for an orderly transition. The FCC could have specified that CLECs must submit their orders by some earlier date to ensure that all customers would be converted as of March 10, 2006. The FCC declined to take such action. Instead, the FCC stated that CLECs have one year from the effective date to submit the necessary orders. In the context of high capacity loops, the FCC states that "At the end of the twelve-month period, requesting carriers must transition all of their affected high-capacity loops to alternative facilities or arrangements." (*TRRO,* ¶196). Because the above quotation references the obligation of the requesting carriers, it must be assumed that the FCC is referencing any actions that the requesting carriers must take, such as ordering a conversion. The CLEC does not control when an ILEC would act on its order; therefore, this passage cannot be reasonably construed to obligate the CLECs to submit orders prior to the one year anniversary in anticipation of the time necessary for the ILEC to process the order. The language in paragraph 143 of the *TRRO*, with respect to the transition period for dedicated interoffice transport is the same as that for high-capacity loops.

The three factors that need to be reconciled are (1) that CLECs have until twelve months after the effective date of the *TRRO* to order conversions, (2) that ILECs only have to provide unbundled local switching and dedicated loop and transport for twelve months from the effective date of the *TRRO* (see, 47 C.F.R.§ 51.319(d)(iii) and (3) processing the conversions takes time. During the cross-examination of BellSouth witness, Pamela Tipton, by counsel for Cbeyond Communications Company, John Heitman, the concept of a true up was explored.

> Q. (Mr. Heitman) Well, let me ask this, if a CLEC agreed or the Commission ordered that if a conversion wasn't completed by March 10, 2006, that once it was completed after that date, that BellSouth could true up to the rate for that alternative service back to March 11, 2006, would that be acceptable to BellSouth?
>
> A (Ms. Tipton) I mean certainly the Commission has the -- the right to do that.

(Tr. 773). The Commission orders that CLECs have until March 11, 2006 to order conversions from BellSouth. To the extent that it takes BellSouth beyond March 11 to process these orders, BellSouth is entitled to a true up of the difference between the TELRIC rate and the rate BellSouth may charge after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

An additional question within this issue concerns high-capacity loops for which the FCC found impairment in the *TRRO*, but may in the future meet the thresholds for non-impairment. Consistent with footnote 519 of the *TRRO*, the Commission requires the parties to negotiate appropriate transition mechanisms through the Section 252 process.

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?

Positions of the Parties

BellSouth

A.

TRRO ¶233 obligates carriers to execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. Therefore, CLECs should be ordered to implement promptly the changes of law that are the subject of this proceeding. (BellSouth Brief, p. 63).

B.

For issues that are currently the subject of arbitrations the Commission should address change-of-law issues in this proceeding and apply its conclusions in those arbitrations. This process is more efficient. *Id.*

C.

The Abeyance Agreement between BellSouth and Cbeyond does not excuse Cbeyond from implementing the *TRRO* until the parties have a new arbitration agreement. *Id.* at 64. The parties agreed to hold the arbitration of their new interconnection agreement in abeyance for 90 days in light of the uncertainty of the FCC's unbundling rules. *Id.* The Abeyance Agreement states that the parties "agreed to avoid a separate/second arbitration process of negotiating/arbitrating change-of-law amendments to the current interconnection agreement to address USTA II and its progeny." TR. 1073; Hyde Direct testimony, at 4.

The Abeyance Agreement does not mention the *TRRO*, and was limited to changes from *USTA II*. Neither the *TRO* nor the *TRRO* are "progeny" of *USTA II*. "Progeny" means "a line of opinions that succeed a leading case." *Black's Law Dictionary.* The *TRO* was issued prior to *USTA II*; therefore, it is not a progeny. (BellSouth Brief, p. 65). The *TRRO* is not a legal opinion, and it does not reaffirm the Circuit court's opinion so it is not a progeny. *Id.*

South Carolina rejected Cbeyond's argument on this point, stating that it was an unreasonable result for BellSouth to have given up its right to implement the new rules, even before it knew what the rules would contain. *Id.* at 65-66.

CompSouth

A.

CompSouth agrees that parties should act in reasonable time frame to implement changes. (CompSouth Brief, p. 10). However, CompSouth charges that BellSouth's proposed language exceeds scope of the docket. *Id.* at 11.

B.

As to the forum for the Commission to decide issues, CompSouth proposes a series of processes depending on the stage of the unresolved dispute. If unresolved disputed issue in a pending arbitration, then the Commission ruling in this case should govern. *Id.* If it is not an unresolved disputed issue in an arbitration, and the parties to the arbitration have agreed that they will abide by their negotiated resolutions notwithstanding the results in this case, those resolutions should be honored. *Id.* at 11-12. If there is no such agreement, either party to the arbitration should be able to invoke the change of law provisions of the interconnection agreement once the agreement is approved by the Commission. *Id.* at 12.

Cbeyond

Cbeyond entered into a voluntary Abeyance Agreement filed with the Commission in Docket No. 18995-U. The Abeyance Agreement obligates the parties to implement the *TRO* and the *TRRO* through the replacement interconnection agreement negotiated and arbitrated between Cbeyond and BellSouth.

Discussion

The first component of this issue that parties addressed in briefs pertained to the obligation under the *TRRO* to implement through good faith negotiations changes to interconnection agreements to account for certain elements no longer being Section 251(c)(3) obligations. There does not appear to be any substantive difference in the parties' positions. Instead, it appears they have chosen different wording to characterize the FCC's holding. The Commission orders that the parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

The Joint CLECs have also charged that BellSouth has proposed language that exceeds the scope of the docket because it pertains to changes unrelated to the *TRO* and the *TRRO*. The Commission initiated this docket in response to two separate petitions for declaratory rulings. In Docket No. 18943-U, XO Georgia, Inc. and Allegiance Telecom of Georgia, Inc. filed a Joint Petition for Declaratory Ruling requesting that the Commission order BellSouth to continue to honor the terms of its interconnection agreements. In Docket No. 19003-U, CompSouth filed a similar petition. The impetus for these petitions was actions taken by BellSouth in the wake of the *USTA II* decision that vacated and remanded portions of the *TRO* in which the FCC established unbundling requirements for local switching, transport and other UNEs. Based on BellSouth's representations that it would not unilaterally violate the terms of its interconnection agreements, the Commission dismissed the petitions and initiated this generic docket. The purpose of this docket was to examine "(a) whether the vacatur represents a "change in law", (b) whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996, and (c) whether BellSouth is obligated to provide UNEs under Georgia State Law." (Order Initiating Docket, p. 1; *quoting* CompSouth Petition, p. 4). The Commission then directed the parties to develop an Issues List for the Commission's consideration. In doing so, the Commission noted that in light of the *TRRO* the issues that the

parties wish to place in front of the Commission may have changed. The Commission adopted the proposed Issues List as part of its Procedural and Scheduling Order in this docket.

Issue 3(a) asks how existing ICAs should be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations. The purpose of this docket was clearly to respond to the *TRO* and the *TRRO*, and not to every change in law that may be the subject of negotiations pursuant to the relevant provisions of the interconnection agreements. The Commission will limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO*. The implementation of other changes of law is not usually the subject of a generic proceeding. This conclusion would not inhibit parties from acting pursuant to the changes of law provisions in their interconnection agreements to implement changes in law unrelated to the *TRO* or *TRRO*.

The Commission also finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise. Parties are free to negotiate interconnection agreements that provide for alternative arrangements. In connection with the three scenarios set forth in CompSouth's brief, the Commission agrees with CompSouth on the first two. However, the Commission does not agree with the process set forth by CompSouth for its third scenario. If there is a pending arbitration, and no agreement among the parties to resolve an issue outside of this generic proceeding, then the parties should incorporate the result of this docket into the interconnection agreement they submit for approval.

Finally, the Commission concludes that Cbeyond is not excused from implementing the *TRRO* until the parties have a new interconnection agreement. The July 23, 2004 Abeyance Agreement included the following language: "Within this framework, Cbeyond and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current Interconnection Agreement to address *USTA II* and its progeny." (Joint Motion, p. 2) (emphasis added). The framework in question appears to include that the abeyance requested by the parties was set to last for ninety (90) days. The parties waived the resolution of the arbitration only through June 2005. It exceeds the scope of the Abeyance Agreement to delay further the implementation of the *TRRO* now that the deadline provided for in the Abeyance Agreement has now passed. While individual statements in the Abeyance Agreement state that the parties will continue to operate pursuant to their existing agreement until the new agreement is finalized, such statements were made within the framework of the abeyance being for ninety (90) days.

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; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

Positions of the Parties

BellSouth

A.
Business Line

BellSouth cites to two areas of disagreement on the definition of "business line." The first disagreement is over BellSouth's inclusion of all UNE loops. The second disagreement concerns BellSouth's counting of high capacity loops.

BellSouth includes all UNE loops, rather than a subset of them and cites to the *TRRO* for support. The *TRRO* states that "Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify." (¶ 105). The FCC also states that "The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." *Id.* (footnotes omitted). BellSouth argues that the *TRRO* included all UNE loops because it gauges business opportunities in a wire center. (BellSouth Brief, p. 72).

The second point of disagreement concerns the counting of high capacity loops. BellSouth again argues that the FCC intended to capture opportunity. *Id.* at 73. BellSouth also asserts that limiting the number of lines runs counter to the FCC's revised impairment standard, which considers whether CLECs can compete without access to particular network elements and considers all the revenue opportunity that a competitor can expect to gain over the facilities it uses. *Id.* Excluding lines because they are not "switched" would ignore the competitive opportunity in the UNE loops. *Id.* It would also violate the direction included in *TRRO ¶ 25* not to evaluate impairment with reference to a particular CLEC's business strategy. *Id. at 74.* The Michigan PSC found that the TRRO requires that the line count include each Centrex line as one line, without a factor to reduce the number to one-ninth. *Id.*

A DS1 line is to be counted as 24 business lines for determining the number of business lines, regardless of how many of the 24 channels are activated. *Id.* Contrary to CompSouth's allegations, BellSouth's reporting is not inconsistent with its financial reporting. *Id.* at 75. Beyond that point, CompSouth's information is not in evidence in Georgia. *Id.*

Finally, BellSouth argues that there is nothing in the federal law that would support limiting its right to designate future wire centers on an annual basis. *Id.* at 76.

B.
Fiber-based collocator

BellSouth argues that the Commission should strike CompSouth's proposed addition to the FCC's definition of "fiber-based collocator" that would result in counting carriers that have

not finalized mergers as one collocator.[1] (BellSouth Brief, pp. 66-69). The practical impact of CompSouth's proposal is that it would result in counting AT&T and SBC as one fiber-based collocator. BellSouth's states that its position has been adopted by the Rhode Island and Michigan commissions. *Id.* at 69.

BellSouth also urges the Commission to reject CompSouth's proposed language about counting the network of fiber-based collocators separately. BellSouth discusses gaming of the routes as a CLEC connecting links from a Tier 1 or Tier 2 wire center in a Tier 3 wire center. *Id.*

C.
Building

BellSouth does not believe the term "building" needs to be defined, but instead, the Commission should just follow a "reasonable person" standard. *Id.* at 67.

CompSouth

A.
Counting of Business Lines

CompSouth states that BellSouth has improperly read the first sentence of FCC Rule 51.5 out of the definition. The first sentence reads as follows:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC.

This first sentence eliminates any residential lines so there was no need for the FCC to restate throughout the definition that residential lines were not included. (CompSouth Brief, p. 15). BellSouth's reading is internally inconsistent because it does not include UNE-P, while it does include all UNE loops. *Id.* CompSouth argues there is no basis for this distinction. *Id.*

CompSouth disagrees with BellSouth's argument that the maximum number of voice grade lines the facility could support should be counted. The final three sentences of the definition of "business lines" states:

> The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to

[1] CompSouth proposes that the term "fiber-based collocator" apply to "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."

> that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

Empty channels are not switched services so do not meet the definition of business lines. (CompSouth Brief, p. 17).

Also, BellSouth treats its own business switched access lines differently than it is proposing the Commission count business lines for purposes of impairment. ARMIS requires that BellSouth report its lines in voice-equivalents, but limit the voice-equivalent line count to only those circuits actually activated to provide business switched access line service. *Id.* at 18. BellSouth has inflated the number of business lines so that they are out of whack with the thresholds relied upon by the FCC. *Id.* at 19-24.

B.
Fiber-Based Collocation

CompSouth argues that state commissions are not bound to looking only at March 10, 2005. CompSouth emphasizes that BellSouth has not cited to any authority for why the Commission must count fiber-based collocators as of March 10, 2005. (CompSouth Brief, p. 27). Moreover, looking backwards to March 10, 2005 is inconsistent with the FCC's direction to count as one fiber collocator multiple collocations at a single wire center by the same or affiliated carriers. *Id.*

C.
Building

CompSouth's definition of "building" incorporates the concept of BellSouth's "reasonable person" standard, but it adapts it to include a "reasonable telecom person." The purpose of this amendment is "to ensure that the deciding factor in defining a 'building ' is that the area is served by a single point of entry for telecom services." *Id.* at 29.

D.
Route

CompSouth states that there is no further dispute on the definition of the term "route."

Discussion

FCC Rule 51.5 defines "business line" as follows:

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

For the counting of business lines, the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops. It is not necessary to read the first sentence out of the definition in order to reach this conclusion. The first sentence includes in the definition of "business line" that it serve a "business customer." However, the next sentence of the line instructs on the manner in which such lines shall be calculated. In setting forth what shall be included in the calculation, the rule modifies the sum of all incumbent LEC switched access lines with the word "business." There is no confusion that this part of the addition is limited to business lines. Yet, in the same sentence, when discussing the sum of all UNE loops connected to that wire center, the rule does not similarly use the modifier "business." If, because of the prior sentence, it would have been duplicative to state that these were business UNE loops, as CompSouth suggests, then the switched access lines need not have been identified as business in the first part of the sentence. That the switched access lines were expressly limited to business lines, and the UNE loops were not so limited, indicates that the limitation does not apply to the UNE loops. In the discussion of business line counts in the *TRRO,* the FCC again refers to "business UNE-P, plus UNE-loops." (¶ 105). This conclusion is consistent with the policy goals expressed by the FCC. The FCC states that it intended to measure business "opportunities" in a wire center provides support for why its method to calculate business lines would potentially include non-business lines. *Id.*

The Commission also concludes that it is appropriate to count DS1 lines as 24 business lines, provided that those DS1 lines in which all 24 channels are empty shall not be counted at all towards the business line count. It is consistent with Commission practice to consider a DS1 line to be an access line. If a DS1 line includes channels that are not empty, then it is an access line that connects end-user customers with incumbent LEC end-offices for switched services. Consistent with 47 C.F.R. § 51.5, such a DS1 line must count as 24 lines. However, if a DS1 line does not connect end-users for switched services, then it does not meet the first requirement set forth in the federal rule, and therefore must be excluded from the tally of business lines.

The issue in defining the term "fiber-based collocator" hinges on the date that the impairment test must be applied. BellSouth cites to language that CompSouth has proposed that would expand the definition of "fiber-based collocator" to address planned mergers. In doing so, CompSouth essentially is seeking to apply the impairment test at a later date because it is accounting for situations in which the number of fiber-based collocators in existence as of the

date of the analysis is more than will be available a short while after the analysis is completed. Because the parties agree that a decision to de-list a particular wire center is irrevocable (Tr. 666), the changes to the competitive landscape could not be reflected in the assessment of the wire centers. As the Michigan Public Service Commission observed, however, state commissions are not free to rewrite federal rules with what we may view to be improvements. Therefore, the Commission does not accept this language because there is no basis for it in the federal law.

More directly on point is whether the March 11, 2005 effective date of the *TRRO* requires that the Commission consider the number of fiber-based collocators in a wire center as of that date. BellSouth argues that it does so require, but does not cite to any authority for why it could not be some other date. CompSouth emphasizes this shortcoming in BellSouth's position, and argues that the Commission should look at circumstances as they exist, rather than how they existed on March 11, 2005. The Commission agrees with CompSouth. That the FCC rules became effective March 11, 2005 does not mean that the application of the rules must ignore changes that occurred between the effective date of the rule and its application.. Rather, it means that as of March 11, 2005 any application must comply with the new rule. State commissions often must apply federal rules in reaching its decisions. When state commissions do so they typically apply the federal rules to the evidence with which it has been presented. State commissions do not typically ask the parties to go back and present evidence that reflects the effective date of the FCC rule to be applied. The only policy reason that BellSouth offers for its position is the need for a certain date. The Commission finds that the date of this Commission order is the date certain for the analysis.

It appears contrary to the intent of the *TRRO* essentially to miscount the number of fiber-based collocators currently in existence because the number was different as of the time that the FCC order took effect. For these reasons, the Commission will apply the definition of "fiber-based collocators" set forth in the *TRRO* and federal rules to the circumstances as they exist currently.

The Commission adopts CompSouth's "reasonable telecom person" standard for the term "building." The only difference between CompSouth and BellSouth on this definition is the inclusion of the word "telecom." This difference would allow buildings to be defined by how they are seen for network engineering purposes.

CompSouth represented in its brief that there was no further dispute on routes; therefore, the Commission adopts BellSouth's definition of route.

Issue 5: TRRO/FINAL RULES:
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)?

BellSouth

BellSouth states that state commissions are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO*. (*TRRO* ¶ 234). The Commission must resolve the parties' disputes concerning the wire centers in Georgia that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition UNEs to alternative arrangements. (BellSouth Brief, p. 70). BellSouth urges the Commission to conclude that CLECs cannot self-certify to obtain Section 251 loops and transport in the future.

CompSouth

A.

State commissions have authority to determine whether BellSouth has followed FCC mandates on how to designate non-impaired wire centers. (*TRRO* ¶100). CompSouth believes that it is most efficient for the Commission to settle disputes on the front end. (CompSouth Brief, p. 30) An orderly process should be established to determine future changes in the wire center list. The process of reclassifying a wire center would be synchronized with the routine filing of ARMIS 43-08. BellSouth has not offered an alternative. *Id.* at 31.

Discussion

The *TRRO* provides that competitive LECs will "be able to challenge the incumbent's estimates in the context of section 252 interconnection agreement disputes." (¶100). State commissions have the authority to resolve disputes arising under Section 252 agreements. Therefore, state commissions have the authority to determine whether an ILEC's estimates are accurate. CompSouth's proposed method of having BellSouth file its ARMIS data and allowing time for the CLECs to review it, with a scheduled date for a Commission decision seems reasonable. The Commission will begin by allowing BellSouth to designate future wire centers on an annual basis. The Commission will monitor how this process works and make necessary and appropriate changes moving forward.

BellSouth requests that the Commission confirm that it has applied the appropriate procedures to identify the wire centers. As discussed in Issue 4, the Commission agrees with BellSouth, except on the issue of the effective date of the *TRRO* and the counting of a DS1 that has only empty channels.

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

Positions of the Parties

BellSouth

A.

For those wire centers that meet the FCC's impairment thresholds for DS1 loops, BellSouth does not have any obligation to provide CLECs with its UNE HDSL loop product. (BellSouth Brief, p. 87). The FCC defined 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." 47 C.F.R. §51.319(a)(4). The FCC has therefore removed any obligation to provide these loops in unimpaired wire centers. In addition, there has been very little CLEC interest in BellSouth's UNE HDSL product. (BellSouth Brief, p. 88).

B.

The second position BellSouth takes with respect to Issue 6 is that it can and should count each deployed UNE HDSL loop as 24 voice grade equivalent lines. The *TRO* states as follows:

> 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 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. (n. 634).

For calculating business lines, a DS1 corresponds to 24 kbps-equivalents, and therefore to 24 business lines. 47 C.F.R. § 51.5.

BellSouth's argument is that (1) a DS1 is the equivalent of 24 business lines, (2) a DS1 loop and a T1 are equal in speed and capacity, and (3) UNE HDSL loops are used to deliver T1 services; therefore BellSouth's UNE HDSL loops must be counted as 24 business lines.

CompSouth

A.

HDSL-capable copper loops are not the equivalent of DS1 loops for purposes of evaluating impairment. (CompSouth Brief, p. 31). They are just copper loops that are less than 12,000 feet long and are clear of equipment that could block provision of high-bit rate DSL services. *Id.* They do not include the electronics on both ends of the loop that provide the means for the loop to be used to provide DS1-level services. *Id.* In sum, CompSouth's position is that an HDSL-capable copper loop doesn't have everything that a DS1 loop has.

BellSouth has read the first sentence out of the FCC's definition. 47 C.F.R. § 51.319(a)(4)(i) states:

> A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

A DS1 loop must be capable of sending signals at a speed of 1.544 mbps. (CompSouth Brief, p. 32). If a certain type of copper loop is capable of doing so, then it qualifies as a DS1 loop, but the rule does not state that copper loops that are not capable of doing so become DS1 loops. *Id.* BellSouth does not contend that an HDSL-capable copper loop cannot provide a 1.544 mbps service if it doesn't have the associated electronics. *Id.*

The outcome of adopting BellSouth's reading is inconsistent with the apparent intent of the FCC. Adoption of BellSouth's position would prevent CLECs from creating their own DS1 loops. (CompSouth Brief, p. 33). In the *TRRO*, the FCC stated that "[t]he record also suggests that in some cases, competitive LECs might be able to serve customers' needs by combining other elements that remain available as UNEs." (¶ 163, n.454). The FCC went on to state that in place of DS1 UNE loops that were declassified as UNEs, CLECs could us HDSL-capable loops. *Id.* If DS1 and HDSL-capable loops were the same things for impairment purposes, then the FCC would not have considered HDSL-capable loops to be substitutes for DS1.

B.

BellSouth's contention that HDSL-capable copper loops should be counted as DS1 lines for purposes of counting business lines would inflate the business line count. (CompSouth Brief, p. 34). This method would allow BellSouth to convert a lot of residential lines to business lines. *Id.* It is also inconsistent with how HDSL-capable copper loops were counted by another one of BellSouth's witnesses in this case. *Id.* at 34-35.

Sprint

A.

A DS1 loop is not the same as an HDSL-compatible loop because a DS1 loop is provisioned with all the required electronics; whereas an HDSL-compatible loop is a conditioned copper loop without any electronics. (Sprint Brief, p. 3). The FCC's conclusion that requesting carriers are impaired without access to copper loops remains in effect. *Id.* at 3-4. The intent behind the FCC rule upon which BellSouth relies is "to ensure that ILECs could not refuse to provide DS1 loops if ILECs used other technologies such as HDSL in combination with DS1 loops." *Id.* at 5.

Discussion

This issue turns on whether an HDSL copper loop is a DS1 loop by itself, or whether it is only a DS1 loop if provided with the associated electronics necessary for it to provide DS1 services. More specifically, the first issue turns on whether the word "capable" in the context of 47 C.F.R.§ 51.319(a)(4) means capable on its own. After reviewing the pertinent FCC rules and

orders on this issue, the Commission finds that the FCC intended for HDSL copper loops to be considered a DS1 loop for purposes of counting lines to determine impairment.

Because there are not any copper loops capable of providing DS1 service without the addition of associated electronics, it is unlikely that by "capable," the FCC meant capable on its own. It would not serve any purpose for the FCC to include within the definition of DS1 loops a type of copper loop that does not exist. It is also of note that there are copper loops that cannot provide DS1 service regardless of the electronics added. This fact supports a reading of the word "capable" to include those loops that are capable if provided the associated electronics. The criterion distinguishes between those loops that are capable of providing DS1 service with the provision of associated electronics and those loops that are not.

In its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* ("*Third Report and Order*"), the FCC states that an "xDSL-capable" loop describes "copper loops from which bridge taps, low-pass filters, range extenders, and similar devices have been removed." (¶ 172). Separately in that order, the FCC explains that that "'xDSL' refers to the various kinds of Digital Subscriber Line service, such as ADSL . . . and HDSL" *Id.* at fn 299. Therefore, the FCC description of an xDSL capable loop would apply to an HDSL-capable loop. The above description of these loops does not include any electronics, but rather refers to simply the copper loop. Construing the rule consistent with the FCC's *Third Report and Order,* DS1 loops would include two and four wire HDSL copper loops without the associated electronics. To reach a different conclusion would necessitate finding that the FCC described HDSL copper loops inconsistently between its rule and its order. The Commission concludes that HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment.

Issue 6 explicitly addresses the narrow question of whether HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment. By phrasing the issue in such a manner, it is apparent that the parties intended for the Commission to address only the question of whether HDSL-capable copper loops should be counted the same as DS1 loops for assessing whether the 60,000 business line threshold set forth in the *TRRO* has been met. The Commission will not address questions that exceed the scope of Issue 6 as agreed upon by the parties and adopted by the Commission.

Issue 9 – 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?

BellSouth

A.

BellSouth relies on the District Court's opinion in the appeal of the Commission's order in this docket. The order states "The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ted]' to place new orders." *BellSouth v. MCIMetro,* Case No. 1:05-CV-0674-CC, (April 5, 2005 Order, p. 4). BellSouth argues that

moving a customer's service to a different location would require the placement of a new order for service, and that therefore the transition period would not apply. (BellSouth Brief, p. 77).

BellSouth states that changes to existing orders do not require a new service order. BellSouth will accordingly process orders to modify an existing customer's service by adding or removing vertical features during the transition period. *Id.* Pursuant to the *TRRO,* CLECs may self-certify that they are entitled to unbundled access to a requested element, and BellSouth must process this request. BellSouth may only challenge the order after the fact. BellSouth asserts that at the conclusion of this generic proceeding the Commission should confirm the Georgia wire centers that satisfy the FCC's impairment tests. (BellSouth Brief, p. 77). Doing so would eliminate the situation in which a CLEC would self-certify.

CompSouth

A.

With regard to high capacity loops and dedicated transport, CompSouth identifies the only issue as being whether moves of de-listed UNE loops or dedicated transport on behalf of a customer that was served by the CLEC as of March 11, 2005 should be permitted. (CompSouth Brief, p. 62). The *TRRO* stated that the transition plans shall apply only to the embedded customer base. (¶ ¶ 0142, 195) It did not state embedded lines or circuits.

B.

With regard to unbundled switching (UNE-P), CompSouth argues that BellSouth should be obligated to continue to process adds, changes, and moves for CLECs at the request of customers that were served through UNE-P arrangements as of March 11, 2005. (CompSouth Brief, p. 63). Again, the transition period applied to the customer base, not to the circuits or lines. (*TRRO,* 227).

Discussion

The Commission concludes that a CLEC may not use facilities that have already been provided to serve existing customers who move to a new location and that the transition period does not apply to moving, adding or changing orders. To do so would require a new order, and the District Court has interpreted the *TRRO* not to allow such action. The Commission is bound by the District Court's interpretation.

Issue 10 – Transition of Delisted Network Elements To Which No Specified Transition Period Applies – What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as 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?

Positions of the Parties

BellSouth

A.

BellSouth incorporates its arguments from Issue 2 into its position for rates, terms and conditions for elements de-listed by the *TRRO* and which have a designated transition period. (BellSouth Brief, p. 78). CLECs have had two years notice of the *TRO* decision that certain elements no longer needed to be unbundled. Therefore, with the exception of entrance facilities, BellSouth should be authorized to disconnect or convert such arrangements upon 30 days written notice absent a CLEC order to disconnect or convert such arrangements. (BellSouth Brief, p. 78).

CompSouth

A.

CompSouth incorporates into its position on Issue 10 its positions on both Issues 2 and 8. (CompSouth Brief, pp. 63-64). The FCC did not provide a specific transition plan for every type of UNE. Such UNEs are not covered by the transition plan covered in Issue 2. *Id.* at 64. For example, DS1 "enterprise" unbundled switching and OCN loops and transport are UNEs that BellSouth is no longer obligated to provide pursuant to Section 251(c)(3) of the Federal Act. *Id.* BellSouth has proposed a 30 day period for the submission of orders to convert UNEs or BellSouth may disconnect or convert.

CompSouth argues that although CLECs have known since the *TRO* that certain UNEs were de-listed, no agreement has been reached as to how the transitions or conversions would be completed. (CompSouth Brief, p. 64). The CLECs argue for at least a 60 day time period. *Id.* at 64-65.

B.

CompSouth incorporates its arguments on Issues 2, 4 and 5 into Issue 10(b). *Id.* at 65. The FCC did not adopt a default transition process for UNEs that are found to meet the non-impairment standard after March 11, 2005. Therefore, the parties have to agree on a transition period. *Id.* The 90 day Subsequent Transition Period proposed by BellSouth is not adequate. *Id*. In order to complete the work necessary to identify and create a spreadsheet to convert the de-listed circuits to alternative circuits, CompSouth proposes a maximum of 12 months and minimum of 180 days for the Subsequent transition period. *Id.*

C.

CompSouth argues that BellSouth should be obligated to provide written notice to the CLECs' point of contacts contained in the notice provision of the interconnection agreement. *Id.*at 66-67. Merely posting the notice on the website is not acceptable. *Id.* at 67.

Discussion

To the extent that resolution of this issue involves other issues in this proceeding, the Commission adopts the conclusions it reached on those other issues. The Commission adopts a 30 day transition period for UNE-P and a 60 day transition period for everything else. While it is true that CLECs have been on notice for two years, there has been no agreement on how the parties would move forward. A 60-day period is reasonable going forward.

The Subsequent Transition Plan applies to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards. The Commission will allow a 120 day Subsequent Transition Period. This is a compromise between the parties on this issue.

Finally, the Commission finds it prudent to obligate BellSouth to provide actual written notice to the point of contact in the parties' interconnection agreements. If a party does not have a point of contact identified in the agreement, then posting constructive notice on the website shall be deemed acceptable.

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?

Positions of the Parties

BellSouth

A.

BellSouth argues that CLECs must transition their entire embedded base by March 10, 2006. (BellSouth Brief, p. 79). BellSouth needs CLECs to provide it with timely information in order to accomplish this transition. BellSouth requests that CLECs be obligated to provide this information by October 1, 2005 or as soon as possible. *Id.* If CLECs do not submit timely orders, then BellSouth should be able to convert or disconnect the remaining embedded base lines by March 10, 2006. *Id.*

B.

For high capacity loops, BellSouth is asking that the Commission direct CLECs to submit spreadsheets by December 9, 2005 or as soon as possible to identify and designate transition plans for their embedded base of these de-listed UNEs. *Id.*

CompSouth

A.

CompSouth argues that CLECs have a right to pay no more than the FCC's transition rates for Section 251 network elements subject to non-impairment findings. (CompSouth Brief, p. 67). The process for transitioning should not result in CLECs being denied transition pricing during the FCC's transition period. *Id.*

B.

If a CLEC has not converted a circuit "de-listed" under Section 251 by the end of the transition period, the Section 271 checklist element rate should apply because (1) all *TRRO* de-listed UNEs must be provided by BellSouth pursuant to Section 271, and (2) Section 271 terms and conditions will similar to those of the de-listed UNEs. *Id.*

C.

The ongoing disputes between the parties regarding the proper designation of wire centers where the FCC has authorized non-impairment findings has complicated the transition. CLECs should not be forced off Section 251 UNE arrangements where there is a dispute over the wire center until the Commission decides this case. The Commission should reject BellSouth's contract proposals that would penalize CLECs for not following its transition schedule. (CompSouth Brief, p. 69).

Discussion

This issue is resolved for the most part by other issues the Commission will address in this docket. The Commission has already concluded that the CLECs have until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that are not completed until after the March 11, 2006. For conversions that are completed prior to March 10, 2006, the Commission orders BellSouth to true-up the difference. The Commission decided to set rates based on the just and reasonable standard in Section 271; therefore those shall be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to charge CLECs the resale tariffed rate beginning March 11, 2006.

Finally, the Commission finds that BellSouth shall not take any action with regard to wire centers in dispute until such dispute is resolved by the Commission.

Issue 13 – Performance Plan: -- Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

Positions of the Parties

BellSouth

A.

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. (BellSouth Brief, p. 81). The purpose of the plan was to ensure nondiscriminatory access to elements as required by Section 251(c)(3), after BellSouth gained permission to provide in-region interLATA service. *Id.* In de-listing a UNE, the FCC found CLECs were able to purchase similar services from other providers. *Id.* It is discriminatory to subject BellSouth to penalties and not these other providers. *Id.*

B.

BellSouth has entered into commercial agreements with more than 150 CLECs. *Id.* These CLECs were willing to forgo the plan's penalties for those included within the commercial

agreement. *Id.* at 81-82. The Commission adopted the Hearing Officer's recommendation to approve a stipulation to remove certain DS0 wholesale platform circuits from the plan. *Id.* at 82.

CompSouth

A.

CompSouth argues that the plan should still apply to the extent such network elements are still required pursuant to Section 271. (CompSouth Brief, p. 69). CompSouth argues that BellSouth still must provide meaningful, non-discriminatory access to such network elements pursuant to the Section 271 competitive checklist. *Id.*

B.

BellSouth's position is inconsistent with the position it took when it applied for Section 271 approval. BellSouth stated that the performance measurement plans were in place to ensure compliance only with Section 271 obligations. *Id.* at 70.

C.

It would make no sense for performance measurements designed to ensure there is no Section 271 backsliding to be limited to Section 251. *Id.*

Discussion

The issue is whether the performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251. The record of BellSouth's Section 271 application indicates that the performance plans were intended to ensure Section 271 compliance. BellSouth's position that the Section 271 compliance the parties were referencing was intended only to cover the overlap between Section 271 and Section 251 is not reflected.

The performance plan was adopted as a condition of the approval of BellSouth's Section 271 application. Therefore, regardless of BellSouth's position that state commissions lack jurisdiction under Section 271, BellSouth subjected itself to this degree of state commission involvement in its Section 271 obligations as part of achieving Section 271 approval. The record reflects that the purpose of the performance plan was to ensure that BellSouth continued to meet its Section 271 obligations. (Tr. 112-19).[2] In its Brief in Support of Application for Provision of In-Region Inter-Lata Services, BellSouth quoted the FCC's Kansas/Oklahoma Order on SBC's Section 271 application. Quoting the FCC, BellSouth stated that the performance plans constitute probative evidence of continued Section 271 compliance. (Tr. 116-17, BellSouth Brief in Support of Application, p. 5). BellSouth also stated in its brief that a performance plan is designed to prevent against Section 271 backsliding. (Tr. 117, BellSouth Brief in Support of Application, p. 5). In its Supplemental Brief filed with the FCC for 271 authority in Georgia,

[2] The Commission took administrative notice of BellSouth's Brief in Support of Application for Provision of In-Region Inter-Lata Services in Louisiana and Georgia, BellSouth's Supplemental Brief filed with the FCC for 271 authority in Georgia, and the FCC order granting BellSouth authority to sell long distance in Georgia. (Tr. 115-16).

BellSouth argued that self-effectuating enforcement mechanisms provided assurance of continued Section 271 compliance. (Tr. 117, Supplemental Brief, p. 7). In its order granting BellSouth Section 271 authority in Georgia, the FCC stated that the performance plans were designed to create a financial incentive for post-entry compliance with Section 271. (Tr. 117-18, FCC's Section 271 Order for Georgia, pp. 9, 13). There is no indication that this purpose was limited to those Section 271 obligations that overlapped what was required by Section 251. The reasonable conclusion is that it was the intent for the performance plan to apply even if BellSouth's Section 251 obligations were to change.

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)?

Positions of the Parties

BellSouth

A.

BellSouth argues that CompSouth's proposed language would improperly assert state commission authority over Section 271 obligations and would resurrect UNE-P. (BellSouth Brief, p. 37). Only the FCC has the authority to regulate the terms of Section 271 compliance; therefore Section 271 services cannot be commingled with other UNEs. *Id.* at 38.

B.

BellSouth also argues that even if the Commission had Section 271 authority, it wouldn't matter because BellSouth is not obligated to commingle Section 251 services with Section 271 services. (BellSouth Brief, p. 38). The FCC only requires commingling of loops or loop transport combinations with tariffed special access services – not with UNE-P. BellSouth relies on the *SOC's* reference to commingling at ¶28 in which it only mentions tariffed services. *Id.* BellSouth then cites to paragraph 579 of the *TRO* to support its position that the *TRO* is consistent with the *SOC*.

Paragraph 579 states, in relevant part, as follows:

> By commingling, we mean 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 combining of a UNE or UNE combination with one or more such wholesale services.

While this paragraph on its own would indicate ILECs have the obligation to commingle Section 271 and Section 251 elements, the *TRO Errata* deleted the italicized language from paragraph 584 below:

> 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.

BellSouth argues that this deletion indicates that the commingling requirement does not pertain to Section 271. (BellSouth Brief, p. 40).

At this same time, the FCC also deleted the following sentence from fn 1989 (1990 pre-errata): "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to checklist items." BellSouth argues that the two deletions read together make the *TRO* consistent with the *SOC*. (BellSouth Brief, p. 40). Had the FCC intended to clear up any conflict, as the CLECs argue, then it only would have deleted the footnote. *Id.*

C.

BellSouth next describes how wholesale services are repeatedly referred to as tariffed access services. BellSouth points to the TRO's references to wholesale services always being followed by the parenthetical "(e.g., switched and special access services offered pursuant to tariff)." (BellSouth Brief, p. 41). Along with the deletion of the language from ¶584, BellSouth says the FCC's clear intent was not to require commingling for 271 unbundling obligations. *Id.*

D.

In the *TRRO*, when describing the conversion from wholesale services to UNEs and UNE combinations, the FCC limited its discussion to the conversion of tariffed services to UNEs. ¶229. BellSouth construes this paragraph as further evidence that the FCC is only referring to tariffed services when it discusses commingling. (BellSouth Brief, p. 42). Any other interpretation would undermine the decision in the *TRRO* to eliminate the unbundling of UNE-P. *Id.*

E.

BellSouth also cites to a number of other state commissions that it asserts have agreed with its position on commingling. BellSouth states that both the New York Public Service Commission and the Mississippi Federal District Court indicated an interpretation of the FCC's orders consistent with BellSouth's position. (BellSouth Brief, p. 42). The North Carolina Utilities Commission Panel concluded that the FCC did not intend for ILECs to commingle Section 271 elements with 251 elements. (NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order, p. 24)*.

The Florida Public Service Commission was swayed that the removal of language from ¶ 584 indicates FCC intent not to require 271 commingling. FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005). The Kansas Commission also found that commingling Section 271 elements was not a part of interconnection agreements. Kansas Order at ¶¶ 13-14.

BellSouth acknowledged that a number of other states reached a different conclusion, among them Kentucky, Washington and Massachusetts. (BellSouth Brief, fn 81).

CompSouth

CompSouth's presentation of its position on commingling includes (A) a background explanation on the origin and nature of commingling, (B) an analysis of the *TRO*, including the errata and (C) a discussion of the impact of the issue on CLECs.

A.

The FCC authorized commingling in 2003. The *TRO* required that ILECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services. *TRO* ¶584. The difference between commingling and combinations is that while combinations involve both Section 251 elements, commingling involves 251 elements with any other wholesale service.

B.

The legal basis for the FCC's commingling rules is the nondiscrimination requirements set forth in Section 202 of Federal Act.

> Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3).

(*TRO,* ¶ 581).

CompSouth addresses the impact of the errata that amended paragraph 584 of the *TRO.* As stated in the discussion of BellSouth's position, the errata removes the language "any network elements pursuant to Section 271" from a sentence that outlined an ILEC's commingling obligations. CompSouth pointed out that even after the phrase in question is deleted from paragraph 584, BellSouth's unbundling obligations are not limited to exclude Section 271 elements. (CompSouth Brief, p. 75). Wholesale facilities and services include those required by 271. *Id.* The FCC merely removed a redundant clause. *Id.* at 76.

In further support of its position, CompSouth states that the *TRO Errata* also removed the last sentence of footnote 1990. In its entirety footnote 1990 reads as follows (with emphasis added to the last sentence):

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). *We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.*

CompSouth contends that the deletion of this sentence indicates that the FCC did not mean to exclude Section 271 elements from commingling. (CompSouth Brief, p. 76).

In response to BellSouth's argument that the FCC always refers to tariffed interstate special access services, CompSouth emphasizes that the *TRO* always says "for example" before identifying these services. *Id.* at 77.

C.

CompSouth argues that the practical effect of restricting commingling would be dire for CLECs. BellSouth's proposed language would lead to potential disruption to customers. *Id.*

Discussion

Prior to determining whether the FCC has required BellSouth to commingle 251 and 271 elements, the Commission must decide whether the FCC intended state commissions to enforce any such obligation. The *TRO* provides that restricting commingling would be inconsistent with the nondiscrimination requirement in Section 251(c)(3). ¶ 581. State commissions enforce Section 251(c)(3). The *TRO* also states that incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are connected, combined or otherwise attached to wholesale services. State commissions have jurisdiction to consider the unlawful denial of UNEs.

Regardless of any determination of state commission authority under Section 271, it appears that the FCC did intend for the states to require ILECs to permit commingling between UNEs and wholesale services. The question then is whether the FCC intended to include Section 271 requirements within wholesale services. The *TRO* requires ILECs "to perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act." ¶ 579. Section 271 elements obtained at wholesale would fit within this description.

The ambiguity exists over whether the FCC intended for the wholesale facilities or services in question to include Section 271 elements. In describing the types of services for which commingling with Section 251 elements is required, the *TRO* offers by way of example "switched and special access services offered pursuant to tariff." *TRO* ¶ 579. This language differs meaningfully from the FCC's treatment of commingling in the *Supplemental Order Clarification* (rel. June 2, 2000). In its *SOC*, the FCC modified the term "commingling" with the following parenthetical "(i.e. combining loops or loop-transport combinations with tariffed special access services)." SOC, ¶ 28. In the *TRO*, issued three years later, the FCC eliminated the restrictions it placed on commingling in the *SOC*, and apparently adjusted its definition of commingling. Tariffed special access services went from being the only services at issue to an example of the services that could be at issue in commingling.

BellSouth maintains, however, that the clear intent of the FCC was not to include Section 271 elements within the commingling requirement. It cites as evidence of this intent the TRO

Errata which deleted the phrase "including any network elements unbundled pursuant to section 271" from paragraph 584 of the *TRO*. CompSouth points out that even without this phrase, the sentence, which requires commingling for wholesale facilities and services, would still apply to Section 271 elements. CompSouth also states that BellSouth should not ignore the other step that the FCC took in the *TRO Errata*, which was to delete a sentence from a footnote that expressly declined to apply the commingling rule to Section 271 checklist items.

In sum, the *TRO* included two statements that shed light on whether Section 271 elements were to be included as part of commingling, and these two statements were directly contradictory to each other. Deletion of either one of the statements would have eliminated any doubt from the requirement. The FCC deleted both statements.

While the focus of the unbundling rules appears to be on special access services, the plain language of the *TRO* would include Section 271 elements provided they were obtained at wholesale. It is unlikely that this result was oversight by the FCC given that the two previously discussed statements expressly mention Section 271, and then were both deleted. BellSouth did not offer any plausible explanation for why the FCC would have deleted the sentence from footnote 1990 that expressly excluded Section 271 elements from the commingling requirement if that was precisely what the FCC wished to do. Granted, it would have been clearer had the FCC not also deleted the phrase from paragraph 584 that specifically included Section 271 elements within the commingling requirement. However, while the specific inclusion was deleted, the general inclusion remains. That is, the sentence as modified still applies the commingling obligation to Section 271 elements obtained at wholesale. The *TRO Errata* removed a redundancy in paragraph 584, but it does not alter the plain meaning of the sentence. In contrast, the meaning of footnote 1990 does change as a result of the *TRO Errata.*

BellSouth also relies on paragraph 229 of the *TRRO,* which states in relevant part that the FCC "determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LECs seeking to convert such services satisfies any applicable eligibility criteria." (*TRRO*, ¶ 229). This language purports neither to modify the plain meaning of the *TRO*, nor to clarify that the commingling obligation in the *TRO* applied exclusively to tariffed services. It cannot be disputed that the *TRO* requires ILECs to commingle Section 251 elements with other wholesale facilities and services. It is also the case that while the FCC used special access services as an example of a wholesale facility or service in the *TRO* it did not exclude other wholesale facilities or services. Finally, it is not disputed that Section 271 elements may be obtained at wholesale. So in the *TRO,* Section 271 elements were included as part of the commingling obligation. Had the FCC in the *TRRO* wished to exclude Section 271 elements from commingling or to clarify that the *TRO* excluded Section 271 elements from the commingling obligation, then it is reasonable to assume it would have stated that it was doing so. It did not make any such statement. Rather, it stated only that the *TRO* allowed CLECs to convert tariffed services to UNEs and UNE combinations, and that this decision was upheld on appeal. (*TRRO,* ¶ 229). Given that the plain language of the *TRO* applies to any facilities or services obtained at wholesale, and that the *TRRO* neither modifies nor clarifies the *TRO* on this issue, BellSouth's reliance on this paragraph is unavailing.

The Commission's interpretation of the *TRO* comports with the 47 C.F.R. § 51.5, which 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."

In conclusion, the Commission finds that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. This action should not be construed as recreating UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that the Commission has concluded that it is prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P.

Issue 15 – TRO Conversions: 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?

Positions of the Parties

BellSouth

A.

BellSouth will make the necessary conversions once the language is incorporated into the interconnection agreements. (BellSouth Brief, pp. 82-83).

B.

The applicable rates for single element conversions in Georgia should be $25.06 for single element conversions and $26.55 for projects consisting of 15 or more loops submitted on a spreadsheet. *Id.* at 83. The Commission-ordered rate of $5.70 should apply for EEL conversions, until new rates are issued. *Id.* 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. *Id.*

C.

CompSouth did not file any testimony on this issue; therefore BellSouth's position should be adopted. *Id.*

CompSouth

A.

The *TRO* requires that ILECs provide procedures to convert various wholesale services, including special access service, to the equivalent UNE or combination of network elements.

(CompSouth Brief, p. 78). The FCC said that "wasteful and unnecessary" ILEC charges would deter economically efficient conversions. *Id.* at 79, quoting *TRO* ¶ 587. The FCC found that "termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time" may not applied to conversions. (*TRO* ¶ 587). Such charges would violate Section 202 of the Communications Act. *Id*.

B.

The Commission has approved a TELRIC rate of $5.70 for switch-as-is conversions of the loop-transport combination known as an EEL. (CompSouth Brief, p. 80). This rate compensates BellSouth for its costs. *Id.* BellSouth proposes new rates for conversions but did not adequately explain the dramatic increase over TELRIC. *Id.* BellSouth did not file the purported cost study that would justify the increase in this proceeding for review by the Commission. *Id.* The increased rate is BellSouth's attempt to circumvent the FCC's requirements to "switch-as-is." *Id.* at 81.

Discussion

The parties do not appear to differ that ILECs must allow CLECs that meet the eligibility requirements to convert the wholesale service used to serve a customer to UNEs or UNE combinations. This requirement is set forth in paragraph 586 of the *TRO*. The FCC declined to establish procedures and stated that parties are bound by good faith.

On the issue of cost, BellSouth proposes a dramatic increase to the Commission's approved TELRIC rate for EEL conversions. According to the testimony of Ms. Tipton, this increase results from a cost study it recently performed. (Tr. 719). This cost study was not provided as part of this proceeding. The Commission finds, therefore, that it shall not afford it any weight. The rate also appears to include a penalty to CLECs that do not work with BellSouth on the schedule preferred by BellSouth. This penalty would involve BellSouth recovering for costs that it does not actually incur. In fact, BellSouth's witness testified that "It isn't a matter, in our minds, of cost recovery at that point." (Tr. 721).

The Commission will remand this issue to a Hearing Officer or to itself for evidence on the issue of the appropriate conversion rate. In the interim, the Commission orders a rate of TELRIC rate plus fifteen percent based on the Commission's determination of TELRIC.

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?

Positions of the Parties

BellSouth

A.

There is no retroactivity; the effective date is the date the agreements were amended. (BellSouth Brief, p. 83). The *TRO* does not contemplate retroactivity. (*TRO* ¶ 588). Moreover,

that CLECs have not agreed to amended contract language shows that the issue is not vital to them.

B.

The Massachusetts Commission found that the rights were not retroactive.

CompSouth

A.

Once conversion language reflecting the *TRO* is included in an interconnection agreement, parties should treat conversions pending as of the effective date of the *TRO*. (CompSouth Brief, p. 81). The FCC stated that it declined to require retroactive billing to any time before its effective date. The FCC went on to state that "To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order." (*TRO*, ¶ 589).

Discussion

Paragraph 589 of the *TRO* provides as follows:

> As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

In the above paragraph, the FCC distinguishes between the time prior to the effective date of the *TRO* and the time after the effective date of the *TRO*. The FCC is clear that it will not require retroactive billing prior to the effective date of the *TRO*, but that "up to the effective date" ILECs would be required to offer the appropriate pricing for orders that were pending at the time of the *TRO*. So a CLEC that submitted an order for conversion prior to the effective date of the *TRO*, that was still pending as of that date was entitled to "the appropriate pricing."

In the preceding paragraphs of the section on conversions, the FCC breaks down the situations in which an ILEC may convert UNE or UNE combinations to the equivalent wholesale service and a CLEC may do the reverse. (*TRO* ¶ 586). In addition, the FCC concludes that it is not fair to permit CLECs to supersede existing contracts through a conversion request; however, ILECs should not be entitled to assess on legitimate conversion requests wasteful and unnecessary fees associated with establishing initial service. *Id.* at 587. The "appropriate pricing" referenced in paragraph 589 appears to reference this discussion. That is, if a CLEC submitted a legitimate request to convert a wholesale service to a UNE or UNE combination and that request was pending as of the effective date of the *TRO,* paragraph 589 indicates that the CLEC is entitled to the UNE or UNE combination rate as of the *TRO*'s effective date. However, any request that sought to supersede an existing contractual arrangement would not be a legitimate request.

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?

Positions of the Parties

BellSouth

A.

BellSouth cites to paragraphs 199 and 260-62 of the *TRO* for the proposition that it does not have any obligation to provide new line sharing arrangements after October 1, 2004. (BellSouth Brief, p. 45).

B.

BellSouth argues that Section 271 does not require, and in fact, does not even mention line sharing. (BellSouth Brief, p. 49). Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services." BellSouth's position is that the high frequency portion of the line ("HFPL") is only part of the loop, and that BellSouth is only obligated to provide the entire loop. (BellSouth Brief, p. 46). 47 CFR 51.319(a) defines the local loop network element as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises. *Id.* at 45. BellSouth argues that it meets its checklist item 4 obligation by offering access to complete loops. *Id.* at 49

C.

CompSouth did not provide testimony in support of its proposed contract language on this issue. *Id.* at 47.

D.

BellSouth charges that CompSouth's position would render the FCC's transitional scheme irrelevant because it would allow CLECs to receive line sharing indefinitely under Section 271 and at rates other than the ones the FCC established as part of the transition plan. *Id.* It would also undermine the *TRO's* plan for CLECs to access facilities that do not have the same anti-competitive effects as line-sharing. *Id.* at 47-48.

E.

BellSouth again asserts that states have no authority to require ILECs to include 271 elements in an interconnection agreement. *Id.* at 47.

F.

BellSouth next discusses the FCC's order in response to its forbearance petition.[3] BellSouth asserted that its petition requested forbearance from any stand-alone unbundling obligations on broadband elements. *Id.* at 50. This requested relief would encompass line sharing. *Id.* at 51. Paragraph 34 of the FCC's *Broadband 271 Forbearance Order* includes the following passage:

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

Because its forbearance petition was granted, BellSouth argues that it is not required to provide line sharing even if otherwise required by Section 271.

G.

BellSouth cites to state commission decisions in Tennessee, Massachusetts, Michigan, Rhode Island and Illinois that support its position. *Id.* at 54. BellSouth also references state commissions that have reached different conclusions, but argues that to the extent those other decisions were based on state tariffs, they are distinguishable. *Id.* at fn 105.

CompSouth

A.

CompSouth refers to decisions of the Maine, Pennsylvania and Louisiana commissions that have held that line sharing falls under checklist item 4, and that BOCs that are subject to Section 271 must provide access to it. (CompSouth Brief, p. 83).

B.

In addition, numerous FCC Orders granting Section 271 access to BOCs discuss line sharing as a component of checklist item 4. *Id.* at 84. Even BellSouth included line sharing as a checklist item 4 element at one point. *Id.* If it was necessary to provide an element in order to satisfy the checklist item, then the element is included in the checklist item. *Id.* at 85.

C.

CompSouth addresses the conflicting comments of the FCC commissioners after the issuance of the *Broadband 271 Forbearance Order.* Regardless of their disagreement over the scope of the *Broadband 271 Forbearance Order*, it is clear that each commissioner viewed line sharing to be included as part of checklist item 4. (CompSouth Brief, p. 87). Addressing the scope of the *Broadband 271 Forbearance Order,* CompSouth asserts that it did not apply to line sharing because BellSouth did not request forbearance from line sharing. *Id* The FCC order identifies FTTH loops, FTTC loops, the packetized functionality of hybrid loops and packet

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

switching as the broadband elements for which it is granting forbearance. *Id.* at 88. An FCC order issued subsequent to the Powell's statement that line sharing was not addressed again listed the same items mentioned above. Therefore, the FCC excluded line sharing from the list of broadband elements. The FCC issued a subsequent order that similarly did not address forbearance for line sharing.[4]

Discussion

The Commission asserted jurisdiction to set just and reasonable rates under Section 271. This issue is not asking about the state commission's authority, but rather whether BellSouth has an obligation under the Federal Act to provide line sharing. The Commission finds that its role in construing Section 271 is consultative and that the FCC possesses ultimate adjudicative authority. Given that condition, the Commission concludes that BellSouth is obligated under Section 271 to provide line sharing.

As pointed out by CompSouth, both the FCC and BellSouth have in the past referred to line sharing as part of checklist item 4 compliance. The FCC has not taken any action to remove this component from checklist item 4. With regards to BellSouth's Petition for Forbearance, it is ambiguous as to whether the FCC construed BellSouth's Petition to include line sharing. Individual FCC commissioners have issued separate conflicting statements on this question, although the statement of the Chairman at the time supports the position that the FCC did not grant BellSouth forbearance with respect to line sharing. On November 5, 2004, subsequent to the conflicting statements of FCC Commissioners, the FCC issued its SBC Order in which it granted forbearance with respect to broadband network elements "specifically fiber-to-the-home loops, fiber-to the-curb loops, the packetized functionality of hybrid loops, and packet switching." The FCC then stated that "SBC's petition remains pending to the extent that it requests forbearance from the requirements of section 271(c)(2)(B) with respect to other network elements." By not listing line sharing in the order and by stating that it would address other network elements separately, it can be argued that the FCC did not intend to include line sharing among the obligations from which it was granting forbearance. At the very least, this subsequent order did not support the position that BellSouth is excused from its obligation to provide line sharing under Section 271.

Given the ambiguity, the Commission will maintain the status quo by requiring BellSouth to provide line sharing until the FCC clarifies that it does not have this responsibility.

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

[4] See, *In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Section 271;* WC Docket No. 03-235, Order, (Rel. November 5, 2004) ("SBC Order").

Positions of the Parties

BellSouth

A.

Those CLECs with line sharing customers must amend their interconnection agreements in accordance with the transition plan set out in paragraph 265 of the *TRO*.

CompSouth

CompSouth agrees with the transitional language should the Commission determine that BellSouth does not have a line sharing obligation.

Discussion

Given the Commission action on Issue 17, this issue is not applicable.

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

Positions of the Parties

BellSouth

A.

Line splitting 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. No CLEC provided testimony on line splitting so CompSouth's proposal should not be adopted.

B.

The Commission should not adopt CompSouth's proposal because it would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271. (BellSouth Brief, p. 89). This issue is covered in the context of Issue 14.

C.

BellSouth should not be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L because splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by using the integrated splitter built into all ADSL platforms. *Id* at 90.

D.

The parties dispute what OSS modifications are necessary. BellSouth sponsored expert testimony that CLECs do not need anything from BellSouth to facilitate line splitting. (Joint Exhibit 2, at 94).

CompSouth

A.

The first question under this issue is whether line splitting can involve the commingling of Section 251 and 271 elements. This issue is the same as was addressed in Issue 14.

B.

The second issue is whether a CLEC should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLEC involved in the line splitting arrangement. CompSouth agrees that a CLEC should indemnify and defend BellSouth against claims against BellSouth. (CompSouth Brief, p. 91). However, CompSouth argues that the language to be included in the interconnection agreement should refer to specific claims, and not entire actions. *Id.*

C.

The third issue is whether BellSouth must upgrade its OSS to facilitate line splitting. BellSouth has electronic ordering for its Fast Access plan. (Tr. 376). The only electronic ordering scenarios available to CLECs right now involve adding line splitting or data to an existing UNE-P account. (Tr. 377). Because UNE-P is going away as of March 11, 2006, these scenarios will not be of use to CLECs after that point. (Tr. 377-78). The difference in manual orders and electronic orders is about $19 ("in excess of $22 vs. $3.50). (Tr. 382).

D.

If BellSouth has deployed ADSL 2-plus, and was conditioning loops over 18,000 feet for itself, then it should be obligated to provide this service to CLECs at TELRIC rates. (Tr. 379). If BellSouth has not deployed ADSL 2-plus, then CLECs would pay the special construction rate for this service. (Tr. 379). So a CLEC that is innovative enough to deploy its own ADSL 2-plus has to pay the higher special construction rate for line conditioning. (Tr. 380-81).

Discussion

For the reasons set forth in the Commission's discussion of Issue 14, the Commission finds that line splitting can involve the commingling of Section 251 and Section 271 elements.

BellSouth did not brief the issue of whether the indemnification language should cover the entire action or be limited to specific claims. CompSouth's position appears reasonable. The Commission concludes that CLECs should indemnify and defend BellSouth against claims made against BellSouth, but that the indemnification language should relate to specific claims.

The Commission remands this issue for a hearing as to the extent of BellSouth's line splitting obligations. In Docket No. 11900-U, the parties dispute how many line splitting scenarios BellSouth must make available. At the time the Commission initially addressed line splitting, the record was not complete on the number of line splitting scenarios. A hearing to determine a fair and reasonable number of line splitting scenarios for BellSouth to provide would be beneficial to the parties, especially in light of the imminent end of the transition period.

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

Positions of the Parties

The parties do not dispute that the obligation of BellSouth to provide nondiscriminatory access to call-related databases arises out of Section 271, and not Section 251. The dispute, as it has been on a number of issues discussed in detail above, has to do with whether the Section 271 obligation must be included in a Section 251 interconnection agreement and whether state commissions have the authority to require ILECs to meet this obligation.

Discussion

The Commission asserted Section 271 jurisdiction to set just and reasonable rates. Therefore, the Commission orders that BellSouth is obligated to offer call related databases at just and reasonable rates.

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

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

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?

Positions of Parties

BellSouth

A.

Covad and some other CLECs have moved for reconsideration of the FCC decision to eliminate certain unbundling requirements concerning certain types of fiber loops.

B.

BellSouth identifies a minor difference between the parties relating to the deletion by CompSouth of BellSouth's proposed language that states that it is not obligated to ensure that non-retired copper loops in FTTH/FTTC overbuild areas are capable of transmitting signals prior to receiving a request for access to such loops by a CLEC. (BellSouth Brief, p. 91).

C.

The major difference between the parties relates to the extent of fiber unbundling. CompSouth erroneously claims its limitation is supported by the FCC's use of terms "mass market." (BellSouth Brief, p. 92). With regard to fiber, the FCC provided that there was no impairment on FTTH, except in overbuild situations where the ILEC elects to retire existing copper loops. (*TRO*, ¶273). In that situation, the unbundling requirement only applies for narrowband. *Id*.

The FCC did not use the term "mass market" in explaining the scope of its fiber relief. The FCC stated that the obligations and limitations for such loops do not vary based on the customer to be served. *Id.* at ¶ 210. In its *MDU Reconsideration Order*[5], the FCC determined that fiber loops that serve MDUs that are predominantly residential are governed by the FTTH rules. (¶ 7).

In its *FTTC Reconsideration Order*,[6] the FCC found that the FTTC Loop is a transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises. (¶ 10). The FCC also stated that "requesting carriers are not impaired in Greenfield areas and face only limited impairment without access to FTTC loops where FTTC loops replace pre-existing loops." *Id.* at 11. CompSouth would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. (BellSouth Brief, p. 94).

BellSouth also cites to other state commissions, including Michigan and Massachusetts, that have found in the ILEC's favor on this issue and rejected limitations for the definition of FTTH, FTTC and hybrid loops. *Id.* at 94-95.

D.
Hybrid loops

BellSouth should not be required to provide access to hybrid loops as a Section 271 obligation. *Id.* at 96.

CompSouth

A.

The FCC distinguishes between "mass market" and "enterprise" loops. For instance, paragraph 209 of the *TRO* states as follows:

> Loops, such as analog loops, DS0 loops or loops using xDSL based technologies are generally provided to small business customers and will be addressed as part of mass market analysis. While high capacity loops

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[5] *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) (*MDU Reconsideration Order")*

[6] *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-248 (*"FTTC Reconsideration Order")*

> (DS1, DS3, OCn capacity) are generally provisioned to larger customers and will be addressed as part of enterprise market analysis.

The FCC did not limit what the customer could order, but rather was conducting the analysis for purposes of impairment. (CompSouth Brief, p. 91).

CompSouth supported its position with numerous references in the *TRO* and *FTTC Order* in which the FCC did not require unbundling for mass market customers. 47 CFR § 51.319(a)(4) also distinguishes between enterprise and mass market loops.

B.

With regard to fiber/copper hybrid loops, the only limitation on BellSouth's unbundling obligation is that BellSouth need not provide access to the packet-based capability in the loop. (*TRO*, ¶288). CompSouth argues that this limitation should not affect CLECs' ability to obtain access to DS1 and DS3 loops because the FCC made clear that BellSouth must provide DS1 and DS3 loops on such facilities:

> We stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers. These TDM-based services - which are generally provided to enterprise customers rather than mass market customer – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs. (*TRO*, ¶294).

C.

CompSouth next criticizes BellSouth for relying on the summaries of orders, instead of the text of the orders. (CompSouth Brief, p. 101). That the summaries did not include the distinction between market and enterprise is a result of it being a summary and should not override the text of the orders. *Id.* In the *Broadband Forbearance Order*, the FCC summarized its *TRO* loop impairment findings and stated that "For enterprise customer loops, the Commission required incumbent LECs to offer unbundled access to dark fiber, DS3 and DS1 loops subject to more granular reviews by the state commissions. ¶5, n. 23. The FCC's pleading in the D.C. Circuit Court of Appeals also explained that the *TRO* and the rules coming out of them "make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices." CompSouth Ex. 1. When a CLEC requests a DS1 loop, by definition it is seeking to serve an enterprise customer.

Discussion

Issue 23:

a) The appropriate definition of MPOE is the FCC's definition. 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." 47 C.F.R. 68.105(b).

b) Based on the following language from the *Broadband Forbearance Order,* the Commission concludes that BellSouth is under no obligation to provide access to greenfield Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops.

> [In the TRO] The [FCC] distinguished new fiber networks used to provide broadband services for the purposes of its unbundling analysis. Specifically, the [FCC] determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including FTTH loops in greenfield situations.... (*Broadband Forbearance Order*, ¶ 6).
>
> In the subsequent Triennial Review FTTC Reconsideration Order, the Commission found that the FTTH analysis applied to FTTC loops, as well, and granted the same unbundling relief to FTTC as applied to FTTH. *Id* (footnote omitted).

Issue 24

The FCC's rules are clear on this issue:

> When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (*where impairment has been found to exist*) on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop. 47 C.F.R. 51.319(a)(2)(ii) *(emphasis added)*

BellSouth's language tracks the FCC's rules and should be adopted.

Issue 28

The parties debated the meaning of paragraph 210 of the *TRO.* The Commission construes this paragraph to mean that while the FCC considered the customers served by a particular loop type for purposes of its impairment analysis, its conclusions on impairment track the loop and not the customer served.

Fiber to the Home ("FTTH") is, by definition, fiber facilities extending to a residence. Because FTTH is an extension of Fiber to the Curb ("FTTC"), it follows that FTTC must also describe facilities to a residence. The FCC's rules on FTTH and FTTC provide for one exception to the foregoing definition. That exception is that primarily residential multiple dwelling units ("MDUs") should be treated consistent with traditional residences. Therefore, FTTH/ FTTC could in fact describe fiber facilities to a business, but only if that business is located in a primarily residential MDU.

In overbuild deployments, the requirement that incumbent LECs provide capacity to competitive LECs, regardless of whether the copper facilities have been retired, applies only to narrowband facilities. *See* 47 C.F.R. 51.319(a)(3)(iii) BellSouth proposes the following language:

> 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.

The Commission finds that BellSouth's proposal is consistent with the federal rule for the most part and adopts BellSouth's language with one modification. Because the third sentence of BellSouth's language would exclude orders for legacy copper from the SQM/ SEEM plan, the Commission modifies that sentence to require these orders to remain in the SQM/ SEEM plan until the Commission determines the appropriate interval for provisioning such an order. BellSouth may petition the Commission to modify the interval. Therefore, the Commission orders the following language:

> 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 apply.

Finally, CompSouth appears to argue that the FTTH/ FTTC rules do not apply in central offices in which the FCC found that competitive LECs were impaired without access to DS1s and DS3s. However, the FCC rules on FTTC/ FTTH make no mention of any exclusion based on impairment analysis. Presumably, the FCC did not anticipate that competitive LECs would seek to provide high-capacity services to residential customers. The Commission finds that the FCC's FTTH/ FTTC rules apply to all central offices.

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

Positions of the Parties

BellSouth

A.

Routine Network Modifications (RNMs) are "those activities that incumbent LECs regularly undertake for their own customers." (*TRO*, ¶ 632). ILECs are not obligated to alter substantially its network to provide superior quality interconnection. (*TRO*, at ¶ 630 quoting Iowa Util. Bd. 120 F.3d. 753 (1997)).

B.

Line conditioning is an RNM. (*TRO*, ¶ 643). Therefore, BellSouth's only obligation is to provide line conditioning at parity. *Id.* Paragraph 250 of the *TRO* states 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."

C.

The Florida Public Service Commission did not obligate BellSouth to remove at TELRIC rates load coils on loops greater than 18,000 feet. (BellSouth Brief, pp. 98-99). The Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access. *Id.* at 99.

CompSouth

A.

BellSouth is wrong to "submerge the FCC's pre-existing rules on line conditioning into the rules adopted in the TRO regarding routine network modifications." (CompSouth Brief, p. 106). In its *Local Competition Order,*[7] the FCC established ILECs must modify their facilities to accommodate CLEC access to UNEs. (¶ 209). In the *UNE Remand Order*, the FCC adopted line conditioning rules, which stated that ILECs are required to condition copper loops and subloops "to ensure that the copper loop or subloop is suitable for providing digital subscriber line services . . . whether or not the [ILEC] offers advanced services to the end-user customer on that copper loop or subloop." 51.319(a)(1)(iii).

In the *TRO,* the FCC (1) re-adopted the line conditioning rules, (2) identified the concept of "routine network modification" for the first time, (3) treated line conditioning and RNMs in different sections and (4) included language that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (¶ 643).

This dispute has important policy implications because there are emerging DSL technologies, and CLECs need to be able to respond with innovative offers. BellSouth's position is a roadblock. (CompSouth Brief, pp. 109-10).

B.

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[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, *First Report and Order,* 11 FCC Rcd at 15608 (1996) ("*Local Competition Order*").

BellSouth struck language from the CLECs proposal that was taken directly from the FCC's rule on RNMs. *Id.* at 110-11).

Discussion

The Commission finds that BellSouth is obligated to perform line conditioning in instances in which BellSouth is not providing advanced services to the customers in question. The FCC notes that in the context of the *UNE Remand Order* it concluded that the Eighth Circuit holding stating that an ILEC is not required to construct a network of "superior quality" did not overturn the FCC's rules requiring an ILEC to condition loops regardless of whether it was providing advanced services to those customers. (TRO, fn 1947). The FCC notes that in the *UNE Remand Order* it found that line conditioning enabled the requesting carrier to use the basic loop. (TRO fn 1947, quoting UNE Remand Order, ¶ 173).

The FCC promulgated line conditioning rules provide, in part, as follows:

> The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop.

47 C.F.R. § 319(a)(1)(iii).

The FCC states in the *TRO* that it is re-adopting its line conditioning rules set forth in the UNE Remand Order. (¶ 642).

The language relied upon by BellSouth states that line conditioning does not constitute the creation of a superior network, but rather, should be "seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (*TRO*, ¶ 643). Read in the context of the remainder of the section on line conditioning and the pertinent FCC's rules, this paragraph cannot mean that ILECs are not required to provide line conditioning unless it provides advanced services to the end-user customers. Such a reading would flatly conflict with the remainder of the line conditioning section and 47 C.F.R. § 319(a)(1)(iii). The more consistent reading of the language at issue is that the FCC was explaining why the requirement expressly set forth in its rules does not conflict with the Eighth Circuit holding on the creation of a superior network. At the bottom of paragraph 643, the FCC notes that "Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices." This explanation is properly viewed as an expansion on the policy behind the excerpt from the *UNE Remand Order* set forth in footnote 1947 of the *TRO* that line conditioning enables use of the basic loop. The FCC did not backtrack on the requirement set forth in its earlier orders. Instead, it rebutted once again the claim that the requirement runs afoul of the Eighth Circuit holding.

The FCC emphasizes that ILECs must provide line conditioning to CLECs on a nondiscriminatory basis. (*TRO,* ¶ 643). The FCC states that line conditioning is seen as a routine network modification that an ILEC regularly performs to provide advanced services to its own customers and does not constitute the creation of a superior network. *Id.* Given this direction, the Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

As to the second issue, the Commission directs BellSouth to permit inclusion of the CompSouth proposed language on RNMs that mirrors the FCC rule.

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?

Positions of the Parties

BellSouth

If BellSouth is not obligated to perform an RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC. The appropriate rate is a commercial or tariffed rate. (BellSouth Brief, p. 99).

CompSouth

A.

BellSouth should not be allowed to impose individual case basis pricing for routine modifications. The rate should be cost-based. (CompSouth Brief, p. 111).

B.

Recovery should be allowed if its RNM costs are not recovered in loop rates. BellSouth should not be able to double recover its costs. *Id.* at 112).

Discussion

In its Line Conditioning Order, the FCC applied ILECs' line conditioning obligation to loops of any length. 14 FCC Rcd 20912, 20951-53, ¶¶ 81-87. BellSouth's position that a commercial rate is appropriate for removing load coils or bridged tap on loops that exceed 18,000 feet was premised on its argument that it is not obligated to perform these functions on such loops. Based on the FCC's Line Conditioning Order, and the reference to such order in the *TRO*, the Commission reaches a different conclusion. Because the Commission has found that BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be

TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

The Commission also agrees with CompSouth that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

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?

Position of the Parties

BellSouth

A.

BellSouth proposed language that would enable it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria. BellSouth should not be required to show cause prior to the commencement of an audit. (BellSouth Brief, p. 85). It argues that the requirement is both unnecessary because it is paying for the audit and is used as a delay tactic. *Id.*

B.

BellSouth should not be required to incorporate a list of acceptable auditors in interconnection agreements or only use an auditor the other party agrees to use. *Id*.

C.

If the auditor determines that a CLEC's noncompliance is material in one area, then the CLEC should be responsible for the cost of the audit. *Id.*

CompSouth

A.

BellSouth's audit rights are limited. The cause requirement is set forth in paragraph 622 of the *TRO*. (CompSouth Brief, p. 113). This requirement could make the process run smoother because if BellSouth identifies circuits, then the internal review conducted by the CLEC may obviate the need for an audit. *Id.* In addition, the identification of circuits would make relevant documentation available earlier in the process. *Id.*

B.

CompSouth's proposal for a mutual agreement process would resolve problems on the front end and is consistent with the way PIU/PLU audits are performed. *Id.* at 115. The CLECs are not willing to agree to a "pre-approved" list of entities. (CompSouth Brief, p. 114).

C.

CLECs should only have to pay for the costs of the audit concerning those audits where material. *Id.* at 116.

D.

CompSouth also argues that a notice requirement makes practical sense. While the FCC didn't require it, state commissions may because the FCC noted that the states were in a better position to provide for implementation. (*TRO,*¶ 625).

Discussion

The *TRO* provides as follows:

> Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order Clarification, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable.

(*Triennial Review Order*, ¶ 622).

It is consistent with the *TRO* to include a requirement that BellSouth have some cause prior to initiating an audit.

The *TRO* requires that the audit be conducted by an independent auditor in accordance with the standards established by the AICPA. (*TRO*, ¶ 626). It does not require that a CLEC agree to the specific auditor. An objection to an auditor that is unrelated to the standard of independence should not suffice to reject the auditor. If the CLEC has an objection that the auditor does not meet the legal standard, then it may raise that objection with the Commission. CompSouth's argument that it is more efficient to resolve any issues with regard to the auditor on the front end is not persuasive. CLECs would be able to delay the process if agreement was required.

The Commission also finds that that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. The *TRO* states that "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." (*TRO,* ¶ 627). The *TRO* does not support CompSouth's position that CLECs should only have to compensate BellSouth related to those circuits for which material non-compliance was found. It states that ILECs are entitled to be reimbursed for the cost of the audit; it does not reference any sub-part of the audit. This conclusion is strengthened by the very next paragraph of the *TRO*, in which the FCC includes the reciprocal position regarding the ILECs compensating the CLECs for their costs in the event the auditor found compliance in "all" material respects. The question then in determining which party has to pay for the other's costs is whether the CLEC complied in "all material respects." And the reimbursement, regardless of who pays who, relates to the audit as a whole. That a CLEC may have complied in numerous material respects does not answer the question of whether it complied in all material respects. If it did not do so, according to the *TRO*, it must compensate the ILEC for the costs of the audit.

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

Positions of the Parties

BellSouth

The order should be incorporated on a case by case basis because BellSouth has entered into specific carrier settlements implementing the Core Order. (BellSouth Brief, p. 86). ITC^DeltaCom's proposed language would not address all scenarios encountered in the implementation of the Core Order. *Id.* at 86-87.

CompSouth

A.

The *2004 ISP Remand Core Forbearance Order* removed certain restrictions on CLEC's right to receive reciprocal compensation. The Commission should order that interconnection agreements should be amended to remove "new markets" and "growth caps" restrictions in BellSouth ICA reciprocal compensation provisions. (CompSouth Brief, p. 117). CompSouth argues that such a result would not upset the contractual differences between CLECs. *Id.*

B.

BellSouth's position is hypocritical because when a change is to its benefit, it always wants the implementation completed as promptly as possible. *Id.*

Discussion

The Commission concludes that agreements be amended to remove "new markets" and "growth caps" restrictions in BellSouth's ICA reciprocal compensation provisions. BellSouth has not explained how the distinctions between carrier contracts would render such direction problematic.

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

Positions of Parties

BellSouth

BellSouth argues that the Commission should make clear that the order in this case is binding upon all CLECs, including those who chose not to participate in this docket. (BellSouth Brief, p.80). It is important that the deadlines not be extended beyond March 10, 2006. *Id.* The Commission should give the parties no more than 45 days from the date of the Commission order to execute complaint amendments. *Id.*

CompSouth

A.

CompSouth did not take a position on whether the order should bind non-parties.

B.

The order should not upend existing agreements that address how such changes of law should be incorporated into existing and new section 252 interconnection agreements. (CompSouth Brief, p. 118).

C.

The Commission should not approve language on issues that were not within the scope of this proceeding. *Id.* at 119.

Cbeyond

See comments from Issue 3.

Discussion

The Commission provided notice of the proceeding and the issues to be addressed in this proceeding to all competitive local exchange carriers. A condition of the certificate of these local exchange carriers is that they comply with orders of the Commission. A carrier may not avoid its obligations by choosing not to participate in a proceeding. The Commission clarifies that its order applies to all certified competitive local exchange carriers.

The Commission concludes that in the event that parties entered into separate agreements with BellSouth that may impact the implementation of changes of law that the parties be bound by those agreements. The Joint CLECs referenced an abeyance agreement between BellSouth and a couple of CLECs in which the parties agreed on a method of implementing *TRO* and *TRRO* changes. This issue was addressed in the context of Issue 3. The Commission also finds that it is appropriate to limit its consideration in this docket to those issues that are within the scope of the proceeding.