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May 18, 2006

**ELECTRONIC FILING**

Ms. Elizabeth O'Donnell  
Executive Director  
Kentucky Public Service Commission  
P.O. Box 615  
Frankfort, KY 40602

***RE: Case No. 2004-00427 – May 15, 2006 Tennessee Regulatory Authority Decision  
Asserting Jurisdiction over Pricing for § 271 Elements***

Dear Ms. O'Donnell:

This letter is written on behalf of CompSouth<sup>1</sup>, an intervenor in this proceeding. Enclosed for your consideration is a transcript of the May 15, 2006 Conference of the Tennessee Regulatory Authority ("TRA") in Docket No. 04-00381, during which the TRA concluded it has jurisdiction to require BellSouth to include in its § 252 interconnection agreements elements required under § 271 of the Telecommunications Act. The TRA also determined it has authority to set the rates for these network elements.

The Tennessee proceeding is a "change of law" docket opened at the request of BellSouth and is therefore Tennessee's equivalent to Case No. 2004-00427. Voting two-to-one to assert authority over rates for § 271 elements, the TRA joined Georgia, Missouri, Maine, Minnesota and Colorado in finding that state regulators have not been preempted by the FCC in this area. Like these states, Tennessee has necessarily concluded that nothing in the Communications Act itself prevents states from requiring Bell Operating Companies to include § 271 elements in § 252 agreements.

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<sup>1</sup> CompSouth's members participating in this docket include the following companies: Access Point Inc., Cinergy Communications Company, Dialog Telecommunications, DIECA Communications, Inc., d/b/a Covad Communications Company, InLine, ITC^DeltaCom, LecStar Telecom, Inc., Lightyear Network Solutions, LLC, Momentum Telecom, Inc., Navigator Telecommunications, LLC, Network Telephone Corp., NuVox Communications, Inc, Supra Telecom, Talk America, Trinsic Communications, Inc., and Xspedius Communications, LLC.

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During the Monday conference TRA Chairman Ron Jones, who made the motion to assert jurisdiction, noted the lack of any binding decision preempting the TRA. Director Miller concurred, alluding to the BellSouth "emergency petition" for preemption filed at the FCC nearly two years ago which the FCC so far has declined to grant. That ineffective petition<sup>2</sup> was BellSouth's collateral attack against a TRA arbitration decision in which the agency concluded unanimously that it had jurisdiction over rates for § 271 elements.

This latest TRA decision is consistent not only with its earlier arbitration decision but with other recent authority CompSouth has filed with the Commission after briefing in this case, including the recent Minnesota PUC decision we discussed in our letter to the Commission dated May 8, 2006.

I certify that this filing was uploaded electronically today to the Commission's web filing portal, and that the electronic version is a true copy of the document filed in paper form. Please indicate receipt of this filing by your office by returning an electronic receipt.

Very truly yours,

STOLL KEENON OGDEN PLLC



Douglas F. Brent

LOU 105113/116479/435475.1

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<sup>2</sup> See Public Notice, *Pleading Cycle Established for Comments on BellSouth's Emergency Petition of BellSouth for Declaratory Ruling and Preemption of State Action*, DA 04-2028, WC Docket No. 04-245, rel. July 6, 2004. The comment cycle in this proceeding closed in mid-2004 and despite the claimed emergency the FCC has not granted the petition.

# EXHIBIT A

BEFORE THE TENNESSEE REGULATORY AUTHORITY

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EXCERPT OF TRANSCRIPT OF AUTHORITY CONFERENCE

Monday, May 15, 2006

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APPEARANCES:

For TRA Staff: Ms. Sharla Dillon

Reported By:  
Christina M. Rhodes, RPR, CCR

1                   (The aforementioned Authority  
2 conference came on to be heard on Monday, May 15, 2006,  
3 beginning at approximately 1:00 p.m., before Chairman  
4 Ron Jones, Director Sara Kyle, and Director Pat Miller.  
5 The following is an excerpt of the proceedings that  
6 were had, to-wit:)

7  
8                   MS. DILLON: First we have Docket  
9 No. 04-00381, BellSouth Telecommunications, Inc.;  
10 BellSouth's petition to establish generic docket to  
11 consider amendments to interconnection agreements  
12 resulting from changes of law; consider Issues 1, 3, 8  
13 (a-c), 10, 13, 15, 16, 17, 18, 19, 23, 24, 26, 27, 28,  
14 29, and 31.

15                   CHAIRMAN JONES: Okay. We'll start  
16 out with Issue 1. The Section 252 process requires  
17 negotiations and to the extent parties may not be able  
18 to negotiate resolution of particular issues arising  
19 out of the final rules/TRRO or to the extent that new  
20 issues related to the final rules/TRO arise, issues  
21 related to those matters will be added to this list.

22                   I would move that in Tennessee we put  
23 this issue there as a placeholder in the event that we  
24 needed additional issues as the docket moved forward,  
25 but given the current procedural posture of the docket,

1       it is my motion at this time we not add any new issues  
2       to this docket.

3                       DIRECTOR MILLER:   Second and vote aye.

4                       DIRECTOR KYLE:   Vote aye.

5                       CHAIRMAN JONES:   Issue 3, A, how  
6       should existing ICAs be modified to address BellSouth's  
7       obligation to provide network elements that the FCC has  
8       found are no longer Section 251(c)(3) obligations and,  
9       B, what is the appropriate way to implement new  
10      agreements pending in arbitration any modifications to  
11      BellSouth's obligations to provide network elements  
12      that the FCC -- that the FCC has found are no longer  
13      Section 251(c)(3) obligations?

14                      This agency has determined that  
15      non-251 elements may be included in Section 252  
16      agreements.  Based on this, I move that as to existing  
17      252 interconnection agreements the parties shall  
18      incorporate the deliberations of this docket including  
19      decisions on non-Section 251(c)(3) obligations in  
20      accordance with the change of law provisions contained  
21      in the interconnection agreements.

22                      As to Section 252 interconnection  
23      agreements that are the subject of pending  
24      arbitrations, I move that parties not be preempted from  
25      bringing those arbitrations forward.  I note, however,

1 that I will give great weight to the agency's past  
2 deliberations and decisions when evaluating issues  
3 similar to those in this docket and may require an  
4 explanation and/or proof as to why a similar issue  
5 should not be decided in the same manner as it was here  
6 or in past arbitrations, and I so move.

7           DIRECTOR KYLE: I would like to read  
8 my answer into the record. I find that the FCC has  
9 been clear about the UNEs that have been delisted and  
10 all carriers are required to implement the FCC's  
11 decision on delisted UNEs. Accordingly, all  
12 interconnection agreements must be amended to reflect  
13 those decisions. Any amendments pending arbitration  
14 should reflect the Authority's decisions unless the  
15 parties negotiate something different.

16           The Authority has done everything  
17 legally required to ensure that every affected party  
18 has had ample notice and opportunity to participate in  
19 this docket and some companies have chosen not to  
20 participate. Nonetheless, all parties who have  
21 existing interconnection agreements are bound by our  
22 decisions in this docket. New interconnection  
23 agreements currently in negotiation or in arbitration  
24 should progress as normal pursuant to Section 251 and  
25 252 with the Authority's deliberation governing the

1 negotiations, and any issue that is presented to the  
2 Authority in a new arbitration that is duplicative of  
3 an issue in this proceeding should be rejected unless  
4 the party can prove that there exists a material change  
5 which should be considered by the Authority.

6 If parties fail to amend their  
7 existing agreements pursuant to the change of law  
8 provision, then their agreements shall be deemed  
9 amended to reflect the decisions in this docket.

10 Was I there with you, Chairman Jones?  
11 I just may have said it in a different way.

12 CHAIRMAN JONES: Well, I -- I will --  
13 as opposed to trying to comment on your motion -- on  
14 your comments, I will leave my motion there and let you  
15 determine if it's consistent with my motion.

16 DIRECTOR KYLE: And I'll do the same.  
17 That's fair.

18 DIRECTOR MILLER: I will second  
19 Director Kyle's motion and vote aye.

20 DIRECTOR KYLE: Thank you.

21 CHAIRMAN JONES: 8(a), does the  
22 Authority have the authority to require BellSouth to  
23 include in its interconnection agreements entered into  
24 pursuant to Section 252 network elements under either  
25 state law or pursuant to Section 271 or any other



1 federal law other than Section 251?

2 The heart of this dispute is whether  
3 the Authority can require BellSouth to include in its  
4 Section 252 interconnection agreements Section 271  
5 elements. The parties agree that there is no current  
6 dispute as to state law elements and do not discuss  
7 elements required by any other federal obligations.  
8 Thus, I will address this issue only with regard to  
9 Section 271.

10 A review of recent federal case law  
11 fails to turn up a definitive response to this issue,  
12 although there is both support and opposition to the  
13 proposition that states may require the filing of  
14 interconnection agreements containing 271 obligations.  
15 Given the lack of a definitive binding decision on this  
16 issue, I choose to affirm my previous position.  
17 Therefore, consistent with my past decision in Docket  
18 No. 03-00119 and my August 22nd, 2005 deliberations on  
19 the motion for summary judgment, I move that the  
20 Authority may include rates, terms, and conditions for  
21 Section 271 elements and Section 252 interconnection  
22 agreements, and I so move.

23 DIRECTOR KYLE: This is rather lengthy  
24 and this will be my last lengthy comments, but I need  
25 to get them in the record.

1                   First of all, I want to say that, as I  
2 know my fellow directors have, I have spent a great  
3 deal of time considering these important issues, and I  
4 think that we can all agree that the FCC's work on the  
5 TRO and the developments following it represent one of  
6 the most important steps in telecommunications since  
7 the 1996 Telecommunications Act.

8                   As a result, I think we must take  
9 great care to be sure that our actions remain  
10 consistent with the path laid out by the FCC. As  
11 you-all must know, I have already considered the  
12 argument that we may act under the authority of  
13 Section 271 to grant certain relief for the CLECs.  
14 Specifically, when the CLECs came to the Authority  
15 seeking to continue receiving UNE-P arrangements beyond  
16 the FCC's transition plan, I rejected that argument. I  
17 believe then as I do now that the FCC meant what it  
18 said and did not intend to create an exception that  
19 would swallow the rules they developed regarding UNEs.  
20 I was initially disappointed that my fellow directors  
21 chose to try an interim alternative path, but I was  
22 pleased when they chose to curtail that relief because  
23 I believe that decision allowed us to get back on track  
24 with what the FCC has decided as a matter of national  
25 policy.

1                   Much has been said about the  
2 Authority's decision in the ITC DeltaCom arbitration.  
3 I was not on that the panel, but I have reviewed the  
4 deliberations and reached these conclusions. First, I  
5 believe that Director Tate took the correct course when  
6 she urged the acceptance of the only negotiated rate  
7 for local switching before the panel. By doing that  
8 she refrained from taking jurisdiction under Section  
9 271 to set a new rate that had not been negotiated.

10                   I have also reviewed Director Miller's  
11 comments and suggestions. They appear to me to be  
12 motivated not by commitment to the concept of state  
13 authority under Section 271, but rather by an attempt  
14 to reach an equitable middle ground for an interim  
15 period. I do not read his comments during deliberation  
16 to provide a clear endorsement of the concept of state  
17 commissions acting under 271 in the fashion urged by  
18 the CLECs.

19                   In short, I just do not believe that  
20 the decision in the present case must be governed by  
21 that one issue in the DeltaCom case, particularly given  
22 the numerous citations provided to us by other  
23 commissions and courts which were reached after that  
24 DeltaCom deliberations. For those reasons I move that  
25 this Authority should not use Section 271 to require

1 the inclusion of UNEs in interconnection agreements  
2 when those UNEs are no longer provided under Section  
3 251 requirements.

4 Even if the Authority did have  
5 jurisdiction to require the inclusion of Section 271  
6 elements in 252 agreements or to establish rates for  
7 Section 271 elements, it is not good policy to do so.  
8 The FCC provides a forum for these issues, and we  
9 should not create a separate Tennessee-specific set of  
10 rules before the FCC has provided guidance on how to  
11 consider these issues.

12 Whether or not the Authority has the  
13 jurisdiction to do so, the Authority should decline to  
14 exercise any jurisdiction to require Section 271  
15 elements to be included in 252 agreements or to set  
16 rates for those elements. In the event BellSouth and  
17 the CLECs cannot negotiate the terms, the conditions,  
18 or just and reasonable rates under Section 271 elements  
19 provided, I am of the opinion that the FCC is the  
20 proper forum to resolve such disputes and not the state  
21 commissions. Therefore, I move to adopt BellSouth's  
22 proposed contract language.

23 DIRECTOR MILLER: While I respect  
24 Director Kyle's comments, I think the action we took in  
25 the ITC DeltaCom was unanimous. All three directors

1 concluded we had jurisdiction. We didn't agree about  
2 how we approached the rate but we agreed we had  
3 jurisdiction.

4                   BellSouth has pending before the FCC a  
5 petition that could resolve this matter. This vacant  
6 chair right here where Director Tate sat is now filled  
7 in Washington, and if she wants to say that you-all  
8 don't have -- that the state commissions don't have  
9 jurisdiction, that's fine, but I don't see anywhere  
10 where the FCC has said that the state commissions don't  
11 have jurisdiction.

12                   I'm going to second Director Jones'  
13 motion and vote aye.

14                   CHAIRMAN JONES: Issue 8(b), if the  
15 answer to Part (a) is affirmative in any respect, which  
16 it was, does the Authority have the authority to  
17 establish rates for such elements?

18                   It is my opinion that the Authority  
19 may set rates for Section 271 elements. This position  
20 is consistent with the recent decision of the Maine  
21 federal district court as well as my past decisions in  
22 Docket No. 03-00119 and my August 22nd, 2005  
23 deliberations on the motion for summary judgment.  
24 Therefore, I move that we answer this issue in the  
25 affirmative.

1                   DIRECTOR MILLER: Second and vote aye.

2                   DIRECTOR KYLE: For the same reasons  
3 outlined in the discussion for Issue 8(a), I find that  
4 whether or not the Authority has jurisdiction to do so,  
5 the Authority should decline to exercise any  
6 jurisdiction to require Section 271 elements to be  
7 included in 252 agreements or to set rates for those  
8 elements, and my motion would have been to adopt  
9 BellSouth's proposed contract language.

10                   CHAIRMAN JONES: Issue 8(c), if the  
11 answer to Part (a) or (b) is affirmative in any  
12 respect, (i), what language, if any, should be included  
13 in the ICA with regard to the rates for such elements,  
14 and, (ii), what language, if any, should be included in  
15 the ICA with regard to the terms and conditions for  
16 such elements?

17                   Given my positions with respect to  
18 8(a) and (b), it is my opinion that the Authority  
19 should not adopt the specific language. Instead, I  
20 would move that BellSouth and the other entities  
21 negotiate the rates, terms, and conditions under which  
22 Section 271 elements will be provided, and in the event  
23 of unsuccessful negotiations either party to the  
24 negotiations may seek arbitration by this agency.

25                   DIRECTOR MILLER: Second and vote aye.

1                   DIRECTOR KYLE: For the record, I just  
2 want to put down that for the same reasons outlined in  
3 the discussions of Issue 8(a) I find that whether or  
4 not the Authority has the jurisdiction to do so, the  
5 Authority should decline to exercise any jurisdiction  
6 to require Section 271 elements to be included in 252  
7 agreements or to set the rates for those elements. I  
8 would have been in favor of adopting BellSouth's  
9 proposed contract language.

10                   CHAIRMAN JONES: Issue 10, TRRO/final  
11 rules. What rates, terms, and conditions should govern  
12 the transition of existing network elements that  
13 BellSouth is no longer obligated to provide as  
14 Section 251 UNEs to non-Section 251 network elements  
15 and other services; and, A, what is the proper  
16 treatment of such network elements at the end of the  
17 transition period; and, B, what is the appropriate  
18 transition period and what are the appropriate rates,  
19 terms, and conditions during such transition period for  
20 unbundled high-capacity loops, high-capacity transport,  
21 and dark fiber transport in and between wire centers  
22 that do not meet the FCC's nonimpairment standards at  
23 this time but that meet such standards in the future?

24                   As to A it is my position that the  
25 transition should be consistent with the approach voted

1 for in favor of Issues 2 and 11 which I will state  
2 below.

3 As to B I find that the transition  
4 from UNEs in wire centers newly designated as  
5 unimpaired should closely follow the transition scheme  
6 provided for in the triennial review remand order with  
7 certain points of clarification.

8 Thus as to A, I move that CLECs should  
9 have 30 days from the execution of an interconnection  
10 agreement or amendment thereto within which to provide  
11 BellSouth a list of UNEs that shall be converted and/or  
12 disconnected. BellSouth shall verify the list within  
13 30 days of receipt, and in the absence of a CLEC order,  
14 BellSouth shall convert a UNE after providing 30 days  
15 written notice to the CLEC.

16 As to B the terms and conditions shall  
17 be consistent with the transition mechanism set forth  
18 in the triennial review remand order but shall specify  
19 that, one, the time period shall begin to run upon  
20 notification by BellSouth that a wire center is  
21 unimpaired. Requests for conversion shall be provided  
22 to BellSouth by the last day of the transition period  
23 and, three, rates shall be trued up to the last day of  
24 the transition period.

25 DIRECTOR KYLE: I find BellSouth



1 should be permitted to convert CLEC service  
2 arrangements no longer subject to Section 251  
3 unbundling. BellSouth may not disconnect arrangements  
4 unless requested by CLECs, and that would be my motion.

5 DIRECTOR MILLER: Second and vote aye.  
6 Second Director Kyle and vote aye.

7 CHAIRMAN JONES: Issue 13, should  
8 network elements delisted under Section 251(c)(3) be  
9 removed from the SQM/PMAP/SEEM plan -- SEEM plan?

10 I cannot agree with BellSouth's  
11 assertions that the Tennessee Performance Plan is  
12 intended only to measure BellSouth's compliance with  
13 Section 251 elements. In the May 15th, 2001 order  
14 opening Docket No. 01-00193 the Authority stated that  
15 an ongoing performance program with enforcement  
16 mechanisms would enable the Authority to ensure that  
17 BellSouth was offering nondiscriminatory access to its  
18 network in a competitively neutral manner. The  
19 Authority's focus was on access to BellSouth's network,  
20 not only on Section 251 UNEs.

21 The FCC, when approving BellSouth's  
22 Tennessee 271 application, recognized the that  
23 Tennessee Performance Plan provides sufficient  
24 incentives to foster post entry checklist compliance.  
25 This would not be the case if the performance program

1 was limited to Section 251 elements alone. Thus, I  
2 move that network elements delisted under Section  
3 251(c)(3) but required by Section 271 should not be  
4 removed from the SQM/PMAP/SEEM plan.

5 DIRECTOR MILLER: Second and vote aye.

6 DIRECTOR KYLE: Right. I find also  
7 that the network elements delisted under Section C3  
8 should not be removed.

9 CHAIRMAN JONES: Issue 15, is  
10 BellSouth required to provide conversion of special  
11 access circuits to UNE pricing, and, if so, at what  
12 rates, terms, and conditions and during what time frame  
13 should such new requests for such conversions be  
14 effectuated?

15 I move that the panel conclude that,  
16 one, BellSouth is obligated to convert special access  
17 circuits to UNE pricing; two, conversions should  
18 consist of switched as-is arrangements. The  
19 nonrecurring rate should be TELRIC based and consistent  
20 with the decision in Docket No. 03-00119. The  
21 nonrecurring rate should include the appropriate  
22 billing charges and should not include termination,  
23 reconnection, or disconnection fees or nonrecurring  
24 charges associated with establishing service for the  
25 first time. Four, BellSouth may use its proposed rates

1 on an interim basis until a permanent rate is  
2 established through negotiations or upon petition of a  
3 party. And, five, interim rates will be trued up to  
4 the permanent rate. And, six, the panel should make no  
5 determination as to timing given the lack of input by  
6 the parties on this subject.

7 DIRECTOR KYLE: While we're going over  
8 that, I just want to make clear for the record,  
9 Chairman Jones, I need to go back to 13. Even though I  
10 didn't win on that one, this is what I had meant to say  
11 and I misspoke. I should have said I'm of the opinion  
12 that 271 network elements should not be included. I  
13 should have used the word "included." That just  
14 corrects my comments.

15 CHAIRMAN JONES: We're on the motion  
16 on Issue 15.

17 DIRECTOR MILLER: I'm going to ask for  
18 a short recess to confer with staff.

19 CHAIRMAN JONES: We'll take a few  
20 minutes.

21 (Recess taken from 2:39 p.m.  
22 to 2:41 p.m.)

23 DIRECTOR KYLE: I would be voting with  
24 you, Chairman Jones.

25 DIRECTOR MILLER: I will vote aye.

1                   CHAIRMAN JONES: Issue 16. What are  
2 the appropriate rates, terms, conditions, and effective  
3 dates, if any, for conversion requests that were  
4 pending on the effective date of the TRO?

5                   It is my opinion that the terms and  
6 conditions for the conversion requests that were  
7 pending on the effective date of the triennial review  
8 order should be controlled by the interconnection  
9 agreement between the parties at the time the  
10 request -- at the time of the request with one  
11 exception.

12                   According to my reading of paragraph  
13 589 of the triennial review order, in the event that a  
14 request was pending on the effective date of the  
15 triennial review order the rates should be trued up to  
16 the effective date of the triennial review order  
17 whereas for conversion requests made after the  
18 triennial review order effective date that have not yet  
19 been completed, the rates should be trued up to the  
20 date the conversion was requested.

21                   DIRECTOR KYLE: Yes. I vote yes.

22                   DIRECTOR MILLER: Vote aye.

23                   You know, it's hard to vote every time  
24 if you don't follow my script on my piece of paper.

25                   DIRECTOR KYLE: Yeah. My script too.

1 I have my own too. I just have to make sure we're  
2 saying the same thing, different words.

3 CHAIRMAN JONES: I'm sorry. I have my  
4 own.

5 Issue 17, is BellSouth obligated  
6 pursuant to the Telecommunications Act of 1996 and FCC  
7 orders to provide line sharing to new CLEC customers  
8 after October 1st, 2004?

9 It is clear that BellSouth has no  
10 obligation under Section 251 of the Telecommunications  
11 Act to provide line sharing after October 1st, 2004 to  
12 new CLEC customers. B --

13 DIRECTOR KYLE: Vote yes.

14 CHAIRMAN JONES: I'm not finished.

15 DIRECTOR KYLE: I can't follow your  
16 script. Sorry.

17 CHAIRMAN JONES: It's the issue  
18 itself. The only question is whether such an  
19 obligation exists under Section 271. It is my opinion  
20 that a review of various 271 decisions and the separate  
21 statements of then FCC Chairman Powell and Commissioner  
22 Martin on the broadband forbearance order led to only  
23 one conclusion, line sharing is a 271(c)(2)(B)(iv)  
24 obligation.

25 Further, it is my opinion that it is

1       unclear whether line sharing is included in either the  
2       BOCs' forbearance petitions or the FCC's broadband  
3       forbearance order.   BellSouth asserts that its  
4       forbearance petition that relies on the relief  
5       requested by Verizon included line sharing as result of  
6       a reference in a white paper attached to a Verizon  
7       ex parte letter.   A tenuous argument at best.

8                       In the broadband forbearance order the  
9       FCC specifically lists the elements that are the  
10      subject of the order and petitions, and line sharing is  
11      not included in the list.

12                      Based on the foregoing, I move that  
13      until such time as the FCC unequivocally grants  
14      forbearance from the line sharing obligation or  
15      declines to act on the petition that clearly requests  
16      line sharing relief, BellSouth must fulfill its  
17      271(c)(2)(B)(iv) obligation and, therefore, provide  
18      line sharing.

19                      DIRECTOR KYLE:   All right.   I would  
20      just say for the record that I feel that we -- that  
21      BellSouth has no obligation pursuant to the  
22      Telecommunications Act and FCC orders to provide line  
23      sharing to new CLEC customers after October 1, 2004.

24                      DIRECTOR MILLER:   I'm going to ask for  
25      a recess.

1 (Recess taken from 2:46 p.m.  
2 to 2:48 p.m.)

3 CHAIRMAN JONES: Director Miller.

4 DIRECTOR MILLER: I don't believe that  
5 the FCC has required line sharing under 251 or 271,  
6 therefore, I am seconding Director Kyle's motion and  
7 vote aye.

8 CHAIRMAN JONES: Issue 18, if the  
9 answer to Issue 17 is negative, which it is, what is  
10 the appropriate language for transitioning off a CLEC's  
11 existing line sharing arrangements?

12 DIRECTOR KYLE: Chairman Jones, I have  
13 a motion.

14 CHAIRMAN JONES: Okay.

15 DIRECTOR KYLE: I determined BellSouth  
16 has no obligation under Section 271 to provide  
17 continuing access to line sharing. Accordingly, I find  
18 that the interconnection agreement should include  
19 provisions properly implementing the transition plan  
20 established by the FCC in the TRO.

21 DIRECTOR MILLER: Second and vote aye.

22 CHAIRMAN JONES: Issue 19, what is the  
23 appropriate ICA language to implement BellSouth's  
24 obligations with regard to line splitting?

25 I would move that this panel conclude

1 that in order for BellSouth to fulfill its obligation  
2 to provide carriers with the ability to engage in line  
3 splitting in accordance with the triennial review order  
4 that BellSouth shall provide the splitter when  
5 requested to do so or permit the CLEC to provide the  
6 splitter either on its own or through the data LEC and  
7 modify its OSS in accordance with 47CFR Section  
8 51.319(a)(1)(ii) to facilitate line splitting.

9 DIRECTOR KYLE: Yes. I vote -- second  
10 and vote yes.

11 DIRECTOR MILLER: I vote aye. I don't  
12 have all those numbers in my script but . . .

13 CHAIRMAN JONES: Issue 23, A, what is  
14 the appropriate definition of "minimum point of entry,"  
15 MPOE; and, B, what is the appropriate language to  
16 implement BellSouth's obligation, if any, to offer  
17 unbundled access to newly deployed or greenfield fiber  
18 loops including fiber loops deployed to the MPOE of a  
19 multiple dwelling unit that is predominately  
20 residential; and what, if any, impact does the  
21 ownership of the inside wiring from the MPOE to each  
22 end user have on this obligation?

23 After reviewing the FCC's orders on  
24 this issue, I find that as to Issue 23A the definition  
25 of "MPOE" adopted by this agency should be that



1 contained in 47CFR Section 68.105, and as to Issue 23B  
2 that BellSouth has no obligation to provide a newly  
3 deployed or greenfield areas, one, unbundled fiber to  
4 the home or fiber to the curb mass market loops or,  
5 two, unbundled fiber to the home or fiber to the curb  
6 loops deployed to the minimum point of entry of  
7 predominately residential multi dwelling units  
8 regardless of whether the ILEC owns or controls any  
9 copper facilities in the multi dwelling units in  
10 greenfield areas.

11 I expressly note my opinion that the  
12 FCC limited the broadband unbundling relief afforded  
13 ILECs in the triennial review order to loops serving  
14 mass market customers; therefore, I move that as to  
15 Issue 23A the definition of "MPOE" adopted by this  
16 agency should be that contained in 47CFR 68.105 and as  
17 to Issue 23B that BellSouth has no obligation, again,  
18 to provide in newly deployed or greenfield areas. One,  
19 it has no obligation with respect to unbundled fiber to  
20 the home or fiber to the curb mass market loops or,  
21 two, unbundled fiber to the home or fiber to the curb  
22 loops deployed to the minimum point of entry of  
23 predominantly residential multi dwelling units  
24 regardless of whether the ILEC owns or controls any  
25 copper facilities in a multi dwelling unit.

1                   DIRECTOR KYLE: Well, I would move  
2   BellSouth does not have an obligation to provide access  
3   to its greenfield fiber plan used to serve mass markets  
4   nor in enterprise market where no impairment exists.  
5   BellSouth has a continuing obligation to make available  
6   DS1 and DS3 UNE loops in enterprise market where  
7   impairment exists. This includes the obligation to  
8   make available greenfield fiber DS1 and DS3 UNE loops  
9   serving enterprise markets including multiple dwelling  
10   units containing predominately business customers, and  
11   I so move.

12                   DIRECTOR MILLER: I apologize, but if  
13   I could borrow y'all's motions and look at them just so  
14   I can --

15                   DIRECTOR KYLE: Any objection?

16                   DIRECTOR MILLER: I mean, I think you  
17   said the same thing, but I would like to look at it.  
18   You-all said a lot. Give me five minutes.

19                                       (Recess taken from 2:55 p.m.  
20                                       to 2:57 p.m.)

21                   CHAIRMAN JONES: We are back on the  
22   record.

23                   DIRECTOR MILLER: After reviewing both  
24   motions, I second Director Kyle's motion and vote aye.

25                   DIRECTOR KYLE: Thank you.

1                   CHAIRMAN JONES: Issue 24, what is the  
2 appropriate interconnection agreement language to  
3 implement BellSouth's obligation to provide unbundled  
4 access to hybrid loops?

5                   The only dispute raised by BellSouth  
6 under this issue was whether the CLECs should be able  
7 to include language with regard to BellSouth's  
8 Section 271 obligations in the interconnection  
9 agreement. BellSouth argues that the Authority should  
10 not include any Section 271 language in Section 252  
11 interconnection agreements. I have previously rejected  
12 this argument and I continue to do so here; therefore,  
13 I move that the language in the interconnection  
14 agreement should accurately reflect BellSouth's  
15 obligation to provide access to hybrid loops as  
16 reflected in 47CFR Section 5.319(a)(2) in the triennial  
17 review order and may include 271 obligations.

18                   DIRECTOR KYLE: Well, I find -- I'm  
19 sorry. Are you through?

20                   I find that BellSouth must offer  
21 hybrid loops in accordance with 47CFR Section  
22 51.319(a)(2) 2005 and TRO paragraph 294 and 289.  
23 Furthermore, I find we should dismiss the CLECs' claim  
24 that a nonimpaired DS1 and DS3 hybrid loop should be  
25 made available under Section 271.

1                   DIRECTOR MILLER: I second Director  
2 Kyle's motion and vote aye.

3                   DIRECTOR KYLE: Thank you.

4                   CHAIRMAN JONES: Issue 26, what is the  
5 appropriate ICA language to implement BellSouth's  
6 obligation to provide routine network modifications?

7                   The parties here raised two issues.  
8 The first is whether line conditioning is a subset of  
9 routine network modification and, therefore, limited to  
10 provisioning only when BellSouth performs line  
11 conditioning for its customers. The second issue  
12 raised by the CLECs is whether language concerning the  
13 nondiscriminatory provisioning of routine network  
14 modifications stricken by BellSouth in its rebuttal  
15 testimony should be included in the agreement.

16                   As to the first issue it's my opinion  
17 that line conditioning should not be treated the same  
18 as routine network modifications. In the UNE remand  
19 order the FCC required line conditioning because  
20 without such conditioning access to the line might not  
21 include access to all features, functions, and  
22 capabilities of the line. Thus, the FCC determined  
23 that line conditioning falls within the definition of  
24 the line. In the triennial review order the FCC  
25 stated, quote, We readopt the Commission's previous

1 line and loop conditioning rules for the reasons set  
2 forth in the UNE remand order, end quote.

3           The FCC's references in the triennial  
4 review order and the UNE remand order to Section 251  
5 (c)(3) of the Federal Telecommunications Act relate to  
6 the CLECs' right to nondiscriminatory access to the  
7 line which necessarily includes line conditioning.  
8 Thus, it is my conclusion that the obligation to  
9 provision line conditioning is tied to the obligation  
10 to provision the line and is not dependent on how or  
11 whether the ILEC provides line conditioning to its  
12 retail customers. I further conclude that BellSouth's  
13 argument that line conditioning is nothing more than a  
14 particular routine network modification must be  
15 rejected as the argument is inconsistent with the  
16 underlying reasoning of the FCC's supporting the  
17 provisioning of line conditioning and the language of  
18 the FCC suggesting that routine network modifications  
19 and line conditioning are similar and that one is the  
20 subset of the other.

21           As to the second issue, it is my  
22 opinion that to the extent that a party seeks to  
23 include language in the agreement that is consistent  
24 with the rules such language should be included. Based  
25 on the foregoing and consistent with my position on the

1 motion for partial summary judgment, I move that the  
2 appropriate ICA language to implement BellSouth's  
3 obligation to provide routine network modifications  
4 should be consistent with 47CFR 51-319 and should not  
5 include line conditioning.

6 DIRECTOR KYLE: My motion would be  
7 that -- first, I move to reaffirm the Authority's  
8 decision when we granted a partial summary judgment,  
9 and I find that the question is not whether BellSouth  
10 receives requests requiring network modification on  
11 loops over 18,000 feet but rather when Bell is  
12 provisioning a loop over 18,000 feet does it normally  
13 or routinely modify the network? Therefore, I find  
14 that where BellSouth upon provisioning a loop over  
15 18,000 feet normally or routinely performs a network  
16 modification for itself that network modification shall  
17 also be provided to CLECs upon request.

18 DIRECTOR MILLER: I second Chairman  
19 Jones and vote aye.

20 CHAIRMAN JONES: Issue 27, what is the  
21 appropriate process for establishing a rate, if any, to  
22 allow for the cost of a routine network modification  
23 that is not already recovered in commission-approved  
24 recurring or nonrecurring rates? What is the  
25 appropriate language, if any, to incorporate into the

1 interconnection agreements?

2                   The FCC concluded in paragraph 640 of  
3 the triennial review order that its pricing rules  
4 permit ILECs to recover the costs of routine network  
5 modifications through the ILECs' recurring or  
6 nonrecurring interconnection and UNE rates. Thus, in  
7 response to this issue it is my motion that the  
8 appropriate process for establishing a rate for routine  
9 network modifications not already recovered in  
10 Commission-approved recurring or nonrecurring rates is  
11 for the parties to either negotiate and, if necessary,  
12 arbitrate a rate or for BellSouth to request the  
13 Authority alter its interconnection and UNE rates to  
14 include the cost not recovered. And I so move.

15                   DIRECTOR KYLE: Well, I would find the  
16 appropriate process for establishing a rate for routine  
17 network modifications not already recovered in  
18 commission-approved reoccurring and nonrecurring rates  
19 is through a TELRIC-based cost study submitted by  
20 BellSouth and approved by the Authority.

21                   DIRECTOR MILLER: Second Director Kyle  
22 and vote aye.

23                   CHAIRMAN JONES: Issue 28, what is the  
24 appropriate language, if any, to address access to  
25 overbuild deployments of fiber to the home and fiber to

1 the curb facilities?

2 Two questions are raised under this  
3 issue. The first is whether fiber to the home and  
4 fiber to the curb obligations with regard to overbuild  
5 situations apply only to mass market loops. Consistent  
6 with my position on Issue 23, the greenfield issue, I  
7 answered this question affirmatively.

8 The second question raised is whether  
9 BellSouth may restore on a project basis rather than  
10 within the standard loop provisioning interval a copper  
11 loop in an overbuild situation where the copper loop  
12 has not yet been retired? Neither the triennial review  
13 order nor the FCC rules address this specific question.  
14 It is my opinion, however, that given BellSouth as  
15 required to provision the copper loop as part of its  
16 Section 251 unbundling obligations and pursuant to  
17 Rule 51.319(a)(iii)(A) in a nondiscriminatory manner it  
18 must provision a copper loop within the standard loop  
19 provisioning interval. If BellSouth is unable to meet  
20 standard loop provisioning interval, then it must  
21 provide a 64 kilobit per second voice grade channel  
22 over its fiber to the home or fiber to the curb  
23 facilities while the copper is being restored.

24 Based on the foregoing, I move that we  
25 affirm the TRA's summary judgment decision as specified



1 that fiber to the home and fiber to the curb  
2 obligations in overbuild situations apply only to mass  
3 market loops.

4 I also move as follows: One, in  
5 overbuild situations where BellSouth retains the copper  
6 loops BellSouth will make those copper loops available  
7 to CLECs on an unbundled basis within the standard loop  
8 provisioning interval. Two, where BellSouth is unable  
9 to meet the standard loop provisioning interval,  
10 BellSouth must provide a 64 kilobit per second voice  
11 grade channel over its fiber to the home or fiber to  
12 the curb facilities while the copper is being restored.  
13 Three, BellSouth's retirement of copper loops must  
14 comply with applicable law and, four, where copper has  
15 been retired BellSouth will offer a 64 kilobit per  
16 second voice grade channel over its fiber to the home  
17 or fiber to the curb facilities.

18 DIRECTOR MILLER: Again, I think I'm  
19 okay with the motion if I can review it.

20 (Recess taken from 3:08 p.m.  
21 to 3:10 p.m.)

22 CHAIRMAN JONES: We're on the record.

23 DIRECTOR MILLER: I second the chair's  
24 motion and vote aye.

25 DIRECTOR KYLE: I vote aye.

1                   CHAIRMAN JONES: Issue 29, what is the  
2 appropriate interconnection agreement language to  
3 implement BellSouth's EEL audit rights, if any, under  
4 the TRO?

5                   The parties raised the following  
6 questions under this issue: One, whether BellSouth  
7 must justify its cause for the audit in the notice of  
8 audit; two, how is the auditor selected; and, three,  
9 how the cost of the audit -- how the costs of audit are  
10 to be allocated?

11                   With the exception of the cost  
12 question, the other questions raised were addressed in  
13 Docket No. 04-00046 arbitration. Although that  
14 proceeding is an arbitration binding only on the  
15 parties thereto, I find no reason here to modify my  
16 decisions as set forth on April 17th. Therefore, as to  
17 the first and second questions I affirm my past  
18 analysis and restate my conclusions that, one, the  
19 FCC's order supports the proposition that just as the  
20 CLECs may self-certify compliance with the eligibility  
21 criteria, BellSouth may self-certify cause; and, two,  
22 the contention that the parties should mutually agree  
23 to an auditor is in direct conflict with the FCC's  
24 statement that the ILEC, quote, may obtain and pay for  
25 an independent auditor to audit, end quote.

1                   As to the cost issue, it is my finding  
2                   that BellSouth's attempt to substitute the word "any"  
3                   for "all" in PAT-5 is contrary to the explicit language  
4                   in the triennial review order.

5                   Based on these findings, I move, one,  
6                   prior to commencing an audit BellSouth shall notify the  
7                   CLEC in writing of BellSouth's intent to audit the  
8                   CLEC's service eligibility criteria. Such notice shall  
9                   include the concern upon which the audit will be based.  
10                  However, such concern need only be stated generally  
11                  without the requirement to detail such things as the  
12                  number, type, or identity of circuits to be audited.

13                  Two, there is no requirement that the  
14                  parties mutually agree to the auditor.

15                  Three, the cost of an audit shall be  
16                  paid by the CLEC if the CLEC is found to have failed to  
17                  comply in all material respects with the service  
18                  eligibility criteria. The CLEC shall be reimbursed its  
19                  costs by BellSouth if the CLEC is found compliant in  
20                  all material respects with the service eligibility  
21                  criteria. I so move.

22                  DIRECTOR KYLE: I'm going to read mine  
23                  into the record. I lost out on some of it, so let me  
24                  try to regroup and read mine into the record.

25                  BellSouth may conduct an EEL audit no

1 more frequently than once a year and only when it has a  
2 concern that the requesting carrier has not met the  
3 criteria for providing a significant amount of local  
4 exchange service. Prior to commencing an audit  
5 BellSouth shall notify the CLEC in writing of its  
6 intent to audit the CLEC service eligibility criteria.  
7 The notice shall state the concern upon which the audit  
8 will be based. Such concern need only be stated  
9 generally without the requirement to detail such things  
10 as the number, type, or identity of circuits to be  
11 audited. The notice shall be provided to the CLEC to  
12 be audited at least 30 days prior to the start of an  
13 audit pursuant to paragraph 31 of the supplemental  
14 order and shall include the name of an independent  
15 auditor BellSouth has selected to perform the audit. A  
16 copy of the notice shall be furnished to the Authority.

17           If a CLEC challenges the concern  
18 provided by BellSouth or the independence of the  
19 auditor selected, BellSouth shall submit for Authority  
20 approval the letter of engagement between itself and  
21 the independent auditor along with the proposed  
22 methodology procedure for conducting EEL audit.

23           This is consistent with the  
24 Authority's decision in Docket No. 02-01203. The cost  
25 of the EEL audit shall be borne by the CLEC if the CLEC

1 is found noncompliant in only one material respect of  
2 the service eligibility criteria. The CLEC shall be  
3 due reimbursement for its costs by BellSouth only if  
4 the CLEC is found compliant in each and every material  
5 respect of the service eligibility requirement.

6 DIRECTOR MILLER: Second and vote aye,  
7 Director Kyle's motion.

8 CHAIRMAN JONES: Issue 31, what  
9 language should be used to incorporate the FCC's ISP  
10 remand core forbearance order into interconnection  
11 agreements?

12 There does not appear to be any  
13 disagreement at this time over the substantive  
14 requirements of the ISP remand core forbearance order.  
15 Instead the dispute seems to center on the timing of  
16 the amendments necessitated by the order. In this  
17 regard it is my opinion -- it is my motion rather that  
18 BellSouth be required to negotiate amendments resulting  
19 from the ISP core forbearance order in the course of  
20 negotiating triennial review order and triennial review  
21 remand order amendments.

22 DIRECTOR MILLER: Second and vote aye.

23 DIRECTOR KYLE: Vote aye.

24 (End of requested  
25 transcript.)

## 1 REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE )

3 COUNTY OF DAVIDSON )

4 I, Christina M. Rhodes, Registered  
5 Professional Reporter, Certified Court Reporter, and  
6 Notary Public for the State of Tennessee, hereby  
7 certify that I reported the foregoing proceedings at  
8 the time and place set forth in the caption thereof;  
9 that the proceedings were stenographically reported by  
10 me; and that the foregoing proceedings constitute a  
11 true and correct transcript of said proceedings to the  
12 best of my ability.

13 I FURTHER CERTIFY that I am not  
14 related to any of the parties named herein, nor their  
15 counsel, and have no interest, financial or otherwise,  
16 in the outcome or events of this action.

17 IN WITNESS WHEREOF, I have hereunto  
18 affixed my official signature and seal of office this  
19 17th day of May, 2006.

20

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22

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CHRISTINA M. RHODES

23

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24

OF TENNESSEE

25 My Commission Expires

January 23, 2010