COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:	)	
	)	
Petition Of Bellsouth Telecommunications, Inc.	)	Case No. 2004-00427
To Establish Generic Docket To Consider	)	
Amendments To Interconnection Agreements	)	
Resulting From Changes Of Law	)	

Direct Testimony
Of
Joseph Gillan
On Behalf of
The Competitive Carriers of the South, Inc.
(CompSouth)

August 16, 2005

I. Introduction and Witness Qualifications

Q. Please state your name, business address and occupation.

A. My name is Joseph Gillan. My business address is P. O. Box 541038, Orlando, Florida 32854. I am an economist with a consulting practice specializing in telecommunications.

Q. Please briefly outline your educational background and related experience.

A. I am a graduate of the University of Wyoming where I received B.A. and M.A. degrees in economics. From 1980 to 1985, I was on the staff of the Illinois Commerce Commission where I had responsibility for the policy analysis of issues created by the emergence of competition in regulated markets, in particular the telecommunications industry. While at the Commission, I served on the staff subcommittee for the NARUC Communications Committee and was appointed to the Research Advisory Council overseeing the National Regulatory Research Institute.

In 1985, I left the Commission to join U.S. Switch, a venture firm organized to develop interexchange access networks in partnership with independent local telephone companies. At the end of 1986, I resigned my position of Vice President-Marketing/Strategic Planning to begin a consulting practice.

Over the past twenty-five years, I have provided testimony before more than 35 state commissions, six state legislatures, the Commerce Committee of the United States Senate, and the Federal/State Joint Board on Separations Reform. I have also been called to provide expert testimony before federal and state civil courts by clients as diverse as the trustees of a small competitive carrier in the Southeast to Qwest Communications. In addition, I have filed expert analysis with the Finance Ministry of the Cayman Islands and before the Canadian Radio-Telecommunications Commission.

Finally, I serve on the Advisory Council to New Mexico State University's Center for Regulation (since 1985) and am an instructor in their "Principles of Regulation" program taught twice annually in Albuquerque. I also lecture at Michigan State University's Regulatory Studies Program and have been invited to lecture at the School of Laws at the University of London (England) on telecommunications policy and cost analysis in the United States.

Q. On whose behalf are you testifying?

A. I am testifying on behalf of Competitive Carriers of the South, Inc. ("CompSouth"). Although the members of CompSouth have worked jointly to develop consolidated positions (thereby simplifying the issues and options for the Commission), there are differences between individual carriers and their specific

business plans in terms of emphasis. Consequently, the Commission should understand that my recommendations represent the consensus views of the group and not necessarily the individual priorities of any particular member.

Q. What is the purpose of your testimony?

A. The *Triennial Review Remand Order* (*TRRO*)[1] eliminates a number of BellSouth's unbundling obligations under §251 of the federal Telecommunications Act of 1996. This is no small change in market dynamics. UNE-based competition is responsible for 77% of *all* the competition in Kentucky,[2] with local switching alone accounting for approximately 98% of all UNE-based competition in the state.[3]

The *TRRO* raises very practical issues as to how a §251 UNE is withdrawn from the market, including *what* is withdrawn, *when* it is withdrawn, *where* it is withdrawn and *how* it is withdrawn. The principal purpose of my testimony is to explain the changes to the parties' interconnection agreements needed to

[1] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, Review of 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand (rel. Feb. 4, 2005) ("*TRRO*").

[2] Source: FCC Local Competition Report and BellSouth Form 477 Filing, data as of December 31, 2004 (most recent UNE data publicly released by FCC).

[3] Source: BellSouth Form 477 Filing.

effectuate the *TRRO*, as well as certain remaining changes from the FCC's earlier *Triennial Review Order* (*TRO*).[4]

Q. In addition to addressing issues associated with the *withdrawal* of a network element under §251 of the federal Act, does your testimony also address *replacement* offerings that BellSouth must make available?

A. Yes. It is important to understand that this proceeding is not simply about making *less* available to CLECs, it is also about making *different* offerings available in their place. It is certainly true that the *TRRO* removes certain of BellSouth's unbundling obligations under §251 of the federal Act. Significantly, however, §251 does not define the *limits* of BellSouth's unbundling obligations. Except for certain specific broadband network elements that the FCC has expressly excluded (through forbearance), BellSouth remains obligated to offer through approved interconnection agreements each of the network elements listed in the competitive checklist of §271, albeit at a (potentially) different price.[5]

[4] In the Matter of Review of §251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. August 21, 2003) ("TRO").

[5] Whereas elements offered under §251 must be priced in accordance with the FCC's Total Element Long Run Incremental Cost (TELRIC) rules, elements offered in compliance with §271 are judged in accordance with the potentially more liberal "just and reasonable" standard.

Where UNEs are no longer required by §251 of the Act, the *TRRO* adopts "transition plans" to alternative arrangements. Significantly, one set of alternatives are the comparable obligations that BellSouth voluntarily accepted under §271 of the federal Act so that it could provide long distance services in Kentucky. As the Commission is well aware, that choice has proven to be quite profitable for BellSouth – it currently provides long distance service to nearly 55% of the Kentucky consumer market and 58% of the Kentucky business market,[6] while competitors serve none using §271 compliant offerings.[7]

This proceeding will define the future of local competition in Kentucky in a post-*TRRO* environment. That future will be based, in part, on §271-compliant offerings, in much the same way that the Commission's arbitrations implementing §251 provided the foundation for initial entry. In order for competitors to make informed choices and so that BellSouth may remain in compliance with §271, §271-compliant offerings must be fully defined *contemporaneously* with the withdrawal of any UNE as outlined in the *TRRO*.[8]

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[6] Source: BellSouth Earnings Release, 2nd Quarter 2005, July 25, 2005, page 7. BellSouth reports consolidated penetration rates for Kentucky combined with North Carolina, Alabama, Mississippi, and South Carolina, which received long distance authority concurrently.

[7] Prior to the TRRO, BellSouth's §271 obligations largely duplicated the mandatory unbundling obligations of §251 of the federal Act. Consequently, there has not previously been a need to establish commercially meaningful §271 offerings, most specifically by assuring just and reasonable rates, terms and conditions for such offerings.

[8] It is useful to recognize that §252 of the federal Act is common to implementing both the *TRRO* and §271. As I explain later in my testimony, BellSouth can only comply with §271 by offering those items required by the competitive checklist through interconnection agreements approved pursuant to §252. Moreover, the *TRRO* explicitly requires (as it must) that its terms be incorporated into new interconnection agreements similarly adopted according to §252.

Q. Does your testimony also recommend specific contract language?

A. Yes. Attached to my testimony is Exhibit JPG-1 recommending specific contract language that the Commission should order the parties to include in interconnection agreements. Because discovery remains outstanding, however, there are some issues that are not yet fully developed – for instance, recommendations concerning rates for specific §271 elements – while other issues will not be fully joined until after BellSouth has filed its direct testimony. As such, the specific proposed language in Exhibit JPG-1 may be updated as the proceeding progresses.

The contract language included in Exhibit JPG-1 is organized to match the organization of issues on the Joint Issues List submitted by BellSouth and CompSouth. In my testimony, I have identified Joint Issues List numbers that correspond to the issues discussed in the testimony. Some specific issues on the Joint Issues List that are not explicitly addressed in my testimony may be discussed in rebuttal in response to proposed contract language or testimony sponsored by BellSouth.

Consequently, it follows that this proceeding should conclude not only with contract terms implementing the declassification of certain network elements as UNEs under §251, but should also establish the terms of replacement offerings that satisfy the requirements of §271.

In addition, the Commission should understand that the contract language attached to my testimony represents a consensus effort by CompSouth to provide a *single* document to the Commission for its consideration. Individual companies, however, with their own business plans and priorities are continuing to negotiate with BellSouth. Because not all companies share the same level of concern on all issues, there may be instances during the proceeding where individual members negotiate individual contract language that differs from the consensus recommendations. Such diversity should be expected in a multi-company environment and the results of individual negotiations should not be interpreted as contrary to these consensus recommendations.

II. Issues Concerning the Application of Transitional Pricing (Issues List No. 2-3, 9, 11-12, 22)

Q. What are the primary issues relating to exactly *how* the market changes called for by the *TRRO* should be implemented?

A. The primary changes caused by the *TRRO* result from the reduction in BellSouth's unbundling obligations under §251 of the federal Act. As discussed above, these changes, however, cannot be implemented in a vacuum. The withdrawal of §251 network elements must be accompanied by the introduction of replacement offerings (for instance, the §271 alternatives described more fully later in my testimony), and with new contract provisions that permit carriers to

"commingle" the remaining §251 network elements with other wholesale offerings. The *TRRO* represents a package of changes (some dating back to the *TRO*), not just the introduction of higher rates by BellSouth.

Q. What are the primary transition issues introduced by the *TRRO*?

A. In simple terms, the primary transition issues involve:

1. When do the higher transitional prices begin;

2. When do the transitional prices end; and,

3. What other changes must accompany the end of the transitional prices to assure an orderly change to new arrangements.

The *TRRO* is not about *less* – it is about *change*. The §251 regime may be shrinking, but the fact that BellSouth still is required to provide meaningful wholesale options to carriers means that establishing an orderly process to a new market dynamic is as critical as the change itself.

Q. What is the basic framework to effect this "orderly change"?

A. The basic framework has two components. First, as always, carriers must establish new interconnection agreements that implement the *full package* of

changes needed for carriers to transition away from their traditional reliance on network elements required under §251 to alternative arrangements. Because there is not agreement between BellSouth and the CLECs as to all of the components of this new environment, state commissions must arbitrate these differences in proceedings such as this. Most of the testimony below addresses the key issues raised in establishing the new regime.

Secondly, the FCC itself adopted some transitional pricing protections to provide the necessary time to move between the old §251-based regime and a new environment that is only partially based on §251 offerings. In this section of my testimony I focus on when these transitional prices begin, when they end, and identify (in a broad sense) the additional changes that must be introduced simultaneously with the introduction of post-transition prices.

Q. How are the transitional prices[9] to be implemented?

A. As with other pricing changes, new rates become effective as they are introduced into carrier interconnection agreements. The FCC was quite clear that the changes called for by the *TRRO* are to take effect through contract changes, not unilateral action:

[9] Transitional price increases were established by the FCC for network elements that are no longer available under §251 at the following levels: for loop and transport elements, the transitional increase is 15%, while local switching rates were increased by $1 per month.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.[10]

The transitional rates adopted by the FCC are to be introduced into interconnection agreements, alongside other changes (such as commingling, discussed below) that enable carriers to adjust to these higher prices.[11] These higher rates do not introduce themselves, and BellSouth may not unilaterally impose them on carriers.

Q. If the transitional rate increases go into effect when they are introduced into carrier interconnection agreements, when do they end?

A. The general expectation of the *TRRO* is that carriers will have a year to determine alternative arrangements for network elements that will no longer be available under §251. One issue, however, concerns what price should apply when a CLEC has placed an order to move a particular UNE to an alternative arrangement, but BellSouth has not yet implemented that order. In such instances, a question arises as to whether the transition rate should apply. The *TRRO* is somewhat ambiguous

[10] *TRRO* ¶ 233.

[11] The term "commingling" refers to a carrier mixing and matching §251 elements with other wholesale offerings. Because one important wholesale offering will be the new wholesale services that BellSouth must introduce to remain in compliance with §271, I discuss commingling in that part of my testimony (IV) that address §271 issues. The need to incorporate commingling language into interconnection agreements, however, is not limited to the need to access §271 elements, it is needed to provide carriers that ability to connect the remaining §251 elements to any wholesale service.

on this point, at times indicating that the CLEC's obligation is to place the order, and at times suggesting that the lines must be moved to alternative arrangements:

> 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 this Order.[12]
>
> ***
>
> Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. At the end of the twelve-month period, requesting carriers must transition all of their affected high-capacity loops to alternative facilities or arrangements.[13]

Q. What do you recommend?

A. For a number of reasons, I believe the Commission should require only that CLECs place an order with BellSouth in order to qualify for transitional rates.

First, I think it is important to recognize that most of the affected UNEs are unlikely to be moved to different network arrangements as opposed to a different pricing schedule.[14] Consequently, any lag in processing CLEC orders should be minimal.

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[12] *TRRO*, ¶227. Emphasis added.

[13] *TRRO*, ¶196. Emphasis added.

[14] Indeed, it would seem that BellSouth shares this view. Last year I appeared on a NARUC panel with Bennett Ross of BellSouth, who discouraged state commission staffs from

Second, and most importantly, the most important "alternative arrangement" that CLECs must consider will be BellSouth's §271 offering that parallels the §251 offering being withdrawn. As I explain in detail later in my testimony, whether BellSouth's §271 offerings are commercially viable is an issue that will be decided in this proceeding. Consequently, CLECs do not yet have even basic information concerning one of the most important options they must consider.

Third, with respect to loop and transport arrangements, CLECs do not yet know even *where* they must analyze alternative arrangements. It is clear that BellSouth has taken considerable license with its interpretation of where the *TRRO* permits it to limit CLEC access to §251 offerings. For instance, BellSouth claims that CLECs are limited to 10 DS1 transport facilities between every end office, even though the *TRRO* is clear that this limitation applies only where BellSouth need not unbundle DS3 transport.[15] Until CLECs have a final listing of exactly where

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developing batch hot-cut systems because of the expectation that most UNE-P lines would remain on the BellSouth network paying higher rates.

[15] See *TRRO*, §128 (emphasis added):

> On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits…. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

I describe this particular issue in more detail in section III.C of my testimony. Clearly, if BellSouth is willing to ignore this clear statement by the FCC – insisting, instead, that it can limit carriers to 10 DS1s everywhere – there is no reason to believe that its wire center listings that are used more generally to limit its unbundling obligations are any more reasonable.

BellSouth is no longer required to unbundle certain high-capacity loop and transport offerings – a list that will be established in this proceeding – specific plans to transition facilities cannot be developed.

Finally, I note that once a CLEC has placed an order with BellSouth to migrate an arrangement to an alternative – whether the alternative is a network facility or an alternative pricing schedule – control passes to BellSouth. CLECs should not be penalized by paying higher prices for orders that BellSouth has not filled.

Q. Do you believe that this issue may become less critical as the docket proceeds?

A. Yes. As I indicated earlier, the most likely alternative arrangement for a post-§251 offering is the parallel offering that BellSouth must make available to remain in compliance with §271. Because the prices for §271 offerings must remain just and reasonable – a standard that §251 prices must also satisfy – there is every reason to expect that the §271 price will be "just and reasonably" close to the rates paid today. In fact, the Missouri Commission recently established interim §271 prices *equal* to the higher transition rates established by the FCC. Obviously, if this Commission were to follow the Missouri approach and establish interim §271 rates based on the existing transition rates (which is one of the options I present below), then the commercial significance of "when the order is placed compared to when it is implemented" issue becomes moot.

Q. Are there any other issues relating to the application of transitional pricing?

A. Yes. The transitional increase of $1 for local switching applies to lines used to serve "mass market" customers, a term that has not been clearly defined in the past. The *TRRO* makes clear that however the term "mass market" may have been used in previous orders, the term (as it relates to BellSouth's pricing obligations for unbundled local switching) includes all lines used to serve customers that use less than a DS1 capacity and that the transitional rules for pricing unbundled local switching apply:

> The *Triennial Review Order* left unresolved the issue of the appropriate number of DS0 lines that distinguishes mass market customers from enterprise market customers for unbundled local circuit switching…. The transition period we adopt here thus applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level as of the effective date of this Order.[16]

Thus, the *TRRO* makes clear that CLECs are entitled to pay TELRIC rates (plus $1) for all analog customers, including any customers that BellSouth may have previously claimed were "enterprise customers" because they had four or more lines.

Q. Are there other changes that must be introduced before the transition ends?

[16] *TRRO*, footnote 625 (¶226).

A. Yes. Higher prices are not the only consequence of the *TRRO*. In addition to withdrawing §251 access, the FCC has also adopted new requirements that allow CLECs to more easily qualify to use UNEs, as well as important commingling rules that permit CLECs to use the remaining §251 elements in combination with other wholesale services that will take the place of those §251 UNEs being eliminated. These counterbalancing components of the FCC's decision must become effective at the same time that BellSouth is permitted to withdraw a UNE so that CLECs have a meaningful opportunity to adapt to the new environment.

III. Issues Relating to Loop/Transport Delisting (Issues List Nos. 2-7, 25)

Q. Please provide an overview of the principal issues the Commission must address to implement the *TRRO* with respect to the delisting of certain high capacity loop and transport UNEs.

A. With respect to high capacity loop and transport UNEs (DS1, DS3 and Dark Fiber), the FCC determined that BellSouth would not be required to offer these UNEs at TELRIC rates under §251 of the federal Act between (or, in the case of loops, from) certain wire centers meeting established criteria. There are two basic issues:

1. Identifying the specific wire centers in Kentucky that *currently* satisfy the criteria adopted by the FCC; and

2. Adopting a process to determine whether additional wire centers meet the criteria in the *future*.

In addition to these basic issues, BellSouth is attempting to further limit its unbundling obligations by applying a "cap" on DS1 transport beyond the wire centers permitted under federal rules (which I discuss in more detail in part C of this section).

A. The Appropriate Categorization of Wire Centers

Q. Please summarize BellSouth's unbundling obligations with respect to high capacity loops and transport.

A. The *TRRO* defines BellSouth's unbundling obligations according to different categories of wire centers determined by the number of business lines and fiber-based collocators in the wire center.

Wire Center Categorization Criteria for Dedicated Transport

Category	Wire Center Must Meet *Either* Criterion		BellSouth Need Not Unbundle
	Business Lines	Fiber-Based Collocators	
Tier 1	> 38,000	4 or more	DS1[17] or DS3
Tier 2	> 24,000	3 or more	DS3[18]

Similarly, the *TRRO* limited BellSouth's §251 unbundling obligations for local loops based on a wire center classification scheme, albeit applying different thresholds.

Wire Center Categorization Criteria for High Capacity Loops

BellSouth Need Not Unbundle	Wire Center Must Meet *Both* Criterion	
	Business Lines	Fiber-Based Collocators
DS1 Loops	> 60,000	4 or more
DS3 Loops	> 38,000	3 or more

Q, Why is it important for the Commission to review the categorization of wire centers?

A. The principal reason that Commission review is critical is that only BellSouth has access to the information used to categorize wire centers and yet, it is BellSouth that would gain by incorrectly assigning wire centers so as to curtail its unbundling obligations under §251. As a result, the Commission must review

[17] BellSouth must offer DS1 dedicated transport as a §251 network element unless both ends of the transport route are Tier 1 wire centers.

[18] BellSouth's unbundling obligations for dark fiber parallel those for DS3 dedicated transport.

BellSouth's claims to ensure that the interconnection agreements properly reflect those wire centers where a reduced level of unbundling is required.[19]

Q. "Business lines" are one half of the FCC's categorization criteria. How are "business lines" counted under the *TRRO*?

A. The *TRRO* is quite specific as to what lines should be counted in determining the total number of business lines. The basic definition of a business line is as follows:

> Business line. 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[20]

Thus, to arrive at the number of business lines in a particular wire center requires the summation of three values:

(1) The number of BellSouth's business switched access lines,

[19] Indeed, the FCC recognized that CLECs would not have the information needed (absent proceedings such as this) to validate BellSouth's claims. *See TRRO* footnote 659, ¶234.

[20] 47 CFR § 51.5.

(2) The number of UNE loops (including, where appropriate, loops used with transport), and

(3) The number of business UNE-P.

As I explain below, while there are certain additional directives as to the source of, and qualifying requirements for, particular lines, the basic calculation involves these three categories.

Q. What additional qualifying requirements did the FCC adopt?

A. The definition for a business line (partially cited above) includes the following additional directions. The business line tally:

(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."[21]

Importantly, these requirements are not "choose one of three" – for a line to be counted, the line must be for switched services before it becomes relevant as to how multi-channel switched lines should be counted. Furthermore, these additional requirements are only relevant for determining how to count UNE lines, for the FCC provides specific direction as to what *source* should be used to count BellSouth's switched business lines – ARMIS 43-08 – whose instructions effectively ensure that these additional requirements are satisfied.

Q. Is there *any* question that BellSouth is to use the ARMIS 43-08 business switched line count that it routinely files with the FCC in determining its own line count?

A. No, there is no question that the *TRRO* methodology is grounded in the ARMIS 43-08 data:

> Moreover, as we define them, business line counts are an objective set of data that incumbent LECs already have created for other regulatory purposes. 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. [B]y basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy

[21] 47 CFR § 51.5, emphasis added.

> of the thresholds, and a simplified ability to obtain the necessary information.[22]

As the FCC explained above, it was deliberately adopting simple measures that were already required (particularly the ARMIS data) that would, therefore, be less susceptible to gaming.

Q. Does the ARMIS 43-08 data already conform to the specific requirements included by the FCC in the *TRRO*?

A. Yes. The additional direction provided by the FCC in the definition of "business lines" boils down to two requirements. The first is that only switched lines are to be counted, while the second directs that multi-channel digital lines be converted to a voice grade equivalent. With respect to the Business Switched Access Lines (to which are added UNE lines), the FCC's directive that ARMIS 43-08 Business Switched Access Lines be used already conform to these requirements. Business Switched Access Lines are defined according to ARMIS as:[23]

> Business Switched Access Lines - Total voice-grade equivalent analog or digital switched access lines to business customers.

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[22] *TRRO*, ¶ 105. Emphasis added. Footnotes omitted.

[23] I note that not only did the text of the *TRRO* direct that ARMIS 43-08 be used for Switched Business Access Lines, but the footnote in the TRRO specifically references the 2004 instructions in which the term is defined. *See TRRO* footnote 303 (¶ 105), specifically referencing http://www.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf (see page 21).

(fc) Single Line Business Switched Access Lines - Includes single line business access lines subject to the single line business interstate end user common line charge, pursuant to § 69.104(h), excluding company official, mobile telephone/pagers and payphone lines.

(fd) Multiline Business Switched Access Lines - Include the total of analog and digital multiline business access lines subject to the multiline business interstate end user common line charge including PBX trunks, Centrex-CU trunks, hotel/motel LD trunks and Centrex-CO lines.

(fe) Payphone Lines - Lines that provide payphone service, i.e., total coin (public and semi-public) lines, including customer owned pay telephones.[24]

As the above ARMIS definition makes clear, Business Switched Access Lines only include (as one would expect) lines configured for switched service and the lines are already computed on a voice-equivalent basis. Thus, there is no justification for BellSouth modifying, in any way, the number of Business Switched Access Lines filed under ARMIS 43-08. To this value it would add UNE-L and business UNE-P lines to arrive at the total Business Line count used to categorize wire centers as required by the *TRRO*.

Q. How should BellSouth count UNE-L lines to ensure that the lines satisfy the specific requirement in the *TRRO* that the business line count "shall include

[24] *Ibid*, page 21. (Note: The rule sections cited above have been shortened to remove unnecessary references to other ARMIS filings).

only those access lines connecting end-user customers with incumbent LEC end-offices for switched services?"[25]

A. Although FCC rules are explicit that only lines used for switched services are to be counted, the FCC provided no guidance as to how that determination should be made for UNE-L lines. As explained above, the requirement that ARMIS 43-08 data be used resolves any issue with respect to BellSouth's Business Switched Lines and, by definition, UNE-P is a switched service. Moreover, BellSouth routinely counts (and reports to Wall Street) the number of UNE-P lines used to serve business customers. What BellSouth cannot measure directly is the number of UNE-L voice equivalent lines used to provide switched services.

Q. What do you recommend?

A. In other states, BellSouth's direct case (and supporting discovery workpapers) has provided the information needed to develop a far better estimate of that portion of digital UNE-L capacity that is actually used to provide switched services to business customers. I expect to be able to use similar information in my rebuttal testimony to develop an unbiased estimate of UNE-L business lines that may be used to correctly classify the wire centers in Kentucky.

[25] *See* 47 CFR § 51.5, emphasis added.

Q. Are you aware of any other issues concerning BellSouth's conversion of UNE-L lines to voice-grade equivalents?

A. Yes. It is my understanding that BellSouth claims that HDSL-capable loops should be counted as though they are DS1 loops (and then converted to 24 business lines).[26] There is nothing in the *TRRO*, however, that justifies this adjustment.

First, the *TRRO* is specific that the only lines that are to be converted to voice-grade equivalent services are digital access lines, noting the business line count:

> … 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."[27]

An HDSL-*capable* loop is exactly that – a dry copper line that is not a digital facility without the addition of CLEC equipment.

[26] Based on a review of BellSouth's testimony in Georgia, the BellSouth position is slightly more subtle. As I understand BellSouth's Georgia testimony, BellSouth states that it has *not* counted HDSL loops as 24 business lines, but that it would be *appropriate* to do so. Because BellSouth apparently reserves the right to do so in the future, the Commission must resolve the issue here, even though it may not affect wire centers in this proceedings.

[27] 47 CFR § 51.5, emphasis added.

Second, the FCC was clear that its business line tally is not intended to identify CLEC loops. The FCC specifically rejected suggestions that it should expand the analysis to include CLEC loops:

> 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.[28]

The additional capacity of an HDSL-capable loop – to the extent it is activated at all – are essentially CLEC-created loops. Not only did the FCC *not* indicate that HDSL-capable loops should be included in the business line count, to include any additional capacity created on those loops by the CLEC would be the equivalent of counting CLEC capacity – an approach the FCC explicitly rejected.

Q. Is there anything in the *TRRO* that even hints at treating a HDSL-capable loop as a DS1?

A. No, I do not believe that the *TRRO* can be legitimately read to suggest that HDSL-capable loops should be assumed equal to 24 switched business lines. It is true that the FCC recognized that HDSL *technology* may be one of the means used to

[28] *TRRO*, ¶105.

provide a DS1 loop (by BellSouth).[29] In defining BellSouth's unbundling obligations, the FCC stated:

> 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.[30]

Taken out of context, the second sentence of the above cite might be misread in isolation as implying that BellSouth's unbundling obligations for HDSL-capable loops were equivalent to its unbundling obligations for DS1 loops. (Of course, even this reading nowhere suggests that HDSL-capable loops are to be *counted* as though they are 24 switched business lines for purposes of categorizing wire centers). When both sentences are read together (as they must be), however, it is clear that the FCC was defining a DS1 loop as a facility that is a 1.544 mbps channel, not anything that could someday become one, with the second sentence merely recognizing that a variety of facilities could be used to actually support the service.

[29] It is useful to note that the FCC only referenced HDSL-capable loops as having some relation to a DS1 loop in that section of its rules addressing BellSouth's unbundling obligations. BellSouth's contribution to the total business line count used to categorize wire centers, however, is determined by its ARMIS 43-08 filing. There is no basis to confuse the FCC's discussion of the technologies used by BellSouth to provision a DS1 with how the Commission should count such loops for purposes of arriving at the business line count.

[30] 47 C.F.R. §51.319(a)(4).

Q. Does the *TRRO* contain language that indicates the FCC intended that BellSouth's obligation to provide HDSL-capable loops would continue, even where it was not required to unbundle a DS1 loop?

A. Yes. As part of its rationale that CLECs would be able to serve customers even where DS1 loops would no longer be unbundled, the FCC reasoned that CLECs would be able to use HDSL-capable loops (ironically citing to BellSouth for record support):

> The 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. *See* BellSouth Dec. 8, 2004 DS1 *Ex Parte* Letter at 2 (stating that competitive LECs can use the following types of copper loops to provide DS1 service to customers: (1) 2-wire or 4-wire High Bit Rate Digital Subscriber Line (HDSL) Compatible Loops; (2) Asymmetrical Digital Subscriber Line Compatible Loops; (3) 2-wire Unbundled Copper Loops-Designed; or (4) Unbundled Copper Loop Non-Designed).[31]

Obviously, the FCC could not have tied BellSouth's unbundling obligations for HDSL-capable loops to its DS1 unbundling obligations because it concluded (as encouraged to do so by BellSouth) that CLECs would still be able to use HDSL capable loops as UNEs to serve customers where DS1 loops were no longer unbundled.

[31] *TRRO*, footnote 454 to ¶163, emphasis added.

Q. In addition to the number of business lines, the other variable used to categorize wire centers for purposes of determining §251 UNE availability is the number of "fiber-based collocators." How does the FCC define a fiber-based collocator?

A. The complete definition of a fiber-based collocator is as follows:

> Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that
>
> (1) terminates at a collocation arrangement within the wire center;
>
> (2) leaves the incumbent LEC wire center premises; and
>
> (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph.
>
> Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.[32]

In practical terms, before BellSouth may restrict §251 access to high-capacity transport in a wire center that qualifies on the basis of the number of fiber-based

[32] 47 C.F.R. §51.5

collocators, there must be at least 4 independent fiber networks (or their equivalent) for DS-1 transport in both wire centers (or at least 3 such networks to eliminate §251 access to DS-3 transport).

Q. How should the Commission proceed to evaluate BellSouth's claims regarding the number of business lines and fiber-based collocators so as to correctly categorize each wire center as required by the *TRRO*?

A. As I noted earlier, nearly all of the information used to categorize wire centers is in BellSouth's control. Consequently, the first step in any validation process is to obtain all the requisite information to determine its accuracy.[33] CompSouth has initiated this process, serving discovery on BellSouth that will enable it the ability to thoroughly analyze the wire center categorizations proposed by BellSouth in its direct testimony. Thus, while the testimony above has explained the appropriate methodology to employ, until discovery is complete it is not possible to recommend specific categories for individual wire centers.

Q. What should the Commission do once it fully reviews the underlying wire center data (and the recommendations of your rebuttal testimony)?

[33] I note that this reason alone requires state commission oversight in which meaningful discovery is a standard procedure.

A. I recommend that the Commission adopt an order establishing the appropriate wire center designations for the BellSouth's operating territory in Kentucky, subject to the annual-update process described in the following section. This list should be incorporated by reference in the interconnection agreements adopted to implement the *TRRO*.

B. The Recommended Process for Future Changes

Q. Should the Commission also establish a formal process to review proposed changes to the wire center list?

A. Yes. The fundamental problem complicating the creation of this initial wire center list – i.e., that BellSouth has exclusive access to the requisite information while having a incentive to distort the analysis – will be as true in the future as it is now. Thus, the Commission should establish a set procedure that will enable entrants to challenge/validate future changes.

Q. What process do you recommend the Commission adopt?

A. I recommend that an annual filing procedure be established that is keyed to BellSouth's annual filing of ARMIS business line data. Because the ARMIS 43-08 data provides a foundation to the analysis, I recommend that BellSouth's

requested changes (if any) be proposed simultaneously with its ARMIS filing.

Specifically:

* BellSouth would file a proposed list of any new wire centers on April 1 of each year (coincident with its filing of ARMIS 43-08 with the FCC), reflecting the number of business lines and fiber-based collocators in each wire center as of December 31st of the year just ending.

* Included with the April filing, BellSouth would file all supporting documentation that each new wire center meets *TRRO* criteria, including the following information. Such documentation would be available to CLECs under terms of a standing proprietary agreement.

  a. The CLLI of the wire center.
  b. The number of switched business lines served by RBOC in that wire center as reported in ARMIS 43-08 for the year just ending.
  c. The number of UNE-P lines used to serve business customers.
  d. The number of analog UNE-L lines in service.
  e. The number of DS-1 UNE-L lines in service.
  f. The number of DS-3 UNE-L lines in service.
  g. A completed worksheet that shows, in detail, any conversion of access lines to voice grade equivalents.
  h. The names of claimed independent fiber-optic networks (or comparable transmission facilities) terminating in a collocation arrangement in that wire center.

* CLECs would have until May 1 to file a challenge to any new wire center named by BellSouth.

* The Commission should have a standing hearing date reserved (by June 1) to take evidence on any disputed wire center, and issue a decision by June 15th.

* Any changes to the wire center list would become effective on July 1 of that year.

Under the schedule above, any dispute concerning the appropriate wire center designation would be resolved within 90 days of BellSouth's initial filing with a revised wire center list becoming effective July 1. By having a standard procedure, the Commission can provide BellSouth a reasonable opportunity to update wire center lists as often as a critical piece of new information is collected (i.e., the ARMIS 43-08), while still ensuring CLEC rights are protected and its own time is used efficiently.

C. The DS1 Transport Cap

Q. Please explain the issue concerning the cap on DS1 transport.

A. As I explained earlier, the FCC adopted different wire center standards to determine where DS1 and DS3 transport must be offered as §251 network elements. As a general rule, the FCC concluded that DS1 transport must be offered as a §251 element everywhere except between Tier 1 wire centers, while DS-3 transport would be available along a more limited set of routes (i.e., DS3 transport would not be available as a §251 element along routes connecting Tier 1 *and* 2 wire centers).

In reaching this determination, however, the FCC recognized that a DS3 is simply a larger unit of digital capacity that is equal to 28 DS1s. As a result, a carrier ordering multiple DS1s could, at some point, have sufficient transport

requirements to justify a DS3. In such circumstances, the FCC needed to reconcile having *different* unbundling obligations for DS1 transport, even where a CLEC had (at least in theory) sufficient transport demand to have ordered a DS3 (at which point the FCC had concluded the CLEC was no longer impaired).

Q. How did the FCC reconcile these conclusions?

A. The FCC reconciled its impairment determinations by placing a cap on the number of DS1s a carrier may order on any route where DS3s are not available, under § 251 applying the theory that if the carrier had a sufficient number of DS1s that it *could* have ordered a DS3, then the non-impairment finding for DS3 transport on that route should apply.[34]

> On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.[35]

[34] The FCC adopted a similar limitation with respect to DS3 transport, reasoning that if a carrier leased 12 DS3s along an individual route that it would have achieved the scale needed to justify deployment (*TRRO*, ¶131).

[35] *TRRO*, ¶128. Footnotes omitted.

As the above discussion makes clear, the FCC adopted its cap on DS1 transport only "on routes for which we [the FCC] determine that there is no unbundling obligation for DS3 transport," not along routes where DS3s themselves would be available.

Q. Is BellSouth attempting to game the FCC's findings by restricting access to DS1 transport along all routes?

A. Yes. As the above makes clear, the sole purpose for the FCC's cap on DS1 transport was to reconcile its impairment findings for DS1 transport with its broader limitation on DS3 transport. The limitation on DS1 transport is not a *general* limitation, it is specific to only those routes where there is no §251 unbundling obligation for DS3 transport.

Unfortunately, BellSouth is attempting to game the FCC's rules, claiming that the DS1 cap applies on all routes, even those routes where the FCC has determined CLECs would be impaired even if they had sufficient needs to justify a DS3. BellSouth takes this position (presumably) because the specific rule implementing the cap on DS1 transport is not as clear as the *TRRO* itself.[36]

[36] Specifically, 47 C.F.R. §51.319(a) (e)(2)(ii)(B) states:

Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

Q. Is it responsible to read individual rules in isolation, without the accompanying text?

A. No. The cap on DS1 transport was adopted for a very specific purpose – to prevent CLECs with enough individual DS1s that they were purchasing the equivalent of a DS3 from avoiding the FCC's finding that the a DS3 need not be offered on that particular route (at least under §251). The TRRO is absolutely clear on this. I repeat:

> On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits…. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.[37]

BellSouth's claim that it need not offer more than 10 DS1s on routes where DS3s would also be available under §251 is fundamentally inconsistent with the FCC's findings – on routes which include a Tier 3 wire center on either end, CLECs are just as impaired with respect to the 11th DS1 (or 12th or 13th) as they are with the 10th. Indeed, the FCC has concluded that on those routes the CLEC would be impaired even if it required a DS3 (or multiple DS3s). BellSouth has no

[37] *TRRO*, ¶128. Footnotes omitted, emphasis added.

justification for refusing to provide additional DS1s on routes where both the DS1 and the DS3 (if the CLEC chooses to request one) are available as §251 elements.

Q. What do you recommend?

A. The Commission should require that interconnection agreements conform to the finding in the *TRRO* that the 10 DS1 limitation on dedicated transport applies solely on routes where DS3 transport is not required to be unbundled under §251.

IV. Establishing §271 Alternatives (Issues List No. 8)

Q. Why is it important for the Commission to establish §271 compliant offerings in this proceeding?

A. As I explain in more detail below, BellSouth is subject to two, independent, unbundling obligations under the federal Act. First, there are the unbundling obligations under §251 of the Act that generally apply to incumbent LECs wherever the FCC has determined impairment. In addition, however, BellSouth voluntarily embraced a broader unbundling obligation under §271 of the Act in exchange for the authority to provide long distance services in Kentucky.

Significantly, until this proceeding concludes with interconnection agreements reflecting the reduced unbundling obligations established by the *TRRO*, BellSouth's §271 obligations will have been satisfied by §251 offerings that duplicated the specific requirements of §271. As §251 offerings are removed (either in whole or in part), however, CLECs must make informed choices as to alternatives to the §251 offerings they have used in the past. Because BellSouth's §271 offerings represent an important option to CLECs, the Commission must give practical effect to this option so that an orderly transition from §251 offerings to §271 offerings (or other choices) may occur. This includes (as I describe below) establishing "just and reasonable" prices for §271 elements, as well as adopting appropriate terms and conditions of service.

A. BellSouth's Unbundling Obligations are Defined by Both §251 and §271

Q. Does the federal Act include two separate and independent requirements concerning the unbundling of BellSouth's network?

A. Yes. Section 251 of the Act (which applies to all ILECs) calls for the unbundling of network elements upon a finding of impairment. Network elements unbundled in accordance with §251 of the Act must be priced at TELRIC in accordance with FCC rules. Bell Operating Companies (including BellSouth), however, are also subject to §271 of the Act that imposes *additional* unbundling obligations as a condition to their offering in-region, interLATA services.

Q. What network elements are specifically required to be offered by BellSouth in order to comply with §271 of the federal Act?

A. The specific obligations are spelled out in the "competitive checklist."[38] The FCC determined in the *TRO* that the competitive checklist imposed distinct obligations requiring the offering of local switching, local loops, transport, as well as databases and signaling. As the FCC summarized its decision:

> Specifically, the Commission considered the relationship between checklist item two (which references section 251) and checklist items four through six and ten (which do not). The Commission concluded that checklist items four through six and ten constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements that does not necessarily hinge on whether those elements are included among those subject to section 251(c)(3)'s unbundling requirements. Accordingly, the Commission stated that even if it concluded that requesting telecommunications carriers are not "impaired" without access to one of those elements under section 251, section 271 would still require the BOC to provide access.[39]

The FCC's conclusions regarding the additional obligations of §271 were affirmed by the D.C. Circuit in *USTA II*.[40] As such, BellSouth's obligations under

[38] 47 U.S.C. § 271(d)(3).

[39] In the Matter of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), WC Docket 01-338 et al., Memorandum Opinion and Order at ¶ 7 (rel. Oct. 27, 2004) ("Broadband Forbearance Order") (footnotes omitted).

[40] *USTA v. FCC*, 359 F.3d 554, 588-590 (D.C. Cir. 2004) ("*USTA II*").

Section 271 continue, unless and until the FCC "forebears" from the requirements of the competitive checklist.[41]

Q. Why would Congress establish additional unbundling obligations in §271 of the federal Act?

A. Congress well understood that permitting the RBOCs to offer in-region long distance services carried great risk. As everyone knew when the Act passed, the RBOCs' ability to bundle local and long distance would be the most powerful force in post-divestiture telecommunications. As noted earlier, BellSouth has achieved nearly a 55% penetration rate for mass market long distance services in Kentucky,[42] a level of success more than twice that achieved by MCI over twenty years.

Precisely because of this expected advantage, Congress was clear that interLATA authority would only be permitted where an RBOC had *fully* opened its network to competitors. Specifically, §271 of the Act required that each of the core elements of the local network – loops, transport, switching and signaling – would be available to competitive entrants in any state where the RBOC sought to offer

[41] The FCC has chosen to forebear from requiring continued unbundling of certain "broadband" network elements. (*See generally Broadband Forbearance Order.*) This decision, however, does not curtail BellSouth's obligations with respect to other affected elements, such as switching or high capacity loops or transport offered over conventional technologies.

[42] BellSouth Investor Briefing, 2nd Quarter 2005, July 25, 2005, page 7. Market penetration is for Kentucky and other states obtaining long distance authority at the same time.

long distance service, without the need for any additional findings by the FCC as to whether an entrant would be "impaired." As the FCC recognized:

> These additional requirements [the unbundling obligations in the competitive checklist] reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market . . . . The protection of the interexchange market is reflected in the fact that section 271 primarily places in each BOC's hands the ability to determine if and when it will enter the long distance market. If the BOC is unwilling to open its local telecommunications markets to competition or apply for relief, the interexchange market remains protected because the BOC will not receive section 271 authorization.[43]

Q. What issues must be resolved in order to establish a §271-compliant offering?

A. The principal issue that must be resolved in order to establish a 271-compliant offering is price. The FCC has determined that §271 elements are subject to a *potentially* more liberal pricing standard than the standard that applies to elements offered under §251 of the Act. Specifically, network elements offered solely in order to comply with §271 must be just, reasonable, nondiscriminatory and provide meaningful access:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate

[43] *TRO* ¶ 655.

> standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[44]

In addition, state commissions must arbitrate appropriate terms and conditions of service, most specifically whether BellSouth is required to connect network elements obtained under §251 to elements obtained under §271 (or other wholesale offerings). As I explain below, when BellSouth "connects" §251 elements with non-§251 offerings, the act is referred to as "commingling."

B. §271 Elements Must be Offered in Interconnection Agreements

Q. Does §252 govern the establishment of §271-compliant offerings, including the establishment of just and reasonable rates, terms and conditions?

A. Yes. Each §271 network element must be offered through interconnection agreements that are subject to the §252 state commission review and approval process. Section 271(c)(2)(A) of the Act clearly links a BOC's duty to satisfy its obligations under the competitive checklist to the BOC providing that access through an interconnection agreement (or a statement of generally available terms ("SGAT")), stating:

[44] *TRO* ¶ 663 (footnotes omitted).

> (A) AGREEMENT REQUIRED - A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—
>
> (i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [Interconnection Agreement], or
>
> (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and
>
> (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the competitive checklist].[45]

As the above-quoted language makes clear, the specific interconnection obligations of §271's competitive checklist (item ii above) must be provided pursuant to the "agreements" described in Section 271(c)(1)(A). By directly referencing Section 271(c)(1)(A) and (B), the Act ties compliance with the competitive checklist to the review process described in Section 252. As Section 271(c)(1) states:

> (1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
>
> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has

[45] 47 U.S.C. § 271(c)(2)(A).

> entered into one or more binding **agreements that have been approved under section 252** specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.[46]

Thus, just as the 252 arbitration process is the vehicle through which the new unbundling rules described in the *TRRO* are implemented, so too must the 252 process be used to establish the contract terms, conditions and prices for §271-compliant network elements. §271 specifically and unambiguously requires that checklist items be offered through interconnection agreements approved under §252 of the Act.

Q. Has the Supreme Court addressed the complementary roles of the FCC and the states in regulating interconnection agreements under §252?

A. Yes. As the Supreme Court explained:

> . . . 252(c)(2) entrusts the task of *establishing rates* to the state commissions . . . . The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). *It is the States that will apply those standards and*

[46] 47 U.S.C. § 271(c)(1)(emphasis added).

> *implement that methodology, determining the concrete result in particular circumstances*.[47]
>
> ***
>
> The approach [in the federal Act] was deliberate, through a hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates.[48]

Although the particular circumstance being addressed by the Supreme Court concerned the TELRIC pricing standard, the *process* being endorsed by the Court is appropriate operation of Section 252 framework, which relies on the state commissions to arbitrate (when needed) and approve all interconnection agreements.

C. Establishing §271 Compliant Prices

Q. You indicated that the FCC adopted a "just and reasonable" pricing standard to govern §271 rates. Is this standard significantly different than the TELRIC standard used to judge the prices of §251 elements?

A. No, not entirely. Indeed there is an important nexus between the two standards – that is TELRIC rates *must* fall within the range of just and reasonable rates by statute. The Act itself requires that rates for §251 network elements (which the

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[47] *AT&T Corp. vs. Iowa Utilities Board*, 525 U.S. 366, 385, 119 S.Ct. 721, 732 (1999) (emphasis added).

[48] *Verizon Communications, Inc. v. FCC*, 535 U.S. at 489.

FCC has interpreted to require compliance with the TELRIC standard) must be "just and reasonable."[49] However, the FCC has also concluded that the just and reasonable standard could permit prices different than TELRIC-based rates:

> So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, *but does not require TELRIC pricing*.[50]

Thus, although §271 does not require TELRIC-based rates, the fact that such rates must also all be within the range of just and reasonable rates should help inform the Commission as to what rates would be appropriate in a §271-compliant offering.

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[49] Specifically, section 252(d) PRICING STANDARDS requires:

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES-

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

[50] *TRO* ¶ 659 (emphasis added).

Q. Are you prepared to recommend permanent §271 prices at this time?

A. CompSouth has served discovery on BellSouth with the intent that specific rate recommendations can be made in this proceeding. It may be necessary, however, for the Commission to adopt interim §271 rates for high capacity loops and transport (where no longer required under §251), pending the completion of a separate "permanent" rate investigation.

Q. If the Commission does adopt interim rates for high capacity loops and transport, what rate level do you recommend?

A. The *TRRO* adopted specific transitional pricing rules to apply to UNEs that are no longer required to be unbundled under §251 of the Act. These transitional rates imposed a 15% increase on loops and transport prices where §251 no longer compelled TELRIC-based rates. These transitional increases would be a reasonable first approximation of "just and reasonable" §271 rates if the Commission is unable to establish permanent rates at this time. Indeed, as Cinergy Communications advised this Commission on July 21 2005, this approach was recently adopted by the Missouri Public Service Commission.[51]

[51] Arbitration Order, Public Service Commission of Missouri, TO-2005-0336, July 11, 2005.

D. BellSouth's Commingling Obligations Apply to §271 Elements (Issues List No. 14)

Q. In addition to price, are there any other critical issues that must be addressed for §271 offerings to provide entrants "meaningful access?"[52]

A. Yes. Price is only half the equation – in addition, §271 offerings must include terms and conditions that are commercially useful. As a general policy, the Commission should require that §271 offerings should be identical – except as to price – to the §251 offerings they replace.

Q. Is BellSouth required to "combine" §271 elements with other elements?

A. Yes, although it is important to describe BellSouth's obligation in the appropriate terms because of the semantic construction of federal rules concerning the connection of network facilities for use by a competitor. Specifically, the FCC has limited the term "combining" to refer to the particular circumstance where

[52] Although the FCC's pricing standard for §271 network elements is frequently shortened to "just and reasonable," the complete standard includes requirements that rates be nondiscriminatory and provide meaningful access (TRO, ¶663 emphasis added):

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.

both elements being requested by an entrant are required by §251 of the federal Act. As such, BellSouth is not technically required to "combine" §271 elements, but that does not mean that BellSouth does not have the same obligation to *connect* §271 elements as it does for elements required under §251 – what changes is the term used to describe the activity, not the obligation itself.

Q. What term is used to describe BellSouth's obligation to connect §251 elements to other wholesale services, such as §271 elements?

A. The term commingling is used to describe BellSouth's obligation to connect a §251 network element to any other wholesale offering (such as a §271 network element). As the FCC explained:

> 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 the combining of a UNE or UNE combination with one or more such wholesale services.[53]

[53] TRO ¶ 597. Emphasis added. Specifically, in CFR 51.5:

Commingling means 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. Commingle means the act of commingling.

Obviously, §271 services listed in the competitive checklist are "wholesale services" – indeed, these checklist items are such important wholesale services that Congress specifically demanded that BellSouth agree to offer such services as a precondition to its offering in-region long distance services.

Q. Is BellSouth required to offer UNE combinations and commingled arrangements?

A. Yes. The FCC's rules involving combinations and commingled arrangements work together to ensure that each of the discrete elements offered by BellSouth – whether offered under §251 of the Act, as special access or any other wholesale arrangement (which would include elements offered pursuant to §271 of the Act) – are also available in connected form. What defines the difference between a "combination" and "commingling" is not the *facilities* themselves that are connected, but the *legal* obligation under which they are offered. The "combinations rules" (which apply to §251 network elements) are based on the nondiscrimination requirement found in §251. "Commingled" arrangements, however, include *both* §251 network elements and network facilities/functions offered through a mechanism other than §251.

Importantly, the fact that commingled arrangements include both §251 and non-§251 elements does not grant BellSouth a license to discriminate, for more than just §251 of the federal Act prohibits discriminatory and anticompetitive conduct.

Specifically, the FCC has held (and the D.C. Circuit has affirmed) that the general nondiscrimination obligations of §202 apply to these other wholesale offerings, including those offerings required by the competitive checklist (loops, transport, switching and signaling).[54]

Q. Has the FCC determined that general requirements of §§ 201 and 202 obligate BellSouth to connect elements to form "commingled" arrangements?

A. Yes. Like its rules that apply specifically to §251 network elements, the FCC found that the general nondiscrimination duties of §202 imposed similar obligations where arrangements containing both §251 and non-§251 facilities and/or services were involved:

> In addition, upon request, an incumbent LEC shall 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.[55]
>
> ***
>
> 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

[54] As explained in *USTA II*: "Of course, the independent unbundling obligation under § 271 is presumably governed by the *general* non-discrimination requirements of § 202." U.S. Telecom Ass'n vs. FCC, 359 F3d 554, decided March 2, 2004, emphasis in the original.

[55] TRO ¶ 597.

> commingling would be inconsistent with the nondiscrimination requirement in Section 251(c)(3).[56]

Thus, whether the applicable nondiscrimination standard is contained in §251 or §202 is immaterial – BellSouth may not refuse to combine wholesale offerings, whether such offerings are entirely comprised of §251 elements (combinations), or §251 elements with other offerings (commingling).

Q. Is it reasonable to require that BellSouth permit carriers to "mix and match" wholesale offerings (including §271 network elements) in this way?

A. Absolutely. There is no question that BellSouth must offer the individual elements and facilities/services that comprise the combinations and commingled arrangements that CLECs seek. The issue here is simply whether BellSouth should be permitted to impose operational impediments to using elements together, when the entire purpose of each of these wholesale arrangements (assuming they are not sham attempts at feigned regulatory compliance) is offerings that are commercially useful.

Q. What do you recommend?

[56] TRO ¶ 591. Footnotes omitted.

A. I recommend that the Commission require BellSouth to offer §271 elements under the same terms and conditions as apply (or, in the case of switching, applied) to the parallel §251 offering, except as to price.

E. Performance Plans and §271 (Issues List No. 13)

Q. In addition to retaining all the other terms and conditions of service, should the Commission also continue to apply performance plans to BellSouth's §271 offerings in the same manner that such plans apply to UNEs required under §251?

A. Yes. The performance penalty plans were an important part of BellSouth's commitment to maintain open markets after it had obtained approval to offer long distance services. As the FCC explained when it granted BellSouth authority to provide long distance services in Kentucky:

> …we find that the existing SEEM plans currently in place for these states [including North Carolina] provide assurance that these local markets will remain open after BellSouth receives section 271 authorization… We therefore approve of these plans and accord them the same probative value as we did the Georgia plan.[57]

[57] Memorandum Opinion and Order, Federal Communications Commission Docket CC 02-150, September 18, 2002, ¶ 293.

With the "probative value" ascribed to SEEM plans by the FCC during its review of BellSouth's Georgia application:

> Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has found that the existence of a satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.[58]

As the above made clear, these plans were used as probative evidence that BellSouth would continue to meet its §271 obligations after a grant of authority. As such, the mere fact that an element has moved from being a §251/§271 obligation to solely a §271 obligation hardly justifies eliminating provisions adopted to ensure compliance with §271. As these plans were adopted to ensure continuing compliance with §271, they should continue to apply to those offerings made available to comply with §271.

[58] Memorandum Opinion and Order, Federal Communications Commission Docket CC 02-35, May 15, 2003, ¶ 291. Emphasis added.

V. Miscellaneous Issues

A. Routine Network Modifications
(Issues List No. 26-27)

Q. What are routine network modifications?

A. The FCC defines routine network modifications as follows:

> A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers.[59]

Under FCC rules, BellSouth is obligated to make routine network modifications for CLECs where the UNE loop has already been constructed.

Q. Does the FCC list or provide examples of routine network modifications?

A. Yes, it does. With respect to loops, the FCC stated:

> Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine modifications may entail activities such as accessing

[59] 47 C.F.R. § 51.319(a)(8)(ii)(local loops); § 51.319(E)(5)(ii)(dedicated transport).

> manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings.[60]

Q. Did the FCC also provide examples of what was not a routine network modification?

A. Yes, the FCC provided:

> Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier.[61]

Q. Should the network modification language closely track the FCC's specific discussion?

A. Yes. The key is that the BellSouth must be required to provide all the same network modifications for the CLEC's customers that it performs for itself. This is particularly true for high-capacity facilities, which are the predominant loop-type required by CLECs and the loop-type most frequently modified to support high-capacity services.

Q. Is it clear that the FCC intended that its routine network modification policies would apply to high capacity loops?

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60 *Id.*

61 *Id.*

A. Yes. For example, in ¶633 of the *TRO*, the FCC noted that the ILECs, in provisioning "high-capacity loop facilities" to CLECs, must make the same routine modifications to their existing loop facilities that they make for their own customers. Moreover, in ¶634, the FCC noted that its "operating principle is that incumbent LECs must perform all loop modification activities that it [sic] performs for its own customers." Finally, in ¶635, where the FCC actually discusses findings in the record about attaching routine electronics, the FCC began by stating as follows:

> The record reveals that attaching routine electronics, such as multiplexers, apparatus cases, and doublers, to high-capacity loops is already standard practice in most areas of the country.[62]

The key is that the provisions requiring BellSouth to perform the same routine network modifications for high capacity loop facilities used to serve CLEC customers as it does for itself.

B. Line Conditioning (Issues List No. 33*)

Q. Has the FCC adopted specific rules requiring BellSouth to condition loop plant to support advanced data services?

[62] *TRO*, ¶ 635.

A. Yes. BellSouth is expressly required to perform "line conditioning" under 47 CFR 51.319 (a)(1)(iii):

> (iii) Line conditioning. 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. If the incumbent LEC seeks compensation from the requesting telecommunications carrier for line conditioning, the requesting telecommunications carrier has the option of refusing, in whole or in part, to have the line conditioned; and a requesting telecommunications carrier's refusal of some or all aspects of line conditioning will not diminish any right it may have, under paragraphs (a) and (b) of this section, to access the copper loop, the high frequency portion of the copper loop, or the copper subloop.

Q. Is Line Conditioning the same obligation as Routine Network Modification?

A. No. As the above rule provision makes clear, BellSouth is obligated to condition facilities *"...*whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop." Thus, BellSouth need not routinely condition loop facilities for its own services for it to be obligated to condition facilities for other CLECs.[63] The obligation to conduct routine network modifications (discussed above), by contrast, is a separate and distinct obligation

[63] I note that if BellSouth does routinely condition its own facilities, it would be required to perform such modifications for a CLEC.

from BellSouth's additional obligation to perform line conditioning for CLECs. In fact, these two obligations are governed by distinct rules: Routine Network Modifications are mandated by Rule 51.319(a)(8), while Line Conditioning is mandated by Rule 51.319(a)(1)(iii). Thus, the structure of Rule 51.319 in itself demonstrates that Line Conditioning is not the same obligation as a Routine Network Modification.

Q. Can you provide an example that illustrates the difference between "Line Conditioning" and a "Routine Network Modification"?

A. Yes. To a large extent, BellSouth's' DSL offerings are housed in remote terminals, located closer to customers. CLECs, on the other hand, collocate their equipment at the central office and, therefore, must frequently use longer loops.

To the extent that BellSouth limits its own line conditioning to shorter loops because of its network architecture, it could claim that it does not need to perform line conditioning for a CLEC because it was not a "routine network modification."[64] However, because the FCC has specifically established Line Conditioning as an obligation that BellSouth must honor *whether or not it would do so for its own customers*, BellSouth must still condition facilities at the request

[64] The FCC defines a Routine Network Modification as "…an activity that the incumbent LEC regularly undertakes for its own customers."

of the CLEC at the TELRIC-compliant rates already approved by this Commission.

C. EEL Audit Requirements (Issues List No. 29)

Q. Do FCC rules permit BellSouth to audit CLEC use of high capacity EELs?

A. Yes. This authority, however, is not open ended. To the contrary, the FCC determined that the ILEC should have only "a limited right to audit compliance with the qualifying service eligibility criteria"[65] and left it to the state commission to develop specific approaches:

> … we [the FCC] recognize that the details surrounding the implementation of these audits may be specific to related provisions of interconnection agreements or to the facts of a particular audit, and that the states are in a better position to address that implementation.[66]

Principles that the FCC established are that the ILEC should use an independent auditor and perform audits no more than once each year.[67] To assure independence, the auditor should be mutually agreed upon by BellSouth and the CLEC.

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65 TRO, ¶626, emphasis added.

66 *TRO*, ¶ 625.

67 *TRO*, ¶ 626.

Q. Is the FCC's audit scheme intended to encourage "fishing expeditions?"

A. No. The FCC's principles are clear. BellSouth has only a "limited right to audit," not an open invitation; in addition, the FCC's intention was to grant CLECs "... unimpeded UNE access based upon self-certification, subject to later verification based upon cause."[68] It is not enough to merely want to audit, BellSouth must have some basis that an audit is appropriate.

Q. What type of procedure do you recommend?

A. To assist a CLEC in preparing to respond to a BellSouth EEL audit request, BellSouth should provide the CLECs with proper notification and the basis to BellSouth's assertion that it has good cause to conduct an audit. CLECs are entitled to review relevant documentation that forms the basis for the cause alleged, and to know which circuits are implicated by those allegations. This approach is necessary to give "teeth" to the FCC's *for-cause* audit standard; undocumented cause is no cause at all. Moreover, because it makes relevant documentation available early in the process, the approach proposed by CompSouth would identify potential issues quickly, thus avoiding unnecessary disputes over whether BellSouth may or may not proceed with an audit.

[68] *TRO*, ¶ 622. Emphasis added.

By requiring BellSouth to establish the scope and the basis for its claimed right to audit up front, it is more likely that BellSouth and the target CLEC will be able to narrow and/or more quickly resolve disputes over whether or not BellSouth has the right to proceed with an EEL audit. Although the *TRO* did not include a specific notice requirement, this Commission may order such a requirement. As noted above, the *TRO* only includes "basic principles for EEL audits" and should not be construed as a comprehensive overview of all EEL audit requirements.

D. Mandated Migration Charges (Issues List No. 10)

Q. How do you define a "mandated migration?"

A. I use the term here to refer to any migration that BellSouth effectively forces on an entrant because a particular UNE or Combination is no longer offered. These migrations are not the choice of the CLEC. As the "moving party" for change, BellSouth should accept responsibility for identifying circuits to be migrated and absorb any non-recurring activity associated from implementing its own decisions.

Establishing new arrangements – whether different network configurations or simply new prices – are not the choice of the CLEC. Because it is BellSouth that stands to garner all of the benefit from conversions from §251 UNEs to other

arrangements, BellSouth should shoulder the costs associated with implementing its demands. The CLECs will already face higher costs by paying BellSouth higher prices; they should not also be required to pay order placement charges, disconnect charges or nonrecurring charges associated with a conversion to or establishment of an alternative service arrangement.

VI. Conclusion

Q. Please summarize your testimony.

A. The decisions the Commission reaches in this arbitration will be the most competitively significant since the initial arbitrations established the foundation for local competition. As the market moves from §251-based offerings to alternatives, including §271-compliant offerings, the goal must be continued competition. The recommendations above are offered with that goal in mind.

Q. Does this conclude your testimony?

A. Yes.