

COMMONWEALTH OF KENTUCKY

BEFORE THE 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)

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

September 8, 2005

I. Introduction 1
II. BellSouth is Required to Provide Access to DS1s on all FTTC, FTTH and Hybrid Loops 4
III. Wire Center Designations 14
IV. Section 271 Prices and Commingling 25
V. Other Issues 34
Issue 3: General Implementation 34
Issue 2: Transition Requirements 35
Issue 4: Building Definition 40
Issue 13: SQM/PMP/SEEM 41
Issue 30: The All or Nothing Rule and Deemed Amended 43

1
2
3
4

I. Introduction

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

1 A. My name is Joseph Gillan. My business address is P. O. Box 541038, Orlando,
2 Florida 32854. I previously filed direct testimony on behalf of CompSouth in this
3 proceeding.

4
5 **Q. What is the purpose of your rebuttal testimony?**

6
7 A. The purpose of my rebuttal testimony is to respond to several key areas of
8 disagreement highlighted by BellSouth's direct testimony.¹ Specifically, my
9 rebuttal testimony addresses:

10

11 * BellSouth's suggestion that it is no longer required to offer
12 unbundled access to fiber and hybrid loops used to serve enterprise
13 customers. As I explain below, BellSouth remains obligated to
14 offer access to DS1s, whether or not it has deployed a hybrid (or
15 all fiber) architecture. FCC broadband policies do not exempt
16 BellSouth from providing high-capacity loops to serve enterprise
17 customers, which include any customer desiring service over a
18 DS1.

19

20 * BellSouth's proposed wire center designations implementing the
21 FCC's impairment determinations for high capacity loops and
22 transport. In Kentucky, BellSouth's wire center claims rest
23 entirely on its claims about the number of fiber-based collocators.
24 Unfortunately, this is also the area where discovery remains
25 outstanding and the CLECs are not yet in a position to validate
26 and/or challenge BellSouth's claims. Consequently, CompSouth

¹ I note that the issues addressed by my rebuttal testimony are not the only areas where I disagree with BellSouth. In a number of areas, however, my direct testimony adequately addresses issues that were foreshadowed by the issues list in this proceeding. The focus of my rebuttal testimony is on new issues and areas where discovery and additional information is needed (for instance, with respect to the correct categorization of wire centers for purposes of defining BellSouth's obligations to offer high capacity loops and transport at TELRIC-based rates under §251 of the federal Act).

1 must reserve the opportunity to file additional testimony or provide
2 additional analysis at hearing, once ongoing discovery is
3 concluded.²
4

5 * BellSouth's refusal to address checklist items required under §271,
6 despite the clear language in the federal Act that such offerings
7 must be included in interconnection agreements approved pursuant
8 to §252 (which includes this Commission's review and approval).
9 In addition, I respond to BellSouth's claim that federal
10 commingling obligations exclude wholesale offerings required
11 under §271 and I explain why the Commission must establish
12 interim §271-compliant rates in this proceeding.
13

14 In addition to these three main areas, my rebuttal testimony also addresses a
15 number of other issues that, while individually important, are not as central to the
16 fundamental dispute as those listed above.

17
18 **Q. Does your testimony also identify areas where CompSouth has changed its**
19 **position to move closer to BellSouth?**

20
21 **A.** Yes. Attached to my testimony is a Revised Exhibit JPG-1 whose contract
22 language has been modified, where possible, to narrow issues with BellSouth.
23 Specifically, Revised Exhibit JPG-1 includes revised contract language to address
24 the following areas:

² This does not mean that CompSouth agrees with the methodology that BellSouth has used to calculate the number of business lines. To the contrary, BellSouth adopted an assumption unsupported by FCC Order, common sense and the facts – that is, BellSouth assumes that every digital access line is used to its *maximum potential capacity* to provide switched access lines services to business customers. However, because this assumption is irrelevant to the wire center designations in this state, my testimony will describe the dispute with BellSouth to prevent possible future disputes, but it does not affect the results here.

1

2

* Contract language is revised to indicate that transitional rates will be applied retroactively to March 11, 2005. However, so as to ensure that all interrelated changes occur simultaneously, provisions incorporating revised EEL eligibility, commingling and conversions must be treated as effective on that same date.

3

4

5

6

7

8

* The contract definition of a “business line” is revised to parallel the definition in the TRRO. It is clear that the dispute with BellSouth involves an *interpretation* of how the definition should be read and not the definition itself.

9

10

11

12

13

* The contract definition of a “building” is modified to move towards the concepts discussed by BellSouth, recognizing, however, that where individual tenants are served by independent and distinct points-of-entry for telecommunications facilities – that is, each area is, from a telecommunications perspective, an independent structure – then each area served by such separate point-of-entry for telecommunications services would be considered a separate building.

14

15

16

17

18

19

20

21

22

In addition, Revised Exhibit JPG-1 includes contract language that implements

23

the discussion concerning BellSouth’s ongoing obligation to provide access to

24

DS1 loops to serve enterprise customers (even loops that might not be available to

25

serve a mass market customer), as well as editorial changes needed to clarify the

26

original intent of the proposal.³

³ The Commission should be aware that there are outstanding discovery requests concerning fiber-based collocation that are *not* addressed by this testimony. As such, CompSouth reserves the right to file additional testimony/exhibits as discovery is produced. As this issue has evolved in other states, it is clear that BellSouth’s methodology to identify fiber-based collocators is flawed, with error rates for some carriers as high as 50%.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

**II. BellSouth is Required to Provide Access to
DSIs on all FTTC, FTTH and Hybrid Loops**

Q. Please summarize BellSouth’s claims regarding its unbundling obligations for broadband facilities.

A. In the TRO (and subsequent Orders), the FCC adopted reduced unbundling obligations for a variety of “broadband facilities,” specifically “fiber to the home” (FTTH),⁴ “fiber to the curb” (FTTC) and “fiber to the predominantly residential multi-dwelling unit” (MDU). BellSouth’s testimony, however, appears to extend the application of these reduced obligations beyond what the FCC intended

According to BellSouth, the “basic principle” that the FCC adopted in its broadband policies is simply that “CLECs continue to have access to currently existing last mile copper facilities, for as long as those facilities continue to exist.”⁵ BellSouth goes on to describe its obligations as:

BellSouth, per TRO Paragraph 271, is not obligated to “offer unbundled access to newly deployed or “greenfield” fiber loops.⁶

... the FCC ruled that hybrid loops should not be unbundled since they are part of the next generation network.⁷

⁴ Although the FCC refers to fiber-to-the-home and abbreviates the architecture as FTTH, it defines the configuration as fiber-to-the-customer-premise.

⁵ Fogle Direct, page 14.

⁶ Fogle Direct, page 17.

1

2

... the same unbundling relief framework (including any unbundling relief) established by the FCC in the TRO for FTTH loops also applies to FTTC loops.⁸

3

4

5

6

Q. Is BellSouth's characterization of the FCC's Orders complete?

7

8

A. No. There is a critical *limiting* factor in the FCC's "broadband exclusions" that

9

BellSouth completely ignores. That is, the *predicate* to BellSouth's reduced

10

unbundling obligations for these network architectures is that the loops are used to

11

serve mass market customers. BellSouth was not granted a *total* exception to its

12

loop unbundling obligations for all fiber and hybrid loops; rather, the FCC's

13

broadband exclusions were specifically limited to circumstances where these

14

loops are used to serve mass market customers. This basic predicate permeates

15

the FCC's Orders:

16

17

... we find that our unbundling rules for local loops servicing the mass market must account for these different loop architectures.⁹

18

19

20

Accordingly, we do not require incumbent LECs to provide unbundled access to new mass market FTTC loops for either narrowband or broadband services.¹⁰

21

22

⁷ Fogle Direct, page 18.

⁸ Fogle Direct, page 19. FTTH and FTTC are abbreviations for "Fiber to the Home" and "Fiber to the Curb," where the later requires that fiber be deployed to within 500 feet of each premise

⁹ TRO ¶ 221.

¹⁰ Order on Reconsideration, Federal Communications Commission, CC Docket 01-338, October 14, 2004, (*FTTC Order*), ¶ 14.

1

2

The Commission granted the greatest unbundling relief for dark or lit fiber loops serving mass market customers that extend to the customer's premises (known as fiber-to-the-home or FTTH loops) in new build or "greenfield" situations. For those loops, the Commission determined that no unbundling is required.¹¹

3

4

5

6

7

8

9

10

11

12

We decline to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market.¹²

13

14

15

16

17

18

...with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis, competitive LECs will need to continue to seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market.¹³

19

20

21

22

23

24

25

Thus, we determine that, particularly in light of a competitive landscape in which competitive LECs are leading the deployment of FTTH, removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market.¹⁴

26

27

28

29

30

31

32

... the rules we adopt herein do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market.¹⁵

¹¹ *FTTC Order*, ¶ 6.

¹² *TRO* ¶ 288 (emphasis added).

¹³ *TRO*, ¶ 272 (emphasis added).

¹⁴ *TRO* ¶ 278 (emphasis added).

¹⁵ *TRO* ¶ 288 (emphasis added).

1 In the *Triennial Review Order*, the Commission limited the
2 unbundling obligations imposed on mass market FTTH
3 deployments to remove disincentives to the deployment of
4 advanced telecommunications facilities in the mass market. We
5 find here that those policy considerations are furthered by
6 extending the same regulatory treatment to incumbent LECs' mass
7 market FTTC deployments.¹⁶
8

9 ... we conclude that, treating FTTC loops the same as FTTH loops
10 will encourage carriers to further deploy fiber architectures
11 necessary to deploy broadband services to the mass market, and
12 the benefits of such deployment outweigh the limited impairment
13 that competitive carriers face.¹⁷
14

15 The citations listed above are representative, not exhaustive, of the distinction
16 drawn by the FCC. In effect, the FCC adopted a broadband policy intended to
17 encourage broadband deployment in the mass market, principally to foster
18 competition for “triple play” services that combine voice, data and video.¹⁸ This
19 rationale does not apply to serving the enterprise market.
20

¹⁶ *FTTC Order* ¶ 2.

¹⁷ *FTTC Order*, ¶ 13.

¹⁸ For instance, when extending its unbundling exclusion to the fiber-to-the-curb architecture, the FCC concluded (*FTTC Order*, ¶ 10 and ¶11):

The record reflects that when fiber is brought within 500 feet of a subscriber's premise, carriers can provide broadband services comparable to that provided by FTTH architecture, including data speeds of 10 megabits per second (Mbps) in addition to high definition multi-channel video services.

[A]s with FTTH loops, competitive LECs deploying FTTC loops have increased revenue opportunities through the ability to offer voice, multi-channel video, and high-speed data services. As the Commission found with respect to FTTH loops in the *Triennial Review Order*, the substantial revenue opportunities that arise from offering this “triple play” of services helps ameliorate many of the entry barriers presented by the costs and scale economies.

1 **Q. Does BellSouth recognize that the FCC’s unbundling exclusions for**
2 **broadband loop-types apply in the mass market?**

3
4 A. Yes, BellSouth correctly *identifies* the limiting principal, but then ignores its
5 importance. In BellSouth’s own testimony, it states:

6
7 BellSouth maintains that the FCC determined in the *TRO* that
8 ILECs have no obligation to unbundle FTTH mass market loops
9 serving greenfield areas or areas of new construction.¹⁹

10

11 What is missing from any of BellSouth’s testimony is acceptance that the FCC’s
12 rules are not a *blanket* exemption from unbundling obligations. BellSouth
13 remains obligated to provide access to carriers serving enterprise customers, even
14 where the CLEC could not gain access to the loop facility to serve a mass market
15 customer.

16

17 **Q. When a CLEC requests a DS1 loop, is it serving a mass market or an**
18 **enterprise customer?**

19

20 A. When a CLEC requests a DS1 loop, by definition the customer it is seeking to
21 serve is considered an enterprise (and not mass market) customer. For instance,
22 in the *TRO*, the FCC distinguished enterprise business customers from the mass
23 market, noting:

¹⁹ Fogle Direct, page 19, emphasis added. (footnote deleted).

1 All other business customers – whom we characterize as the
2 enterprise market – typically purchase high-capacity loops, such as
3 DS1, DS3, and OCn capacity loops. We address high-capacity
4 loops provisioned to these customers as part of our enterprise
5 market analysis.²⁰
6

7 Thus, whenever a CLEC requests a DS1 loop to serve a customer, that request
8 itself means that the customer is (or is becoming) a member of the enterprise
9 market and BellSouth must comply with loop unbundling requirements as defined
10 for that market.²¹
11

12 **Q. Did the FCC clearly require ILECs to provide CLECs DS1 loops without**
13 **regard to whether the loop is FTTH, FTTC or a fiber/copper hybrid?**
14

15 A. Yes. As I explain later in my testimony, BellSouth’s unbundling relief for DS1
16 loops is defined by the number of fiber-based collocators/switched business lines
17 in an end office, not by the type of loop architecture in place. (Not surprisingly,
18 BellSouth is attempting to obtain relief under both). As the FCC explained in the
19 *TRO*:

21 DS1 loops will be available to requesting carriers, without
22 limitation, regardless of the technology used to provide such loops,
23 e.g., two-wire and four-wire HDSL or SHDSL, fiber optics, or
24 radio, used by the incumbent LEC to provision such loops and

²⁰ TRO, ¶ 209.

²¹ I note that it is immaterial how many lines, or what type of facility, BellSouth may be using to initially serve the customer. If the CLEC is requesting a DS1 (or higher) loop facility for the customer, BellSouth must provide the DS1 so that the customer may become an enterprise customer.

1 regardless of the customer for which the requesting carrier will
2 serve unless otherwise specifically indicated. *See supra* Part
3 VI.A.4.a.(v) (discussing FTTH). The unbundling obligation
4 associated with DS1 loops is in no way limited by the rules we
5 adopt today with respect to hybrid loops typically used to serve
6 mass market customers. *See supra* Part VI.A.4.a.(v)(b)(i).²²
7

8 Moreover, to the extent that there *had* been any confusion over the scope of the
9 FCC’s broadband loop polices, that confusion should have been put to rest by the
10 FCC’s own description of its policies to the D.C. Circuit Court of Appeals.
11 Responding to a pleading by Allegiance Telecom that expressed the fear that the
12 FCC may have restricted access to DS1 loops, the FCC explained:

13
14 Allegiance also claims that it will lose access to DS1 loops.
15 Motion at 11. It based that claim on the theory that when the
16 Commission changed “residence” to end user in the erratum, it
17 removed business customers served by DS-1 loops from the
18 unbundling obligation. That reading of the erratum is incorrect....
19 The text, as well as the rules themselves, make it clear that DS1
20 and DS3 loops remain available as UNEs at TELRIC prices.²³
21

22 DS1 loops are available to CLECs, subject to the separate unbundling analysis
23 discussed in the following section of my testimony concerning the appropriate
24 wire center classifications governing access to high capacity loops and transport.
25

26 **Q. Is there any limitation on hybrid loops?**
27

²² *TRO* ¶ 325, footnote 956. Emphasis added.

²³ *Allegiance Telecom, Inc. et al. v. FCC*, D.C. Cir. No. 03-1316, Opposition of the Federal Communications Commission to Allegiance Telecom’s Motion for Stay Pending Review (filed Oct. 31, 2003) at 12.

1 A. Yes. The only “limitation” on BellSouth’s unbundling obligations with respect to
2 fiber/copper hybrid loops is that BellSouth need not provide access to the packet-
3 based capability in the loop.²⁴ This limitation, however, should not affect CLECs
4 ability to obtain access to DS1 (and DS3) loops in any meaningful way.

5

6 First, the FCC made clear that BellSouth must still provide DS1 and DS3 loops on
7 such facilities:

8

9 We stress that the line drawing in which we engage does not
10 eliminate the existing rights competitive LECs have to obtain
11 unbundled access to hybrid loops capable of providing DS1 and
12 DS3 service to customers. These TDM-based services – which are
13 generally provided to enterprise customers rather than mass market
14 customers – are non-packetized, high-capacity capabilities
15 provided over the circuit switched networks of incumbent LECs....
16 Incumbent LECs remain obligated to comply with the
17 nondiscrimination requirements of section 251(c)(3) in their
18 provision of loops to requesting carriers, including stand-alone
19 spare copper loops, copper subloops, and the features, functions,
20 and capabilities for TDM-based services over their hybrid loops.²⁵

21

22

23 Although packetized fiber capabilities will not be available as
24 UNEs, incumbent LECs remain obligated, however, to provide
25 unbundled access to the features, functions, and capabilities of
26 hybrid loops that are not used to transmit packetized information.
27 Thus, as discussed more specifically in the Enterprise Loops
28 section, consistent with the proposals of HTBC, SBC, and others,
29 incumbent LECs must provide unbundled access to a complete
30 transmission path over their TDM networks to address the
31 impairment we find that requesting carriers currently face. This
32 requirement ensures that competitive LECs have additional means
 with which to provide broadband capabilities to end users because

²⁴ *TRO* ¶ 288.

²⁵ *TRO* ¶ 294. Footnotes omitted.

1 competitive LECs can obtain DS1 and DS3 loops, including
2 channelized DS1 or DS3 loops and multiple DS1 or DS3 loops for
3 each customer.²⁶

4
5 Second, the FCC's policies are premised on the understanding that, to the extent
6 that an ILEC does deploy a packet-based architecture, the packet-architecture
7 parallels its TDM-network, and would not isolate customers from access to CLEC
8 DS1-based services.

9
10 In their submissions in this proceeding, incumbent LECs
11 demonstrate that they typically segregate transmissions over hybrid
12 loops onto two paths, *i.e.*, a circuit-switched path using TDM
13 technology and a packet-switched path (usually over an ATM
14 network). *See, e.g.*, SBC Jan. 15, 2003 *Ex Parte* Letter at 4
15 (providing diagram to illustrate that its network architecture
16 consists of a TDM-based portion and a packet-switched portion).²⁷
17

18 Thus, the relatively narrow exception to BellSouth's general obligation to
19 unbundle DS1 (and DS3) services should have little practical effect. To the extent
20 that BellSouth is no longer required to provide access to DS1 (and DS3) loops,
21 those circumstances are defined by the wire center list addressed in the following
22 section of my rebuttal testimony (relating to the correctly establishing the number
23 of switched business lines and unaffiliated fiber-based collocators at a wire
24 center) and not by the loop architecture deployed by the incumbent.
25

²⁶ TRO ¶ 289. Footnote omitted.

²⁷ TRO ¶ 294, footnote 846.

III. Wire Center Designations

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Q. To begin, is the testimony of Mr. Wallis of Deloitte Financial Advisory Services relevant to any wire-center issue in dispute?

A. No. My understanding of the Deloitte analysis is that the firm merely confirmed that BellSouth’s spreadsheets were free of mathematical error. The Wallis report makes clear that it does not:

- * Verify the accuracy and completeness of the source data obtained for the calculation of the business lines;
- * Verify the accuracy of the systems in which the business lines are captured (and the source data that was extracted);
- * Validate BellSouth’s methodology developed to calculate the business lines for FCC TRRO purposes; or
- * Validate the definitions of “business lines” used by BellSouth.²⁸

In other words, the testimony and analysis avoids the *issues* in question and, as such, does nothing to legitimize BellSouth’s claims in this proceeding (other than its arithmetic).²⁹

²⁸ Exhibit DW-2, Mathematical Calculation of BellSouth Business Line Counts for the Year 2004, July 15, 2005, Deloitte Financial Advisory Services (“Wallis Report”), page 2.
²⁹ Indeed, the Wallis Report fully discloses its exceedingly narrow purpose, explaining “we [Deloitte] obtained an understanding of BellSouth’s methodologies, a set of its applicable data,

1

2 **Q. What appears to be the two most significant errors with BellSouth’s wire-**
3 **center analysis?**

4

5 A. Unlike most other states in the BellSouth region, BellSouth’s wire center
6 classifications in Kentucky are based entirely on BellSouth’s claims regarding the
7 number of fiber-based collocators. Unfortunately, this is also the area where
8 discovery is ongoing and CompSouth’s ability to conduct an analysis is most
9 limited.³⁰

10

11 In other states, however, an issue has also arisen in how BellSouth counts
12 “business lines.” Although the results are not sensitive to the methodology here, I
13 will explain the issue here so that future disputes can be avoided.

14

and then replicated the mathematical calculation utilized by BellSouth ...” (Wallis Report, page 2). In other words, Deloitte performed the role of a “shadow spreadsheet,” confirming only that BellSouth’s arithmetic was correct.

³⁰ CompSouth’s attempt to validate BellSouth’s list of claimed unaffiliated fiber-optic collocators is ongoing. CompSouth only recently (August 11) obtained a list of the carriers that BellSouth claims are fiber-based collocators in Kentucky and CompSouth is serving discovery on such carriers in an effort to validate whether BellSouth’s claims are accurate. Moreover, CompSouth has become aware that there are significant errors in BellSouth’s analysis as a number of “named fiber-based collocators” have responded to BellSouth discovery denying BellSouth’s characterization. Unfortunately, BellSouth is only now collecting this information through discovery and has not yet provided a comprehensive collection of responses to CompSouth to enable our analysis. We expect the need to update our analysis during the hearing and may also require a post-hearing process to incorporate additional discovery in this important area.

1 **Q. What steps are you taking to validate and/or challenge BellSouth’s claims**
2 **regarding the number of fiber-based collocators?**

3
4 A. As I indicated, we have only recently received from BellSouth the names of those
5 carriers that it claims have fiber-based collocations in the wire centers at issue in
6 this proceeding.³¹ CompSouth is seeking to validate through discovery that these
7 carriers do, in fact, satisfy the FCC’s requirement that they “...operate(s) a fiber-
8 optic cable or comparable transmission facility that (1) terminates at a collocation
9 arrangement within the wire center; (2) leaves the incumbent LEC wire center
10 premises; and (3) is owned by a party other than the incumbent LEC or any
11 affiliate of the incumbent LEC.³²

12
13 We are also aware that BellSouth has sought confirmation from its named “fiber-
14 based collocators” through Requests for Admissions and is receiving a number of
15 responses from carriers denying that they are, in fact, fiber-based collocators in
16 the claimed offices. To date, however, we do not have a comprehensive set of
17 responses and cannot, at this point, offer a recommendation. As soon as the
18 discovery responses are available, CompSouth hopes to provide additional
19 information to the Commission. In addition, we expect BellSouth to revise its

³¹ As indicated earlier, there is one wire center in Kentucky where BellSouth is attempting to justify the elimination of its high capacity unbundling obligations on the basis of fiber-based collocation.

³² 47 CFR § 51.5 emphasis added.

1 claims based on the denials that it is receiving from the carriers that it had claimed
2 are fiber-based carriers.

3
4 This step is particularly critical in Kentucky because there are two end-offices
5 where BellSouth claims that it may reduce its unbundling obligations
6 (LSVLKYAP and LSVLKYBR), and a reduction in the number of fiber-based
7 collocators by *one* in either office would change BellSouth’s unbundling
8 obligations.

9
10 **Q. With respect to the issue concerning business lines, please explain the**
11 **methodological flaw in BellSouth’s analysis.**

12
13 A. The basic flaw concerns an assumption that BellSouth adopts in how it counts
14 digital capacity. In effect, BellSouth assumes that the *maximum potential*
15 *capacity* of each digital circuit is used to provide switched business line service
16 when, in fact, that is not the case. Although BellSouth claims it is following FCC
17 direction by adopting this assumption, the FCC sanctions no such behavior. The
18 FCC defines a “business line” (in part) as:³³

19
20 A business line is an incumbent LEC-owned switched access line
21 used to serve a business customer, whether by the incumbent LEC
22 itself or by a competitive LEC that leases the line from the
23 incumbent LEC. The number of business lines in a wire center

³³ As I indicated in the introduction, Revised Exhibit JPG-1 has been amended to incorporate this definition.

1 shall equal the sum of all incumbent LEC business switched access
2 lines, plus the sum of all UNE loops connected to that wire center,
3 including UNE loops provisioned in combination with other
4 unbundled elements.³⁴
5

6 Importantly, as BellSouth interprets this rule, it reads the second sentence in the
7 rule as granting a waiver of the first sentence. That is, even though the FCC rule
8 clearly defines a business lines as “an incumbent LEC-owned switched access
9 line used to serve a business customer,” BellSouth believes that it is entitled to
10 count the maximum potential capacity of every UNE-L circuit as a switched
11 access line serving a business customers no matter *how* the circuit is actually
12 configured and to *what* use it is put.

13
14 **Q. Do you believe that the FCC sanctioned BellSouth’s assumption that the**
15 **maximum potential capacity of each UNE-L circuit is used to provide**
16 **switched access line service to business customers?**

17
18 A. No. I believe that the definition should be read completely – from top to bottom –
19 in a manner where each sentence is consistent with the sentences that precede and
20 follow it. The FCC did not sanction BellSouth’s assumption, as the full business
21 line definition makes clear:³⁵
22

³⁴ 47 CFR § 51.5 emphasis added

³⁵ I do not intend to suggest that BellSouth does not include the entire rule reference in its testimony. I will present the rule in components to more clearly illustrate why its selective *reading* of the rule is incorrect.

1 Business line. A business line is an incumbent LEC-owned
2 switched access line used to serve a business customer, whether by
3 the incumbent LEC itself or by a competitive LEC that leases the
4 line from the incumbent LEC. The number of business lines in a
5 wire center shall equal the sum of all incumbent LEC business
6 switched access lines, plus the sum of all UNE loops connected to
7 that wire center, including UNE loops provisioned in combination
8 with other unbundled elements. Among these requirements,
9 business line tallies (1) shall include only those access lines
10 connecting end-user customers with incumbent LEC end-offices
11 for switched services, (2) shall not include non-switched special
12 access lines, (3) shall account for ISDN and other digital access
13 lines by counting each 64 kbps-equivalent as one line. For
14 example, a DS1 line corresponds to 24 64 kbps-equivalents, and
15 therefore to 24 “business lines.”³⁶
16

17 As the rule definition above plainly states, the FCC went on to make clear that
18 among these requirements (i.e., what should be counted, including UNE-L), the
19 business line tallies “shall include *only* those access lines connecting end-user
20 customers with incumbent LEC end-offices for switched services.” Thus, while
21 BellSouth claims that the FCC rule does not exclude any particular type of
22 unbundled loop,”³⁷ the rule most plainly does. The rule specifically requires that
23 only those access lines connecting end-user customers with incumbent LEC end-
24 offices for switched services shall be counted. It could not be clearer.

25
26 **Q. Does the directive that digital access lines should count “each 64 kbps-**
27 **equivalent as one line” override every other requirement in the rule?**
28

³⁶ 47 CFR § 51.5 emphasis added.

³⁷ Tipton Direct, page 15.

1 A. No. There is nothing in the rule that suggests the final instruction overrides the
2 entire rest of the rule. The rule should be read in its entirety and a circuit must
3 satisfy all requirements in the rule in order to be counted: it must be a switched
4 line, it must be ILEC-owned, it must be used to serve a business customer and, for
5 digital circuits that *satisfy* these requirements, each 64 kbps channel used to
6 provide switched service to a business customer should be counted as a line. But
7 this final instruction does not mean BellSouth may count unused capacity or
8 capacity that is not used to provide switched services to a business customer
9 merely because it is part of a digital circuit.

10
11 **Q. Do CLECs routinely offer non-switched services using UNE-L?**

12
13 A. Yes. Indeed, a staple of the CLEC product offering is the “integrated” service
14 that combines voice and data on the same access facility (typically a DS1). In
15 addition, CLECs offer data-only services and sometimes only partially-fill DS-1s
16 (even where only switched service is provided). It is patently unreasonable to
17 assume that the maximum potential capacity of each UNE-L is used to provide
18 business customers with switched services, which is the assumption that
19 BellSouth makes.

20
21 **Q. Overall, are BellSouth’s claims regarding the number of business lines filed**
22 **here substantially different to the evidence that BellSouth provided the FCC**
23 **during its deliberations leading to the *TRRO*?**

1
2
3
4
5
6
7
8
9
10
11
12
13
14

A. Yes, there is a dramatic difference between the number of business lines at each wire center that BellSouth provided the FCC (and which it used at establishing its impairment thresholds) and the number that BellSouth claims here. For the BellSouth region overall, the following table compares the number of wire centers that BellSouth told the FCC would fall in each category to its claims now.³⁸

Table 1: Comparing the Number of Wire Centers BellSouth Told the FCC Would Meet Impairment Criteria to BellSouth’s Claims Today

Criterion: WC lines>	Use of Criteria under TRRO³⁹	Told FCC	Claims Now	Change
60,000	Restricts Access to DS1 Loops	3	11	267%
38,000	Restricts Access to DS3 Loops and DS1/DS3 Transport	15	34	127%
24,000	Restricts Access to DS3 Transport	54	100	85%

As Table 1 makes clear, the evidentiary basis to the FCC’s decision rested upon data quite different than that which BellSouth presents here. The FCC specifically indicated that the *TRRO* “is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-Loops” and cites *specifically* to BellSouth for the basis of its analysis. BellSouth is attempting to implement the FCC’s *TRRO* with data far different than the data the FCC relied upon in establishing its criteria.

³⁸ Source: BellSouth Ex Parte, WC Docket No. 04-313 and 01-338, filed December 7, 2004.

³⁹ In addition to business line counts, the FCC criteria also considers, as either an alternative qualifying requirement (for transport), or a mandatory additional criteria (for loops), the number of fiber-based collocators.

1 **Q. Does BellSouth manipulate its own switched business line counts to impose**
2 **the same assumption that it applied to UNE-L?**

3

4 A. Yes. As further evidence of how extreme BellSouth’s assumption is, BellSouth
5 went so far as to manipulate its own ARMIS 43-08 data – data that the FCC
6 specifically used⁴⁰ – in order to make it consistent with the assumption it applies
7 to the UNE-L data. As BellSouth “explains:”

8

9 ARMIS 43-08 line counts only include provisioned or “activated”
10 64 kbps channels that ride high capacity digital lines. For
11 example, if a switched DS1 Carrier System had eighteen (18) 64
12 kbps channels provisioned as business lines for a customer, the
13 ARMIS 43-08 would count only 18 business lines. The TRRO
14 definition business lines requires that the full system capacity be
15 counted as business lines, so for TRRO purposes, the business line
16 count for that DS1 Carrier System would be the full system
17 capacity, or 24 business lines.⁴¹

18

19 In other words, BellSouth began its analysis with correct information – that is,
20 ARMIS 43-08 only counts lines that are actually used to provide switched access
21 line service to business customers – and then expanded the count so that it would
22 assume that the maximum potential capacity of each circuit was being used.

23 There is no greater indictment of BellSouth’s interpretation than this, where
24 BellSouth elevates its unreasonable assumption to the point where it is used to
25 mask actual facts.

⁴⁰ *TRRO*, ¶ 105.

⁴¹ Tipton Direct, page 31.

1

2 **Q. What changes do you believe the Commission must make to ensure that the**
3 **business line counts “shall include only those access lines connecting end-user**
4 **customers with incumbent LEC end-offices for switched services” as**
5 **required by 47 CFR § 51.5?**

6

7 A. I recognize that the FCC did not provide specific guidance as to the best way to
8 ensure that UNE-L counts appropriately include only those access lines used to
9 provide switched services to business customers. However, BellSouth’s approach
10 – to simply *assume* that the maximum potential capacity of each UNE-L is entirely
11 used to provide switched services – is clearly unreasonable and dramatically
12 overstates the number of business lines at each wire center. The fact that
13 BellSouth then expands its own business line count to mirror the assumption --
14 rather than to use its actual business line count -- underscores the
15 unreasonableness of the approach. Fortunately, however, BellSouth’s approach
16 provides the information needed to correct both deficiencies.

17

18 **Q. Please explain how BellSouth’s data can be used to correct for both errors.**

19

20 A. First, BellSouth’s workpapers permit me to directly correct for its phantom
21 business lines – i.e., the maximum potential capacity that its ARMIS 43-08 data
22 properly excludes because the capacity is not used to provide switched access line
23 service to business customers.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Second, however, this same data provides a *reasonable* estimate of the percentage of digital capacity that is used to provide switched access line service to business customers. That is, BellSouth’s data reveals exactly what percentage of its digital access capacity is used to provide switched access line service to business customers. All that the Commission needs to do is to accept the simple and straightforward assumption that the average utilization for the CLECs is equal to the average utilization for BellSouth.

Q. Did you correct BellSouth’s business line count in this manner?

A. Yes. To illustrate this analysis, Exhibit JPG-2 provides a corrected business line count by removing BellSouth’s phantom business lines and applying to the CLEC’s digital UNE-L capacity the same percentage of used-to-potential capacity that BellSouth experiences.⁴² I believe that it is plainly more reasonable to assume that CLECs use approximately the *same* percentage of their potential digital capacity to provide switched access line services to business customers as BellSouth, than it is to assume that CLECs use *all* of their maximum potential capacity in this manner (an assumption that is unquestionably false). As I indicated earlier, however, the methodological flaw in BellSouth’s analysis does not affect its unbundling obligations in Kentucky (at this time).

⁴² The percentage I applied is the average over those wire centers which BellSouth claims have more than 10,000 business lines.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IV. Section 271 Prices and Commingling

Q. As a threshold point, BellSouth claims that only elements required under §251 must be provided in interconnection agreements.⁴³ Do you agree with this claim?

A. No. As I explain in my direct testimony, BellSouth has a separate obligation under §271 to offer checklist items (for instance, loops, switching and transport) in interconnection agreements, even where the FCC does not require such items to be unbundled pursuant to §251.⁴⁴ This requirement is clearly stated in §271(c)(1)(A) of the federal Act and requires that such offerings be included in interconnection agreements approved by state commissions under §252:

PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has 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.⁴⁵

⁴³ Blake Direct, page 5; Tipton Direct, page 38.

⁴⁴ See Gillan Direct, pages 38-45.

⁴⁵ 47 U.S.C. § 271(c)(1)(emphasis added).

1 This unambiguous requirement that checklist items must be offered in
2 interconnection agreements was cited by a Federal District Court upholding fines
3 imposed by the Minnesota Commission on Qwest for failing to file certain
4 interconnection agreements:

5
6 Citing the fair notice doctrine, Qwest argues additionally that it
7 should not be penalized for failing to file some of the twelve ICAs
8 [interconnection agreements] because it did not know which
9 agreements were subject to the Act's filing requirement.
10

11 ***

12 ... despite the absence of a definition [for the term interconnection
13 agreement] in the Act, other sources outlined the scope of §252
14 and provided notice. For example, §271 includes a comprehensive
15 checklist of items that must be included in ICAs before an ILEC
16 may receive authority to provide regional long distance service.
17 This list reveals that any agreement containing a checklist item
18 must be filed as an ICA under the Act.⁴⁶
19

20 Section 271 is clear that the wholesale requirements of the competitive checklist
21 are to be offered through interconnection agreements, and interconnection
22 agreements are subject to the arbitration and approval process of §252.
23

24 **Q. BellSouth also claims that the FCC excluded the wholesale offerings of the**
25 **competitive checklist when it adopted its commingling rules.⁴⁷ Do you agree**
26 **that this is a proper interpretation of the FCC's rules?**

⁴⁶ *Qwest Corporation v. Minnesota Public Utilities Commission*, 2004 WL 1920970, at *7 (D. Minn. 2004) (citations omitted) (emphasis added).

⁴⁷ Tipton Direct, page 47.

1

2 A. No. To begin, the FCC’s discussion of commingling and its rule does not have
3 reference any exclusions, as shown by the following rule and discussion:

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

47 C.F.R. §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. Commingling means the act of commingling.

23

24

25

26

Q. If the FCC did not exclude the wholesale offerings required by the competitive checklist in the rule or by its Order, why does BellSouth claim that its commingling obligations do not apply to these important offerings?

27

28

29

30

A. BellSouth’s claim rests upon (1) a single paragraph in the *TRO* (§579) as adopted, and (2) an Errata that eliminated one sentence from an earlier “draft” of the *TRO*.⁴⁹

⁴⁸ *TRO* ¶ 579, emphasis added

⁴⁹ Tipton Direct, page 48.

1 First, BellSouth claims that paragraph 579 of the *TRO* limits wholesale service
2 subject to commingling to “switched and special access services offered pursuant
3 to tariff.”⁵⁰ The complete text of ¶ 579, however, provides important context and
4 language that BellSouth fails to acknowledge in its testimony:
5

6 We eliminate the commingling restriction that the Commission
7 adopted as part of the temporary constraints in the *Supplemental*
8 *Order Clarification* and applied to stand-alone loops and EELs.
9 We therefore modify our rules to affirmatively permit requesting
10 carriers to commingle UNEs and combinations of UNEs with
11 services (*e.g.*, switched and special access services offered
12 pursuant to tariff), and to require incumbent LECs to perform the
13 necessary functions to effectuate such commingling upon request.
14 By commingling, we mean the connecting, attaching, or otherwise
15 linking of a UNE, or a UNE combination, to one or more facilities
16 or services that a requesting carrier has obtained at wholesale from
17 an incumbent LEC pursuant to any method other than unbundling
18 under section 251(c)(3) of the Act, or the combining of a UNE or
19 UNE combination with one or more such wholesale services.
20 Thus, an incumbent LEC shall permit a requesting
21 telecommunications carrier to commingle a UNE or a UNE
22 combination with one or more facilities or services that a
23 requesting carrier has obtained at wholesale from an incumbent
24 LEC pursuant to a method other than unbundling under section
25 251(c)(3) of the Act. In addition, upon request, an incumbent LEC
26 shall perform the functions necessary to commingle a UNE or a
27 UNE combination with one or more facilities or services that a
28 requesting carrier has obtained at wholesale from an incumbent
29 LEC pursuant to a method other than unbundling under section
30 251(c)(3) of the Act. As a result, competitive LECs may connect,
31 combine, or otherwise attach UNEs and combinations of UNEs to
32 wholesale services (*e.g.*, switched and special access services
33 offered pursuant to tariff), and incumbent LECs shall not deny
34 access to UNEs and combinations of UNEs on the grounds that
35 such facilities or services are somehow connected, combined, or
36 otherwise attached to wholesale services.
37

⁵⁰ *Ibid.*

1 Importantly, neither of the parentheticals that mention “switched and special
2 access services” includes any discussion that *limits* the FCC’s commingling
3 decision to only these services. Rather, each parenthetical is introduced by (what
4 was dropped from BellSouth’s testimony citation) the abbreviation “*e.g.*,” defined
5 by Black’s Law Dictionary as *exempli gratia*, “for the sake of any example.”
6 Thus the FCC was *illustrating* its commingling rules, not *limiting* their
7 application.

8
9 Moreover, the FCC had good reason for using these particular access services as
10 *examples* of wholesale services to which its commingling rules would apply. As
11 the very first sentence of the paragraph explains, one consequence of its decision
12 would be that the FCC’s new commingling rules would supersede the
13 “commingling restriction that the Commission adopted as part of the temporary
14 constraints in the *Supplemental Order Clarification*.” The temporary constraints
15 in the *Supplemental Order* were adopted in order to prevent interexchange
16 carriers from substituting UNEs for access services. Thus, it would stand to
17 reason that the FCC would point to access services as a specific *example* to
18 remove any question that it was changing its prior approach.

19
20 **Q. BellSouth also points to one sentence deleted from the TRO to argue that the**
21 **FCC’s commingling rules exclude the wholesale offerings required by §271.⁵¹**
22 **Is this argument reasonable?**

⁵¹ Tipton Direct, page 48.

1

2 A. No. The fact is that BellSouth cannot find support in any Order for its claim that
3 the wholesale services required by §271 were singled out by the FCC to be
4 uniquely (and discriminatorily) excluded from the commingling obligations.
5 Because BellSouth cannot find anything in an FCC Order that justifies its
6 position, it claims the policy was established by what was left out.

7

8 Before addressing the specifics of the Errata that BellSouth relies upon so heavily,
9 it is useful to put its claim in context. The competitive checklist represents
10 mandatory wholesale offerings that Congress insisted BellSouth must offer if it
11 wanted to provide long distance service. These are not just “any” wholesale
12 offerings – these are offerings that the Congress of the United States wrote as
13 *specific* obligations that apply even where the FCC concludes there is no
14 impairment. BellSouth’s position is that not only that the FCC could relegate
15 these wholesale offerings to an inferior standing that excluded from them from the
16 ILEC’s general commingling obligations,⁵² but that the *way* the FCC would
17 choose to effect such a remarkable policy was through an Errata deleting a single
18 sentence.

19

20 **Q. In your view, does the Errata accomplish the changes claimed by BellSouth?**

⁵² The FCC adopted its commingling requirements concluding that a refusal to commingle would constitute an “unjust and unreasonable practice,” as well as an “undue and unreasonable prejudice or advantage.” BellSouth never even attempts to explain what it is about its §271 wholesale offerings that would reverse the FCC’s analysis and find that a refusal to commingle these services/facilities would be a reasonable practice.

1

2 A. No. The Errata made two changes relevant to the issue at hand.

3

4 First, the portion of the Errata that BellSouth emphasizes effected the following
5 deletion [in brackets]:

6

7 As a final matter, we require that incumbent LECs permit
8 commingling of UNEs and UNE combinations with other
9 wholesale facilities and services, including [any network elements
10 unbundled pursuant to section 271 and] any services offered for
11 resale pursuant to section 251(c)(4) of the Act.⁵³

12

13 In the same Errata, the FCC also made the following change, deleting the final
14 sentence draft [in brackets below]⁵⁴ to footnote 1989:⁵⁵

15

16 We decline to require BOCs, pursuant to section 271, to combine
17 network elements that no longer are required to be unbundled
18 under section 251. Unlike section 251(c)(3), items 4-6 and 10 of
19 section 271’s competitive checklist contain no mention of
20 “combining” and, as noted above, do not refer back to the
21 combination requirement set forth in section 251(c)(3). [We also
22 decline to apply our commingling rule, set forth in Part VII.A.
23 above, to services that must be offered pursuant to these checklist
24 items.]

25

26 Obviously, had the FCC intended to exempt the § 271 competitive checklist from
27 its commingling rules, it would not have eliminated this express finding.

⁵³ *TRO*, ¶ 584.

⁵⁴ I realize that “underlining” a deletion is not a standard editorial format, but I have done so to make clear exactly what sentence the FCC deleted from the draft *TRO* by its Errata.

⁵⁵ This footnote appears as footnote 1990 in the pre-Errata *TRO*.

1 BellSouth has characterized any discussion of this footnote as an attempt to
2 “confuse the issue,”⁵⁶ claiming the FCC deleted this statement because the text
3 was now clear. With all due respect to BellSouth, the facts simply cannot support
4 that claim.

5
6 At one time, the *TRO* included two contradictory statements regarding the
7 RBOC’s obligation to commingle §251 elements with the wholesale offerings
8 listed in §271. Both citations were removed. Importantly, even if the
9 Commission focuses exclusively on the editorial deletion favored by BellSouth,
10 the edit does not result in a sentence that limits BellSouth’s commingling
11 obligations. The cited passage (post-Errata) still reads “...we require that
12 incumbent LECs permit commingling of UNEs and UNE combinations with other
13 wholesale facilities and services,” which would include by definition, wholesale
14 facilities and services required by the § 271 competitive checklist.

15
16 One would expect that if the FCC had decided to eliminate an entire category of
17 wholesale offerings specifically adopted by Congress, they would have done so
18 expressly and not through the (absurdly) subtle method of issuing text in error and
19 correcting it. The plain language of the *TRO* applies the commingling rules to
20 wholesale services obtained “pursuant to any method other than unbundling under

⁵⁶ Tipton Direct, page 48

1 section 251,⁵⁷ and the language that would have exempted § 271 offerings from
2 commingling obligations was removed from the *TRO* by the Errata.

3
4 The Errata simply cannot be read as excusing BellSouth's wholesale offerings
5 required by §271 from its general commingling obligations.

6
7 **Q. Are you prepared to offer specific pricing recommendations for BellSouth's**
8 **§271 offerings?**

9
10 **A.** No, not at this time. CompSouth has propounded discovery to BellSouth
11 addressing that would provide use information needed to propose just and
12 reasonable rates. BellSouth has objected to these questions and, as a result,
13 necessary information for detailed analysis is not available at this time.

14
15 There is, however, a need for the Commission to establish interim §271 prices
16 that would remain in effect until the conclusion of a permanent rate proceeding.

17 The Missouri Commission recently confronted the identical timing dilemma – that
18 is, there is a need for §271 prices, but the record did not provide the information
19 needed to establish such prices.

20
21 SBC offered no rates because its view is that these ICAs should not
22 contain prices for § 271 UNEs. Likewise, the [CLEC] Coalition's
23 original suggestion that TELRIC rates be continued is not

⁵⁷ See *TRO* ¶ 579 (emphasis added).

1 appropriate given that the appropriate standard is now “just and
2 reasonable.” However, the Commission concurs that the
3 Coalition’s compromise position – rates patterned on the FCC’s
4 transition period rates for declassified UNEs – constitutes a
5 suitable interim rate structure for § 271 UNEs.⁵⁸
6

7 Because BellSouth has not provide the data to even propose permanent prices, I
8 believe that the “Missouri Approach” is the best avenue for loops and transport
9 (to the extent it is no longer available as a §251 network element).

10
11 **V. Other Issues**

12
13 **Issue 3: General Implementation**

14
15 **Q. BellSouth is proposing a complete UNE Attachment for “all new CLECs and**
16 **all new interconnection agreements.”⁵⁹ Do you agree this is appropriate?**

17
18 A. No. My understanding of this proceeding is that it is to address changes required
19 by the TRO and TRRO, with respect to the issues listed. While obviously some
20 of the decisions the Commission reaches will require BellSouth to modify its
21 standard offering, this proceeding is not intended to short-circuit BellSouth’s
22 obligation to negotiate amendments or new agreements with CLECs. When the
23 Commission resolves the issues in this proceeding, it will require the parties to

⁵⁸ Arbitration Order, Public Service Commission of Missouri, TO-2005-0336, July 11, 2005, page 30.

⁵⁹ Blake Direct, footnote 2, page 5.

1 modify existing or new interconnection agreements (as discussed below) and its
2 decision will affect the relative negotiation/arbitration postures of both BellSouth
3 and the CLECs. The proceeding should not, however, be used to obtain a
4 blanket-approval of BellSouth's complete Attachment 2, which has not been the
5 focus of this proceeding (nor the negotiations between BellSouth and many
6 CompSouth members). The issues identified do not impact every aspect of each
7 Attachment 2 currently in place between or subject to arbitration BellSouth and
8 CompSouth's members. Nor do they take account of agreements on language
9 already reached by BellSouth and many of CompSouth's members. Surely, the
10 goal of this proceeding cannot be to supplant what has been voluntarily negotiated
11 and agreed to between particular CLECs and BellSouth with a new standardized
12 Attachment 2, neither voluntarily agreed to nor designated for arbitration.

Issue 2: Transition Requirements

13
14
15
16 **Q. BellSouth claims that CLECs must complete all transitions by March 10,**
17 **2006.⁶⁰ Do you agree?**

18
19 A. No. As I discussed in my direct testimony,⁶¹ I believe that once a CLEC submits
20 an order it has satisfied its obligations and the "ball is in BellSouth's court" to

⁶⁰ Tipton Direct, page 5. With respect to dark fiber, the transition period ends September 10, 2006. Tipton Direct, pages 4 and 5.

⁶¹ Gillan Direct, page 11.

1 implement that order. I also emphasize that I believe that the significance of this
2 issue will diminish once the Commission resolves other questions in this
3 proceeding.

4
5 Strategically, BellSouth wants to pressure CLECs to reconfigure their wholesale
6 offerings *before* CLECs even know precisely which wire centers and what
7 transport routes will no longer be available under §251,⁶² and without *any*
8 knowledge as to the §271 offerings available as an option. BellSouth’s “squeeze
9 play” is preventing sound planning because the planning itself first requires
10 decisions by this Commission.

11
12 There is no provision in the *TRRO* permitting BellSouth to establish arbitrary cut-
13 off dates in advance of March 10, 2006 by which CLEC orders must be placed.⁶³
14 Before BellSouth can reasonably expect CLECs to make informed choices the
15 Commission must establish (at least on an interim basis) the appropriate rate for
16 BellSouth’s parallel §271 offering. BellSouth is clearly able to “change prices”
17 for a large number of orders on short notice – indeed, BellSouth’s proposal for
18 UNE-P lines that have not been migrated is to unilaterally change both the *price*

⁶² BellSouth’s attempt to “cap” the number of DS1 transport circuits CLECs may obtain even on transport routes where the FCC Order clearly does not impose such a limitation (Gillan Direct, page 33) is the most glaring example of BellSouth attempting to force a CLEC into “false planning” for a transition that is unnecessary.

⁶³ For instance, BellSouth’s proposal for UNE-P would require that CLEC orders be placed by October 1, 2006, more than *five months* before the transition date chosen by the FCC and *three weeks before* briefs are even filed in this proceeding. (Tipton Direct, page 42.)

1 and the *service* that the CLEC is receiving (to resale). Consequently, it is hard to
2 conclude that it would be unable to handle other orders in a reasonable manner.

3

4 **Q. Does the TRRO permit transitional rates to be applied retroactively to**
5 **March 11, 2005?**

6

7 A. Yes. The problem, however, is that the *TRO* (which was adopted nearly two
8 years *before* the *TRRO*),⁶⁴ adopted a number of other changes in unbundling
9 policy that are necessary to establish a consistent regime that reflects the
10 environment assessed by the FCC in making its *TRRO* impairment
11 determinations. Thus, if the Commission applies the transitional rates
12 retroactively to March 11, 2005, it must also include the retroactive application
13 effective date of these the *TRO* provisions as well. Specifically, the *TRO*:

14

15 * Made it simple and more efficient for EELs (i.e.,
16 loop/transport) combinations to qualify for UNE pricing by
17 adopting new high capacity EEL eligibility criteria;

18

19 * Permitted CLECs to commingle UNE and non-UNE
20 offerings to obtain complete circuits (thereby eliminating
21 commingling restrictions contained in the old EEL
22 eligibility criteria), and

23

24 * Clarified that CLECs are permitted to convert special
25 access circuits to individual UNEs, as well as to
26 combinations of UNEs.

27

⁶⁴ The *TRO* was adopted February 20, 2003..

1 In CompSouth's view, to the same extent that BellSouth is able to reach back in
2 time and treat part of a circuit as a non-251 offering (and thus subject to higher
3 transitional rates), these complementary *TRO*-mandated changes must also be in
4 place. To do otherwise would mean that only those portions of the FCC's
5 unbundling framework that enable BellSouth to charge higher rates would be
6 effective, while the tools/options the CLECs need to adjust to the new §251
7 unbundling regime would not be in place.

8
9 **Q. Can you give an example as to why these provisions must be effective**
10 **together?**

11
12 A. Yes. As mentioned above, one consequence of the *TRRO* is that high-capacity
13 loops and transport will not necessarily be available as §251 UNEs in every wire
14 center. (Indeed, one of the key issues in this proceeding is determining precisely
15 where high-capacity loops and transport will no longer be available). One
16 consequence of being "de-listed" is that an EEL (loop/transport combination) that
17 had been comprised of all §251 elements will become a "commingled
18 arrangement" consisting of a §251 element subject to standard UNE pricing and a
19 non-§251 element subject to transitional rates.

20
21 It is vital that at the very same time that BellSouth is able to treat a portion of the
22 circuit as a non-§251 offering (and thus subject to the higher transitional rates),
23 the CLEC must have language that entitles it to such a configuration that is part-

1 §251/part-other offering (commingling), including the ability to qualify under the
2 new rules for EEL combinations.⁶⁵ Unless commingling and the revised EEL
3 eligibility criteria are in place, it is possible that BellSouth might try to argue that
4 CLECs have no concurrent contractual right to commingle §251 loops with non-
5 §251 transport. Moreover, full conversion rights must be incorporated into
6 interconnection agreements, to allow CLECs to make full use of the remaining
7 §251 loop and transport offerings, regardless of whether such offerings are used
8 in combinations.

9
10 **Q. Is it unreasonable to make these provisions effective retroactively?**

11
12 A. No. The March 11, 2005 date is more than two years after the FCC adopted the
13 *TRO* giving CLECs “theoretical access” to commingling, conversions of special
14 access to individual UNEs or combinations of UNEs, and clearer, “architectural”
15 EEL eligibility criteria. It makes no sense to implement transition rates that apply
16 to a non-§251 portion of an EEL without making effective the language that
17 permits the arrangement in the first place (i.e., provisions that permit
18 commingling and remove the commingling restrictions that the FCC jettisoned
19 when it adopted its new EEL eligibility criteria). Thus, to the same extent that

⁶⁵ The *TRO* simplified eligibility requirements for EELs and clarified that right of CLECs to convert circuits that had been ordered as special access to UNE status was not limited to UNE combinations, such as EELs, but that CLECs could convert special access circuits to individual UNEs, as well.

1 BellSouth is able to apply non-UNE rates retroactively, CLECs must have
2 language in their agreements to retroactively:

- 3
- 4 a. Qualify circuits for UNE treatment (i.e., new high capacity
5 EEL eligibility criteria and full conversion rights), and
6
- 7 b. Grant access to circuit configurations that mix non-251
8 offerings with §251 arrangements (commingling).
9

10

11 **Q. BellSouth proposes that CLECs provide BellSouth with spreadsheets that**
12 **identify all circuits that will no longer be available under §251.⁶⁶ Is this**
13 **reasonable?**

14

15 A. No, I do not believe that it is. It is *BellSouth* that is withdrawing a service from
16 the market, not the CLEC. Consequently, it should be incumbent (no pun
17 intended) upon BellSouth to initially inform their customers of exactly which
18 circuits it will no longer offer as UNEs under §251, not the other way around.
19 CLECs would then have the opportunity (and obligation) to review BellSouth's
20 information and inform BellSouth of any disagreements.

21

22 ***Issue 4: Building Definition***

23

24 **Q. Have you revised the definition of a “building” in Revised Exhibit JPG-1?**

⁶⁶ Tipton Direct, pages 10 and 11.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

A. Yes. I have revised the proposed “building definition” taking, as a starting point, BellSouth’s concept of a “reasonable person.”⁶⁷ The main difference is that the recommended building definition in Revised Exhibit JPG-1⁶⁸ is based on the concept of a “reasonable *telecom* person,” to ensure that the deciding factor in defining a “building” is that the area is served by a single point of entry for telecom services. Thus, a high-rise building with a general telecommunications equipment room would be considered a single building, while a strip mall with separate telecom-service points for each individual business in the mall would not. Such circumstances should be treated, for loop-aggregation purposes, as individual premises, even though they may share common walls.

Issue 13: SOM/PMAP/SEEM

Q. Please summarize the fundamental issue concerning the continuing application of the SQM/PMAP/SEEM plans.

A. BellSouth’s view is that the elements that are no longer required to be unbundled under §251 of the Act should no longer be subject to these plans.

⁶⁷ Tipton Direct, page 18.

⁶⁸ *Ibid.*

1 The purpose of establishing and maintaining a SQM/PMAP/SEEM
2 plan is to ensure that BellSouth provides nondiscriminatory access
3 to elements required to be unbundled under section 251(c)(3), and
4 if BellSouth fails to meet such measurements, it must pay the
5 CLEC and/or the state a monetary penalty.⁶⁹
6

7 **Q. Do you agree that the SQM/PMAP/SEEM plan is intended to ensure**
8 **compliance with section 251(c)(3)?**

9
10 A. No. These plans were developed in order to ensure continuing compliance with
11 §271, which includes but is not limited to BellSouth's obligations under
12 §251(c)(3). As the FCC explained:

13
14 In prior orders, the Commission has explained that one factor it
15 may consider as part of its public interest analysis is whether a
16 BOC would have adequate incentives to continue to satisfy the
17 requirements of section 271 after entering the long distance
18 market. Although it is not a requirement for section 271 authority
19 that a BOC be subject to such performance assurance mechanisms,
20 the Commission previously has found that the existence of a
21 satisfactory performance monitoring and enforcement mechanism
22 is probative evidence that the BOC will continue to meet its
23 section 271 obligations after a grant of such authority.⁷⁰

24
25 As I explained in my direct testimony, the FCC's impairment findings with
26 respect to loops, transport, switching and signaling do not eliminate BellSouth's
27 obligations under §271 to continue to offer these elements.⁷¹ As the above makes

⁶⁹ Blake Direct, page 10.

⁷⁰ Memorandum Opinion and Order, Federal Communications Commission Docket CC 02-307, December 19, 2002, ¶ 167. Emphasis added.

⁷¹ See Gillan Direct, page 38.

1 clear, the “purpose” of establishing and maintaining a SQM/PMAP/SEEM plan is
2 not to comply with §251 (as claimed by BellSouth), but to ensure that BellSouth
3 will continue to meet its section 271 obligations. As such, the Commission
4 should continue to apply these plans to any offering required under §271.
5

6 **Issue 30: The All or Nothing Rule and Deemed Amended**

7
8 **Q. What is the issue with respect to language implementing the “All or Nothing**
9 **Rule”?**

10
11 A. The issue is not with the language proposed by BellSouth itself, but rather
12 BellSouth’s suggestion in discussing this issue that once the Commission rules, all
13 interconnection agreements should be “deemed amended.”⁷² The Commission is
14 addressing a number of issues in this proceeding and in most (if not all) instances,
15 is provided with competing contract language. It is the CLECs view that once the
16 Commission rules, the parties will need to amend their contracts, including
17 (perhaps) developing language that tracks any Commission decision that only
18 partially adopts a party’s position. What the CLECs cannot accept is BellSouth’s
19 unilateral interpretation of any decision such that the contracts are “deemed
20 amended.”
21

⁷² Blake Direct, page 13.

1 **Q. Do you oppose BellSouth’s suggestion that after the Commission rules in this**
2 **proceeding, the parties should be directed to file conforming ICA**
3 **amendments with 45 days?**⁷³

4
5 A. No. Of course, the time-frame should accommodate any requests for
6 reconsideration, which the Commission should address expeditiously. So long as
7 the parties retain the right to seek meaningful reconsideration and have the ability
8 to address the unique circumstances of any individual negotiation/arbitration
9 process underway with BellSouth, it would be reasonable for the Commission to
10 establish a timeframe for the filing of necessary amendments to implement its
11 decision.

12
13 **Q. Does this conclude your rebuttal testimony?**

14
15 A. Yes.

⁷³ Blake Direct, page 16.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing testimony has been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 8th day of September, 2005.

Douglas F. Brent