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September 3, 2004

VIA HAND DELIVERY

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Re: Docket No.: 040601-TP

Dear Ms. Bayo:

On behalf of DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), enclosed for filing and distribution are the original and 15 copies of the following:

- DIECA Communications, Inc., d/b/a Covad Communications Company's Legal Brief.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996.
_____/

Docket No.: 040601-TP

Filed: September 3, 2004

DIECA Communications, Inc., d/b/a Covad Communications Company's Legal Brief

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996.

Docket No.: 040601-TP

Filed: September 3, 2004

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DIECA Communications, Inc., d/b/a Covad Communications Company's Legal Brief

As a preliminary matter in this proceeding, the Parties have agreed to submit the following legal question to the Commission for an answer:

Issue:	Is BellSouth obligated to provide Covad access to line sharing after October 2004?
Covad's Position:	Yes. Line sharing is a checklist item 4 loop transmission facility, which BellSouth is obligated to provide pursuant to 47 U.S.C. § 271(c)(2)(B)(iv) unless the FCC grants a forbearance petition under 47 U.S.C. § 160 *et seq.* specifically forbearing from enforcement of that obligation.

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), pursuant to the Order of the Florida Public Commission ("Commission"), dated August 26, 2004, hereby files this Legal Brief setting forth the legal basis for BellSouth's obligation to provide Covad access to line sharing after October 2004. The second half of Covad's Brief responds to BellSouth's arguments, previously made in other proceedings, regarding its obligation to provide line sharing under section 271.

I. SUMMARY OF ARGUMENT

BellSouth's obligation to provide access to line sharing is grounded in two irrefutable legal facts: 1) Line sharing is a checklist item 4 loop transmission facility; and 2) Regional Bell Operating Companies ("RBOCs"), like BellSouth, offering long distance services pursuant to section 271 authority have an obligation to provide checklist item 4 loop transmission facilities

irrespective of unbundling determinations under section 251. To date, BellSouth has never disputed the second of these facts – that if line sharing falls under checklist item 4, then BellSouth has the obligation to provide it irrespective of section 251 determinations. All of BellSouth's previous arguments are directed at clouding the legal fact that line sharing is a checklist item 4 loop transmission facility. Each of BellSouth's arguments misconstrues the law or is otherwise incorrect.

The only two state commissions who have addressed the question presented here have both agreed that line sharing falls under checklist item 4, and that Bell Operating Companies ("BOCs") subject to section 271 must provide access to it.[1] No deliberative body anywhere has held otherwise.[2]

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[1] In Maine: Examiner's Report, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No. 2002-682*, issued July 23, 2004, p. 1 (holding that "Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271") (hereinafter "*ME Examiner's Report*") (Approved in relevant part by Maine Commission in: Order – Part 1, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No. 2002-682*, issued August 17, 2004, p. 1); (The Maine Orders are attached hereto as Exhibit 1).

In Pennsylvania: Opinion and Order, *Covad Communications Company v. Verizon Pennsylvania Inc.*, Pennsylvania Public Utility Commission Docket No. R-00038871C0001, issued July 8, 2004, pp. 19-20 (finding that "it is a reasonable interpretation of Checklist item #4 to also include the HFPL of the local loop. . . . line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing Section 271 obligations") (hereinafter, "*PA Opinion and Order*") (The Pennsylvania Order is attached hereto as Exhibit 2).

[2] It is also worth noting that both the North Carolina and Georgia Commissions determined that BellSouth had a continuing obligation under Section 271 to provide access to line sharing. However, both commissions modified their orders – without reversing the determination – upon reconsideration on the ground that reaching the 271 question was unnecessary for the resolution of the dispute at issue.

In Georgia: Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan, GPSC Docket No. 7892-U, issued Jan. 14, 2004, p. 3 (holding that "Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC and Section 271 checklist item 4.") (modified by Order on Reconsideration, GPSC Docket No. 7892-U, issued February 17, 2004, pp. 3-4 (Modifying its prior order "to remove the ground for denial . . . relating to whether BellSouth has an independent and ongoing access obligation under Section 271 to provide line sharing. The reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original motion.") (The Georgia Orders are attached hereto as Exhibit 3); and

In North Carolina: Order Denying BellSouth's Motion to Modify the SEEM Plan, NCUC Docket No. P-100, 133k, issued February 13, 2004, p. 23 (holding that "the Commission believes that BellSouth remains obligated to provide the HFPL under Section 271 of the Act") (modified by Order on Reconsideration of Order Denying BellSouth's Motion to Modify the SEEM Plan, NCUC Docket No. P-100, 133k, issued July 13, 2004, p. 27-28 ("the Commission is not convinced that line sharing will no longer be required under Section 271 although it has been removed by the FCC in the TRO as a Section 251 UNE.

II. STATEMENT OF THE LAW

A. Line Sharing is a Checklist Item 4 Loop Transmission Facility.

There can be no legitimate debate that line sharing is a checklist item 4 loop transmission facility. In the *Massachusetts 271 Order*, the FCC explicitly held:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[3]

The FCC placed line sharing in both checklist items 2 and 4 because at the time of the *Massachusetts 271 Order*, line sharing was required to be unbundled pursuant to section 251(c)(3). As a consequence, it, along with the other section 251(c)(3) UNEs, was included in checklist item 2 – which requires access to all section 251(c)(3) UNEs. Line sharing was also included in the specific checklist item under which it falls, checklist item 4.[4] While the determination in the *TRO*[5] that line sharing was no longer a section 251(c)(3) UNE did remove line sharing from checklist item 2, it did not remove line sharing from checklist item 4.[6]

However, due to the fact that the Commission finding in the *February 13, 2004* Order in this docket was not required for the Commission to reach its decision to deny BellSouth's Motion . . . the Commission believes that it is appropriate . . . to strike certain language . . .") (The North Carolina Orders are attached hereto as Exhibit 4).

[3] *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 164 (hereinafter "*Massachusetts 271 Order*") (relevant portions of the *Massachusetts 271 Order* are attached hereto as Exhibit 5).

[4] 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi) and (x); *see also, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (FCC-03-36). In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, Federal Communications Commission ("FCC") 03-36 (rel. Aug. 21, 2003) ¶ 654 ("*Triennial Review Order*" or "*TRO*") (relevant portions of the *TRO* are attached hereto as Exhibit 6).

[5] *Id.*

[6] *TRO* at ¶ 652 ("[W]e reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain [checklist 4, 5, 6 and 10] network elements that are no longer subject to unbundling under section 251 . . ."); *see also, Id.* at ¶ 654, 659.

Importantly, the FCC's statement in the *Massachusetts 271 Order* was not an anomaly: In every FCC 271 Order granting BellSouth long distance authority[7] -- indeed, in every FCC order granting any RBOC such authority – the FCC placed line sharing in checklist item 4.[8] For instance, in granting BellSouth 271 authority to sell long distance in Florida and Tennessee, the FCC determined that "BellSouth's provisioning of the line shared loops satisfies checklist item 4."[9] Moreover, before it was in its interest to do otherwise, BellSouth itself placed line sharing and line splitting in every one of its own 271 briefs to the states and to the FCC under checklist item 4.[10] Manifestly then, line sharing is a section 271(c)(2)(B)(iv) (checklist item 4) network element.

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[7] *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331, Released December 19, 2002 at ¶ 144 (hereinafter "*BellSouth FL/TN 271 Order*") (relevant portions of the *BellSouth FL/TN 271 Order* are attached hereto as Exhibit 7); *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, WC Docket No. 02-150, FCC 02-260, Released September 18, 2002, ¶ 248 (relevant portions of the *BellSouth AL, KY, MS, NC and SC 271 Order* are attached hereto as Exhibit 8); *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, WC Docket No. 02-35, FCC 02-147, Released May 15, 2002, ¶ 238 (relevant portions of the *BellSouth GA/LA 271 Order* are attached hereto as Exhibit 9).

[8] A spreadsheet providing citations and quotations from FCC 271 Orders is attached hereto as Exhibit 10.

[9] *BellSouth FL/TN 271 Order* ¶144.

[10] *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Florida and Tennessee, WC 02-307, filed September 20, 2002 at pp. 96-99; *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC 02-150, filed June 20, 2002 at pp. 114-116; *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Georgia and Louisiana,, CC 01-277, filed October 2, 2001 at pp. 112-114. (Relevant portions of BellSouth's 271 Briefs to the FCC are attached hereto as Exhibit 11).

B. Because Line Sharing is a Checklist Item 4 Network Element, BellSouth Remains Obligated to Provide Access to Line Sharing Pursuant to Section 271(c)(2)(B)(iv) Despite the FCC's Unbundling Determination under Section 251.

There appears to be no question that if line sharing is a local loop transmission facility under section 271(c)(2)(B)(iv), then BellSouth is obligated to provide access to it irrespective of any section 251 unbundling determinations by the FCC. [11] In apparent recognition that it has an obligation to provide access to checklist item 4 elements, BellSouth does not take issue with that obligation, but, rather, devotes its legal arguments to challenging line sharing's historical placement in checklist item 4. Despite its effort to rewrite history, there can be no legitimate dispute that BellSouth does indeed have an obligation to provide non-discriminatory access to all checklist item 4 elements, including line sharing "regardless of any unbundling analysis under section 251."[12] So long as BellSouth continues to sell long distance service under section 271 authority, it must continue to provide non-discriminatory access to all network elements under checklist items 4, 5, 6 and 10, irrespective of whether they are "de-listed under 251"[13] – including line sharing under checklist item 4.[14]

In sum, two irrefutable legal facts govern the decision in this matter: 1) Line sharing is a checklist item 4 loop transmission facility and 2) RBOCs offering long distance services pursuant to section 271 authority have an obligation to provide checklist item 4 elements irrespective of unbundling determinations under section 251. As a consequence of those two

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[11] *TRO* at ¶ 653 (providing that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling [checklist items 4, 5, 6, and 10] regardless of any unbundling analysis under section 251"); *see also*, *TRO* at ¶ 659 (providing that "section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251 . . .").

[12] *TRO* at ¶ 653; 47 U.S.C. § 271(c)(2)(B)(iv).

[13] With the exception of checklist item numbers 1 and 2, as these items are directly tied to section 251 and 252.

[14] This obligation can only be removed by the FCC in response to a petition for forbearance pursuant to 47 U.S.C. §160.

irrefutable facts, BellSouth has a legal obligation to provide access to line sharing beyond October 2004.[15] This should end the legal analysis. However, in contravention of its own prior advocacy – and in an overt attempt to breach its social contract with Congress, codified in the Act, to unbundle its network to competition – BellSouth now tries to avoid its obligation to provide line sharing by obfuscation.

III. RESPONSE TO BELLSOUTH'S ARGUMENTS

Given the absence of a Response Brief in this case, Covad is obliged to attempt to anticipate BellSouth's arguments and provide some response herein. In that effort, Covad is guided by the arguments BellSouth has previously made regarding line sharing and checklist item 4.[16] BellSouth has previously argued that: 1) Because of section 251 unbundling determinations line sharing is no longer a checklist item 4 element; 2) the High Frequency Portion of the Loop ("HFPL"), used to provide line sharing, is not a "loop transmission facility" under the definition of checklist item 4, and thus, line sharing was never a checklist item 4 element; and 3) in the *TRO* or in prior orders granting section 271 authority, the FCC stealthily indicated that, although it invariably considered line sharing under checklist item 4, line sharing is not really a checklist item 4 facility. These arguments are baseless.

A. The FCC's Section 251 Unbundling Determination in the *TRO* Did Not Remove Line Sharing From Checklist Item 4.

BellSouth previously argued that "[t]he fact that the FCC addressed line sharing under checklist item 4 when the FCC's rules required the line sharing be unbundled does not mean that line sharing is a checklist item 4 requirement even after the FCC's rules no longer require such

[15] Unless and until the FCC grants a Petition for Forbearance pursuant to 47 U.S.C. §160.

[16] The parties previously briefed the issue of line sharing and checklist item 4 in the context of BellSouth's efforts to have line sharing removed from state penalty plans.

unbundling."[17] This argument is demonstrably incorrect. BellSouth's argument is directly contrary to the FCC's interpretation of sections 251 and 271.[18] If section 251 unbundling determinations could remove elements from checklist item 4, as BellSouth asserts, then checklist item 4 would *not* be independent of section 251. However, the FCC made it clear in the *TRO* that access requirements under checklist item 4 *are* independent of 251 determinations. In the *TRO*, the FCC explained:

> Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3). Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling without mentioning section 251. **Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2. Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and work of a statute.**[19]

It was precisely to explain the redundancy of the overlapping network access requirements in checklist item 2 and checklist items 4-6 and 10 that the FCC engaged in the *TRO* analysis at paragraphs 649-667.[20] The FCC's interpretation of section 271(c)(2)(B) *reconciles* the overlapping access requirement contained in checklist item 2 with the same access requirements contained in checklist items 4-6 and 10:

> 659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251,

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[17] BellSouth Telecommunications, Inc.'s Motion for Reconsideration of the Order Denying BellSouth's Motion to Modify SEEM Plan, NCUC Docket No. P-100, Sub 133k, filed March 15, 2004, at 8. (hereinafter "BellSouth's Motion for Reconsideration")

[18] *TRO* at ¶ 652 ("[W]e reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251 . . ."); *see also, Id.* at ¶ 654, 659.

[19] *Id.* at ¶ 654 (emphasis added) (internal footnotes omitted).

[20] *Id.* at ¶ 651 ("In the *Triennial Review NPRM*, the Commission sought comment on how the access requirements specified in the section 271 competitive checklist relate to the unbundling requirements derived from sections 251(c)(3) and 251(d)(2).").

> 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. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has **eliminated.**[21]

In short, although the *price* for a "de-listed" UNE may change, if that UNE falls under section 271(c)(2)(B)(iv)-(vi) or (x) (checklist items 4-6 or 10), the obligation to provide non-discriminatory *access* remains.[22]

BellSouth previously made a similar argument – that section 251 determinations may remove elements from checklist 4 – when citing to paragraph 665 of the *TRO*.[23] Specifically, BellSouth cites to the portion of *TRO*, paragraph 665, which reads:

> We conclude that for purposes of Section 271(d)(6), BOCs must continue to comply with any conditions required for approval, consistent with changes in the law. While we believe that Section 271(d)(6) establishes an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that "the conditions required for approval" would not change with time.

BellSouth takes the fact that there will be "changes over time" to a BOC's section 271 obligations and leaps to the conclusion – without further explanation – that section 251 unbundling determinations can remove line sharing from checklist 4.[24] It is a bit bold to make

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[21] *TRO* at ¶ 659 (emphasis added).

[22] *TRO* ¶ 658 ("Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2). Rather, the checklist *independently imposes unbundling obligations*, but simply does so with less rigid accompanying conditions.") (emphasis added); *see also, TRO* ¶ 653 ("the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251*") (emphasis added); *see also, TRO* ¶ 654.

[23] BellSouth Telecommunications, Inc.'s Reply Comments Regarding Motion for Reconsideration of the Order Denying BellSouth's Motion to Modify SEEM Plan, NCUC Docket No. P-100, Sub 133k, filed May 17, 2004, at 8. (hereinafter "BellSouth's Reply Comments Regarding Motion for Reconsideration").

[24] Id.

that assertion based on a generally worded paragraph when it follows a specific twelve-paragraph discussion detailing why section 251 determinations do not remove elements from checklist items 4, 5, 6, or 10.[25] Nevertheless, BellSouth attempts to cloud the law by posing "the question of what the FCC could possibly have in mind if, as the CLPs [Competitive Local Providers] contend, the requirements considered under the general rubric of checklist items four, five, six and ten can never change."[26] Of course, the twelve-paragraph discussion preceding paragraph 665, answers that question: among other possible changes (*TRO* ¶¶656-664), elements not in checklist item 4, 5, 6, or 10 UNEs which are "de-listed" under section 251(c)(3) may no longer need be offered under section 271 (*TRO* ¶ 654); the price for checklist item 4, 5, 6 and 10 elements will be determined under a different standard (sections 201/202 versus TELRIC) and thus may presumably change (*TRO* ¶ 663); the commingling and combination rules applicable to section 251 UNEs may not apply to section 271 UNEs (*TRO* ¶ 656, fn 1990); and the FCC may forbear from enforcing 271 obligations pursuant to 47 U.S.C. §160. In short, the FCC's general discussion in paragraph 665 of a BOC's post-entry obligations did not secretly reverse its immediately preceding analysis that section 251 unbundling determinations do not change a BOC's obligations to provide access to section 271 checklist items 4, 5, 6 and 10 – including line sharing under checklist item 4. Notably, Verizon made these same arguments, and they were rejected by both the Pennsylvania and Maine commissions.[27]

B. The High Frequency Portion of the Loop is a Loop Transmission Facility under Checklist Item 4.

[25] *Compare TRO* ¶ 665 *with* ¶¶ 653-664.

[26] BellSouth's Reply Comments Regarding Motion for Reconsideration at 8.

[27] *ME Examiner's Report*, pp. 25-26, 28-29; *PA Opinion and Order*, pp. 9-10, 16-17.

BellSouth has also previously attempted to avoid its obligations under section 271 based on a literal reading of section 271(c)(2)(b)(iv) (checklist item 4) which ignores the FCC's clarifying definition. In previous briefing BellSouth has quoted section 271(c)(2)(b)(iv), which requires access to the "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services", and argued that checklist 4 "is for the provision of a whole loop, nothing more and nothing less."[28] However, BellSouth fails to even reference the FCC's clarifying definition of "loop."[29] The FCC defined the "loop" in section 271(c)(2)(B)(iv), competitive checklist item 4, as a "transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer's premises."[30] In the *TRO*, the FCC defined the High Frequency Portion of the Loop ("HFPL"), used to provide line sharing, as "a complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises."[31] Because the HFPL is "a complete transmission path" over the loop, it constitutes a form of "loop transmission facility" under the FCC's definition for checklist item 4 elements.[32] Indeed, BellSouth routinely uses the HFPL

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[28] BellSouth's Reply Comments Regarding Motion for Reconsideration at 8.

[29] *Id.*

[30] *In the Matter of Joint Application by SBC Communications, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin,* Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, Released October 15, 2003 at F-26 (explaining the legal background of checklist item 4, including line sharing) ("*SBC Order*") (relevant portions of the *SBC Order* are attached hereto as Exhibit 12).

[31] *TRO* ¶268.

[32] *Id.*

transmission channel to provide xDSL services.[33] The FCC and BellSouth always considered the HFPL under checklist item 4 – local loop transmission facilities – precisely because the HFPL is a type of loop transmission facility. This same argument was also made by Verizon and rejected by both the Pennsylvania and Maine commissions.[34]

C. BellSouth's Argument that the *TRO* Somehow Stealthily Removed Line Sharing From Its Historical Placement in Checklist Item 4 is Demonstrably Incorrect.

In the context of its efforts to remove line sharing from state penalty plans, BellSouth has previously attempted to explain away the historical treatment of line sharing under checklist item 4. BellSouth bases its assertion that line sharing is no longer (or never was) a checklist item 4 element on two facts. First, BellSouth relies on the fact that in the *TRO*, the FCC specifically addressed whether carriers were impaired without access to the HFPL separately from other loop types in its section 251 unbundling analysis, but only referred to "loops" when addressing checklist item 4 in its section 271 analysis. Second, BellSouth relies on the fact that in the *SBC Order*, the FCC addressed the HFPL (line sharing) separately from other "loops" in its discussion of unbundling requirements pursuant to section 271(c)(2)(B)(ii), competitive checklist item 2.[35] Both of these arguments misconstrue the significance of the treatment of loops and the HFPL.

1. The FCC did not secretly remove line sharing from checklist item 4 in the *TRO*.

BellSouth misconstrues the purposes of the *TRO* sections addressing section 251 unbundling analyses and section 271 statutory interpretation to argue that line sharing is not a

[33] In other words, Bell customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services over the high frequency portion of their local loop (HFPL).

[34] *ME Examiner's Report*, pp. 26, 28-29; *PA Opinion and Order*, pp. 9, 17-19.

[35] BellSouth's Motion for Reconsideration at 5-6.

checklist item 4 element.[36] BellSouth argues that various "whole loops" and the HFPL (line sharing) are analyzed as separate UNEs under the *TRO* section 251 analysis, and then jumps to the conclusion that they cannot, therefore, both fall under "local loop transmission facilities" in checklist item 4.[37] BellSouth fails, however, to mention that in the *TRO*, all of the checklist items are considered as separate UNEs in the unbundling analysis, but lumped together under their general checklist description in the section 271 analysis.[38] Specifically, "loops" are analyzed from paragraph 197 to paragraph 341 as numerous separate UNEs defined both by capacity and market levels, with differing section 251 unbundling determinations for each. Yet in the discussion of section 271 obligations at paragraphs 649 to 653, the FCC only mentions "loops." Under BellSouth's reasoning, the FCC's failure to list all of the loop types at paragraphs 649-653 should imply that not a single one of them is a checklist item 4 loop transmission facility. Of course, this is absurd. If the FCC intended to remove a loop type that had historically always been considered under checklist 4, then it would have made that determination explicit.

Similarly, in the *TRO*'s unbundling analysis, switching (checklist item 6) and transport (checklist item 5) are addressed as numerous discrete UNEs based on market type (switching) and capacity (transport), with differing section 251 unbundling determinations for each. In

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[36] Id. (arguing that "it makes no sense to conclude that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two together without any distinction.")

[37] Id.

[38] For instance, in *TRO* paragraphs 197 to 341 under the heading "Loops", the FCC analyzed stand-alone copper loops (¶ 248), line splitting (¶ 251), copper subloops (¶ 253), the HFPL (¶ 255), FTTH loops (¶ 273), hybrid loops (¶ 285), dark fiber (¶ 311), OCn loops (¶ 315), DS3 loops (¶ 320), and DS1 loops (¶ 325) for section 251 unbundling purposes. However, in paragraphs 649 to 653 the FCC only generally refers to "local loop transmission" (¶ 650), "loops" or "loop" (¶ 652, 653, 654, and 661). BellSouth fails to explain why some or all of the remaining nine loop types discussed in paragraphs 197 to 341 should not also be removed from checklist item 4 based on the FCC's failure to mention them in its 271 discussion.

discussing these checklist items in its section 271 analysis, however, the FCC only identified them generically as "switching" and "transport." Does this imply that certain transport or switching UNEs are being surreptitiously removed from their respective 271 checklist? No. Yet this is the very logic BellSouth applies in its argument that "it makes no sense to conclude that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two together without any distinction."[39]

The FCC's "separate analyses" for section 251 unbundling determinations and "lumping together" for the section 271 discussion makes perfect sense when one considers the purpose of the two sections: the section 251 unbundling analysis specifically addressed whether particular network elements met the FCC's impairment standard, whereas the section 271 analysis *generally* addressed the relationship between two statutory sections, 251 and 271.[40] That is why section 251 loop, transport and switching network elements – some unbundled and others not unbundled – were "lumped together" under their general section 271 checklist titles: "loops, transport and switching." The use of general terms in a general discussion does not constitute a basis to assert that there is a hidden change in the FCC's historical treatment of line sharing under checklist item 4. Accordingly, BellSouth's argument that there is a secret change in the FCC's treatment of line sharing under section 271(c)(2)(B)(iv) is incorrect and must be rejected.

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[39] BellSouth's Motion for Reconsideration at 5-6.

[40] *Compare TRO* at ¶ 197 (describing the FCC's specific loop analyses: "Consistent with our statutory mandate and relevant judicial precedent, we focus on specific market and customer characteristics ***as informed by various loop types and capacities*** that typically serve these markets and customers to undertake the granular inquiry necessary to determine where loop impairment exists.") (emphasis added) *with TRO* at ¶ 651 (describing its general statutory analysis: "In the *Triennial Review NPRM*, the Commission sought comment on how the access requirements specified in the section 271 competitive checklist relate to the unbundling requirements derived from sections 251(c)(3) and 251 (d)(2).")

2. The *SBC Order* demonstrates that line sharing is a checklist item 4 element.

In an effort to bolster its *TRO* argument, BellSouth grossly mischaracterizes the FCC's *SBC Order*. BellSouth represents that the *SBC Order* "made clear that line sharing has never been subsumed within the obligation to provide access to unbundled loops pursuant to checklist item 4 of Section 271."[41] To support this bold statement, BellSouth cites paragraphs 10 and 11 of the *SBC Order*. These two paragraphs, however, do not relate to checklist item 4 in any way. In fact, they do not even *mention* checklist item 4 in passing. Instead, paragraphs 10 and 11 address checklist item 2 matters, something that is not even at issue in this proceeding.[42] In its prior arguments, BellSouth fails to mention that SBC's provision of line sharing ***is*** considered in the section of the *SBC Order* addressing compliance with checklist item 4.[43] It is patently inconsistent for the FCC to place line sharing in checklist item 4 in the same order that BellSouth claims makes it "clear that line sharing has never been subsumed within . . . checklist item 4." There is no other way to characterize BellSouth's claim that the *SBC Order* "made clear" some change in the historical treatment of line sharing other than to say that it is just plain false.

In a similar argument, BellSouth quotes from the section of the *SBC Order* considering SBC's compliance with checklist 4 (again, the section of the *SBC Order* addressing line sharing) to assert that line sharing actually is not a checklist 4 element. Specifically, BellSouth quotes:

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[41] BellSouth's Motion for Reconsideration at 7.

[42] *SBC Order* ¶ 10 ("One part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules governing UNEs. [fn 35 – "In order to comply with the requirements or checklist item 2, a BOC must show that it is offering '[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3).' 47 U.S.C. § 271 (c)(2)(B)(ii).] In the *UNE Remand* and *Line Sharing Orders*, the Commission established a list of UNEs that incumbent LECs were obliged to provide: (1) local loops and subloops; (2) network interface devices; (3) switching capability; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) OSS; and (7) the high frequency portion of the loop.")

[43] *Id.* ¶145; *see also, SBC Order*, Appendix F at ¶¶ 48-52 (discussing the requirements for compliance with checklist item 4, including the provision of line sharing).

> Based on the evidence in the record, we conclude . . . that SBC provides unbundled local loops in accordance with the requirements of Section 271 and our rules. Our conclusion is based on our review of SBC's performance for all loop types which include voice grade loops, xDSL capable loops, digital loops and high capacity loops, as well as our review of FCC's processes for hot cut provisioning, and line sharing and line splitting.[44]

BellSouth argues that the reference to "and our rules" in the first sentence excludes "hot cut provisioning, and line sharing and line splitting" from checklist item 4 based on the use of the conjunction "as well as" in the second sentence, arguing:

> Thus, the FCC clearly stated that its analysis was based on the provisioning of loops, as well as other requirements related to the provisioning of hot cuts, line sharing and line splitting that are based, not upon the requirements of checklist four as expressly articulated in the Act, but rather upon FCC's rules. In this specific instance, the rule in question is the FCC's former rule (pre-TRO) that required that line sharing be offered on an unbundled basis pursuant to Section 251.[45]

BellSouth argues that these two sentences from the *SBC Order* demonstrate that the FCC "clearly" (but obliquely) communicated that its consistent and repeated treatment of line sharing as a checklist item 4 element was only convenient treatment of checklist 2 item elements (section 251 UNEs) in checklist 4.[46] This is facially absurd. Having gone through the section 271 application process, BellSouth well knows what the reference to "our rules" means: FCC rules governing the provision of the section 271 network elements in question, such as access to loop make-up information, repair, provisioning, and ordering. The same sentence from the *Massachusetts 271 Order* reads:

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[44] *SBC Order* ¶142.

[45] BellSouth's Reply Comments Regarding Motion for Reconsideration at 9.

[46] In BellSouth's own words, "the FCC has considered the requirement of checklist four to provide a loop at the same time it considers the requirements to provide unbundled network elements that are related to the loop" (i.e. elements that, in BellSouth's interpretation of the Act would only fall under checklist item 2) Reply Comments Regarding Motion for Reconsideration at 9.

> Based on the record before us, we conclude that Verizon has adequately demonstrated that it provides unbundled local loops as required by section 271 and our rules. First, as described above, we find that Verizon provides access to loop make-up information in compliance with the *UNE Remand Order*. Second, we find that Verizon provides nondiscriminatory access to stand alone xDSL-capable loops and high-capacity loops. Third, we find that Verizon provides voice grade loops, both as new loops and through hot-cut conversions, in a non-discriminatory manner. Finally, we find that Verizon has demonstrated that it has a line sharing and line-splitting provisioning process that affords competitors nondiscriminatory access to these facilities. In doing so, we acknowledge that the Massachusetts Department also concludes that Verizon complies with this checklist item.[47]

The *Massachusetts 271 Order* expressly identifies one source of FCC rules: The *UNE Remand Order*. Indeed, the *Massachusetts 271 Order* not only lists line sharing among the loop types required under checklist 4, but expressly identifies line sharing as a checklist item 4 element:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 **and 4** of section 271.[48]

As a consequence, BellSouth's misconstruction of the *SBC Order* should be rejected.

D. The Transition For Line Sharing Does Not Apply to RBOCs Operating Under Section 271 Authority.

In the *TRO*, the FCC's line sharing transition plan was developed in conjunction with the FCC's section 251 unbundling analysis, and consequently, applies to Incumbent Local Exchange Carriers ("ILECs") for whom the obligation to provide line sharing arises under section 251.[49] BellSouth is both an ILEC and a Bell Operating Company ("BOC"). Section 271 of the

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[47] *Massachusetts 271 Order* ¶ *125.*

[48] *Massachusetts 271 Order* ¶ 164.

[49] *TRO* ¶ 264 (Stating the policy objective of the transition plan as providing "carriers . . .adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with **incumbent LECs** to replace line sharing. . . .) (emphasis added).

Telecommunications Act imposes separate and independent obligations on ILECs who are also BOCs operating under section 271 authority. In the words of the FCC:

> [S]ection 271 places specific requirements on BOCs that were not listed in section 251 . . . . recognizing an independent obligation on BOCs under section 271 would by no means be inconsistent with the structure of the statute. Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[50]

As a consequence, the FCC's transition plan applies to ILECs for whom the obligation to provide access to line sharing was removed pursuant to the FCC's section 251 unbundling analysis, but not to BOCs, like BellSouth, who have an independent obligation to provide access to line sharing under section 271.[51] Congress crafted a different procedure for the BOCs to seek removal of their independent 271 obligations – a Petition for Forbearance pursuant to 47 U.S.C. §160. Indeed, BellSouth is currently seeking forbearance pursuant to 47 U.S.C. §160 at the FCC.[52] In sum, BellSouth is obligated to provide line sharing pursuant to 47 U.S.C. § 271(c)(2)(B)(iv) unless the FCC grants a forbearance petition under 47 U.S.C. § 160 *et seq.*, specifically forbearing from enforcement of that obligation.

IV. CONCLUSION

For the foregoing reasons, Covad respectfully asks that the Commission rule that BellSouth is obliged to provide access to line sharing beyond October 2004 pursuant to 47 U.S.C. §271(c)(2)(B)(iv) and FCC rules.

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[50] *TRO* ¶ 655.

[51] *Id.*

[52] Petition for Forbearance, *In the Matter of BellSouth Telecommunications, Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c)*, WC Docket No. 04-48, filed March 1, 2004 (BellSouth's Petition for Forbearance is attached hereto as Exhibit 13).

Respectfully submitted this 3rd day of September 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Legal Brief has been furnished by (*) hand delivery and U.S. Mail this 3rd day of September, 2004 to the following:

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EXHIBITS
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EXHIBIT	DESCRIPTION
1	Examiner's Report, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No. 2002-682*, issued July 23, 2004; and Maine Commission in: Order – Part 1, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No. 2002-682*, issued August 17, 2004.
2	Opinion and Order, *Covad Communications Company v. Verizon Pennsylvania Inc.*, Pennsylvania Public Utility Commission Docket No. R-00038871C0001, issued July 8, 2004.
3	Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan, GPSC Docket No. 7892-U, issued Jan. 14, 2004; and Order on Reconsideration, GPSC Docket No. 7892-U, issued February 17, 2004.
4	Order Denying BellSouth's Motion to Modify the SEEM Plan, NCUC Docket No. P-100, 133k, issued February 13, 2004; and Order on Reconsideration of Order Denying BellSouth's Motion to Modify the SEEM Plan, NCUC Docket No. P-100, 133k, issued July 13, 2004.
5	*In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, FCC 01-130, Released April 16, 2001, pages 1-2, 68-104.
6	*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (FCC-03-36). In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, Federal Communications Commission ("FCC") 03-36, Released Aug. 21, 2003, pp. 1-6, 123-205, 400-409.
7	*In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331, Released December 19, 2002, pp. 1-2, 68-80, D-29-31.
8	*In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, WC Docket No. 02-150, FCC 02-260, Released September 18, 2002, pp. 1-2, 129-146, H-26-28.

9	*In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, WC Docket No. 02-35, FCC 02-147, Released May 15, 2002, pp. 1-2, 127-140.
10	Spreadsheet of FCC 271 Checklist Item 4 Line Sharing Quotations.
11	*In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Florida and Tennessee, WC 02-307, filed September 20, 2002, pp. i-iii, 84-101; *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC 02-150, filed June 20, 2002, pp. i-iii, 101-117; and *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Georgia and Louisiana,, CC 01-277, filed October 2, 2001, pp. i-iii, 98-114.
12	*In the Matter of Joint Application by SBC Communications, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, Released October 15, 2003, pp. 1-8, 88- 94, F-26-27.
13	Petition for Forbearance, *In the Matter of BellSouth Telecommunications, Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c)*, WC Docket No. 04-48, filed March 1, 2004.

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

July 23, 2004

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **noon on August 6, 2004**. It is expected that the Commission will consider this report at a special deliberative session on **August 12, 2004**.

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), in its state wholesale tariff. We also find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their

interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial Case Conference for December 10th. On December 4, 2002, prior to the Case Conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December

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[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

[2] The parties include: OPA, ASCENT, WorldCom, Mid-Maine Tele-communications, and Oxford Networks. Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

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[3]At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Great Works Internet, Conversent Communications, and Cornerstone Communications) and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al.*, FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO.* On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing unbundled network elements (UNEs) under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial briefs were filed by Verizon-Maine (Verizon), the CLEC Coalition, and the Consolidated Intervenors (Biddeford Internet Company d/b/a Great Works Internet (GWI), the Office of the Public Advocate (OPA) and Cornerstone

Communications (CC)). The same parties filed reply briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II,*[5] **the appeal of the** *TRO.* Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon. The arguments from all parties in the three rounds of briefs are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I* decision was released, the FCC issued its *TRO,* and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most

[5] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

respects[6]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. Applicable Law

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[7] Thus, Checklist Item No. 2 requires an ILEC to meet

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[6]In a recent order in the *Skowhegan Online Proceeding,* we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

[7]In the *TRO,* the FCC retained its earlier definition of "necessary" ("...a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a

all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[8]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271. However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.

In the FCC's Order granting Verizon 271 authority in Maine,[9] the FCC stated:

> *Working in concert with the Maine Commission*, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[10]

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barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[8]*USTA II* vacated the *TRO*'s findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[9]*Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (Maine 271 Order).

[10]*Maine 271 Order* at ¶ 65.

(emphasis added). The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order,* for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[11]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order,* which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the New York 271 Order specifically endorsed state commission authority to enforce commitments made by Verizon [then Bell Atlantic] to the New York Public Service Commission. The FCC stated that:

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.[12]

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[11] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order*).

[12] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order*) at ¶ 452.

Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[13]

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[14]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

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[13] *New York 271 Order* at n. 1353.

[14] March 1, 2004 Letter from Commission to Edward Dinan, President, Verizon Maine.

> The MPUC finds, based upon the record before us, Including the commitments made by Verizon in its March 4, 2002 letter to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[15]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[16]

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[15]Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[16]271 Report to FCC at p. 7.

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon.

Verizon's initial brief did not directly respond to the Hearing Examiner's question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon admits that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argues that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC can set rates for these UNEs. Verizon maintains that the pricing standard set by the FCC for 271 network elements, "just and reasonable," is not the same as a total element long run incremental cost methodology (TELRIC) used for section 251 UNEs.

In its reply brief Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the Performance Assurance Plan (PAP) and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon does not specifically address state authority under section 271 in its

Supplemental Brief, Verizon states that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

2. Consolidated Intervenors.

In their initial brief, the Consolidated Intervenors state that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cites paragraphs 653 and 655 of the *TRO*. They also point to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They point to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review as evidence of the Commission's authority. They assert that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors state that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpret the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

3. CLEC Coalition.

In its brief, the CLEC Coalition states that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO*. The CLEC Coalition also concludes that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271. Here, the state should secure compliance by setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argues that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine. In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process.

D. Analysis

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and whether this Commission has authority to require Verizon to file a tariff in Maine reflecting its 271 unbundling obligations, i.e. its obligations under Checklist Items 4, 5, 6, and 9.

First, with regard to the scope of Verizon's commitment to file a wholesale tariff in Maine, we examine the underlying purposes of the condition and find that the same reasons for requiring a wholesale tariff encompassing Verizon's 251 obligations apply equally to Verizon's 271 obligations. Indeed, they apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may come up in an interconnection agreement negotiation. In the Verizon Arbitration proceeding,[17] CLECs complained that Verizon has not responded to requests from CLECs to negotiate amendments to their interconnection agreements. These are the same types of complaints we heard during the 271 process which led us to adopt the wholesale tariff condition in this first place. Finally, Verizon has not argued to us that it did not commit to tariff all of its wholesale obligations. Instead, it focuses on the jurisdictional issues without examining the motivations and intentions behind its 271 commitment. We find that a reasonable interpretation of the condition we placed upon Verizon, and the condition it committed to fulfill, requires Verizon to include both its 251 and 271 unbundling obligations in its wholesale tariff filed in Maine.

We turn now to our authority to enforce that commitment. While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon fails to explain adequately why states have authority over some 271 issues, such as performance assurance plans, and not others. Previously, state commissions did not have authority to approve an ILEC's 271

[17] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

application but were allowed, indeed encouraged, by the FCC to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met 271 standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
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> . . .
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> 5. **We rely heavily in our examination of this application** on the work completed by the Maine Commission. . . .

We find that states have a similar role with regard to enforcement of 271 obligations. Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

As indicated above, the FCC has already clearly stated that states may enforce commitments made by ILECs during the 271 process. Here, where the commitment involves filing a wholesale tariff, we believe we also have authority to review that tariff for compliance with the applicable federal and state requirements. If a party believes the Commission has not applied the correct standard, the party may then file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II*.

In addition to the legal basis for our decision, our decision also addresses a significant practical consideration facing the Commission. Specifically, from a Commission resource perspective, it makes much more sense to litigate all of the issues associated with unbundling in one docket and develop a standard offer or Statement of Generally Available Terms (SGAT). A single litigated case ensures that we receive the benefit of briefing on an issue from all interested parties, rather than rely on individual litigants to brief issues that may, or may not, be important to them. Individual litigation diverts Commission resources from addressing matters that impact all carriers to issues that may only affect one or two carriers.

Finally, we note that 35-A M.R.S.A. § 304 requires that all utilities file schedules containing the rates, terms, and conditions for any service performed by it within the State. We have previously interpreted this provision to require filing of

wholesale rates with the Commission, i.e. services which are resold to other carriers or special contracts made with specific customers. For example, Verizon has on file with the Commission a state access tariff through which it offers many UNE-like services, such as high capacity transport. Thus, subject to the specific finding below, we require Verizon to file both its terms and conditions and rates for all of its 251 and 271 obligations in its Maine wholesale tariff.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Now that we have determined that Verizon must tariff its 271 obligations, we must consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II*.

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost, be nondiscriminatory, and may include a reasonable profit. This standard has been interpreted by the FCC (and upheld by the

Supreme Court[18]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[19] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[20] The FCC noted

[18] *See AT&T v. Iowa Utilities Bd.*, 525 U.S. 355 (1999)(*Iowa II*).

[19] *TRO* at ¶ 656.

[20] *TRO* at ¶ 664.

that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[21]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[22] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are jurisdictionally intrastate.[23] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252

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[21] *Id.*

[22] *USTA II* at 53.

[23] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

arbitration proceeding.[24] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon.

Verizon argues that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contends that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. Verizon argues that the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also points out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

2. CLECs.

The CLEC Coalition argues that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs over which the Commission would have the authority to review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because

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[24] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[25]

D. Analysis

Determination of the scope of the Commission's 271 pricing authority requires both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation.

There are a number of factors which could support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. Finally, both CLECs and the National

[25]It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, that the question needed to be addressed.

Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, that the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[26] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 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 implement that methodology, determining the concrete result in particular circumstances.[27]

These same parties also point to a state commission's authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct as another source of authority to set rates for elements provided pursuant to section 271.

Notwithstanding these arguments in favor of Commission authority to set 271 UNE rates, we decline at this time to exercise that authority. While we do not necessarily agree with the FCC's assertion of exclusive jurisdiction over 271 UNE rates, it is, nonetheless, the current law of the land. Rather than add an additional layer of confusion to an already complex situation, we will allow time for the process envisioned by the FCC to work, i.e., for Verizon to file federal tariffs or for the parties to reach arms-length agreements. While we will not set the rates charged by Verizon, we will exercise our authority to require Verizon to file those rates with us in its wholesale tariff. Indeed, before Verizon may begin charging any CLEC 271 UNE rates which are higher than its current TELRIC rates, Verizon must first obtain the FCC's approval for the specific rates

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[26] *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000).

[27] *Iowa II,* 525 U.S. at 384.

(in whatever form necessary) and then must file the rates here pursuant to our usual tariffing process. We will suspend any rates filed with us which have not been specifically approved by the FCC.

We leave open today the possibility that in the future, perhaps after the FCC has ruled on the BellSouth Emergency Petition or if the Supreme Court takes the *TRO* appeal and reverses the *USTA II* decision, we might revisit the issues decided today. We also leave open the possibility that we will step in and take action if the FCC abdicates its authority, either explicitly or by taking an undue amount of time to exercise its authority. We firmly believe that *all* parties would greatly benefit from increased certainty concerning wholesale pricing and if the FCC does not actively assert its jurisdiction, we will assert ours so as to ensure the continued viability of local competition in Maine.

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[28] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and

[28] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[29] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.

USTA II at 45. Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.

Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs. In its *Line Sharing Order,*[30] the FCC discussed the necessity of unbundling the HFPL as part of an ILEC's 251 unbundling obligations. In its *Oklahoma/Kansas 271 Order,* the first 271 Order issued after the *Line Sharing Order*,

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[29] *TRO at* ¶ 258.

[30] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order).*

the FCC included its discussion of compliance with the line sharing requirement under its discussion of compliance with Checklist Item No. 4, access to local loops.[31] In the *Massachusetts 271 Order*, the FCC explicitly stated that:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[32]

Thus, the FCC appears to consider line sharing a form of access to the local loop that must be provided pursuant to section 271, regardless of whether it must also be provided pursuant to section 251.

B. Positions of the Parties

1. Verizon.

Verizon argues that in the *TRO*, the FCC determined that CLECs are not impaired without unbundled access to line sharing. Verizon argues that where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, "the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns." Citing section 251(d)(3) and "long-standing federal preemption principles," Verizon asserts that state commissions have no authority to override the FCC's determination that the unbundling of certain network elements is not required under the TelAct.

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[31] *Oklahoma/Kansas 271 Order* at ¶ 214.

[32] *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 163 (*Verizon MA 271 Order*).

Verizon contends that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon. This is especially true where the FCC has explicitly declared that line sharing is not required. Verizon points out that the FCC authorized the state to perform "granular" review of specific elements only and that line sharing was not one of them.

Verizon further argues that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argues that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's rulings in its *TRO*." In particular, Verizon disputes the CLECs' claim that the Commission has separate state authority to order line sharing and states that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refutes the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts. Since the FCC has already found no impairment, they conclude, the Commission is not free to order line sharing.

In its Supplemental Brief, Verizon asserts that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[33] Verizon also repeats its belief that

[33] *USTA II* at 12.

the "Commission may not lawfully rely on state law to impose an unbundling obligation for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *Triennial Review Order*." Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argues that even if the state is authorized to order unbundling (which they insist, it is not), it may not do so in the case of line sharing because *USTA II* affirmed the FCC's decision in the *TRO* not to order line sharing because it discourages investment.

2. CLECs.[34]

In their Brief, the Consolidated Intervenors point to the Commission's reliance upon Verizon's performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine's 271 proceeding. They contend that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission's support and is anti-competitive. The Consolidated Intervenors argue that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They suggest that the Commission follow the Pennsylvania Public Utilities Commission's lead in insisting that Verizon honor its 271 obligations. Finally, they cite 35-A M.R.S. A. § 7101 and argue that Verizon's proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas. The Consolidated Intervenors argue that the Commission should order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

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[34]The CLEC Coalition did not brief the line sharing issues but "supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate".

In their Reply Brief, the Consolidated Intervenors again describe how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cite to paragraph 650 of the *TRO* where the FCC states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops...." The Consolidated Intervenors implore the Commission to enforce Verizon's 271 obligations.

In their Supplemental Brief, the Consolidated Intervenors state that the decision in *USTA II* confirms the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argue that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

C. Decision

We find, based upon the language quoted above from the FCC's *Massachusetts 271 Order,* that Verizon must continue to provide CLECs with access to line sharing in order comply with Checklist Item No. 4 of section 271. As discussed above, however, we will not exercise any authority we might have to set rates for 271-based UNEs such as line sharing and will leave those issues to the FCC, which has already stated what it believes to be the fair rate, i.e. three years of transition rates leading to up to the full cost of the loop. While our decision today does not provide the CLECs with all of the relief they requested, it does provide them with the continued

opportunity to share lines with Verizon, which retains the majority of local service lines in Maine.

We decline the opportunity to exercise any authority we have under either federal or state law to order line sharing at TELRIC rates at this time. While we do not concede the point as argued by Verizon, the FCC clearly intended to preempt state authority to order line sharing pursuant to section 251 or state law. Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO,* the FCC asserts that its interpretation of the requirements of section 251, i.e., its rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[35] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted. Any party aggrieved by a state decision to require line sharing after the effective date of the *TRO* can seek a declaratory ruling from the FCC

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[36] If the statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[37] Savings

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[35] *TRO* at ¶ 191.

[36] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[37] *Id.*

clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[38] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[39]

The FCC's assertion that its rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in *Iowa I*.[40] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[41] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[42] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[43] Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it

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[38] *Id.*

[39] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[40] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

[41] *Id.* at 806.

[42] *Id.* It further held that section 261(c) of the TelAct (which requires state commission decisions to be consistent with the FCC's regulations) applies only to state requirements that are not promulgated pursuant to section 251. *Id.* at 807.

[43] *See TRO* at ¶ 192, fn. 611.

automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

We find that, with respect to line sharing, there has been a clear policy decision at the federal level that line sharing should not be made available at TELRIC pricing. Any decision on our part, whether based upon federal or state law, to require line sharing at TELRIC prices would directly contradict federal policy and would, in fact, substantially prevent implementation of section 251 as interpreted by the FCC.[44] We do not reach the issue of whether the FCC's interpretation of 251 would limit state authority in every instance but instead find that here, with regard to line sharing, and where the federal policy has been so clearly enunciated and upheld by the D.C. Circuit, that the most appropriate action at this time requires denial of the CLECs' request for state-ordered unbundling at TELRIC rates. We leave open the possibility that if, at some future date the Supreme Court overturns the FCC's interpretation of its powers of preemption and/or overturns the FCC's decision concerning line sharing, we might revisit this issue and reach a different result. Until such time, the only line sharing that will be available in Maine will be pursuant to section 271 at "just and reasonable rates" as determined by the FCC.

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[44] *But see, Investigation into Skowhegan Online's Request for UNE Loops*, Docket No. 2002-704, Orders (April 20, 2004 and June 16, 2004) where the Commission asserted its authority under 35-A M.R.S.A. §§ 301, 7101 and ordered Verizon to unbundle certain copper subloops not required under federal law.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs in its state wholesale tariff and to continue to offer line sharing pursuant to Checklist Item No. 4 of section 271.

Respectfully submitted,

Trina M. Bragdon
Hearing Examiner

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

August 17, 2004

ORDER – PART 1

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

For reasons which will be discussed fully in our forthcoming Part II Order, we find that Verizon must include all of its wholesale offerings in its state wholesale tariff, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996. In addition, Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. "Total Element Long Run Incremental Cost" for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. We also find that we are not preempted from considering in this proceeding whether Verizon must continue to offer line sharing pursuant 35-A M.R.S.A. §§ 1306 and 7101.

Dated at Augusta, Maine, this 17th day of August, 2004.

BY ORDER OF THE COMMISSION

Raymond Robichaud
Acting Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Public Meeting held July 8, 2004

Commissioners Present:

Terrance J. Fitzpatrick, Chairman
Robert K. Bloom, Vice Chairman
Glen R. Thomas
Kim Pizzingrilli
Wendell F. Holland

Covad Communications Company,
Complainant,

R-00038871C0001

v.

Verizon Pennsylvania Inc.,
Respondent

OPINION AND ORDER

BY THE COMMISSION:

Before this Commission for consideration is the Petition of Verizon Pennsylvania Inc. (Verizon PA) for Interlocutory Commission Review and Answer to a Material Question and a Stay of Proceedings (Petition and Stay) filed on February 25, 2004, in the above-captioned proceeding. *See* 52 Pa. Code § 5.302. The Petition and Stay have been filed in response to a February 13, 2004 Interim Order of Administrative Law Judge (ALJ) John H. Corbett, Jr. (assigned as Motions Judge January 20, 2004). In the Interim Order, ALJ Corbett denied a Verizon PA Motion to Dismiss a Formal Complaint of Covad Communications, Inc. (Covad), which was filed

against certain tariff revisions to Verizon PA's Tariff No. 216 (pertaining to Unbundled Network Elements (UNEs)) which are designed to remove and revise terms and conditions for, among other services, line sharing.[1]

By its Petition and Stay, Verizon PA requests interlocutory review of the following two material questions:

(1) Whether this Commission is preempted by federal law from requiring Verizon to provide "line-sharing" under state tariff under terms, conditions and prices differing from those that the FCC has determined are appropriate under the federal Telecommunications Act ("Act"); and

(2) Whether this Commission lacks independent authority under Section 271 of the Act or state law to impose any line-sharing requirement.

Briefs in opposition to Verizon PA's Petition and Stay were filed by the Office of Consumer Advocate (OCA) and Covad. Verizon PA filed a Brief in support of its Petition and Stay.[2] We, thereafter, elected to waive the 30-day period for consideration of the Petition and Stay as set forth in 52 Pa. Code § 5.303. *See* Secretarial Letter of March 18, 2004 citing 52 Pa. Code § 1.2(c); also *C.S. Warthman Funeral Home, et al. v. GTE North, Incorporated*, Docket No. C-00924416 (Order entered June 4, 1993).

Before we evaluate the interlocutory matter before us, we make the following procedural observations. As noted, this proceeding involves tariff revisions filed by Verizon PA to its Services for Other Telephone Companies Tariff – Pa. PUC No. 216, to remove certain UNEs and to revise terms and conditions for line sharing. We

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[1] *See* Tariff PA PUC 216, Section 3A, Revised Sheet 5.

[2] The Parties were permitted to increase the page length of the briefs to twenty-five pages and also granted an extension of time until March 8, 2004, in which to file.

observe that pursuant to the requirements of Section 1308(b) of the Public Utility Code, 66 Pa. C.S. § 1308(b), this Commission may, at any time before they become effective, suspend the operation of such rates for a statutorily prescribed period, pending decision by the Commission. By Order entered herein on December 4, 2003, the Commission suspended the proposed revisions to Tariff No. 216. However, the period of time for the suspension of the proposed tariff revisions has expired and we are advised that Verizon PA intends to place said tariff revisions in effect. Notwithstanding, there are substantial questions raised by the proposed revisions and we shall continue this Commission's investigation into the lawfulness of said tariff revisions. Final adjudication of the lawfulness of said revisions may require changes to Tariff No. 216.

Background

In the Federal Communications Commission (FCC) *Line Sharing Order*,[3] FCC rules implementing the unbundling requirements of the federal Telecommunications Act of 1996 (Act or TA96) were amended to require incumbent local exchange carriers (LECs) to provide unbundled access to the high frequency portion of the local loop (HFPL).[4] This was mandated to enable competitive LECs to compete with incumbent LECs to provide xDSL-based services through telephone lines that the competitive LECs could "share" with incumbent LECs. Line sharing, therefore, is the process by which a requesting LEC provides DSL service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting LEC using the HFPL.

The *Line Sharing Order* was vacated and remanded. *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied* 538 U.S. 940 (2003). After the D.C. Circuit Court's vacation and remand of the FCC's original line sharing rules, line sharing was again considered in the recently issued FCC *Triennial Review Order* (TRO).[5] Pursuant to

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[3] See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order; CC Docket No. 96-98, 14 FCC Rcd 20912. (1999).

[4] The HFPL is defined as ". . . the frequency range on the copper loop above the range that carries analog circuit-switched voice transmissions." 47 C.F.R. § 51.319(a)(1)(i). *See* 47 U.S. C. § 251(c) and 252(d)).

[5] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003); corrected by Errata, 18 FCC Rcd 19020 (2003); *vacated, in part, United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases).

the TRO, FCC unbundling rules were further revised and as a result of the TRO, line sharing is no longer classified as a UNE subject to the unbundling requirements of Section 251 of the Act, 47 U.S.C. § 251. *See* TRO para. 255. Except as directed by the FCC on a "grandfathered" basis, and subject to a three-year transition mechanism, paras. 264-266, line sharing is no longer considered by the FCC to be a UNE, the lack of which would "impair" the ability of competitive LECs seeking access to provide the services that they seek to offer to the public. *See* 47 U.S.C. § 251(d)(2)(B).

Most of the self-implementing revisions to FCC rules mandated by the TRO became effective October 2, 2003, after publication in the Federal Register. On October 2, 2003, Verizon PA made the filing at issue here, seeking to revise its tariffs so as to remove line sharing based on its interpretation of the TRO. The TRO was appealed by several Parties.[6] On March 2, 2004, while the Verizon PA Petition and Stay of the Interim Order of ALJ Corbett was pending our consideration, the United States Court of Appeals for the District of Columbia Circuit issued a decision which vacated the TRO, in part. *See USTA v. FCC*, No. 00-1012, __ F.3d ___ (D.C. Cir. 2004) 2004 U.S. App. LEXIS 3960. However, the D.C. Circuit affirmed the FCC rules pertaining to line sharing.

In the case before us, the two material questions presented by Verizon PA, arise from the following procedural history (reprinted from the Initial Decision):

> On October 2, 2003, Verizon Pennsylvania Inc. ("Verizon") filed tariff revisions to its Services for Other Telephone Companies Tariff-Pa. PUC No. 216, to remove certain Unbundled Network Elements ("UNEs") and to revise terms and conditions for line sharing. . .
>
> Verizon proposes to make the following revisions to its Tariff 216:

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6 This Commission was an active petitioner in those appeals.

(1) Eliminate OC3 (Optical Carrier level-3) and OC12 (Optical Carrier level-12) interoffice transport from the list of available UNEs.

(2) Eliminate STS-1 (Synchronous Transport Signal-1) interoffice transport from the list of available UNEs.

(3) Discontinue provisioning IOF (Inter-Office Facility) Dark Fiber between a TC (Telephone Company) Collocation arrangement in a Telephone Company Central Office and the TC's central office (Dark Fiber Channel Termination).

(4) Discontinue provisioning new Line Sharing arrangements over copper loops or sub-loops.

On October 28, 2003, Covad Communications Company ("Covad") filed a complaint challenging Verizon's tariff filing. In its complaint, Covad alleges Verizon's proposed Tariff 216 violates the Telecommunications Act of 1996 (the "Act") and the Public Utility Code (the "Code"). Tariff 216 does not correctly implement the FCC's *TRO*. First, Verizon incorrectly interprets the FCC's grandfathering rule for existing line sharing arrangements and unilaterally imposes additional limitations on CLECs not contained in the *TRO*. Second, Verizon cannot cease offering line sharing. Verizon must detail its line sharing obligations in its tariff to include: (1) its obligations under the *TRO*'s § 251 transition plan; and (2) unbundled access to line sharing under § 271 of the Act and under Pennsylvania law. The Act preserves independent state authority, which the *TRO* does not preempt.

For relief, Covad seeks, *inter alia*, a Commission ruling to require Verizon to continue line sharing pursuant to § 271 of the Act. Covad suggests the Commission can determine this threshold question without evidentiary hearings by ruling on the pleadings. 52 Pa. Code §5.102. In addition, it notes in Verizon's pending Network Modernization Plan proceeding, Covad has raised the applicability of §271 to the issue of hybrid copper-fiber loop availability to Verizon's competitors. Thus, Covad suggests the Commission should investigate Verizon's proposed Tariff 216, set the remaining

issues for hearing and disposition, and consolidate Covad's complaint with that proceeding.

On November 7, 2003, Verizon answered the complaint and filed a motion to dismiss it. Verizon declares it filed its Tariff 216 revisions to conform the tariff to the self-executing provisions of the *TRO*. The FCC's *TRO* eliminated "line sharing" as an UNE and phased out its availability. "Line sharing" refers to a requirement to unbundle the high frequency portion of the loop ("HFPL"), so "a competing carrier provides xDSL service over the same line that the incumbent LEC uses to provide voice service to a particular end-user, with the incumbent LEC using the low frequency portion of the loop and the competing carrier using the HFPL." In the *TRO*, the FCC held ILECs will no longer be required to provide line sharing as a UNE, because competitors are not "impaired" without unbundled access to the HFPL. Under new FCC rules set forth in the *TRO*, the high frequency portion of a copper loop is not a UNE under §251, even on a transitional basis.

. . . Verizon argues any Commission attempt to impose additional line sharing requirements is preempted by federal law. Its tariff proposals, Verizon claims, are fully consistent with the plain language of the *TRO*. Thus, it contends Covad's complaint is baseless and fails to state a claim on its face.

By Order entered December 4, 2003, the Commission, *inter alia*, suspended the tariff filing for a period not to exceed six months or until June 4, 2004 pursuant to 66 Pa. C.S. § 1308(b). In Ordering Paragraph Four of this Order, the Commission also assigned this tariff filing "in conjunction with [Covad's] complaint" to the Office of Administrative Law Judge "for such proceedings as shall be deemed necessary and the issuance of a Recommended Decision." I received the assignment as Motions Judge on January 20, 2004.

(Interim Order, pp. 1-4) (Note omitted).

Discussion

1. Positions of the Parties

The Interim Order provides a succinct summary of the positions of the Parties. We rely on that summary as supplemented by our review of the Briefs filed in support of and in opposition to interlocutory review.

Verizon PA takes the position that this Commission, as a result of the suspension and investigation of its tariff revisions "conforming" its Tariff 216 to the TRO's line sharing requirements, has placed itself in direct conflict with federal law and the FCC's policy articulated in the TRO, to eliminate line sharing as a UNE. (VZ Brief at 3). Verizon PA, repeating the arguments made in its Motion to Dismiss, argues that any attempt to require line sharing beyond what is set forth in the TRO is preempted by federal law. Also, Verizon PA asserts this Commission lacks independent authority to require line sharing under either state law or Section 271 of TA96, 47 U.S.C. § 271. (Brief at 5).[7]

With regard to unbundling under Section 251 of TA96, Verizon PA also takes the position that, notwithstanding any retention by the state commissions of general unbundling authority in areas where the FCC did not specifically adopt a national rule, because the FCC has reached a determination that unbundling the HFPL would be contrary to the goals and requirements of the Act. Consequently, the states may not reverse such a conclusion. (Brief at 7). The FCC, relying on long-standing federal preemption principles, concluded that states may not enact or maintain a regulation or

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[7] Verizon PA states that this Commission has never imposed a state law line-sharing requirement. It explains that the Commission set prices and other details for line sharing under the FCC's prior line sharing rules. Based on the foregoing, Verizon PA argues the Commission lacks state law authority to now establish a line sharing requirement. (VZ Brief at 6; also I.D. at 6).

law pursuant to state authority that thwarts or frustrates the federal regime adopted in the TRO. (Brief at 8). Verizon PA additionally notes that the FCC rules which previously gave states the discretion to create additional unbundled network elements were eliminated. *See* Brief at 8, n. 12 citing 47 C.F.R. § 51.317. Thus, state authority expressly preserved by 47 U.S.C. § 251(d)(3) is narrow and limited to action that is consistent with the requirement of Section 251 and does not substantially prevent the implementation of the federal regulatory scheme. *Id.* referencing TRO, para. 194.

Verizon PA's position regarding independent authority under Section 271 of the Act is as follows. The FCC alone is authorized to approve or deny a former Bell Regional Operating Company (RBOC) application for in-region intraLATA authority. The role of the state commission is limited to providing "consultation" to the FCC in this regard. Therefore, the state commission does not have any authority concerning line sharing based on Section 271 of TA96. (Brief at 13). Also, Verizon PA argues that after Section 271 authority is granted it is, again, the FCC which has the enforcement authority under the Act to determine, after notice and hearing, whether an RBOC has "ceased to meet" any of its Section 271 conditions. Should such a deficiency be found, the FCC must issue an order correcting the deficiency. (Brief at 15-16).

Verizon PA, thereafter, attacks Covad's basis for asserting that line sharing is a cognizable requirement under Section 271, Checklist item # 4. Verizon PA asserts that Covad is wrong in implying that line sharing is a Section 271 requirement. (Brief at 17). It argues that the plain language of the statute requires it to provide only a loop, and does not encompass some portion or capacity of the loop. *Id.* Verizon PA bolsters its position regarding whether Checklist item # 4 could be read to include line sharing, by making a distinction between the "limited" and "specific" language of Section 271 with the more expansive language of Section 251(c)(3), which requires LECs to provide unbundled access to network elements. And, "network elements" are defined to include their features, functions, and capabilities. *Id.*

Verizon PA discounts the FCC's discussion of line sharing in past Section 271 decisions by observing that the FCC and the courts have recognized that each checklist item draws its content from the evolving nature of the FCC's local competition rule at any given time. (Brief, p. 18). Because Checklist item # 2 requires an RBOC to provide nondiscriminatory access to network elements in accordance with Sections 251(c)(3) and 252(d)(1) of TA96, the FCC, in prior decisions was obligated to consider line sharing because the law prior to TRO was that line sharing was required under Section 251. Now that there is no longer a requirement for line sharing under Section 251, Verizon PA reasons that the elimination from the Checklist #2 item should also result for Checklist item # 4, which requires an RBOC to provide a loop unbundled from switching. (Brief at 18-19).

Verizon PA makes two concluding points. They are: (1) the FCC concluded that Total Element Long Run Incremental Cost (TELRIC) pricing does not apply to elements unbundled pursuant to the authority of Section 271 of TA96; and (2) line sharing was neither established or discussed in the Commission's *Global Order.* Rather, specific findings were made regarding line sharing as a result of the arbitration of interconnection agreements, and not as a state law requirement. (Brief at 20-22).

The essence of Covad's Complaint against Verizon PA's proposed tariff revisions is based on the independent authority of Section 271 of TA96. Covad maintains that Verizion PA must provide line sharing "at the current rates, terms, and conditions set forth in Tariff 216." (Covad Brief at 3). Covad primarily relies on Section 271 of the Act for its position that this section provides an independent source of authority by which a state commission could require unbundled access to the HFPL, notwithstanding a contrary conclusion of the FCC regarding the unbundling of this element pursuant to Section 251 of the Act. (Brief at 4). Covad observes that should the state commission acknowledge this independent authority, this would obviate the need to

consider the preemptive effect of the TRO on state commission unbundling determinations and would render questions on this issue moot. *Id.*; 7.

Covad also relies, although to a lesser degree, on its view that there is independent state law authority through Chapter 30 of the Public Utility Code (sunset December 31, 2003), to mandate a line sharing requirement. Covad argues: (1) the FCC TRO has established the independence of Section 271 requirements from any analysis pursuant to Section 251; and (2) the HFPL comes within the definition of unbundling of local loop transmission which is a checklist item (Checklist item # 4) Verizon PA had to satisfy in order to receive authorization for intraLATA authority. This obligation continues. (Brief at 8-9). Covad points out that in the *PA Section 271 Order*, the FCC relied upon access to the HFPL through line sharing and line splitting when it found that Verizon PA had complied with Checklist item # 4. *See* Brief at 9 citing *PA Section 271 Order*, paras. 76; 78.

Covad further observes that since the advent of line sharing, each time the FCC has reviewed an application of a former RBOC's entry into long distance, the FCC has "insisted" on the applicant's demonstration of non-discriminatory access to the HFPL in order to comply with Checklist item # 4. (Brief at 10). To this end, Covad cites a recent FCC decision which required compliance with Checklist item # 4 and line sharing after the TRO was issued. *Id.*, n. 15. Covad, therefore, suggests that the Section 271 proceedings require Verizon PA to provide non-discriminatory access to the HFPL and that these obligations are enforceable in Pennsylvania. (Brief at 10).

Covad additionally points to decisions in the jurisdictions of North Carolina and Georgia and argues that the commissions in these states have adopted decisions which Covad asserts, stand for the proposition that RBOCs have an independent obligation under Section 271 to provide unbundled access to loop transmission, which, necessarily includes line sharing. (Brief at 13) Regarding the rates for line sharing, Covad

continues to press for the maintenance of Tariff 216 for line sharing at the rates, terms, and conditions presently contained therein. (Brief at 11).

Covad then criticizes the TRO as an invalid exercise of congressional authority to the extent the TRO purports to preempt states from establishing additional UNEs. (Brief at 17). Covad suggests that the deference given to a federal agency's interpretation of an act which it administers under the doctrine of *Chevron*,[8] has been forfeited as a result of the many D.C. Circuit Court rulings which have vacated various portions of the FCC rules. *Id.*

Although Covad asserts, in the primary sense, that should this Commission find independent authority pursuant to Section 271 of the Act and independent state law authority for the maintenance of a line sharing requirement, there would be no need to engage in a preemption analysis, it also addresses the preemptive effective of the TRO. Covad makes the argument that preservation of line sharing would not frustrate the intent of the FCC TRO, but would complement the goals of Section 251. Covad holds that "unbundling of the HFPL is clearly consistent with the intent of Section 251, which authorizes states to implement additional requirements fostering interconnection and competition." (Brief at 18). The proper preemption analysis, according to Covad, should be that outlined by the United States Court of Appeals for the Sixth Circuit in *Michigan Bell v. MCI Metro*, 323 F. 3d 348 (6th Cir. 2003). *Michigan Bell* is cited for the proposition that the focus of conflict preemption is frustration of purpose. Therefore, state law regulations may be enforced, even where the terms differ from the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services. (Brief at 20).

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[8] *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The OCA adopts the arguments set forth by Covad in its Complaint and Motion. The OCA agrees that Section 271 and state law provide an independent source of authority to require line sharing. The OCA, however, does not elect to address pricing issues at this juncture. It emphasizes that the question of Verizon PA eliminating its present line sharing tariff should be considered separately from the question of what pricing should be applied. (*See* OCA Brief at 6)

As noted, ALJ Corbett denied both the Verizon PA Motion to Dismiss and the Covad Motion for Judgment on the Pleadings.[9] Consequently, both Parties filed pleadings indicating a view that there are no genuine issues of material fact to be resolved and that they are each entitled to a favorable determination on their respective positions as a matter of law and without the necessity for a hearing.[10] ALJ Corbett disagreed and found that the Commission has jurisdiction to address the threshold jurisdictional question of preemption in this case. (I.D. at 21). However, in order to do so would require the development of a record in light of the ambiguity of material facts essential to a reasoned decision. (I.D. at 22). ALJ Corbett was further persuaded that the Commission had jurisdiction to make a threshold determination of the propriety of removing line sharing from its tariff in light of the fact that access to the HFPL was integral to the FCC's determination to grant it authority to provide long-distance service in the *Pennsylvania Section 271 Order.*[11]

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[9] Covad does not seek interlocutory review of the denial of its motion for judgment on the pleadings.

[10] By e-mail communications attached to the Covad Brief as Appendix A, the Office of ALJ has indicated that the question of whether the independent access to the loop requirement of Section 271 approval requires access to the whole loop or access to a select portion of the loop was amenable to resolution by explanation of counsel. (Brief at 3).

[11] *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*; 16 FCC Rcd 17419, 2001 FCC LEXIS 5009 (September 19, 2001).

3. Disposition

On consideration of the positions of the Parties, and the Petition and Stay, we shall grant interlocutory review, consistent with the discussion below. The standards for interlocutory review of a material question sought by a participant are set forth at 52 Pa. Code § 5.302(a). The Regulation requires that the petitioning party "state ... the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." Therefore, the principal concern in our determination of whether interlocutory review is appropriate, is whether the alleged error, and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process. *See Joint Application of Bell Atlantic Corporation and GTE Corporation;* Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. P.U.C. v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Pa. P.U.C. v. C.S. Water and Sewer Associates,* 74 Pa. PUC 716 (1991); *Re Knights Limousine Service, Inc.,* 59 Pa. PUC 538 (1985).

Verizon PA raises substantial jurisdictional questions which go the very heart of this Commission's ability to suspend and investigate its proposed tariff revisions for line sharing. We, therefore, conclude that interlocutory review is appropriate. Resolution of the material questions raised by Verizon PA at this stage of the proceeding will remove uncertainty regarding the effect of Commission action on the lawfulness of Verizon PA's revisions to its line sharing rules, will prevent substantial prejudice, and expedite the conduct of the proceeding as it relates to all participants.

On consideration of the first material question, we shall decline to answer it. The TRO's potential to preempt state law is a concern that has been raised as a result of statements at paragraph 195 where the FCC observed that:

> 195. Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission. If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instance for the subject states to amend their rules and to alter their decision to conform to our rules.

The preemption of state law resulting from the TRO was an issue expressly raised by this Commission in the appeal. The D.C. Circuit Court concluded that the state commission challenge to this aspect of the TRO was unripe. *See USTA v. FCC*, slip op. at 61. Notwithstanding the filing of Verizon PA's proposed tariff supplement, this Commission finds that any conclusion regarding the authority of the state commission to require unbundling of the HFPL independent of the analysis engaged in by the FCC, should be deferred at this time. We observe that the course of TRO litigation is uncertain at this time and that FCC initiatives could, perhaps, obviate the need to resolve the preemption. Our decision to decline to answer Verizon PA's first material question at this time is consistent with the conclusions we reach relative to the second material question raised as addressed in the discussion that follows.

On consideration of the positions of the Parties, we shall decline to answer the second material question as presented by Verizon PA, but shall re-phrase the question as follows:

(2) **RE-PHRASED: Whether this Commission lacks independent authority under Section 271 of the Act to relieve Verizon PA of a line sharing requirement.**

On consideration of the positions of the Parties, we shall answer the material question, as re-phrased, in the affirmative, clarified by our discussion below.

We agree with the positions of Covad and the OCA, which are in accord with the conclusions of ALJ Corbett, that Section 271 of the Act provides an independent source of authority by which Verizon may still be under a requirement to provide non-discriminatory access to the HFPL. At para. 653 of the TRO, the FCC concluded:

> For reasons set forth below, we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

Verizon PA does not dispute the fact that Section 271 obligations are not necessarily relieved based on the FCC's Section 251 unbundling analysis. (*See* VZ Brief at 16; I.D. at 6) Also, the FCC conclusion that Section 271 requirements are distinct from the "impairment" analysis of Section 251 of TA96, has been affirmed by the D.C. Circuit Court:

> The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundled local loops, local transport, local switching, and call-related databases in order to enter the interLATA market. Order ¶ ¶ 653-55.

USTAv. FCC, slip op.

While we agree with the positions of Covad and the OCA concerning the independent basis under Section 271 for non-discriminatory access to the HFPL, we acknowledge that the state commission's role in this regard is consultative and that the ultimate adjudicative authority lies with the FCC. We also note that the TRO and the D.C. Circuit Court have not specifically addressed the extent of loop unbundling.

Notwithstanding the distinction between Verizon PA's possible obligations arising from Section 271 of TA96, Verizon PA raises a substantial question as to whether the unbundling requirement for local loop transmission (Checklist item # 4) would include the HFPL. Verizon PA asserts; in pertinent part, that:

> . . . Covad is wrong in implying that line sharing is a section 271 requirement because a straightforward reading of that section demonstrates that it is not. Covad contends that Verizon is required to provide line sharing because Checklist Item 4 requires "[l]ocal loop transmission from the central office to the customer's premises, unbundled from switching or other services." (Covad Motion at 5). Checklist Item 4, however, requires Verizon to provide **only** a "loop" unbundled from switching, not some portion of the capacity of the loop. The plain language of the statute, therefore, does not require unbundling of the high frequency portion of the loop (*i.e.* line sharing). The limited and specific language of section 271 is in direct contrast to the more expansive language of section 251(c)(3), which requires ILECs to provide unbundled "access" to "network elements," including their "features, functions, and capabilities."

(VZ Brief at 17) (Notes omitted; emphasis original).

While this Commission does not have the authority to ultimately construe the statutory requirements for Checklist item # 4, we need not engage in an extensive analysis. We are able to conclude that we would agree with the position of Covad to the extent that under prior line sharing rules, unbundling of the HFPL of the stand-alone

copper loop has been invariably discussed by the FCC in conjunction with that agency's review of RBOC compliance with Checklist item # 4. *See In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*; 16 FCC Rcd 17419 (September 19, 2001) Paras. 76-78; *In the Matter of Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*; 16 FCC Rcd 14147 (July 20, 2001) Para. 10-11; *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*; 17 FCC Rcd 17595 (September 18, 2002); *In the Matter of Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West* Virginia; 18 FCC Rcd 5212 (March 19, 2003); *In the Matter of Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*; 17 FCC Rcd 18660 (September 25, 2002); and *In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*; 18 FCC Rcd 25504 (December 3, 2003).

Section 271 Checklist item # 4, provides, in pertinent part, as follows:

(B) **COMPETITIVE CHECKLIST**: Access or inter-connection provided or generally offered by a Bell

> operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> * * * *
>
> (iv) **Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.**

The language of Checklist item #4 provides for the unbundling of the local loop transmission *from switching or other services*. The FCC TRO has stated:

> 268. In order to implement the line sharing transition plan described above, we find that it is necessary to reinstate certain rules concerning the HFPL. Specifically, we define the HFPL as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions. The features, functions and capabilities of the HFPL network element are those that establish a complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises, and includes any inside wire owned by the incumbent LEC. Incumbent LECs must condition loops to enable requesting carriers to access the HFPL. Finally, incumbent LECs must provide physical loop test access points on a nondiscriminatory basis for the purpose of loop testing, maintenance, and repair activities. (Notes omitted).

In light of the above quoted language and the inclusion of line sharing arrangements in determining RBOC compliance with Checklist item # 4, we find that it is a reasonable interpretation of Checklist item #4 to also include the HFPL of the local loop.

Based on the conclusion that line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing Section 271 obligations, we conclude that there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA's tariff under the present state of FCC orders. We further note that on October 24, 2003, the Verizon telephone companies filed a petition asking the FCC to forebear from § 271 obligations. See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); CC Docket No. 01-338. The matter is pending. Therefore, we conclude that it would be improvident to adjudicate Verizon PA's request to remove line sharing from its PA 216 Tariff until the ambiguity surrounding its obligation to maintain line sharing based on Section 271 has been addressed by the FCC.

If Verizon PA believes that line sharing should no longer be a part of its Section 271 obligations, that issue should be put to the FCC either in conjunction with or separate from, its forbearance request. Our determination to answer the second material question on Section 271 TA96 authority, makes it unnecessary to address state authority or preemption issues at this time. We express no opinion regarding the enforceability of our independent state authority preserved by 47 U.S.C. § 251(d)(3) and any other applicable law. After Verizon obtains a determination from the FCC as to its ongoing obligation to maintain line sharing as part of its 271 commitments, Verizon may then petition the Commission for such further action as may be appropriate.

Conclusion

We decide that Verizon PA's request for interlocutory review is appropriate to a limited extent. Due to pending court litigation, we decline to answer Verizon PA's first material question regarding the preemptive effect of the FCC's TRO at this time. We agree to answer Verizon PA's second material question in part, but rephrase the

question to clarify the scope of our jurisdiction based on the unique circumstances of this case. The question answered, as rephrased, is whether this Commission lacks independent authority under 47 U.S.C. § 271 to relive Verizon PA of a line sharing requirement. We answer in the AFFIRMATIVE.

This Commission lacks independent authority under Section 271 of TA96 to relieve Verizon PA of the obligation to provide access to line sharing, which is imposed by the FCC as a condition of Verizon PA's authority to enter the long distance market. Unless or until the FCC affirmatively relieves Verizon PA of this Section 271 access obligation imposed as a condition of Section 271 approval, we will not relieve Verizon PA of its corresponding tariff obligation to provide such access. This proceeding is remanded to the Office of Administrative Law Judge for further proceedings as may be necessary to address any remaining issues; **THEREFORE,**

IT IS ORDERED:

1. That the Petition of Verizon Pennsylvania Inc. for Interlocutory Commission Review and Answer to a Material Question and a Stay of Proceedings is granted.

2. That the Commission declines, at this time, to answer the following material question:

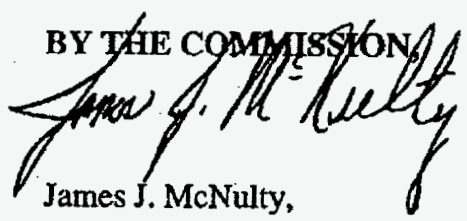
> Whether this Commission is preempted by federal law from requiring Verizon to provide "line-sharing" under state tariff under terms, conditions and prices differing from those that the FCC has determined are appropriate under the federal Telecommunications Act ("Act"); and

3. That the Commission declines to answer the second material question presented in the instant Petition as stated. The Commission re-phrases the second material question, as follows, and answers the question in the AFFIRMATIVE, consistent with our discussion contained in this Opinion and Order:

> RE-PHRASED: Whether this Commission lacks independent authority under Section 271 of the Act to relieve Verizon PA of a line sharing requirement.

4. That the matter shall be returned to the Office of Administrative Law Judge for such proceedings as may be deemed necessary.

BY THE COMMISSION,



James J. McNulty,
Secretary

(SEAL)

ORDER ADOPTED: July 8, 2004

ORDER ENTERED: JUL 0 8 2004

RECEIVED
JAN 1 4 2004
EXECUTIVE SECRETARY
GPSC

COMMISSIONERS:
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DOCKET # 7892
DOCUMENT # 69632

Docket No. 7892-U

In Re: Performance Measures for Telecommunications Interconnection, Unbundling and Resale

ORDER DENYING BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO MODIFY SELF-EFFECTUATING ENFORCEMENT MECHANISM PLAN

BY THE COMMISSION:

I. INTRODUCTION

The Georgia Public Service Commission ("Commission") first held hearings in the above-styled docket in November, 1997. Since that time, the Commission has continued to take input from interested parties and guidance from the Federal Communications Commission ("FCC") in the development of a performance plan for BellSouth Telecommunications, Inc. ("BellSouth"). The Commission has identified the three main components of a comprehensive performance plan: an appropriate set of performance measurements; an appropriate set of benchmarks and retail analogs to apply to those measurements; and, a remedy plan to ensure compliance with the performance goals. (Docket No. 7892-U, Commission Order, p. 2; January 16, 2001). BellSouth's Motion to Modify Self-Effectuating Enforcement Mechanism ("SEEM") Plan ("Motion") addresses the last of these components by seeking to eliminate the penalties associated with line sharing. The term "line sharing" describes when a competitive local exchange company ("CLEC") uses the high frequency portion of the loop ("HFPL") to provide xDSL service, and the incumbent local exchange company ("ILEC") uses the low frequency portion of the same loop to provide voice service.

II. POSITIONS OF THE PARTIES

A. BellSouth's Motion

On October 22, 2003, BellSouth filed with the Commission a Motion to eliminate the penalties associated with line sharing. BellSouth bases its Motion in large part on the Triennial

Review Order[1] issued by the Federal Communications Commission ("FCC"). The FCC concluded that CLECs are no longer impaired without unbundled access to the HFPL. (Triennial Review Order, ¶ 258). The standard for designating unbundled network elements ("UNEs") pursuant to Section 251 of the Telecommunications Act of 1996 ("Federal Act") consists of a finding that CLECs would be impaired without unbundled access. 47 U.S.C. 251(d)(2)(B). BellSouth argues that because line sharing is no longer a UNE the SEEM should be modified to eliminate associated penalties. (BellSouth Motion, p. 1). BellSouth supports this position by arguing that every state in its region has limited the application of automatic payments to Section 251 obligations. *Id.* at 2. BellSouth's Motion includes a request that the Commission act immediately to change the SEEM requirements, as opposed to waiting for the next review process. BellSouth argues that this is appropriate because this requested modification results from a change in applicable law, rather than routine information gathering. *Id.* at 6.

B. Joint CLEC Response

On November 7, 2003, AT&T Communications of the Southern States, LLC, DIECA Communications, Inc. d/b/a Covad Communications and MCI WorldCom ("Joint CLECs") filed with the Commission a Response to BellSouth's Motion to Modify SEEM Plan ("Response"). In their Response, the Joint CLECs argued that the Motion should be denied for three reasons. First, the Joint CLECs stated that "the Commission has jurisdiction over the SEEM Plan to protect Georgia citizens from anti-competitive behavior, including enforcement of BellSouth's Section 271 obligations." (Response, p. 1). The Response cites to Georgia law, specifically O.C.G.A. § 46-5-168(d)(2), to support the position that the Commission retains jurisdiction over the SEEM plan. *Id.* at 2. The Joint CLECs argue that BellSouth still must provide line sharing under the Federal Act, and that therefore, discontinuing the SEEM penalties for line sharing would violate the Section 271 of the Federal Act. *Id.* at 3. Second, the Joint CLECs argue that both the Triennial Review Order and Section 271 require BellSouth to provide non-discriminatory access to line sharing. *Id.* Finally, the Joint CLECs argue that granting the relief BellSouth seeks in its Motion would be contrary to public interest. *Id.* at 6.

3. BellSouth's Reply

On December 4, 2003, BellSouth filed with the Commission a Reply in Support of its Motion ("Reply"). In its Reply, BellSouth emphasized that there is no explicit requirement under Georgia law that a performance assessment plan be developed. (Reply, p. 2). BellSouth claims that it does not have an obligation to continue to provide line sharing under Section 271. BellSouth reasons that it would be illogical for the FCC to have expressly stated that line sharing is not required under Section 251, but remains a requirement under Section 271. *Id.* at 7.

III. DISCUSSION

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, FCC 03-36 (rel. Aug. 21, 2003)

The Triennial Review Order states that CLECs are no longer impaired without unbundled access to line sharing. (Triennial Review Order, ¶ 258). In making this determination the FCC recognized that some CLECs have made commitments, such as the building of internal systems to order HFPL from ILECs, based on the existence of line sharing. *Id.* at ¶ 264. To prevent disruption of service and harm to consumers, the FCC ordered a three-year transition period for new line sharing arrangements. *Id.* While the FCC concluded that line sharing should no longer be a UNE, it maintained that CLECs and their consumers would be placed at risk if CLECs were not given an adequate time to adjust to the new rules. BellSouth's Motion to immediately eliminate penalties associated with line sharing is inconsistent with the implementation of a transitional period. BellSouth's Motion, at the very least, is premature.

In addition, the Triennial Review Order makes clear that bell operating companies ("BOCs") have an independent and ongoing access obligation under Section 271. ("Triennial Review Order, ¶ 654). Section 271 checklist items 4, 5, 6, and 10 impose access requirements without reference to Section 251, while checklist item 2 on non-discriminatory access to network elements includes the language "in accordance with the requirements of sections 251(c)(3) and 252(d)(1). 47 U.S.C.271(c)(2)(B). The FCC notes that concluding all of the checklist items are subject to Section 251 would make checklist items 4, 5, 6, and 10 duplicative of item 2. (Triennial Review Order, ¶ 654). The FCC also concluded that because Section 251 applies to all ILECs, whereas Section 271 applies only to BOCs, it is logical to interpret the two sections as operating independently. *Id.* at 655.

Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC and Section 271 checklist item 4. The Commission determines that at this time it is not sound policy to eliminate the penalties associated with line sharing. BellSouth's Motion is therefore denied.

WHEREFORE IT IS ORDERED, that BellSouth's Motion to Modify Self-Effectuating Enforcement Mechanism Plan is hereby denied.

ORDERED FURTHER, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 16th day of December, 2003.

Reece McAlister
Executive Secretary

1-14-04
Date

Robert B. Baker, Jr.
Chairman

Jan. 14, 2004
Date

Docket No. 7892-U

In Re: Performance Measurements for Telecommunications Interconnection, Unbundling, and Resale

ORDER ON RECONSIDERATION

BY THE COMMISSION:

On January 14, 2004, the Georgia Public Service Commission ("Commission") denied the October 22, 2003 Motion by BellSouth Telecommunications, Inc. ("BellSouth") to Modify Self-Effectuating Enforcement Mechanism ("SEEM") Plan. On January 26, 2004, BellSouth filed a Motion for Rehearing and Reconsideration of the Commission order. AT&T Communications of the Southern States, LLC, DIECA Communications, MCI MetroAccess and MCI WORLDCOM (collectively "Joint CLECs") filed their opposition to BellSouth's motion on February 4, 2004. BellSouth responded to the Joint CLEC's pleading on February 6, 2004.

Background

In its original Motion, BellSouth argued that it should be relieved as of October 2, 2003, of the obligation to make line sharing SEEM Plan payments because the FCC's *Triennial Review Order* concluded that line sharing is no longer an unbundled network element ("UNE") under Section 251 of the Telecommunications Act of 1996. (BellSouth Motion, p. 1). AT&T Communications of the Southern States, LLC, DIECA Communications, Inc. d/b/a Covad Communications and MCI WorldCom filed with the Commission a Response urging the Commission to deny BellSouth's October 22, 2003 Motion ("Response") because (1) the Commission has jurisdiction over the SEEM Plan to protect against anti-competitive behavior, (2) BellSouth is obligated to provide non-discriminatory access to line sharing and (3) to remove line sharing from the SEEM Plan would be against the public interest and the purpose of the SEEM Plan. (Response, pp. 1-2).

The Commission stated two grounds for denying BellSouth's Motion to Modify the SEEM Plan. First, the Commission found that given the transitional period for new line sharing arrangements, BellSouth's Motion was at the very least premature. (Order, p. 3). The transition period is to account for the commitments made by some CLECs based on the existence of line sharing, and to prevent disruption of service and harm to consumers. (*Triennial Review Order*, ¶ 264). The Commission concluded that BellSouth's Motion to eliminate the penalties associated with line sharing was inconsistent with the implementation of a transitional period. (Order, p. 3). The second ground for denying BellSouth's Motion related to the Commission's finding that

BellSouth has an independent and ongoing access obligation under Section 271. (Order, p. 3). The Commission based its conclusion primarily on the *Triennial Review Order*.

BellSouth's Motion

BellSouth's Motion for Rehearing and Reconsideration only addresses the ground for denial related to whether it has an independent and ongoing obligation under Section 271 to provide access to line sharing. BellSouth argues, as it did during consideration of its original motion, that the *Triennial Review Order* states that line sharing is no longer required under Section 251. (Motion for Rehearing and Reconsideration, p. 2). BellSouth argues further that the discussion in the *Triennial Review Order* on the checklist items for Section 271 does not mention line sharing. *Id.* BellSouth argues that in its *Line Sharing Order*[1] the FCC designated the high frequency portion of the loop as an unbundled network element separate and apart from the loop. *Id.* at 3. BellSouth also argues that line sharing has never been included in checklist item 4 under Section 271. It bases this argument on the FCC's treatment of SBC Communications, Inc.'s application for Section 271 authority in Illinois, Indiana, Ohio, and Wisconsin. *Id.* at 4. BellSouth argues that the FCC listed "local loops and subloops" separate from "high frequency portion of the loop." *Id.*[2]

Joint CLECs' Response to Motion for Rehearing and Reconsideration

The Joint CLECs argued in their Response that both the FCC and BellSouth itself has placed line sharing under checklist item 4 in their respective Section 271 orders and briefs. (Joint CLEC Response, p. 2). The Joint CLEC Response also argues that BellSouth's argument that the Commission lacks jurisdiction over SEEM plans with respect to Section 271 items is incorrect. *Id.* at 3. In support of this position, the Joint CLECs state that the *SBC Order* relied upon by BellSouth preceded any grant of Section 271 authority and only stands for the proposition that jurisdiction over applications of Bell Operating Companies for interLATA authorization lies with the FCC. *Id.* In addition, the Joint CLECs argue that the FCC has granted states authorization over SEEM plans to prevent against Section 271 backsliding. *Id.* at 4.

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[1] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 20912 (1999) *vacated and remanded,* USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied,* 123 S. Ct. 1571 (2003).

[2] BellSouth cites to *Application by SBC Communications, Inc. et. al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin,* Memorandum **Opinion** and Order, WC Docket No. 03-167, FCC 03-243, issued October 15, 2003. ("SBC Order")

BellSouth's Reply Memorandum in Support of its Motion for Reconsideration

In its Reply Memorandum, BellSouth argues that the Joint CLEC Response did not adequately address the *Triennial Review Order's* treatment of line sharing, including the question of why a transition mechanism would be necessary if checklist item 4 applied to line sharing. (Reply Memorandum, p. 3). BellSouth also argues that the backsliding that the FCC intended for states to prevent against applied to Section 251, not Section 271. *Id.* at 4.

Discussion

BellSouth's Motion for Rehearing and Reconsideration does not address the first ground for denial of its original motion. The first ground for denial was that the FCC provided for a three-year transitional period for new line sharing arrangements. (Order, p. 3). This ground is independent from the second ground regarding whether BellSouth has an ongoing Section 271 obligation to provide line sharing. Regardless of whether the Commission granted or denied BellSouth's Motion for Rehearing and Reconsideration, the decision to deny BellSouth's Motion to Modify the SEEM Plan to eliminate penalties for line sharing would stand.

It is therefore not necessary to reach the issue of whether BellSouth has an independent and ongoing obligation under Section 271 to provide line sharing in order to deny BellSouth's Motion to Modify the SEEM Plan. The parties have raised various arguments regarding the FCC's intent with respect to the role of the states with respect to Section 271 obligations and the status of line sharing. Given that the Commission does not need to rule on this issue to deny BellSouth's Motion, it makes more sense to address this question, if and when necessary, at a point when more information on the FCC's intent is available.

In modifying its order to remove this basis for its decision, it must be understood that the Commission is not indicating that it agrees with the arguments in BellSouth's Motion for Rehearing and Reconsideration. Towards that end, the Commission concludes that BellSouth's Motion for Rehearing and Reconsideration should be denied. The Commission on its own motion, however, modifies its January 14, 2004 Order to remove the ground for its decision related to an independent and ongoing access obligation under Section 271. In making this modification, the Commission does not alter the ultimate decision to deny BellSouth's Motion to Modify the SEEM Plan to eliminate penalties for line sharing. The reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original motion.

* * * * *

WHEREFORE IT IS ORDERED, that BellSouth's Motion for Rehearing and Reconsideration is hereby denied.

ORDERED FURTHER, that the Commission on its own motion, hereby modifies its January 14, 2004, order to remove the ground for denial of BellSouth's Motion to Modify the SEEM Plan relating to whether BellSouth has an independent and ongoing access obligation under Section 271 to provide line sharing. The reason for taking this action is that the issue of an

ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original motion. This action should not be construed as constituting agreement with the arguments raised by BellSouth in its Motion for Rehearing and Reconsideration.

ORDERED FURTHER, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 17th day of February, 2004.

Reece McAlister Executive Secretary	H. Doug Everett Chairman
Date	Date

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 133k

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Generic Docket to Address Performance	)	ORDER DENYING
Measurements and Enforcement	)	BELLSOUTH'S MOTION
Mechanisms	)	TO MODIFY SEEM PLAN

BY THE COMMISSION: On August 1, 2003, BellSouth Telecommunications, Inc.'s (BellSouth's) North Carolina Utilities Commission-ordered Self-Effectuating Enforcement Mechanisms (SEEM) Plan and Service Quality Measurement (SQM) Plan went into effect.

On August 21, 2003, the Federal Communications Commission (FCC) released its *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et. al.,* CC Docket No. 01-338, *et. al.,* FCC 03-36 (rel. Aug. 21, 2003) (Triennial Review Order or *TRO*).

On October 27, 2003, BellSouth filed its Motion to Modify SEEM Plan.

By Order dated November 5, 2003, the Commission requested initial and reply comments by interested parties on BellSouth's Motion.

On November 25, 2003, CompSouth[1] filed its comments on BellSouth's Motion. Also, on November 25, 2003, the Public Staff filed its comments on the Motion.

On December 10, 2003, BellSouth filed its reply comments in this regard.

On December 22, 2003, CompSouth filed its Motion to File Supplemental Reply Comments in Response to the Reply Comments filed by BellSouth. In addition, CompSouth filed its Supplemental Reply Comments.

On January 21, 2004, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad) filed a Motion to Take Administrative Notice of the

[1] CompSouth is comprised of: ITC^DeltaCom, MCI, Business Telecom Inc., NewSouth Communications Corporation, AT&T Communications of the Southern States, LLC, NuVox Communications, Inc., Access Integrated Networks, Inc., Birch Telecom, Talk America, Cinergy Communications Company, Z-Tel Communications, Network Telephone Corporation, Momentum Business Solutions, Covad Communications Company, KMC Telecom, IDS Telecom, LLC, Access Point, Inc., and Xspedius Corporation.

January 15, 2004 *Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan* issued by the Georgia Public Service Commission (PSC).

BELLSOUTH'S MOTION

In its Motion, BellSouth noted that on August 21, 2003, the FCC released the *TRO.* BellSouth stated that the *TRO* became effective on October 2, 2003 and that among the many rulings in the *TRO* is the decision by the FCC that line sharing is no longer an unbundled network element (UNE) that incumbent local exchange companies (ILECs) are required to offer pursuant to Section 251 of the Telecommunications Act of 1996 (the Act or TA96). BellSouth argued that for this reason, it should be relieved of any further obligation to pay SEEM penalties that relate to the provision of line sharing. BellSouth maintained that although its SEEM Plan is voluntary, it has been approved by an Order of the Commission. Therefore, BellSouth explained that it filed its Motion requesting that the Commission enter an Order authorizing BellSouth to remove the penalties relating to line sharing from the SEEM Plan and to cease the payment of any such penalties as of October 2, 2003.

BellSouth asserted that the North Carolina-ordered BellSouth performance measurement plan – and more specifically, the penalty component of the plan – is not required by any portion of TA96. BellSouth asserted that the FCC clearly made this point in the Order in which it approved BellSouth's 271 application for Georgia and Louisiana (Paragraph 291), as follows:

> In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentive to continue to satisfy the requirements of Section 271 after entering the long distance market. 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 the satisfactory performance monitoring and enforcement mechanisms is probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority.

Thus, BellSouth maintained, "performance assurance mechanisms," including SEEM penalties, are not required by Section 271. BellSouth argued that to the contrary, a measurement plan is simply a mechanism that can be utilized to ensure that a Regional Bell Operating Company (RBOC) meets its obligations under Section 251. BellSouth noted that consistent with this, every state commission in BellSouth's region, including this Commission, has limited the application of automatic penalties to performance failures relating to offerings that an incumbent must provide to meet its obligations under Section 251, specifically, UNEs, interconnection, and resold services. BellSouth asserted that the current North Carolina SEEM Plan does not include (and has never included) other products that BellSouth may provide to competing local providers (CLPs) that are not encompassed within Section 251. BellSouth commented

that at the time the current SEEM Plan was approved by the Commission, line sharing was included in the plan because it had previously been deemed by the FCC to be a UNE. BellSouth argued that with the FCC's above-referenced ruling in the *TRO*, line sharing is no longer a UNE. Therefore, BellSouth opined, it should no longer be subject to penalties under the SEEM Plan.

BellSouth noted that Section 251 places upon ILECs the duty to provide "nondiscriminatory access to network elements on an unbundled basis." (§ 251(c)(3)) More specifically, BellSouth commented, network elements are to be made available on an unbundled basis if "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer." (Section 251(d)(2)(b)) Thus, BellSouth asserted, whether a network element is required to be offered pursuant to Section 251 depends, at least in part, upon whether the lack of this element would impair the CLP's ability to do business.

BellSouth argued that in the *TRO*, the FCC stated in general terms its interpretation of the impairment standard as follows: "We find a requesting carrier to be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic, that are to make entry into the market uneconomic." BellSouth stated that applying this standard, the FCC found that line sharing does not meet this impairment test. Specifically, BellSouth noted, the FCC found in Paragraph 248 of the *TRO* that carriers **are** "generally impaired on a national basis without unbundled access to an incumbent LEC's local loops." However, BellSouth commented, the FCC also determined "that unbundled access to conditioned stand-alone copper loops . . . is sufficient to overcome such impairment for the provision of broadband services." Accordingly, BellSouth maintained, the FCC further ruled, "that, subject to the grandfather provision and transition period explained below, the incumbent LECs do not have to unbundle the HFPL [High Frequency Portion of the Loop] for requesting telecommunications carriers." Further, BellSouth noted, by way of explaining this decision, the FCC stated that it disagrees "with the Commission's prior finding that competitive LECs are impaired without unbundled access to the HFPL." BellSouth pointed out that the FCC also noted that line splitting **is** available as a means to obtain the HFPL.

Likewise, BellSouth noted, the FCC specifically rejected earlier findings by it that "line sharing will level the competitive playing field."

Moreover, BellSouth commented, the FCC found in Paragraph 261 of the *TRO* that availability of line sharing as a UNE could have the opposite effect:

> ...[R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage

> innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets.

BellSouth argued that, thus, the FCC has clearly ruled that line sharing does not meet the impairment test, and, therefore, need not be offered on an unbundled basis pursuant to Section 251.

BellSouth maintained that the FCC also made the determination that the availability of line sharing will not change immediately. Instead, BellSouth noted, the FCC adopted a transitional mechanism both for new and existing line sharing arrangements. Specifically, BellSouth stated, the FCC decided to grandfather until the next biennial review which will commence in 2004 all existing line sharing arrangements unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user customer. BellSouth commented that the FCC also ruled that new line sharing arrangements would be subject to a three-year transitional period, during which new arrangements could be added in the first year and the price for line sharing would increase next year; at the end of the three year period, "any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with an incumbent LEC to replace line sharing."

BellSouth argued that in outlining the transitional and grandfathering processes, the FCC did nothing to undercut its finding that line sharing does not meet the impairment test, and that it is no longer a UNE. Instead, BellSouth asserted, the FCC adopted this gradual approach because some CLPs currently rely on line sharing to serve their customers. Accordingly, BellSouth stated that the FCC decided to gradually phase out the availability of line sharing "in order to ensure that these carriers have adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with incumbent LECs to replace line sharing."

BellSouth opined that the Commission has always limited the application of SEEM penalties to the offerings that an incumbent must provide under Section 251. Further, BellSouth maintained, failure to continue this long-standing approach by not removing line sharing would likely have a deleterious effect. BellSouth commented that as it previously noted, the FCC specifically found that the continuation of rules to require line sharing "would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." Likewise, BellSouth argued, the continuation of SEEM penalties for line sharing, even though it is no longer a UNE, would likely have the same effect by encouraging CLPs to utilize line sharing rather than other competitive alternatives. Accordingly, BellSouth asserted that the Commission should enter an Order to allow BellSouth to cease making penalty payments effective October 2, 2003, for the portion of any SEEM penalties that apply to line sharing.

BellSouth maintained that under the SEEM Plan currently in place, some measurements specifically identify line sharing as a product and several other measures contain data for line sharing as part of a group of products even though it is not reported separately. BellSouth proposed removing line sharing from the SEEM Plan in both of these cases.

BellSouth acknowledged that, in general, modifications to either the SQM Plan or the SEEM Plan should be limited to the review process outlined in the Commission's Order(s) adopting the SQM and SEEM. BellSouth submitted, however, that the instant circumstances are unique and that they justify immediate modification. BellSouth argued that the Commission-ordered review process is an ongoing process in which information about the plan is gathered, and as this occurs, modifications are made to add necessary measurements, delete measurements or penalties that have proven to be unnecessary, make administrative changes in the plan, or make other appropriate changes on an ongoing basis. BellSouth maintained that it is important to group these types of ongoing changes together and to deal with them as part of a periodic review process to avoid having constant changes to the measurement and penalty plan.

BellSouth submitted, however, that the removal of line sharing from SEEM should be dealt with outside of the periodic review process, due to the unique circumstances that exist. Specifically, BellSouth opined, the FCC's recent decision constitutes a change in the law that has the effect of placing line sharing outside of the fundamental framework of the SEEM Plan. As a result of this, BellSouth argued, line sharing can no longer be included in the SEEM Plan after October 2, 2003.

BellSouth, however, did not propose that line sharing be immediately removed from the measurement plan. BellSouth stated that as it previously noted, the FCC has provided a transitional process whereby the availability of line sharing would change over time. Consistent with this approach, BellSouth stated that it believes that it is appropriate to have some transitional period at the state level, before line sharing is removed from the SQM. Thus, for now, BellSouth stated that it is only requesting removal from the SEEM. BellSouth asserted that its performance related to line sharing would continue to be reported for some period of time. BellSouth noted that it anticipates that the Commission would consider during future periodic reviews the removal of line sharing from the measurement plan.

Finally, as to the timing of the implementation of this change, BellSouth noted that under the SEEM Plan, both Tier I and Tier II penalties are paid 45 days after the end of the month in which the particular performance occurs. Thus, BellSouth stated, any penalties due under the plan for the month of October would normally be payable on December 15, 2003. BellSouth maintained that this means that the Commission would have approximately two months to rule on BellSouth's Motion, prior to the time that penalties would be due. BellSouth asserted that although it believes that the Commission will have ample time to consider its Motion and to rule before December 15, 2003, there is, of course, the possibility that the Commission might not be able to rule by this date. BellSouth proposed that in this event, it would escrow any

penalty payments (both Tier I and Tier II) pending a resolution of its Motion by the Commission. BellSouth commented that if the Commission subsequently rules in BellSouth's favor, then the payments would be returned from escrow to BellSouth. BellSouth stated that if it does not obtain the requested relief, then any payments due would be promptly remitted upon the entry of an Order by the Commission.

INITIAL COMMENTS

COMPSOUTH: CompSouth stated in its comments that BellSouth's Motion seeks to modify the SEEM Plan to eliminate the requirement that BellSouth pay penalties relating to line sharing because, allegedly, the FCC's recently released *TRO* eliminated line sharing as a UNE which must be offered by ILECs such as BellSouth.

CompSouth asserted that BellSouth's Motion should be denied for three reasons: 1) the Commission has jurisdiction over the SEEM Plan to protect North Carolina citizens from anticompetitive behavior, including enforcement of BellSouth's Section 271 obligations; 2) BellSouth remains obligated to provide nondiscriminatory access to line sharing both under the *TRO* and TA96; and 3) excusing BellSouth from providing nondiscriminatory access to line sharing under the SEEM Plan is against the public interest and the purpose of the SEEM Plan.

CompSouth maintained that the purpose of the SEEM Plan is to discourage anticompetitive behavior, encourage fair and effective competition, and enforce BellSouth's Section 271 obligations. CompSouth argued that BellSouth's Motion should be denied because under applicable state law there is a mandate to continue line sharing under the SEEM Plan for as long as BellSouth is required to provide line sharing. CompSouth asserted that BellSouth's entire Motion is based on the assertion that the SEEM Plan is narrowly tailored to enforce BellSouth's Section 251 obligations. CompSouth alleged that this is a dramatic misstatement of the law. CompSouth argued that the Commission's jurisdiction over the SEEM Plan is based on North Carolina statutes designed to "provide just and reasonable rates for services without unjust discrimination, undue preferences, or advantages, or unfair or destructive competitive practices." CompSouth maintained that in addition to discouraging anticompetitive behavior and encouraging fair and effective competition, in BellSouth's own words, "the purpose of the enforcement plan is to provide additional assurance that BellSouth will not 'backslide' once it obtains interLATA relief."

CompSouth noted that in contravention of its own previous advocacy, BellSouth now attempts to avoid any relationship to its Section 271 obligations or the jurisdictional basis of the SEEM Plan. CompSouth noted that in its Motion, BellSouth asserted: "a measurement plan is simply a mechanism that can be utilized to ensure that a RBOC meets its obligations under [Section] 251." CompSouth argued that the reason BellSouth feels obligated to divorce the SEEM Plan from enforcement of BellSouth's Section 271 obligations and the Commission's jurisdicti```is because BellSouth r emains obligated to provide nondiscriminatory access to line sharing both under the *TRO* and Section 271 of TA96. CompSouth opined that it would be premature, a violation of

Section 271, and detrimental to North Carolina consumers and competition for the Commission to approve any discontinuance of the SEEM Plan for line sharing when BellSouth remains obligated to provide line sharing under TA96 and the rules and regulations of the FCC.

CompSouth maintained that BellSouth is still obligated to provide nondiscriminatory access to line sharing provisioning, maintenance, and repair. CompSouth noted that the *TRO* requires BellSouth to continue providing access to line sharing. CompSouth asserted that BellSouth *only* provides access to line sharing because it has been and remains obligated to do so. Indeed, CompSouth commented, the FCC expressly outlined the ILECs' continuing line sharing obligations in the *TRO*: "In order to implement the line sharing transition plan described above, we find that it is necessary to reinstate certain rules concerning the HFPL . . . . Incumbent LECs must condition loops to enable requesting carriers to access the HFPL . . . . Incumbent LECs must provide physical loop test access points ***on a nondiscriminatory basis*** for the purpose of loop testing, maintenance, and repair activities." Accordingly, CompSouth maintained, BellSouth remains obligated to provision, maintain, and repair line sharing on a nondiscriminatory basis under the terms of the *TRO*.

CompSouth maintained that BellSouth is also obligated to provide access to line sharing under Section 271 of TA96. CompSouth commented that the FCC stated in the *TRO* that "section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251..." CompSouth noted that the FCC went on to state that "BOCs must continue to comply with any conditions required for approval consistent with changes in the law." CompSouth asserted that there can be no question that Section 271 checklist item number 4 requires the RBOCs to provide access to "local loop transmission from the central office to the customer's premises, *unbundled from local switching or other services*." CompSouth maintained that the HFPL is clearly a form of loop transmission – loop transmission that the RBOCs themselves routinely use to provide xDSL services separately from narrowband voice services. Indeed, CompSouth noted, in describing the HFPL in the *Line Sharing Order*, the FCC stated that "requesting carriers may access unbundled loop functionalities, such as *non-voiceband transmission frequencies, separate from other loop functions*" – distinguishing the high frequency loop transmission path from the narrowband frequencies used for circuit switched voice services. Thus, CompSouth maintained, in light of the clear statutory language in c``cklist item number 4, there is no question that BellSouth and the other RBOCs remain under a statutory obligation to offer unbundled HFPL loop transmission to competitors.

CompSouth asserted that a long line of FCC Section 271 orders confirms the continuing obligation of RBOCs to offer unbundled access to HFPL loop transmission after Section 271 approval. CompSouth noted that since the RBOCs first implemented access to line sharing, the FCC has consistently looked at the nondiscriminatory availability of line sharing as part of its review of RBOC compliance with checklist item number 4. To this day, CompSouth argued, months after its decision to eliminate the line sharing UNE, and even after the rules in the *TRO* have become effective, the FCC continues to look

at the nondiscriminatory availability of line sharing as an integral component of its checklist item number 4 analysis in Section 271 proceedings (i.e., Qwest in the state of Minnesota, SBC in Michigan, and SBC in Illinois, Indiana, Ohio, and Wisconsin) – even when the Section 271 application at issue was filed more than a month after the FCC voted to eliminate the line sharing UNE *and* the FCC Order granting the application was issued two weeks after the *TRO* became effective. In the SBC – Illinois, Indiana, Ohio, and Wisconsin Section 271 Order released on October 15, 2003, the FCC continued to consider nondiscriminatory access to line sharing under checklist item number 4:

> ¶ 142: . . . Based on the evidence in the record, we conclude, consistent with the state commissions, that SBC provided unbundled local loops in accordance with the requirements of section 271 and our rules. Our conclusion is based on our review of SBC's performance for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, and high capacity loops, as well as our review of SBC's processes for hot cut provisioning, and ***line sharing*** and line splitting. . .
>
> ¶ 145. ***Line Sharing*** and *Line Splitting*. Based on the evidence in the record, we find that SBC provides nondiscriminatory access to the high frequency portion of the loop (***line sharing***). SBC's performance data for line shared loops demonstrate that it is generally in compliance with the parity and benchmark measures established in the application states.
>
> [footnotes omitted]

Manifestly then, CompSouth declared, nondiscriminatory access to line sharing remains a requisite to Section 271 approval after the *TRO*, and consequently, a requisite to compliance with Section 271 "back-sliding" provisions. CompSouth argued that despite a change in the law relied upon by BellSouth, BellSouth remains under a continuing obligation under Section 271 of TA96 to provide nondiscriminatory access to line sharing.

CompSouth maintained that in accordance with the purposes of the SEEM Plan and the continuing obligation of BellSouth to provide nondiscriminatory access to line sharing, BellSouth's Motion should be denied. CompSouth asserted that it is strongly in the public interest that the customers of AT&T, WorldCom, Covad, and other CLPs are protected from discriminatory treatment by BellSouth. CompSouth argued that what BellSouth is really asking the Commission to do is grant BellSouth unfettered discretion to treat line sharing customers of CLPs in any manner it sees fit. CompSouth maintained that if such discretion were responsibly handled by the RBOCs and other monopolists in the past, the Sherman Act, the Modified Final Judgment, the Act, and the SEEM Plan would all be unnecessary. CompSouth stated that the SEEM Plan is necessary for the very reasons that underlie the Commission's jurisdiction: discouraging anticompetitive behavior and encouraging fair and effective competition.

CompSouth maintained that it is also an integral part of the Section 271 requirements that allow BellSouth to compete in the arena of interLATA telecommunications services. CompSouth opined that as long as BellSouth is obligated to provide parity treatment to its competitors and its competitor's customers, plans like the SEEM Plan are required to enforce that obligation.

CompSouth concluded that for the reasons set-forth in its Comments, BellSouth's Motion to Modify the SEEM Plan to relieve it of any penalties for discriminatory treatment of line sharing customers should be denied.

PUBLIC STAFF: The Public Staff maintained that BellSouth's Motion is premature. The Public Staff commented that in Paragraphs 255 through 263 of the *TRO*, the FCC determined that CLPs were no longer impaired if they did not have unbundled access to the HFPL via line sharing. However, the Public Staff noted, in Paragraphs 264 through 265 of the *TRO*, the FCC continued to require ILECs to offer new line sharing arrangements for the next three years at transitional rates derived from each state's current line sharing rates or contained in the parties' interconnection agreement. The Public Staff stated that the FCC also grandfathered all existing line sharing arrangements until the FCC's next biennial review and set the rate as that charged prior to the effective date of the *TRO*.

The Public Staff pointed out that in Paragraph 27 of the *TRO*, the FCC explained that transitional rates establish a "glide path from one regulatory/pricing regime to another" and encourage either the orderly migration of customers to the whole loop or negotiations between ILECs and CLPs of rates, terms, and conditions for continued access to the high frequency portion of the loop.

The Public Staff stated that it believes that as long as BellSouth is required by the FCC to offer line sharing, the performance measures and SEEM penalties for line sharing should remain in the plans. The Public Staff commented that as the transition period passes, the number of line sharing arrangements should decline, thereby decreasing the potential for BellSouth to incur penalties. However, the Public Staff maintained, to remove the penalties from BellSouth's SEEM Plan for line sharing at this time could disrupt the "glide path from one regulatory/pricing regime to another" envisioned by the FCC. Moreover, the Public Staff noted, as long as BellSouth continues to offer line sharing during this transition period in a nondiscriminatory manner, penalty payments will be unnecessary.

REPLY COMMENTS

BELLSOUTH: BellSouth argued that CompSouth's comments to BellSouth's Motion do not dispute the fact that the FCC has found line sharing does not meet the impairment standard set forth in Section 251(b)(2)(d), and, is, therefore, not subject to the unbundling requirements of Section 251(c)(3). BellSouth opined that it is not surprising that CompSouth would (at least implicitly) concede this point, since the clarity of the FCC's ruling really leaves it no choice. Instead, BellSouth maintained, CompSouth

argued that the Commission should require the continued payment of penalties relating to line sharing, even though it is no longer a UNE, based on (1) the jurisdiction of the Commission to prevent anticompetitive behavior, and (2) public policy. BellSouth asserted that these two related arguments both fail for precisely the same reason; they are both premised upon a completely fabricated view of the current competitive market that has no basis in reality.

BellSouth noted that CompSouth made the argument that even as the FCC removed the unbundling requirement for line sharing pursuant to Section 251, it also determined that Section 271 applies to, in effect, counteract that removal. In other words, BellSouth stated, CompSouth argued that the FCC went to great lengths to make the explicit pronouncement that line sharing need not be unbundled, but at the same time, buried within the *TRO* language which should be read, by implication, to achieve precisely the opposite result. BellSouth asserted that although this contention is facially counterintuitive, it will explain in more detail why the language of the *TRO* does not support this contention.

BellSouth maintained that CompSouth's argument that the imposition of penalties for line sharing is required by "applicable state law" draws no support from the actual language of any statutory provision, the Orders of the Commission, or the Orders of the FCC. BellSouth noted that CompSouth cited only to a state statute that is designed to "provide just and reasonable rates for services without unjust discrimination, undue preferences, or advantages, or unfair or destructive competitive practices." BellSouth maintained that there is no explicit requirement in the North Carolina statutes that a performance assessment plan be developed, with or without penalties. BellSouth argued that there is, likewise, no explicit requirement that line sharing be offered on an unbundled basis. In fact, BellSouth asserted, the FCC has made it clear that if there were a state requirement to unbundle UNEs in a way that contradicts the federal scheme, it would be pre-empted. BellSouth noted that the FCC stated the following in Paragraph 187 of the *TRO*:

> Where appropriate, based on the record before us, we adopt uniform rules that specify the network elements that must be unbundled by incumbent LECs in all markets and the network elements that must not be unbundled, in any market, pursuant to Federal Law. In doing so, we exercise our authority pursuant to Sections 201(b) and 251(d) of the Act. As we explain in this Order, we find that setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers including small entities. We find that states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations. (emphasis added)

BellSouth argued that CompSouth has cited no state law that requires either unbundling of line sharing or the imposition of penalties for line sharing. Instead, BellSouth maintained, CompSouth cited general statutory provisions that preclude destructive

competitive practices. BellSouth commented that CompSouth made the statement, without citation to any authority, that the SEEM Plan's purpose is to discourage anticompetitive behavior. BellSouth asserted that since there is no support in any state law, statutory or otherwise, for the notion that line sharing must be offered on an unbundled basis or subject to penalties, CompSouth's "Commission jurisdiction" argument and its policy argument are ultimately identical. BellSouth maintained that each is dependent upon the unsupported contention that there will necessarily be an anticompetitive result if penalties are not paid for line sharing.

BellSouth argued that CompSouth's approach is to imply that: (1) BellSouth is a monopolist; (2) BellSouth would not offer line sharing if it were not required to; and (3) CLPs must obtain line sharing from BellSouth on nondiscriminatory terms to compete. BellSouth maintained that this argument proves nothing other than CompSouth's refusal to acknowledge the reality of the current competitive market. BellSouth maintained that the plain fact is that local competition exists. BellSouth asserted that after a process that spanned several years, this Commission recommended that BellSouth receive Section 271 authority, because, among other reasons, the local market is open to competition. BellSouth noted that the FCC specifically endorsed this decision, and also ruled that the local market is, in fact, open to competition.

BellSouth maintained that moreover, perhaps more important in the context of line sharing, is the fact that BellSouth has only a fraction of the data market. BellSouth commented that as the FCC explicitly held, CLPs and other providers can and do compete in the data market, and do not need access to ILEC facilities to do so. Thus, BellSouth asserted, CompSouth's contention that the CLPs need line sharing to compete is not only incorrect, it does not even focus on the data market, which is the more relevant market to line sharing.

Further, BellSouth argued, CompSouth's contention that the removal of penalties for line sharing would have an anticompetitive effect is totally unsupported. BellSouth noted that CompSouth's "public interest" argument consists of little more than a general claim that the SEEM Plan is required to prevent anticompetitive behavior. BellSouth maintained that CompSouth stated that "as long as BellSouth is obligated to provide parity treatment to its competitors and its competitors' customers, plans like the SEEM Plan are required to enforce that obligation." BellSouth argued that the real issue here, however, has nothing to do with whatever general competitive benefits there may be to having a SEEM Plan. BellSouth asserted that the pertinent, specific question is whether line sharing should continue to be a part of the SEEM Plan. BellSouth maintained that the FCC's removal of line sharing from the list of UNEs that must be offered pursuant to Section 251 has clearly answered that question in the negative.

BellSouth commented that the argument that CompSouth now makes, that the CLPs must obtain line sharing from BellSouth to compete in the local market, was made by these very same CLPs to the FCC. BellSouth asserted that the FCC rejected this argument in the *TRO* and found that competitive alternatives exist. In fact, BellSouth

noted, the FCC found that there are available alternatives to line sharing based, in part, on the activity of two of the CLPs that filed the instant Comments. Specifically, BellSouth commented, in the *TRO* the FCC stated the following:

> Moreover, we can no longer find that competitive LECs are unable to obtain the HFPL from other competitive LECs through line splitting. For example, the largest nonincumbent LEC provider of xDSL service, Covad, recently announced plans to offer ADSL service to 'more of AT&T's 50 million consumer customers' through line splitting. (¶ 259) (emphasis added)

BellSouth maintained that the FCC also noted in the *TRO* that the above-quoted information was contained in a press release by Covad, which stated "that this agreement will enable more of AT&T's 50 million consumer customers to obtain xDSL service through Covad's network, which itself covers more than 40 million households and businesses nationwide." (footnote 767 of the *TRO*) (emphasis added). Given this, BellSouth commented, the FCC stated that it did "not find credible Covad's argument that the Commission's previous finding, that there are no third party alternatives to the incumbent LEC's HFPL, remains valid."

Moreover, BellSouth stated, the FCC found that a continued unbundling requirement for line sharing could very well have an anticompetitive effect. BellSouth stated that as it noted in its Motion, the FCC specifically found in Paragraph 261 of the *TRO*:

> ...[R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets.

In sum, BellSouth argued, CompSouth's state law and policy arguments are dependent entirely upon its unsupported contention that the application of a SEEM penalty to line sharing is necessary to ensure competition. BellSouth maintained that this contention completely ignores the facts that a competitive market for local services currently exists, that line sharing has been found to be competitively available (based in substantial part, upon the competitive activity of AT&T and Covad), and that the FCC has also found that continuing to require the offering of unbundled line sharing under the standards that apply under Section 251 could well have an anticompetitive effect. Clearly, BellSouth opined, CompSouth's position is at odds with any reasonable assessment of the current competitive reality.

BellSouth asserted that in the only portion of the comments in which CompSouth makes a legal argument, it contended that, even in the wake of the FCC's removal of Section 251 unbundling requirements for line sharing, BellSouth still has precisely the same obligation to provide nondiscriminatory, unbundled access pursuant to Section 271. BellSouth maintained that this argument, however, is misplaced because BellSouth has no obligation to offer line sharing pursuant to Section 271. Further, BellSouth commented, the SQM and SEEM Plans were created to ensure BellSouth's compliance with its obligations under Section 251. Thus, BellSouth asserted, CompSouth is arguing for a dramatic expansion of the Plan beyond its intended purposes, which BellSouth would obviously oppose. BellSouth opined that to rule upon its Motion, however, the Commission does not need to consider the relation of the Plan to Section 271 because there is no requirement in Section 271 to offer unbundled line sharing.

BellSouth maintained that the *TRO* contains no explicit statement that line sharing must be offered on an unbundled, nondiscriminatory basis pursuant to Section 271. However, BellSouth noted, the *TRO* does explicitly state that line sharing is no longer required to be provided on an unbundled basis pursuant to Section 251. Thus, BellSouth stated, CompSouth argued that the FCC has, after a lengthy analysis, explicitly determined that line sharing is no longer subject to the unbundling obligation of Section 251, then reimposed precisely the same unbundling obligation through the unarticulated implication of the *TRO*'s discussion of Section 271. BellSouth opined that it is difficult to understand why the FCC would devote several pages of analysis to the question of whether line sharing should be unbundled, answer the question in the negative, then reverse its decision in another portion of the *TRO*. However, BellSouth noted, the *TRO*'s eighteen-paragraph-long discussion of Section 271 issues never mentions the words "line sharing," "the high frequency portion of the loop" or "HFPL". Nevertheless, BellSouth noted, CompSouth eschewed a common sense reading of the *TRO*, and contended that the Section 271 discussion in the *TRO* reimposes an unbundling obligation.

BellSouth stated that to the contrary, while the *TRO* does discuss Section 271, there is nothing in the discussion from which one could reasonably conclude that the *TRO* ordered the provision of line sharing pursuant to Section 271. BellSouth noted that the *TRO* states in Paragraph 650 that four of the checklist items for Section 271 compliance relate specifically to network elements that have been deemed to be UNEs subject to the standards of Section 251(c)(3); these include local transport, local switching, access to databases and associated signaling and "local loop transmission from the central office to the customer's premise," i.e., checklist items 4, 5, 6 and 10. BellSouth maintained that CompSouth makes the simplistic assertion that since line sharing (i.e., the high frequency portion of the loop) is part of the loop, then the checklist item four requirement to provide loops must apply. BellSouth argued that this contention, however, flies in the face of the entire analytical framework that prevails, both in the *Line Sharing Order* and in the *TRO*.

BellSouth maintained that the FCC decided almost four years ago in the *Line Sharing Order* to designate the high frequency loop spectrum as an unbundled network element, i.e, separate from the loop UNE. Specifically, BellSouth noted, the FCC stated in Paragraph 25 of the *Line Sharing Order* that, "we conclude that access to the high frequency spectrum of a local loop meets the statutory definition of a network element and satisfies the requirements of Sections 251(d)(2) and (c)(3)." BellSouth stated that despite the FCC's designation of the loop and the HFPL as separate UNEs, CompSouth argues that the *TRO*'s discussion of loop unbundling in the context of Section 271 applies equally to the HFPL UNE. BellSouth asserted that CompSouth's argument, however, cannot be reconciled with the FCC's decision to treat the loop and HFPL as separate UNEs. In other words, BellSouth maintained, since the FCC ruled that the loop and the HFPL are separate UNEs, there is no basis for the CLPs to argue that a discussion of loop unbundling in the *TRO* also applies to the separate HFPL UNE, which was not even mentioned in this discussion.

Further, BellSouth stated, there are clear indications of the separate treatment of loops and HFPL throughout the *TRO*. BellSouth commented that the FCC found in Paragraph 248 of the *TRO* that requesting carriers' stand alone copper loops are generally impaired on a national basis, while, at the same time, finding that carriers that request HFPL are not impaired under any circumstances. Again, BellSouth maintained, it makes no sense to conclude, as CompSouth did, that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two separate UNEs together without any distinction. BellSouth asserted that this conclusion makes even less sense when one considers that the FCC specifically found line sharing to be competitive (i.e., not to meet the impairment test), while reaching a different conclusion regarding whole loops.

Finally, BellSouth stated, CompSouth attempted to support its position that the FCC has treated line sharing differently for Section 251 and Section 271 purposes by contending that "a long line of FCC 271 Orders confirms the continuing obligation of BellSouth companies to offer unbundled access to HFPL loop transmission after Section 271 approval." BellSouth noted that in support of this contention, CompSouth cites to four Section 271 applicants, all of which were filed before the current unbundling rules went into effect on October 2, 2003, and three of which were issued before that date.

Paradoxically, BellSouth noted, CompSouth specifically cited the pronouncement in the *TRO* that "BOCs must continue to comply with any conditions required for [271] approval consistent with the changes in the law," but, at the same time, ignored the obvious intent of that language, i.e, that Section 271 requirements are based on the current law at any given point in time. BellSouth maintained that in the portion of the *TRO* that CompSouth quotes, the FCC went on to explain this approach as follows:

> While we believe that Section 271(d)(6) established an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that 'the conditions required for such approval' would not

> change in time. Absent such a reading, the Commission would be in a position where it was imposing different backsliding requirements on BOCs solely based on date of Section 271 entry, rather than based on the law that currently exists. We reject this approach as antithetical to public policy because it would require the enforcement of out-of-date or even vacated rules. (¶ 665) (emphasis added)

Thus, BellSouth argued, the particular standards that the Commission applied for Section 271 purposes prior to the effective date of the *TRO* are different from the standards that will apply with the advent of the *TRO*.

BellSouth noted that although CompSouth cited four Section 271 applications, it based its argument on this point entirely on a single Section 271 application approval that occurred on October 15, 2003, thirteen days after the date that the *TRO* became effective. BellSouth stated that CompSouth quoted from this Order at great length, and argued the references in this Order to line sharing prove definitively that, even in the aftermath of the *TRO*, line sharing continues to be considered as part of the loop for purposes of checklist item number 4 analysis. Unfortunately, BellSouth argued, CompSouth's contention reflects a less than thorough reading of the Order upon which it relies.

BellSouth commented that in the *SBC Section 271 Order*, the FCC acknowledged that it adopted new unbundling rules as part of the Triennial Review on October 2, 2003. BellSouth noted that the FCC then stated that for purposes of the SBC application, it would apply the former rules. Specifically, the FCC stated in Paragraph 11 of the *SBC Section 271 Order*:

> As the Commission found in the *Bell Atlantic New York Order*, we believe that using the network elements identified in the former unbundling rules as a standard in evaluating SBC's application, filed during the interim period between the time the rules were vacated by the DC Circuit and the effective date of the new rules, is a reasonable way to ensure that the application complies with the checklist requirements.

Thus, BellSouth maintained, the FCC applied, based in substantial part on the date the application was filed, the old unbundling rules rather than the new rules. BellSouth argued that this means that, contrary to CompSouth's assertion, the SBC case does not demonstrate that line sharing remains under the umbrella of checklist item 4, even after the *TRO* became effective.

Further, BellSouth maintained, the *SBC Section 271 Order* demonstrates that, even under the old bundling rules, the loop and the HFPL were treated as separate elements. BellSouth noted that in the *SBC Section 271 Order*, the FCC stated specifically that "one part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules concerning UNEs." BellSouth commented

that the FCC then listed seven UNEs that ILECs are obliged to provide. BellSouth stated that the first UNE on the list is "local loops and subloops." BellSouth further noted that the seventh UNE on this list is the "high frequency portion of the loop." Thus, BellSouth argued, it is clear that, contrary to CompSouth's contention, the FCC has specifically separated the local loop UNE from the HFPL UNE. BellSouth commented that this separation first appeared in the *Line Sharing Order* and it continues to apply. Thus, BellSouth opined, even if Section 271 could be read to include a loop unbundling obligation, this obligation does not extend to the separate HFPL UNE.

BellSouth concluded that one of the most important aspects of CompSouth's Comments is not what it contends, but rather what it concedes: that the FCC has removed line sharing from the unbundling obligations of Section 251. BellSouth maintained that this removal provides the most compelling reason that the penalty for line sharing should be removed from the SEEM Plan. BellSouth asserted that CompSouth's arguments to the contrary are based on a misreading of the *TRO* that would render the *TRO* patently illogical. BellSouth asserted that beyond this, the CLPs also rely on a state law/policy argument that is only valid if one accepts CompSouth's implication that BellSouth is a monopolist, and the contention that there is no competition in the local market and that line sharing specifically is not competitive. BellSouth argued that both this Commission (in the case of the first two assertions) and the FCC (in the case of all three) have specifically rejected these arguments. Moreover, BellSouth stated, the FCC's finding that line sharing is competitively available was based, in part, upon the market activity of the same CLPs that now contend to the contrary. Given this, BellSouth contended, CompSouth's contention that removing the penalty for line sharing from the SEEM Plan would be anticompetitive must fail.

In response to the Public Staff's comments, BellSouth stated that it respectfully disagrees with the Public Staff's analysis, particularly the conclusion that it would be premature to immediately cease the payment of SEEM payments relating to line sharing. BellSouth argued that the Public Staff's Comments do not contend that there is a continuing legal requirement under the Act to provide line sharing. In fact, BellSouth noted, the Public Staff's Comments specifically acknowledge that in the *TRO*, the FCC determined that CLPs were no longer impaired if they did not have unbundled access to the HFPL via line sharing. BellSouth argued that since there is no continuing legal requirement to offer unbundled access to line sharing pursuant to Section 251, the SEEM payments for line sharing should end immediately.

BellSouth asserted that although the *TRO* extends the time that line sharing must be offered, this extension does not in any way constitute a finding that there is a legal requirement to provide line sharing pursuant to Section 251, Section 271, or any other portion of the Act. BellSouth maintained that both the three-year transitional period and the grandfathering rule set forth in the *TRO* are designed solely to ensure that carriers that have utilized line sharing to provide service have adequate time to implement alternative arrangements and to avoid the disruption of service to end users. BellSouth noted that the FCC specifically stated tha``the grandfathering rule is designed "to prevent consumers who rely on line sharing from losing their broadband service."

BellSouth argued that in keeping with this intent, the "grandfathering" of existing line sharing arrangements pertains only until the next biennial review, which as the FCC noted, "will commence in 2004". Thus, BellSouth asserted, the grandfathering of existing service is clearly contemplated as a short-term arrangement to allow customers to transition to alternative service arrangements as quickly as possible.

Likewise, BellSouth noted, although the transitional period allows CLPs to order new line sharing arrangements for a three year period, the treatment of line sharing as a UNE that must be offered pursuant to Section 251 ends immediately. BellSouth argued that UNEs that must be offered on an unbundled basis pursuant to Section 251 are to be priced at TELRIC rates. In contrast, BellSouth commented, during the transitional period, line sharing will immediately cease to be priced at the TELRIC rate. Instead, BellSouth noted, it will be priced at an amount that equals 25% of the state approved recurring rates for stand alone copper loops and that price will increase throughout the three year transitional period. Thus, BellSouth commented, as the transitional period begins, the *TRO* affects an immediate change in the regulatory treatment of line sharing.

BellSouth argued that as it stated in its Motion, the entire purpose of the performance assessment plan (including the SEEM component) is to ensure compliance with Section 251 obligations after Section 271 authority is granted. Therefore, BellSouth opined, immediate removal of the SEEM penalties for the line sharing UNE that has already been found not to be a required Section 251 offering is the only appropriate result. At the same time, BellSouth maintained, its proposal does allow for a transitional process within the context of the measurement and penalty plan. BellSouth commented that as it noted in its Motion, BellSouth does not propose line sharing measurements be immediately removed from the SQM. Instead, BellSouth noted, its performance in providing line sharing will continue to be reported until the Commission deems in a future periodic review that such reporting is no longer necessary. BellSouth argued that the continuation of reporting without penalties is an appropriate match to the FCC-ordered approach of allowing a transitional period in which customers that utilize line sharing will migrate to other alternatives. BellSouth asserted that it is not appropriate, however, to continue to treat line sharing in precisely the same manner for penalty purposes, even though it is no longer a Section 251 UNE.

BellSouth stated that in the Public Staff's Comments, the Public Staff noted that "the FCC explained that transitional rates establish a 'glide path from one regulatory/pricing regime to another' and encourage either the orderly migration of customers to the whole loop or negotiations between ILECs and CLPs as rates, terms, and conditions for continued access to the high frequency portion of the loop." BellSouth commented that the Public Staff further concluded that BellSouth's approach "could disrupt" this glidepath. BellSouth asserted, however, that the approach advocated by Public Staff would impede "the orderly migration of customers" to other alternatives to line sharing or the negotiations of other arrangements. BellSouth argued that in the *TRO*, the FCC specifically found that, given the fact that line sharing does n't meet the impairment test, continued treatment of line sharing as a UNE would have an anticompetitive affect.

BellSouth noted that the FCC stated the following in this regard in Paragraph 261 of the *TRO*:

> ...[R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets." (emphasis added)

BellSouth maintained that while the FCC contemplated that the removal of Section 251 obligations for line sharing would be handled in a way that would not cause disruption to customer service, the FCC obviously recognized the dangers of continuing to treat line sharing as a UNE even though it no longer meets the impairment test. BellSouth asserted that it only follows from this recognition that alternative arrangements (either functional alternatives to line sharing or alternative line sharing arrangements that would be negotiated with ILECs) should be implemented as quickly as possible in order to avoid a deleterious, anticompetitive effect. Again, BellSouth opined, the entire point of the transition period is to encourage CLPs to find (in an orderly fashion) other **alternatives to the current line sharing arrangements. BellSouth stated that if, however,** it is required to pay penalties for line sharing throughout the entire transitional period – as if line sharing were still a Section 251 UNE – this requirement will obviously slow the transition and thwart the intent of the FCC.

BellSouth asserted that the FCC clearly intended that a balance be struck between not transitioning current line sharing arrangements to other alternatives too quickly (since this could have an ill effect on customers) and not transitioning too slowly (since this would have an ill effect on competition). BellSouth maintained that it is, in part, for this reason that the FCC ordered that line sharing should be treated differently throughout the transitional period than it was treated when it was a Section 251 UNE. BellSouth argued that if, the FCC's decision notwithstanding, BellSouth is required to continue to pay penalties relating to line sharing as if it were a UNE, then this will only provide an additional incentive for CLPs to continue to utilize line sharing under the present arrangement for as long as possible. In other words, BellSouth stated, this will prevent achievement of the FCC's goal of ensuring that the transition occurs as quickly as possible.

Again, BellSouth maintained, while it may have been appropriate to pay penalties for line sharing when it was categorized as a Section 251 UNE, now that it is not categorized in this matter, and is, therefore, clearly outside of the structure of the plan, the treatment of UNEs under the plan must change. BellSouth commented that the FCC has ordered a transitional process that must begin immediately; this means that

the treatment of line sharing must change now, not at some later point. BellSouth asserted that the only ruling by this Commission that would be consistent with this approach is to change the treatment of line sharing under the penalty plan immediately as well.

BellSouth noted that in its Motion to Modify SEEM Plan, it proposed to escrow SEEM payments relating to line sharing until the Commission rules upon the Motion, if such ruling has not occurred by December 15, 2003 (i.e., when the first of the payments are due for performance that occurs after the effective date of the *TRO*). BellSouth restated its request. BellSouth noted that if this requested relief is not granted, then BellSouth will be required to pay both Tier I and Tier II penalties on December 15, 2003 that the Commission could well subsequently determine should not be paid. BellSouth opined that in this event, it would be placed in the untenable position of having to attempt to recoup penalty payments from a number of CLPs. Thus, BellSouth maintained, under the best case scenario, it would have the unnecessary administrative burden of making payments to CLPs only to later expend additional efforts to recover these funds. BellSouth argued that there is, of course, a substantial likelihood that at least some of the CLPs would decline to voluntarily return the penalty payments. BellSouth asserted that if these CLPs do not repay the subject penalties for line sharing, then BellSouth would be unjustly deprived of these payments.

Given the above, BellSouth opined that the better alternative would be for the Commission to allow BellSouth to place into escrow all penalties attributable to line sharing (beginning with those payable on December 15, 2003) until such time as the Commission rules on BellSouth's Motion to Modify the SEEM Plan. BellSouth commented that if the Commission subsequently rules in BellSouth's favor, then the payments would be returned from escrow to BellSouth. BellSouth asserted that although it should prevail in this issue for the reasons set forth in its Motion and Reply Comments, if BellSouth does not obtain the requested relief, any payments due would be promptly remitted to the CLPs upon the entry of an Order by the Commission. Therefore, BellSouth noted, granting its Motion, and allowing these funds to be paid into escrow, would not cause harm to any party.

BellSouth noted that although the immediate entry of an Order allowing BellSouth to pay the above-described funds into escrow is the best approach, BellSouth also purposes an alternative, i.e., that the Commission allow BellSouth to offset any SEEM payments made for line sharing, which the Commission subsequently determines are not required, against subsequent penalty payments due under Tier I and Tier II. In other words, BellSouth commented, if the Commission ultimately rules in BellSouth's favor on the Motion to Modify SEEM Plan, then BellSouth would be allowed to offset all SEEM payments for line sharing, beginning with those due December 15, 2003, against penalties that BellSouth otherwise would owe under the Plan. Thus, BellSouth noted, if at the time the Commission rules, BellSouth owes Tier I payments to a given CLP, it would simply reduce the amount of the payment by the amount of the line sharing penalties that BellSouth had paid to the CLP, beginning with the December 15, 2003 payment. Again, BellSouth stated that it believes that the better alternative is to enter

immediately an Order allowing BellSouth the authority to place the subject payments into escrow. BellSouth stated that if the Commission declines to take this action, however, then allowing BellSouth to offset these penalties against others that are due in the future would likely represent the only realistic opportunity that BellSouth would have to recoup these funds.

SUPPLEMENTAL REPLY COMMENTS

COMPSOUTH: CompSouth asserted that it was obliged to file its Response to BellSouth's December 10, 2003 Reply Comments. CompSouth argued that the December 10, 2003 Reply Comments misstate both BellSouth's legal obligations and its prior advocacy to reach the conclusion that "BellSouth has no obligation to offer line sharing pursuant to Section 271." CompSouth maintained that BellSouth's attempt to weaken the SEEM Plan by ignoring line sharing obligations under Section 271 must be rejected by this Commission as it has been by the Georgia PSC and the Alabama PSC.

CompSouth asserted that BellSouth based its argument that BellSouth has no obligation to offer line sharing pursuant to Section 271 on two assertions: 1) line sharing (the HFPL) is not a Section 271 checklist number 4 item (271(c)(2)(B)(iv)); and 2) that it would be "illogical" for the FCC to lift the obligation for an ILEC to provide line sharing as a UNE only to reinstate that obligation under Section 271. CompSouth argued that both of BellSouth's assertions are incorrect.

CompSouth noted that BellSouth argued that line sharing is not a "loop transmission" under checklist item number 4. However, CompSouth maintained, the FCC and BellSouth itself have repeatedly categorized line sharing under checklist item number 4. CompSouth noted that in every FCC Section 271 Order granting BellSouth long distance authority, the FCC placed line sharing and line splitting in the section of the Order considering checklist item number 4. CompSouth asserted that the FCC's treatment of BellSouth is hardly unique. More importantly, CompSouth stated, BellSouth placed line sharing and line splitting in every one of its four briefs to the states and to the FCC under checklist item number 4. CompSouth maintained that having briefed line sharing as a checklist number 4 item, it is a bit disingenuous for BellSouth to now assert that line sharing is *not* a checklist number 4 item. CompSouth argued that BellSouth cannot admit this, of course, because to do so would admit that BellSouth continues to have an obligation to provide access to line sharing under Section 271. Instead, CompSouth stated, BellSouth spends several paragraphs arguing that loops and line sharing are separate UNEs under Section 251, therefore they cannot both fall under "local loop transmission facilities" in checklist item number 4. CompSouth asserted that the HFPL is clearly a form of loop transmission – a loop transmission that the Bells themselves routinely use to provide xDSL services separately from narrowband voice services. Indeed, C`mpSouth maintained, in describing the high frequency portion of the loop in the *Line Sharing Order*, the FCC stated that "requesting carriers may access unbundled loop functionalities, such as *non-voiceband transmission frequencies, separate from other loop functions*" – distinguishing the high frequency loop transmission path from the narrowband frequencies used for circuit

switched voice services. CompSouth argued that both BellSouth and the FCC repeatedly categorize the HFPL (line sharing) under checklist item number 4 because the HFPL is a "local loop transmission" facility under Section 271(c)(2)(B)(iv). Accordingly, CompSouth maintained, as long as BellSouth continues to offer long distance, it must provide access to line sharing. Because, CompSouth stated, in BellSouth's own words, "the purpose of the enforcement provisions of the [SEEM] plan is to prevent 'backsliding' after BellSouth obtains authority to provide interLATA service", BellSouth's Motion to Modify the SEEM Plan to remove line sharing should be denied.

CompSouth stated that in lieu of actual legal argument, BellSouth asserted that it is "illogical" for the FCC to lift the obligation of ILECs to provide access to line sharing as a UNE only to maintain an RBOC's obligation to continue access under Section 271. CompSouth argued that despite BellSouth's reasoning, however, the FCC expressly held that "BOC obligations under Section 271 are not necessarily relieved based on any determination we make under Section 251 unbundling analysis." Moreover, CompSouth noted, the FCC expressly addressed the question of the apparent illogic of a statutory scheme in which the FCC could cease the requirement of an RBOC to provide access to a UNE under Section 251, and yet continue the identical requirement under Section 271. In Paragraph 659 of the *TRO*, the FCC stated

> In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. 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. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

In short, CompSouth argued, although the price for a "de-listed" UNE may change, if that UNE falls under Section 271(c)(2)(B)(iii)-(vi), the obligation to provide nondiscriminatory access remains. CompSouth maintained that BOCs who continue to sell long distance must continue to provide nondiscriminatory access to all checklist items "de-listed under 251", including line sharing under checklist item number 4. CompSouth opined that whether BellSouth thinks that statutory scheme is illogical or not, it is the law.

CompSouth asserted that there is no legitimate debate whether line sharing should be categorized under checklist item number 4 – the FCC and BellSouth have categorized

line sharing as such in every pleading on the subject. CompSouth further stated that there is no legitimate debate about whether RBOCs, including BellSouth, must continue to provide nondiscriminatory access to checklist number 4 items, including the HFPL (line sharing). Manifestly then, CompSouth maintained, BellSouth remains obligated to provide nondiscriminatory access to line sharing under both the *TRO* and Section 271. CompSouth maintained that obligation should be enforced, as it always was intended to be, by the SEEM Plan. CompSouth concluded that the Commission should, therefore, reject BellSouth's obfuscatory tactics and deny its Motion to Modify the SEEM Plan.

COVAD'S MOTION

In its Motion to Take Administrative Notice, Covad supplied a copy of the Georgia PSC's January 15, 2004 *Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan.*

The Georgia PSC denied BellSouth's October 22, 2003 Motion to modify its SEEM Plan to eliminate penalties associated with line sharing. The Georgia PSC stated in its Order

> Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC and Section 271 checklist item 4. The Commission determines that at this time it is not sound policy to eliminate the penalties associated with line sharing. BellSouth's Motion is therefore denied.

DISCUSSION

There are two unresolved procedural matters which need to be addressed by the Commission. First, the Commission finds it appropriate to grant CompSouth's Motion to File Supplemental Reply Comments, thereby allowing CompSouth's Supplemental Reply Comments to be recognized as filed in the docket. Second, the Commission finds it appropriate to grant Covad's Motion to Take Administrative Notice of the Georgia PSC's *January 15, 2004 Order.*

The Commission believes that it is undisputed that under the *TRO*, line sharing is no longer required to be unbundled under Section 251 of TA96 (See Paragraph 255 of the *TRO*). Further, the Commission believes that it is undisputed that the FCC: (1) allowed for a transition period for carriers that have relied on line sharing to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with ILECs; and (2) grandfathered all existing line sharing arrangements unless the respective CLP, or its successor or assign, discontinues providing xDSL service to a particular end-user customer until the FCC's next biennial review which will commence in 2004 (See Paragraph 264 of the *TRO*). Therefore, the Commission agrees with the Public Staff that since BellSouth is still currently obligated to provide line sharing during this transitional period and on a grandfathered basis, it is premature to remove line sharing from the SEEM Plan. The Commission believes that

as long as BellSouth is required to provide line sharing, whether as a Section 251 UNE (which it no longer is) or during a transition period or on a grandfathered basis, BellSouth should provide such line sharing in accordance with previously-established measurements and penalties.

In addition, the Commission agrees with CompSouth's argument that BellSouth is still obligated to provide line sharing under Section 271 of the Act. Although BellSouth argues that it is illogical for the FCC to remove line sharing from the national UNE list in the *TRO* but still require line sharing under Section 271 of the Act, the Commission believes that the FCC did address this issue in Paragraph 659 of the *TRO*, as CompSouth noted, wherein the FCC stated

> In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. 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. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

Therefore, the Commission believes that CompSouth is correct in its assertion that the FCC found in the *TRO* that Section 271 of the Act requires BellSouth to provide unbundled access to the HFPL although the HFPL is no longer required to be unbundled under Section 251 of the Act. The Commission notes that the FCC simply clarified that such an element (one required under Section 271 but not under Section 251) does not have to be priced based on TELRIC. Therefore, the Commission believes that BellSouth remains obligated to provide the HFPL under Section 271 of the Act, although the pricing for the HFPL no longer is required to be TELRIC-based. The Commission believes that since BellSouth is still obligated to provide the HFPL under Section 271 of the Act, it is inappropriate to remove line sharing from the North Carolina SEEM Plan.

CONCLUSIONS

Based on the record of evidence on this matter, the Commission finds it appropriate to deny BellSouth's Motion to Modify SEEM Plan to remove penalties associated with the provisioning of line sharing. To the extent BellSouth has not paid

any penalties associated with line sharing in its December 15, 2003 penalty payments, the Commission hereby orders BellSouth to immediately remit said penalties.

Further, the Commission finds it appropriate to: (1) grant CompSouth's Motion to File Supplemental Reply Comments, thereby allowing CompSouth's Supplemental Reply Comments to be recognized as filed in the docket; and (2) grant Covad's Motion to Take Administrative Notice of the Georgia PSC's *January 15, 2004 Order*.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth's Motion to Modify SEEM Plan is hereby denied.

2. That to the extent BellSouth has not paid any penalties associated with line sharing in its December 15, 2003 penalty payments, BellSouth shall immediately remit said penalties.

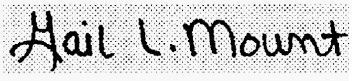
3. That CompSouth's Motion to File Supplemental Reply Comments is hereby granted.

4. That Covad's Motion to Take Administrative Notice of the Georgia PSC's *January 15, 2004 Order* is hereby granted.

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of February, 2004.

NORTH CAROLINA UTILITIES COMMISSION



Gail L. Mount, Deputy Clerk

bp021204.01

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 133k

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Generic Docket to Address Performance Measurements and Enforcement Mechanisms	))))	ORDER ON RECONSIDERATION

BY THE COMMISSION: On August 1, 2003, BellSouth Telecommunications, Inc.'s (BellSouth's) North Carolina Utilities Commission-ordered Self-Effectuating Enforcement Mechanisms (SEEM) Plan and Service Quality Measurement (SQM) Plan went into effect.

On August 21, 2003, the Federal Communications Commission (FCC) released its *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et. al.,* CC Docket No. 01-338, *et. al.* (*Triennial Review Order* or *TRO*).

On October 27, 2003, BellSouth filed its Motion to Modify SEEM Plan.

By Order dated November 5, 2003, the Commission requested initial and reply comments by interested parties on BellSouth's Motion. On November 25, 2003, CompSouth[1] filed its comments on BellSouth's Motion. Also, on November 25, 2003, the Public Staff filed its comments on the Motion. On December 10, 2003, BellSouth filed its reply comments in this regard. On December 22, 2003, CompSouth filed its Motion to File Supplemental Reply Comments in Response to the Reply Comments filed by BellSouth. In addition, CompSouth filed its Supplemental Reply Comments.

On January 21, 2004, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad) filed a Motion to Take Administrative Notice of the January 15, 2004 *Order Denying BellSouth Telecommunications, Inc.'s Motion to*

[1] CompSouth is comprised of: ITC^DeltaCom, MCI, Business Telecom, Inc., NewSouth Communications Corporation, AT&T Communications of the Southern States, LLC, NuVox Communications, Inc., Access Integrated Networks, Inc., Birch Telecom, Talk America, Cinergy Communications Company, Z-Tel Communications, Network Telephone Corporation, Momentum Business Solutions, Covad Communications Company, KMC Telecom, IDS Telecom, LLC, Access Point, Inc., and Xspedius Corporation.

Modify Self-Effectuating Enforcement Mechanism Plan issued by the Georgia Public Service Commission (PSC).[2]

On February 13, 2004, the Commission issued its *Order Denying BellSouth's Motion to Modify SEEM Plan.* In its Order, the Commission found it appropriate to deny BellSouth's Motion to Modify SEEM Plan to remove penalties associated with the provisioning of line sharing. The Commission stated in its Order that to the extent BellSouth had not paid any penalties associated with line sharing in its December 15, 2003 penalty payments, BellSouth was to immediately remit said penalties.

Further, the Commission found it appropriate to: (1) grant CompSouth's Motion to File Supplemental Reply Comments, thereby allowing CompSouth's Supplemental Reply Comments to be recognized as filed in the docket; and (2) grant Covad's Motion to Take Administrative Notice of the Georgia PSC's *January 14, 2004 Order.*

On March 15, 2004, BellSouth filed its Motion for Reconsideration of the Commission's *February 13, 2004 Order.*

By Order dated March 23, 2004, the Commission requested initial and reply comments on BellSouth's Motion. After Motions for Extension of Time were granted, Initial Comments were filed on April 26, 2004 by CompSouth and the Public Staff, and Reply Comments were filed on May 17, 2004 by BellSouth and CompSouth.

BELLSOUTH'S MOTION FOR RECONSIDERATION

BellSouth specifically requested that the Commission reconsider its conclusion that BellSouth has an independent obligation to provide line sharing under Section 271(c)(2)(B)(4) of the Telecommunications Act of 1996 (TA96 or the Act). BellSouth noted that in the *TRO,* the FCC found that line sharing does not meet the impairment standard set forth in Section 251(b)(2)(d) and is, therefore, not subject to the unbundling requirements of Section 251(c)(3). BellSouth stated that the Commission's *February 13, 2004 Order* not only acknowledges this, but further states specifically that "it is undisputed that under the *TRO*, line sharing is no longer required to be unbundled under Section 251 of TA96 (See Paragraph 255 of the *TRO*)." Nevertheless, BellSouth maintained, the Commission held that line sharing should continue as a part of the SEEM plan because: (1) BellSouth must continue to provide line sharing during the *TRO*'s transitional period; and (2) BellSouth is obligated to provide line sharing under Section 271 of the Act. BellSouth stated that it is this latter point upon which BellSouth seeks reconsideration.

First, BellSouth argued, the Commission should reconsider its interpretation of Section 271 to the extent it was predicated upon the *TRO.* BellSouth noted that on March 2, 2004, the United States Court of Appeals, District of Columbia remanded

[2] Covad incorrectly stated in its Motion to Take Administrative Notice that the Georgia PSC's Order was issued on January 15, 2004. The Georgia PSC's Order was issued on January 14, 2004.

certain aspects of the *TRO* to the FCC for further proceedings and vacated other portions of the *TRO*. BellSouth commented that although the Court temporarily stayed its mandate, whether the FCC will seek an additional stay of and/or petition for Supreme Court review of the D.C. Circuit's Order remains to be seen. BellSouth asserted that under such circumstances, which did not exist at the time the Commission entered its *February 13, 2004 Order*, the Commission should reconsider its interpretation of the language in the *TRO* to reach its conclusion as to the requirements of Section 271.

Second, BellSouth argued, given the Commission's conclusion in the *February 13, 2004 Order* regarding Section 271, it would appear that the Commission was, to some extent, misled by the Supplemental Reply Comments of CompSouth. Specifically, BellSouth asserted, the Commission quoted the CLPs on Page 20 of the *February 13, 2004 Order*, in pertinent part, as follows:

> CompSouth maintained [in its Reply Comments] that BellSouth's attempt to weaken the SEEM Plan by ignoring line sharing obligations under Section 271 must be rejected by this Commission as it has been by the Georgia PSC and the Alabama PSC.

BellSouth argued that this quotation from the *February 13, 2004 Order* reflects almost exactly the representation by the CLPs in their Supplemental Reply Comments. BellSouth maintained that the truth of the matter, however, is that neither of these state commissions ultimately ruled that Section 271 applies as the CLPs contended. BellSouth noted that at the time the CLPs filed their Supplemental Reply Comments, the Alabama PSC had voted, but an Order had not been issued. BellSouth asserted that it does not believe that there was anything in the Alabama PSC's vote that would give the CLPs the impression that the Alabama PSC had utilized Section 271 as the basis of its decision. However, BellSouth stated, even if there once was a basis for this belief, there is none now. BellSouth noted that the Alabama PSC entered its Order (a copy of which was attached as Exhibit A to BellSouth's Motion) on February 14, 2004. BellSouth commented that the Order expressly stated that it was not based on an interpretation of the requirements of Section 271. Specifically, BellSouth stated, the Alabama PSC Order stated on Page 4 the following:

> We further note that nothing in our decision herein should be construed as an adoption or rejection of the CLEC argument that regardless of the FCC's *TRO Order*, BellSouth has an independent obligation under Section 271 to continue to provide line sharing. We will address that issue in future proceedings as necessary. Our decision herein to deny BellSouth's request to eliminate the penalties associated with line sharing from the SEEM Plan is, at this juncture, based exclusively on the requirement in the *TRO* that BellSouth continue to provide line sharing on a transitional/grandfathered basis.

BellSouth maintained that the CLPs were, at least initially, more accurate in their information concerning the Georgia PSC. BellSouth noted that the Georgia PSC did initially rule that BellSouth's obligation to provide line sharing was not only pursuant to the traditional mechanism created by the *TRO*, but pursuant to Section 271 as well. BellSouth stated that since that ruling was issued, however, in response to a Motion for Reconsideration filed by BellSouth in Georgia, the Georgia PSC has clarified its Order to remove any reference to Section 271 as the basis for its decision. BellSouth commented that although the Georgia PSC had not yet entered a written Order, BellSouth attached to its Motion, as Exhibit B, a copy of the transcript of the Georgia PSC's vote taken on February 17, 2004, during which the Georgia PSC indicated that it was no longer relying upon the requirements of Section 271 to support its conclusion that BellSouth should continue to be required to make penalty payments on measurements that involve line sharing.

Thus, BellSouth asserted, the representations of the CLPs notwithstanding, the fact is that, currently, the North Carolina Commission is the only Commission in BellSouth's region (and, to the best of BellSouth's knowledge, the only Commission in the country) that has ruled that line sharing is a continuing requirement under Section 271.

BellSouth further submitted that the Commission also appears to have been misled by the CLPs' mischaracterization of BellSouth's position. Specifically, BellSouth noted, the CLPs made the argument in their Supplemental Reply Comments that, in effect, BellSouth was urging the Commission to reject a ruling of the FCC set forth in the *TRO* simply because BellSouth believed it to be "illogical." Specifically, BellSouth stated, the *February 13, 2004 Order* noted on Page 21 that, "CompSouth stated that in lieu of actual legal argument, BellSouth asserted that it is 'illogical' for the FCC to lift the obligation of ILECs to provide access to line sharing as a UNE only to maintain an RBOC's [Regional Bell Operating Company's] obligation to continue access under Section 271."

BellSouth stated that, building upon this mischaracterization by the CLPs, the Commission then cited at some length to Paragraph 659 of the *TRO*, which contains a discussion of how Section 251 obligations relate to Section 271 obligations. BellSouth noted that based on this Paragraph, the Commission determined that the *TRO* did take a logical approach, and it rejected BellSouth's argument to the contrary. BellSouth maintained that the problem with this conclusion is that BellSouth has never argued that the FCC's decision in this portion of the *TRO* is illogical.

Instead, BellSouth noted, its position was based on one of the fundamental principles of legal interpretation, that a decision should not be interpreted in a manner that would render it illogical. BellSouth urged an interpretation of the *TRO* that was logical and consistent. BellSouth stated that the CLPs argued for an interpretation of the *TRO* that, if accepted, would render it patently illogical and internally inconsistent. BellSouth maintained that a routinely accepted principle of legal interpretation is that a decision, whether by the FCC, by this Commission, or by a Court, should not read in a

way that would make it internally inconsistent or illogical. BellSouth commented that as the United States Supreme Court observed in the context of statutory interpretation, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative intent are available." *Griffin v. Oceanic Contractors, Inc.* 73 L Ed 2d 973, 982 (1982). Thus, BellSouth stated, far from taking the position the CLPs claimed, actually argued that because its interpretation of the *TRO* is clearly the more logical one, it is also the more likely.

BellSouth asserted that the conclusion that the *TRO* requires line sharing to be offered pursuant to Section 271 is unsupportable for three reasons: (1) the *TRO* does not state that line sharing is a Section 271 obligation, either pursuant to checklist 4 or otherwise; (2) the pertinent discussion in the *TRO* of continuing Section 271 obligations refers to the loop-UNE, not line sharing; and (3) line sharing is consistently treated in the *TRO* in a way that distinguishes it from the loop.

BellSouth maintained that the *February 13, 2004 Order* relies exclusively upon Paragraph 659 of the *TRO* for the conclusion that line sharing is a continuing Section 271 obligation. BellSouth argued that that paragraph, however, even if read to mean that Section 271 obligations exist independent of Section 251 obligations, contains nothing to suggest that such a Section 271 obligation exists for line sharing. BellSouth noted that in the discussion of Section 271 in the *TRO*, the FCC stated that four of the checklist items for Section 271 compliance relate specifically to network elements that have been deemed to be UNEs subject to Section 251(c)(3). BellSouth stated that these include local transport, local switching, access to databases and associated signaling, and local loop transmission from the central office to the customer's premise, i.e., checklist items 4, 5, 6, and 10. Importantly, BellSouth argued, line sharing is never mentioned.

BellSouth stated that in the *February 13, 2004 Order*, the Commission observed that Section 251 and Section 271 operate independently. BellSouth noted that the *February 13, 2004 Order*, however, contains no indication of why the Commission concluded that line sharing is a continuing Section 271 obligation. BellSouth noted that if the Commission tacitly accepted the CLPs' argument that line sharing is required pursuant to checklist item 4, then the Commission overlooked the FCC's language in Paragraph 654 of the *TRO* making clear that checklist items 4, 5, 6, and 10 "impose access requirements regarding loop, transport, switching, and signaling . . .". Again, BellSouth maintained, line sharing is never mentioned by the FCC as a requirement of any checklist item.

BellSouth commented that if the *February 13, 2004 Order* reflects a conclusion by the Commission that line sharing is a requirement of checklist item 4 because line sharing involves part of the loop (i.e., the high frequency portion of the loop or HFPL), such a conclusion cannot be reconciled with the FCC's analytical framework, both in its *Line Sharing Order* and in the *TRO*. BellSouth argued that the FCC decided almost four years ago in the *Line Sharing Order* to designate the HFPL as an unbundled network element, separate and apart from the loop itself. Specifically, BellSouth noted, as the

FCC stated in the *Line Sharing Order*, "we conclude that access to the high frequency spectrum of a local loop meets the statutory definition of a network element and satisfies the requirements of Sections 251(d)(2) and (c)(3)."

BellSouth maintained that the FCC's treatment of HFPL and the loop as separate unbundled network elements appears throughout the *TRO*. BellSouth noted that the FCC found that requesting carriers of stand alone copper loops are generally impaired on a national basis, while, at the same time, finding that carriers that request the HFPL are not impaired under any circumstances. Again, BellSouth argued, it makes no sense to conclude that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two together without any distinction. BellSouth asserted that this conclusion makes even less sense when one considers that the FCC specifically found line sharing to be competitive (i.e., not to meet the impairment test), while reaching a different conclusion regarding whole loops.

More recently, BellSouth noted, the FCC made clear that line sharing has never been subsumed within the obligation to provide access to unbundled loops pursuant to checklist item 4 of Section 271. BellSouth commented that the case involved SBC Communications, Inc.'s application for Section 271 authority in Illinois, Indiana, Ohio, and Wisconsin, which was granted by Order issued on October 15, 2003, thirteen days after the date the *TRO* became effective (*Memorandum Opinion and Order*, FCC 03-243, In the Matter of Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin, WC Docket No. 03-167 – *SBC Order*). BellSouth noted that in the *SBC Order*, the FCC stated specifically that "one part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules concerning UNEs." BellSouth noted that the FCC then listed seven UNEs that incumbent LECs are obligated to provide. BellSouth stated the first UNE on the list is "local loops and subloops." BellSouth commented that the seventh UNE on this list is the "high frequency portion of the loop."

BellSouth argued that the *SBC Order* demonstrates that, even under the FCC's old unbundling rules, the loop and the HFPL were treated as separate elements. BellSouth noted that the FCC's delineation of the loop and HFPL as separate elements began in the *Line Sharing Order* and has continued to this day in the *TRO*. Thus, BellSouth commented, while checklist item 4 of Section 271 may obligate BellSouth to provide access to loops, this obligation does not extend to providing line sharing, as the Commission's *February 13, 2004 Order* erroneously concluded.

Furthermore, BellSouth stated, the historical location of the line sharing discussion in the Section 271 context has been a matter of convenience than legal necessity. BellSouth noted that this fact is clear from the SBC decision discussed above. BellSouth commented that in the *SBC Order*, the FCC analyzed SBC's

compliance with checklist 4 by considering the extent to which SBC was providing "unbundled local loops in accordance with the requirements of section 271 and our rules". BellSouth noted that because at the time the FCC's rules required that line sharing be unbundled, the FCC reviewed under checklist item 4 SBC's performance "for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, high-capacity loops," as well as SBC's "processes for hot cut provisioning, and line sharing and line splitting." BellSouth argued that the fact that the FCC addressed line sharing under checklist item 4 when the FCC's rules required that line sharing be unbundled does not mean that line sharing is a checklist item 4 requirement even after the FCC's rules no longer require such unbundling.

Finally, BellSouth maintained, even assuming line sharing were a requirement of Section 271 (which is not the case), the Commission lacks authority to mandate the payment of self-effectuating penalties to enforce compliance with any such requirement. First, BellSouth noted, enforcement authority for ensuring Section 271 compliance rests with the FCC, not this Commission. Second, BellSouth asserted, while the Commission may have authority to order self-effectuating penalties in connection with BellSouth's Section 251 obligations, the Commission's authority to order such penalties in other contexts is considerably more circumscribed. BellSouth argued that the lack of any legal authority by this Commission to impose self-effectuating penalties to enforce compliance with Section 271 constitutes a separate ground for granting reconsideration.

INITIAL COMMENTS

COMPSOUTH: CompSouth asserted that BellSouth's Motion for Reconsideration should be denied for two reasons: (1) The Commission's determination is correct; and (2) BellSouth has failed to identify any new law or fact warranting reconsideration.

CompSouth maintained that BellSouth's Motion for Reconsideration should be denied because the Commission's determination that BellSouth has an obligation to provide access to line sharing under Section 271(c)(2)(B)(iv) is unassailable: (1) line sharing has always been and remains a checklist item 4 loop transmission facility; and (2) RBOCs offering long distance services pursuant to Section 271 authority have an obligation to provide checklist item 4 elements irrespective of unbundling determinations under Section 251, albeit under a different pricing standard.

CompSouth argued that there can be no legitimate debate about whether or not line sharing is a checklist item 4 loop transmission facility: it is. In fact, CompSouth noted, even BellSouth itself has always asserted that line sharing is a checklist item 4 loop transmission facility. CompSouth noted that the FCC defined the "loop" in Section 271(c)(2)(B)(iv), competitive checklist item 4, as a "transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer's premises." CompSouth noted that the HFPL, used to provide line sharing, is clearly a form of loop transmission facility. Indeed, CompSouth asserted, BellSouth routinely uses the HFPL transmission channel to provide xDSL services. As a consequence, CompSouth stated, it is not surprising that

the FCC and BellSouth always considered the HFPL under checklist item 4 – local loop transmission facilities.

CompSouth maintained that the FCC and BellSouth repeatedly placed line sharing in checklist item 4. CompSouth noted that in every FCC Section 271 Order granting BellSouth long distance authority – indeed, in every FCC Order granting any RBOC such authority – the FCC placed line sharing in checklist item 4. CompSouth stated that BellSouth does not dispute this fact. Indeed, CompSouth asserted, BellSouth itself placed line sharing and line splitting in every one of its own briefs to the states and to the FCC under checklist item 4. Manifestly then, CompSouth argued, the Commission was correct that line sharing is a Section 271(c)(2)(B)(iv) network element, which BellSouth remains obligated to provide so long as it offers long distance under Section 271 authority.

CompSouth argued that BellSouth now offers-up three arguments in its Motion for Reconsideration to explain-away the historical treatment of line sharing under checklist item 4. First, CompSouth asserted, BellSouth argued that line sharing never really was a checklist number 4 item. Then, CompSouth stated, in apparent recognition that line sharing really was always considered under checklist item 4, BellSouth argued that "the historical location [under checklist item 4] of the line sharing discussion in the 271 context has been more a matter of convenience than legal necessity". And finally, CompSouth noted, BellSouth concluded (without citation) that "[t]he fact that the FCC addressed line sharing under checklist item 4 when the FCC's rules required that line sharing be unbundled does not mean that line sharing is a checklist item 4 requirement even after the FCC's rules no longer require such unbundling." CompSouth argued that each of these arguments is demonstrably incorrect.

CompSouth asserted that BellSouth's arguments that line sharing is really not a checklist item 4 element are incorrect. CompSouth noted that BellSouth based its assertion that line sharing is no longer (or never was) a checklist item 4 element on two facts: (1) that in the *TRO*, the FCC specifically addressed whether carriers were impaired without access to the HFPL separately from other loop types in its Section 251 unbundling analysis, but only referred to "loops" when addressing checklist item 4 in its Section 271 analysis; and (2) that in the *SBC Order*, the FCC addressed the HFPL (line sharing) separately from other "loops" in its discussion of unbundling requirements pursuant to Section 271(c)(2)(B)(ii), competitive checklist item 2. CompSouth argued that both of these arguments misconstrue the significance of the treatment of loops and the HFPL.

CompSouth maintained that the FCC did not secretly remove line sharing from checklist item 4 in the *TRO*. CompSouth argued that BellSouth misconstrued the purposes of the *TRO* sections addressing Section 251 unbundling analyses and Section 271 statutory interpretation to argue that line sharing is not a checklist item 4 element. CompSouth asserted that BellSouth spent several paragraphs arguing that various "whole loops" and the HFPL (line sharing) are analyzed as separate UNEs under the *TRO* Section 251 analysis, and then leapt to the conclusion that they cannot, therefore, both

fall under "local loop transmission facilities" in checklist item 4. CompSouth argued that the Commission should not be fooled by this chicanery: in the *TRO*, all of the checklist items are considered as separate UNEs in the unbundling analysis, but lumped together under their general checklist description in the Section 271 analysis. In fact, CompSouth maintained, a passing glance at the Table of Contents in the *TRO* reveals the fallacy of BellSouth's argument. CompSouth noted that as the Table of Contents reveals quite clearly, "loops" are analyzed from Paragraph 197 to Paragraph 341 as numerous separate UNEs defined both by capacity and market levels, with differing unbundling determinations for each. CompSouth noted that yet in the discussion of Section 271 obligations at Paragraphs 649 to 653, the FCC only mentions "loops". CompSouth maintained that under BellSouth's reasoning, the FCC's failure to list all of the loop types at Paragraphs 649 through 653 should imply that not a single one of them is a checklist item 4 loop transmission facility. CompSouth argued that this is absurd. CompSouth maintained that if the FCC intended to remove a loop type that had historically always been considered under checklist 4, then it would have made that determination explicit.

Similarly, CompSouth argued, in the *TRO*'s unbundling analysis, switching (checklist item 6) and transport (checklist item 5) are addressed as numerous discrete UNEs based on market type (switching) and capacity (transport), with differing unbundling determinations for each. CompSouth noted that in discussing these checklist items in its Section 271 analysis, however, the FCC only identified them generically as "switching" and "transport." CompSouth asserted that this does not imply that certain transport or switching UNEs were being surreptitiously removed from their respective Section 271 checklist. Yet, CompSouth asserted, this is the very logic BellSouth applies in its argument that "it makes no sense to conclude that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two together without any distinction."

CompSouth noted that the FCC's "separate analyses" for Section 251 unbundling determinations and "lumping together" for the Section 271 discussion makes perfect sense when one considers the purpose of the two sections: the Section 251 unbundling analysis specifically addressed whether particular network elements met the FCC's impairment standard, whereas the Section 271 analysis *generally* addressed the relationship between two statutory Sections, 251 and 271. CompSouth argued that that is why Section 251 loop, transport, and switching network elements – some unbundled and others not unbundled – were "lumped together" under their general Section 271 checklist titles: "loops, transport, and switching." The use of general terms in a general discussion does not constitute a basis to assert that there is a hidden change in the FCC's historical treatment of line sharing under checklist item 4. Accordingly, CompSouth asserted, BellSouth's argument that there is a secret change in the FCC's treatment of line sharing under Section 271(c)(2)(B)(iv) is incorrect.

CompSouth noted that in an effort to bolster its *TRO* argument, BellSouth mischaracterized the FCC's *SBC Order*. CompSouth maintained that BellSouth

represented that the *SBC Order* "made clear that line sharing has never been subsumed within the obligation to provide access to unbundled loops pursuant to checklist item 4 of Section 271." CompSouth commented that to support this statement, BellSouth cited Paragraphs 10 and 11 of the *SBC Order*. CompSouth maintained that these paragraphs do not relate to checklist item 4 in any way. In fact, CompSouth noted, they do not even mention checklist item 4 in passing; instead, Paragraphs 10 and 11 address checklist item 2 matters, something that is not even at issue in this proceeding. CompSouth asserted that not surprisingly, then, BellSouth's briefing to the Commission failed to mention that SBC's provision of line sharing is considered in the section of the *SBC Order* addressing compliance with checklist item 4. CompSouth maintained that it is inconsistent for the FCC to place line sharing in checklist item 4 in the same Order that BellSouth claimed made clear that line sharing has never been subsumed within checklist item 4.

CompSouth argued that BellSouth's claims regarding the *SBC Order* and the *TRO* also seem to confuse the provision of network elements as UNEs under checklist item 2 and the provision of "local loop transmission facilities" under checklist item 4. CompSouth argued that the FCC made it clear in the *TRO* that checklist item 2 and checklist item 4 are independent of each other. CompSouth maintained that the fact that the FCC addresses separate UNEs under checklist 2 does not foreclose those *same* UNEs being considered under the independent checklist item 4. CompSouth stated that in addition to local loops and line sharing being considered under both checklist items 2 and 4, the FCC requires the demonstration of nondiscriminatory access to operations support systems (OSS) under both checklist items 2 and 4. Indeed, CompSouth maintained, OSS is in the same list identified by BellSouth as "clear" evidence that separate elements listed in checklist item 2 cannot be considered under checklist item 4. However, CompSouth argued, like line sharing, the FCC considers OSS under both checklist item 2 and checklist item 4. In short, CompSouth maintained, checklist item 4 is independent of checklist item 2, and the two checklist items contain whole loops as well as the HFPL. CompSouth asserted that the *SBC Order* does not remove line sharing from its historical treatment under checklist item 4. Indeed, CompSouth maintained, because the *SBC Order* continues to consider line sharing under checklist item 4, BellSouth's assertion that the *SBC Order* supports its position that line sharing is not really a checklist item 4 element is manifestly incorrect.

CompSouth stated that BellSouth's argument that the fact that the FCC addressed line sharing under checklist item 4 when the FCC's rules required that line sharing be unbundled does not mean that line sharing is a checklist item 4 requirement even after the FCC's rules no longer require such unbundling is also demonstrably incorrect. CompSouth maintained that BellSouth's argument is directly contrary to the FCC's interpretation of Sections 251 and 271. CompSouth asserted that if Section 251 unbundling determinations could remove elements from checklist item 4, as BellSouth asserted, then checklist item 4 would not be independent of Section 251. However, CompSouth argued, the FCC made it clear in the *TRO* that access requirements under checklist item 4 are independent of Section 251 determinations.

CompSouth stated that the FCC engaged in the *TRO* analysis at Paragraphs 649 through 667 to explain the redundancy of the overlapping network access requirements in checklist item 2 and checklist items 4 through 6 and 10. CompSouth argued that far from rendering the statute illogical, as BellSouth asserted, the FCC's interpretation of Section 271(c)(2)(B) reconciles the access requirements contained in checklist item 2 and checklist items 4 through 6 and 10. CompSouth noted that the FCC stated in Paragraph 659 of the *TRO*:

> In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. 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. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

In short, CompSouth maintained, although the price for a "de-listed" UNE may change, if that UNE falls under Section 271(c)(2)(B)(iv)-(vi) or (x), the obligation to provide nondiscriminatory access remains. CompSouth asserted that if BellSouth wants to continue to sell long distance service under Section 271 authority, it must continue to provide nondiscriminatory access to any network elements under checklist items 4, 5, 6, and 10, irrespective of whether they are "de-listed under Section 251", including line sharing under checklist item 4. Accordingly, CompSouth argued, line sharing has been and remains a checklist item 4 network element.

CompSouth asserted that there appears to be no question that if line sharing is a local loop transmission facility under Section 271(c)(2)(B)(iv), then BellSouth is obligated to provide access irrespective of any Section 251 unbundling determinations by the FCC. CompSouth noted that in apparent recognition that it has an obligation to provide access to checklist item 4 elements, BellSouth does not take issue with that obligation, but, rather, devotes its Motion for Reconsideration to challenging line sharing's historical placement in checklist item 4. CompSouth argued that it needs to be made clear that BellSouth does indeed have an obligation to provide nondiscriminatory access to all checklist item 4 elements, including line sharing regardless of any unbundling analysis under Section 251.

CompSouth asserted that BellSouth's Motion for Reconsideration should be denied because it fails to raise any new law or fact warranting reconsideration. CompSouth stated that BellSouth's Motion for Reconsideration is largely a rehash of the arguments it made in its Reply Comments regarding its Motion to Modify the SEEM Plan.

CompSouth maintained that BellSouth does, however, raise two new issues: (1) the recent decision of the United States Court of Appeals, District of Columbia; and (2) the recent decision of the Georgia PSC to remove, on its own motion, the portion of its prior order finding that BellSouth had an obligation under Section 271 to provide access to line sharing. CompSouth noted that neither of the recent decisions warrant a reconsideration of the Commission's determination.

CompSouth argued that BellSouth's assertion that "the Commission should reconsider its interpretation of the language in the *TRO* to reach its conclusion as to the requirements of 271" is not supported by the *USTA II* decision itself. CompSouth stated that the D.C. Circuit affirmed the FCC's interpretation of the relationship between Sections 251 and 271, finding that "[t]he FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52." Accordingly, CompSouth noted, the *USTA II* decision did not change the law at issue in BellSouth's Motion for Reconsideration and cannot support reconsideration.

CompSouth argued that the Georgia PSC's Order does not support the grounds upon which BellSouth seeks reconsideration of the Commission's Order. CompSouth noted that the transcript from the administrative session of the Georgia PSC, attached to BellSouth's Motion for Reconsideration, as well as the Georgia PSC's Order itself, make it clear that the Georgia PSC did not agree with the arguments made by BellSouth in its Georgia Motion for Reconsideration. CompSouth stated that, in fact, the Georgia PSC's Order flatly states that "[t]his action should not be construed as constituting agreement with the arguments raised by BellSouth in its Motion for Reconsideration."

CompSouth noted that the arguments made by BellSouth in Georgia are the same arguments made by BellSouth here. Indeed, CompSouth maintained, the Georgia PSC expressly denied BellSouth's Motion for Reconsideration. CompSouth explained that without reversing its prior decision regarding BellSouth's obligation to provide line sharing under Section 271, the Georgia PSC modified its prior Order on its own motion by removing its Section 271 determination as a basis to deny BellSouth's Motion to Modify the SEEM Plan. Importantly, CompSouth maintained, the Georgia PSC did not repudiate its Section 271 conclusions. CompSouth asserted that far from supporting reconsideration, the Georgia PSC's decision supports denial of BellSouth's Motion for Reconsideration. CompSouth argued that this Commission, like the Georgia PSC, should deny BellSouth's Motion for Reconsideration.

CompSouth maintained that BellSouth's last basis for reconsideration, that the Commission is somehow without subject matter jurisdiction, is equally without merit. CompSouth noted that BellSouth conceded the subject matter jurisdiction of the Commission when it brought its Motion to Modify the SEEM Plan. CompSouth asserted that having now lost the Motion, BellSouth cannot assert that the Commission to which it originally submitted its Motion lacks jurisdiction over the matter.

CompSouth argued that apart from this obvious problem with BellSouth's jurisdictional challenge, BellSouth relies on a demonstrably incorrect legal assertion regarding the Commission's general subject matter jurisdiction. CompSouth maintained that BellSouth's assertion that the Commission lacks authority over the SEEM Plan in the context of Section 271 enforcement is incorrect. CompSouth noted that BellSouth cited to *SBC Communication v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998) for the proposition that "enforcement authority for ensuring Section 271 compliance rests with the FCC, not this Commission." CompSouth asserted that *SBC Communications* is, however, inapposite to the Commission's Section 271 enforcement authority. Indeed, CompSouth argued, *SBC Communications* preceded any grant of Section 271 authority. CompSouth stated that *SBC Communications* does not address enforcement of Section 271 obligations.

Moreover, CompSouth maintained, the FCC has expressly recognized state commission jurisdiction over SEEM plans in the context of Section 271 back-sliding complaints. CompSouth noted that in granting Bell Atlantic Section 271 authority for the State of New York, the FCC ordered that "[c]omplaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC." CompSouth maintained that given the FCC's express order that Section 271 back-sliding complaints regarding enforcement mechanisms be brought before the state commissions, BellSouth's statement that "enforcement authority for ensuring Section 271 compliance rests with the FCC, not this Commission" is manifestly incorrect. CompSouth asserted that while Section 271(d)(6) does provide the FCC with enforcement powers, it does not preempt the states from acting under state law nor preclude the FCC from delegating authority to the states. CompSouth argued that it is axiomatic that if the state commissions lack the jurisdiction under Section 271 to enforce back-sliding, the FCC would not order that Section 271 back-sliding complaints be filed with the state commissions. Accordingly, CompSouth maintained, BellSouth's unsupported and vague jurisdictional challenge does not warrant reconsideration.

CompSouth recommended that BellSouth's Motion for Reconsideration should be denied because the Commission's initial determination is correct, and BellSouth has failed to identify any new factual or legal issues warranting reconsideration. CompSouth asserted that the Commission has never hesitated to answer regulatory questions put to it by companies within its jurisdiction. CompSouth maintained that in this case, BellSouth placed this question before the Commission. CompSouth asserted that the parties, including BellSouth, fully briefed it, and the Commission correctly answered it. CompSouth noted that whether the answer is the first in the country, the twenty-fifth, or the last, when the Commission's determination is correct, the Commission should stand by it. Accordingly, CompSouth asked that the Commission deny BellSouth's Motion for Reconsideration.

PUBLIC STAFF: The Public Staff noted that in the Commission's *February 13, 2004 Order*, the Commission held that BellSouth should continue to provide line sharing in

accordance with previously-established measurements and penalties during the transition period or on a grandfathered basis as established in the *TRO*. The Public Staff stated that the Commission also found that BellSouth is still obligated to provide line sharing pursuant to Section 271 of TA96.

The Public Staff maintained that BellSouth's Motion for Reconsideration challenges only the Commission's determination that line sharing is required by Section 271 of the Act. The Public Staff noted that in support of its Motion, BellSouth cited Orders from the Georgia and Alabama PSCs that denied similar Motions by BellSouth to modify the SEEM plans on the basis that the measurements and penalties were necessary during the transition period. The Public Staff stated that neither PSC used Section 271 of the Act as the basis for its decision. The Public Staff commented that the Alabama PSC expressly refused to rule on the issue of whether BellSouth has an independent obligation under Section 271 to provide line sharing, and the Georgia PSC removed any reference to Section 271 from its decision on reconsideration.

The Public Staff stated that as suggested in its initial comments, it believes that the transition period required by the FCC in the *TRO* is sufficient to justify the denial of BellSouth's motion to modify the SEEM plan at this time. The Public Staff asserted that it is unnecessary to base such a decision on Section 271 of the Act. The Public Staff commented that a state commission's authority under Section 271 requiring unbundling of a network element in the face of a decision by the FCC delisting an unbundled network element under Section 251 is a disputed issue at this time. The Public Staff stated that it believes it merits further consideration and study. As such, the Public Staff recommended that the Commission adopt the approaches of the Georgia and Alabama PSCs and refrain from basing a decision to deny BellSouth's Motion on the basis of Section 271 of the Act.

REPLY COMMENTS

BELLSOUTH: BellSouth argued that its Motion for Reconsideration of the *February 13, 2004 Order* does not impact the Commission's ultimate conclusion to retain SEEM penalties for line sharing during the three-year transitional period described in the *TRO*. Instead, BellSouth stated that it simply asked that the Commission reconsider its reliance on Section 271 as the secondary basis for the result it reached. **BellSouth stated that its position is based on the following:** (1) the *February 13, 2004 Order* appears to reach (without analysis) a legal conclusion that can not be sustained; (2) the *February 13, 2004 Order* appears to have been influenced greatly by misrepresentations made by the CLPs in their filings; and (3) the erroneous legal conclusion that line sharing is required by Section 271 need not be reached for the purpose of resolving BellSouth's original Motion to remove SEEM penalties.

BellSouth stated that the CLPs have responded to BellSouth's Motion with a disingenuous attempt to convert the Commission's limited decision into a far-reaching, unsupportable, and likely unintended result. BellSouth submitted that this attempt should be rejected. Instead, BellSouth asserted, the Commission should grant

BellSouth's Motion. BellSouth stated that given the structure of the *February 13, 2004 Order*, the Commission's determination that the payment of penalties for line sharing is required by Section 271 is not necessary to reach the conclusion that SEEM penalties should apply for line sharing during the transitional period. BellSouth stated that the Commission exercised its discretion to require that line sharing penalties stay in place during the transitional period. BellSouth noted that although it had requested that the Commission exercise its discretion differently on this matter, it does not contest this aspect of the Order. Instead, BellSouth stated that its Motion for Reconsideration only seeks removal from the Order of the citation to Section 271 as a secondary basis for its decision (i.e., the same action taken by the Georgia PSC). BellSouth argued that by doing this, the Commission would bring itself in line with every other Commission in BellSouth's region that has considered this issue.

BellSouth commented that it raised in its Motion the fact that the Commission appeared to have relied on misinformation provided by the CLPs as to actions taken by the Alabama and Georgia PSCs. BellSouth also noted that the Commission appeared to have been misled by the CLPs' mischaracterization of BellSouth's argument as being that the FCC had acted illogically in the *TRO*. Consistent with this, BellSouth commented, the Commission cited as the sole substantive support for its decision the language of Paragraph 659 of the *TRO* to show that the *TRO* is not structured illogically. BellSouth maintained that Paragraph 659 describes how a requirement to provide a UNE pursuant to Section 271 can be reconciled with the fact that the UNE is no longer required under Section 251. BellSouth asserted that there is nothing in this Paragraph, or anywhere in the *TRO*, however, to support the conclusion that line sharing is a Section 271 obligation. Thus, BellSouth maintained, the *February 13, 2004 Order* appeared to offer Paragraph 659 of the *TRO* as a response to an argument that BellSouth actually never made. However, BellSouth stated, the *February 13, 2004 Order* never really reached the fundamental issue that is at the heart of BellSouth's true position: the fact that there is no support for the CLPs' contention, either in the *TRO* or otherwise, that line sharing is a Section 271 obligation. Further, BellSouth asserted, there is no legally sustainable basis for reaching this conclusion.

BellSouth noted that in response to its Motion, the Public Staff filed Comments supporting BellSouth's request. BellSouth stated that the CLPs, on the other hand, responded that: (1) line sharing is a Section 271 requirement; and (2) the Commission has jurisdiction to create mechanisms to enforce the substantive requirements of Section 271 (specifically checklist item four). BellSouth argued that both contentions are wrong.

Moreover, BellSouth opined, the CLPs' strident argument on this point begs the question of why they care so much about a portion of the Commission's *February 13, 2004 Order* that only provides a secondary basis for the decision to keep line sharing in place. BellSouth asserted that the answer is that the CLPs recognize that in two short paragraphs of the *February 13, 2004 Order*, this Commission made two rulings that have not been made by any other state commission in the country, and that are extremely significant: (1) that line sharing is a Section 271 obligation; and (2) that

SEEM penalties should be available to enforce Section 271 checklist compliance, even in the absence of a continuing Section 251 requirement. BellSouth argued that neither of these legal determinations is necessary to resolve BellSouth's Motion to remove SEEM penalties, and both obviously have far-reaching implications. Moreover, BellSouth commented, neither issue was given more than minimal consideration in the *February 13, 2004 Order*. Again, BellSouth stated, the first conclusion was apparently based only on a paragraph of the *TRO* that does not address the issue of whether line sharing is a Section 271 obligation. The second issue, BellSouth noted, although implicated in the Commission's decision, was never directly addressed at all.

BellSouth argued that issues of this magnitude deserve more thorough analysis, and the Commission may undertake this analysis if another factual scenario requires such analysis. BellSouth maintained that the Commission should not take the unprecedented step of making such far-reaching determinations based on a two paragraph analysis of a secondary basis for ruling on a Motion that did not even raise these issues. BellSouth noted that every other state commission in BellSouth's region has reached this conclusion, and this Commission should do the same.

BellSouth asserted that this Commission is the only state commission in the country that has ruled that line sharing must necessarily be subject to a SEEM penalty as a result of a Section 271 obligation. BellSouth noted that in the *February 13, 2004 Order*, the Commission, before reaching this result, cited the representation of the CLPs that both the Alabama and Georgia PSCs have ruled that SEEM penalties apply to line sharing because it continues to be a Section 271 obligation. BellSouth noted that in its Motion for Reconsideration, it stated that the CLPs had misinformed this Commission, and that the Alabama Order specifically stated that, "nothing in [that] decision . . . should be construed as an adoption or rejection of the CLEC argument that, regardless of the FCC's *TRO Order*, BellSouth has an independent obligation under Section 271 to continue to provide line sharing." BellSouth commented that in the sixteen pages of Comments the CLPs filed in response to BellSouth's Motion, there was no mention whatsoever of the Alabama Order. Thus, BellSouth stated, it would appear that the CLPs concede, at least implicitly, that they misinformed this Commission on this point, but have adopted the approach of ignoring their past misstatement.

BellSouth noted that in regard to the Georgia Order, the CLPs have taken the tact of trying to mischaracterize the Georgia Order as meaning precisely the opposite of what it really means. Specifically, BellSouth stated, the CLPs make the bizarre pronouncement that "the Georgia PSC's decision supports denial of BellSouth's Motion for Reconsideration," even though the Georgia PSC granted the relief BellSouth requested. BellSouth noted that it requested that the Georgia PSC remove from its Order the finding that SEEM penalties are required for line sharing because line sharing is a Section 271 obligation. BellSouth stated that the Georgia PSC declined to grant BellSouth's Motion, and instead decided on its own Motion to grant the exact relief requested by BellSouth.

BellSouth argued that the CLPs make much of the fact that the Georgia PSC took this approach because it did not want the Order to be construed as an indication "that it agree[d] with the arguments in BellSouth's Motion for Rehearing and Reconsideration." Still, BellSouth asserted, the Georgia PSC ultimately determined that whether SEEM penalties should apply to line sharing as a function of Section 271 is the subject of some future debate. BellSouth noted that the Georgia PSC stated on page 11 of its ruling as follows:

> It is . . . not necessary to reach the issue of whether BellSouth has an independent and ongoing obligation under Section 271 to provide line sharing in order to deny BellSouth's Motion to Modify the SEEM Plan. The parties have raised various arguments regarding the FCC's intent with respect to the role of the states with the respect to Section 271 obligations and the status of line sharing. Given that the Commission does not need to rule on this issue to deny BellSouth's Motion, it makes more sense to address this question, if and when necessary, at a point when more information on the FCC's intent is available. [emphasis added by BellSouth]

Further, BellSouth commented, the Georgia PSC stated in the Ordering clause that "the reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original Motion." Thus, BellSouth asserted, the Georgia PSC made exactly the decision that BellSouth requests this Commission to make: the deferral of a decision on line sharing under Section 271 to a future time if such a determination even becomes necessary.

BellSouth argued that it is extremely telling that, while the CLPs make the specious argument that the Georgia PSC's Order undercuts BellSouth's position, they obviously do not advocate that this Commission reach the same result as the Georgia PSC. Again, BellSouth noted that it is only requesting that the Commission not make a ruling that will be subsequently used by the CLPs to argue for broad (and likely unintended) consequences regarding Section 271 and SEEM penalties. BellSouth asserted that there is no state commission in the country, to BellSouth's knowledge (and the CLPs cite to none in their Comments), that has ruled that line sharing is a Section 271 obligation, that the SEEM Plan is designed to enforce substantive Section 271 obligations, or that penalties should be paid for measurements relating to line sharing for this reason. BellSouth opined that there is no reason for this Commission to take this extraordinarily significant step at this time.

BellSouth argued that the most prudent course of action by this Commission would be to do as every other Commission in BellSouth's region has done, that is, to decline to consider at this point the Section 271/line sharing issue that is presently included in the *February 13, 2004 Order* as a secondary basis for perpetuating penalties relating to line sharing during the transitional period. BellSouth stated that the CLPs ignored in their Comments the fact that there is no need for the Commission to reach this issue at this

point and continue to argue the underlying issue of whether line sharing is, or is not, a Section 271 obligation. However, BellSouth noted, even if the Commission decides for some reason that it needs to resolve this issue at this juncture, the CLPs' position must be rejected for three separate and independent reasons:

(1) Line sharing is not a Section 271 requirement;

(2) Even if line sharing were a Section 271 requirement, this Commission lacks jurisdiction to create substantive remedies for Section 271 violations; and

(3) Even if line sharing were a Section 271 obligation, and even if this Commission had jurisdiction, the Commission should not extend the SEEM Plan to enforce Section 271 checklist items.

BellSouth argued that Paragraph 659 of the *TRO* explains the relationship of Section 251 to Section 271. BellSouth noted that Paragraph 654 of the *TRO* states that whatever Section 271 obligations that exist independent of Section 251 relate to "checklist items 4, 5, 6 and 10 [which] separately impose access requirements regarding loop, transport, switching, and signaling." However, BellSouth stated, there is no mention of line sharing in either of these Paragraphs, or at any point in the fifteen-paragraph discussion in the *TRO* of Section 271 obligations. Thus, BellSouth commented, as it stated in its Motion for Reconsideration, the CLPs' entire argument is that the FCC intended the term "loop" to include line sharing, even though the FCC never states this intention. Further, BellSouth stated, the CLPs offer this strained interpretation despite the fact that the FCC went to such obvious pains in the *TRO* to distinguish the UNE - loop from the UNE - line sharing. BellSouth noted that it detailed in its Motion the FCC's extensive efforts to distinguish the loop from the HFPL. BellSouth stated that in response to the common sense interpretation of the *TRO* offered by BellSouth, the CLPs' Comments include an unlikely argument based, not on the language of the *TRO*, but rather on its structure. Specifically, BellSouth noted, the CLPs argue that, because the *TRO* contains a more granular analysis of network elements in the context of Section 251 than within the fifteen paragraph discussion of Section 271, this must mean that the term "loop" is intended to include line sharing by implication wherever it appears. Finally, BellSouth maintained, finding no language in the *TRO* to support their position, the CLPs are reduced to making an argument based on the Table of Contents of the *TRO*.

BellSouth asserted that when one parses through the convoluted arguments of the CLPs, they all come down to one fundamental premise: that line sharing is immutably in checklist four no matter what the FCC does. BellSouth argued that the difficulty with this position is that this is belied by the language of the Act, the *TRO*, and by other Orders by the FCC. First, BellSouth noted that, in the general context of the discussion of Section 271 in the *TRO*, the FCC stated the following:

> We conclude that for purposes of Section 271(d)(6), BOCs must continue to comply with any conditions required for approval, consistent with changes in the law. While we believe that Section 271(d)(6) establishes an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that 'the conditions required for such approval' would not change with time.

Thus, BellSouth maintained, the FCC first discusses the ongoing requirements of Section 271, then discusses the fact that these requirements will change. BellSouth noted that this discussion, of course, begs the question of what the FCC could possibly have in mind if, as the CLPs contend, the requirements considered under the general rubric of checklist items four, five, six and ten can never change. Thus, BellSouth stated, the CLPs' position would render one more portion of the *TRO* inexplicable.

Moreover, BellSouth stated, the CLPs' contention that the requirement to provide line sharing is necessarily a part of checklist four is contradicted by the simple language of checklist item four. BellSouth noted that this item, of course, appears in Section 271, and requires access or interconnection that includes:

> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services. (Section 271(c)(2)(B)(iv))

Thus, BellSouth commented, the literal language of checklist four requires the provision of a loop -- not subloops, or portions of the loop (high frequency or otherwise), or isolated functionalities of the loop. BellSouth noted that the requirement is for the provision of a whole loop, nothing more and nothing less. Given this, BellSouth stated, one must ask why, under the general topic of checklist four analysis, the FCC has considered subloops and loop functionalities that are different than the whole loop. BellSouth opined that the simple answer is that, historically, the FCC has considered the requirement of checklist four to provide a loop at the same time that it considers the requirements to provide unbundled network elements that are related to the loop.

BellSouth maintained that in its Motion, it cited to the portion of the *SBC Order* that made clear the FCC's analytical approach. BellSouth stated that given the clarity of this provision, it bears repeating. Specifically, BellSouth noted, in the context of considering SBC's compliance with checklist item 4, the FCC stated the following:

> Based on the evidence in the record, we conclude . . . that SBC provides unbundled local loops in accordance with the requirements of Section 271 and our rules. Our conclusion is based on our review of SBC's performance for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, and high-capacity loops, as well as our review of SBC's processes for hot cut provisioning, and line sharing and line splitting. (¶ 142 with footnotes omitted) (emphasis added by BellSouth)

Thus, BellSouth opined, the FCC clearly stated that its analysis was based on the provisioning of loops, as well as other requirements related to the provisioning of hot cuts, line sharing, and line splitting that are based not upon the requirements of checklist four as expressly articulated in the Act, but rather upon the FCC's rules. BellSouth argued that in this specific instance, the rule in question is the FCC's former rule (pre-*TRO*) that required that line sharing be offered on an unbundled basis pursuant to Section 251.

BellSouth opined that if, as the CLPs contend, line sharing necessarily inheres in checklist item four (despite the actual language of checklist item 4), then it is impossible to make sense of the reference in the above-quoted language to the requirements of the FCC's rules; if a requirement to provide line sharing (and line splitting and hot cut provisioning) resides in checklist four, rather than the Commission's unbundling rules, then there is nothing left to be considered as part of the checklist item 4 analysis that does arise from the FCC's rules. Therefore, BellSouth noted, the above-quoted reference by the FCC to its rules would make no sense. BellSouth commented that it is noteworthy that, although BellSouth made precisely the same point in its Motion for Reconsideration, the CLPs neglected entirely to address this portion of the *SBC Order* in their Comments.

BellSouth argued that the CLPs did address the *SBC Order*, but only for the purpose of making a circular argument that requires one to accept the CLPs' conclusion as a starting premise. BellSouth pointed out that the *SBC Order* clearly treats the line sharing-UNE as separate from the loop-UNE. BellSouth stated that the CLPs attacked BellSouth by arguing that the FCC made this distinction in the context of the unbundling required under checklist item 2, not under checklist item 4. However, BellSouth maintained, the language of the *SBC Order* quoted above makes clear that the FCC's checklist four analysis included both the actual checklist item 4 requirement for the provision of the loop and the related requirements (such as line sharing) that arise from the FCC's unbundling rules (i.e., the same unbundling that is the topic of checklist item 2). Thus, BellSouth opined, the discussion of unbundling in the *SBC Order* is only irrelevant (as the CLPs claim) if one accepts the CLPs' conclusion that line sharing obligations reside in checklist item four, i.e., if one joins the CLPs in ignoring the above-quoted language of Paragraph 142 of the FCC's *SBC Order*.

Finally, BellSouth stated, the CLPs argue that line sharing must be an inherent part of checklist item four because the FCC's checklist four analysis in the *SBC Order* included a consideration of line sharing. In other words, BellSouth noted, the CLPs argued that since the SBC case came out after the *TRO*, the fact that line sharing was still considered must mean that the line sharing requirement does not arise from the unbundling rules, which were changed by the *TRO*. However, BellSouth opined, the reason that line sharing was considered in the SBC case was explained in BellSouth's Motion for Reconsideration: "In the *SBC Order*, the Commission [FCC] acknowledged that it had adopted new unbundling rules as part of the *Triennial Review Order* on October 2, 2003, but stated that for purposes of this application, it would apply the *former rules* because of the date SBC's application had been filed (*SBC Order*,

¶¶ 10-11)." Thus, BellSouth argued, when the FCC considered both the actual checklist item four requirements and the loop-related requirements of the FCC's rules, it applied for the purpose of this consideration the old unbundling rules (under which line sharing was required to be provided as a UNE). Again, BellSouth asserted, although it made this point in its Motion for Reconsideration, the CLPs elected to simply ignore any portion of the *SBC Order* that they cannot align with their unlikely position.

BellSouth commented that as it noted in its Motion, this Commission has no jurisdiction to enforce compliance with the requirements of Section 271. BellSouth argued that the CLPs have responded to BellSouth's position with: (1) a spurious waiver argument; and (2) a blatant attempt to misconstrue applicable federal law.

BellSouth asserted that the CLPs' waiver argument is that by filing a Motion to remove line sharing from the SEEM Plan because it is no longer a Section 251 requirement, BellSouth waived any jurisdictional objection to the Commission imposing penalties pursuant to Section 271. BellSouth maintained that the CLPs cite no legal authority to support this proposition, and in fact, there is none. Apparently, BellSouth argued, what the CLPs have in mind is the principle that in some contexts (e.g., admissibility of evidence), a party may, by its actions, waive an objection that it might otherwise have. BellSouth asserted that this principle, however, has absolutely no application in this situation. First, BellSouth stated, it is a well-settled principle of law that a party cannot create subject matter jurisdiction by its actions. BellSouth maintained that if it were otherwise, then a party could, for example, vest the Commission with the authority to consider any type of legal matter, even one that is clearly outside of the Commission's jurisdiction, e.g., criminal complaints or bankruptcy petitions. However, BellSouth opined, this is simply not possible from a legal standpoint.

Moreover, BellSouth noted, even if jurisdiction could be created by waiver, there can be no waiver in this case because BellSouth has taken no action that could form the basis for the waiver. BellSouth stated that its original Motion recited that SEEM penalties are in place to enforce Section 251 obligations, and requested that, since this obligation no longer applies to line sharing, the penalty should be removed. BellSouth stated that the CLPs raised for the first time the contention that Section 271 applies. Thus, BellSouth argued, the CLPs appear to advance the proposition that they can waive BellSouth's rights by their actions. BellSouth commented that this would be tantamount to the CLPs filing a Complaint (or a set of Comments) so spurious that their opponent was forced to reply that their mischaracterizations should be considered criminal. BellSouth argued that under the CLPs' analysis, this would create some sort of waiver by the CLPs, and the Commission would then be entitled to impose criminal penalties against the CLPs for their prevarication; action by the CLPs cannot constitute a wavier by BellSouth.

BellSouth noted that beyond their specious waiver argument, the CLPs contended that this Commission has jurisdiction over Section 271 enforcement, but they do so without any legal support. Instead, BellSouth maintained, the CLPs offer an obvious misconstruction of the authority cited by BellSouth in its Motion. BellSouth cited in its Motion to the D.C. Circuit decision for the proposition that Section 271 enforcement

authority resides with the FCC, not state commissions. BellSouth stated that the CLPs' claim that this case is inapplicable because it occurred before Section 271 authority was granted. BellSouth stated that when one considers the actual language of the decision, however, it is obvious that the decision applies equally before and after the grant of Section 271 authority. Specifically, BellSouth maintained, the Court considered the question of how the FCC should utilize state commission determinations as to whether the Track A requirements of Section 271 have been met. BellSouth noted that the Court stated as follows:

> Congress has clearly charged the FCC, and not the State commissions with deciding the merits of the BOCs' request for intraLATA authorization and interLATA service is typically interstate.

Thus, BellSouth maintained, the gravamen of this decision is that the FCC has the authority to resolve Section 271 issues because Section 271 deals with interstate services. Clearly, BellSouth argued, the services at issue remain interstate whether the specific question to be resolved arises pre-authorization Section 271 or post-authorization Section 271.

Further, BellSouth stated, the provisions of Section 271(d)(6), entitled "Enforcement of Conditions," state the remedial steps that the FCC may take if it "determines that a Bell operating company has ceased to meet any of the conditions required . . . [271] . . . for approval." BellSouth argued that there is nothing in Section 271 from which one could conclude that this Commission has jurisdiction for Section 271 enforcement.

Beyond this, BellSouth noted, the CLPs' attempted to support their position with the contention that "while 271(d)(6) does provide the FCC with enforcement powers, it does not preempt the states from acting under state law nor preclude the FCC from delegating authority to states." BellSouth stated that other than the single cryptic reference to state law quoted above, the CLPs provide no indication of how state law could empower this Commission to enforce federal statutory requirements. BellSouth maintained that suffice it to say, the CLPs "state law" argument is worth no more than the few scant words that the CLPs devote to it.

BellSouth maintained that as to the CLPs' delegation argument, they have drastically overstated the ruling of the FCC in the Bell Atlantic case in which they cite [*In the Matter of: Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-404, released December 22, 1999 – the *Bell Atlantic Order*). BellSouth maintained that in the Bell Atlantic case, the FCC first discussed its powers pursuant to Section 271(d)(6)(a). BellSouth noted that the FCC then stated the manner in which it planned to handle complaints alleging that Section 271 requirements were not being met. BellSouth commented that the FCC noted both the broad role that it would have and the extremely more limited role of the state commissions. BellSouth opined that it is instructive to consider this entire

paragraph, as opposed to the limited language from the paragraph that the CLPs have quoted out of context:

> *Complaints.* In addition to FCC-initiated enforcement actions (such as forfeitures, suspensions, and revocations), Congress provided for the expeditious review of complaints concerning failure by a BOC to meet the conditions required for section 271 approval. Such complaints may include requests for damages. The Commission will consider and resolve those complaints alleging violations of section 271 as well as the Commission's rules and orders implementing the statute. Complaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC. (Paragraph 447 of FCC's *Bell Atlantic Order* - Footnotes Omitted)

Thus, BellSouth argued, if you consider the entire paragraph, not merely the section the CLPs quoted in their Comments, you can see that the FCC clearly reserved to itself the jurisdiction to "consider and resolve those complaints alleging violations of section 271." Beyond this, BellSouth noted, the FCC simply observed that to the extent a state commission has ordered a RBOC to do particular things, then it has the ability to enforce its own orders. BellSouth commented that the delegation of authority described in the Bell Atlantic case is extremely narrow, and in no way supports the CLPs' argument for a dramatic expansion of this Commission's ability to enforce Section 271. BellSouth asserted that the language quoted above obviously contemplates a situation in which a state commission is enforcing its prior Orders. Thus, for example, BellSouth stated, if a CLP filed a complaint alleging that BellSouth had failed to properly apply a measurement of service order intervals, or failed to pay penalties arising from that measurement, then the Commission could consider the request that it enforce its own Order. BellSouth stated that in marked contrast, the CLPs are, in effect, arguing for a dramatic expansion of the SEEM plan to enforce Section 271 obligations that are independent of Section 251 obligations. BellSouth opined that the case law cited by the CLPs provides no basis to conclude that this Commission has this enforcement power.

BellSouth stated that the purpose of both the SQM and the SEEM Plans is to ensure that BellSouth continues to meet the requirements of Section 251 after it is granted entry into the distance market pursuant to Section 271. BellSouth asserted that the fundamental structure of the SQM and SEEM Plans is designed to implement Section 251 requirements. BellSouth noted that the fact that these plans address the provision of resale service, the full panoply of available UNEs, and interconnection is a direct reflection of the fact that the plans are based on the requirements of Section 251. BellSouth argued that there is nothing in the structure of either plan to suggest that it was ever intended to enforce whatever independent checklist obligations there may be under Section 271. Further, BellSouth maintained, there is nothing in the Order

originally entered by this Commission to suggest that the SQM and SEEM Plans were created to enforce specific Section 271 obligations.

BellSouth noted that the CLPs have argued previously that the SEEM Plan functions to enforce both Sections 251 and 271 obligations. BellSouth asserted that this position, however, finds no support in the plan itself or in the Commission's Orders. Moreover, BellSouth argued, a consideration of the context in which the plans were developed undercuts this contention. BellSouth asserted that Section 251 obligations were initially broader than Section 271 obligations; that is, if all UNEs that were originally unbundled were the subject of the measurement plan, then the plan would also cover the more limited offerings required by checklist items 4, 5, 6, and 10. Thus, BellSouth stated, by developing a plan to ensure Section 251 compliance after Section 271 approval, the checklist items were also necessarily addressed. BellSouth opined that this does not mean that the plan was created to enforce the checklist requirements, and it certainly does not mean that penalties should remain in place for this purpose as the Section 251 obligations cease to apply.

BellSouth asserted that all of the above brings us full circle back to the original, fundamental question that the Commission must consider: Why make a far reaching determination regarding the application of Section 271 when it is not necessary to resolve the limited issue that was originally before the Commission? BellSouth commented that as set forth above, line sharing is not a Section 271 obligation, and even if it were, the Commission has no jurisdiction to enforce this obligation. BellSouth noted that beyond this, however, is the question that the CLPs largely ignore: Even if the Commission could expand the plan to require the payment penalties for the violation of Section 271 obligations that are independent from Section 251, why would it want to do so? BellSouth noted that this is, of course, a question that the Commission has never considered. Further, BellSouth maintained, it is one that bears thorough consideration before the Commission makes a determination. BellSouth asserted that this expansion should not occur on the basis of an inference that the CLPs will draw from an Order that the Commission entered for an entirely different, more limited, purpose, that is, to resolve BellSouth's original Motion.

BellSouth noted that in the future, network elements will obviously be removed from the list of what must be offered on an unbundled basis pursuant to Section 251. BellSouth stated that as this occurs, the CLPs will no doubt argue that these UNEs should remain subject to the SEEM Plan because, they will contend, they are subject to Section 271 obligations. Thus, BellSouth maintained, the question of whether the plan should be expanded to cover Section 271 obligations independent of Section 251 will undoubtedly come up in the future. BellSouth opined that this Commission will have ample opportunity to consider this question at that time, as well as the related jurisdictional questions. BellSouth asserted that when this issue does arise, and it is ripe for consideration, it deserves thorough consideration. BellSouth argued that there is absolutely no reason to pre-decide this issue at this juncture in the context of resolving a more limited issue that the Commission has already resolved on a different, independent basis.

BellSouth concluded that through the *February 13, 2004 Order*, the Commission became the only state commission in BellSouth's region (and, to BellSouth's knowledge, the only commission in the country) to rule that line sharing is a Section 271 obligation and that this obligation should be enforced by SEEM penalties. BellSouth argued that this conclusion should be reconsidered and removed as a basis for the *February 13, 2004 Order* for the following reasons: (1) it is based on an apparent (CLP-created) misunderstanding of the actions other state commissions have taken; (2) it misconstrues BellSouth's position; (3) it entails a decision that need not, and should not, be made at this time; (4) it is based on a conclusion regarding line sharing and Section 271 that is legally erroneous; and (5) it entails a ruling on a Section 271 enforcement issue that goes beyond the Commission's jurisdiction and is legally unsupportable for this additional reason. For all of these reasons, BellSouth argued that its Motion for Reconsideration should be granted.

COMPSOUTH: CompSouth stated that it opposes the Public Staff's recommendation that the Commission adopt the approaches of the Georgia and Alabama PSCs and refrain from basing a decision to deny BellSouth's Motion on the basis of Section 271 of the Act for two reasons: (1) the Commission has already based its decision on that determination; and (2) the Commission's determination is correct under existing law.

CompSouth argued that the Commission should deny BellSouth's Motion for Reconsideration because of a simple principle: the Commission's legal determinations should not be modified until the legal basis for the Commission's determination changes. CompSouth maintained that this core principle forms the basis for a consistent and predictable regulatory environment. CompSouth noted that when applied to BellSouth's Motion for Reconsideration this principle compels denial of the Motion for Reconsideration. CompSouth stated that here, BellSouth is not arguing that the Commission's determination regarding its Section 271 obligations was unnecessary – the basis for the Georgia PSC's Motion to Modify its prior order. CompSouth asserted that BellSouth is arguing that the Commission's determination was incorrect. CompSouth stated that the Public Staff's recommendation is not based on an agreement with BellSouth's arguments for reconsideration, but rather, is based on the idea that the Commission's determination was unnecessary. However, CompSouth noted, whether necessary or not, the Commission did make a legal determination based on a proper record.

CompSouth asserted that under these circumstances, the Commission should adhere to its determination until circumstances change. CompSouth stated that to do otherwise, as the Public Staff recommends, creates several problems. First, CompSouth maintained, the Commission's prior order becomes essentially an advisory opinion. CompSouth stated that though the Commission's prior order is no longer a legally binding order, the Commission has stated the manner in which it will rule if presented with a similar fact pattern. CompSouth noted that as a consequence, the parties are left to debate the quasi-legal status of the regulations governing their relationship. CompSouth commented that BellSouth will take the position that it has no Section 271 obligation (as there is no binding determination), and CompSouth will take

the position that BellSouth does have a Section 271 obligation (as there is an advisory opinion). Thus, CompSouth opined, the very reason courts avoid advisory opinions (quasi-legal orders with no clear application) is the reason the Commission should deny BellSouth's Motion for Reconsideration. CompSouth asserted that creating an unclear regulatory environment only encourages unnecessary litigation.

Moreover, CompSouth noted, as set-forth in its Initial Comments, under existing law the Commission's determination is correct. CompSouth stated that nothing in BellSouth's Motion for Reconsideration nor in Public Staff's Initial Comments changes that fact. CompSouth commented that if future FCC orders render the Commission's Section 271 determination incorrect or moot, then the Commission is free to modify its *February 13, 2004 Order* at that time. CompSouth opined that to modify the Commission's *February 13, 2004 Order* now will only create confusion. Accordingly, CompSouth respectfully asked that the Commission deny BellSouth's Motion for Reconsideration.

DISCUSSION

In the *February 13, 2004 Order,* the Commission found it appropriate to deny BellSouth's Motion to Modify SEEM Plan to remove penalties associated with the provisioning of line sharing. The Commission found that as long as BellSouth is required to provide line sharing, whether as a Section 251 UNE (which it no longer is) or during a transition period or on a grandfathered basis, BellSouth should provide such line sharing in accordance with previously-established measurements and penalties. In addition, the Commission stated that it agreed with CompSouth's argument that BellSouth is still obligated to provide line sharing under Section 271 of the Act. The Commission noted that although BellSouth argued that it was illogical for the FCC to remove line sharing from the national UNE list in the *TRO* but still require line sharing under Section 271 of the Act, the Commission believed that the FCC addressed the issue in Paragraph 659 of the *TRO.* BellSouth's Motion for Reconsideration specifically requests reconsideration of the Commission's decision that BellSouth has an independent obligation under Section 271 to provide line sharing.

The Commission further notes that at the time of the *February 13, 2004 Order,* the Georgia PSC had only issued its January 14, 2004 *Order Denying BellSouth Telecommunications, Inc.'s Motion to Modify Self-Effectuating Enforcement Mechanism Plan.* In its *January 14, 2004 Order*, the Georgia PSC stated:

> Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC and Section 271 checklist item 4. The Commission determines that at this time it is not sound policy to eliminate the penalties associated with line sharing. BellSouth's Motion is therefore denied. [emphasis added]

On January 26, 2004, BellSouth filed a Motion for Rehearing and Reconsideration of the Georgia PSC's *January 14, 2004 Order.* By Order released on

March 24, 2004, the Georgia PSC denied BellSouth's Motion for Rehearing and Reconsideration. However, the Georgia PSC determined that it was ". . . not necessary to reach the issue of whether BellSouth has an independent and ongoing obligation under Section 271 to provide line sharing in order to deny BellSouth's Motion to Modify the SEEM Plan." (Page 3 of Georgia PSC's *March 24, 2004 Order*). The Georgia PSC further noted on Page 3 of its *Order* that:

> In modifying its order to remove this basis [the Section 271 basis] for its decision, it must be understood that the Commission is not indicating that it agrees with the arguments in BellSouth's Motion for Rehearing and Reconsideration. Towards that end, the Commission concludes that BellSouth's Motion for Rehearing and Reconsideration should be denied. The Commission on its own motion, however, modifies its January 14, 2004 Order to remove the ground for its decision related to an independent and ongoing access obligation under Section 271. In making this modification, the Commission does not alter the ultimate decision to deny BellSouth's Motion to Modify the SEEM Plan to eliminate penalties for line sharing. The reason for taking this action is that the issue of an ongoing Section 271 line sharing obligation does not need to be resolved to address BellSouth's original motion.

The Commission further notes that in the Commission's July 9, 2002 *Order and Advisory Opinion Regarding Section 271 Requirements* in Docket No. P-55, Sub 1022 which addressed BellSouth's Section 271 application, the Commission discussed line sharing under checklist item 4. The Commission noted that BellSouth had produced evidence showing that it provided access to the HFPL as a UNE. However, since the FCC has found in the *TRO* that the HFPL is no longer a Section 251 UNE, there is uncertainty about whether a RBOC is required under Section 271 obligations to make line sharing available.

In addition, the Commission agrees with BellSouth that the FCC explicitly stated in its October 15, 2003 *SBC Order* in Paragraph 11 that it would apply the old unbundling rules to SBC's application instead of the new unbundling rules under the *TRO*. In the discussion of SBC's compliance with checklist item 4, the FCC stated at Paragraph 145, "Based on the evidence in the record, we find that SBC provides nondiscriminatory access to the high frequency portion of the loop (line sharing). . ." However, since the old unbundling rules were applied, the FCC's discussion in checklist item 4 does not provide an analysis of a Section 271 application with the *TRO* rules in place.

Based on the foregoing and the filings made on this matter, the Commission is not convinced that line sharing will no longer be required under Section 271 although it has been removed by the FCC in the *TRO* as a Section 251 UNE. However, due to the fact that the Commission's Section 271 finding in the *February 13, 2004 Order* in this docket was not required for the Commission to reach its decision to deny BellSouth's Motion to Modify the SEEM Plan to remove line sharing, the Commission believes that it

is appropriate to reconsider the *February 13, 2004 Order* in this regard. The Commission finds it appropriate to strike certain language as set forth below from the Commission's *February 13, 2004 Order.*

Finally, the Commission notes that the issue of whether line sharing is required under Section 271 will be directly before the Commission in the near future. On June 24, 2004, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad) filed a Petition for Arbitration with BellSouth in Docket No. P-775, Sub 8. Issue No. 1 of that Arbitration is: "Is BellSouth obligated to provide Covad access to line sharing after October 2004?"

CONCLUSIONS

The Commission finds it appropriate on reconsideration to strike the following language from the Commission's *February 13, 2004 Order.*

> In addition, the Commission agrees with CompSouth's argument that BellSouth is still obligated to provide line sharing under Section 271 of the Act. Although BellSouth argues that it is illogical for the FCC to remove line sharing from the national UNE list in the *TRO* but still require line sharing under Section 271 of the Act, the Commission believes that the FCC did address this issue in Paragraph 659 of the *TRO*, as CompSouth noted, wherein the FCC stated
>
> > In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. 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. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.
>
> Therefore, the Commission believes that CompSouth is correct in its assertion that the FCC found in the *TRO* that Section 271 of the Act requires BellSouth to provide unbundled access to the HFPL although the HFPL is no longer required to be unbundled under Section 251 of the Act.

The Commission notes that the FCC simply clarified that such an element (one required under Section 271 but not under Section 251) does not have to be priced based on TELRIC. Therefore, the Commission believes that BellSouth remains obligated to provide the HFPL under Section 271 of the Act, although the pricing for the HFPL no longer is required to be TELRIC-based. The Commission believes that since BellSouth is still obligated to provide the HFPL under Section 271 of the Act, it is inappropriate to remove line sharing from the North Carolina SEEM Plan.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of July, 2004.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

bp071204.01

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Verizon New England Inc.,	)	
Bell Atlantic Communications, Inc. (d/b/a	)	
Verizon Long Distance), NYNEX Long	)	CC Docket No. 01-9
Distance Company (d/b/a Verizon Enterprise	)	
Solutions) And Verizon Global Networks Inc.,	)	
For Authorization to Provide In-Region,	)	
InterLATA Services in Massachusetts	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 2001 **Released:** April 16, 2001

By the Commission: Chairman Powell and Commissioner Ness issuing separate statements; Commissioner Furchtgott-Roth concurring and issuing a statement; and Commissioner Tristani dissenting and issuing a statement.

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I. INTRODUCTION

1. On January 16, 2001, Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc. (Verizon) filed this application pursuant to section

This argument does not suggest that Verizon is not in compliance with current UNE requirements, and therefore is not relevant to our inquiry.

B. Checklist Item 4 – Unbundled Local Loops

1. Background

122. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[393] A BOC has an obligation to provision different types of loops, including "two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals."[394]

123. In evaluating Verizon's overall performance in providing unbundled local loops in Massachusetts, we examine Verizon's performance in the aggregate (*i.e.*, by all loop types) as well as its performance for specific loop types (*i.e.*, by voice grade, xDSL-capable, line-shared and DS-1 types).[395] In doing so, we are looking for patterns of systemic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete.[396] As the Commission has noted in previous section 271 orders, we

(Continued from previous page)

Dkt. Nos. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4-P Order at 6 (Jan. 10, 2000) <http://www.state.ma.us/dpu/telecom/96-73/UneProvi.htm>) (emphasis omitted).

[393] 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. *See Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-167, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

[394] *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67.

[395] Competing carriers in Massachusetts rely principally on three types of unbundled stand-alone loops that support high-speed services: the xDSL loop, the Digital loop and the high-capacity or DS-1 loop. The Massachusetts Department has adopted the New York Commission's separate loop-type performance measurement categories for xDSL loops (including, but not limited to, loops provisioned for ADSL, HDSL, and SDSL services); Digital loops, which are used by competing carriers to provide xDSL, IDSL or ISDN-like services and high-capacity or DS-1 loops. Commenters in this proceeding do not specifically criticize Verizon's performance with regard to Digital loops which are a decreasing proportion of all xDSL-capable loops requested by competing LECs. For example, in November of 2000, the measure of missed installation appointments, PR 4-04, captured 1292 xDSL loops compared to 276 Digital loops. The carrier-to-carrier reports also suggest that Verizon's performance for xDSL loops is similar to its performance for Digital loops. We analyze high-capacity or DS-1 loops separately at the end of this section.

[396] *See* Updated Filling Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, *Public Notice*, DA 01-734, (rel. March 23, 2001) at 6 (encouraging BOC-applicants to explain why factual anomalies may have no meaningful adverse impact on a competing carrier's ability to obtain and serve customers).

examine the data for all the various loop performance measurements, as well as the factors surrounding the development of these measures. Verizon demonstrates that for xDSL loops, it is performing at acceptable levels for all of the measures the Commission has considered in previous section 271 orders. Isolated cases of performance disparity, especially when the margin of disparity or the number of instances measured is small, will generally not result in findings of checklist noncompliance. Finally, we evaluate the information Verizon provided describing its processes for installing and maintaining loops, the capabilities of its workforce, and employee training to show that it provisions and maintains unbundled loops.

124. We focus our analysis in this section on the issues in controversy under this checklist item, beginning with the pre-ordering, ordering, provisioning and maintenance and repair of stand-alone xDSL-capable loops. We also address voice-grade loops provisioned as new loops and hot cut loops as well as Verizon's subloop unbundling offering. Finally, we address line sharing and line splitting at the end of this discussion.

2. Discussion

125. Based on the record before us, we conclude that Verizon has adequately demonstrated that it provides unbundled local loops as required by section 271 and our rules. First, as described above, we find that Verizon provides access to loop make-up information in compliance with the *UNE Remand Order*. Second, we find that Verizon provides nondiscriminatory access to stand alone xDSL-capable loops and high-capacity loops. Third, we find that Verizon provides voice grade loops, both as new loops and through hot-cut conversions, in a nondiscriminatory manner. Finally, we find that Verizon has demonstrated that it has a line-sharing and line-splitting provisioning process that affords competitors nondiscriminatory access to these facilities. In so doing, we acknowledge that the Massachusetts Department also concludes that Verizon complies with this checklist item.[397]

126. When all types of loops are considered, Verizon shows that it performs at an acceptable level, generally meeting the parity standards in the four month period leading up to its application. Verizon demonstrates that it has put in place a process to deliver xDSL-capable loops in a timely manner and at acceptable levels of quality to allow competitors to meet the significant demand for high-speed services in Massachusetts. Furthermore, Verizon demonstrates that it has adapted its provisioning methods and procedures to accommodate competitive carrier requests for line-shared loops – loops that are recognized as an important element in providing high-speed service to residential subscribers. One commenter, Rhythms, initially opposed Verizon's application on the basis of its xDSL loop performance, but now states that Verizon has taken steps to resolve its difficulties and has withdrawn its opposition.[398] We find that Verizon's overall performance meets the checklist requirements, even though some performance measurements indicate isolated and marginal problems. As explained below, we

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[397] *See* Massachusetts Department Massachusetts II Comments at 24.

[398] *See* Letter from Kimberly Scardino, Assistant General Counsel, Rhythms, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 14, 2001).

believe that the marginal disparities in some measurements are not competitively significant and do not show signs of systemic discrimination.

127. As described above, the New York Commission developed Verizon's performance measurements, business rules and standards in a collaborative state proceeding with input from competing carriers.[399] The Massachusetts Department has adopted these performance measures, business rules and standards. When possible, the New York Commission elected to compare Verizon's service to competing carriers using unbundled loops directly to the level of service provided to Verizon's retail operations.[400] Where, however, the New York Commission determined that no comparable retail function exists, the level of service Verizon provided to competing carriers in Massachusetts is tested against benchmarks developed in New York.[401] Because the New York Commission adopted the performance measures through an open and collaborative process, and no commenter specifically criticizes the New York Commission's process, we defer to the reasonable standards it set for these measurements as a basis for analyzing Verizon's Massachusetts application.[402]

a. Overview of Performance Data

128. In our analysis we rely primarily on Massachusetts performance data collected and submitted by Verizon under the state-adopted carrier-to-carrier standards. Where the data displays facial disparities in performance between the manner in which Verizon provisions loops for itself vis-à-vis its competitors, Verizon proposes explanations for statistical disparities and offers studies that recalculate measures according to various exclusions which are discussed below. In such instances, we look to the availability of data reconciled under the auspices of the Massachusetts Department and specific evidence presented by commenters to determine the appropriate weight to accord the challenged data. In evaluating the probity of Verizon's explanations and studies, we consider among other things, whether third parties had access to the underlying data and whether the challenged data were reconciled by the Massachusetts Department.

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[399] *See* Massachusetts Department Massachusetts I Comments at 7.

[400] Where the New York Commission determined that a retail analogue is appropriate and the Massachusetts Department uses this analogue in its evaluation, we examine Verizon's Massachusetts performance by determining whether it provides unbundled local loops to competing carriers in substantially the same time and manner as it does to its retail customers. *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20655, para. 87; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4098, para. 279.

[401] In these instances, we examine Verizon's service to competing carriers in terms of whether its performance affords competitors a meaningful opportunity to compete. *See generally Bell Atlantic New York Order*, 15 FCC Rcd at 4098, para. 279.

[402] *See Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Order Amending Performance Assurance Plan, Case 97-C-0271 (NY PSC Mar. 9, 2000); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3974-76, paras. 54-60.

129. Although KPMG conducted a review of other Verizon performance metrics in Massachusetts, it did not separately evaluate the xDSL metrics because they were implemented by Verizon after the initial testing period.[403] In its supplemental filing, however, Verizon describes its engagement of PwC to "validate its DSL and line sharing measures" and notes that PwC performed its work under the same standards as KPMG did during its third party OSS testing.[404] PwC replicated a total of 159 measures and matched Verizon's calculations for 136 of 159 measures. Verizon asserts that for the remaining 23, the number of observations were identical and the reported performance was within one percent of the results replicated by PwC.[405] In addition to replicating the carrier-to-carrier data, PwC examined the additional special studies Verizon performed with respect to certain DSL measures.[406]

130. Several commenters challenge the validity of Verizon's adjustment to official carrier-to-carrier performance data.[407] Where commenters challenge the comprehensiveness of a third-party evaluation of underlying data or a BOC-applicant's adjustment to carrier-to-carrier measures, carrier-specific carrier-to-carrier data become an important tool for the Commission to evaluate a BOC's compliance with section 271. Carrier-specific data underlying the carrier-to-carrier reports are important to this Commission's section 271 process because they allow competing carriers to compare carrier-to-carrier results or BOC-applicants' explanations to their own experiences and thus provide us with as complete a record as possible on which to make our decision.[408] Likewise, where there is no comprehensive third-party evaluation of particular metrics, we strongly suggest that state commissions and applicants enable all parties to have access to the data used to calculate special studies of the BOC's performance. We find evidence that has been scrutinized in this manner is most persuasive. Accordingly, BOC-applicants may facilitate the development of a full record upon which they may rely to demonstrate compliance with section 271.[409] In this case, Verizon has provided carrier-specific data underlying carrier-to-

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[403] *See* Department of Justice Massachusetts I Evaluation at 15; Rhythms Massachusetts I Comments at 29-30 (quoting KPMG Technical Session Tr. 5185-89). As part of its more general process evaluation, Covad suggests that KPMG observed the installation of 45 xDSL loops. *See* Covad Massachusetts I Comments at 35.

[404] Verizon Massachusetts II Ruesterholz/Lacouture Decl. at para. 20; *see also supra* at para. 47.

[405] *See* Verizon Massachusetts II Ruesterholz/Lacouture Decl. at para. 20.

[406] PwC used the carrier-to-carrier guidelines and Verizon's raw data to replicate Verizon's DSL performance results in Massachusetts for October. PwC undertook a similar process with Verizon's October line sharing performance results for New York and Massachusetts based on the January 16th corrected guidelines filed with the New York Commission in compliance with its December 15 order approving the new carrier-to-carrier working group consensus.

[407] *See* Rhythms Massachusetts II Comments at 7; Covad Massachusetts II Comments at 7-8; Rhythms Massachusetts I Comments at 29; Covad Massachusetts I Comments at 13; ALTS Massachusetts I Comments at 32; NAS Massachusetts I Comments at 5.

[408] During the Massachusetts I application, Verizon began the process of submitting carrier-specific data to the Commission.

[409] In addition, we note that carrier-specific data aided the Massachusetts Department in concluding that Verizon provides nondiscriminatory access to hot cut loops. *See* Massachusetts Department Massachusetts I Comments at (continued....)

carrier measures and the underlying data used to generate reformulated measures of performance.[410] We discuss competitor challenges to Verizon's performance based on carrier-specific data where relevant below.

b. xDSL-Capable Loops

131. We find that Verizon demonstrates that it is providing xDSL-capable loops in accordance with the requirements of checklist item 4. In analyzing Verizon's showing, we rely primarily on the performance measures and performance data described in prior section 271 orders. We review Verizon's xDSL-capable loop order processing timeliness, the timeliness of Verizon's xDSL-capable loop installation and percentage of Verizon-caused missed installation appointments, the quality of the xDSL-capable loops Verizon installs, and the timeliness and quality of the maintenance and repair functions Verizon provides to competing carrier xDSL-capable loops. We note, however, that we do not rely on data reflecting Verizon's provision of xDSL loops to its separate affiliate to reach our conclusions because Verizon demonstrates checklist compliance with an evidentiary showing of performance to its wholesale xDSL customers.[411]

132. Verizon has a concrete and specific legal obligation to provide unbundled xDSL-capable loops to competing carriers.[412] Verizon makes available unbundled xDSL-capable loops (including all technically feasible features, functions and capabilities) in Massachusetts through interconnection agreements and pursuant to tariffs approved by the Massachusetts Department.[413]

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290. The availability of carrier-specific data was an important factor in the Commission's prior section 271 approvals. In New York, the Commission relied upon carrier-specific data to find that Bell Atlantic provided nondiscriminatory access to OSS. *See Bell Atlantic New York Order*, 15 FCC Rcd at paras. 166, 175, 181.

[410] Verizon states that it has provided carrier-specific reports beginning in May 2000 to competitors operating in Massachusetts that have requested them. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 17. Verizon has included carrier-specific reports for September, October and November 2000 in its application. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. App. C. Going forward Verizon has represented that it will provide carrier-specific reports to those competitors that have requested them by the 25th day of the following month. Further, Verizon is in the process of establishing a secure Website through which competitors will be able to obtain the aggregate performance results and their own individual reports and their Performance Plan reports, along with the underlying data in the first half of 2001. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 17.

[411] Verizon's separate affiliate has not been purchasing the same inputs to provide advanced services as unaffiliated competing carriers. Specifically, Verizon's separate affiliate purchases line sharing to provide ADSL service while competing carriers in Massachusetts continue to purchase stand alone, xDSL-capable loops and have only recently begun purchasing line sharing. As a result, Verizon's advanced services separate affiliate is not useful in making a presumption of nondiscriminatory performance.

[412] *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at paras. 63, 114.

[413] *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at Exh. B (citing D.T.E. Tariff No. 17, Part B, Section 5).

(i) Order Processing Timeliness

133. To determine whether Verizon is processing orders in a timely fashion, we examine whether it provides competitors with nondiscriminatory access to loop information in a timely manner and whether it returns timely firm order confirmations (FOCs) to competitors.[414]

134. *Timely Access to Loop Information.* As described above, we find that Verizon has demonstrated that its pre-ordering OSS provides competitors with access to the same underlying loop information available to Verizon's retail and back office personnel.[415] We also find that Verizon appears to be providing that information within the required time frames.

135. Verizon's performance data reflect that it provides responses to competing carrier requests for loop information in substantially the same time and manner as for itself.[416] The carrier-to-carrier reports contain four pre-ordering metrics that measure Verizon's performance in providing competitors with pre-order access to loop information.[417] Under two of these metrics, Verizon provides performance data for September through December 2000 showing that Verizon is providing timely responses to competitors' pre-order mechanized loop database queries submitted via Verizon's EDI and CORBA interfaces.[418] Verizon, however, has not reported carrier-to-carrier performance data measuring its average response times in conducting pre-order manual loop qualifications and engineering record requests.[419] Instead, Verizon provides data for manual loop qualifications conducted from September through November 2000 under Verizon's existing process through its ordering OSS, showing that between 97 percent and 99 percent of manual loop qualifications were completed within 48 hours.[420] Although these data have not

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[414] *See SWBT Texas Order*, 15 FCC Rcd at 18499-18501, paras. 286-90.

[415] *See supra* Part V.A.2.c(ii).

[416] *See* PO-1-06 (Facility Availability, Loop Qualification, EDI and CORBA).

[417] The first two metrics are "PO-1-06 Facility Availability (Loop Qualification) – EDI" and "PO-1-06 Facility Availability (Loop Qualification) – CORBA," both of which measure the timeliness of Verizon's responses to mechanized loop database queries. The second two metrics are "PO-8-01 Average Response Time – Manual Loop Qualification" and "PO-8-02 Average Response Time – Engineering Record Request," which measure the timeliness of Verizon's responses to manual loop qualification and engineering record requests. *See* Verizon Massachusetts I Guerard/Canny Decl. Tab B at 9, 18.

[418] *See* PO-1-06 for EDI. The performance data for these months show that Verizon consistently responds faster to queries for loop qualification information from the mechanized LiveWire database placed from competitors' application-to-application interfaces than to similar queries placed from VADI's retail pre-ordering interfaces. From October through December 2000, competitors received mechanized loop qualification responses on average within 3.11, 2.92, and 3.02 seconds respectively, as compared to 4.72, 17.26, 11.85 seconds for VADI's retail personnel.

[419] In its reply comments, Verizon explains that it has not reported data for the PO-8-01 and PO-8-02 metrics measuring the timeliness of its responses to pre-order manual loop qualification and engineering record requests, because there are currently no electronic pre-ordering OSS functions for manual loop qualification and engineering record requests. *See* Verizon Massachusetts I Guerard/Canny Reply Decl. at 13.

[420] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. Tab J. As discussed below, Verizon's performance data also show that it returns to competitors ordering xDSL loops timely firm order confirmations and rejects, which (continued....)

been submitted under the auspices of the Massachusetts carrier-to-carrier reports prepared in accordance with business rules developed collaboratively by Verizon and competitive carriers, we accept them here because they have not been challenged.[421] Finally, Verizon provides evidence that it is consistently meeting its target of returning loop make-up information to competitors within 24 hours under its interim LFACS process.[422] Verizon also states that competitors generally receive this information within 2 hours.[423]

136. *Timely Return of Firm Order Confirmations.* We conclude that Verizon's reported performance metrics indicate that it consistently provides timely confirmation notices to competing LECs in Massachusetts for xDSL unbundled loop orders.[424] We encourage Verizon to work in the collaborative process to adopt disaggregated performance metrics for xDSL and digital loops, whether pre-qualified or manually qualified.[425] As the Commission explained in the

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under Verizon's current manual loop qualification process contain the results of manual loop qualifications. *See id.* at Tab K and Tab L (summarizing Verizon's performance data for September through November 2000 for DSL order confirmation and reject timeliness); *see also infra* at para. 136.

[421] We note that Verizon has been ordered to begin reporting on these two pre-ordering metrics, in accordance with the guidelines adopted in the carrier-to-carrier working group. As stated above, the availability of carrier-to-carrier reports permits competitors to fully analyze Verizon's performance and evaluate it against the performance data they have collected themselves.

[422] *See* Verizon Massachusetts II Reply, App. A, Tab 1, Attach. C (showing 100 percent of LFACS queries receiving responses within 24 hours for February 2001).

[423] *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed April 3, 2001).

[424] As the Massachusetts Department concluded, "although [Verizon] includes xDSL orders with other loop orders in the denominator of the relevant metric, based upon our review of [Verizon's] performance data, it appears that [Verizon] returns [xDSL confirmation notices] within the stated interval almost all of the time." Massachusetts Department Massachusetts I Comments at 298. For example, from September through December 2000, respectively, for "Loop/Pre-qualified Complex/LNP" orders, Verizon timely returned 99.68, 99.82, 99.48, and 99.79 percent of confirmation notices for flow-through orders within 2 hours; 97.35, 97.35, 97.27, and 97.88 percent of confirmation notices for orders of less than 10 lines within 24 hours; and 96.90, 99.73, 100.00, and 99.74 percent of confirmation notices for orders equal to or more than 10 lines within 72 hours. Verizon likewise exceeded the 95 percent benchmark for timely return of reject notices during this period. *See* OR-1-02, OR-1-04, OR-1-06, OR-2-02, OR-2-04, OR-2-06. "Pre-qualified Complex" orders encompass orders for pre-qualified xDSL-capable loops, and include specifically orders for pre-qualified 2-wire xDSL and 2-wire digital loops. *See* Verizon Massachusetts I Guerard/Canny Decl. Attach. B at 100. Verizon also appears to have exceeded the 95 percent benchmark for timely return of confirmation and reject notices with respect to manually qualified, 2-wire xDSL loop orders. For example, from September through December 2000, respectively, for "2 Wire xDSL Service" orders, Verizon timely returned 98.75, 98.67, 99.25, and 96.77 percent of confirmation notices, and 98.80, 98.92, 99.38, 97.75 percent of reject notices, for orders of less than 10 lines within 72 hours. *See* OR-1-04 and OR-2-04.

[425] In Texas, for example, SBC disaggregated its order confirmation timeliness performance data into separate categories for stand-alone loops, loops ordered with a ported number, digital loops, and xDSL loops. *See id.* at paras. 172, 288. SBC's disaggregated data arose from a Texas Commission proceeding and involved joint efforts by SBC, interested competitive LECs, and the Texas Commission. *See id.* at paras. 286-90. In Massachusetts, beginning with its August 2000 carrier-to-carrier metrics, Verizon has disaggregated manually-qualified, 2-wire xDSL loop ordering performance measures from manually qualified, 2-wire digital loop ordering performance (continued....)

Bell Atlantic New York Order, the "need for unambiguous [xDSL] performance standards and measures has been reinforced by the disputes in [that] record regarding . . . what performance is being measured."[426]

(ii) Provisioning Timeliness

137. We find that Verizon demonstrates that it provisions xDSL-capable loops for competing carriers in substantially the same time and manner that it installs xDSL-capable loops for its own retail operations. In analyzing Verizon's provisioning performance for checklist compliance, we continue to rely primarily upon the performance measurements identified in the *Bell Atlantic New York Order* and *SWBT Texas Order*, *i.e.*, missed installation appointments and average completion intervals.[427]

138. *Percent Missed Installation Appointments.* Recent performance data show that Verizon's missed appointment measure demonstrates parity performance for competitive LECs.[428] Although past performance indicates some statistically significant disparities, the trend

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measures. *See* Verizon Massachusetts I Guerard/Canny Reply Decl. Attach. D at 7, 22 (metrics OR-1-03-06 and OR-2-03-06). Furthermore, one of the "consensus items" from the New York carrier-to-carrier working group, whose results are likewise to be implemented in Massachusetts shortly, *see, e.g.*, Verizon Guerard/Canny Decl. at para. 15, calls for Verizon to disaggregate further its 2-wire xDSL services ordering metrics into separate measures pertaining to 2-wire xDSL loops and DSL line sharing. *See* Verizon Guerard/Canny Decl. Attach. A at 2, 7-8 (discussing further disaggregation to line sharing order confirmation and reject timeliness metrics, specifically OR-1-03-06 and OR-2-03-06). Such disaggregation likewise should apply to performance data on reject notice timeliness, as captured in the OR-2 metrics.

[426] *Bell Atlantic New York Order*, 15 FCC Rcd at 4123, para. 334.

[427] The New York Commission and Massachusetts Department established Verizon's provisioning of 2-Wire xDSL services as the appropriate retail analogue for competing carrier xDSL loops in the performance measurement for missed installation appointments. Verizon notes, however, that, for purposes of one xDSL measure, the Percent Completed in 6 Days measure, PR 3-10, the retail analogue has been changed to Verizon's installation of POTS second lines. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 94.

[428] This performance metric is disaggregated to divide Verizon's missed installation appointments between those requiring dispatch of a technician and those not requiring dispatch. A "dispatch" typically involves sending a Verizon technician "in" to a Verizon central office to provision a particular UNE or "out" into the field to work in the outside plant. To date, competing carriers generally request stand-alone xDSL-capable loops and thus request "dispatch" xDSL loops which require a Verizon technician to perform field work to provision an xDSL-capable loop. Verizon's retail xDSL provisioning is overwhelmingly "no-dispatch" because its ADSL services are provided through line sharing arrangements. Since filing its original application, Verizon has amended its carrier-to-carrier performance reports to include both dispatch and no-dispatch information in the missed appointments measure. During the initial phase of this proceeding, Verizon was unable to resolve the discrepancy between the average completion interval and percent missed appointments measures for competing carrier no dispatch orders. On December 3, 2000, Verizon offered an explanation for this discrepancy. Verizon "discovered that performance for all unbundled xDSL loops was aggregated in the reported results for PR 4-04, whether or not the orders required a dispatch." *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon to Eric Einhorn, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 00-176 (filed Dec. 3, 2000). Since then, Verizon has reported both dispatch and no-dispatch volumes in the percent missed appointment measure for the months of September, October, November and December. Accordingly, the Commission can now rely upon competing carrier carrier-to-carrier data when examining the percent missed (continued....)

in Massachusetts has improved significantly and, in the months of September, October, November and December, Verizon's performance moved to within approximately two percentage points of Verizon's retail missed appointment rate.[429] Thus, the record shows that whatever performance disparities may have existed in the past, they have been narrowed to a small margin.[430]

139. We find no basis in the record to support NAS' contention that Verizon grants preferential installation appointments to its retail affiliate.[431] Verizon states that it offers nondiscriminatory access to shorter appointment windows for competitive LECs and Verizon alike.[432] Given Verizon's representation that it offers identical installation appointment windows to customers of both competitors and its retail affiliate that have "extenuating circumstances," we emphasize that Verizon is required to apply this policy consistently.[433]

140. *Average Completion Interval.* We find that Verizon's average completion interval data for the period September through December show nondiscriminatory treatment. During this period, the average completion interval for orders requiring a dispatch, which captures the vast majority of competing carrier orders, indicates a trend of improving performance and shows that retail performance is, on average, within approximately one-half a day of Verizon's retail affiliate

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appointments metrics to obtain a more accurate dispatch-to-dispatch comparison and therefore a more reliable picture of Verizon's performance.

[429] The four month average (September – December) for competing carrier missed appointment rates, for dispatch services was 6.4 percent compared to 4.6 percent for Verizon. Indeed, in November, Verizon provided better service to competitors than its retail affiliate. In the months of October, November and December, the missed appointment rate for dispatch xDSL services for competitors was 3.67, 2.40 and 4.19 percent and the retail rate was 3.18, 4.21 and 2.13 percent, respectively. Verizon's performance in September showed some disparities, which Verizon attributes to the lingering effect of a strike it experienced in August. For September, Verizon missed 12.75 percent of its dispatch installation appointments for competitors compared to 7.13 percent for itself. *See* PR 4-04 (Provisioning , Two Wire xDSL Services, percent Missed Appointment, Verizon, Dispatch). Verizon responds that its September results were adversely affected by the work stoppage, because orders missed in August but completed in September were recorded as missed appointments in the September performance reports. Verizon performed a study which excludes orders not originally due during the strike, which shows that the adjusted missed appointment rate of 3.79 percent for September is comparable to its October and November results. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 72 and Attach. V.

[430] While the Department of Justice takes issue with isolated xDSL performance measures and the manner in which those measures report Verizon's wholesale performance, it does not specifically criticize the percent missed appointments measure for stand-alone xDSL loops. *See generally* Department of Justice Massachusetts I Evaluation at 8.

[431] *See* NAS Massachusetts II Comments at 5; *but see* Massachusetts Department Massachusetts I Reply at 86.

[432] Verizon states that if a retail customer has "extenuating circumstances and requests a shorter installation appointment window, Verizon will schedule either a morning or afternoon appointment window. Verizon will also schedule a morning or afternoon appointment for a competing LEC customer with extenuating circumstances." Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 38.

[433] Failure to provide nondiscriminatory access to installation appointments at identical windows could subject Verizon to a targeted enforcement action or carrier-initiated complaint. *See infra* Part IX.

and approximately one and one-half days longer than the standard six-day interval established by the Massachusetts Department.[434] The average completion interval for Verizon retail during the period September through December is also approximately one day longer than the standard interval.[435] Verizon argues that these results show nondiscriminatory treatment and any average completion interval disparities that remain should be discounted because these results are skewed by competing carrier behavior. Specifically, Verizon asserts that orders which were not prequalified (which have a 9-day interval) and orders which request installation dates outside of the standard interval skew the carrier-to-carrier results.[436]

141. Although we recognize that the average completion interval as reported by the carrier-to-carrier measure slightly exceeds the standard interval adopted by the Massachusetts Department, we note that Verizon's performance has improved over the period September through December while the number of competitor orders has remained consistent.[437] This

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[434] The 4 month (September – December) average for competing carrier dispatch orders was 7.3 days compared to 6.94 days for Verizon. In the months of September, October, November and December Verizon completed no-dispatch competing carrier orders in 9.7, 7.75, 7.3 and 6.7 days compared to 11.4, 7.63, 5.2 and 6.3 days for Verizon. *See* PR 2-02 (Provisioning , Two Wire xDSL Services, Average Interval Completed, Total Dispatch). While the September results for this measure appear to be affected by the strike, Verizon states that during the period September through November 2000, the average completion interval to provision DSL loops for competitors where a dispatch was required averaged 8.32 days, while Verizon's retail ADSL orders that likewise required a dispatch were provisioned within an average of 8.48 days. Verizon avers that consistent with the relevant business rules, this measure reports the time from Verizon's receipt of a valid service order to actual work completion, and uses the same measurement points for both retail and wholesale orders. *See* Verizon Massachusetts II Guerard/Canny Decl. Attach. B, at para. 42; Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 75.

[435] *See* PR 2-02 (Provisioning, Two Wire xDSL Services, Average Interval Completed, Total Dispatch).

[436] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 75. In its original application, Verizon argued that its recalculated results - which exclude manually qualified loops - for average completion interval also show parity. *See* Verizon Massachusetts I Guerard/Canny Decl. at para. 79 and Attach. K. Approximately half of the orders, according to Verizon, were pre-qualified, while the remainder required manual loop qualification. The results of this study show that "[t]he average interval completed for pre-qualified xDSL loops was 6.46 days compared to 6.69 days for retail in June and 5.40 days compared to 5.93 days for retail in July." *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 101. Covad responded to Verizon's study questioning its methodology and results. *See* Letter from Jason Oxman, Senior Governmental Affairs Counsel to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 (filed November 7, 2000) (Covad Nov. 7 *Ex Parte* Letter).

[437] Competitor order volumes captured in the average completion interval, PR 2-01/2-02 peaked in October 2000 with 934 orders and have remained well-above 600 orders per month for the last four months. *See* PR 2-01/2-02 (Provisioning, 2-Wire xDSL Services, Average Interval Completed, Total Dispatch, Total No-Dispatch). Rhythms argues that Verizon's contention that VADI also receives service outside the standard interval is no response to Verizon's late wholesale performance for unaffiliated competitive LECs. Rhythms states that "it makes no difference to Rhythms that it received "parity" with Verizon's retail service when "parity" means that Rhythms received its loops two days later than the standard interval, an interval Rhythms notes is already an unnecessarily long period of time. *See* Rhythms Massachusetts II Comments at 11-12 and Williams Supplemental Declaration at para. 21. CIX argues that the Massachusetts Department's six-day interval was defined through a "long and thorough regulatory process" and Verizon should be accountable for failing to meet that interval for competitive LEC orders. CIX Massachusetts II Comments at 22.

improving trend and the competitively insignificant disparity between competitor and Verizon completion intervals persuades us that Verizon's technicians have gained sufficient expertise and operational readiness to adjust to the growth of competition in Massachusetts.[438] To evaluate Verizon's provisioning timeliness, we look to the totality of the evidence presented to us. It is based on this totality and specifically, the measures the Commission has relied upon in the past, that we conclude that Verizon's provisioning timeliness performance offers competitors a meaningful opportunity to compete.

142. Although Verizon and some commenters urge us to rely on other measures, we need not do so in this case because Verizon has demonstrated compliance with this aspect of our loops analysis on the basis of the measures the Commission has relied upon in previous section 271 orders. We decline to rely upon the percent on-time measure supplied by Verizon[439] or percent completed within 6 days measures supplied by competitors,[440] because we do not have

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[438] The Department of Justice recognizes that Verizon's on-time performance is "improving" but notes that it falls short of the 95 percent on-time benchmark. Department of Justice Massachusetts II Evaluation at 9.

[439] Verizon supplements its affirmative showing by arguing that it provides xDSL loops when competing carriers request them and asks us to consider, in addition to the average completion interval, Verizon's performance under a different metric which measures percent "on-time" installation. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 66. Verizon claims that when facility misses are included in the results, Verizon's performance, when adjusted to remove the impact of the strike, is approximately 85 percent on-time in October and in November it is approximately 90 percent on-time. Verizon's removal of strike-affected orders from these measures for September and October 2000 improves Verizon's reported performance somewhat (from 75.7 to 86.6 percent). *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 69 and Attach. S. Verizon's final data presentation of the revised on-time measure, which excludes orders for which Verizon cannot provide a loop and adjusts for strike-affected orders, shows on-time performance that exceeds the 95 percent standard in November 2000. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 66 and Attach. R.

[440] Competing carriers contest Verizon's claim that it provides xDSL-capable loops on time and point to yet another measure of on-time performance, the percentage of xDSL loops completed within the standard interval of 6 days. *See* PR 3-10 (Provisioning, 2-Wire xDSL Services, percent Completed in 6 Days). In September, October, November and December Verizon completed 62.1, 64.6, 63.4 and 72.9 percent of competing carrier xDSL loops within 6 days. In the same months, Verizon completed 65.5, 82.3, 87.8, and 87.2 percent of xDSL loops within 6 days for itself. *See* Rhythms Massachusetts I Comments at 28; Department of Justice Massachusetts II Evaluation at 9 n.2; CIX Massachusetts II Comments at 22. USIAPA argues that the real provisioning interval is, on average, 25 days between the first FOC and actual installation because some 24 percent of orders in Massachusetts receive sliding FOCs. *See* USISPA Massachusetts II Reply at 8. During Verizon's original proceeding, Verizon and competing carriers reached consensus to eliminate the retail analogue and instead set a 95 percent benchmark standard for the percent completed within 6 days measure. Consensus was also reached to exclude orders that were not pre-qualified, orders requesting intervals outside of the standard interval and orders missed for lack of facilities. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply. Decl. at paras. 77-80. Verizon engaged a consultant, Lexecon, to recalculate the reported results for this measure consistent with the exclusions discussed above and to adjust this measure for orders affected by the strike. When Verizon's performance for this measure is calculated in accordance with the new business rules, Verizon argues it provides 84 percent of xDSL loops between September and November with six days. This study shows that during the September through November period, 95 percent of the competitor orders not completed within the standard six day installation interval are completed within 7 days. The Lexecon study shows that under the revised PR 3-10 measure, in September, 89.12 percent of competitive LEC orders were completed within 6 days; 80.00 percent were completed within 6 days in October and 82.24 percent were completed within 6 days in November. Reply Appendix, Tab 4, Joint Reply Declaration of Robert H. Gertner and Gustavo E. Bamberger. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 82. Competitors (continued....)

enough data or experience with them for determining a BOC's compliance with section 271.[441] Moreover, commenters have offered no persuasive reason to depart from Commission practice of placing primary reliance upon the percent missed appointment or the average completion interval measures. Accordingly, we view the on-time measures cited by Verizon and the percent completed within 6 days measure cited by competitors as additional diagnostic data to evaluate Verizon's contention that it provides xDSL-capable loops in a timely manner.[442] We find that these measures support rather than refute the measures the Commission relied upon in the past and confirm our view that the missed appointment and average completion interval measures provide an accurate description of Verizon's performance for competitors.

(iii) Provisioning Quality

143. We conclude that Verizon provides xDSL loops to competing carriers at a level of loop installation quality that meets the requirements of checklist item 4. In analyzing installation quality we continue to rely primarily upon the measure identified in the *Bell Atlantic New York Order* and *SWBT Texas Order* – percent installation troubles within 30 days.[443] Assessing the quality of loop installation is important because advanced services customers that experience substantial troubles in the period following installation of an xDSL-capable loop are unlikely to remain with a competing carrier.[444]

144. As an initial matter, we reject Verizon's request that we depart from relying upon certain metrics the Commission has relied upon in the past. We conclude that Verizon's use of the total DSL trouble report rate as a substitute for the percent trouble within 30 days does not measure the quality of Verizon's installation performance.[445] In fact, it is not even classified in the carrier-to-carrier reports or the Commission's past orders as a provisioning metric, but rather, as a measure of maintenance and repair activities. Verizon has not persuaded us that the metric

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respond that even Verizon's recalculated results show that that a substantial number of orders are completed outside the standard interval. Rhythms Massachusetts II Comments at 11-12; CIX Massachusetts II Comments at 22.

[441] Furthermore, by some estimates, 83.77 percent of all DSL orders are excluded from the percent completed within 6 days measure. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 84. We note that the Commission has not previously relied upon either the on-time measure cited by Verizon nor the percent completed within 6 days metric cited by competing carriers. Data supporting the 6-day measure became available for the first time in July 2000 and data supporting the on-time measure became available in June. The Massachusetts Department did not initially evaluate the percent completed on time measure relied upon by Verizon and also did not evaluate the percent completed with 6 day measure cited by competing carriers.

[442] For example, when the percent completed within 6 days results are examined in conjunction with the average completion interval, it is not surprising that approximately 80 percent of orders are completed within six days because the average completion interval is slightly more than 6 days.

[443] The Commission stated in the *SWBT Texas Order*, that we consider trouble reports within 30 days as "indicative of the quality of network components supplied by the incumbent LEC." *SWBT Texas Order*, 15 FCC Rcd at 18504-05, para. 299.

[444] *SWBT Texas Order*, 15 FCC Rcd at 18504-05, para. 299.

[445] *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 86.

for trouble reports within 30 days of installation is any less probative of installation quality in the factual context of this application than it was in the previous applications wherein the Commission relied on this metric. Specifically, we find that the percent troubles within 30 days measure is more probative of installation quality than the total trouble report rate which measures all xDSL-lines in service throughout Verizon's network, not lines recently installed.[446]

145. During this proceeding, the New York Commission and the Massachusetts Department accepted a consensus revision to the trouble report within 30 days measure to control for certain carrier business practices.[447] Under the new consensus measure, the metric will include only trouble reports that are submitted within 30 days of installation by competitors that participate in acceptance testing.[448] The revised definition reflects the fact that properly conducted acceptance testing could identify some installation quality problems that could be resolved at the time the competitive LEC and Verizon conduct the acceptance test. When Verizon presents data that control for the exclusions adopted by the consensus revision, the performance dissimilarities are reduced or eliminated entirely.[449] Competitive LECs question

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[446] *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 (filed Nov. 14, 2000); *see also* Letter from Edward D. Young, III, Verizon, to William E. Kennard, Chairman, Federal Communications Commission, CC Docket No. 00-176 (filed Dec. 1, 2000).

[447] The New York Commission adjusted the retail analogue to compare Verizon's performance for competitors with Verizon's own retail POTS service rather than its DSL service because Verizon's DSL service is almost always provided over a loop that is already working and delivering dial tone, whereas retail POTS will involve providing service over a loop that is not already working. Thus, because stand-alone loops better approximate the manner in which Verizon provisions stand alone xDSL-capable loops to competitors, it was selected as the appropriate retail analogue.

[448] Acceptance testing is a joint project whereby after installation, Verizon contacts competitors so the loop can be tested for improper voltages, or other impediments to xDSL service, such as ringers and load coils. Under established acceptance testing procedures, Verizon "shorts" a loop enabling competitors to verify continuity length and to ensure that the loop meets a competitor's requirements. Competitors then provide to Verizon a confirmation indicating a loop is in working order, or, in the alternative, reject the loop as non-working.

[449] Verizon engaged Lexecon to recompute the I-code rate (trouble reports within 30 days) presented in the official carrier-to-carrier data, for September through November 2000 using the new consensus method. Lexecon found that the performance disparity between competitive LEC and retail I-code rate was eliminated in September and substantially reduced – by 51 percent in October (from 8.2 to 4.34 percentage points); and by 74 percent in November (from 4.96 to 1.29 percentage points). Verizon contends that the "weighted average I-code rate under the new consensus rules for September through November 2000 was 4.78 for [competing carriers] and 3.3 for Verizon's retail customers." Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 94. Verizon goes on to adjust its performance results to include troubles that could have been discovered by a properly conducted acceptance test. Under this adjustment the competitive LEC I-code rate was 3.12 percent in September 2000; 6.08 percent for October 2000, and 4.19 percent for November 2000. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 95 Attach. Z. The weighted average for this period is 4.28 percent for competitive LECs and 3.30 percent for Verizon retail. *Id.* Verizon performs a third level of analysis: after quantifying the I-code rate under the revised measure recently approved by the New York Commission, and then excluding those I-codes that could have been discovered by a properly conducted acceptance test, Verizon shows that the gap between competitive LECs and retail I-code rate in September and November 2000 is eliminated and reduced to less than one percent in October 2000. The adjusted rate is 1.43 percent for September 2000, 4.04 percent for October 2000 and 1.94 percent for (continued....)

whether Verizon may appropriately exclude some of these trouble reports and have used carrier-specific data supplied by Verizon to argue that Verizon does not provide loops at an acceptable level of quality.[450]

146. We agree with the Department of Justice that Verizon's adjustments to the data are justified if an inference could reliably be made when the type of trouble reported: (1) could not occur post-acceptance, but rather must have existed at acceptance; and (2) would consistently be detected by the joint testing methods employed.[451] The issue of whether competing carriers can consistently detect loop quality problems is disputed by Covad, Rhythms and NAS.[452] Covad argues that carrier-specific data show that it experiences installation quality troubles which are over four times higher for its orders compared to Verizon retail.[453] Verizon responds that when

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November 2000 compared to the weighted average during this period of 2.36 percent for competitive LECs and 3.30 percent for Verizon. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 96 and Attach. AA.

[450] *See* Rhythms Massachusetts II Williams Decl. para. 26; Covad Clancy Decl. para. 10-23; *see also* USISPA Massachusetts II Reply at 8. The Department of Justice questions the validity of the performance data and contends that Verizon's exclusion methodology infers improper acceptance testing from the nature of the trouble reported. *See* Department of Justice Massachusetts II Evaluation at 10 n.39. The Massachusetts Department discounts this measure entirely and questions whether the measure accurately captures Verizon's ability to provision quality loops. Massachusetts Department Massachusetts II Evaluation at 30. We agree with the Department of Justice that the calculation of the revised measure appears to be flawed. While trouble reports from carriers that do not conduct acceptance tests are excluded from the numerator of this measure, orders from such carriers are not excluded from the denominator. The result is to inappropriately skew the trouble report rate. When these orders are excluded from the denominator, the reported trouble rate is higher for October and November 2000 under the revised measure than as reported under the original carrier-to-carrier measure. The Department of Justice has recalculated PR 6-01 to control for this anomaly. Pursuant to this recalculation, for the period September to November, competitive LECs experienced 6.99 percent troubles within 30 days. *See* Department of Justice Evaluation at 10-11, Exh. 1.

[451] *See* Department of Justice Massachusetts II Evaluation at 11 n.39. Verizon responds that "while it is possible for a DSL loop to break after the loop is installed, that is a rare occurrence." Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 100.

[452] *See* Covad Massachusetts II Comments at 11; NAS Massachusetts II Comments at 11; Rhythms Massachusetts II Comments at 18.

[453] In its comments, Covad reviewed 8 trouble tickets in the month of November to refute Verizon's argument that Covad knowingly accepted non-working loops. Covad contends that these loops were accepted because: (1) the Verizon technician was not at the NID when the test was performed; (2) Verizon failed to provision the loop to the appropriate NID; or (3) the loops became non-working after Covad accepted it. *See* Covad Massachusetts II Reply at 9. On reply Covad surveyed its acceptance testing logs for all of the I-codes reported in November. This survey showed that of the 25 I-codes which Verizon excluded from its adjusted performance measure, none of the installation quality troubles could have been discovered at the time of acceptance and all of these installation quality troubles were properly addressed as maintenance and repair issues. Covad argues that in many cases its records show that loops were much shorter at the time of acceptance testing than when repaired by Verizon, demonstrating that Verizon did not test the full loop length during acceptance testing. *See* Covad Massachusetts II Reply at 10. Verizon responds to Covad's initial survey of I-codes by showing that in two cases, Covad's test equipment was not available to perform an acceptance test and in two other instances, Covad's acceptance test failed to identify the presence of a load coil and half ringer. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 91. In three other instances, Verizon states that Covad tested and accepted a loop that Verizon identified as defective; (continued....)

an adjustment is made for Covad's failure to properly conduct acceptance testing its I-code rate falls to below retail.[454] Verizon forwards similar carrier-specific responses to Rhythms and NAS.[455]

147. We find that Verizon is making loops available at substantially the same level of quality as Verizon provides to itself. In reaching this conclusion we rely upon data that are adjusted to comply with the recently-adopted consensus revision to the troubles with 30 days measure.[456] During the period September through November 2000, competitive LECs experienced installation quality troubles at a rate of 7.0 percent compared to 2.3 percent for Verizon retail.[457] Thus, the adjusted data narrow the facial disparity between Verizon's performance to its competitors compared to itself. Moreover, we also note that recent performance shows that Verizon has improved its ability to provide competitors with xDSL-capable loops at acceptable levels of quality.[458] We find, therefore, that the adjusted data coupled

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Covad's technician went to the wrong demarcation point and finally, Covad could not locate the acceptance testing data on the loop in question in its database. *See id.*

[454] When Verizon controls for installation quality issues that could have been discovered during acceptance testing Covad's rate is at parity for the period September through November. *Id.* at para. 83.

[455] Rhythms claims that it reviewed the list of I-codes excluded by Verizon for acceptance testing reasons and states that "its records did not match Verizon's." Rhythms Massachusetts II Comments at 18. Verizon states that Rhythms did not provide any information for a number of the Rhythms I-codes excluded by Verizon. Verizon shows that some of the I-codes contested by Rhythms were not excluded by Verizon, therefore no downward adjustment to the competitive LEC I-code rate was taken. Finally, of the remaining I-codes submitted by Rhythms, Verizon's records show that these loops had ringers on the lines and should have been discovered during acceptance testing; these records contain inconclusive information or contained no relevant data or finally, the I-code was not related to Rhythms' failure to properly perform acceptance testing. See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 94. Verizon performed a similar analysis for NAS adjusting its I-code rate to below retail in the period September through November. *See id.* at paras. 84-85.

[456] We also agree with the Department of Justice that Verizon's practice of excluding trouble reports from carriers that do not conduct acceptance testing from the numerator but not the denominator is inappropriate and will result in inappropriately low trouble report rates. *See* Department of Justice Evaluation at 10. In this circumstance, where the carriers have agreed to revise a measure going forward, we believe it is reasonable to include the results of the revised measure to adjust Verizon's performance as officially reported.

[457] *See* Department of Justice Massachusetts II Evaluation at 10, Attach. 1.

[458] The individual results for competitive LECs performing acceptance testing for September, October and November were 4.13 percent, 11.18 and 8.22 percent compared to 1.93 percent, 2.09 percent and 2.81 percent for Verizon retail over the same period. *See id.* The unrevised carrier-to-carrier data confirm this positive trend. Even as volumes have remained substantial, the percent trouble within 30 days measure as originally reported moved from a high in October 2000 of 11.1 percent to 7.8 percent in November and 5.8 percent in December, reducing the disparity to approximately 3 percent in the most recent month we consider. In September, competitive LEC trouble reports within 30 days were 5.4 percent. The comparable numbers for Verizon retail were 1.93, 2.09, 2.81 and 2.79 percent in September, October, November and December respectively. *See* PR 6-01 (Provisioning, 2-Wire xDSL Services, percent Installation Troubles Reported Within 30 Days). The four month (September – December) average for competitive LEC trouble reports within 30 days, according to the unrevised carrier-to-carrier reports filed with the application, was 7.3 percent compared to 2.4 percent for Verizon.

with the improving trend in Verizon's performance are sufficient for us to conclude that Verizon is installing loops in a nondiscriminatory manner.

148. We are unable to quantify exactly the effect of Verizon and competitor adjustments to the data because of limited factual disputes.[459] We note however, that the Massachusetts Department has conducted a comprehensive and detailed factual reconciliation of I-codes for the month of November 2000 with the participation of Covad and Verizon.[460] This inquiry has yielded several process improvements that are designed to improve Verizon's installation quality results.[461] We welcome the Massachusetts Department's participation in addressing Verizon's acceptance testing process and are encouraged by the improvements to this process.[462] We encourage carriers to bring issues such as these to the attention of state commissions so that factual disputes can be resolved before a BOC applicant files a section 271 application with this Commission.

149. We find that recent carrier-to-carrier installation quality measures show that Verizon has improved significantly its ability to provide competitors with xDSL-capable loops at

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[459] We note that Verizon's adjustment to the data lower the I-code rate to less than 7 percent and competitive LEC challenges to Verizon's adjustment raise the I-code rate; but in no case do competitor challenges to Verizon's adjustment raise the I-code rate above the 7 percent level presented by the revised carrier-to-carrier measure as calculated by the Department of Justice. *See* Letter from Paul Afonso, General Counsel, Massachusetts Department of Telecommunications and Energy to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 21, 2001) (*Massachusetts Department Reconciliation Letter*).

[460] On March 15 2001, at the request of the Commission's staff, the Massachusetts Department, together with Covad and Verizon, undertook a review of the disputed Covad orders. After conducting its review, the Massachusetts Department submitted a list of process improvements developed by Verizon and Covad during this review.

[461] Under the auspices of the Massachusetts Department, Covad and Verizon have agreed to several modifications or additions to the existing acceptance testing process. Verizon has agreed to implement a process requirement that its technicians will "cut down" xDSL loops at the NID before the final cooperative test is performed. Additionally, Covad has agreed to insert into its acceptance testing script a question to determine whether the Verizon technician is testing through the network interface device. Second, to reduce technician confusion about where in Verizon's outside plant the cooperative test was performed, the carriers have agreed to enhance the demarcation point information procedures by establishing a three-fold process whereby the Covad technician can: (1) verify before dispatch, that the loop was located and tagged by the Verizon technician during cooperative testing; (2) access Verizon's demarcation information electronically before dispatching to the filed; and (3) call Verizon from the field if the technician cannot locate the demarcation point. Third, Verizon has committed to make it clear to its technicians that they should remove all half ringers on stand-alone xDSL loops. Fourth, Covad and Verizon have agreed to implement a process for obtaining a final acceptance test when an earlier acceptance test has failed and to educate their technicians about interim loop testing versus final acceptance testing. *See* Massachusetts Department Reconciliation Letter at 8.

[462] We note that the Department of Justice did not have the benefit of the Massachusetts Department's reconciliation of Verizon's I-codes. *See* Department of Justice Massachusetts II Evaluation at 15 n.61 (noting that the Department of Justice's evaluation is "necessarily based solely on the evidence in Verizon's application" and stating that "[r]eply comments and *ex parte* submissions undoubtedly will provide additional evidence concerning the questions that have been raised about Verizon's pre-application DSL performance.").

acceptable levels of quality.[463] Moreover, we find that Verizon's remedial efforts to improve the stand-alone xDSL loop provisioning and acceptance testing process, in addition to those agreed to in the context of the Massachusetts Department's reconciliation proceeding, are likely to reduce competitive LEC installation quality impairments in the future. Starting in January 2001, Verizon will tag DSL loops at both the NID and the cross-connection box with special services markers to indicate to Verizon technicians that the loop is in use for data services and should not be used to serve another customer.[464] Verizon is also engaged in on-site visits to competitive LEC testing centers to discover ways to improve the acceptance testing process.[465] Verizon has committed to providing competitive LECs with detailed information on their I-codes to diagnose acceptance testing issues and reconcile data.[466] Verizon has also agreed to a trial of "sync" testing to enable Verizon technicians, at the time of testing, to determine whether the competitive LEC can synchronize its DSLAM with customer premises modems.[467] Finally, Verizon is working with a competitive LEC to make access to its testing equipment available to Verizon through a voice response unit.[468] We emphasize that Verizon's installation quality performance is minimally acceptable -- even under our flexible approach of reviewing Verizon's performance in light of the totality of the circumstances.[469]

(iv) Maintenance and Repair

150. We agree with the Massachusetts Department that Verizon demonstrates that it provides maintenance and repair functions for competing carrier xDSL-capable loops in a manner sufficient to meet the requirements of checklist item 4.[470] In analyzing Verizon's maintenance and repair functions we continue to rely primarily upon the mean time to repair and repeat trouble rate measures identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.

151. *Mean Time to Repair.* Like the Massachusetts Department, we find that Verizon offers nondiscriminatory access to maintenance and repair functions. During the period from

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[463] We therefore rely upon the Massachusetts Department's conclusion that "the information contained in VZ-MA's supplemental application only affirms our earlier conclusion that VZ-MA provides [competing carriers] an installation quality sufficient to afford them a meaningful opportunity to compete." Massachusetts Department Massachusetts II Comments at 29-30; *see also SWBT Kansas/Oklahoma Order* at para. 191 (finding that SWBT generally met 6 percent installation quality benchmark and noting improved performance trend).

[464] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para. 110.

[465] *See id.* at para. 110.

[466] *See id.* at para. 109.

[467] *See id.* at para. 118.

[468] *See id.* at para. 109.

[469] Any future evidence of significant and sustained deterioration may result in a targeted enforcement action or carrier-initiated complaint under the Act. *See also infra* Part IX.

[470] *See* Massachusetts Department Massachusetts II Comments at 31.

September through December, the mean time to repair competing carrier troubles on xDSL loops was 29.4 hours while the comparable number for Verizon was 21.59 hours, an approximately 8 hour difference. Although this disparity is statistically significant, we note that, in December, Verizon repaired competitive LEC lines in 19.1 hours compared to 17.8 hours for its retail affiliate, bringing Verizon into near facial parity with its retail operation.[471] Accordingly, the most recent month we consider indicates that Verizon has virtually eliminated this performance disparity.[472] We do not find, therefore, any systematic discrimination in Verizon's maintenance and repair functions offered to competitors.[473]

152. Verizon contends that the data reflecting the measurement of mean time to repair for xDSL loops provide a misleading indication of its performance and thus the Commission should look behind the measures for additional evidence of nondiscrimination. Verizon claims that it is much more likely to be unable to access competing carriers customers' premises to repair xDSL loops than access to the premises of its own retail customers[474] and that competing carriers are less willing to schedule weekend appointments than are Verizon's retail customers.[475] Both of these factors, Verizon claims, lengthens the time needed to repair competing carrier

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[471] Verizon's missed repair appointment performance is likewise at parity. During September through November 2000, Verizon met approximately 85 percent of repair appointments for competitive LECs compared to approximately 86 percent for retail. MR 3-01 (Maintenance and Repair, 2-wire xDSL Services, percent Missed Repair Appointment – Loop); *see also* Verizon Massachusetts II Lacouture/Ruesterholz Decl. Attach. EE. Verizon concludes that during September through November 2000, nearly 58 percent of troubles reported within 30 days of the installation of a DSL loop were closed with no trouble found. *See id.* at para. 105 and Attach. BB. This number is consistent with Verizon's analysis for the period May through July. *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 78, 104 & Attach. I (discussing the effect of failure to isolate troubles on UNE POTS repair metrics).

[472] Indeed, we take additional comfort in Verizon's January performance which indicates that this trend has continued. In fact, Verizon performs better for competitive LECs than for itself in January. The January mean time to repair competitive LEC xDSL loops was 20.82 hrs compared to 23.80 hrs. for Verizon. *See* MR 4-02 (Maintenance, 2-Wire xDSL Services, Mean Time to Repair – Loop Trouble).

[473] Should Verizon's future performance reverse this positive trend, Verizon risks a targeted enforcement action or carrier-initiated complaint under the Act. *See infra* Part IX.

[474] Verizon Massachusetts II Application at 25; Verizon Massachusetts II Lacouture/Ruesterholz Decl at para. 106. During April, May, June and July 2000, Verizon claims that competing carriers provided only "limited access' to end users for 58.9 percent of competing carrier Complex loop repair requests, compared to 3.4 percent on Verizon's Complex loop retail repair requests. *Id.* at para. 106 & Attach. N.

[475] Verizon contends that a relatively small disparity in the mean time to repair measure exists during September, October and November and that there is some variation among competitive LECs regarding the rate at which they accept weekend repair appointments. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 119 Attach. GG. Verizon performed an analysis of the weekend repair appointment exclusion and concluded that the rejection of weekend repair appointments added approximately 4.35 hours to the average repair interval for competitive LEC loops, reducing the 9 hour difference to approximately 4-5 hours of disparity, an amount Verizon contends, that is not competitively significant; *See also* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para 119 Attach. GG. *See also* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at 73-74 & Attach. G (discussing the effect of not accepting weekend repair appointments on the UNE POTS repair metrics.)

xDSL loops. Covad and Rhythms specifically deny that they avoid weekend repair appointments and otherwise criticize Verizon's maintenance and repair functions.[476]

153. We exercise our discretion to afford Verizon's adjusted mean time to repair data little weight.[477] Because the official carrier-to-carrier data provide sufficient evidence for the Commission to conclude that Verizon provides nondiscriminatory access to maintenance and repair functions, we need not resolve the factual dispute presented by commenters regarding refused weekend repair appointments. We recognize and encourage BOCs to conduct root cause analysis of their performance and will appropriately credit explanations of disparities in the performance measures. We believe, however, that such explanations are best used to improve processes and carrier-to-carrier reporting and that they are most useful when surfaced in state proceedings. We note that the development of performance measures is an iterative process and we encourage competitive LECs and Verizon to continue to specifically improve the mean time to repair measure to provide a more accurate indicator of performance.[478]

154. *Repeat Trouble Rate.* We conclude that Verizon provides competitors with maintenance and repair services at an acceptable level of quality. Verizon's repeat trouble report data show that competing carriers infrequently experience problems after a repair visit for a trouble on DSL loops. This measure shows that competing carriers experience fewer repeat troubles than Verizon's retail affiliate.[479] For the period September through December, competing carriers experienced 16.3 percent repeat trouble report rates compared to 21.5 percent

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[476] *See* Rhythms Massachusetts I Comments at 31-32; *See* Letter from Dhruv Khana, Executive Vice President and General Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176, at 8 (filed Dec. 5, 2000); *see also* Covad Massachusetts I Comments at 20-22 (stating that Verizon adds to the "no access" problem by assigning "all day" appointment windows); Network Access Solutions Massachusetts I Comments at 3-4 (same). Rhythms Massachusetts I Comments at 32. Covad specifically notes that an apparent increase in competing carrier "no access" situations is explained by the fact that Verizon's schedules retail repair appointments in smaller windows than for competing carriers. The Massachusetts Department was unable to comment on Covad's alleged unsuccessful attempt to shorten repair windows offered by Verizon to competing carriers. *See* Massachusetts Department Massachusetts I Reply at 86. On reply, Verizon states that it will grant morning or afternoon appointments for retail customers if they have extenuating circumstances and it will do the same for competing carriers. Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl. at 33 (emphasis added).

[477] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para 119 Attach. GG.

[478] The Department of Justice notes that the mean time to repair measure is likely to be disputed in the future and, if the measure is left unrevised, it may create an analysis that is biased toward finding parity. "Excluding observations involving competitive LEC refusals of weekend appointments makes Verizon's performance for competitive LECs look stronger, moving the apparent balance toward parity. Excluding observations involving refused weekday appointments – an adjustment Verizon did not make – could make Verizon's performance as to its retail unit or separate affiliate look better, moving the apparent balance away from parity." Department of Justice Massachusetts II Evaluation at 12.

[479] The Percent Repeat Trouble Reports metric, MR 5-01 shows that the 4-month (September – December) average for competing carriers is 16.3 percent and 21.5 percent for Verizon. For the months of September, October, November and December, competing carrier repeat trouble rates were 19.3, 15.4, 16.1 and 13.4 percent. For the same months, Verizon repeat trouble rate was 22.7, 20.3, 22.6 and 16.5 percent. *See* MR 5-01 (Maintenance, 2-Wire DSL Services, percent Repeat Trouble Reports within 30 Days).

for Verizon.[480] Thus, during the four recent months we consider, Verizon provides better service to competitors in this area than it does for its retail affiliate.[481]

c. Subloops

155. We find that Verizon provides nondiscriminatory access to subloops consistent with the requirements of section 271 and the *UNE Remand Order*.[482] The Commission's *UNE Remand Order* requires incumbent LECs to provide competitors access to subloop elements at any technically feasible point to ensure that "requesting carriers [have] maximum flexibility to interconnect their own facilities" with those of the incumbent LEC.[483] Competitors take issue with Verizon's subloop offering claiming that Verizon limits subloops to "metallic distribution pairs/facilities;" restricts competitor subloop access to interconnection at the feeder distribution interface (FDI); and refuses to allow competitors to collocate equipment inside remote terminals for purposes of accessing subloops.[484]

156. We find that, consistent with our rules, Verizon allows collocation inside remote terminals on a space-available basis.[485] Where space is unavailable, competitive LECs may deploy an adjacent cabinet to access subloops through an interconnecting cable.[486] Furthermore, Verizon does not limit competitive LEC access to subloops to only metallic distribution facilities. Rather, Verizon allows requesting carrier to obtain access to subloop facilities regardless of the transmission medium.[487] Finally, Verizon has demonstrated that competitive

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[480] *See id.*

[481] The average repeat trouble report rate for the period September through December is 16.3 for competing LECs compared to 21.5 for Verizon retail. *See* MR 5-01 (Maintenance, 2-Wire DSL Services, percent Repeat Trouble Reports within 30 Days). We take additional comfort in Verizon's network trouble report rates for DSL loops in Massachusetts. These results further support our conclusion that Verizon provides competing carriers with maintenance and repair service in substantially the same time and manner as Verizon's own retail operations. Competing carriers experienced a trouble report rate of 1.9 percent for the months of September through December 2000 while Verizon experienced trouble report rates at a comparable 1.3 percent rate. *See* MR 2-02/2-03 (Maintenance, 2-Wire xDSL Services, Network Trouble Report Rate, Loop; Network Trouble Report Rate, Central Office).

[482] Although nondiscriminatory access to subloops technically falls under checklist item 2, we treat subloops in this section because it is logically related to the provision of unbundled loops.

[483] *UNE Remand Order* at para. 206. The Commission held that technically feasible points of interconnection near a customer premises could include poles or pedestals, the NID or the minimum point of entry (MPOE), the feeder distribution interface (FDI) or a remote terminal or environmentally controlled vault. *Id.*

[484] Rhythms Massachusetts I Comments at 12; ALTS Massachusetts I Comments at 16-17; Covad Massachusetts I Comments at 25-28.

[485] *See* Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl. at para. 44.

[486] *Id.*

[487] Verizon offers "feeder subloops over DS1 or DS3 transmission paths which may be either fiber or copper depending upon facilities availability." *See* Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl. at para. (continued....)

LECs may gain access to subloops at technically feasible points of interconnection other than the FDI.[488] For these reasons, we cannot agree with the commenters' claims that Verizon limits access to subloop unbundled network elements in violation of the requirements of section 271.

d. High Capacity Loop Performance

157. We find that Verizon's performance for high capacity loops does not result in a finding of noncompliance with checklist item four. We look to the totality of the circumstances in evaluating Verizon's performance in providing loops in accordance with the checklist requirements.[489] During the period September through November, although volumes are low, carrier-to-carrier data show that Verizon misses a comparable number of installation appointments for competitors and retail alike.[490] Verizon's performance data for its maintenance and repair functions for high capacity loops show parity.[491] Like other types of loops we consider, Verizon states that competing carrier behavior skews its high capacity loop performance.[492] We recognize that Verizon's performance on other measures with respect to

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137. *Id.* at Attach. P (stating that a 'Feeder Sub-Loop' means a DS1-DS3 transmission path over a feeder facility in Verizon's network).

[488] Verizon specifically identifies the NID and the MPOE as possible alternative points for competing LECs to obtain access to subloops. *See* Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl. at para. 138.

[489] In so doing, we do not consider Verizon's special access services performance. OnSite Access specifically criticizes Verizon's performance in provisioning high capacity "loops" in New York and Massachusetts. *See also* On Site Access Massachusetts I Comments at 20-21 (citing Leonard Kriss Decl. at 2-6). CompTel lodges a related complaint alleging that Verizon has not demonstrated that it can comply with the competitive checklist at the same time it meets its obligation to provision access services and operate its long distance affiliate consistent with section 272's nondiscrimination requirements. *See* CompTel Massachusetts II Comments at 1-3. Criticisms of Verizon's provisioning of special access service are not relevant to compliance with checklist item four. As we held in the *SWBT Texas* and *Bell Atlantic New York Orders*, we do not consider the provision of special access services pursuant to tariffs for purposes of determining checklist compliance. *SWBT Texas Order*, 15 FCC Rcd at 18504, para. 335; *Bell Atlantic New York Order*, 15 FCC Rcd at 4126-27, para. 340. Checklist item 4 does not address itself to retail services Verizon provides to competitors such as special access services.

[490] *See* PR 4-01 (UNE POTS/Special Services, Percent Missed Appointments – Verizon – Total). In September and October, Verizon did not miss any installation appointments for high-capacity loops and missed 18.39 percent of its installation appointments in November. In November, the number of observations in this metric is 310 competitive LEC installations. However, this measure aggregates EEL and interoffice facilities installations. The comparable numbers over the same period for Verizon retail were 2.78, 1.90 and 1.43 percent. *See id.*

[491] For the period September through January, the Mean Time to Repair measure shows that Verizon troubles are resolved in 8.38 hours compared to 8.40 hours for competitive LECs during the same period. *See* MR 4-01 (Maintenance, UNE POTS, Special Services, Mean Time to Repair, Total).

[492] Verizon examined a sample of the January orders that were included in the Average Interval Offered measure (PR 1-07) and discovered that the vast majority of the orders should have been "X" coded because the competitive LEC asked for an interval longer than the standard interval. Because the orders were incorrectly "W" coded, Verizon states that they were included in the results and skewed the reported results. *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-09 (filed February 28, 2001) (*Verizon Feb. 28 Ex Parte Letter*).

provisioning high capacity loops has been poor in Massachusetts.[493] High capacity loops in Massachusetts represent only approximately 0.8 percent of all unbundled loops provisioned to competitors.[494] Verizon performs at an acceptable level for most types of unbundled local loops. Given the low volumes of orders for high capacity loops in Massachusetts we cannot find that Verizon's performance for high capacity loops results in a finding of noncompliance for all loop types.[495]

e. Voice Grade Loops

158. We agree with the Massachusetts Department that Verizon demonstrates that it provides voice grade unbundled loops in a nondiscriminatory manner.[496] This category includes hot cut loops and new stand-alone loops. We discuss each of these categories separately below.

(i) Hot Cut Loop Provisioning

159. *Hot Cut Process.* Verizon's hot cut process is designed to move a loop that is in service from Verizon's switch to a competitor's switch. Competitors can request that Verizon complete the hot cut within a specific appointment window and Verizon has committed to ensuring that the customer will not be out of service for more than five minutes during the hot cut.[497] Verizon's hot cut process includes a number of steps that Verizon and competitors must take during the days preceding the hot cut. These steps include pre-wiring a cross-connection from the competitor's collocation arrangement to Verizon's main distribution frame prior to the committed date and time of the hot cut, setting the appropriate Local Number Portability triggers and confirming with the competitor that the loop is to be cut over to a competitor's switch.[498]

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[493] *See e.g.*, PR 2-07 (Special Services – Provisioning, Av. Interval Completed – DS-1); PR 6-01 (Special Services – Provisioning, percent Installation Troubles reported within 30 Days).

[494] Verizon states that during the period September through January, observations for PR 2-07 totaled 176 loops. Verizon notes that the high-capacity loop volumes the Commission considered in the *SWBT Kansas/Oklahoma Order* was even higher over the four month period the Commission considered in that proceeding. *See Verizon Feb. 28 Ex Parte Letter.* Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-09 (filed February 28, 2001). In the period July through October, SWBT received 210 orders for DS-1 loops in Oklahoma. *SWBT Kansas/Oklahoma Order* at para. 213 n.616.

[495] Although we recognize specific performance problems for high capacity loops, we do not find that these disparities in and of themselves are enough to render a finding of checklist noncompliance because of the small numbers of DS-1 loops requested by competing carriers. We stress, however, that we will be actively monitoring Verizon's performance in this area and we will take swift and appropriate enforcement action in the event that Verizon's provisioning performance for high capacity loops deteriorates. *See infra* Part IX.

[496] *See* Massachusetts Department Massachusetts I Comments at 279.

[497] *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 81.

[498] *Id.* at Attach. J.

160. *Hot Cut Timeliness and Quality.* We find that Verizon demonstrates that it provides hot cuts in Massachusetts in accordance with checklist item 4 because it provides hot cuts in a timely manner, at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.[499] Verizon reports data on the percentage of hot cut orders completed within the cut-over window specified by the requesting competing carriers on an LSR.

161. In the instant application, Verizon demonstrates that its hot cut performance has returned to acceptable pre-strike levels which afford a competitor a meaningful opportunity to compete.[500] During October and November 2000, Verizon completed on average 96 percent of hot cut orders on time. During the same time period, less than 0.8 of the hot cut lines experienced installation troubles within 7 days.[501] The Massachusetts Department engaged in a reconciliation of various Verizon self-reported hot cut performance measurement data in the context of the state section 271 proceeding.[502] Relying upon the results of its carrier-specific data reconciliation, the Massachusetts Department concluded that "there is no need for further data reconciliation" and concluded that Verizon provides sufficient on-time hot cut performance to meet the requirements of checklist item 4.[503] Because the Massachusetts Department performed a searching and specific data reconciliation of Verizon's hot cut performance, we accord its resolution of this issue substantial weight. We note that no commenter challenges Verizon's hot-cut conversion performance in this phase of the proceeding. We thus conclude that the record demonstrates that the hot cut performance Verizon makes available to competing carriers in Massachusetts minimizes service disruptions and affords a competitor a meaningful opportunity to compete.

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[499] We evaluate the PR 9-01 (Provisioning, POTS, percent On-Time Performance – Hot Cut); PR 6-02 (Provisioning, POTS, percent Installation Troubles reported within 7 Days – Hot Cut Loop) measures in Massachusetts.

[500] *See* Verizon Massachusetts I Guerard/Canny Decl. at Attach. E; PR 9-01 (Provisioning POTS, percent On Time Performance – Hot Cuts). For May, PR 9-01 showed 98.45 percent on time performance, for June, PR 9-01 showed 99.63 percent on time performance and for July, PR 9-01 showed 99.19 percent on time performance. KPMG reviewed Verizon's hot cut performance between October 1999 and January 2000 and found that 98 percent of hot cuts were completed on-time. *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 83 (citing KPMG Report at 198-99 (POP-6-2-6). The Massachusetts Department characterizes Verizon's hot cut timeliness performance as "excellent" and notes that unlike Verizon's performance in New York prior to filing its application with this Commission, Verizon bettered the 95 percent "on time" benchmark in Massachusetts every month from January through July 2000. *See* Massachusetts Department Comments at 284-85.

[501] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 5.

[502] In response to criticism from one carrier, AT&T, regarding the accuracy of Verizon's hot cut data, the Massachusetts Department engaged in a reconciliation of various Verizon self-reported hot cut performance measurement data in the context of the state section 271 proceeding. Massachusetts Department Massachusetts I Comments at 288. AT&T does not criticize Verizon's hot cut performance in this proceeding.

[503] Massachusetts Department Massachusetts I Comments at 288.

(ii) New Stand-Alone Loop Provisioning

162. We agree with the Massachusetts Department that Verizon demonstrates that it provisions new unbundled stand-alone voice grade loops in accordance with the requirements of checklist item 4.[504] When Verizon does not presently service the customer on the line in question, a hot cut loop is not required. In such instances, a competing carrier obtains a new stand-alone loop from Verizon which dispatches a technician to the customer's premises to complete the installation. We find that Verizon demonstrates that it provisions and maintains new stand-alone voice grade loops for competing carriers in substantially the same time and manner that it installs new voice grade loops for its own retail operations.

163. *Provisioning Timeliness and Quality, Maintenance and Repair.* Verizon demonstrates that it delivers new voice grade loops in a timely manner and at acceptable levels of quality. Verizon also demonstrates that it provides maintenance and repair functions for such loops in a nondiscriminatory manner. No party specifically criticizes Verizon's new, stand-alone loop provisioning performance. As in previous section 271 orders, in reviewing Verizon's performance we examine the average completion interval, missed installation appointments, trouble reports within 7 days and mean time to repair measures. Specifically, Verizon's performance results for the months of September, October, November and December 2000 also demonstrate parity for the average completion interval for new loop orders of 1-5 lines measure.[505] During the same period, Verizon's missed installation appointment rate for new voice loops also demonstrated parity.[506] Furthermore, Verizon appears to be providing new voice grade loops to competitors at an acceptable level of quality. Based on the trouble report within 7 days measure, Verizon provided installation at the same level of quality for competitive LECs compared to retail during the months of September, October, November and December 2000.[507] Verizon's mean time to repair measures show that it is providing maintenance and repair functions for new loops to competitors in a nondiscriminatory manner.[508]

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[504] *See id.* at 256.

[505] In September, Verizon completed POTS loop orders of 1-5 lines in 8.82 for Verizon retail and 8.53 for competitors. The comparable numbers for October were 5.81 for Verizon retail affiliate and 9.22 and 5.45 for Verizon retail and 4.86 for competitors in December. *See* PR 2-03 (Provisioning, Average Completed Interval, Dispatch 1-5 lines – Loop).

[506] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at Attach. A. The September to November missed appointment rate, PR 4-04, is 8.13 percent for Verizon and 7.09 percent for [competing carriers]. The December rate was 6.96 for Verizon and 10.31 for competing LECs. *See* PR 4-04 (Provisioning, POTS, percent Missed Appointments, Verizon, Dispatch, Loop – New).

[507] The percentage of installation troubles reported on voice grade loops for competitors were 1.13 percent in September, .98 percent in October, .80 percent in November and .74 in December. The comparable numbers for Verizon were 2.39 in September, 1.87 in October, 1.77 in November and 1.60 in December. *See* PR 6-02 (Provisioning, POTS, percent Installation Troubles reported within 7 Days – Loop).

[508] Results for the mean time to repair measure, Mean Time to Repair – Total, in the months of September, October, November and December show parity. Competitor troubles were repaired in 19.77 hours in September, 18.52 hours in October, 19.00 hours in November and 15.38 hrs in December. Verizon's troubles were repaired in (continued....)

f. Line Sharing

(i) Background

164. On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[509] In the *Line Sharing Order* the Commission acknowledged that it could take as long as 180 days from the release date for incumbent LECs to develop and deploy the modifications necessary to implement this new requirement. This 180 day period concluded on June 6, 2000, approximately six months before Verizon filed its Massachusetts II application. In the *SWBT Kansas/Oklahoma Order*, the Commission provided BOC-applicants guidance concerning the required section 271 line sharing showing necessary to meet a BOC's burden of proof. Specifically, the Commission stated that "a successful BOC-applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases."[510] The Commission also held that "to the extent that a BOC applicant relies upon commercial data from another state to establish that it is providing nondiscriminatory access to line shared loops in a state where it requests section 271 authority, it should provide evidence that the OSS and provisioning processes are identical.[511] Verizon must demonstrate, therefore, that it provides nondiscriminatory access to the unbundled high-frequency portion of the loop to gain section 271 approval in Massachusetts.

165. Verizon proposes to demonstrate compliance with its line sharing obligation with evidence that it has signed nine interconnection agreements in Massachusetts with line sharing provisions. Verizon also notes that the Massachusetts Department recently approved its line sharing tariffs, with only minor amendments.[512] It further states that it is able to handle

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21.63 hours in September, 17.68 hours in October, 17.95 hours in November and 16.98 hrs in December. *See* MR 4-01 (Maintenance, POTS Loop, Mean Time to Repair – Total).

[509] *See Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of1996*, Third Report and Order, CC Docket No. 98-147, Fourth Report and Order, CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*) (*pet. for rehearing pending sub nom. USTA v. FCC*, DC Cir. No. 00-102 (filed Jan 18, 2000)).

[510] *SWBT Kansas/Oklahoma Order* at para. 215.

[511] *SWBT Kansas/Oklahoma Order* at para. 215. The Commission further stated that to "the extent its OSS provisioning processes are not identical, a BOC applicant bears the burden of showing that whatever differences are present are not material." *Id.*

[512] Verizon offers competing carriers two arrangements for line sharing pursuant to its interconnection agreements and line sharing tariff. The first arrangement provides a competing carrier with the ability to install, own and maintain the splitter in the competing carrier's own collocation arrangement. In the second arrangement, a competitive LEC-owned splitter is located in Verizon's central office space and is maintained by Verizon. *See* Verizon Massachusetts I Ruesterholz/Lacouture Decl. at para. 118. As part of its *Phase III* proceeding, the (continued....)

"considerable volumes of line sharing orders" by utilizing its successful New York provisioning methods and procedures in Massachusetts.[513] Finally, through the New York DSL collaborative, it has worked with competing carriers to identify and resolve various technical and operational issues associated with line sharing in Massachusetts.[514] Competing carriers contest Verizon's operational readiness to offer line sharing and Verizon's ability to offer line sharing on a nondiscriminatory basis.[515]

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Massachusetts Department has directed Verizon to implement OSS enhancements to support line sharing by April 1, 2001. The Massachusetts Department, however, found that the fact that line sharing orders currently require manual processing does not prevent it from finding that Verizon satisfies its nondiscrimination obligation. *See* Massachusetts Department Massachusetts I Comments at 328. Covad contests Verizon's showing that it offers line sharing capability over fiber-fed loops. Covad Massachusetts II Comments at 35. Verizon responds that it satisfies the Commission's requirements through remote terminal collocation and unbundled subloop offerings. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at paras. 160-65. We note that the issue of line sharing over fiber-fed loops is the subject of a *Further Notice of Proposed Rulemaking* at the Commission. *See* Line Sharing Reconsideration Order at para. 12; *see also accompanying*, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98.

[513] Verizon Massachusetts I Ruesterholz/Lacouture Decl. at para. 114. In its initial application Verizon stated that it has provisioned over 7,000 line sharing orders in New York, the majority of which were for its own data affiliate. *See id.* Verizon's Massachusetts II application shows that Verizon has processed roughly 10 times the number of line sharing orders for its retail affiliate compared to line sharing orders processed for unaffiliated competing LECs.

[514] Verizon Massachusetts I Ruesterholz/Lacouture Decl. at para. 115. For example, Verizon asked competing carriers to identify their priority wire centers throughout Massachusetts by March 13, 2000 so that Verizon could prioritize the central office wiring work necessary to accommodate line sharing requests. *Id.* at 127.

[515] *See* Covad Massachusetts II Comments at 7-8; Rhythms Massachusetts II Comments at 6; CIX Massachusetts II Comments at 7; USISPA Massachusetts II Reply at 9; AT&T Massachusetts II Reply at 25; Covad Massachusetts I Comments at 28; WorldCom Massachusetts I Comments at 62; Rhythms Massachusetts I Reply at 18; ALTS Massachusetts I Reply at 36. On March 14, 2001, Verizon filed an *ex parte* letter in this proceeding stating that Verizon has "taken steps to address the outstanding issues" between Rhythms and Verizon and accordingly, Rhythms "no longer opposes Verizon's Application for section 271 authority in Massachusetts." Letter from Kimberly A. Scardino, Assistant General Counsel, Rhythms to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 14, 2001). Rhythms had argued that where Verizon completed pre-wiring collocation work, in some instances it was wired incorrectly or the cable and pair assignment were not entered into Verizon's inventory system. *See* Rhythms Massachusetts II Comments, Williams Decl. at para. 39. Covad claims that Verizon cannot "provision a single line shared order in a central office while at the same time Verizon was shutting off line-sharing ready central offices for its own retail service because orders are flowing through beyond capacity." Letter from Jason D. Oxman, Senior Government Affairs Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 at 1 (filed Feb. 21, 2000); *see also* Letter from Jason D. Oxman, Senior Government Affairs Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 at 1 (filed Nov. 28, 2000) (arguing that walkthroughs of Verizon central offices showed incomplete splitter installations as of the week of November 20, 2000). Verizon responds that Covad and Rhythms are the only competing carriers that submitted their line sharing plans to Verizon's project management plan and that installation of splitters was performed on a timely basis. Verizon Massachusetts I Lacouture/Ruesterholz Decl. at paras. 112-13. The Massachusetts Department found that whatever delays resulted from splitter installation were attributable to competing carriers, specifically Covad. Massachusetts Department Massachusetts I Comments at 327.

(ii) Discussion

166. We find that Verizon demonstrates that it provides nondiscriminatory access to the high-frequency portion of the loop. Specifically, the most probative evidence that Verizon submits to support this point is actual commercial usage.[516] The Commission stated in the *SWBT Kansas/Oklahoma Order* that "a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates."[517] Our approach in this case is to rely primarily on the limited commercial data Verizon has submitted from its Massachusetts operations. Because line sharing volumes in Massachusetts have escalated only recently, however, we look to Verizon's line sharing performance in New York as well, where line sharing volumes are larger for additional evidence that Verizon is providing nondiscriminatory access to line sharing.[518] As discussed above, we conclude that Verizon's line sharing OSS in New York and Massachusetts uses the same systems and offers the same functionality.[519] Accordingly, we shall consider Verizon's commercial line sharing performance in New York as a supplement to Verizon's limited commercial line sharing performance in Massachusetts.

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[516] *See supra* Part II.A.

[517] *See SWBT Kansas/Oklahoma Order* at para. 215.

[518] From September 2000 through January 2001, Verizon has provided a total of approximately 51,000 line shared loops in Massachusetts including those for VADI. During December and January, Verizon completed nearly 500 line shared loops for competitors in Massachusetts. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 103. In New York, Verizon has processed 110,000 line shared orders including those provided to VADI. *See id* at para. 28.

[519] *See supra* Part IV.A.2.b. The Massachusetts Department concluded that the "systems and processes in Massachusetts are comparable to, indeed the very same as, those found in New York." Massachusetts Department Massachusetts II Comments at 35; *see also* Verizon Massachusetts II Sapienza/Mulcahy Decl. App. A, Attach. B. PwC also investigated whether VADI has the same interface options as unaffiliated competitive LECs and whether Verizon treats transactions it receives from VADI the same as transactions it receives from unaffiliated competitive LECs. PwC confirmed that VADI offers DSL service using line sharing purchased from Verizon using the same interfaces that are available to other unaffiliated competitive LECs. VADI generally uses CORBA for pre-ordering, EDI for ordering and the Web GUI for maintenance and repair. In addition, PwC confirmed that once Verizon receives the orders over the interface, it provisions a VADI order using the same systems and processes as it uses to provision an order for any other competitive LEC. Likewise, PwC reports that VADI's maintenance and repair requests are handled by Verizon in the same manner as a request from an unaffiliated competitive LEC. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl at para. 143. Verizon does, however, reveal that a "small percentage" of VADI's New York line sharing orders are distributed by a team leader in the Boston xDSL/Line Sharing Center to a group of approximately 35 temporary service order representatives located in New York. Verizon contends that it retained these temporary representatives to clear a backlog of retail DSL orders in New York that existed before VADI was operational. Verizon Massachusetts II Lacouture/Ruesterholz Supp. Decl. at para. 154. This slight difference in OSS functionality does not alter our conclusion that the OSS in New York and Massachusetts are identical for purposes of the Commission's consideration of New York line sharing commercial data.

167. *Operational Readiness.* Competitive LECs take issue with Verizon's ability to wire adequately central offices to offer line sharing.[520] Covad specifically contests Verizon's representation that it was operationally ready to provision line sharing for all splitter collocation arrangements in place as of December 1, 2000.[521] In response, Verizon states that it recognized central office wiring problems that delayed the readiness of certain offices and committed to reinspections of all line-sharing related central office work beginning in December 2000.[522] The Department of Justice recognizes that "Verizon is making efforts to resolve its line sharing implementation difficulties" and the Massachusetts Department urges us to find that Verizon provides nondiscriminatory access to the high frequency portion of the loop.[523]

168. Verizon has now completed all the quality inspections and has "taken the necessary corrective action for all of the line sharing-related collocation arrangements that were in place as of December 1, 2000 . . . in both Massachusetts and New York."[524] Verizon has also agreed to implement the elements of its quality inspection process into the normal collocation inspection process and thus, new line sharing-related collocation arrangements will be subject to

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[520] *See* Covad Massachusetts II Comments at 6; Rhythms Massachusetts II Comments at 8. Rhythms contends that Verizon's explanation of defective splitter installation could not apply to it because Rhythms has elected to place splitter in Rhythms collocation spaces and the only remaining central office wiring work to be done is the re-termination of existing 200 cable and pair, a process that Rhythms claims is simple and accomplished quickly. Rhythms Massachusetts II Comments at 8.

[521] Covad argues that it requested that 55 central offices in Massachusetts offer line sharing capability. As of February 21, 2000, Covad has successfully provisioned line sharing in 44 of those 55 offices and it has provided the CLLI codes for those offices where Covad has pending orders. *See* Covad Massachusetts II Reply at 19; *see also* Rhythms Massachusetts II Comments at 8. Verizon responds that only two of the offices Covad initially complained of are in Massachusetts and of these two, it has provisioned Covad orders in a number of the central offices which are relevant to this application. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 131. As to the status of contested offices in New York, Verizon responds that Covad's claim that its "Failed Dispatch Report" shows discrimination is misplaced because joint investigations at these central offices show that the orders have failed due to operational and other problems on Covad's part. *Id.* at 133-35. Covad concedes that for some of its collocation arrangements, it is possible that "Covad has not yet installed DSLAM cards in a particular office to support line sharing capability" to conserve scarce resources but nonetheless argues that regardless of whether such equipment is installed, Verizon has an obligation to ensure that the office is line-sharing ready. Covad Massachusetts II Reply at 20 n.35. Verizon offers a similar response to Rhythm's allegations that several Massachusetts central offices are not line sharing ready. Verizon contends that the central offices in question have been re-examined and it has not found any wiring problems. Verizon further responds that its records show that of the LSRs submitted by Rhythms only a small proportion of the central offices in Massachusetts are at issue. Of these offices, Verizon claims that it has completed line sharing orders for Rhythms in nearly all of the central offices at issue in Massachusetts. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at paras. 143-145.

[522] Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 138.

[523] Massachusetts Department Massachusetts II Comments at 36-38; Department of Justice Massachusetts II Evaluation at 14.

[524] *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para 126; *see also* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed February 23, 2001). Covad represents that it submitted "every single one of its linesharing collocation applications in Massachusetts in April 2000." Covad Massachusetts II Reply at 22.

this inspection process as well.[525] It therefore appears that Verizon instituted its quality inspection process and completed any necessary corrective action as it became aware of central office wiring issues described by competitive LECs.[526]

169. *Line Sharing Performance Data.* Verizon has supplied a limited amount of Massachusetts commercial data for the period September through November 2000 in support of its line sharing showing.[527] To show that the data are reliable, Verizon engaged PwC to replicate its carrier-to-carrier results and 34 line sharing measures for the period September through November, the results of which, according to PwC, largely confirm the results presented by Verizon.[528] We recognize the Department of Justice's concerns that some of the line sharing completion interval data may be inaccurate.[529] Like the Massachusetts Department, however, we conclude that the data adequately show that Verizon has met its line sharing obligation.[530] The

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[525] *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed February 22, 2001). Rhythms argues that Verizon did not institute its quality inspection audit process soon enough. *See* Rhythms Massachusetts II Comments at 8. Verizon responds that its "implemented the inspection process as soon as it became aware of the start-up issues." Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 37.

[526] *See* Verizon Massachusetts II Lacouture/Ruesterholz. Reply Decl. at para. 137. Verizon has continued to address these issues, particularly with Covad. Recent reports suggest that Verizon has largely, if not completely, resolved central office wiring issues that have affected the deployment of line-shared services by competing carriers. *See* Letter from Jason Oxman, Senior Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9, (filed April 6, 2001) (stating that "Covad verified, in Massachusetts, that Verizon honored its commitment to clear all infrastructure related troubles, throughout the former Bell Atlantic footprint, by February 15, 2001").

[527] *See* Verizon Massachusetts II Sapienza/Mulcahy Decl. at para. 13.

[528] *See id.* (finding that for the majority of the line sharing measurements, PwC's numbers matched Verizon's and that for the remaining measurements, the number of observations was consistent and Verizon's reported performance was within one percent).

[529] While PwC confirmed that Verizon accurately calculated the missed appointment rates under the terms of the new consensus measurements, the reported results may overstate Verizon's performance. Verizon's technicians may have marked some competitive LEC orders as completed after they had tested the line and received a working dialtone, even though the splitter to enable DSL serve on that line may not initially have been installed correctly. Verizon however has committed to adopt additional testing procedures to ensure that line sharing orders are not marked completed unless working splitters are in place. *See* Verizon Massachusetts II Application at 30 n.25. The Department of Justice states that this problem "affected those performance measures calculated using the provisioning completion date: PR-2 (average interval completed); PR 3-10 (percent completed within x days); and PR-4 (missed appointments)." Department of Justice Massachusetts II Evaluation at 13 n.54. Competing carriers also contest Verizon's line sharing showing and argue that the current record is insufficient to support a finding of nondiscrimination. *See* Covad Massachusetts II Comments at 8; Rhythms Massachusetts II Comments at 6; CIX Massachusetts II Comments at 24.

[530] The Massachusetts Department notes that Verizon states that for the percent missed appointments – dispatch measure, PR 4-05, "Verizon may not have included those instances where Verizon's technician performed the central office work typically required for xDSL loops but failed to confirm that a splitter . . . was functioning on the line." Massachusetts Department Massachusetts II Comments at 37. The Massachusetts Department found that Verizon's manual processing of line sharing orders "will be short-lived and, even absent complete line sharing order flow-(continued....)

New York Commission only recently directed Verizon to capture its xDSL performance in disaggregated line sharing measures. In this case, we decline to hold isolated inaccuracies against Verizon where the method of reporting and collecting data is new and the underlying cause of the distortion has been addressed by Verizon.[531] In this context, we believe it is appropriate to credit Verizon's submission of Massachusetts commercial line sharing data, supplemented by data from New York, when making our determination that Verizon provides nondiscriminatory access to the high-frequency portion of the loop. Specifically, we are convinced that the flawed timeliness measures provide evidence of the time it takes Verizon to provision line shared loops.

170. *Provisioning Timeliness.* Overall, Verizon adequately demonstrates that it provisions line sharing to competitors in substantially the same time as it does for itself. We note at the outset that we give no decisional weight to Verizon's missed appointment data for line sharing in New York and Massachusetts. Although the data on their face show that Verizon meets the parity standard[532] we agree with the Department of Justice, the Massachusetts Department and even Verizon itself, that the measure may be flawed.[533] Specifically, Verizon states that this measure may not have captured those instances where a Verizon technician performed the central office work typically required for xDSL loops but failed to confirm that a splitter was functioning on the line.[534] Parties criticizing the completion measures appear to argue that because a Verizon technician did not test for a functioning splitter, the quality – rather than the timeliness – of Verizon's installation work is unacceptable.[535] While we recognize that performing the additional work required to test whether a splitter was functioning on the line could have an impact on the completion measures, we find that the data provided by Verizon are probative of the time it takes Verizon's technicians to install line-shared service.[536] We are

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through" Verizon can meet foreseeable demand for line sharing. Massachusetts Department Massachusetts I Comments at 327.

[531] Verizon now performs a "splitter signature test" which is used "to determine whether the splitter, which is necessary for line sharing, is functioning on the line." Verizon Massachusetts II Reply at 23.

[532] In September, October, and November in Massachusetts, Verizon did not miss any competitive LEC line sharing appointments. In December, Verizon missed approximately one percent of competitive LEC appointments. Verizon has supplied provisioning information for its separate data affiliate, VADI, only for the month of November. In November, these results demonstrate parity. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at Attach. JJ.

[533] Verizon Massachusetts II Application at 30 n.25. The Massachusetts Department believes that the measure is sufficiently flawed to merit exclusion of this information as evidence that Verizon is providing nondiscriminatory access to line sharing. Massachusetts Department Massachusetts II Comments at 37. The Department of Justice agrees and characterizes the measure as "substantially undermined" by the inaccuracies captured in the measure. *Id.* at 13.

[534] Verizon Massachusetts II Brief at 30 n.25. Without such testing, even though technicians have confirmed dial-tone to and from the splitter, Verizon is unable to confirm that a splitter is properly functioning on a line.

[535] *See* Covad Massachusetts II Comments at 8; *see also* Department of Justice Massachusetts II Evaluation at 13.

[536] Even with the miscoding, the measures describe accurately the amount of time Verizon technicians required to install line-shared service without the added task of performing a splitter signature test. Because failure to install a (continued....)

therefore not prepared to dismiss all of the evidence of commercial usage as USISPA suggests because the inaccuracies appear to be limited to the completion measures and are not so pervasive as to render Verizon's line sharing data completely untrustworthy.[537] Furthermore, as Verizon became aware of this problem, it addressed this data integrity issue by properly instructing its installation personnel to code orders as complete after properly functioning splitters are working on a given line, implementing its quality inspections for line sharing-related collocation work and performing a splitter signature test to ensure that the quality of its installation work was acceptable. Indeed, the record shows that during the period of time not affected by the distortion, Verizon's timeliness performance demonstrates parity.[538]

171. The average completion interval data for line sharing show parity.[539] While Verizon has supplied no retail information as a basis for comparison during the months of September and October for Massachusetts data, the average completion interval measure in November shows that Verizon required slightly more than six days to provision line-shared loops to competitors compared to over seven days for itself.[540] In New York, for the months of September and November, performance for competitive LECs is superior to that provided to VADI.[541] Although these data show that Verizon is performing at parity we note that Verizon's

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functioning splitter on a line could prevent line-shared service, the lack of a splitter test suggests that the quality of the work, rather than its timeliness, was affected.

[537] We disagree with USISPA that the line sharing "measurements simply do not exist." USISPA Massachusetts II Reply at 6.

[538] Verizon remedied this miscoding problem by December 15, 2000. In Massachusetts, the missed appointment measure in January shows that Verizon missed only one percent of competitive LEC line sharing installation appointments. Verizon argues that the January results show that "the impact on the performance measures caused by the lack of the splitter signature test was minimal." Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 19, 2001). The December results also show that Verizon misses less than one percent of installation appointments for competing carrier line sharing orders. *See id.*

[539] We acknowledge that the failure of Verizon's technicians to test whether a splitter was functioning on the line may also have affected the average completion interval. As discussed above, Verizon has addressed this data integrity issue going forward and has instituted a quality inspection program to ensure that competitive LECs receive acceptable installation quality performance.

[540] The Massachusetts average completion interval in November was 6.37 days for competitive LECs compared to 7.53 days for VADI. In September, Verizon completed competitive LEC line sharing orders in 6.47 days and 6.29 days in October. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 159 & Attach. NN. Verizon has also presented data for another interval measure, the percent completed within 6 days measure. In New York, from September through November, Verizon completed 74.87 percent of competitive LEC orders and 71.60 percent of VADI orders within six days, where a six day interval was requested. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 159 & Attach. OO. Verizon contends that a majority of the competitive LEC orders not completed within six days are completed within seven days. In Massachusetts, over 93 percent of the competitive LEC line sharing orders in the period September through November were completed within seven days. *See id.*

[541] For the months of September, October and November, the average completion interval for competitive LECs in New York was 5.59, 6.4, and 6.42 days compared to 9.15, 6.2, 6.02 days for VADI. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at 159, Attach. MM.

performance is generally above the 5-day interval established by the Massachusetts Department even as the current interval is scheduled to be reduced to four days in the near future.[542] It is encouraging that Verizon is moving toward meeting this state-approved provisioning interval while it gains additional experience provisioning commercial volumes of line shared orders.

172. *Installation Quality & Maintenance and Repair.* Based on the commercial data presented in Massachusetts, Verizon appears to be providing line shared loops at acceptable levels of quality. Although VADI did not submit any trouble reports within thirty days of installation in the month of November, the competitive LEC rate was 1 percent and in September and October 2000, competitive LECs did not report any troubles on line-shared loops captured by the measures.[543] In New York, from September through November, the weighted average of installation troubles for competitive LECs was 1.70 percent compared to less than one percent for VADI.[544]

173. With respect to maintenance and repair, Verizon repairs loops for competitors in less time than it takes to repair retail line-shared loops. In November, the only month for which Verizon provided such data in Massachusetts, Verizon repaired competing carrier line-shared loops in just over three hours.[545] Verizon represents that it took significantly longer to repair loops for VADI – over 25 hours.[546] In New York, Verizon shows that the mean time to repair is

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[542] Verizon has introduced flow through capability for line-shared ADSL orders and will accomplish line sharing provisioning for most orders without the time necessary to dispatch a technician to install service. Given the fact that line sharing provisioning is largely accomplished without manual intervention, the Massachusetts Department ordered Verizon to reduce its line sharing interval from 6 days to five days effective November 27, 2000. Massachusetts Department Massachusetts I Comments at 36 n.110; *see also* CIX Massachusetts I Comments at 25. Verizon states that its 5-day interval tariff for line sharing orders of 1-9 lines went into effect on November 27, 2000 and Verizon "is now complying with the new interval." *See* D.T.E. Tariff No. 17, Part A, Section 3.2.10. Additionally, Verizon has committed to file, as required by the Massachusetts Department, a tariff reducing the provisioning interval by an additional business day after the April 1st deadline for fully implementing certain OSS upgrades. *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 164.

[543] Massachusetts Department Massachusetts II Comments at 36. We are mindful that, because Verizon has committed to resolving line sharing troubles through a coordinated process, it addresses some number of line sharing troubles "without the receipt of a trouble ticket" and concedes that the "small number of maintenance and repair requests reported is likely attributable to that interim process." *See* Verizon Massachusetts II Lacouture/Ruesterholz Supp. Decl. at para. 156.

[544] Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 166 & Attach. SS. Covad argues that Verizon's line sharing I-code data are skewed because Verizon classifies troubles associated with splitter wiring as "CPE troubles" which show up in the performance measure as competitive LEC-caused troubles. Covad Massachusetts II Reply at 15. Verizon responds that Covad mistakenly assumes that Verizon's trouble designation codes are designed to assign blame for a trouble ticket to Verizon or a competitive LEC. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 119. The codes at issue are designed to indicate whether the trouble is caused by an item in the Verizon or competitive LEC network. Because splitters are not part of Verizon's network Verizon codes splitter troubles accordingly.

[545] *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 71.

[546] *Id.*

comparable to stand-alone xDSL loop repair times and offers competitors nondiscriminatory access to maintenance and repair functions.[547] Verizon also shows that its repair services are performed at acceptable levels of quality.[548] Thus we find that the data suggest that Verizon is providing line-shared loops at an acceptable level of quality and repairing these facilities in a nondiscriminatory manner.

174. Although we have some concerns with the accuracy of Verizon's performance results and the limited volume of competitive LEC orders captured by the measures, we base our decision on measures not affected by such inaccuracies, the replication of other measures by PwC and Verizon's efforts in addressing the central office wiring issues that have impaired the ability of competitive LECs to submit commercial volumes of line sharing orders. Recent efforts by Verizon have substantially, if not completely, addressed the initial central office wiring implementation issues experienced by competitive LECs in Massachusetts.[549] Furthermore, we also note that Verizon has designed a process to address line sharing implementation difficulties going forward.[550]

g. Line Splitting

(i) Background

175. In the *Line Sharing Order on Reconsideration*, the Commission made clear that line splitting is an existing legal obligation and that incumbent LECs must allow competitors to order line splitting immediately, whether or not a fully electronic interface is in place.[551] The Commission further stated that "we expect Bell Operating Companies to demonstrate, in the

[547] During September through November, the mean time to repair for competitive LECs was 16 hours compared to slightly longer than 10 hours for VADI. Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 172. In New York, from September through November, Verizon met more than 92 percent of the repair appointments that did not require a dispatch for both VADI and competitors. Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 170 & Attach. TT.

[548] Verizon also provided the percentage of repeat trouble reports for both competitors and VADI. These data demonstrate that Verizon provides superior service to competitors compared to itself. *See* MR 5-01 (Line Sharing, percent Repeat Troubles w/30 Days).

[549] *See* Letter from Kimberly A. Scardino, Rhythms to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-09 (filed March 2, 2001).

[550] Verizon has designated a single point of contact for each competitive LEC to address line sharing ordering or provisioning processes regardless of whether they arise in Verizon's TISOC, CLPC or RCMC. Verizon is participating in the Commission's "Line Sharing Summit" and is engaged in a dialogue with competitive LECs to further improve the line sharing process. Verizon has also introduced flow through capability on line sharing orders for connections requiring less than three lines. Verizon has also accompanied Covad on site visits of several Massachusetts central offices to address what it terms are several "minor collocation-related issues." *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 139.

[551] Third Report and Order and Order on Reconsideration, CC Docket No. 98-147; Fourth Report and Order on Reconsideration, CC Docket No. 96-98; Third Further Notice of Proposed Rulemaking; CC Docket No. 98-147; Sixth Further Notice of Proposed Rulemaking; CC Docket No. 96-98 (rel. Jan. 19, 2001) at para. 20 n.36.

context of section 271 applications, that they permit line splitting, by providing access to network elements necessary for competing carriers to provide line-split services."[552] We discuss below the steps Verizon has taken to offer line splitting capabilities consistent with the *Line Sharing Order on Reconsideration*.[553]

176. Verizon states that it currently offers the unbundled network elements that would allow line-split services.[554] On February 14, 2001, Verizon issued a statement of policy to accommodate line splitting.[555] Additionally, Verizon has incorporated line splitting contract language reflecting this policy into its Model Interconnection Agreement which it will make immediately available to any carrier who wishes to offer line-split services.[556] Verizon has also demonstrated that it offers competitors nondiscriminatory access to the individual network elements necessary to provide line-split services and that nothing prevent competitors from offering voice and data services over a single unbundled loop.[557] Several competitors contest the adequacy of this language and argue that Verizon is currently not in compliance with the Commission's line sharing and line splitting requirements.[558] These carriers further contend that Verizon has engaged in a pattern of recalcitrant behavior with regard to implementing line sharing and line splitting requirements and the Commission should not credit its promises of future compliance.[559]

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[552] *Id.*

[553] The Massachusetts Department recognizes that Verizon is required to offer line splitting but requests that the Commission "take into account the recent nature of both its and the Department's clarifying Orders on line splitting when reviewing" Verizon's section 271 application. Massachusetts Department Massachusetts II Comments at 41.

[554] *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at 149.

[555] Verizon issued its statement of policy on February 14, 2001, approximately three weeks after this Commission issued the *Line Sharing Reconsideration Order*. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply. Decl. at 154. AT&T argues that Verizon must at least demonstrate it has a nondiscriminatory process in place to support line-split services. AT&T Massachusetts II Reply at 24; *see also* USISPA Massachusetts II Reply at 5; CompTel Massachusetts II Comments at 3-5.

[556] In its line splitting amendment, Verizon commits to offer line splitting consistent with the Commission's *Line Sharing Reconsideration Order* by utilizing Verizon's OSS to order the unbundled network elements necessary to provide line-split services. With regard to migrations of UNE-P customers to line splitting, Verizon commits to follow the implementation schedules, terms, conditions and guidelines established in the ongoing DSL collaborative at the New York Public Service Commission. Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at 154, Attach. Q.

[557] *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 149-58. Verizon further argues that the Commission has already held that Verizon can provide unbundled network elements in combination, and line splitting can be achieved through the combination of unbundled network elements. *See id.* at para. 158.

[558] *See* AT&T Massachusetts II Reply 24; WorldCom Massachusetts II Reply at 12-13; Covad Massachusetts II Reply at 5-6.

[559] AT&T Massachusetts II Reply 24; WorldCom Massachusetts II Reply at 12-13; Covad Massachusetts II Reply at 5-6.

(ii) Discussion

177. Verizon demonstrates that it makes it possible for competing carriers to provide voice and data service over a single loop – *i.e.*, to engage in "line splitting."[560] Specifically, Verizon demonstrates that it has concrete and specific legal obligation to provide line splitting through rates, terms and conditions in interconnection agreements. As a result, a competing carrier may, for instance, provide voice service using UNE-P and, either alone or in conjunction with another carrier, provide xDSL service on that same line.

178. Our recent *Line Sharing Reconsideration Order* is clear: Verizon must permit competing LECs to offer both voice and data services over a single unbundled loop in a line splitting configuration.[561] The Commission also stated that incumbents must make necessary network modifications including access to OSS necessary for the "pre-ordering, ordering, provisioning, maintenance and repair and billing for loops used in line splitting arrangements."[562] As carriers identify operational issues associated with line splitting, the Commission recognized that state collaboratives and change management processes could be used by "incumbent LECs and competing carriers to work together to develop processes and systems to support competing carrier ordering and provisioning of unbundled loops and switching necessary for line splitting."[563]

179. We disagree with WorldCom's contention that Verizon's line-splitting interconnection agreement language limits line splitting to carriers who are collocated in Verizon central offices or that Verizon is taking the position that the UNE-P providers may not line split unless they are collocated.[564] Verizon's contract language, which includes a reference to "collocator to collocator" connections, does not require UNE-P providers to be collocated in Verizon central offices to offer line split services.[565] Rather, UNE-P providers need not obtain collocation in Verizon central offices to offer the voice component of line-split services.

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[560] *Line Sharing Reconsideration Order* at para. 14-25; *SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. § 51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers "to provide any telecommunications service that can be offered by means of that network element").

[561] *Line Sharing Reconsideration Order* at para. 18.

[562] *Id.* at paras. 18-20.

[563] *Id.* at para. 21.

[564] *See* WorldCom Massachusetts II Reply at 13.

[565] *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 23, 2001) (clarifying that voice providers in line splitting arrangements are not required to be collocated). We note that where a competitive LEC purchases an unbundled xDSL-capable loop terminated to its collocation arrangement to provide data service, it may partner with another competitive LEC to provide voice service. In this situation, the data provider may require a connection to the voice provider's collocation arrangement.

180. Verizon's interconnection agreement amendment is also consistent with our *Line Sharing Reconsideration Order*, which requires that incumbent LECs minimize service disruptions to existing voice customers undergoing a transition to line-splitting.[566] For example, where competitive LECs provide data service to existing end user customers and Verizon provides voice service to that customer there is no need to "rearrange" network facilities to provide line-split services.[567] Because no central office wiring changes are necessary in such a conversion from line sharing to line splitting, Verizon is required under our *Line Sharing Reconsideration Order* to develop a streamlined ordering processes for formerly line sharing competitive LECs to enable migrations between line sharing and line splitting that avoid voice and data service disruption and make use of the existing xDSL-capable loop.[568] Such a transition from line sharing to line splitting should occur subject only to charges consistent with the Commission's cost methodology as articulated in the *Local Competition First Report and Order*.[569]

181. We disagree with WorldCom's claim that Verizon's OSS does not comply with our *Line Sharing Reconsideration Order* in other respects.[570] The *Line Sharing Reconsideration Order* does not require Verizon to have implemented an electronic OSS functionality to permit line splitting. Rather, the Commission's *Line Sharing Reconsideration Order* recognizes that a state-sponsored xDSL collaboratives is the appropriate place for Verizon to evaluate how best to

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[566] Verizon's line splitting amendment refers to "existing supporting OSS to order and combine" unbundled network elements necessary for line-split services. *Line Sharing Reconsideration Order* at para. 22. WorldCom likewise asserts that Verizon's contract language suggests that it intends to charge a series of non-recurring charges associated with each unbundled network element to its line-splitting customers that it does not charge to its UNE-P customers. *See* WorldCom Massachusetts II Reply at 13.

[567] In the *Line Sharing Reconsideration Order*, the Commission held that "no central office wiring changes are necessary in a conversion from line sharing to line splitting." *Line Sharing Reconsideration Order* at para. 22. Verizon suggests that when competitive LEC serve customers with existing voice service, they may order new unbundled xDSL-capable loops and UNE-P arrangements and then issue a disconnect of the existing voice service to provide line split services. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 157. Disconnecting a customer's currently-established voice service to enable the transition from line sharing to line splitting would require some disruption of dial tone and may require a change in the voice customers telephone number, a result that is inconsistent with our *Line Sharing Reconsideration Order. See Line Sharing Reconsideration Order* at para. 22.

[568] *Line Sharing Reconsideration Order* at para. 22.

[569] *See Local Competition First Report and Order*, 11 FCC Rcd at 15814-84, paras. 625-771. For example, we would expect Verizon to demonstrate why non-recurring charges in addition to those assessed when a competitive LEC orders a UNE-P arrangement are necessary. We cannot agree with Verizon when it states that "if Covad wants to engage in a line splitting arrangement with a voice [competing carrier], it may do so by working with the voice [competing carrier] to order the individual network elements" if such a process would impose unnecessary charges that are not cost-based or would otherwise require disruption of an end user's voice service in the context of a migration from line sharing to line splitting. Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 159.

[570] WorldCom Massachusetts II Comments at 27.

develop this functionality.[571] For example, Verizon has represented that it is actively working on developing the OSS upgrades necessary to provide for electronic ordering of line-split services in the context of the New York Commission's xDSL collaborative.[572] We recognize that Verizon has not, to date, implemented the OSS upgrades necessary to electronically process line-splitting orders in a manner that is minimally disruptive to existing voice customers; but that such functionality may require significant software upgrades and testing. It is undisputed that the parties in the New York DSL collaborative commenced discussion of line splitting over a year ago; that in April 2000 Verizon formally posed numerous questions to competitors concerning their business rules for line splitting; and that in August 2000, competitive LECs submitted their initial detailed business rules to Verizon.[573] Thus it appears that Verizon has the necessary information to implement the necessary OSS upgrades. Verizon has been able to provide its customers line-shared DSL service for approximately two years. Our *Line Sharing Reconsideration Order* is fulfilled by Verizon's adoption of an implementation schedule for line splitting as directed by the New York Commission that will afford competitors the same opportunities.

182. We note that in response to WorldCom's concerns, Verizon has agreed upon an implementation schedule to offer line splitting-specific OSS capabilities under the supervision of the New York Commission.[574] In June of this year we expect that Verizon will conduct a preliminary OSS implementation in New York using new OSS functionality to add data service to an existing UNE-P customer. In October, Verizon has committed to implement, in the Verizon East territory including Massachusetts, the new OSS capability necessary to support migrations from line sharing to line splitting arrangements consistent with the business processes defined in the New York DSL collaborative.[575] Consistent with their plans and with the guidance of the New York DSL collaborative, Verizon plans to offer OSS capability necessary to support UNE-P migrations to line splitting by October 2001.

V. OTHER CHECKLIST ITEMS

A. Checklist Item 1 – Interconnection

183. We conclude, as described below, that Verizon demonstrates that it provides equal-in-quality interconnection on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of sections 251(c)(2) and as specified in

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[571] *Line Sharing Reconsideration Order* at para. 22 n.41 ("We also encourage participants in state collaboratives and change management processes to develop specific ordering procedures associated with a variety" of line splitting scenarios.)

[572] Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 157.

[573] *See* New York PSC, Order Granting Clarification, Granting Reconsideration in Part and Denying Reconsideration in Part and Adopting Schedule, Case 00-C-0127 (Issued and Effective January 29, 2001).

[574] *See* Verizon Massachusetts II Reply at 30.

[575] *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at paras. 157.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 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

Adopted: February 20, 2003 **Released:** August 21, 2003

Comment Date: 30 days after Federal Register publication of this Notice
Comment Reply Date: 60 days after Federal Register publication of this Notice

By the Commission: Chairman Powell and Commissioner Abernathy approving in part, dissenting in part and issuing separate statements; Commissioners Copps and Adelstein approving in part, concurring in part, dissenting in part and issuing separate statements; Commissioner Martin issuing a separate statement.

Para.

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APPENDIX A: LIST OF COMMENTERS
APPENDIX B: FINAL RULES

I. INTRODUCTION

1. Seven years ago, Congress enacted the Telecommunications Act of 1996 (1996 Act) for the benefit of the American consumer.[1] This watershed legislation was partially designed to remove the decades-old system of legal monopoly in the local exchange and open that market to competition. The 1996 Act did so by establishing broad interconnection, resale and network access requirements, designed to facilitate multiple modes of entry into the market by intermodal and intramodal service providers. The 1996 Act also sought to reduce the need for regulation in the presence of competition and provide for universal service mechanisms in order to foster the deployment of advanced telecommunications capabilities to all Americans.

2. This Commission and our colleagues in state commissions around the country have devoted enormous amounts of time and resources to implement the Act's market-opening requirements, and the industry has devoted equally large amounts of time and resources to take advantage of the new business opportunities made available by the 1996 Act. Few, if any, other requirements of the 1996 Act have attracted so much regulatory attention, industry effort, or litigation, however, as the requirement under section 251(c)(3) that incumbent local exchange carriers (incumbent LECs) make elements of their networks available on an unbundled basis to new entrants at cost-based rates. Every aspect and application of this extraordinary vehicle for

[1] **Telecommunications Act of 1996,** Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these Acts collectively as the "Communications Act" or the "Act."

196. We find that our federal framework, which provides for uniform national rules for some network elements and a more granular approach for others, offers the certainty and stability necessary to enable parties to make investment decisions. This approach is required under *USTA*.[618] Commenters have argued that nothing could create more instability, and be more destructive of investment incentives for both incumbent LECs and competitive LECs, than the establishment of multiple, separate state decisions as to which UNEs have to be offered and under what conditions.[619] In this Order we have balanced the need for a more granular analysis with the need for certainty through a federal unbundling regime. In light of policy reasons and the fact that the D.C. Circuit has found fault with our uniform national rules, we find that the availability of certain network elements may vary between geographic regions. However, the basis on which those more granular determinations will be made is straightforward and predictable. Additionally, we find that the limitations embodied in section 251(d)(3)(B) and (C) will prevent states from taking actions under state law that conflict with our framework and create disincentives for investment.

VI. UNBUNDLING REQUIREMENTS FOR INDIVIDUAL NETWORK ELEMENTS

A. Loops

1. Summary

197. Consistent with our statutory mandate and relevant judicial precedent, we focus on specific market and customer characteristics as informed by the various loop types and capacities that typically serve these markets and customers to undertake the granular inquiry necessary to determine where loop impairment exists.[620] In distinguishing among the various types of loop facilities, *i.e.*, DS0 (voice-grade/POTS), DS1, DS3, OCn and dark fiber, we recognize that these facilities, as a practical matter, typically serve distinct classes of customers,[621] resulting in different economic considerations for competitive carriers seeking to self-deploy.[622] Through this approach we are able to more precisely calibrate our rules to ensure that competitive LECs only gain access to unbundled loops where they are impaired under the

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[618] *See USTA*, 290 F.3d at 427 (finding that Commission's concept of impairment failed to take account of relevant cost disparities).

[619] Verizon Reply at 51. Verizon also urges the Commission to expeditiously halt existing state efforts to craft expanded unbundling requirements. *Id.* at 53; *see also* SBC Reply at 71-83.

[620] Specifically, the local loop network element is a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises. This network element also includes all features, functions and capabilities of such transmission facility, including the NID. It also includes all electronics, optronics, and intermediate devices (including repeaters and load coils) used to establish the transmission path to the end-user customer premises as well as any inside wire owned or controlled by the incumbent LEC that is part of that transmission path. *See infra* note 638.

[621] *See, e.g.*, SBC Comments at 96-98; NewSouth Reply at 16.

[622] As explained in Part VI.A.4.a. below, we make a further distinction in our unbundling analysis for mass market loops based upon the type of loop facility (*e.g.*, copper or fiber).

standard we adopt above, *i.e.*, where they cannot economically self-provision loops and competitive alternatives do not exist.[623] To that end, we conduct separate loop impairment analyses based on loop types and capacity levels, which also consider two relevant customer classes – the mass market and the enterprise market.[624]

198. With respect to our mass market analysis, we make national impairment determinations for loops based on general economic and operational factors that do not vary significantly by geographic region.[625] As we explain more fully below, we find that the technical characteristics of the loop facilities generally deployed for use by mass market customers counsel for adopting rules that take into account the various technologies now used in loops. In crafting our unbundling requirements, we consider other factors, most notably our mandate under section 706 of the Act to promote the rapid deployment of advanced services throughout the nation. Additionally, we reach our findings after full recognition and consideration of intermodal platforms, notably cable and CMRS.

199. Given the steep economic barriers associated with alternative loop deployment that are compounded by various identified operational issues, we require that loops consisting of either all copper or hybrid copper/fiber facilities must be provided on an unbundled basis so that

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[623] Our loop unbundling analyses takes into account the relevant customer market typically served by the loop capacity involved. However, we recognize that although each loop type and capacity level may be used predominantly to provide service to a particular customer group, that same loop also may be used to provide service across a range of customer categories. For that reason, though our loop unbundling analysis focuses upon the customer classes most likely to be served by a specific type of loop, the unbundling rules we adopt apply with equal force to every customer served by that loop type. *See infra* paras. 209-10.

[624] As described in Part V.B.2.a. above, the mass market consists primarily of residential and similar, very small, business users of analog POTS. The enterprise market is a business customer market of typically medium to large businesses with a high demand for a variety of sophisticated telecommunications services. *See supra* Part V.B.2.a. The record reflects that high-capacity loops, DS1 to OCn, are generally provisioned to enterprise customers, while voice-grade analog loops, DS0 loops, and loops that deploy xDSL services, are used to serve customers typically associated with the mass market. We note, however, that while the enterprise market is comprised of business customers of varying size and capacity requirements, these customers reside, most often, in multiunit premises which are owned or controlled by another entity. Competitive carriers serving multiunit premises face deployment barriers that are not present when a competitive carrier seeks to deploy service to a customer located in a premises that such customer owns or controls. *See infra* Part VI.B.2. (addressing in detail barriers associated with accessing customers in multiunit premises). When customers typically associated with the mass market reside in multiunit premises, carriers seeking to self-deploy their own facilities to serve these customers face the same barriers as when serving multiunit premise-based enterprise customers. Because we find that the barriers faced by requesting carriers in accessing customers in multiunit premises are not unique to enterprise market customers residing in such premises but extend to all classes of customers residing therein, including residential or other mass market tenants, the conclusions we reach for high-capacity loops in the enterprise market apply equally to mass market customers in multiunit premises. This in no way affects or changes the conclusions we reach with respect to DS0 and xDSL capable loops in our mass market analysis.

[625] *See, e.g.*, AT&T Reply at 146, 165.

requesting carriers may provide narrowband services over them.[626] For these reasons, we also direct incumbent LECs to unbundle stand-alone copper loops and subloops for the provision of broadband service. However, subject to a transition plan discussed below, we do not reinstate the Commission's vacated line sharing rules because we determine that continued unbundled access to stand-alone copper loops and subloops enables a requesting carrier to offer and recover its costs from all of the services that the loop supports, including broadband service.

200. In addition, we find that different policy considerations, as well as different technical considerations, are associated with copper loops, hybrid copper/fiber loops, and FTTH loops. For example, we decline to require incumbent LECs to provide unbundled access to their hybrid loops for the provision of broadband services.[627] Similarly, we decline to unbundle loops that consist of FTTH facilities for broadband services. As explained more fully below, this unbundling approach – *i.e.*, greater unbundling for legacy copper facilities and more limited unbundling for next-generation network facilities – appropriately balances our goals of promoting facilities-based investment and innovation against our goal of stimulating competition in the market for local telecommunications services.

201. With respect to our enterprise market analysis, we make national impairment determinations based on loop characteristics that do not vary significantly from area to area. Our conclusions with respect to loop deployment do vary, however, according to the loop type, *i.e.*, dark fiber[628] or "lit" fiber,[629] and the capacity level of the particular loop. We find that different economic characteristics impact a competitive LEC's ability to self-deploy or utilize wholesale alternatives based on the capacity level of the loop facility demanded by its customer.[630]

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[626] As explained below, in overbuild situations where the incumbent LEC elects to retire existing copper loops for FTTH loops, we also require incumbent LECs to make available unbundled access to a 64 kbps transmission path over that FTTH loop so that a competitor may provide narrowband service to that end-user customer.

[627] Incumbent LECs must continue to provide unbundled access to the TDM features, functions, and capabilities of their hybrid loops. This will allow competitive LECs to continue providing both traditional narrowband services (*e.g.*, voice, fax, dial-up Internet access) and high-capacity services like DS1 and DS3 circuits.

[628] Dark fiber is optical fiber through which no light is transmitted and no signal is carried. It is unactivated deployed fiber that is left dark, *i.e.*, with no necessary equipment, *i.e.*, "opto-electronics" or "optronics" attached to light the fiber to carry a signal to serve customers. *See* NEWTON'S TELECOM DICTIONARY 201 (18th ed. 2002) (definition of Dark Fiber); *see also UNE Remand Order*, 15 FCC Rcd at 3771, para. 162 n.292. Once the optronics are attached to the fiber to make signal transmission possible the dark fiber becomes "lit." *See* NEWTON'S TELECOM DICTIONARY 538-39 (18th ed. 2002) (definition of Opto-Electronics and Optronics).

[629] *Id.*; *see also* NEWTON'S TELECOM DICTIONARY 433 (18th ed. 2002) (definition of Lit Fiber).

[630] We also know that alternative transmission technologies such as fixed wireless, satellite and unlicensed wireless may exist as potential enterprise market loop alternatives in limited circumstances and, therefore, consider these alternative transmission capabilities in our impairment analysis where appropriate. *See, e.g.*, BellSouth Comments at 42-44; SBC Reply at 91; Verizon Comments at 118-19.

202. With regard to the highest capacity loop facilities, *i.e.*, OCn loops,[631] we conclude that no impairment exists on a nationwide basis. At the OCn level, requesting carriers have the ability to economically self-provision their own loops or are able to obtain unbundled dark fiber and light it at the OCn level. With respect to dark fiber loops,[632] DS3 loops,[633] and DS1 loops,[634] we conclude that requesting carriers are impaired on a location-by-location basis without unbundled access to incumbent LEC loops nationwide. We find, however, that some competitive carriers have been able to deploy certain high-capacity loops to particular customer locations and that some wholesale alternatives also exist at particular customer locations. Because the record does not provide the specific information necessary to identify the precise customer locations

[631] OCn is an optical interface designed to work with a Synchronous Optical Network (SONET). *See* NEWTON'S TELECOM DICTIONARY 528 (18th ed. 2002) (definition of OCn). SONET is an optical interface standard for translating electronic communications signals into photonic signals for transmission across fiber optic facilities. Ideally, SONET transmission systems are laid out in a ring formation to provide redundancy. *See* NEWTON'S TELECOM DICTIONARY 684-85 (18th ed. 2002) (definition of SONET). OCn transmission facilities are deployed as SONET channels having a bandwidth of typically 155.52 Mbps (OC3 or the equivalent capacity of 3 DS3s) and higher, *e.g.*, OC12 (622.08 Mbps); OC48 (2.488 Gbps) etc. *See* NEWTON'S TELECOM DICTIONARY 527 (18th ed. 2002) (definitions of OC3, OC12, and OC48).

[632] In the *UNE Remand Order*, the Commission determined that the loop facility includes dark fiber, stating that both copper and fiber alike represent unused loop capacity therefore dark fiber and extra copper both fall within the loop network element's "facilities, functions, and capabilities." *See UNE Remand Order*, 15 FCC Rcd at 3776, para. 174. The Commission went on to state that there is "no reason to distinguish dark fiber from our general unbundling analysis for loops." *UNE Remand Order*, 15 FCC Rcd at 3785, para. 196. The record contains no basis for departing from this determination.

[633] A DS3 loop is a digital local loop having a total digital signal speed of 44.736 Mbps provided over various transmission media including but not limited to fiber optics, coaxial cable, or radio. DS3 loops can be channelized into 28 DS1 channels. *See infra* note 634. They can also be unchannelized. *See* NEWTON'S TELECOM DICTIONARY 242 (18th ed. 2002) (defining DS3).

[634] A DS1 is a 1.544 Mbps first-level signal in the digital transmission hierarchy. In the time division multiplexing hierarchy of the telephone network, DS1 is the initial level of multiplexing. Traditionally, 24 64 kbps DS0 channels have been multiplexed up to the 1.544 Mbps DS1 rate, with each DS0 channel carrying the digital representation of an analog voice channel. *See* TELCORDIA, INC., NOTES ON THE NETWORK, TELCORDIA TECHNOLOGIES SPECIAL REPORT, SR-2275, Issue 4, Oct. 2000, Glossary at 46 (TELCORDIA NOTES ON THE NETWORK). DS1 loops are provided over various transmission media and combinations of transmission media, including but not limited to two-wire and four-wire copper, fiber optics, or radio. DS1 loops may be channelized typically into up to 24 DS0 channels of 56/64 kbps each, or unchannelized, *i.e.*, providing a continuous bit stream for data (such as frame relay, ATM, or Internet access) or other customer applications. We note that throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. Carriers frequently use a form of DSL service, *i.e.*, High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers. We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps. *See* NEWTON'S TELECOM DICTIONARY 242 (18th ed. 2002) (definition of DS1); *id.* at 718 (definition of T1); *see also* ENGINEERING AND OPERATIONS IN THE BELL SYSTEM 198-201 (R.F. Ray Technical ed., 2d ed. 1983) (channelization process for transmission of telecommunications), 369-73 (technical characteristics of DS1 loops), 386-93 (describing T-carrier hierarchy and necessary equipment); TELCORDIA, INC., NOTES ON THE NETWORK, SR-2275, section 7.7 (Dec. 2000) (describing digital data services provided over local loops) at 7-23 (overview of DS hierarchy).

where this deployment has occurred,[635] we delegate to state commissions the authority to make findings of fact within the scope of the deployment triggers we define, to identify on a more granular scale where carriers are not impaired without access to incumbent LEC unbundled high-capacity loops.

2. Background

203. Loops in their simplest form are the transmission facilities between a central office and the customer's premises, *i.e.*, "the last mile" of a carrier's network that enables the end-user customer to receive, for example, a telephone call or a facsimile, as well as to originate similar communications.[636] Loops were included on the initial list of UNEs in the *Local Competition Order*, and even the incumbent LECs agreed that the loop network element must be unbundled pursuant to sections 251(c)(3) and 251(d)(2) of the Act.[637] In the *UNE Remand Order*, the Commission broadened the definition of the loop to include all features, functions, and capabilities of these transmission facilities, including high-capacity loops, dark fiber and all attached electronics (except those used for providing advanced services).[638] The Commission also concluded that obtaining all types of loops from alternative, non-incumbent LEC sources, *i.e.*, third party or self-provisioning, would impede competitive entry by materially raising entry costs; delaying entry; and limiting the scope and timeliness of competitor's offerings.[639] Accordingly, the Commission applied a one-size-fits-all approach to loops, and ordered

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[635] We do, however, determine that the record contains sufficient information to enable us to identify appropriate triggers and related criteria that will, after a more particularized analysis, identify the specific customer locations where certain types of high-capacity loop impairment does not exist. To that end, we develop a mechanism for a further level of granular inquiry by state commissions on a customer location-specific basis where our defined triggers exist. We both delegate authority to and direct state commissions to undertake more granular analyses for dark fiber loops, DS3 loops, and DS1 loops at specific customer locations based upon our defined triggers and related criteria for each of these three types of loops, as described below. These more granular impairment analyses may result in non-impairment determinations for one or more of these three types of high-capacity loop facilities at specified customer locations.

[636] *Local Competition Order*, 11 FCC Rcd at 15691, para. 380.

[637] *Id.* at 15689-90, para. 377; *see also UNE Remand Order*, 15 FCC Rcd at 3771, para. 162 n.292.

[638] *UNE Remand Order*, 15 FCC Rcd at 3772, paras. 166-67 nn.300 & 301; *see also* 47 C.F.R. § 51.319(a)(1), which defined loops as:

> Local loop. The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, dark fiber, attached electronics (except those electronics used for the provision of advanced services, such as Digital Subscriber Line Access Multiplexers), and line conditioning. The local loop includes, but is not limited to, DS1, DS3, fiber, and other high-capacity loops.

[639] *UNE Remand Order*, 15 FCC Rcd at 3772, para. 165.

unbundling of all incumbent LEC loops, from DS0 to OCn and dark fiber, throughout the nation.[640]

204. In the *Triennial Review NPRM*, as part of its overall inquiry about the viability of adopting more granular unbundling rules, the Commission asked whether its impairment analysis should make "service, geographic, capacity or other distinctions to the unbundled loop."[641] In addition, the Commission asked whether there were meaningful distinctions between those loops capable of providing basic services versus those capable of advanced or broadband services.[642] Finally, for high-capacity loops (DS1 and above), the Commission sought comment on whether there was a particular capacity level at which new entrants could economically self-deploy.[643]

3. General Economic Characteristics of Loop Deployment

205. Constructing loop plant is both costly and time consuming, regardless of the type of loop being deployed.[644] Notably, both the Supreme Court and the D.C. Circuit recognized that incumbent LECs may be required to unbundle loop facilities because they are "very expensive to duplicate."[645] Because the distribution portion of the loop serves a specific location,[646] and installing and rewiring that loop is very expensive, most of the costs of constructing loops are sunk costs. Unless that loop is subsequently purchased by another provider wishing to serve that same location, a carrier's ability to recover the cost of that loop is generally constrained except in limited circumstances at certain capacity levels. While fixed costs for constructing loops are quite high, economies of scale in deployment can accrue in constructing loops to locations that are geographically close to a carrier's transport network, assuming other barriers do not preclude

[640] In the *UNE Remand Order*, the Commission did not engage in a capacity-based analysis beyond confirming that high-capacity loops were included in the definition of the loop. The Commission found that because "the wire facility used for transmission of the traffic is indistinguishable from any other copper wire" there was no reason to modify the definition of loops to describe various categories of capacity. *UNE Remand Order*, 15 FCC Rcd at 3777, para. 176. The Commission, however, did separately consider dark fiber local loops, finding the characteristics to be similar to dark fiber transport ("Because fiber is currently a more significant component of interoffice transport than the loop network element, we discuss aspects of dark fiber common to both elements when we discuss interoffice transport below."). *UNE Remand Order*, 15 FCC Rcd at 3785-86, para. 198.

[641] *Triennial Review NPRM*, 16 FCC Rcd at 22804, para. 51.

[642] *Id.* at 22804-05, para. 51

[643] *Id.*

[644] *See, e.g.*, ALTS *et al.* Comments at 56-57 (stating that fiber deployment costs $100,000-$300,000 per mile underground, $50,000 per mile on poles, and $10,000 to $60,000 through pipelines and adding a building averages $250,000 – and that if the building is more than a mile from the competitive LEC's existing networks , it can cost more that $1,000,000 per mile to construct fiber loops in urban areas); WorldCom Comments at 74-75 (stating that it costs approximately $250,000 for a "building add" and can take six to nine months for a competitive LEC to deploy a new DS1 loop).

[645] *USTA*, 290 F.3d at 426 (citing *Verizon*, 535 U.S. 467 at n.27).

[646] This contrasts with the feeder portion of the loop which may serve multiple locations.

construction.[647] This is especially true in urban areas where the concentration of potential customer locations is very dense.[648] Conversely, because of long loop lengths required to reach more distant, geographically dispersed customers, loops are more expensive to build in rural areas, raising the average cost per loop for equipment, installation, and maintenance.[649] In addition to the cost-related barriers discussed above, competitive carriers deploying loops also face difficulties in acquiring municipal and private rights-of-ways as well as gaining building access from owners of multiunit premises.[650] These additional factors can further affect competitive carriers' ability to sign up customers that need predictability in their business decisions.[651]

206. For fiber-based loops, the cost of construction does not vary significantly by loop capacity, *i.e.*, the per-mile cost of building a DS1 loop does not differ significantly from the cost to construct an OCn loop. The most significant portion of the costs incurred result from deploying the physical fiber infrastructure in the ground, rather than from lighting the fiber optical cable.[652] The ability to recover these construction costs for different loop capacities does, however, vary based on the relevant capacity level of the loop to be provided. Accordingly, a key consideration in our impairment analysis is the loop capacity level at which a competitive entrant can recover its construction costs. Similarly, the ability to overcome other operational barriers to deployment varies based on the capacity of the loop. The record confirms that loop capacity level directly affects the potential revenue stream that can reasonably be obtained to offset construction costs in an economically feasible timeframe.[653] Thus, in addition to the barriers a

[647] *See, e.g.*, AT&T Comments at 134.

[648] *See, e.g.*, Letter from Douglas A. Dawson, CCG Consulting, (on behalf of 20 "network-based" competitive LECs) to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 6-7 (filed July 17, 2002) (submitting survey-based "State Of CLEC Competition") (CCG July 17, 2002 CLEC Survey *Ex Parte* Letter) (demonstrating that for the six major metropolitan areas surveyed the concentration of competitive LEC loop deployment is in the downtown area); Allegiance Comments at 23.

[649] In addition, we note that scale economies may particularly affect small businesses.

[650] *See, e.g.*, AT&T Reply at 174-79 (discussing other barriers linked to the incumbent LECs' historical monopoly that preclude competitive loop deployment independent of cost factors); *see also* NuVox Comments at 74; KMC Duke Aff. at paras. 7-8 (citing proprietary information), Affidavit of Joseph Polito, SNiP LiNK, Inc. (SNiP LiNK Polito Aff.) at paras. 4-7; Sprint Comments at 22; Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2-3 (filed Oct. 25, 2002) (discussing building access barriers) (WorldCom Oct. 25, 2002 Building Access *Ex Parte* Letter); ALTS *et al.* Comments at 56.

[651] *See, e.g.*, AT&T Reply at 175 (describing how it keeps statistics on "breakage," *i.e.*, instances where it initially won a customer but subsequently lost it due to delay in gaining building access to provision the customer); *see also* Sprint Comments at 23 ("Customers will not wait the months required by CLECs to acquire permits, cut streets, install additional equipment, engineer, construct, and test new facilities.").

[652] *See, e.g.*, AT&T Comments at 130; AT&T Reply at 148 (arguing that the cost of loop deployment primarily lies in the structures and rights-of-way, not in the copper or fiber conductor).

[653] *See, e.g.*, WorldCom Comments at 76; Letter from Timothy J. Regan, Senior Vice President – Government Affairs, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 32 (filed Nov. 26, 2002) (Corning Nov. 26, 2002 *Ex Parte* Letter); Corning Comments, App. A at 10 (Cambridge Strategic (continued....)

new entrant faces in deploying loops, we consider the revenue potential associated with particular loop capacity,[654] as well as the ability to mitigate construction delays that affect provisioning intervals as keys to determining the degree to which an entrant is impaired in deploying a particular loop capacity.

207. Unlike transport facilities, loops generally do not aggregate multiple customers' traffic. As a result, loop impairment is more closely related to the demands of the individual customer served by such loop. In that regard, customer class distinctions are useful in understanding competitive carriers' decisions and economic abilities regarding deployment of loops typically used to serve customers generally associated with that particular class.

208. Consistent with our impairment framework set out above,[655] our loop analysis considers alternative transmission technologies that are capable of providing transmission to individual customers as alternatives to the incumbent LEC's loop facility. These alternative technologies may use non-wireline platforms to offer other kinds of services to customers, *i.e.*, intermodal competition, such as cable operators providing cable telephony and cable modem service in addition to cable television, or may be used solely to provide telephone and data communications service, such as fixed wireless technologies. As explained above, we will consider whether these alternative technologies permit a requesting carrier to serve the market, either through self-provisioning the necessary transmission capacity to the customer, or by obtaining the transmission capacity on a wholesale basis from other firms deploying that technology.

4. Loop Impairment by Customer Market

209. The record reflects that customers generally associated with the mass market typically use different types of loop facilities than customers generally associated with the enterprise market. We note that very small business customers, like residential customers, typically purchase analog loops, DS0 loops, or loops using xDSL-based technologies. We address the loops provisioned to these customers as part of our mass market analysis. All other business customers – whom we characterize as the enterprise market – typically purchase

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Management Group, *Assessing the Impact of Regulation on Deployment of Fiber to the Home* (2002) (*CSMG Study*)).

[654] In considering potential revenue streams from the various types of loops, it is necessary to factor in the ability to enter into and enforce long-term contracts with customers. We have some evidence that certain states have adopted or are considering regulations that limit the ability of carriers to bind a customer to a long-term local service contract (*i.e.*, longer than one year) and associated termination charges. *See, e.g., Missouri Public Service Commission, Southwestern Bell Telephone Company's Proposed Revisions to PSC Mo. No. 26, Long Distance Message Telecommunications Service Tariff*, Report and Order, Case Nos. TT-2002-227 *et al.* (June 27, 2002) (local service terms in excess of one year will not be permitted); California Public Utilities Commission, *Rules Governing Telecommunications Consumer Protection*, Interim Decision, Rulemaking 00-02-004, Rule 3 (June 6, 2002). To the extent such limitations exist, a carrier's ability to rely on a guaranteed long-term revenue stream from a loop to recover sunk construction costs is adversely affected.

[655] *See supra* Part V.B.

high-capacity loops, such as DS1, DS3, and OCn capacity loops. We address high-capacity loops provisioned to these customers as part of our enterprise market analysis.[656] We first analyze those loops generally provisioned to mass market customers and then analyze the high-capacity loops generally provisioned to enterprise customers.

210. In considering the different customer markets to inform our understanding of competitive carrier loop deployment, we note that our market classifications allow us to conduct our impairment analyses for the various loop types at a more granular level but are not intended to prohibit the use of UNE loops by customers not typically associated with the respective customer market class. For example, business customers typically associated with the enterprise market may require DS0 lines, particularly if they have remote business locations staffed by only a few employees where high-capacity loop facilities are not required.[657] Because a competitive carrier faces the same economic characteristics to serve these customers at their remote locations with a DS0 loop that it faces to serve residential customers served by the same loop type, our customer class distinctions are not intended to preclude a competitive LEC from obtaining an unbundled DS0 loop to serve these business customers. Similarly, a competitive LEC faces the same economic considerations in provisioning a DS1 loop to a large business customer typically associated with the enterprise market that it faces in provisioning that same loop type to a very small business or residential customer typically associated with the mass market. Thus, while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served.

a. Mass Market Loops

(i) Introduction

211. We conclude that requesting carriers seeking to serve the mass market face varying levels of impairment without unbundled access to the transmission path between the central office and the customer premises depending upon whether the loop used to complete this path consists entirely of copper, or consists of a hybrid of fiber and copper cables, and whether a requesting carrier seeks to offer narrowband or broadband services or both. In fact, for those loops consisting of fiber from the central office to the customer premises, *i.e.*, FTTH loops, we find no impairment on a national basis.[658] Based on our review of the record, which covers the

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[656] We note that through the application of our new impairment standard to high-capacity loops, including impairment analyses based on each particular loop capacity level, we have considered evidence raised by joint petitioners in the High-Capacity Loop and Transport Petition. *See, e.g.*, BellSouth, SBC, and Verizon, Joint Petition for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket No. 96-98 (filed Apr. 5, 2001) (High-Capacity Loop and Transport Petition). Because we base our unbundling obligations with respect to high-capacity loops on our findings of impairment and non-impairment according to our new impairment standard, we dismiss the High-Capacity Loop and Transport Petition as moot.

[657] *See, e.g.*, WorldCom Comments at 14.

[658] As discussed more fully below, there is an unbundling obligation for narrowband voice services in one FTTH loop deployment scenario, *i.e.*, overbuild deployment in which an incumbent LEC constructs fiber transmission facilities parallel to or in replacement of its existing copper loop plant. *See infra* Part VI.A.4.a.(v)(b).

current deployment of local loops, technological advancements in incumbent LEC outside plant, and the economic barriers and revenue opportunities facing competitive providers today with regard to loops, we conclude that incumbent LECs must provide, as UNEs pursuant to section 251(c)(3), copper loops, including copper loops conditioned to provide xDSL service. As discussed below, we also require incumbent LECs to provide competitive LECs the ability to line split, which allows two competitive LECs to split the loop so that one carrier can provide narrowband service and the other can provide broadband service.

212. As for our unbundling rules related to broadband, we recognize there are special considerations in crafting unbundling rules for loops used to provide broadband service. Broadband deployment is a critical domestic policy objective that transcends the realm of communications. While the development of broadband infrastructure is a fundamental and integral step in ensuring that consumers are able to fully reap the benefits of the information age, even more broadly, it is vital to the long-term growth of our economy as well as our country's continued preeminence as the global leader in information and telecommunications technologies. The Commission's primary regulatory challenge for broadband is to determine how we can help drive the enormous infrastructure investment required to turn the broadband promise into a reality. This challenge is squarely raised in our consideration of unbundling rules for last-mile facilities.

213. With respect to unbundling obligations for facilities used to provide broadband service, we are charged with determining the potential impact of our rules on advanced services, including those supported by broadband deployment and infrastructure investment, as directed by section 706 of the 1996 Act.[659] For this reason, we craft unbundling rules that provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities. Thus, we decline to require unbundling on a national basis of the features, functions, and capabilities of the packetized fiber facilities of incumbent LEC hybrid loops. We require, however, incumbent LECs to provide unbundled access to the time division multiplexing (TDM) features, functions, and capabilities of their hybrid loops on a national basis. Subject to a three-year transition period explained below, we also decline to require incumbent LECs to continue to unbundle the high frequency portion of the loop. Our rules strike the appropriate statutorily required balance between ensuring competitive access and maintaining incentives to invest in next-generation networks.

(ii) Mass Market Loop Types

214. At its most basic level, a local loop that serves the mass market consists of a transmission medium, which almost always includes copper wires of various gauges. The loop may include additional components (*e.g.*, load coils, bridge taps, repeaters, multiplexing equipment) that are usually intended to facilitate the provision of narrowband voice service.

215. As a general matter, incumbent LECs use two local exchange network configurations to connect customers to their switching systems. First, carriers connect customers

[659] 47 U.S.C. § 157 nt.

directly to a central office via a loop dedicated solely to a particular customer. In this configuration, the local loop consists of a single cable pair – for copper loops, this is often referred to as "home-run copper."[660] For the mass market, carriers can use copper loops to provide both narrowband voice service and broadband xDSL services.[661] Providing broadband service requires the use of special equipment, such as DSLAMs[662] located in the central office (or remote terminals in the incumbent LEC's outside plant) and xDSL modems or other equipment at the customer's premises.

216. Second, incumbent LECs deploy "feeder plant" to a centralized location (referred to as a "remote terminal") where the carrier aggregates "distribution plant," *i.e.*, copper cable pairs that are used to serve individual customers. In this second configuration, then, the local loop portion of the network consists of two parts, *i.e.*, feeder plant and distribution plant.[663] The feeder plant consists of a large number of high-capacity cable pairs to accommodate a large volume of telecommunications traffic. In recent years, carriers have started deploying fiber optic cable in the feeder plant to handle more efficiently the increasing volume of traffic (although some legacy technologies continue to require use of copper feeder plant).[664] By contrast, the distribution plant consists generally of many copper cable pairs, *i.e.*, one direct connection or transmission path to each customer premises.

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[660] *See, e.g.*, Letter from Stephen C. Gray, President, McLeodUSA, to William Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 96-98, 98-147, 01-338, 02-33 at 8 (filed Dec. 18, 2002) (McLeodUSA Dec. 18, 2002 *Ex Parte* Letter). McLeod states that customers are served by "a connected-through copper loop, with a direct analog electrical connection between the customer's network interface and the central office main distribution frame" or one of two types of DLC systems.

[661] Subject to certain distance limitations, a carrier can provide various types of xDSL service over a copper loop with appropriate conditioning. We use the term "xDSL" to refer to DSL as a generic transmission technology, as opposed to a specific type of DSL such as ADSL (asymmetric digital subscriber line), HDSL (high-speed digital subscriber line), UDSL (universal digital subscriber line), VDSL (very-high speed digital subscriber line), and RADSL (rate-adaptive digital subscriber line).

[662] DSLAMs send the customer's voice traffic to the public, circuit-switched telephone network and the customer's data traffic (combined with that of other xDSL users) to a packet-switched data network. *See Line Sharing Order*, 14 FCC Rcd at 20920, para. 9; *see also* Walter Goralski, ADSL AND DSL TECHNOLOGIES at 252-60 (describing DSLAMs).

[663] TELCORDIA NOTES ON THE NETWORK at § 12 (describing LEC distribution networks); AT&T Comments at 184-86; AT&T Reply at 149. We recognize that carriers may categorize their outside plant facilities into three sections, *i.e.*, feeder, distribution, and customer drops. *See* AT&T Reply at 149. For the purposes of our unbundling analysis, we consider customer drops to be part of an incumbent LEC's distribution plant.

[664] WorldCom Comments, Joint Declaration of Tom Stumbaugh and David Reilly (WorldCom Stumbaugh/Reilly Joint Decl.) at paras. 8-10; Letter from Leonard G. Ray, Government Relations Committee Chairman, FTTH Council, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 10 (filed Jan. 8, 2003) (FTTH Council Jan. 8, 2003 FTTH Deployment *Ex Parte* Letter) (noting that fiber feeder optimized the network for voice transmission); Letter from Kimberly Scardino, Senior Counsel, WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-98, 98-147, 01-338 at 2 (filed Dec. 12, 2002) (WorldCom Dec. 12, 2002 Next-Generation Networks *Ex Parte* Letter).

217. Carriers use digital line carrier (DLC) systems to aggregate the many copper loops that terminate at a remote terminal location,[665] multiplex such signals onto a fiber or copper feeder loop facility, and transport them to the carrier's central office.[666] These DLC systems may be integrated directly to the carrier's switch (*i.e.*, Integrated DLC systems) or not (*i.e.*, Universal DLC systems).[667] Through the use of feeder loop plant and DLC systems, carriers can reduce the costs of constructing, deploying, and maintaining their outside plant.[668]

218. Although originally deployed to manage voice networks, carriers now use DLC systems to provide both voice and data services. Technological improvements have enabled carriers to use DLC systems to deliver broadband services (*e.g.*, ADSL) in addition to narrowband services.[669] In particular, manufacturers have developed "line cards" that can be

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[665] Although there are different varieties of DLC systems, they typically consist of cross-connect and multiplexing equipment that are housed in remote terminals, which are intended to house a limited amount of equipment. There are three basic types of remote terminals: (1) huts, which are above-ground structures with environmental control capabilities; (2) controlled environmental vaults (CEVs), which are below-ground structures that are accessed through manholes and contain environmental control capabilities; and (3) cabinets, which are above-ground structures that are typically designed as an integrated system. *See Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Second Memorandum Opinion and Order, 15 FCC Rcd 17521, 17539, para. 34 n.94 (2000) (*Pronto Modification Order*) (describing remote terminals).

[666] Carriers historically deployed local loops on a one-for-one basis, *i.e.*, one direct copper cable pair connecting a customer to the central office. WorldCom Stumbaugh/Reilly Decl. at para. 7. Carriers started using DLC for feeder pair relief in urban areas. *Id.* at para. 9.

[667] Universal DLC systems consist of a "central office terminal" and a "remote terminal," *i.e.*, a DLC system in the carrier's central office terminal mirrors the deployment at the remote terminal. Notes on the Network at § 12.6. By contrast, an Integrated DLC system does not require the use of a central office terminal because the DLC system is integrated into the carrier's switch (thus, the naming convention). *Id.* § 12.7; *see also* Letter from David R. Conn, Deputy General Counsel, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-98, 98-147, 01-338, 02-33 at 8 (filed Nov. 15, 2002) (McLeodUSA Nov. 15, 2002 DLC systems *Ex Parte* Letter); McLeodUSA Dec. 18, 2002 *Ex Parte* Letter at 8; *see also* TELCORDIA NOTES ON THE NETWORK at 2-2 to 2-5 (describing DLC systems).

[668] TELCORDIA NOTES ON THE NETWORK at § 12.6-12.7.

[669] WorldCom Stumbaugh/Reilly Decl. at paras. 9-11 (describing technological developments in DLC systems); AT&T Reply at 152-53 (noting that incumbent LECs can upgrade existing DLC systems by replacing the line cards installed in such systems). In their original form, carriers connected DLC systems to copper transmission facilities that comprised the feeder loop plant. The DLC system would convert analog signals transmitted from the customer's premises to digital signals suitable for transmission over the carrier's network. By the late 1990s, carriers were purchasing "Next Generation Digital Loop Carrier" (NGDLC) systems, which were designed for use with fiber optic cable. In addition to the fiber capability, NGDLC systems have more flexible and remote configuration capabilities than their predecessors and, depending on the manufacturer, they may contain additional features like the ability to provide broadband services. *See* Walter Goralski, ADSL AND DSL TECHNOLOGIES, 273 (1998); NEWTON'S TELECOM DICTIONARY 510 (18th ed. 2002) (defining NGDLC systems as "DLC [that] can receive and aggregate large amounts of bandwidth (higher than T-1)); *see also* Letter from Jim Lamourex, Senior Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 1-2 (filed Dec. 12, 2002) (SBC Dec. 12, 2002 *Ex*
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installed (along with other components) into a DLC system to provide broadband services, or a combination of broadband and narrowband service, to customers served by DLC systems.[670] By deploying this DSLAM functionality in a DLC system, carriers can serve customers whose copper loop facility would otherwise be too long to support the provision of xDSL service.[671] To do so has generally required incumbent LECs deploying this technology to segregate and minimize the traffic in a different way – that is, carriers dedicate a segment of their feeder plant to serving narrowband voice traffic and another segment to serving broadband traffic.[672] The feeder loop plant transporting voice traffic connects to the carrier's switch in its central office (often through intermediate electronics in the central office).[673] By contrast, the feeder loop plant transporting the broadband signal terminates at a packet switch (usually referred to as an "optical concentration device" or OCD) also located in the carrier's central office.[674]

219. In recent years, carriers have started deploying FTTH – that is, using fiber optic cable to replace traditional copper loops. Whereas the use of fiber feeder plant and DLC systems is an augmentation of the existing network and relies on the continued use of copper (albeit to a lesser degree) in the loop plant, FTTH is essentially a broad replacement of the existing loop plant. The use of fiber optic cable requires the deployment of network equipment with different features and capabilities from comparable equipment used for copper cable. As noted above, deployment of FTTH loops – that is, a transmission path consisting entirely of fiber optic cable and associated equipment between the customer's premises and the central office – remains in its infancy.

220. Carriers use different technologies to transport telecommunications over their networks. As digital transmission technologies replaced analog systems, carriers started using

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Parte Letter) (stating that SBC "considers DLC that provides both time slot interchanger and xDSL functionality as NGDLC.").

[670] Alcatel Comments at 26; Catena Comments in CC Dkt. Nos. 02-33, 95-20, and 98-10, at 5 n.7 (describing Catena's DLC system upgrade); WorldCom Stumbaugh/Reilly Decl. at para. 13; Alcatel Reply at 6; *see Pronto Modification Order*, 15 FCC Rcd at 17523-31, paras. 4-19 (describing SBC's DLC network architecture used to provide broadband service).

[671] WorldCom Stumbaugh/Reilly Decl. at para. 13.

[672] *Id.* at para. 15; Letter from W. Scott Randolph, Director – Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-337, 01-338, 96-98, 98-147, 02-33 at 10 (filed Sept. 30, 2002) (Verizon Sept. 30, 2002 *Ex Parte* Letter) (submitting diagram showing the use of two parallel feeder loops to provide broadband service through DLC systems).

[673] Alcatel Reply at 6 (explaining that voice and data traffic are segregated in the incumbent LEC's central office).

[674] AT&T Comments at 187-89; Covad Comments at 65; WorldCom Comments at 108; WorldCom Stumbaugh/Reilly Decl. at para. 13; Letter from Jonathan J. Boynton, Associate Director – Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 5 (filed Jan. 15, 2003) (SBC Jan. 15, 2003 *Ex Parte* Letter); Verizon Sept. 30, 2002 *Ex Parte* Letter at 10. Several parties explain that an OCD is equivalent to a main distribution frame. *See, e.g.*, Covad Comments at 65 (noting that the OCD demultiplexes data transmissions from the fiber feeder and distributes the signal to its next destination).

TDM to combine multiple transmission paths onto a single cable.[675] TDM provides a transmission path by dividing a circuit into time slots and providing a dedicated time slot to an end user for the duration of the call. More recently, carriers have started using packet-switched technologies (*e.g.*, ATM or frame relay) to combine different types of traffic over shared facilities.[676] By using packet-switched technology, carriers can transmit voice, fax, data, video, and other over a single transmission path at the same time.

221. In light of the foregoing, we find that our unbundling rules for local loops serving the mass market must account for these different loop architectures. Therefore, we craft unbundling rules specific to each different loop type. First, we address our unbundling rules for loops consisting of copper pairs of various gauges and associated electronics (*e.g.*, load coils, repeaters, multiplexers), which we refer to as copper loops. Second, we address our unbundling rules for loops consisting of DLC systems that are fed by fiber optic cable, which we refer to as "hybrid loops." Finally, we address our unbundling rules for loops consisting entirely of fiber optic cable, which we refer to as FTTH loops.

(iii) Evidence of Loop Deployment

222. The record indicates that deployment of alternative local loop facilities for the purposes of providing telecommunications services to the mass market has been minimal. The record also indicates, however, that there is evidence that other types of network facilities deployed primarily for other purposes (*e.g.*, cable television systems, satellite technologies) can and are increasingly being modified to support the delivery of narrowband and broadband services, particularly telephony and high-speed Internet access services, to the mass market. As a general matter, while these systems are increasingly being used for the delivery of retail narrowband and broadband services (*e.g.*, telephony and high-speed Internet access services), the record indicates that such systems are not being used currently to provide wholesale local loop offerings that might substitute for access to incumbent LECs' loop facilities.

223. The factual record consists of three parts. First, several parties submitted detailed studies describing local loop deployment and conditions surrounding competitive access to local loops.[677] Second, many parties described their network operations, experiences, and future

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[675] *See, e.g.*, Walter Goralski, ADSL AND DSL TECHNOLOGIES 77-98 (1998) (describing differences between packet-switched and circuit-switched networks); Walter Goralski, SONET 99-108 (2d. ed. 2000) (describing T-carrier and different multiplexing techniques).

[676] For example, some carriers use packet-switching technology as the building blocks of their networks. *See, e.g.*, NewSouth Comments at 11-13 (describing use of packet-switching technology in its network).

[677] *See, e.g.*, BOC UNE Fact Report 2002; Letter from Dee May, Assistant Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Oct. 23, 2002) (submitting *UNE Rebuttal Report 2002* commissioned by the BOCs); CCG July 17, 2002 CLEC Survey *Ex Parte* Letter. These studies in turn rely on additional evidence to support their conclusions, such as briefings to the investment community, analyst reports, newspaper articles, and trade industry reports. Some commenters argue that unbundling requirements decrease incumbent LECs' financial rewards from selling future broadband services by increasing the risk of investment, thereby decreasing the amount of investment incumbent LECs will make in broadband infrastructure. *See, e.g.*, Corning Comments at 5-9; HTBC Comments at 28-33, App. A (submitting John Haring and Jeffrey H. Rohlfs, *The* (continued....)

deployment plans in comments and *ex parte* letters.[678] Finally, the Commission staff has published reports arising from its monitoring of the deployment of advanced telecommunications capability and the development of local competition throughout the country.[679]

224. Relying on these sources, the record shows that incumbent LECs continue to control the vast majority of voice-grade local loops throughout the nation. The Commission staff's recent *Local Telephone Competition December 2002 Report* noted that incumbent LECs served approximately 167.5 million switched access lines, or approximately 88.6 percent of the national market.[680] The record reflects a significant growth in the amount of fiber incumbent LECs are deploying in the local loop, with most of this deployment occurring in the feeder plant rather than the distribution plant. According to some estimates, upwards of 30 percent of incumbent LEC access lines are now supported by the use of mixed fiber-copper loop facilities.[681]

(a) Self-Deployment

225. The record reflects that competitive LECs have not self-deployed alternate copper local loops to provide telecommunications services (or packages of telecommunications and

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Disincentives for ILEC Broadband Deployment Afforded by the FCC's Unbundling Policies (July 16, 2002)); Verizon Comments at 27-32 (submitting Declaration of Alfred E. Kahn and Timothy J. Tardiff); Letter from Matthew J. Tanielian, Vice President – Governmental Relations, ITI – Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Apr. 22, 2002) (HTBC Apr. 22, 2002 *Ex Parte* Letter); Letter from W. W. Jordan, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Oct. 15, 2002) (BellSouth Oct. 15, 2002 *Ex Parte* Letter). By contrast, other commenters argue that unbundling requirements do not decrease the incentives for BOCs to provide broadband services over fiber-fed loops. *See, e.g.*, AT&T Willig Decl. at paras. 15, 175; Letter From Jason D. Oxman, Vice President and Assistant General Counsel, Covad, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Nov. 22, 2002) (Covad Nov. 22, 2002 *Ex Parte* Letter); Covad Murray Reply Decl. at paras. 99-113; Letter from C. Frederick Beckner III, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4 (filed Dec. 6, 2002) (AT&T Dec. 6, 2002 *Ex Parte* Letter).

[678] *See, e.g.*, ACS Reply at 5-6 (describing market conditions in Alaska); BellSouth Rely, Reply Declaration of Prof. Robert G. Harris (BellSouth Harris Reply Decl.) at paras. 11-21 (submitting projections and market data related to broadband services); New York State Attorney General Reply at 4, 9-11 (describing competitive entry in New York); Letter from Rebecca H. Sommi, Vice President Operations Support, Broadview Networks, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 16, 2002) (Broadview Oct. 16, 2002 *Ex Parte* Letter); Letter from Jason Oxman, Vice President and Assistant General Counsel, Covad, to William Maher, Chief, Wireline Competition Bureau, FCC, CC Docket No. 01-338 (filed Oct. 15, 2002) (Covad Oct. 15, 2002 Broadband Deployment *Ex Parte* Letter); Letter from Thomas Jones, Counsel for Allegiance, to William Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3-4 (filed Dec. 12, 2002) (Allegiance Dec. 12, 2002 *Ex Parte* Letter).

[679] *See Seventh Wireless Report 2002*; *Third Section 706 Report 2002*, 17 FCC Rcd at 2844.

[680] *Local Telephone Competition December 2002 Report* at Table 1.

[681] Covad Comments at 55 n.105 (citing *Trends in Telephone Service May 2002 Report* at Table 18.3 (21.7% of working telecommunications channels are fiber)); AT&T Reply at 80 (citing *Trends in Telephone Service May 2002 Report* at Table 18.3 (32.5% of working telecommunications channels are fiber)).

other services) to the mass market. Moreover, the record indicates that, in those limited cases where competitors are deploying alternative loop facilities, competitive LECs are using fiber, although such deployment continues to be targeted primarily to serving the enterprise market rather than the mass market. We recognize, however, that potential self-deployment could use existing wireline telephony technologies and facilities or could employ other approaches that bear little or no resemblance to the current network architecture of the incumbent LECs.

226. No party seriously asserts that competitive LECs are self-deploying copper loops to provide telecommunications services to the mass market. Indeed, in the BOC UNE Fact Report 2002, the BOCs provide no evidence that competitive LECs have made any progress towards replicating the incumbent LECs' embedded base of voice-grade copper local loops.[682] Likewise, no competitive LEC claims to have made, let alone attempted to make, such progress. Competitive LECs generally argue that building new local loops to serve the mass market would be prohibitively expensive.[683] Considered as a whole, the record indicates that competitive LECs rely primarily on unbundled local loops to serve the mass market on a nationwide basis.[684]

227. The record demonstrates that current deployment of FTTH for providing telecommunications services to the mass market is still in its infancy.[685] Corning, for example, presents evidence of FTTH deployment to approximately 26,000 homes and asserts that competitive LECs account for 77 percent of this FTTH deployment to date.[686] The record shows further that some competitive LECs are self-deploying fiber transmission facilities primarily to serve business customers in downtown locations.[687] The record also shows that competitive LECs are self-deploying fiber transmission facilities to the mass market in certain circumstances. In particular, competitive LECs are competing in so-called "greenfield" markets, which require entirely new construction of local loops (in addition to the deployment of the necessary switching and other network equipment) to serve new residential communities.[688] According to at least one

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[682] **In their UNE Fact Report, the BOCs rely primarily on intermodal sources** to argue that viable alternatives exist to incumbent LEC local loop facilities. We address these arguments below.

[683] *See* Covad Comments at 16-18; AT&T Comments at 132.

[684] CompTel Reply at 24 (citing statistics compiled by Commission staff showing that competitive LECs serve 23% of the access lines in New York, 14% of the access lines in Texas, and 13% of the access lines in Illinois). Incumbent LECs assert that competitive LECs have deployed on a national basis somewhere between 16 and 23 million loops based on their interpretation of data in E911 databases. *See* BOC UNE Fact Report 2002 at I-5, II-4, and A-2. We note that CompTel's data, among other competitive LECs', are generally closer to those published by the Commission in the *Local Telephone Competition December 2002 Report.*

[685] AT&T Reply at 74.

[686] Corning Reply at 12 (citing *CSMG Study* at 51). In other studies submitted on the record, Corning estimates that competitive LECs account for 68% of the FTTH deployment nationwide. *See* Corning Nov. 20, 2002 *Ex Parte* Letter at 7.

[687] CCG July 17, 2002 CLEC Survey *Ex Parte* Letter at 6 (noting that five competitive LECs are deploying fiber in Chicago and four competitive LECs are deploying fiber in Boston and Portland).

[688] BOC UNE Fact Report 2002 at IV-16.

study, non-incumbent LEC providers (*i.e.*, competitive LECs and municipalities) have deployed 90 percent of current FTTH.[689] We also note that the Commission staff's *High Speed Services December 2002 Report* found that parties *other than* incumbent LECs deployed 92 percent of FTTH and fixed wireless service lines.[690]

(b) Intermodal Loops

228. The record presents some evidence that intermodal platforms increasingly support the provision of narrowband and broadband services to the mass market. In particular, the record indicates that cable and wireless technologies are currently being used, and will likely increasingly be used, to provide loop substitutes to support services that compete with incumbent local services.[691]

229. Cable companies have widely deployed local broadband service in the form of high-speed Internet access offered via cable modem service. As of June 2002, cable companies provided more than 9.1 million high speed lines for Internet access to consumers nationwide and the service is available to more than 70 million homes in the nation.[692] Some cable companies also have augmented their networks to enable the provision of two-way voice telephony services.[693] For such services, the cable infrastructure serves as a replacement for loops. At this time, however, deployment of voice telephony by cable companies has been substantially exceeded by the deployment of cable modem service.[694] In their *UNE Fact Report*, the BOCs

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689 FTTH Council Second Reply at 2.

690 *High Speed Services December 2002 Report* at Table 5. In that report, staff found that, as of June 2002, carriers provided 6,120 fiber lines capable of supporting data transmissions over 200 kbps in at least one direction. *See id.* at Table 3.

691 BOC UNE Fact Report 2002 at IV-8 to IV-14. Current estimates are that only 1.7% of U.S. households rely on other technologies to replace their traditional wireline voice service. Allegiance Reply at 35 n.38.

692 Cable companies provided 9,172,895 high speed lines for Internet access as of June 30, 2002. *High Speed Services December 2002 Report* at Table 1. *See* Letter from Jason D. Oxman, Vice President and Assistant General Counsel, Covad, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Declaration of Stephen Siwek and Su Sun (Covad Siwek/Sun Decl.) at paras. 58-59 (filed Nov. 20, 2002) (Covad Nov. 20, 2002 *Ex Parte* Letter). Some parties estimate that cable modem service is available to two-thirds or more of the homes in the nation. BOC UNE Fact Report 2002 at IV-12 n.59 (estimating that cable modem service is available to 70-75 million homes).

693 BellSouth Comments at 64 (noting cable companies upgraded to provide voice in Atlanta, Jacksonville, Miami and Louisville); Letter from Florence M. Grasso, Covad, to Marlene M. Dortch, Secretary, FCC, Docket Nos. 01-338, 96-98, 98-147 at 6 (filed Apr. 19, 2002) (Covad Apr. 19, 2002 *Ex Parte* Letter) (noting cable companies spent $55 billion to upgrade their facilities).

694 As of June 2001, only 1% of all local access lines terminated over coaxial cable facilities. For example, AT&T notes that UNE-P providers in New York alone have as many customers as cable-provided telephony does on a nationwide basis. AT&T Reply at 26.

note that 1.5 million homes[695] subscribe to cable telephony on a nationwide basis. The record indicates that circuit-switched cable telephony has been deployed in portions of 20 states and is now available to about 10 million households in the United States, or about 9.6 percent of the total households in the nation.[696] Because companies originally deployed cable television systems for the provision of a one-way mass media service, retrofitting cable infrastructure to support cable telephony and broadband services requires substantial investment and modification.[697] For those cable operators that have not already augmented their networks to offer cable telephony, which encompasses the majority of the cable networks currently in operation, significant technical and operational issues must still be resolved.[698] Thus, it is difficult to predict at what point cable telephony will be deployed on a more widespread and ubiquitous basis. In addition, the record reflects that a number of cable operators are delaying their deployment of voice telephony until they are able to deploy such services over a packet-switched platform.

230. The record also shows that narrowband local services are widely available through CMRS providers. As discussed in Part IV above, one study estimates that 64.3 million households (*i.e.*, 61 percent of all U.S. households) use wireless phones.[699] The record shows that

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[695] BOC UNE Fact Report 2002 at IV-10. There are approximately 108.3 million households in the nation. *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *Telephone Subscribership in the United States* (Nov. 8, 2002) at Table 1 (*Telephone Subscribership November 2002 Report*).

[696] BOC UNE Fact Report 2002 at II-11, IV-10 (noting that Cox has the capability to offer cable telephony to "75 to 95 percent" of the consumers in Rhode Island).

[697] WorldCom Comments at 35-36, Attach. A at 23, 25-27 (Richard A. Chandler, A. Daniel Kelley, David M. Nugent, *The Technology and Economics of Cross-Platform Competition in Local Telecommunications Markets* (Apr. 4, 2002) (HAI Report)). Although precise numbers are difficult to assemble because much of the necessary information is not publicly available, there is substantial evidence in our record concerning actual and projected completion of cable plant upgrades necessary to provide voice and data services. For example, according to a Yankee Group Report, at the end of 2000, 50% of United States households had cable modem service available and this percentage was predicted to exceed 80% by the end of 2005. BellSouth Comments at 39 (citing *Broadband Access Technology: Whose Number is Up?*, Yankee Group Report (Sept. 19, 2001)). BellSouth offered more recent numbers: at the end of 2001, 70% of United States households had cable modem service available. BellSouth Reply at 48 (citing BellSouth Harris Reply Decl. at para. 9).

[698] For example, potential cable telephony providers must determine how to provide power to the consumer premises equipment (wireline systems utilizing copper facilities already provide power through the same network telephony service is provided, thus ensuring continuous access to telecommunications in the event of power outages) and ensure accurate 911 service. Allegiance Reply at 33. Allegiance notes that incumbent LEC comments rely not on current deployment but on predictions such as whether Comcast will deploy telephony after merger with AT&T and future deployment of IP telephony over cable networks.

[699] *See* BOC UNE Fact Report 2002 at IV-12 (citing *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Sixth Report, 16 FCC Rcd 13350, 13381 n.211 (2001) (*Sixth Wireless Report 2001*). Wireless phones are now a mass market consumer device used by some 45% of the United States. *Seventh CMRS Report* at 31. One study estimates that 64.3 million households (*i.e.*, 61% of all U.S. households) use wireless phones. *Id.* By contrast, 103.4 million households (*i.e.*, 95.5% of all U.S. households) own and use wireline (continued....)

CMRS, while continuing to be primarily a complementary technology to wireline narrowband service, is growing as a substitute to wireline narrowband service with about three to five percent of CMRS subscribers using their service as a replacement for *primary* fixed voice wireline service.[700] While this percentage is small, it continues to show increasing growth. Indeed, the Commission recently relied on wireless substitution to support the Track A findings in two section 271 proceedings where residential customers in New Mexico and Nevada had replaced their landline phones with wireless ones.[701] In addition, the record demonstrates that, although promising, wireless CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity.[702] Finally, the record indicates that CMRS is not yet capable of providing broadband services to the mass market – although a growing number of wireless carriers make available Internet access, such access is generally limited to transmissions of 25 to 66 kbps.[703]

231. The record indicates that, at present, fixed wireless and satellite services remain nascent technologies, with limited availability, when used to provide broadband services to the mass market. Although current satellite services may be available in all 50 states, their transmission capabilities remain limited and their mass market services have few subscribers.[704] For example, combined, satellite and fixed wireless provide broadband services to approximately 200,000 customers nationwide.[705] In addition, recent financial difficulties of fixed wireless

(Continued from previous page)

telephones. *Telephone Subscribership November 2002 Report* at Table 1. BellSouth Comments at 64 (arguing wireless is a substitute for wireline).

[700] *See Seventh CMRS Report* at 32 n.208; *see also* BOC UNE Fact Report 2002 at IV-12 (citing *Sixth Wireless Report 2001*, 16 FCC Rcd at 13381 n.211).

[701] *See Application by SBC Communications Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Nevada*, WC Docket No. 03-10, Memorandum Opinion and Order, 18 FCC Rcd 7196, 7206, para. 18 (2003) (*SBC Nevada 271 Order*); *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11, Memorandum Opinion and Order, 18 FCC Rcd 7325, 7336 n.53 (2003) (*Qwest New Mexico 271 Order*); *see also In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, Interlata Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20606, 20622-23, paras. 11, 29-33 (1998) (*BellSouth Louisiana II 271 Order*) (finding that PCS can be a substitute for wireline service).

[702] BellSouth Comments at 41 (stating that wireless is "[not] very effective in transmitting large amount of data at high speed."). AT&T points out, for example, that wireless service is engineered to provide only roughly 70% call completion rate while wireline call completion rates exceed 99%. AT&T Reply at 25; *see also id.* at 162-63.

[703] *Seventh CMRS Report* at 53-54. By the end of 2001, approximately eight to ten million people accessed the Internet through their wireless telephones, up from 2 to 2.5 million the year before. *Id.* at 53.

[704] *See, e.g.*, WorldCom Comments at 4, 47, Attach. A at 76-78.

[705] *See High Speed Services December 2002 Report* at Table 3.

carriers suggest the potential to use such services as substitutes for local loops used to serve the mass market is limited, at least for the short term.[706]

232. Finally, we note that other technologies that can substitute for loops in providing narrowband and broadband service are currently under development. For example, some companies are experimenting with delivering narrowband voice service via power lines.[707] Such technologies have not been deployed beyond an experimental basis (*e.g.*, technical trials) at this time.

(c) Third-Party Offerings

233. The record indicates that no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market.[708] This includes intermodal platforms such as cable and satellite that have no statutory or regulatory obligation comparable to the unbundling requirements of section 251(c).[709] We note that, in their various reports and other submissions, the incumbent LECs have not demonstrated that third parties are offering alternate local loop transmission on a wholesale basis.

(iv) Unbundling Analysis

234. We engage in a balancing test in determining our unbundling requirements for mass market local loops. We recognize, of course, that impairment remains our statutory touchstone. We do not rely exclusively, however, on an impairment analysis to make our unbundling determination. We retain the flexibility under our section 251(d)(2) "at a minimum" authority to consider other factors. We use this flexibility sparingly. However, we believe that the goal of swift and ubiquitous broadband deployment is so important to the United States that we consider the statutory goals outlined in section 706 and how they relate to broadband as additional factors when considering loops. In addition, we also consider the comparative weight of the costs versus benefits of unbundling and the effect of intermodal competition.[710] As explained below, based on our analysis of impairment and evaluation of other factors, we adopt

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[706] *See* Sprint Comments at 24-25; *see also* Covad Siwek/Sun Decl. at paras. 49-57 & Schedule 5 (arguing that consumers are not buying satellite broadband because it does not work well in inclement weather, requires unobstructed view of southern sky, and is too expensive); Letter from Florence Grasso, Covad, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 6 (filed Oct. 21, 2002) (Covad Oct. 21, 2002 *Ex Parte* Letter).

[707] *See* Committee on Broadband Last Mile Technology, Computer Science and Telecommunications Board, National Research Council, BROADBAND: BRINGING HOME THE BITS 135-36 (2002).

[708] Covad Comments at 35 (no copper alternative); *see also* Access Integrated Networks Reply at 13; Allegiance Reply at 32-33 (contending that incumbent LEC arguments are based on predictions and speculation rather than actual marketplace conditions).

[709] Covad Comments at 36-37 (arguing cable, wireless satellite and competitive fiber are not capable of providing xDSL quality or ubiquity); *see* AT&T Reply at 95-98, 161-63; WorldCom Reply at 87.

[710] *See supra* Part V.D.

loop unbundling rules for the mass market that ensure competitive access through extensive unbundling of the legacy copper loop facilities while promoting incentives to invest in next-generation network facilities and equipment through more limited unbundling of fiber-based loop facilities.

235. We conclude that requesting carriers seeking to serve the mass market face varying levels of impairment on a national basis without unbundled access to the transmission path between the central office and the customer premises depending upon whether the loop used to complete this path consists entirely of copper, or consists of a hybrid of fiber and copper cables, and whether a requesting carrier seeks to offer narrowband or broadband services or both. Pursuant to our section 251(d)(2) unbundling standard, we consider generally whether the potential revenue opportunity exceeds the costs, taking into consideration the relevant entry barriers – *i.e.*, scale economies, sunk costs, first-mover advantages, and barriers within the control of the incumbent LEC – and evidence of actual marketplace conditions.

236. Because of the importance of broadband to the American public and telecommunications users generally, we also consider other factors, foremost among these our obligation to ensure adequate incentives for infrastructure investment under section 706 of the Telecommunications Act of 1996, under our "at a minimum" authority in section 251(d)(2). For copper loops, we find on a national basis that requesting carriers are impaired without access to these loops, including copper subloops, because their absence is likely to make entry uneconomic.[711] For other types of loops (*i.e.*, FTTH loops and hybrid fiber/copper loops used in packet-based transmissions), however, we recognize that additional revenue opportunities associated with increased bandwidth capabilities may alleviate, in direct proportion to the level of fiber deployment, at least some of these entry barriers. Moreover, our obligation to ensure adequate infrastructure investment incentives pursuant to section 706 supports limitations on the unbundling of fiber-based loops. Finally, the existence of intermodal competition for mass market broadband services reduces the need for more extensive unbundling rules.

(a) Impairment

237. The costs of local loops serving the mass market are largely fixed and sunk. By fixed we mean that these costs are largely insensitive to the number of customers being served.[712] Much of the cost applies whether a carrier serves a single residential customer or ten thousand

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[711] In its *Verizon* decision, the Supreme Court stated that "the most costly and difficult part of [replicating the incumbent LEC's network] would be laying down the 'last mile' of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses." *Verizon*, 535 U.S. at 490-91. Indeed, in its *USTA* decision, the D.C. Circuit quotes the following passage from this Supreme Court decision in its discussion of cost disparities: "entrants may need to share some facilities that are *very expensive to duplicate* (say, loop elements) in order to be able to compete in other, *more sensibly duplicable* elements (say, digital switches or signal-multiplexing technology)." *USTA*, 290 F.3d at 426 (citing *Verizon*, 535 U.S. at 510 n.27) (emphasis added by D.C. Circuit).

[712] Covad Comments at 28; AT&T Reply at 150, 154-55 (citing AT&T Comments, Attach. B, Declaration of Richard N. Clarke (AT&T Clarke Decl.) at para. 23); WorldCom Reply at 14-18 (citing WorldCom Reply, Attach. A, Declaration of Mark T. Bryant (WorldCom Bryant Reply Decl.) at paras. 3, 5-14).

residential customers: that carrier must secure rights-of-way, dig trenches or place poles, and run wire underground or along poles.[713] Such deployment costs are also sunk. That is, local loop facilities are not fungible because they cannot be used for any other purpose if the investment fails.[714] If a new entrant overbuilds to serve a mass market customer and loses that customer to another carrier, the new entrant cannot economically redeploy that loop to another location. Its investment might be lost unless it could find a purchaser for its redundant loops. This is true regardless of whether the new entrant was providing narrowband or broadband service, or both. A carrier will not deploy mass market loops unless it knows in advance that it will have customers that will generate sufficient revenues to allow it to recover its sunk loop investment.[715] This certainty could most easily be achieved through long-term service contracts and a large, guaranteed customer base. In contrast to the enterprise market, however, long-term contracts are not commonplace in the mass market for either the narrowband or the broadband services and we have no information in our record to indicate that consumers ordinarily would accept such terms.[716] As new entrants, competitive LECs do not enjoy a large guaranteed subscriber base that would provide a predictable source of funding to offset their local loop deployment costs.[717] For these reasons, we find that the costs of self-provisioning mass market loop facilities are demonstrably greater than those faced universally by new entrants in other industries.[718]

238. Incumbent LECs also enjoy first-mover advantages that work with the steep costs noted above to compound the entry barriers associated with local loop deployment. When the incumbent LECs installed most of their loop plant, they had exclusive franchises and, as such,

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[713] *See* Covad Comments at 28 (arguing that incumbents could afford such massive fixed costs because they had 100% of the market share when they constructed their loop plant); WorldCom Reply at 63 (citing WorldCom Bryant Reply Decl. at para. 11). We note that fixed costs may strongly affect small businesses because, among other things, they likely serve fewer customers. See *supra* Part V.B. for a discussion of the relationship between fixed costs and scale economies.

[714] AT&T Reply at 144; WorldCom Reply at 16.

[715] NuVox Comments at 74-75; AT&T Reply at 154 (citing AT&T Willig Reply Decl. at paras. 21-22, 26, 39); *see also* Covad Reply at 16 (arguing that there are no "uncommitted entrants" because of the extremely high sunk costs in constructing loop plant).

[716] The record reflects that mass market customers typically purchase services offered over voice-grade loops on a month-to-month basis at relatively low prices. Compared to higher-capacity loops demanded by other customer classes, loops serving the mass market require less complex technology. Nevertheless, replicating a single loop for a mass market customer is prohibitively expensive due to the relatively low revenue per loop as compared to the cost of construction. This factor, coupled with the market's predominant use of short-term customer commitments, equates to a very low profit margin per loop, especially for new entrants. Moreover, loops for mass market customers exhibit substantial economies of scale, in that the larger the number of loops provisioned in a given area, the lower the average cost of provisioning each loop.

[717] As noted earlier in this Order, large sunk costs make it more difficult to ramp up to scale and, therefore, overcome a scale economies problem. *See supra* Part V.B.

[718] AT&T Comments at 127; Covad Reply at 15-18; WorldCom Reply at 14-18 (citing WorldCom Bryant Reply Decl. at paras. 3, 5-14).

the record shows that they secured rights-of-way at preferential terms and at minimal costs.[719] By contrast, our record shows that new entrants have no such advantage.[720] Even if a competitive LEC obtains speedy resolution of rights-of-way issues, it may still experience delays involved with constructing new loop plant. Incumbent LECs, of course, experience no such delays when providing narrowband or broadband services over their legacy copper loops. Because these loops are already deployed, they are available immediately for providing narrowband services (*i.e.*, voice, fax, dial-up Internet access) and available after performing any necessary line conditioning for providing broadband service. Furthermore, competitive LECs are also faced with the problem of overcoming the incumbent LECs' established brand name recognition for providing reliable service in order to convince (potentially reluctant) mass market customers to change carriers.

239. According to several commenters, due to the high fixed costs described above, the incumbents LECs designed their networks to minimize the extent to which they must modify their loop plant when adding new customers or services.[721] Accordingly, when incumbent LECs construct loops, they typically add several spare wire pairs to the customer's location because the cost of these spare wires is small in comparison to the cost of adding these pairs at a later date.[722] This design lowers the incumbent LECs' cost of adding customers. Incumbent LECs achieved low average costs because historically they have served 100 percent of demand in any given area. Their investments were recovered, in most cases, through regulated rates and an authorized rate

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[719] *See, e.g.*, Covad Comments at 28 (stating that incumbents often obtained rights-of-way through the use of the states' eminent domain power); AT&T Willig Decl. at paras. 62-63 (arguing that as the first mover, incumbents received rights-of-way from local governments with only minimal transaction costs because the residents in that neighborhood or municipality otherwise would not receive any telecommunications services).

[720] *See* WorldCom Comments at 33 (contending that competitive LECs have been hindered in their ability to install their own loops by "municipal ordinances that have imposed excessive, non-cost based fees on access to rights-of-way and have also delayed such access through unnecessary and cumbersome application procedures and bonding requirements."). Although section 224 of the Act imposes nondiscriminatory access obligations on incumbent LECs with respect to their poles, ducts, conduits, and rights-of-ways, we note that such access does not eliminate the transaction costs or first-mover advantages described above. 47 U.S.C. § 224.

[721] *See* AT&T Reply at 149.

[722] *See id.* (stating that "a customer drop may contain six pairs of wires rather than two because the carrying costs of the extra capacity are small compared to the cost of deploying additional capacity later (*e.g.*, to add a second or third line)"); *see also* AT&T Reply at 150 n.101 (explaining the incumbent LECs' use of bridged tap and additional transmission electronics to maximize the use of the existing plant); WorldCom Reply at 15 (citing WorldCom Bryant Reply Decl. at paras. 11-14; AT&T Clarke Decl. at para. 23) (arguing that "once a cable route is established, there are only small incremental structure costs to serving additional customer lines located along the route.").

of return.[723] For a new entrant to match or even come close to the incumbent LECs' economies of scale, at a minimum, it would have to capture quickly a significant percentage of the market.[724]

240. We recognize, however, that the deployment of next-generation network facilities and equipment – that is, fiber optic cables and equipment used to provide packet-based services – affects our analysis. Although some of the entry barriers exist for both all-copper and all-fiber loops (*e.g.*, the costs are both fixed and sunk, and such deployment is characterized by scale economies),[725] the revenue opportunities are significantly greater for fiber-based construction. The record indicates that carriers can earn significant returns on their fiber-based investment by providing a suite of services ranging from traditional voice to full-motion video.[726] In fact, the potential rewards of fiber deployment may offset the likelihood that competitive LECs will view entry as uneconomic. In addition, the barriers faced in deploying fiber loops, as opposed to existing copper loops, may be similar for both incumbent LECs and competitive LECs.[727] Both incumbent and competitive LECs must purchase fiber and the associated equipment, negotiate access to the necessary rights-of-way, obtain any necessary government permits, hire skilled labor, and manage their construction projects in order to deploy fiber loops. Moreover, by some estimates, competitive LECs enjoy advantages that incumbent LECs do not have, such as lower labor costs and superior back office systems.[728]

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[723] AT&T Reply at 150 (citing AT&T Reply, Tab C, Declaration of Anthony Fea and Anthony Giovannucci (AT&T Fea/Giovannucci Reply Decl.) at paras. 6-7).

[724] *See, e.g.*, AT&T Reply at 157 (arguing that even with an "aggressive" market share of 30%, the new entrant's loop investments per line costs would exceed the incumbent's by 45 to 87% and its monthly loop costs would exceed the incumbent's by 39 to 65%).

[725] Covad Comments at 27 (arguing that xDSL "signals are no easier or cheaper to replicate than loops carrying POTS"); WorldCom Reply at 15 (citing AT&T Clarke Decl. at para. 23).

[726] Corning Comments at 19-20 (asserting that incumbent and competitive LECs are on equal footing for FTTH deployment). Corning and the FTTH Council estimate that FTTH loops allow revenue opportunities of approximately $33 per subscriber compared to $18 per subscriber for xDSL-based services. Letter from Timothy J. Regan, Senior Vice President, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338, Attach. at 33 (filed Nov. 26, 2002) (Corning Nov. 26, 2002 FTTH Deployment *Ex Parte* Letter).

[727] *See, e.g.*, Verizon Reply at 40 n.117 (arguing that both incumbents and competitive LECs must incur and recover the costs of obtaining franchises and construction permits, and building out fiber loops). Similarly, as discussed earlier in this Order, incumbent LECs' first-mover advantages would be greatly reduced in greenfield situations. *See supra* Part V.B.

[728] Corning estimates construction accounts for more than 50% of FTTH deployment costs. Letter from Timothy J. Regan, Senior Vice President, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attach. 2 at 9 (filed Nov. 20, 2002) (Corning Nov. 20, 2002 FTTH Deployment *Ex Parte* Letter). Corning further explains that labor is "the largest component" of construction costs, and that competitive LECs enjoy an advantage. *Id.*, Attach. 2 at 10-11. *See CSMG Study* at 14 (noting that competitive LEC FTTH construction costs for labor are lower than those of incumbent LECs); BOC Shelanski Reply Decl. at para. 3; *see also* Verizon Reply at 42.

(b) Other Considerations

241. As we have stated elsewhere, broadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age.[729] In this regard, we weigh how our rules related to broadband deployment address other policy considerations. In particular, we seek to encourage investment in next-generation network architecture suitable for delivering advanced telecommunications capability throughout the nation. We also look to promote the potential of broadband in a minimally regulated environment in accordance with the deregulatory intent of the 1996 Act. Finally, we seek to unleash the innovation that has been characteristic of the computer and software industries. We expect to develop unbundling rules that serve these broad goals so that consumers ultimately benefit from a ubiquitous, efficient, nationwide broadband deployment.

242. *Section 706.* In determining what our unbundling rules for loops used for broadband services should be, we also are guided by the goals of, and our obligations under, section 706 of the 1996 Act.[730] Section 706 directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using regulatory measures that "promote competition in the local telecommunications market" and "remove barriers to infrastructure investment."[731] Through its "at a minimum" language, section 251(d)(2) provides the Commission with the discretion to consider factors in addition to impairment before requiring unbundling.[732] We find that this discretion is appropriately exercised by evaluating whether unbundling of local loops used to provide broadband services to the mass market is consistent with our section 706 mandate. In particular, we consider whether our unbundling requirements encourage the deployment of advanced telecommunications capability to all Americans by, among other things, promoting competition in the local market, promoting facilities-based deployment, promoting the delivery of innovative advanced services offerings, and removing barriers to infrastructure investment. In addition, we note that section 706 promotes the deployment of "high-speed, switched, broadband

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[729] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22747, para. 4 (2001) (*Dom/Non-Dom NPRM*).

[730] 47 U.S.C. § 157 nt.

[731] *Id.*

[732] With regard to the Commission's authority to "consider other elements" under the "at a minimum" language, the Court of Appeals for the D.C. Circuit has stated, "[w]e assume in favor of the Commission that is so." *USTA*, 290 F.3d at 425.

telecommunications capability," which counsels in favor of measures aimed at spurring the deployment of packet-switching technologies.[733]

243. Upgrading telecommunications loop plant is a central and critical component of ensuring that deployment of advanced telecommunications capability to all Americans is done on a reasonable and timely basis and, therefore, where directly implicated, our policies must encourage such modifications. Although a copper loop can support high transmission speeds and bandwidth, it can only do so subject to distance limitations and its broadband capabilities are ultimately limited by its technical characteristics.[734] The replacement of copper loops with fiber will permit far greater and more flexible broadband capabilities.[735] Although both the material used in the transmission path and the attached equipment work together to enable broadband capabilities, the record shows that, of the two, it is the upgrade to the transmission path (the loop) that is, by far, the more costly, complex, and risky endeavor.

244. In establishing our unbundling requirements, we consider our section 706 mandate in light of the technical characteristics of local loops. As we discuss in more detail below, we determine that our obligation to ensure the deployment of advanced telecommunications capability under section 706 warrants different approaches with regard to existing loop plant and new loop plant. With existing copper loops, all investment in advanced telecommunications capability is necessarily limited to the equipment, not the transmission facility. Therefore, our obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation. Because the incumbent LEC has already made the most significant infrastructure investment, *i.e.*, deployed the loop to the customer's premises, we seek, through our unbundling rules, to encourage both intramodal and intermodal carriers (in addition to incumbent LECs) to enter the broadband mass market and make infrastructure investments in equipment. In addition, we seek to promote the deployment of equipment that can unleash the full potential of the embedded copper loop plant so that consumers can experience enhanced broadband capabilities before the mass deployment of fiber loops. We expect that more innovative products and services will follow the deployment of new loop plant and associated equipment. With new loop plant, however, encouraging infrastructure investment must be balanced between ensuring that incumbent LECs retain adequate incentives to upgrade their loop plant and ensuring that competition continues to drive the deployment of innovative broadband services. These considerations come into play most acutely in determining

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[733] 47 U.S.C. § 157 nt. Section 706 defines "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

[734] *Line Sharing Order*, 14 FCC Rcd at 20919, para. 8 n.9.

[735] BROADBAND: BRINGING HOME THE BITS, *supra* note 707, at 129-30; Corning Comments at 2; Letter from Timothy Regan, Senior Vice President, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, FTTH Council Attach. at 28 (filed Jan. 29, 2003) (Corning Jan. 29, 2003 *Ex Parte* Letter).

the appropriate unbundling requirements for loops used to provide broadband service to the mass market.[736]

245. *Intermodal Competition.* Upon review of the extensive record on intermodal competition compiled in this proceeding, we determine that, although the existence of intermodal loops does not warrant a finding of no impairment, such competition is a factor to consider in establishing our unbundling requirements. We have discussed the competitive characteristics of intermodal loops in preceding paragraphs. Indeed, the broadband competition posed by cable operators in the mass market supports our decision to refrain from unbundling requirements on the features, functions, and capabilities of certain types of loops. Similarly, the state of intermodal competition, including competition from wireless telephony, in the mass market for narrowband services supports our approach to unbundling the legacy loops of incumbent LECs. Neither wireless nor cable has blossomed into a full substitute for wireline telephony. In addition, because wireless does not yet demonstrate the technical characteristics necessary to provide broadband services, unbundling incumbent LEC legacy loops is necessary for mass market consumers to realize the benefits of competition both for narrowband and broadband services, as well as both combined as a bundle.

246. There appear to be a number of promising access technologies on the horizon[737] and we expect intermodal platforms to become increasingly a substitute for wireline voice telephony services and for wireline broadband services. As we continue to assess impairment in the future, we recognize that the increased presence of viable alternative platforms may help increase competitive alternatives, both retail and wholesale, in the narrowband and broadband mass markets. The presence of such alternatives in the future may enable us to find that requesting carriers are no longer impaired in their ability to compete without access to incumbent LEC loops.[738]

(v) Specific Unbundling Requirements for Mass Market Loops

247. In this section, we address the specific unbundling requirements for mass market loops. We address the requirements based on the three primary types of local loops noted above, *i.e.*, copper loops, FTTH loops, and hybrid fiber/copper loops.

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[736] We note that one party, Corning, requested that the Commission forbear from imposing on incumbent LECs the resale requirements set forth in section 251(c)(4) for FTTH loops. Corning Comments at 31-33. Obviously, Corning's request is outside the scope of this proceeding and, thus, we will not address it in this Order.

[737] *See, e.g., Third Section 706 Report 2002*, 17 FCC Rcd at 2877-80, paras. 79-88 (describing other potential intermodal platforms capable of providing broadband service).

[738] We note that the impairment standard set forth in section 251 is different from, and does not prejudge, the standard we use to assess a carrier's dominant or non-dominant status. *See Dom/Non-Dom NPRM.*

(a) Legacy Networks

248. *Stand-Alone Copper Loops.* As discussed above, we find that requesting carriers are generally impaired on a national basis without unbundled access to an incumbent LEC's local loops, whether they seek to provide narrowband or broadband services, or both.[739] However, we determine that unbundled access to conditioned, stand-alone copper loops (which, of course, may be shared between two competitive LECs as discussed below) is sufficient to overcome such impairment for the provision of broadband services. Consequently, we find that, subject to the grandfather provision and transition period explained below, incumbent LECs do not have to unbundle the HFPL for requesting telecommunications carriers.

249. With more than 6 million kilometers of copper cable deployed, it is clear that copper remains the predominant loop type serving the mass market[740] and no party seriously asserts that stand-alone copper loops should not be unbundled in order to provide services to the mass market.[741] To address the impairment discussed above, we conclude that incumbent LECs must provide unbundled access to local loops comprised of copper wire.[742] That is, incumbent LECs shall provide, as a UNE, access to the complete transmission path comprised of a copper local loop between the central office and the customer's premises. The copper loop network element is a single local loop, including all intermediate devices (*e.g.*, repeaters, load coils) used to establish the transmission path. Consistent with the definition the Commission adopted in the *UNE Remand Order*, this complete transmission path between the incumbent LEC's main distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises[743] also includes the features, functions, and capabilities of the copper loop.[744] We include within this network element all local loops comprised of copper cable, including two- and four-wire analog voice-grade loops, digital loops (*e.g.*, DS0s and ISDN lines) and two- and four-wire loops conditioned to transmit the digital signals needed to provide xDSL service. Consistent with their obligation to provide unbundled local loops on just, reasonable, and

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739 *See* our discussion of the high fixed and sunk costs, large economies of scale, and operational barriers such as rights-of-way, *supra* Part VI.A.4.a(iv)(a).

740 *See Statistics of Communications Common Carriers September 2002 Report* at Table 2.2.

741 *See, e.g.*, SBC Reply at 109 (stating that competitive LECs have "ample opportunity to offer voice and data over the legacy network" and can "access the copper distribution subloop at the first accessible point in the ILEC's network . . . and use it to provision DSL service."). In addition, we note that some commenters assumed continued unbundling of loops to support their argument that UNE-P is unnecessary. *See, e.g.*, Verizon Reply at 113 (arguing that UNE-P is unnecessary because a competitive LEC could simply "use hot cuts and a UNE-L strategy to serve mass market customers.").

742 To be clear, we require incumbent LECs to unbundle both existing copper loops and copper loops as they are newly deployed.

743 As discussed below, this also includes any inside wire owned by the incumbent LEC. *See infra* Part VI.B.2 (discussing inside wire).

744 As noted above, the Act defines the term "network element" as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29).

nondiscriminatory terms and conditions, incumbent LECs must provide the requesting carriers with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent LEC in the same time intervals it is provided to the incumbent LEC's retail operations.[745] We note that our requirements for stand-alone copper loops apply to both copper loops that are in active service and those that are deployed in the network as spares.[746]

250. The practical effect of this unbundling requirement is to ensure that requesting carriers have access to the copper transmission facilities they need in order to provide narrowband or broadband services (or both) to customers served by copper local loops. We understand that this unbundling obligation may require an incumbent LEC to provide the functionality available in certain equipment, as well as to remove the functionality from other equipment (*i.e.*, to condition the loop), in order to provide a complete transmission path between its main distribution frame (or equivalent) and the demarcation point at the customer's premises.[747] As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service.[748]

251. *Line Splitting.* We find that when competitive carriers opt to take an unbundled stand-alone loop, the incumbent LEC must provide the requesting carrier with the ability to engage in line splitting arrangements. We use the term "line splitting" to describe the scenario where one competitive LEC provides narrowband voice service over the low frequency of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop. The Commission previously found that existing rules require incumbent LECs to

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[745] *See supra* Part VI.I (discussing incumbent LECs' OSS obligations); *see also UNE Remand Order*, 14 FCC Rcd at 3884-87, paras. 426-31 (requiring incumbent LECs to provide, among other things, the composition of the loop material; the existence, location and type of any electronic or other equipment on the loop; the loop length; the wire gauge(s) of the loop; and the electrical parameters of the loops); *Line Sharing Order*, 14 FCC Rcd at 20958-73, paras. 96-130; 47 C.F.R. § 51.319(g).

[746] These requirements also include the obligation to condition the spare pair so that the requesting carrier may provide xDSL service. As Qwest points out, when incumbent LECs construct new loop plant, they frequently overlay fiber facilities that supplement existing loops. Qwest Comments at 45; *see* Alcatel Comments at 16 (noting that, when incumbent LECs deploy fiber loops, competitive LECs would continue to maintain access to legacy copper transmission facilities). Thus, the construction of new facilities does not in itself alter a competitive LEC's ability to use the incumbent LEC's network. Qwest explains that it "does not proactively remove copper facilities in the case of an overlay" so that requesting carriers should be able to continue providing service in these circumstances. Qwest Comments at 45-46.

[747] As discussed in Part VI.A. *infra*, we readopt incumbent LECs' line conditioning obligations. The Commission noted in its *Line Sharing Order* that devices such as load coils and bridged taps interfere with the provision of xDSL service and, absent a certain showing by the incumbent LEC to the relevant state commission, must be removed at the request of the competitive LEC. *See Line Sharing Order*, 14 FCC Rcd at 20952-54, paras. 83-86. We determine that, upon the competitive LEC's request, incumbent LECs must similarly condition unbundled stand-alone loops to make them xDSL-compatible.

[748] We also require such conditioning for the HFPL consistent with the grandfather provision and transition period described below. *See Line Sharing Order*, 14 FCC Rcd at 20952-54, paras. 83-87.

permit competing carriers to engage in line splitting where a competing carrier purchases the whole loop and provides its own splitter to be collocated in the central office.[749] We reaffirm those requirements but, for purposes of clarity and ensuring regulatory certainty, we find that it is appropriate to adopt line splitting-specific rules.

252. Included among these rules is the requirement that incumbent LECs modify their OSS in such a manner as to facilitate line splitting. We also readopt the Commission rules requiring incumbent LECs to provide access to physical loop test access points on a nondiscriminatory basis for the purpose of loop testing, maintenance, and repair activities, and allowing incumbent LECs to maintain control over the loop and splitter equipment and functions in certain circumstances. We do not anticipate that the incumbent LECs will have any difficulty implementing such an obligation because the Commission required as much from them in its *Line Sharing Reconsideration Order*.[750] Furthermore, so long as the unbundled loop-switch combination is permitted in a particular state, the rules make clear that incumbent LECs must permit competitive LECs providing voice service through that arrangement to line split with another competitive LEC.[751] As the Commission did before, we encourage incumbent LECs and competitors to use existing state commission collaboratives and change management processes to address OSS modifications that are necessary to support line splitting.[752]

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[749] *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18515-16, paras. 324-25 (2000) (*SWBT Texas 271 Order*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 16 FCC Rcd 2101, 2109-14, paras. 16-26 (2001) (*Line Sharing Reconsideration Order*). These Orders expressly determined that rules 51.307(c) (requiring incumbent LECs to provide unbundled access to a UNE in a manner that "allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element") and 51.309(a) (prohibiting an incumbent LEC from imposing "limitations, restrictions, or requirements on . . . the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner" the requesting carrier intends) require incumbent LECs to permit line splitting.

[750] *See Line Sharing Reconsideration Order*, 16 FCC Rcd at 2111, para. 20 (requiring incumbent LECs to make all necessary network modifications, including providing nondiscriminatory access to OSS necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements). For the reasons explained herein, we grant WorldCom's request for clarification that requesting carriers may engage in line splitting. MCI WorldCom Petition for Clarification, CC Docket No. 96-98 at 10 (filed Feb. 17, 2000) (MCI WorldCom Feb. 17, 2000 Petition for Clarification).

[751] Again, the Commission required this in an earlier Order. *See Line Sharing Reconsideration Order*, 16 FCC Rcd at 2110-11, para. 19.

[752] *See id.* at 2111-12, para. 21. We note with support the work already performed by state commissions in this area and we encourage states to continue overseeing and participating in such collaboratives. *See, e.g.*, New York Department Comments at 6-7. Some commenters claimed that BOCs reject competitive LEC xDSL orders because the BOCs are not the local voice provider and they refuse to coordinate the HFPL order with the voice competitive LEC. *See, e.g.*, WorldCom Comments, Declaration of Ian Graham (WorldCom Graham Decl.) at para. 33. We do (continued....)

253. *Unbundled Access to Copper Subloops.* We require incumbent LECs to provide unbundled access to their copper subloops, *i.e.*, the distribution plant consisting of the copper transmission facility between a remote terminal and the customer's premises.[753] We conclude that our impairment finding extends to copper subloops because they are part and parcel of the local loop plant of incumbent LECs – requesting carriers face precisely the same barriers to entry for a subloop as with a copper loop that extends from the incumbent LEC's central office to the customer's premises. Indeed, we note that several incumbent LECs argue that accessing copper subloops provides competitive LECs with sufficient access to the loop for the provision of the services that they seek to provide.[754] Consistent with our section 706 goal to spur deployment of advanced telecommunications capability, we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE. As explained below, in light of our decision to refrain from unbundling the packetized capabilities of incumbent LECs, incumbent LECs will provide access to their fiber feeder plant only to the extent their fiber feeder plant is necessary to provide a complete transmission path between the central office and the customer premises when incumbent LECs provide unbundled access to the TDM-based capabilities of their hybrid loops. We encourage parties to negotiate access arrangements that would facilitate competitive LEC access to copper subloops. Specifically, we expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.[755]

254. We define the copper subloop UNE as the distribution portion of the copper loop that is technically feasible to access at terminals in the incumbent LEC's outside plant (*i.e.*, outside its central offices), including inside wire.[756] We find that any point on the loop where technicians can access the cable without removing a splice case constitutes an accessible terminal. As HTBC points out, a non-exhaustive list of these points includes the pole or pedestal, the serving area interface (SAI), the NID itself, the MPOE, the remote terminal, and the

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expect incumbent LECs to implement, in a timely fashion, "practical and reasonable measures" to enable competitive LECs to line split. *Id.*

[753] Letter from Derek R. Khlopin, High Tech Broadband Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attach. at 2 (filed Feb. 14, 2003) (HTBC Feb. 14, 2003 *Ex Parte* Letter) (submitting proposed rule language).

[754] Qwest Comments at 46; SBC Comments at 53-54; Verizon Comments at 89 n.296.

[755] For example, incumbent LECs could develop, and provide pursuant to sections 201/202 of the Act, telecommunications services that are similar to the special access services they already provide. Such services would, in effect, offer competitive LECs access to the shared fiber feeder plant (and any necessary cross-connections or similar functions) in order to obtain access to equipment in a remote terminal or to the copper subloop itself. We note that at least one incumbent LEC has supported making available wholesale broadband service offerings because such arrangements would make commercial sense. *See, e.g.*, Verizon Comments at 82 (arguing that incumbent LECs should be permitted to offer wholesale broadband services in lieu of unbundling its broadband network equipment and facilities). *But see* WorldCom Reply at 120-21 (criticizing Verizon's proposal).

[756] HTBC Feb. 14, 2003 *Ex Parte* Letter at 2 (submitting proposed rule language).

feeder/distribution interface. To facilitate competitive LEC access to the copper subloop UNE, we require incumbent LECs to provide, upon a site-specific request, access to the copper subloop at a splice near their remote terminals.[757] With respect to the copper subloop, in addition to providing greater specificity of access points consistent with the HTBC proposal, we readopt our previous requirements for providing unbundled access to subloop UNEs. Unlike our previous subloop unbundling rules, however, the rules we adopt herein do not require incumbent LECs to provide unbundled access to their feeder loop plant as stand-alone UNEs, thereby limiting incumbent LEC subloop unbundling obligations to their distribution loop plant.

255. *High Frequency Portion of the Loop.* Although we make the whole copper loop and the copper subloop available to requesting carriers as UNEs, along with the ability to engage in line splitting, some parties have requested that we also make available the high frequency portion of the copper loop. For reasons we discuss below, we decline to do so except as specified on a grandfathered basis. As an initial matter, we use the term "line sharing" to describe when a competing carrier provides xDSL service over the same line that the incumbent LEC uses to provide voice service to a particular end user, with the incumbent LEC using the low frequency portion of the loop and the competing carrier using the HFPL. Continued access to the incumbent LEC's conditioned, stand-alone copper loops and subloops enables a requesting carrier to offer and recover its costs from all of the services that the loop supports, including xDSL service.[758] Commenters have not argued that it is technically infeasible to provide xDSL service over a stand-alone copper loop nor have they argued that it is technically infeasible to provide xDSL service over a line split loop (*i.e.*, a loop that is shared by two competitive LECs – one offering voice service and the second offering xDSL service). Advocates for reinstating unbundled access to the HFPL instead offer various economic and operational reasons for why they would be impaired without such access, generally reiterating the same reasons that were offered in the Commission's original line sharing proceeding in 1999.[759]

256. As we noted above, the D.C. Circuit vacated these rules and directed the Commission to apply some limiting standard rationally related to the goals of the Act.[760] The D.C. Circuit stated that the Commission must weigh the costs associated with unbundling in making its section 251(d)(2) determinations.[761] More generally, the D.C. Circuit explained that

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[757] *Id.*

[758] Moreover, as explained above, the Commission reaffirms the incumbent LECs' obligation to permit line splitting so that a competitive LEC seeking only to offer xDSL service (*i.e.*, a data LEC) may partner with a voice-only competitive LEC to provide the service – xDSL – that the data LEC offered under the Commission's now-vacated rules.

[759] *Line Sharing Order*, 14 FCC Rcd at 20931-38, paras. 38-53.

[760] *USTA*, 290 F.3d at 429 (citing *Iowa Utils. Bd.*, 525 U.S. at 386-88). The D.C. Circuit also cautioned the Commission against imposing the costs of unbundling if doing so would not bring on a significant enhancement of competition. *Id.*

[761] *Id.* at 429.

the Commission must make an effort to balance these costs against the benefits of unbundling.[762] It is against this backdrop that the Commission makes its decision on line sharing.

257. In its *Line Sharing Order*, the Commission found that competitive LECs were impaired without unbundled access to the HFPL because, among other things, purchasing a stand-alone loop would be too costly for carriers seeking to offer only broadband service.[763] It also determined that requiring these carriers to offer voice service in order to provide xDSL service would impose on them the cost of providing circuit-switched voice services, which includes the development of marketing, billing, and customer care infrastructure to serve the needs of voice customers.[764] In addition, the Commission found no evidence that requesting carriers could obtain the HFPL from another competitive LEC (*i.e.*, what the Commission subsequently termed "line splitting").[765]

258. As an initial matter, we disagree with the Commission's prior finding that competitive LECs are impaired without unbundled access to the HPFL because purchasing a stand-alone loop would be too costly for carriers seeking to offer a broadband service. Whereas in the *Line Sharing Order*, the focus was only on the revenues derived from an individual service, our focus is on the all potential revenues derived from using the full functionality of the loop. As stated above, the impairment standard we adopt today considers whether *all* potential revenues from entering a market exceed the costs of entry, taking into account consideration of any advantages a new entrant may have.[766] Thus, in the instant case, we take into the account the fact that there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (i.e., VoDSL), data, and video services. In so doing, we conclude that the increased operational and economic costs of a stand-alone loop (including costs associated with the development of marketing, billing, and customer care infrastructure) are offset by the increased revenue opportunities afforded by the whole loop.

259. Moreover, we can no longer find that competitive LECs are unable to obtain the HFPL from other competitive LECs through line splitting. For example, the largest non-incumbent LEC provider of xDSL service, Covad, recently announced plans to offer ADSL service to "more of AT&T's 50 million consumer customers" through line splitting.[767] In

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[762] *Id.* at 427, 429.

[763] *Line Sharing Order*, 14 FCC Rcd at 20932-35, paras. 39-43.

[764] *Id.* at 20936, para. 48.

[765] *Id.* at 20938, para. 53.

[766] *See supra* para. 84.

[767] *See* Covad Communications, *AT&T and Covad Extend Residential DSL Relationship*, Press Release (dated Jan. 6, 2003) <http://www.covad.com/companyinfo/pressroom/pr_2003/010603_press.shtml> (stating that this agreement will enable more of AT&T's 50 million consumer customers to obtain xDSL service through Covad's network, which itself covers more than 40 million households and businesses nationwide). We thus do not find credible Covad's argument that the Commission's previous finding, that there are no third-party alternatives to the incumbent LEC's HFPL, remains valid. *See* Covad Comments at 42.

addition, in the 1999 *Line Sharing Order*, the Commission relied on the marketplace conditions present at the time to justify, at least partially, its decision to unbundle the HFPL. Specifically, the Commission noted the nascency of local competition and the lack of viable alternatives for a provider of broadband services.[768] Although we recognize that these circumstances have not been completely reversed, significant strides have been made by competitors in the local market. Competitors now serve more than three times the number of voice customers that were served in 1999.[769] Moreover, the conditions for further competitive entry are much better established as evidenced by the Commission's approval of 43 section 271 applications, which requires the Commission to find that the local telephone market is open to competition in a particular state, since 1999.[770] Since some incumbent LECs have thus far refused to provide xDSL service to customers that obtain voice service from a competitive LEC, by necessity, any of the over 11 million voice customers served by competitive LECs who seek xDSL service would have to obtain that service from a competing carrier.[771]

260. We find that allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives. This is largely due to the difficulties in pricing the HFPL as a separate element. As we explained in the *Line Sharing Order*, the same physical loop is used for multiple services, and there is no single correct method for allocating loop costs among these services and the HFPL.[772] Pricing the HFPL thus creates a dilemma: either incumbent LECs are allowed to over-recover their loop costs by fully charging for both the HFPL and the low frequency portion of the loop, or competitive LECs are allowed to purchase the HFPL at a price of roughly zero.[773] Following our pricing rules, most states did the latter.[774] The result is that competitive LECs purchasing only the HFPL have an irrational cost advantage over competitive LECs purchasing the whole loop and over the incumbent LECs. In contrast, allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the

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[768] *See, e.g., Line Sharing Order*, 14 FCC Rcd at 20938, 20939-40, paras. 53, 56.

[769] *See Local Telephone Competition December 2002 Report* at Table 2 (comparing 3.4 million mass market customers in December 1999 with over 11 million mass market customers in June 2002). We also note that several voice providers, AT&T and WorldCom, subsequently purchased the assets of two former data LECs: NorthPoint and Rhythms NetConnections, respectively. *See, e.g.*, WorldCom Reply, Reply Declaration of Ian Graham (WorldCom Graham Reply Decl.) at para. 1.

[770] We note that in 1999, only one state, New York, had been granted section 271 authority. Since then, the Commission has approved section 271 applications in 42 other states (including the District of Columbia).

[771] *See Local Telephone Competition December 2002 Report* at Table 2. As noted by WorldCom, the need for line splitting is likely to grow as penetration by competitive voice providers increases. WorldCom Comments at 104.

[772] *Line Sharing Order*, 14 FCC Rcd at 20975, para. 138; *see also Intercarrier Compensation NPRM*, 16 FCC Rcd at 9625, para. 39 (describing generally the difficulties associated with allocating common costs among services).

[773] *Line Sharing Order*, 14 FCC Rcd at 20975, para. 137.

[774] *See, e.g.*, Covad Dec. 27, 2002 *Ex Parte* Letter at 6 (noting that 73% of the states in which Covad does business have approved a zero rate for the HFPL). *See also CALLS Order*, 15 FCC Rcd at 13001, para. 98 (stating that, as of 2000, the Commission was unaware of any incumbent LEC allocating any loop costs to ADSL service).

HFPL to be separately unbundled puts competitive LECs using only the HFPL in a more fair competitive position with respect to other competitive LECs and to the incumbent LECs. Each carrier faces the same loop costs and, it if wishes, each can partner with another carrier to provide service over the HFPL alone or the low frequency portion of the loop alone as it wishes.

261. We expressly reject the Commission's earlier finding that "line sharing will level the competitive playing field . . . ."[775] In fact, rules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets.

262. Furthermore, in vacating the Commission's line sharing rules, the D.C. Circuit found that the Commission failed to consider the relevance of broadband competition coming from cable and, to a lesser extent, satellite providers.[776] The Commission staff's *High Speed Services December 2002 Report* shows that, nationally, cable modem service is the most widely used means by which the mass market obtains broadband service.[777] Indeed, two reports show that the gap between cable modem and ADSL subscribership continues to widen.[778]

263. As discussed earlier, the Commission also has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines.[779] Although cable modem's lead in broadband deployment is not dispositive in our impairment analysis,[780] the fact that broadband service is actually available through another network platform and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon unbundled access to the HFPL. Indeed, as noted by Allegiance, the existence of some

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[775] *Line Sharing Order*, 14 FCC Rcd at 20930-31, para. 35.

[776] *USTA*, 290 F.3d at 428.

[777] *See High Speed Services December 2002 Report* at Table 5 (noting that cable modem service is provided over nine million lines, which is approximately 57% of all high-speed lines).

[778] *Compare* Industry Analysis and Technology Division, Wireline Competition Bureau, *High Speed Services July 2002 Report* at Table 5 (noting that the difference in number of high-speed lines served by cable modem service and ADSL service was 3.11 million as of December 2001) *with High Speed Services December 2002 Report* at Table 5 (noting that the difference in number of high-speed lines served by cable modem service and ADSL service was 4.07 million as of June 2002).

[779] *See, e.g., Third Section 706 Report 2002*, 17 FCC Rcd at 2877-81, paras. 79-88.

[780] *See supra* Part V.B. (discussing intermodal alternatives in the general impairment Part of this Order).

measure of intermodal alternatives in the residential market lessens the benefits of unbundling.[781] Given that the whole loop is available, on an unbundled basis, we find that the costs of unbundling the HFPL outweigh the benefits when taking into account the skewed entry incentives discussed above. Moreover, we anticipate that the Commission's decisions in this Order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options.[782]

264. *Line Sharing Transition.* We recognize that a number of competitive LECs have relied on the existence of line sharing to provide broadband service to end users since the adoption of the *Line Sharing Order*. These carriers have built internal systems to order the HFPL from incumbent LECs and have designed products that depend on line sharing as an input. In order to ensure that these carriers have adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with incumbent LECs to replace line sharing, we adopt a three-year transition period for new line sharing arrangements of requesting carriers.[783] In addition, until the next biennial review, a proceeding that will

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[781] *See* Letter from Thomas Jones, Counsel for Allegiance, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Feb. 13, 2003) (Allegiance Feb. 13, 2003 *Ex Parte* Letter).

[782] Chairman Powell claims that our decision on line sharing contains some compromises, which, he contends, are improper. *Chairman Powell Statement* at 15-16. There is nothing improper about our decision. The Commission is composed of five people, each of whom sometimes has a different view of the right answer. When that occurs, it is essential to work together to find common ground, or else the agency cannot function. Compromise is inherently part of that process, and "good public policy often must be[] a balanced compromise of conflicting values and judgments." Separate Statement of Commissioner Michael K. Powell, *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12669 (1999); *see also* Separate Statement of Commissioner Michael K. Powell, *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, Report and Order, 15 FCC Rcd. 9219, 9296-97 (1999) ("Well, this time we are not doing much to modify or eliminate the rule and I do not agree with all of the findings and competitive analysis in the item. . . . Most importantly, in the spirit of compromise, the item recognizes three things that I find somewhat comforting in my decision today to support the item."). In fact, "compromise . . . is within the Commission's purview," *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 36 (D.C. Cir. 2002), so long as an "agency articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Ass'n of American Railroads v. Surface Transp. Bd.*, 161 F.3d 58, 66 (D.C. Cir. 1998) (quoting *Michigan Consol. Gas Co. v. FERC*, 883 F.2d 117, 120-21 (D.C. Cir. 1989)) (quotation marks omitted). Here, we have offered a detailed justification of our actions. Specifically, as discussed, the Commission's previous decision to require line sharing was unequivocally vacated by the D.C. Circuit; the Commission's earlier assessment of costs and revenues from the local loop failed to consider all potential revenues; competitive LECs are now able to obtain the HFPL from other competitive LECs through line splitting; the Commission's previous line sharing rule created warped incentives, because there is no single correct method for allocating the costs attributable to the HFPL; and cable television providers, who are not subject to line sharing obligations, serve a majority of the current residential broadband customers, while incumbent LECs have only a fraction of this market share.

[783] In response to the transition mechanism for line sharing voted on February 20th, the dissent raised some concerns regarding aspects of the transition for existing customers that had not been previously discussed. Separate Statement of Commissioner Kathleen Q. Abernathy, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Feb. 20, 2003) ("I am also troubled by the majority's decision to establish a three-year transition period for the elimination of line sharing. I believe that the majority should own up to the fact that, by cutting off data LECs' access to line sharing, it has shut down residential (continued....)

commence in 2004, we grandfather all existing line sharing arrangements unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user customer. During this interim period, we direct incumbent LECs to charge competitive LECs the same price for access to the HFPL for those grandfathered customers that they charged prior to the effective date of this Order. Consistent with our stated policy goal of preventing harm to consumers caused by a discontinuance of service, we conclude that establishing a grandfathering rule is necessary to prevent consumers who currently rely on line sharing from losing their broadband service.[784] This interim grandfathering rule will help alleviate the impact of such a significant rule change on end-user customers.[785] Consistent with

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broadband competition over the copper loop. Any talk of a glide path is fanciful, because, in all likelihood, there will regrettably be no providers left to participate in a transition three years from now."); Separate Statement of Chairman Michael K. Powell, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Feb. 20, 2003) ("By some estimates, 40% of DSL providers use line shared inputs. The decision to kill off this element and replace it with a transition of higher wholesale prices will lead quite quickly to higher retail prices for broadband consumers . . ."). As the Commission has concluded in other contexts, "some of those concerns were well thought out and prompted the majority to rethink its position and further explain its rationale. Those steps improved this Order --and in turn resulted in a higher quality product for the American people. At the end of the day that should be the goal of all the Commissioners." Joint Statement of Chairman Michael Powell and Commissioner Kathleen Q. Abernathy, *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, ET Docket No. 98-206, RM-9147, RM-9245, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9807 (2002) (*Joint Statement of Chairman Powell and Commissioner Abernathy on Northpoint*). Those concerns prompted the majority to address the status of existing customers and further explain its rationale. The interim grandfathering rule we adopted improved this Order, responds to the dissenters' call for the need to strengthen the glide path we set forth on February 20th, and further ameliorates the immediate impact of our decision on retail prices for broadband consumers. In addition, immediate change of existing service may be unnecessary in light of frequent broadband customer churn and our effort to reevaluate the extent that grandfathered customers remain prior to the end of the three-year transition in the context of our next biennial review. While ideally we would engage in the dialogue at an earlier stage, "continuous improvement of our items is the right thing to do." *See id*; *see also infra* note 1396.

[784] *See e.spire Application to Discontinue Domestic and International Telecommunications Services*, Order, Comp. File No. 592, 17 FCC Rcd 14785, para. 1 (WCB 2002) (denying application to discontinue telecommunications service because such action would disrupt service to consumers); *Rhythms Link Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services*, Order, NSD File No. W-P-D-517, 16 FCC Rcd 17024, 17025, paras. 4, 13 (CCB 2001) (granting application to discontinue telecommunications service after determining that Rhythms gave proper notice to its customers, which resulted in most affected customers being migrated to other carriers without a service interruption).

[785] We note that both Qwest and Verizon suggested some form of grandfathering line sharing customers. For example, Qwest proposed grandfathering existing locations for line sharing. Qwest Comments at 44-45. Although Qwest's proposal was premised on the D.C. Circuit upholding the Commission's line sharing rules, we find that a modification of this proposal to address current marketplace conditions is appropriate. *Id.* at 45 n.115. Namely, instead of permitting competitive LECs to continue obtaining unbundled access to the HFPL at all current locations, which presumably would allow requesting carriers to add new subscribers served out of those locations, we limit this proposal to existing customers only. Even after issuance of the *USTA* decision, Verizon suggested grandfathering existing competitive LEC xDSL customers served over line shared loops. *See* Letter from William P. Barr, Verizon, to Michael Powell, Chairman, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 5 (filed Jan. 17, 2003) (Verizon Jan. 17, 2003 *Ex Parte* Letter) (noting that "[a]s a purely transitional measure . . . existing [line sharing] customers could (continued....)

our findings set forth above in Part V.E, if a decision taken pursuant to state law after this Order becomes effective were to require line sharing obligations, any party that believes such decision is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission.[786]

265. The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state-approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location.[787] During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location.[788] After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing.[789] We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary.

266. The purpose of this transition is to minimize disruption to the customers that obtain xDSL service through line shared loops and to provide a reasonable glide path to competitive LECs currently availing themselves of this UNE. The Commission has established

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be grandfathered for some period of time."). As a practical matter, because of the churn rates associated with this industry, we find that our grandfathering requirement described above is not without end.

[786] *See supra* Part V.E for our discussion of the role of the states.

[787] We determine that it is appropriate to permit requesting carriers to continue obtaining new customers during the first year of the transition. This augmented customer base will enable requesting carriers, especially data LECs, to continue their day-to-day operations while modifying their business plans and working to preserve access arrangements with incumbent LECs. *See* Letter From Jason D. Oxman, Vice President and Assistant General Counsel, Covad, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (Covad Feb. 24, 2003 *Ex Parte* Letter).

[788] After this third year, competitive LECs will not have unbundled access to the HFPL, pursuant to section 251(c)(3), to provide those customers obtained after the Order became effective xDSL service over line shared loops. That is, after this third year, the recurring charge for the HFPL increases to 100% of the recurring charge for a stand-alone loop.

[789] By new customers, we mean any customer obtained during the three-year transition period or after the three-year transition period. New customers do not include, however, those line sharing customers who have been grandfathered, as described above in para. 264.

transition periods of this length in the past. For example, in establishing a three-year interim intercarrier compensation regime for ISP-bound traffic, the Commission stated that it would be "prudent to avoid a 'flash cut' to a new compensation regime that would upset the legitimate business expectations of carriers and their customers."[790] We find that a similar approach is required here. It is entirely appropriate to fashion a transition period of sufficient length to enable competitive LECs to move their customers to alternative arrangements and modify their business practices and operations going forward.[791]

267. As one commenter noted in describing the Commission's authority to establish interim rates for unbundled local circuit switching, in combination with other elements, inherent in the Commission's authority to establish transitional rules is its authority to establish transitional rates.[792] Section 201(b) gives the Commission broad authority to adopt the transition mechanism set forth in this Part and nothing in that provision limits our authority with respect to rates. Indeed, we agree with those commenters that contend that a transitional rate is often the most effective means by which to implement a "glide path from one regulatory/pricing regime to another."[793] The incremental approach we adopt here will encourage requesting carriers either to migrate their customers to the whole loop in an orderly manner or to reach agreement, if it is desired, with the incumbent LEC to continue access to the HFPL on different terms and conditions.

268. In order to implement the line sharing transition plan described above, we find that it is necessary to reinstate certain rules concerning the HFPL.[794] Specifically, we define the HFPL as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions.[795] The features, functions, and capabilities of the HFPL network element are those that establish a complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises, and includes any inside wire owned by the

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[790] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9186-87, paras. 77-78 (2001) (*ISP Remand Order*).

[791] *See, e.g.*, Letter from Susan Guyer and Michael Glover, Verizon, to William F. Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4 (filed Jan. 10, 2003).

[792] *See* Letter from Gary L. Phillips, Counsel for SBC, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-338 at 2 (filed Dec. 19, 2002) (SBC Dec. 19, 2002 *Ex Parte* Letter) (citing the Commission's *ISP Remand Order*).

[793] *Id.*

[794] To be clear, although the D.C. Circuit referred broadly to vacating the *Line Sharing Order*, it did not address the Commission's spectrum management rules or that portion of the Order in its decision. Consequently, the Commission finds that these rules were unaffected by the *USTA* decision and therefore do not need to be readopted because they remain in effect. *See, e.g.*, 47 C.F.R. §§ 51.230-.233. Finally, we find no reason to modify these rules in this Order.

[795] 47 C.F.R. § 51.319(h)(1); *Line Sharing Order*, 14 FCC Rcd at 20926-27, para. 26.

incumbent LEC. Incumbent LECs must condition loops to enable requesting carriers to access the HFPL.[796] Finally, incumbent LECs must provide physical loop test access points on a nondiscriminatory basis for the purposes of loop testing, maintenance, and repair activities.[797]

269. In addition, incumbent LECs are only required to provide access to the HFPL if the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop over which the requesting carriers seeks access to provide ADSL service.[798] In the event that the customer ceases purchasing voice service from the incumbent LEC, either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service. Finally, as the Commission found before, incumbent LECs may also maintain control over the loop and splitter equipment and functions.[799]

270. *Low Frequency Portion of the Loop.* We disagree with CompTel that we should separately unbundle the low frequency portion of the loop, which is the portion of the copper local loop used to transmit voice signals.[800] We conclude that unbundling the low frequency portion of the loop is not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit a narrowband service-only competitive LEC to take full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer xDSL service.

271. *Retirement of Copper Loops and Copper Subloops.* As we note below in our discussion of FTTH loops, we decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced with fiber. Instead, we reiterate that our section 251(c)(5) network modification disclosure requirements (with the minor modifications also noted below in that same discussion) apply to the retirement of copper loops and copper subloops.[801] In

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[796] *Line Sharing Order*, 14 FCC Rcd at 20952-54, paras. 83-87; 47 C.F.R. § 51.319(h)(5). Included among the incumbent LECs' conditioning requirements that we reinstate is the requirement that, after determining that conditioning a loop will significantly degrade the voiceband service offered by the incumbent LEC on that loop, the incumbent LEC must either locate another loop and migrate its voice service to that loop while providing the requesting carrier with access to the HFPL, or demonstrate to the relevant state commission that the loop cannot be conditioned without significantly degrading the voiceband service and no alternative loop exists to which the customer's voiceband service can be moved to enable line sharing. *See* 47 C.F.R. § 51.319(h)(5)(ii); *see also infra* Part VII.D (discussing modifications to the existing network).

[797] *See Line Sharing Order*, 14 FCC Rcd at 20964-67, paras. 111-18; 47 C.F.R. § 51.319(h)(7).

[798] *Line Sharing Order*, 14 FCC Rcd at 20947, para. 72; 47 C.F.R. § 51.319(h)(3). Finally, we also readopt our finding contained in the *Line Sharing Order* that if an incumbent LEC disconnects a customer's voice service in accordance with applicable law, then the competitive LEC must purchase the entire loop to continue providing that customer with xDSL service. *Line Sharing Order*, 14 FCC Rcd at 20947-48, para. 73.

[799] *Id.* at 20949-50, paras. 76-79.

[800] CompTel Comments at 43-45.

[801] *See* 47 U.S.C. § 251(c)(5) (specifying network disclosure requirements); 47 C.F.R. §§ 51.324-.335.

addition, any state requirements that currently apply to an incumbent LEC's copper loop or copper subloop retirement practices will continue to apply.

(b) Next-Generation Networks

272. Although we require the unbundling of legacy technology used over hybrid loops, we decline to attach unbundling requirements to the next-generation network capabilities of fiber-based local loops, *i.e.*, those loops that make use of fiber optic cables and electronic or optical equipment capable of supporting truly broadband transmission capabilities based on the analysis described earlier in this subsection. We expect that this decision to refrain from unbundling incumbent LEC next-generation networks – which is based on our evaluation of an extensive record developed over more than two years – will stimulate facilities-based deployment in two ways. First, with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market. Thus, we conclude that relieving incumbent LECs from unbundling requirements for these networks will promote investment in, and deployment of, next-generation networks. Second, 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. The end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services.

(i) FTTH Loops

273. We conclude that requesting carriers are not impaired without access to FTTH loops,[802] although we find that the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop.[803] With a limited exception for narrowband services, our conclusion applies to FTTH loops deployed by incumbent LECs in both new construction and overbuild situations. Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loops must be

[802] By "FTTH loop," we mean a local loop consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark fiber, that connects a customer's premises with a wire center (*i.e.*, from the demarcation point at the customer's premises to the central office). *See* Corning Nov. 20, 2002 *Ex Parte* Letter at 2 (submitting proposed definition of FTTH loop).

[803] Alcatel Comments at 15-16; Corning Comments at 22-26 (arguing that no impairment exists for FTTH loops); Corning Nov. 26, 2002 *Ex Parte* Letter, Attach. 1 at 17-21, 78-89, Attach. 2 at 7-10; HTBC Comments at 40-41. We therefore disagree with those parties who argue we should require unbundling of FTTH loops. *See* ALTS *et al.* Comments at 82 (contending that the Commission should require incumbent LECs to provide unbundled access to "broadband fiber"); CompTel Comments at 40-42; Covad Comments at 54-58 (arguing that the Commission should unbundle fiber loops).

unbundled for narrowband services only. Incumbent LECs do not have to offer unbundled access to newly deployed or "greenfield" fiber loops.

274. FTTH loop deployment is still in its infancy. Corning notes, for example, that only 47 communities throughout the nation currently enjoy widespread FTTH deployment.[804] The record demonstrates that mass market FTTH loops are used almost entirely for providing broadband services (or broadband in conjunction with narrowband services) at this time, and that carriers are not deploying such loops to provide narrowband services alone.[805] The record further indicates that FTTH loops display several economic and operational entry barriers in common with copper loops – that is, the costs of FTTH loops are both fixed and sunk, and deployment is expensive.[806] The record also shows, however, that the potential rewards from FTTH deployment are significant. Corning notes, for example, that carriers will be able to earn a substantially greater return on their FTTH investment by offering voice, data, video, and other services.[807] Thus, we find that the substantial revenue opportunities posed by FTTH deployment help ameliorate many of the entry barriers presented by the costs and scale economies.

275. With respect to new FTTH deployments (*i.e.*, so-called "greenfield" construction projects), we note that the entry barriers appear to be largely the same for both incumbent and competitive LECs – that is, both incumbent and competitive carriers must negotiate rights-of-way, respond to bid requests for new housing developments, obtain fiber optic cabling and other materials, develop deployment plans, and implement construction programs.[808] Indeed, the record indicates that competitive LECs are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation.[809] Competitive LECs' active participation in deploying FTTH loops demonstrates that

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[804] Letter from Timothy Regan, Senior Vice President, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 5 (filed Dec. 20, 2002) (Corning Dec. 20, 2002 FTTH *Ex Parte* Letter).

[805] Deployment of FTTH loop plant enables a carrier to provide both narrowband voice and broadband services – in essence, voice telephony becomes an application provided over an integrated network. *See* Corning Comments at 2 (asserting that FTTH allows carriers to provide narrowband voice service, full motion video, and high speed data transfers simultaneously), 16-18; FTTH Council Comments at 1; HTBC Comments at 6-8, 14-17.

[806] *See* Corning Nov. 20, 2002 *Ex Parte* Letter, Attach. at 7-10 (estimating costs involved with deploying FTTH loops).

[807] Corning Nov. 26, 2002 *Ex Parte* Letter, Attach. at 33. Corning indicates that, through FTTH deployment, carriers could reasonably earn a return of $33 per subscriber, compared to $18 for ADSL deployment and $21 for cable modem service. *Id.*

[808] Some parties contend that competitive LECs actually have a competitive advantage in deploying FTTH loops because their labor costs are generally lower. *See* Corning Comments at 4; Corning Jan. 29, 2003 *Ex Parte* Letter at 19; Corning Nov. 20, 2002 *Ex Parte* Letter, Attach. 2 at 10. In addition, some parties argue that FTTH loop costs are declining because of the cost of the necessary attached electronics is dropping. Corning Comments at 13, n. 33. BellSouth notes that competitive LECs have "a mandatory right to access the rights-of-way of [incumbent LECs] and presumptive rights to access other utility rights-of-way." BellSouth Comments at 68-69.

[809] Corning Comments at 5; HTBC Comments at 42 (asserting that competitive LECs and incumbent LECs are on equal footing for deploying FTTH loops); Corning Reply at 12; Letter from Jeffrey S. Linder, Counsel for Corning, (continued....)

carriers are not impaired if we refrain from unbundling these loops.[810] Thus, we conclude that incumbent LECs do not have a first-mover advantage that would compound any barriers to entry in this situation. In addition, we conclude that incumbent LECs have no advantages concerning the sunk costs of greenfield FTTH loops – both incumbent LECs and competitive LECs are faced with the same issue in their deployment of such loops. As a result of our analysis, we do not require incumbent LECs to provide unbundled access to new FTTH loops for either narrowband or broadband services.[811]

276. We recognize that one FTTH deployment scenario, *i.e.*, overbuild deployment in which an incumbent LEC constructs fiber transmission facilities parallel to or in replacement of its existing copper plant, merits slightly different treatment than greenfield FTTH deployments. Although the record indicates that this scenario is largely theoretical, at least today, the evidence suggests that impairment would not exist for two reasons. First, as with greenfield deployments, competitive and incumbent LECs largely face the same obstacles in deploying overbuild FTTH loops, although incumbent LECs still enjoy an established customer base. Both competitive LECs and incumbent LECs must obtain materials, hire the necessary labor force, and construct the fiber transmission facilities. Second, we note that the revenue opportunities associated with deploying any type of FTTH loop are far greater than for services provided over copper loops. Besides providing narrowband services like voice, fax, and dial-up Internet access, competitive LECs could also deploy a wide-array of video and other broadband applications over such FTTH loops.[812] In fact, broadband platforms enabled by the deployment of FTTH loops will likely

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to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attach 1 at 2 (filed Feb. 6, 2003) (Corning Feb. 6, 2003 *Ex Parte* Letter); Letter from Larry Aiello, President and Chief Executive Officer, Corning Cable Systems, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 3 (filed Feb. 3, 2003) (noting that competitive LECs have deployed 68% of the existing FTTH deployment to date) (Corning Feb. 3, 2003 *Ex Parte* Letter); Letter from Derek R. Khlopin, HTBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 4 (filed Jan. 14, 2003) (arguing that competitive LECs are not impaired without access to FTTH loops) (HTBC Jan. 14, 2003 *Ex Parte* Letter); Letter from Timothy J. Regan, Senior Vice President, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 , Attach. 2 at 7 (filed Jan. 29, 2003) (Corning Jan. 29, 2003 FTTH *Ex Parte* Letter). Corning estimates that competitive LECs have deployed FTTH loops to 44,890 homes, that small incumbent LECs have deployed FTTH loops to 3,600 homes, that the BOCs have deployed FTTH loops to some 400 homes, and that municipalities have deployed FTTH loops to about 18,100 homes. Corning Jan. 29, 2003 FTTH *Ex Parte* Letter, Attach. at 7.

[810] Corning Jan. 29, 2003 FTTH *Ex Parte* Letter at 6-7.

[811] By FTTH loop, we mean a loop consisting entirely of fiber optic cable between the main distribution frame (or its equivalent) and the demarcation point at the customer's premises. We recognize that other "fiber-in-the-loop" network architectures exist, such as "fiber to the curb" (FTTC), "fiber to the node" (FTTN), and "fiber to the building" (FTTB). *See* Telcordia, Inc., NOTES ON FIBER-IN-THE-LOOP (FITL), SR-Notes-Series-10, Issue 1 at 5-1 to 6-17 (Jul. 2001). Our definition of FTTH loops excludes such intermediate fiber deployment architectures. For purposes of our unbundling rules, we consider any loop consisting of fiber optic and copper cable to be a hybrid loop.

[812] *See* Corning Comments at 2; HTBC Comments at 15-16 (describing services that can be offered over FTTH loops); *CSMG Study* at 10 (describing key revenue drivers for FTTH loops), 18-24 (comparing revenue opportunities for xDSL-based networks and FTTH networks); Corning Nov. 26, 2002 *Ex Parte* Letter at 28.

enable a variety of new services and applications, competing directly with the market-leading cable broadband offerings and the broadband offerings potentially provided by other technological platforms, such as satellite and wireless, thereby weakening the case for unbundling. Thus, the potential rewards for deploying overbuild FTTH loops are distinctly greater than those associated with deploying copper loops and thus present a different balance when weighed against the barriers to entry.

277. We agree with Corning and Verizon, however, that in a FTTH overbuild situation we must ensure continued access to an unbundled transmission path suitable for providing narrowband services to customers served by FTTH loops.[813] The record indicates that deployment of overbuild FTTH loops could act as an additional obstacle to competitive LECs seeking to provide certain services to the mass market. By its nature, an overbuild FTTH deployment enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve mass market customers. In this regard, incumbent LECs potentially have an entry barrier within their sole control (*i.e.*, the decision to replace pre-existing copper loops with FTTH). In order to ensure continued narrowband access in this situation, incumbent LECs have the option to either (1) keep the existing copper loop connected to a particular customer after deploying FTTH;[814] or (2) in situations where the incumbent LEC elects to retire the copper loop, it must provide unbundled access to a 64 kbps transmission path over its FTTH loop.[815] Under the first option, we do not require incumbent LECs to incur relief and rehabilitation costs for that loop unless a competitive LEC requests unbundled access to it and such loop is placed back into service. We conclude that these measures counteract any obstacles competitive LECs face in overbuild FTTH situations much like other provisions of the Act offset certain entry barriers. We note that this is a very limited requirement intended only to ensure continued access to a local loop suitable for

[813] Letter from Timothy J. Regan, Senior Vice President, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 2 (filed Feb. 5, 2003) (Corning Feb. 5, 2003 FTTH Overbuild *Ex Parte* Letter); Verizon Jan. 17, 2003 *Ex Parte* Letter at 7 (asserting that incumbent LECs should only have to provide unbundled access to a 64 kbps transmission path over their fiber transmission facilities).

[814] Corning Feb. 5, 2003 FTTH Overbuild *Ex Parte* Letter at 2 (proposing policy recommendations related to overbuild FTTH); Corning Feb. 6, 2003 *Ex Parte* Letter at 5; Letter from Timothy J. Regan, Senior Vice President, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 2 (filed Feb. 13, 2003) (proposing overbuild FTTH policies) (Corning Feb. 13, 2003 *Ex Parte* Letter); Letter from Leonard G. Ray, Government Relations Committee Chairman, FTTH Council, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 2-3 (filed Feb. 13, 2003).

[815] *See* Letter from Timothy J. Regan, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attach. 3 at 1 (providing key definitions); Verizon Jan. 17, 2003 *Ex Parte* Letter at 7 (asserting that incumbent LECs should only have to provide unbundled access to a 64 kbps transmission path over their fiber transmission facilities). A key part of the HTBC proposal is ensuring that competitive LECs maintain access to "all existing non-packet loop capabilities over hybrid fiber/copper facilities." Letter from Derek. R. Khlopin, HTBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attach. 1 at 1 (filed Jan. 24, 2003) (HTBC Jan. 24, 2003 Khlopin *Ex Parte* Letter). As an example, HTBC states that "DS-1s provided over TDM facilities would remain subject to a Section 251 impairment analysis." *Id.*

providing narrowband services to the mass market in situations where an incumbent LEC has deployed overbuild FTTH and elected to retire the pre-existing copper loops.

278. As noted above, section 706 informs our policymaking as we determine what unbundling rules, if any, should apply to FTTH loops.[816] All parties agree that FTTH loops meet the definition of advanced telecommunications capability,[817] and so we determine that promoting the deployment of FTTH loops is particularly important in light of our section 706 mandate. Simply put, delivering broadband service is impossible without a transmission path to the customer's premises that supports broadband capabilities. While copper loops enable carriers to deliver xDSL-based broadband services, FTTH loops significantly enhance the broadband capabilities a carrier can deliver to consumers. 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.[818]

279. We further agree with Corning that our FTTH policy adopted herein should not adversely affect competitive LECs for several reasons.[819] First, competitive LECs have demonstrated that they can self-deploy FTTH loops and are doing so at this time. Second, competitive LECs can continue to use resale as a means for serving mass market customers after incumbent LECs deploy FTTH loops. Finally, competitive LECs can continue to have unbundled access to existing copper facilities, to the extent such facilities are available.

280. For these reasons, we disagree with AT&T that we should further study issues surrounding the deployment of FTTH loops used to serve the mass market.[820] The record contains sufficient information concerning the current deployment of FTTH loops and the economic barriers surrounding such deployment, as well as a number of studies and projections of future FTTH deployment.[821]

281. *Retirement of Copper Loops*. We decline to impose a blanket prohibition on the ability of incumbent LECs to retire any copper loops or subloops they have replaced with FTTH

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816 Section 706(a) of the Telecommunications Act of 1996. *See* Corning Comments at 10-11 (arguing that the Commission should consider section 706 in crafting its unbundling framework); HTBC Comments at 43-44.

817 *See, e.g.*, Corning Comments at 2, 11-13; HTBC Comments at 5.

818 Corning Comments at 3, 10-14; SBC Reply at 55-60; Letter from Jeffrey S. Linder, Counsel for Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attach. at 6 (filed Jan. 31, 2003) (estimating that unbundling relief will increase FTTH deployment by a factor of 6.2).

819 *See* Corning Feb. 6, 2003 *Ex Parte* Letter at 5.

820 AT&T Reply at 74 (advocating that the Commission study FTTH deployment issues further before determining what unbundling requirements, if any, apply to FTTH loops used to serve the mass market).

821 *See* Corning Nov. 26, 2002 *Ex Parte* Letter, Attach. at 29-33 (describing revenue opportunities), 42-45 (describing competitive LEC ability to self-deploy FTTH loops); *CSMG Study* at 10-14 (providing overview of study conclusions).

loops. Several parties also propose extensive rules that would require affirmative regulatory approval prior to the retirement of any copper loop facilities.[822] We find that such a requirement is not necessary at this time because our existing rules, with minor modifications, serve as adequate safeguards.[823] Pursuant to the Act and the Commission's rules, incumbent LECs must provide public notice of any network change that will affect a competing carrier's performance or ability to provide service.[824] Because the retirement of copper loop plant is a network modification that affects the ability of competitive LECs to provide service,[825] we clarify that incumbent LECs must provide notice of such retirement in accordance with our rules. Thus, incumbent LECs must disclose among other things the planned date for retiring a copper loop and a description of the reasonably foreseeable impact of the planned changes.[826] Such notifications will ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain access to loop facilities.

282. Consistent with the proposals of Corning and HTBC, we modify our network modification rules with respect to the retirement of copper loops.[827] Specifically, when a copper loop is retired and replaced with a FTTH loop, we allow parties to file objections to the incumbent LEC's notice of such retirement. Consistent with our existing network disclosure rules, such oppositions must be filed with the Commission and served on the incumbent LEC within nine business days from the release of the Commission's public notice.[828] Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities

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[822] Allegiance Comments at 25; California Commission Comments at 18 (proposing rule requiring incumbent LEC to maintain copper plant); Letter from Timothy J. Regan, Corning, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 9 (filed Nov. 27, 2002) (Corning Nov. 27, 2002 *Ex Parte* Letter) (arguing that incumbent LECs should have the option of retiring or selling copper plant where FTTH is deployed); HTBC Comments at 36-37 (proposing measures regarding incumbent LEC retirement of legacy copper plant); TIA Comments at 17-18 (proposing rule to prohibit incumbent LECs from retiring copper loops unless they allow access to broadband facilities); AT&T Reply at 216-19 (asserting that a home-run copper loop may be of inferior quality).

[823] *See* Verizon Jan. 17, 2003 *Ex Parte* Letter at 7 (arguing that a duty to maintain two networks would impose additional costs).

[824] 47 U.S.C. § 251(c)(5); 47 C.F.R. §§ 51.325-.335. This disclosure requirement applies to the retirement of both feeder plant and distribution plant.

[825] *See, e.g.*, Sprint Comments at 45 (arguing that a competitive LEC could be stranded after an incumbent LEC upgrades its loop plant); Supra Comments at 10-13.

[826] *See* 47 C.F.R. § 51.327.

[827] Corning Feb. 6, 2003 *Ex Parte* Letter at 7 (proposing a 90-day application process before the Commission with respect to the retirement of any copper loops); Letter from Derek R. Khlopin, HTBC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Jan. 23, 2003) (HTBC Jan. 23, 2003 *Ex Parte* Letter) (stating that HTBC's proposal would prohibit incumbent LECs "from retiring the existing copper loop absent permission from the Commission.").

[828] Objections to both short and long-term notices should be made in accordance with section 51.333(c) of the Commission's rules. Moreover, incumbent LECs may respond to such objections in accordance with section 51.333(d) of the Commission's rules. *See* 47 C.F.R. § 51.333(c)-(d).

required under our rules, we will deem all such oppositions denied unless the Commission rules otherwise upon the specific facts and circumstances of the case at issue within 90 days of the Commission's public notice of the intended retirement.

283. We note that, with respect to network modifications that involve copper loop retirements, the rules we adopt herein differ in two respects from the notification rules that apply to other types of network modifications.[829] First, we establish a right for parties to object to the incumbent LEC's proposed retirement of its copper loops for both short-term and long-term notifications as outlined in Part 51 of the Commission's rules. By contrast, our disclosure rules for other network modifications permit oppositions only for instances involving short-term notifications.[830] Second, we establish a mechanism to deny such objections automatically unless the Commission rules otherwise within 90 days of the Commission's public notice of the intended retirement. As a practical matter, this mechanism redefines the short-term notice rules for a subset of network modifications, *i.e.*, retirement of copper loops that are replaced by FTTH loops, and means that incumbent LECs must file their disclosures for copper loop retirements at least 91 days prior to their planned retirement date.

284. As a final matter, we stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements. We also stress that we are not establishing independent authority based on federal law for states to review incumbent LEC copper loop retirement policies. We understand that many states have their own requirements related to discontinuance of service, and our rules do not override these requirements. We expect that the state review process, working in combination with the Commission's network disclosure rules noted above, will address the concerns noted by Corning and others regarding the potential impact of an incumbent LEC retiring its copper loops.

(ii) Hybrid Loops

285. Hybrid loops represent an important step towards the deployment of a fiber-based network capable of supporting a wide array of advanced telecommunications and other services. Several incumbent LECs note that they pursue their construction and network modification projects in incremental ways – first, deployment of fiber in the feeder plant and associated equipment like DLC systems (often with line cards capable of providing xDSL services), followed by fiber-to-the-curb, followed by FTTH.[831] In light of this practice, we view our task with respect to hybrid loops as determining an unbundling approach that addresses impairment, but also aligns business incentives with the explicit congressional goal of promoting the rapid deployment of advanced services.

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[829] These modified network notification requirements apply only to the retirement of copper loops and copper subloops, but not to the retirement of copper feeder plant.

[830] *See* 47 C.F.R. § 51.333(c)-(d).

[831] *See* Verizon Nov. 22, 2002 *Ex Parte* Letter at 1.

286. In making our unbundling determination for hybrid loops, we consider both impairment and, through our section 251(d)(2) "at a minimum" authority, additional factors. As noted above, we find that competitive LECs are impaired on a national basis without unbundled access to a transmission path when seeking to provide service to the mass market. We further find that this impairment at least partially diminishes with the increasing deployment of fiber. In addition, we retain the flexibility to determine the unbundling approach that best addresses the impairment in a manner that advances other goals of the Act. In this regard, balanced against impairment, we evaluate three primary factors to determine the most appropriate unbundling requirements for hybrid loops. First, we consider the costs of unbundling, *i.e.*, whether refraining from unbundling requirements will stimulate facilities-based investment and promote the deployment of advanced telecommunications infrastructure. Second, we consider the effect of alternatives to mandating unbundled access to the hybrid loops of incumbent LECs. In particular, we consider whether unbundled access to subloops, spare copper loops, and the non-packetized portion of incumbent LEC hybrid loops, as well as remote terminal collocation, offer suitable alternatives to an intrusive unbundling approach. Finally, we consider the state of intermodal competition in crafting our unbundling approach. As explained further below, after balancing these three primary factors against our impairment findings, we adopt a national approach that relieves incumbent LECs of unbundling requirements for the next-generation network capabilities of their hybrid loops, while at the same time ensures requesting carriers have access to the transmission facilities they need to serve the mass market.

287. We discuss our unbundling rules for hybrid loops below. These rules vary depending upon whether a competitive LEC seeks access for the provision of broadband or narrowband services. Therefore, our discussion is separated into two parts in order to clearly reflect this important distinction.

288. *Broadband Services.* 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.[832] AT&T, WorldCom, Covad, and others urge the Commission to extend our unbundling requirements to the packet-based and fiber optic portions of incumbent LEC hybrid loops. We conclude, however, that applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706. The rules we adopt herein do not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized

[832] As noted above in our description of the record evidence, incumbent LECs have deployed, and are continuing to deploy, a substantial amount of "hybrid loops," *i.e.*, local loops consisting of both copper and fiber optic cable (and associated electronics, such as DLC systems). Incumbent LECs appear to be at various stages of fiber deployment and have chosen a number of FITL architectures (*e.g.*, FTTC, FTTN) and hybrid loops. Thus, we treat such intermediate deployments of fiber as hybrid loops because they consist of both copper and fiber optic cable.

information.[833] Moreover, 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.[834]

289. Although packetized fiber capabilities will not be available as UNEs, incumbent LECs remain obligated, however, to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information. Thus, as discussed more specifically in the Enterprise Loops section, consistent with the proposals of HTBC, SBC, and others, incumbent LECs must provide unbundled access to a complete transmission path over their TDM networks to address the impairment we find that requesting carriers currently face.[835] This requirement ensures that competitive LECs have additional means with which to provide broadband capabilities to end users because competitive LECs can obtain DS1 and DS3 loops, including channelized DS1 or DS3 loops and multiple DS1 or DS3 loops for each customer.

290. Section 706 requires the Commission to encourage deployment of advanced telecommunications capability by using, among other things, "methods that remove barriers to infrastructure investment."[836] Unbundling access to hybrid loops in the manner adopted herein – that is, limiting the requesting carrier's access to the TDM portion of the hybrid loop and precluding unbundled access to the packet-based networks (and associated fiber transmission facilities) of incumbent LECs – promotes our section 706 goals in two ways. First, it limits access to the (in many cases) newly deployed fiber transmission facility, and thereby gives incumbent LECs an incentive to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings for

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[833] *See* Letter from Robert Holleyman, HTBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Jan. 24, 2003) (HTBC Jan. 24, 2003 *Ex Parte* Letter); Letter from Veronica O'Connell, Director, HTBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Feb. 7, 2003) (HTBC Feb. 7, 2003 *Ex Parte* Letter); HTBC Feb. 14, 2003 *Ex Parte* Letter. Because we decline to require unbundling of packet-switching equipment, we deny WorldCom's petitions for reconsideration and clarification requesting that we unbundle packet-switching equipment, DSLAMs, and other equipment used to deliver DSL service. MCI WorldCom Petition for Reconsideration, CC Docket No. 96-98 at 2-18 (filed Feb. 17, 2000) (MCI WorldCom Feb. 17, 2000 Petition for Reconsideration); MCI WorldCom Feb. 17, 2000 Petition for Clarification at 2, 13.

[834] *See* HTBC Feb. 14, 2003 *Ex Parte* Letter at 1-4.

[835] HTBC Feb. 7, 2003 *Ex Parte* Letter at 2 (advocating a requirement to unbundle "non-packet loop capabilities" only); SBC Jan. 24, 2003 *Ex Parte* Letter at 12-13 (describing proposal to ensure competitive LECs have unbundled access to TDM and non-packet capabilities of SBC's networks); Letter from Jonathan J. Boynton, Associate Director, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 5 (filed Jan. 15, 2003) (SBC Jan. 15, 2003 Broadband *Ex Parte* Letter) (explaining that competitive LECs will have continued unbundled access to "non packet fiber" feeder plant combined with copper distribution plant).

[836] Section 706(a) of the Telecommunications Act of 1996. *See* Corning Comments at 10-11 (arguing that the Commission should consider section 706 in crafting its unbundling framework); CompTel Comments at 26 (arguing that the Commission should use section 706 to expand unbundling obligations); HTBC Comments at 42-45; SBC Reply at 95-96.

mass market consumers free of any unbundling requirements.[837] Although incumbent LECs have been deploying fiber feeder plant for some time, such deployment was generally limited to the purpose of increasing network efficiency for the provision of narrowband services rather than enhancing network capabilities to deliver broadband services. In addition, fiber feeder deployment (and the broadband capabilities attendant to such deployment) is far from ubiquitous. Moreover, incumbent LECs have not widely deployed the next-generation networking equipment (*e.g.*, DLC systems with xDSL-capable line cards) needed to deliver broadband services to mass market customers served by hybrid loops.[838] Second, by prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks. Because competitive LECs will not have unbundled access to the packet-based networks of incumbent LECs, they will need to continue to seek innovative access options, including the deployment of their own facilities necessary for providing broadband services to the mass market.

291. In making our unbundling determination, we are also guided by the availability of other loop alternatives within the networks of incumbent LECs. In particular, we determine that unbundled access to incumbent LEC copper subloops adequately addresses the impairment competitive LECs face so that intrusive unbundling requirements on incumbent LEC packetized fiber loops facilities is not necessary. Unbundled access to subloops also better promotes our section 706 goals than unbundling incumbent LEC packetized fiber loops. In particular, subloop access promotes competitive LEC investment in next-generation network equipment (*e.g.*, packet switches, remote DSLAMs, etc.) and transmission facilities (*e.g.*, fiber loop facilities built to points in incumbent LEC networks closer to the home). Furthermore, unbundled subloop access furthers our goal of promoting innovation because it enables competitive LECs to differentiate their product and service offerings from those of the incumbent LEC. In addition to subloop unbundling, as discussed more fully below, we require incumbent LECs to continue providing unbundled access to the TDM-based features, functions, and capabilities of their hybrid loops where impairment exists. As discussed above, in addition to subloop unbundling, the availability of TDM-based loops, such as DS1s and DS3s, provide competitive LECs with a range of options for providing broadband capabilities. We therefore find that competitive LECs retain alternative methods of accessing loop facilities in hybrid loop situations and disagree with WorldCom and others concerning the appropriate unbundling requirements for the next-generation broadband features, functions, and capabilities of hybrid loops.[839]

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[837] *See* Corning Jan. 29, 2003 *Ex Parte* Letter at 12 (estimating that FTTH deployment will reach 31% of U.S. households if no unbundling requirements apply to incumbent LECs, but only 5% of U.S. households if unbundling requirements apply); *CSMG Study* at 26-28, 30 (concluding that incumbent LECs will deploy more FTTH loops if relieved from unbundling obligations).

[838] Indeed, some incumbent LECs contend that the regulatory environment has deterred their deployment of such equipment. *See, e.g.*, SBC Reply at 96-104.

[839] WorldCom Dec. 12, 2002 Next-Generation Networks *Ex Parte* Letter at 3 (arguing that, without unbundled access to hybrid loops, competitive LECs will not be able to serve certain customers).

292. We are also informed in our analysis by the state of intermodal competition for broadband service.[840] As noted above, cable companies have made significant inroads in providing broadband service to the mass market, but these same companies have made less progress in the market for traditional narrowband services. For example, cable companies have widely deployed broadband service in the form of high-speed Internet access offered via cable modem service, but cable telephony deployment is still in its infancy. According to a Commission staff report, more consumers continue to obtain their high speed Internet access by cable modem service than by xDSL, and the rate of growth for cable modem subscribership continues to outpace the rate of growth for xDSL subscribership (*i.e.*, since the period June to December 2001, cable modem subscribership for high speed Internet access increased 55 percent versus an increase of only 35 percent for xDSL-based subscribership).[841] A primary benefit of unbundling hybrid loops – that is, to spur competitive deployment of broadband services to the mass market – appears to be obviated to some degree by the existence of a broadband service competitor with a leading position in the marketplace.[842] We therefore tailor our unbundling requirements to most effectively address those services that are not yet fully subject to competition (*i.e.*, narrowband services in the mass market) rather than the broadband services that are currently provided in a competitive environment.

293. Several parties have advocated drawing a bright line between "old" and "new" investment in network architectures and using such a division to articulate our unbundling requirements.[843] Others contend that we should make no such distinction.[844] Based on our

[840] *See* SBC Reply at 95; Allegiance Feb. 13, 2003 *Ex Parte* Letter at 2 (asserting that the Commission should consider the existence of an intermodal competitor with a leading position in the market).

[841] *High Speed Services December 2002 Report* at Table 2 (noting that cable companies provide 6.8 million lines capable of providing at least 200 kbps in both direction, compared to only 1.8 million xDSL lines). The *High Speed Services December 2002 Report* notes the percentage change of growth. For coaxial cable services providing at least 200 kbps in both directions, cable companies provided 4.394 million lines as of December 2001. This number increased to 6.819 million lines by June 2002. By comparison, wireline carriers provided 1.369 million such lines as of December 2001 and a total of 1.852 million such lines by June 2002. Thus, not only do cable companies provide more high speed lines capable of providing at least 200 kbps in both directions than xDSL-based carriers, but cable companies continue to outpace xDSL-based carriers in terms of the rate of growth of such subscribership. *See id.* at Table 2; *see also id.* at Table 1 (noting that cable companies provide 9.1 million cable modem-based lines compared to 5.1 million ADSL-based lines provided by LECs); *see also* Covad Siwek/Sun Decl. at paras 58-59. As a result, cable companies' leading position in providing broadband services to the mass market appears to be increasing rather than leveling off.

[842] Allegiance Feb. 13, 2003 *Ex Parte* Letter at 2 (asserting that the Commission should consider the existence of an intermodal competitor with a leading position in the market).

[843] *See, e.g.*, Alcatel Comments at 15-17; SBC Reply at 109; Verizon Jan. 10, 2003 *Ex Parte* Letter at 6-7 (proposing a line drawn on voice-grade versus broadband capability); Verizon Nov. 22, 2002 *Ex Parte* Letter at 4.

[844] AT&T Reply at 216-19 (advocating "unified loops" theory and arguing that home-run copper is not sufficient to address impairment); Covad Reply at 46-54; WorldCom Reply at 111-13 (advocating in support of unbundling all the features, functions, and capabilities of loops, including those provided by means of DLC systems and packet-switching equipment); Letter from Jonathan Askin, General Counsel, ALTS, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 5 (filed Feb. 13, 2003) (ALTS Feb. 13, 2003 *Ex Parte* Letter) (arguing that the Commission should not limit access to capacity on any fiber-fed loop plant); Letter from Jonathan Askin, General (continued....)

evaluation of impairment, as informed by the two factors noted above, we determine that drawing such a bright line is practical, if the line is drawn between legacy technology and newer technology. In fact, we conclude that such a line is best drawn based on technological boundaries rather than transmission speeds, bandwidth, or some other factor – the technical characteristics of packet-switched equipment versus TDM-based equipment, for example, are well-known and understood by all members of the industry.

294. We stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers.[845] These TDM-based services – which are generally provided to enterprise customers rather than mass market customers – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs. To provide these services, incumbent LECs typically use the features, functions, and capabilities of their networks as deployed to date – *i.e.*, a transmission path provided by means of the TDM form of multiplexing over their digital networks – or certain capabilities of multi-use integrated equipment (*e.g.*, integrated line cards deployed in DLC systems).[846] Incumbent LECs remain obligated to comply with the nondiscrimination requirements of section 251(c)(3) in their provision of loops to requesting carriers, including stand-alone spare copper loops, copper subloops, and the features, functions, and capabilities for TDM-based services over their hybrid loops. In this regard, we prohibit incumbent LECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs (either hybrid loops or stand-alone copper loops) provided to competitive LECs. To ensure competitive LECs receive the transmission path within the parameters we establish, we determine that any incumbent LEC practice, policy, or procedure that has the effect of disrupting or degrading access to the TDM-based features, functions, and capabilities of hybrid loops for serving the customer is prohibited under the section 251(c)(3) duty to provide unbundled access to loops on just, reasonable, and nondiscriminatory terms and conditions.[847]

295. Finally, in balancing potential impairment against our obligations under section 706, we conclude that the costs associated with unbundling these packet-based facilities outweigh the potential benefits. A number of parties have argued that unbundling requirements deter the incentive of incumbent LECs to take risks and deploy fiber-based networks because

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Counsel, ALTS, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 3 (filed Jan. 31, 2003) (ALTS Jan. 31, 2003 *Ex Parte* Letter) (advocating in support of unbundling requirements on fiber-fed loop plant).

[845] HTBC Feb. 7, 2003 *Ex Parte* Letter at 2; SBC Jan. 24, 2003 *Ex Parte* Letter.

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

[847] Notwithstanding our prohibition against disrupting or degrading unbundled access to the TDM capabilities of hybrid loops, incumbent LECs may remove copper loops from their plant so long as they comply with our Part 51 network notification requirements, as amended by this Order, and any applicable state law.

they would face reduced returns on their investment.[848] We recognize that, particularly in the realm of next-generation network capabilities, unbundling requirements could have the unintended effect of blunting innovation because such an approach would largely lock competitive LECs to the technological choices of the incumbent LECs. We therefore consider the effect of other approaches, such as the subloop access and remote terminal collocation requirements, discussed above, on stimulating the deployment of advanced telecommunications infrastructure. For these reasons, we conclude that it is consistent with our section 706 mandate to promote investment in infrastructure by refraining from unbundling incumbent LECs' next-generation network facilities and equipment.

296. *Narrowband Services.* With respect to providing unbundled access to hybrid loops for a requesting carrier to provide narrowband service,[849] we require incumbent LECs to provide an entire non-packetized transmission path capable of voice-grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office and customer's premises. Pursuant to this requirement, competitive LECs will be able to obtain access to UNE loops comprised of the feeder portion of the incumbent LEC's loop plant, the distribution portion of the loop plant, the attached DLC system, and any other attached electronics used to provide a voice-grade transmission path between the customer's premises and the central office.[850] Consistent with the access requirements for broadband services noted above, we limit the unbundling obligations for narrowband services to the TDM-based features, functions, and capabilities of these hybrid loops. Incumbent LECs may elect, instead, to provide a homerun copper loop rather than a TDM-based narrowband pathway over their hybrid loop facilities if the incumbent LEC has not removed such loop facilities.[851]

297. We recognize that providing unbundled access to hybrid loops served by a particular type of DLC system, *e.g.*, Integrated DLC systems, may require incumbent LECs to implement policies, practices, and procedures different from those used to provide access to loops served by Universal DLC systems.[852] These differences stem from the nature and design of

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[848] *See* Corning Comments at 7-9.

[849] Narrowband services include traditional voice, fax, and dial-up modem applications over voice-grade loops.

[850] As discussed below, we do not require incumbent LECs to maintain or retain copper loops if they have deployed fiber replacements. Incumbent LECs have the option of either providing competitive LECs with unbundled access to a voice-grade channel over a hybrid loop or, to the extent a copper loop exists, the existing copper loop.

[851] As Qwest points out, when incumbent LECs construct new loop plant, they frequently overlay fiber facilities that supplement existing loops. Qwest Comments at 45; Alcatel Comments at 16 (noting that, when incumbent LECs deploy fiber loops, competitive LECs would continue to maintain access to legacy copper transmission facilities). Thus, the construction of new facilities does not in itself alter a competitive LEC's ability to use the incumbent's network. Qwest Comments at 45. Qwest explains that it "does not proactively remove copper facilities in the case of an overlay" so that requesting carriers should be able to continue providing service in these circumstances. Qwest Comments at 45-46.

[852] McLeodUSA Dec. 18, 2002 *Ex Parte* Letter at 10-11; Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2-3 (filed Dec. 4, 2002) (AT&T Dec. 4, 2002 *Ex Parte* Letter) (describing operational issues related to providing unbundled access to (continued....)

Integrated DLC architecture. Specifically, because the Integrated DLC system is integrated directly into the switches of incumbent LECs (either directly or through another type of network equipment known as a "cross-connect") and because incumbent LEC's typically use concentration as a practice for engineering traffic on their networks, a one-for-one transmission path between an incumbent's central office and the customer premises may not exist at all times. Even still, we require incumbent LECs to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems.[853] We recognize that in most cases this will be either through a spare copper facility or through the availability of Universal DLC systems.[854] Nonetheless even if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access.[855]

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loops served by DLC systems using a GR-303 interface, *i.e.*, integrated DLC systems, and proposing some solutions); McLeodUSA Nov. 15, 2002 *Ex Parte* Letter at 1.

[853] *See* SBC Jan. 15, 2003 *Ex Parte* Letter at 3; SBC Jan. 24, 2003 *Ex Parte* Letter, Attach. 2 at 3-4.

[854] *See* Letter from Jim Lamoureux, Senior Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 1 (filed Dec. 10, 2002) (SBC Dec. 10, 2002 *Ex Parte* Letter) (describing DLC deployment in SBC's region). SBC explains that, for 99.88% of SBC's lines served over Integrated DLC, competitive LECs have access to Universal DLC or spare copper facilities as alternatives to the transmission path over SBC's Integrated DLC system. *Id.*

[855] We recognize that it is technically feasible (though not always desirable for either carrier) to provide unbundled access to hybrid loops served by Integrated DLC systems. Incumbent LECs can provide unbundled access to hybrid loops served by integrated DLC systems by configuring existing equipment, adding new equipment, or both. *See* McLeodUSA Dec. 18, 2002 *Ex Parte* Letter 10-11. Qwest explains, for example, that it can provide a UNE loop over Integrated DLC systems by using a "hairpin" option, *i.e.*, configuring a "semi-permanent path" and disabling certain switching functions. *See* Qwest Nov. 13, 2002 *Ex Parte* Letter at 23 (describing "hairpin" solution to providing UNE loop over Integrated DLC system); *see also* Telcordia, Inc., NOTES ON THE NETWORKS, SR-2275, Issue 4, 12.13.2.1 (Oct. 2000) (describing means for incumbent LECs to provide unbundled loops to competitive LECs over integrated DLC systems). In addition, we understand that some Integrated DLC systems can simulate Universal DLC systems. *See* Telcordia, Inc., NOTES ON FIBER-IN-THE-LOOP (FITL), SR-Notes-Series-10, Issue 1, 2.3 (Jul. 2001) (noting that many modern Integrated DLC systems "can operate in UDLC mode."). Frequently, unbundled access to Integrated DLC-fed hybrid loops can be provided through the use of cross-connect equipment, which is equipment incumbent LECs typically use to assist in managing their DLC systems. McLeodUSA Nov. 15, 2002 DLC systems *Ex Parte* Letter at 10-11 (describing use of cross-connect equipment to provide unbundled loops over Integrated DLC systems); *Pronto Modification Order*, 15 FCC Rcd at 17565-66, App. B, C (showing that SBC typically uses a cross-connect in its network to establish the connection between the feeder loop plant and its circuit and packet switches); Verizon July 19, 2002 *Ex Parte* Letter at 3 (showing that Verizon typically uses central office terminations and cross-connects). McLeodUSA explains that an incumbent LEC can configure most Integrated DLC systems to assign requesting carriers "individual interface groups" that assist in establishing a complete transmission path between the central office and the customer's premises. In this way, incumbent LECs can provide Integrated DLC-fed hybrid loops on an unbundled basis. McLeodUSA Dec. 18, 2002 *Ex Parte* Letter at 10. In addition, McLeodUSA further explains that manufacturers either already account for an incumbent LEC's regulatory obligations in designing equipment (and software used to upgrade that equipment) or are planning to do so. *Id.* at 11 n.15.

b. Enterprise Market Loops

(i) Record Evidence

298. The record contains a wealth of evidence to inform our enterprise market loop analyses. First, it reflects that competitive LECs have deployed fiber that enables them to reach customers entirely over their own loop facilities.[856] When competitive LECs self-deploy fiber they predominantly do so at the OCn-level.[857] In addition, the record shows that competitors have built fiber loops to buildings that carry a significant portion of the competitive traffic in certain MSAs.[858] In contrast, the record contains little evidence of self-deployment, or availability from alternative providers, for DS1 loops.[859] As for DS3 loops, evidence of self-deployment and wholesale availability is somewhat greater than for DS1s and is directly related to location-

[856] Both competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation's commercial office buildings are served by competitor-owned fiber loops. *See, e.g.*, ALTS *et al.* Comments at 52 (citing to WorldCom Comments, CC Docket Nos. 96-98 at 7 (filed June 11, 2001) (WorldCom June 11, 2001 High-capacity Comments)); Sprint Comments at 23-24; WorldCom Comments at 74-76; *see also BOC UNE Rebuttal Report* at iv, 44; Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Oct. 30, 2002) (discussing high-capacity transmission facility deployment) (WorldCom Oct. 30, 2002 *Ex Parte* Letter); AT&T Comments at 152 (citing proprietary information); Cbeyond *et al.* Comments, CC Docket 96-98 at 23 (filed June 11, 2001) (Cbeyond *et al.* June 11, 2001 High-capacity Comments) (citing confidential information in attached Affidavit of Michael P. Duke, KMC Telecom, Inc. (KMC Duke June 11, 2001 High-capacity Aff.) at para. 5); NuVox *et al.* Comments, Affidavit of Nicholas D. Jackson, TDS Metrocom, Inc. (TDS Jackson Aff.) at para. 6; El Paso *et al.* Comments at 16. Competitive carriers indicate that most of these commercial office buildings are carrier hotels or large office buildings. *See, e.g.*, ALTS *et al.* Comments at 52; WorldCom June 11, 2001 High-capacity Comments at 9; El Paso *et al.* Comments at 16. Some commenters indicate that other facilities-based competitive LECs may have self-deployed high-capacity loops, but have not submitted comments in this proceeding. *See, e.g.*, SBC Comments at 102; Verizon Comments at 117.

[857] *See, e.g.*, ALTS *et al.* Comments at 52; CCG July 17, 2002 CLEC Survey *Ex Parte* Letter at 6-7; WorldCom Comments at 76; WorldCom Fleming Decl. at para. 10; NewSouth Reply at 17.

[858] *See, e.g.*, *BOC UNE Rebuttal Report* at 45 (relating this figure to a typical Tier-I MSA but stating that New York, San Francisco, Washington, D.C., and Los Angeles account for 40% of all data revenue nationwide).

[859] Based on the record as a whole, for DS1 loops and some DS3 loops, overbuilding to enterprise customers that require services over these facilities generally does not present sufficient opportunity for competitors to recover their costs and, therefore, may not be economically feasible. *See, e.g.*, Covad Reply at 56; AT&T Jan. 14, 2003 *Ex Parte* Letter at para. 3 n.5; Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. B (filed Nov. 25, 2002) (AT&T Nov. 25, 2002 *Ex Parte* Letter) (providing loop build/no-build cost analysis); WorldCom Comments at 7; WorldCom Fleming Decl. at para. 10; Allegiance Reply at 38; NewSouth Reply at 17. In limited cases where evidence exists that a competitive LEC is serving customers via their own DS1 loops, the record suggests this is largely because these competitive LECs have *already* self-provisioned OCn level capacity to that specific location and other deployment barriers have not precluded them from using that capacity to serve other customers at lower loop capacity levels at that same location. *See* Letter from Joan Marsh, Director, Governmental Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, at para. 2 (AT&T Jan. 14, 2003 *Ex Parte* Letter); WorldCom June 11, 2001 High-capacity Comments at 8 (citing confidential information) and Attach. B, Proprietary and Confidential Declaration of Jay Slocum (WorldCom Slocum Decl.) at paras. 3-6.

specific criteria.[860] Indeed, competitive LECs agree that at a three DS3 loop capacity level of demand, it is economically feasible to self-deploy,[861] and record evidence reveals that both AT&T and WorldCom have self-provisioned DS3 circuits to many customer locations.[862]

299. The record also contains extensive, albeit contradictory, evidence regarding the degree to which competitors rely on the incumbent LEC's facilities versus their own to provision loops to their customers. According to the BOC UNE Fact Report 2002, market statistics show that competitive LECs are now serving between 13 and 20 million business lines off their own switches – yet they have obtained only about 1.5 million unbundled loops to serve business customers.[863] The BOCs conclude that competitive LECs are, therefore, serving the remaining 85-95 percent of those 13-20 million self-switched business lines using "alternative facilities" instead of unbundled loops.[864] In addition, the BOCs state that virtually all of the high-capacity unbundled loops that competitive LECs have purchased in the BOC territories are DS1 loops and that competitive LECs have purchased only 140 unbundled DS3 loops, and not a single unbundled loop above a DS3 level.[865] The BOCs reason that these figures reflect that competitive LEC fiber networks are now so extensive in urban markets that they readily can be – and routinely are – extended as needed to pick up additional traffic from new customers in

[860] *See, e.g.*, WorldCom Fleming Decl. at para. 10 (when customer demand is projected at several DS3s or optical level capacity a self-build decision is made); WorldCom Comments at 7 (customers in a building must commit to at least three DS3 circuits before it is economically viable to extend fiber to that building); AT&T Comments at 134 (a competitive LEC can only self-deploy to a location with enormous demand, the smallest of which would be at the OC3 level); AT&T Nov. 25, 2002 *Ex Parte* Letter at 3 (the amount of committed traffic to support construction of loops for large business customers is about three DS3s, *i.e.*, an OC3), and Attach. B at 9 (at least three DS3s worth of demand is required before a facility build can generally be proven as financially prudent). The record also contains some evidence that DS3 loop services may be available from alternative providers other than the incumbent LECs in some buildings where competitive capacity to the building has already been provisioned at the OCn level. *See* Sprint Comments at 23-24; Letter from John E. Benedict, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338, 96-98, 98-147, Attach. at 1 (filed Oct. 16, 2002) (Sprint Oct. 16, 2002 *Ex Parte* Letter); WorldCom Comments at 16; KMC Duke June 11, 2001 High-capacity Aff. at para. 5 (citing confidential information); SBC Reply at 143 (citing AT&T Comments at 150 n.10 (citing confidential information)); WorldCom Slocum Decl. at paras. 3-6; AT&T Reply at 185 (citing CCG July 17, 2002 CLEC Survey *Ex Parte* Letter at 6 & Table 3); NuVox *et al.* Comments at 7.

[861] *See supra* note 860.

[862] *See* SBC Reply at 143 (citing AT&T Comments at 150 n.10 (confidential information)); WorldCom Slocum Decl. at paras. 3-6; *see also* CCG Jul. 17, 2002 CLEC Survey *Ex Parte* Letter (indicating that competitive loop capacity has been deployed into buildings but not indicating at what capacity level customers are served in those buildings).

[863] BOC UNE Fact Report 2002 at IV-1 through IV-4.

[864] The BOCs also claim that competitive LECs have deployed approximately 1,800 fiber "networks" in the 150 largest MSAs. BOC UNE Fact Report 2002 at I-3.

[865] BOC UNE Fact Report 2002 at IV-6. Specifically, the BOC UNE Fact Report 2002 states that competitive LECs have purchased a total of 72,000 high-capacity loops UNEs – all but 140 of which are DS1s. *Id.*

adjacent buildings, or down the block, and on outward from there.[866] According to the BOCs, once a competitive LEC deploys its initial fiber ring, extending that fiber incrementally to new customers is comparatively inexpensive.[867]

300. Competitive LECs strongly disagree with the BOCs' figures on line deployment, claiming these numbers are far less reliable than the data the Commission itself collects to measure competitive LEC deployment and the level of local competition.[868] Competitive carriers point to our own statistics which reveal that competitive LECs serve fewer than 9 million business lines nationwide, *i.e.*, not the 13 to 20 million lines that the incumbent LECs claim.[869] They further claim that this discrepancy is due in large part to the BOCs' inclusion of special access lines as alternative facilities in the BOC UNE Fact Report 2002.[870] Further, these commenters correctly note that the Commission staff's *Local Competition Report*, which calculates approximately 8.9 million voice-grade equivalent (VGE) lines for competitive LECs, explicitly indicates that it does not count special access lines as competitive LEC self-provisioned or "alternative provided" lines.[871] The BOCs acknowledge the inclusion of special access lines in their data, thus accounting for the approximate 15.8 million VGE differential from the Commission's *Local Competition Report*.[872]

301. Finally, the record indicates that various types of alternative transmission technologies to high-capacity local loops, *i.e.*, fixed-wireless, unlicensed-wireless, and satellite facilities, have been deployed in limited circumstances at certain locations.[873] The record, however, does not indicate the extent to which these alternative transmission technologies have

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866 *See* BOC UNE Fact Report 2002 at IV-4.

867 *Id.*

868 *See, e.g.*, El Paso *et al.* Comments at 16-18 & n.68 (citing numerous other competitive LEC comments).

869 AT&T Reply, Declaration of C. Michael Pfau (AT&T Pfau Reply Decl.) at paras. 2, 12-14 (describing how the incumbent LECs' methods for determining the number of competitive loops deployed substantially overstates the actual number by including, *inter alia*, leased special access circuits and other "flawed" assumptions). *See* Covad Reply 55; AT&T Reply at 182-85; NuVox *et al.* Reply at 42; WorldCom Comments at 76 (arguing that even in the most competitive market in the country, incumbent LECs have seven times more fiber than competitive LECs do).

870 *See, e.g.*, AT&T Pfau Reply Decl. at paras. 14 (indicating that his experience recognizes that a much greater proportion of circuits are bought as special access).

871 *See Local Competition June 2002* at 1 n.2, <http://www.fcc.gov/wcb/iatd/stats.html>.

872 *See BOC UNE Rebuttal Report* at 45 (acknowledging that special access lines are, indeed, included in their numbers). In evaluating the extent to which competitive LECs have self-provisioned, the Commission has instructed competitive carriers to exclude local services provisioned over special access facilities in their reported data. *See supra* note 871. Because the Commission places little weight on the availability of special access in its impairment analysis, we do not rely on evidence that includes such lines.

873 *See, e.g.*, BellSouth Comments at 42-43; SBC Comments at 91; Verizon Comments at 118.

been deployed or where they are available on a wholesale basis.[874] Nevertheless, it appears that, in certain circumstances, such technologies have been used by competitive LECs as alternatives to incumbent LEC unbundled high-capacity loops.[875] Incumbent LECs report that competitive carriers can often deploy fixed wireless connections more quickly and cheaply than fiber, and that free space optics, *i.e.*, laser-guided high-bandwidth connections to a fiber backbone, is now a viable technology.[876] Competitive LECs, however, question the extent to which this deployment is widespread and point to certain technical limitations of such technologies.[877]

(ii) Impairment Analysis

(a) Operational and Economic Barriers to Serving the Enterprise Market

302. Enterprise market customers demand reliable services that include customized products, significant customer care, and enhanced security features.[878] Moreover, they prefer a single provider capable of meeting all their needs at each of their business locations which may be in multiple locations in different parts of the city, state or country.[879] The economics of serving a particular enterprise customer at each of its business' facilities may be very different depending on the location of the facility.[880] Small to medium-sized business customers generally demand services at the DS1, and to a lesser extent, DS3 capacities.[881] Competitive LECs meet

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[874] *See, e.g.*, ALTS *et al.* Comments at 45; Allegiance Comments at 19-22; Allegiance Reply at 36; AT&T Fea/Giovannucci Reply Decl. at 21 n.19; WorldCom June 11, 2001 High-capacity Comments at 13-14; Covad Comments at 49-50; Sprint Comments at 24-25; TDS Jackson Aff. at para. 9.

[875] *See Local Telephone Competition December 2002* Report; *see also* Allegiance Comments at 20-21; Sprint Comments at 25; Verizon Comments at 118.

[876] *See, e.g.*, Verizon Comments at 118 (stating that fixed wireless and free space optics is available for high-capacity links); SBC Reply at 91 (fixed wireless and satellite are broadband options for small business users).

[877] *See, e.g.*, Sprint Comments at 24-25 (indicating its significant experience with fixed wireless and noting its limitations and delayed development); TDS Jackson Aff. at para. 9 (indicating wireless loop alternatives are too costly, not available in TDS markets, and are not sufficiently robust platforms for TDS services); WorldCom June 11, 2001 High-capacity Comments, Attach. D, Affidavit of A. Daniel Kelley & Richard A. Chandler (WorldCom Kelley & Chandler June 11, 2001 High-capacity Aff.) at paras. 38-45 (arguing that there have been abortive attempts by competitors to provide high-capacity access to business customers using several fixed wireless technologies). We note that fixed wireless alternatives require Commission issued licenses and are subject to the availability of limited spectrum resources.

[878] *See, e.g.*, GCI Reply at 20.

[879] *See, e.g.*, WorldCom Comments at 13-18; Covad Reply at 57.

[880] *Id.* The loop capacity impairment approach we adopt today accommodates the need to serve a single enterprise customer at multiple locations because it recognizes that it may only be economical to build at the primary location where the loop capacity demanded is very high, enabling the competitive LEC to obtain unbundled lower capacity loops to serve the customer's other business locations.

[881] *See, e.g.*, NewSouth Reply at 16 (DS1 loops serve smaller businesses and DS3 and OCn serve larger businesses); NuVox *et al.* Reply at 39-41 (T1 facilities serve innovative bundled service offerings efficiently to small

(continued....)

these demands by providing packages of services, carrying both voice and data traffic, sold under month-to-month or short-term contracts.[882] In contrast, larger enterprise customers demand extensive services using multiple DS3s or OCn loops typically offered under long-term arrangements which guarantee a substantial revenue stream over the life of the contract.[883]

303. Because the cost to self-deploy local loops at any capacity is great,[884] and the cost to deploy fiber does not vary based on capacity,[885] a competitive LEC that plans to self-deploy its own facilities must target customer locations where there is sufficient demand from a potential customer base, usually a multiunit premises location, to generate a revenue stream that could recover the sunk construction costs of the underlying loop transmission facility, including laying the fiber and attaching the requisite optronics to light the fiber.[886] For competitive LECs deploying a very high-capacity loop facility to a particular customer location, the revenue commitment relative to the cost of constructing that loop facility may result in a positive profit margin for that single customer location, making it economically feasible from a profitability perspective, to self-provision in that particular case.[887] Even when the customer demand at a certain location may support self-deployment from a pure cost recovery perspective, however, there are other obstacles that must be overcome before such self-deployment can effectively occur.[888] These other barriers include the inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and getting it into the building

(Continued from previous page)

and medium business customers); Allegiance Reply at 35-36 (a significant segment of business customers are small and medium-sized enterprises that use DS1 capacity services).

[882] *See, e.g.*, ITC^Deltacom Aug. 16, 2001 Petition at 1-2; NewSouth Comments at 5; Affidavit of Edward J. Cadieux, NuVox (NuVox Cadieux Jan. 24, 2003 Aff.) at paras. 4-5, *in* Letter from Steven A. Augustino, Counsel for NuVox *et al.*, to William Maher, Chief, Wireline Competition Bureau, FCC, CC Docket No. 01-338, 96-98, 98-147 (filed Jan. 24, 2003); *see also* Letter from Kimberly Scardino, Senior Counsel, WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Jan. 31, 2003) (WorldCom Jan. 31, 2003 *Ex Parte* Letter).

[883] *Id.*

[884] In discussing the general economic characteristics of loop deployment above, we noted that loop construction costs do not vary by the capacity of the loop and that the ability to recover the high fixed and sunk costs is the key factor to considering impairment. We also observed that loop impairment is closely related to the demands of the individual customer served by such loop and the capacity level of the loop provided. *See supra* Part VI.A.3.

[885] *See supra* Part VI.A.3.; *see also* Letter from Stephen W. Crawford, General Counsel, El Paso Global Networks, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1 (filed Feb. 5, 2003) (El Paso Feb. 5, 2003 *Ex Parte* Letter).

[886] *See, e.g.*, Allegiance Comments at 23; WorldCom Comments at 76; AT&T Reply at 145; *see also* TDS Jackson Aff. at para. 8.

[887] *Id.*; *see also* TDS Jackson Aff. at paras. 8-10.

[888] *See, e.g.*, El Paso *et al.* Comments at 20-21.

thereafter,[889] as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities.[890]

304. The record reflects that constructing local loops generally takes between 6-9 months without unforeseen delay.[891] Competitive LECs describe numerous ways in which further delay affecting construction decisions and deployment occurs. These delays can be attributable to securing rights-of-way from local authorities which is necessary before competitive LECs can dig up streets to lay fiber. Often, carriers must engage in lengthy negotiations with local authorities over the ability to use the public rights-of-way.[892] Similarly, obtaining building and zoning permits adds further delay as local authorities often conduct extensive inquiries into the planned construction activity of the competitive carrier.[893] Moreover, commenters note that many local jurisdictions impose construction moratoriums which prevent the grant of a franchise agreement to construct new fiber facilities in the public rights-of way.[894]

305. In addition to delays associated with gaining access to rights-of-ways and permits from local or municipal authorities, competitive LECs face additional barriers with regard to serving multiunit premises due to difficulties and sometimes outright prohibitions in gaining building access.[895] Although multiunit premises could present substantial economic opportunities for competitors, if the entity or individual controlling access to the premises does not allow a competitor to reach its customer residing therein (or places unreasonable burdens on the competitive LEC as a condition of entry), the competitive LEC may be unable to serve its

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[889] *See, e.g.*, ALTS *et al.* Comments at 56 (discussing other barriers competitive LECs face in self-deployment); AT&T Reply at 174-79.

[890] *See, e.g.*, Sprint Comments at 23; AT&T Reply at 175. Competitive LECs argue that they can not feasibly construct loop facilities and justify the fixed and sunk costs that self-provisioning will entail in advance of securing firm customer commitments guaranteeing the likelihood of cost recovery. *See, e.g.*, NuVox *et al.* Comments at 74; AT&T Reply at 176-77; Supra Comments at 7. This barrier to entry can be exacerbated when states adopt service quality rules that require local service providers to be in a position to provision service within a specified number of days after a customer signs up for service. *See, e.g.*, Ohio Admin Code Ch. 4901 § 1-5-20 (C); 220 ILCS 5 § 13-712; 83 ILAC § 730.540.

[891] *See, e.g.*, ALTS *et al.* Comments at 58; WorldCom Comments at 75 (citing WorldCom Fleming Decl.).

[892] Because of the expense and delay associated with filing a preemption petition, carriers rarely avail themselves of section 253(c) of the Act. *See* 47 U.S.C. § 253(c).

[893] *See, e.g.*, ALTS *et al.* Comments at 23-24. Incumbent LECs argue, however, that actual competitive LEC deployment undermines these arguments. *See, e.g.*, SBC Reply at 156.

[894] *See, e.g.*, ALTS *et al.* Comments at 42, 50, 56, 58; *see also* New York Department Comments at 4. Incumbent carriers, however, generally argue that competitive LECs are not impaired by rights-of-way costs and delays. BellSouth argues that mandatory access to rights-of-way means that there are not generally extreme delays caused by disputes, and competitive LECs can turn to the accelerated docket if need be. BellSouth Comments at 68-69.

[895] *See, e.g.*, AT&T Reply at 175 (stating that the time to negotiate building access arrangements can be up to 18 months); *see also* WorldCom Oct. 25, 2002 Building Access *Ex Parte* Letter.

customer via its own facilities,[896] even where a competitive carrier may be ready, willing, and otherwise able to self-deploy the loop.[897]

306. In conducting our impairment analysis, we give substantial weight to the cost of constructing a loop facility in relation to the ability of the competitive carrier to recover those costs over time, *i.e.*, where the traffic volume and associated revenue potential from the loop facility allow a carrier to earn a return necessary to sustain its operations at that location. We do, however, consider other factors affecting competitive LEC loop deployment, including access to public and private rights-of-way and multiunit premises access, that incumbent LECs have not or do not similarly face as a result of their first-mover advantage. Altogether, these factors directly influence the ability of competitive carriers to raise capital to deploy service to customers using their own loop facilities in a timely manner. The record reflects that these barriers can be overcome at certain loop capacity levels and certain service locations as we explain below.[898]

(b) General Framework

307. We organize our analysis of high-capacity loops based on capacity level because it is a more reliable indicator of the economic abilities of a requesting carrier to utilize third-party alternatives, or to self-deploy. At the same time, we recognize that operational and economic concerns will vary depending on the geographic market served. We find that the extent of competitive deployment of high-capacity loop facilities can vary tremendously by geographic area. More specifically, the barriers to entry requesting carriers face are most precisely identified on each geographic route serving a particular customer location. Where our record permits, however, we distill general characteristics of high-capacity loop deployment on a national level sufficient to make nationwide determinations of impairment and non-impairment. Where the record indicates impairment and that only with more granular evidence could a finding of non-impairment be made, we establish triggers to identify non-impairment based on customer location-specific evidence.

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[896] *See, e.g.*, AT&T Reply at 178-79. Verizon argues that, in the interim, competitive LECs can purchase special access services or use wireless or "free-space optics" loop in the interim during construction of the loop. Verizon Comments at 120-23. Competitive LECs, however, question the extent to which these wireless modes are available for use on an interim basis. *See supra* Part VI.A.4.a.(iii)(b). As for Verizon's suggestion that the use of special access services is sufficient, the Commission has stated it does not factor the availability of incumbent LEC's special access services into its loop impairment analysis. *See supra* Part V.B.1.d.(ii).

[897] *See, e.g.*, ALTS *et al.* Comments at 56-58; WorldCom Oct. 25, 2002 Building Access *Ex Parte* Letter; AT&T Reply at 175. We address building access-related barriers to loop deployment in greater detail below in our subloop and NID unbundling analyses, particularly, with respect to the Inside Wire Subloop. We expect that the subloop and NID unbundling rules that we adopt today will substantially mitigate the adverse impact of many of the building access-related barriers requesting carriers face with respect to serving customers in multiunit premises, particularly where the incumbent LEC's network extends beyond the minimum point of entry at the premises and the wiring in the building is owned and controlled by the incumbent LEC. Moreover, the Commission still has an open proceeding, WT Docket No. 99-217, related to building access. *See Competitive Networks Order*, 15 FCC Rcd 22983.

[898] *See supra* para. 298; *see also* Allegiance Comments at 23; ALTS *et al.* Comments at 58.

308. In conducting our impairment analyses for the various types of high-capacity loops, we first consider evidence of whether competitive LECs have self-deployed such loop facilities, on either an intermodal or intramodal basis, to provide retail services to enterprise market customers.[899] In our analysis, we recognize that a variety of alternative high-capacity loop transmission technologies, in various stages of development and use, are offered to enterprise customers in certain locations as potential alternatives to their traditional high-capacity loops, *i.e.*, different types of fixed-wireless, *e.g.*, 38 GHz, LMDS, MMDS, and 24 GHz; satellite facilities; and unlicensed wireless.[900] As we have indicated above,[901] evidence of self-deployment demonstrates better than any other kind of evidence what business decisions competitive carriers have *actually* made regarding the feasibility to deploy facilities without relying on the incumbent LEC. This evidence shows us, as a practical matter, that competitive LECs have been able to surmount barriers to entry with respect to that particular loop deployment. We then consider the extent of this deployment, whether it occurs or could occur on a nationwide basis, or is more limited in scope. Next we look at the extent to which wholesale alternatives to the incumbent LEC's unbundled loops are available to competitive LECs to provision high-capacity loops to their customers. We consider whether these alternatives, including alternative transmission technologies, are available ubiquitously or only in certain places.

309. We note that our consideration of alternative loop technologies in the enterprise market analysis differs from our consideration of intermodal alternatives in our mass market analysis. Different approaches are warranted because of the differences in how these technologies are deployed in these markets based on their suitability to individual customers, as well as the likelihood these technologies could be self-provisioned or made available to competitive carriers on a wholesale basis.[902] In the enterprise market, companies are able to target individual buildings and customers and determine which technology is the optimal means of reaching each customer. On the other hand, in the mass market where revenues are small, customers are typically served in large groups, using uniform technologies and mass marketing and provisioning techniques to minimize the cost of serving each customer.[903] As such, creating mechanisms to identify intermodal alternatives on an individual customer basis in the mass market is impractical, whereas it is feasible, in certain cases, in the enterprise market.

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[899] *Iowa Utils. Bd.*, 525 U.S. at 389 (noting that the Commission must consider the availability of elements "outside the incumbent's network" when applying the "impair" standard). *See also* ITTA Jan. 29, 2003 *Ex Parte* Letter, Attach. at 1 (noting that the question is whether elements are available from sources other than incumbent LEC).

[900] *See, e.g.*, BellSouth Comments at 42-43; SBC Comments at 91; Verizon Comments at 118; *see also* ALTS *et al.* Comments at 45; Allegiance Comments at 19-22; Allegiance Reply at 36; AT&T Fea/Giovannucci Reply Decl. at 21.

[901] *See supra* Part V.B.

[902] *See supra* Part V.B.1.d.(ii); *see also supra* Part VI.A.4.a.(iv).

[903] Thus, those technologies that can only be used for accessing certain customers and require equipment installation at the customer location, such as fixed wireless, have only proven to be economically viable for customers found in the enterprise market.

310. We find that certain types of alternative loop technologies could be made available on a wholesale basis to competitive carriers for providing high-capacity loop services to particular building locations in the enterprise market. Providers of viable intermodal alternatives to mass market customers have shown no inclination to provide access to competing carriers to serve their customers, nor would we expect them to.[904] With respect to the ability of a competitive LEC to self-provision high-capacity loops using alternative loop technologies, there are substantial differences between the mass market and the enterprise market. For example, one of the mass market's major alternative loop technologies, cable telephony, is only available to cable TV companies that, because of their unique economic circumstances of first-mover advantages[905] and scope economies,[906] have access to the customer that other competitive carriers lack. Other technologies, such as fixed wireless, have not proven to be viable or deployable on a mass market scale. This contrasts with the enterprise market, where the record reflects that alternative technologies are available to some degree at certain locations that might be used by competitive carriers to provide high-capacity loops to enterprise customers.

(c) Capacity-based Impairment Findings

(i) Dark Fiber Loops

311. We find on a national basis that requesting carriers are impaired at most customer locations without access to dark fiber loops. Dark fiber, unlike "lit" fiber, is unused fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.[907] Users of unbundled dark fiber loops, similar to users of dark fiber transport,[908] provide the electronic equipment necessary to activate the dark fiber strands to provide services.[909] While the underlying capacity level of a strand of dark fiber is comparable in total capacity to an OCn loop, we address dark fiber loops separately from OCn loops due to economic and operational characteristics that distinguish dark fiber from "lit"

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[904] A provider that has privileged access to a single mass market customer potentially will lose the customer if it provides wholesale access to a potential competitor.

[905] These companies had the advantage of beginning with exclusive franchises and a captive market. These advantages are not available to other entrants.

[906] Scope economies exist when the cost of providing a service is lower when combined with other services. The cost of providing cable telephony to customers is lower for cable TV companies because they also provide video services to those customers.

[907] *See supra* note 628 (definition of dark fiber).

[908] *See infra* Part VI.C.4.c.(i).

[909] By itself, dark fiber has virtually unlimited capacity. It is the electronics that define the capacity. *See* El Paso Feb. 5, 2003 *Ex Parte* Letter at 2; *see also* AT&T Comments at 130; Letter from Thomas Jones, Counsel for Conversent Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-2 (filed Dec. 24, 2002) (Conversent Dec. 24, 2002 *Ex Parte* Letter).

fiber.[910] We make our determination of impairment based on the high sunk costs associated with deploying high-capacity loop facilities and lack of evidence showing alternatives at specific customer locations.

312. Dark fiber exists in a carrier's network as unused fiber available because that carrier has deployed fiber in the first instance for the express purpose of lighting certain strands of it to serve a particular customer location.[911] The "dark" fiber strands, however, remain unlit. Dark fiber loop construction, like loops generally, involves substantial fixed and sunk costs. The primary costs associated with fiber deployment lie in the substantial sunk costs associated with physically laying the fiber cable.[912] In addition, there are other barriers that must be overcome before deployment can effectively occur.[913] These other barriers include the inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and getting it into the building thereafter,[914] as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities.[915] It is only when a competitive LEC has sufficient demand for "lit" fiber to a particular customer location to enable it to recover the fixed and sunk costs of the fiber deployment that it is economically feasible for that competitor to deploy fiber to that location.[916] When a fiber build decision is made, carriers

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For example, competitive providers that use unbundled dark fiber claim that it can offer a higher level of service than "lit" transmission because unbundled dark fiber integrates more efficiently into their networks by reducing the number of failure points and by providing the competing carrier with greater ability to test for quality and maintenance. *See* Conversent Comments at 7; Letter from Scott Sawyer, Vice President - Regulatory Affairs, Conversent Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Oct. 10, 2002) (Conversent Oct. 10, 2002 *Ex Parte* Letter). Other competitive carriers indicate that dark fiber gives them greater control over their own network components which is an important aspect of their competitive service offerings. *See* Letter from Lawrence R. Freedman, Counsel for Norlight, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Dec. 30, 2002) (Norlight Dec. 30, 2002 *Ex Parte* Letter). In the *UNE Remand Order*, we recognized that the characteristics of dark fiber do not vary between loop and transport deployment. Because dark fiber is more extensively used in transport, we discuss its characteristics in more detail below in our discussion of dark fiber transport and do not repeat such discussion here other than to indicate that the characteristics of dark fiber described therein pertain to dark fiber loops as well. *See infra* Part VI.C.4.c.(i). Any operational or provisioning requirements associated with incumbent LEC provisioning of unbundled dark fiber transport apply equally to provisioning unbundled dark fiber loops. *See id.*, para. 385 (discussing issues associated with dark fiber access and granting states the flexibility to establish reasonable limitations and technical parameters).

911 Competitive carriers indicate that they, unlike the incumbent LEC, can not build fiber loop plant until they have secured a substantial customer base and revenue stream. *See* Letter from Robert J. Aamoth, Counsel for Dominion Telecom, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-338 at 4 (filed Jan. 28, 2003) (Dominion Jan. 28, 2003 Aamoth *Ex Parte* Letter); *see also* El Paso *et al.* Comments at 9.

912 *See supra* Part VI.A.3 (discussing loop construction costs); *see also* El Paso Feb. 5, 2003 *Ex Parte* Letter at 1.

913 *See, e.g.*, El Paso *et al.* Comments at 20-21.

914 *See, e.g.*, ALTS *et al.* Comments at 56 (discussing other barriers competitive LECs face in self-deployment); AT&T Reply at 174-79.

915 *See supra* note 890.

916 *See infra* Part VI.A.4.b.(i) (stating that evidence that the specific level of demand must be OCn or 3 DS3s of capacity into a particular customer location to justify competitive loop deployment); *see also supra* note 911.

take advantage of the fact that they are already incurring substantial fixed costs to obtain the rights-of way, dig up the streets, and trench the cable, to lay more fiber than they immediately need. Once the significant fiber construction cost is incurred,[917] the record reflects that it is relatively easy and inexpensive to install fiber strands in excess of current demand at that time to maximize the use of the conduit and avoid the need to incur duplicate costs to retrench the same location in the future if demand for additional fiber facilities occurs.[918] As such, incumbent LECs are the largest source of intracity dark fiber nationwide as a result of their "first-mover" fiber deployment to the majority of customer locations.[919] This sharply contrasts with the availability of competitive dark fiber loops, which is necessarily limited by the economic barriers inherent in deploying alternative fiber loops, generally, except to certain customer locations.[920]

313. Because it is generally not economically feasible to deploy duplicate fiber loop facilities, the record reflects that a number of facilities-based competitive LECs rely on incumbent LEC unbundled dark fiber to provision "last-mile" services to small and medium-sized customers, particularly in rural, unserved, or underserved areas of the country.[921] These users of unbundled dark fiber provide the necessary optronics[922] and collocations that are preconditions to activating the fiber to serve customers. These carriers extensively deploy their own network facilities, *e.g.*, switches, transport, and the necessary optronics to light dark fiber to enable the provision of competitive high-capacity local service to end users in direct competition with the incumbent LEC.[923] These competitive LECs argue that they seek to construct their own fiber loops all the way to the customer if economically feasible to self-deploy, but that in many areas the level of demand is not sufficient to warrant overbuilding the dark fiber already available

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[917] *See supra* Part VI.A.3 (discussing loop construction costs); *see also* El Paso *et al.* Comments at 20-21.

[918] *See, e.g.*, El Paso *et al.* Comments at attached TPUC testimony at 8 (indicating an industry average of a "mere" $1.00 per foot to increase fiber placement from a 72 fiber strand cable to the next standard 144 size fiber strand cable); *see also* Norlight Dec. 30, 2002 *Ex Parte* Letter at 5.

[919] *See* Norlight Dec. 30, 2002 *Ex Parte* Letter at 5 (the first carrier to lay fiber to a particular location will lay significantly more than it will need because the incremental cost of burying additional fibers is negligible; requiring competitors to construct duplicate facilities where there is already excess capacity in place is precisely the inefficiency the *USTA* court instructed the Commission to avoid).

[920] *See supra* note 905.

[921] *See, e.g.*, Dominion Jan. 28, 2003 Aamoth *Ex Parte* Letter at 4 (dark fiber loops are especially critical because they are often located in areas where few or no competitors presently serve customers; eliminating unbundled dark fiber loops would deprive hundreds of businesses in Tier II and III cities from receiving competitive service); Norlight Dec. 30, 2002 *Ex Parte* Letter at 5 (in smaller rural markets where dark fiber exists there typically is no demand or expected growth in demand to warrant additional facilities); Norlight Comments at 2-4 (Norlight serves Tier II and III cities where the incumbent LEC is the only option other than cost prohibitive self-deployment to extend competitive service to customers).

[922] We note that the cost of electronics, such as those used to activate dark fiber, are not sunk costs like fiber construction costs because they can be moved from one location to another location upon exit from a particular location.

[923] *See, e.g.*, Norlight Dec. 30, 2002 *Ex Parte* Letter at 2.

from incumbent LECs.[924] Because it is not economically feasible to self-deploy to many enterprise market customer locations, particularly less densely populated areas, unbundled dark fiber loops enable competitive carriers to build facilities-based networks to serve customers at those locations[925] with the least reliance on the incumbent LEC's facilities.[926] We find that dark fiber loops allow competing carriers to provide services without incurring many of the high sunk costs of self-deploying the loop facility, but still require significant investment in collocation and optronics. We expect that unbundling of dark fiber loops will encourage construction of alternative facilities because it will provide facilities-based carriers the means of obtaining the last-mile facility necessary to serve customers over competitive networks comprised largely of facilities other than the incumbent LEC's. The availability of dark fiber loops increases the ability of facilities-based competitive LECs to reduce their reliance on unbundled "lit" high-capacity loops at locations where dark fiber loops are available to them, encouraging investment in the optronics necessary to light the fiber.[927] Moreover, unbundling dark fiber enables the Commission to limit unbundling obligations with respect to certain high-capacity "lit" loops as we discuss below.

314. In most areas, competing carriers are unable to self-deploy and have no alternative to the incumbent LEC's facility.[928] However, the record indicates that competitive LECs have been able to self-deploy fiber to some customer locations, although the record does not reveal the specific locations of such deployment.[929] For this reason, we delegate to the states the authority to collect and analyze more specific evidence of loop deployment on a customer location basis, applying a uniform national trigger that measures self-provisioning to determine customer

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[924] *Id* at 5. Carriers also note that in these more rural areas it actually may be less costly to both in time and dollars to self-deploy fiber than in more urban areas, but the level of demand to a customer location may simply be too low to justify the cost of installing duplicative facilities. *Id* at 3.

[925] *See, e.g.*, Dominion Jan. 28, 2003 Aamoth *Ex Parte* Letter at 2; Norlight Dec. 30, 2002 *Ex Parte* Letter at 5.

[926] *See, e.g.*, Letter from Joshua M. Bobeck, Counsel for El Paso Global Networks, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, 96-98, 98-147 at 2 (filed Oct. 4, 2002) (El Paso Oct. 4, 2002 *Ex Parte* Letter) (dark fiber is the UNE that is closest to 100% facilities-based competition).

[927] *See* Letter from Stephen W. Crawford, General Counsel, El Paso Networks, and Scott Sawyer, Vice President and Counsel, Conversent Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 1 (filed Nov. 26, 2002) (El Paso/Conversent Nov. 26, 2002 *Ex Parte* Letter).

[928] *See supra* note 856; *see also* Letter from Brad E. Mutschelknaus, Counsel for OnFiber Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, 96-98, 98-147 at 2 (filed Feb. 6, 2003) (OnFiber Feb. 6, 2003 *Ex Parte* Letter) (asserting that the vast expense associated with deploying dark fiber precludes self-provisioning and prevents any kind of alternative market from developing).

[929] *See supra* note 856; *see also* Letter from Patrick J. Donovan, Counsel for El Paso Networks LLC, to Marlene H. Dortch, Secretary, FCC, CC *Docket* No. 01-338 (filed Jan. 22, 2003) (El Paso Jan. 22, 2003 *Ex Parte* Letter); Letter from Ann D. Berkowitz, Project Manager – Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 19 (filed Jan. 31, 2003) (discussing competition for special access) (Verizon Jan. 31, 2003 Special Access *Ex Parte* Letter); Norlight Dec. 30, 2002 *Ex Parte* Letter at 2.

locations where competitive carriers are not impaired without access to incumbent LEC unbundled dark fiber loops.[930]

(ii) OCn Loops

315. We find that requesting carriers are not impaired on a nationwide basis without access to unbundled "lit" OCn loops because the barriers relating to the deployment of OCn "lit" loops can be overcome through self-deployment at the OC3 and above level, the use of unbundled dark fiber, or the use of "lit" DS3s.[931] Record evidence reflects competitive deployment of loops at the OCn level and competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers which use them.[932] Further, there does not appear to be any evidence of demand for incumbent LEC OCn level unbundled loops.[933] Competitive LECs have deployed OCn capacity to some commercial buildings nationwide, including Tier II and Tier III markets.[934] We find this evidence of deployment

[930] *See infra* Part VI.A.4.b.(ii)(d) (discussing in detail the state reviews on a customer-location specific basis applying the defined Self-Provisioning Trigger and Competitive Wholesale Facilities Trigger).

[931] OCn circuits range from OC3 to OC192. The smallest common OCn capacity circuit, an OC3, is comparable in capacity to 3 DS3s, 84 DS1s, or 2016 voice-grade loops. Our impairment finding for OCn level loops differs from our finding for dark fiber loops as the economics of deploying "lit" fiber at the OCn level differs from deploying dark fiber at a comparable capacity level. While the construction-related costs in laying the fiber are the same, the ability to recover these sunk costs differs if considered as distinct types of loop facilities. As we noted in our discussion of dark fiber loops above, dark fiber is unused deployed fiber along a particular route that is not associated with a specific potential revenue stream from a known customer at the time of construction. *See supra* para. 312. A competitive LEC does not deploy dark fiber to use in self-provisioning high-capacity local service to customers *unless* that competitive LEC already has sufficient customer demand at a "lit" fiber level, *i.e.*, at the OCn or 3 DS3 level, to recover the sunk costs of the fiber construction. *See supra* note 911; *see also* Dominion Jan. 28, 2003 Aamoth *Ex Parte* Letter at 4. In other words, competitive carriers can not economically deploy dark fiber on a stand-alone basis for self-deployment purposes without an associated "lit" fiber demand. While carriers deploying OCn fiber loops must necessarily first deploy dark fiber and then attach the requisite optronics to activate the fiber for service capability at the OCn level, carriers deploying fiber to meet a particular customer demand for OCn capacity are viewed as deploying an OCn loop to serve that customer rather than deploying dark fiber to serve that customer.

[932] *See, e g.*, WorldCom Fleming Decl. at para. 10 (when customer demand is projected at several DS3s or optical level capacity a self-build decision is made); Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, 96-98, 98-147, Attach. at 5 (filed Oct. 7, 2002) (WorldCom Oct. 7, 2002 *Ex Parte* Letter) (for self-deployment to be feasible, the demand must be for at least multiple DS3s); AT&T Comments at 134 (a competitive LEC can only self-deploy to a location with enormous demand, *i.e.*, the smallest of which would be at the OC3 level); AT&T Nov. 25, 2002 *Ex Parte* Letter at 2 (the amount of committed traffic to support construction of loops for large business customers is about 3 DS3s, *i.e.*, an OC3), and Attach. B at 9 (at least 3 DS3s worth of demand is required before a facility build can generally be proven as financially prudent).

[933] *See supra* para. 299 (BOCs state that not a single unbundled loop above a DS3 level has been purchased).

[934] *See* KMC Duke June 11, 2001 High-capacity Aff. at para. 3 (naming the Tier III markets they serve with their own facilities); CCG July 17, 2002 CLEC Survey *Ex Parte* Letter (explaining that the six metropolitan areas chosen to represent competitive LEC loop buildout – Albany, Augusta, Boston, Chicago, Corpus Christi, and Portland – represent a broad cross section of populations and business concentrations); *see also* WorldCom Oct. 30, 2002 *Ex Parte* Letter.

persuasive in demonstrating that competitive LECs can often overcome the barriers associated with loop deployment at the OCn level.

316. Commenters indicate that services offered over OCn loops produce revenue levels which can justify the high cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs associated with the loop construction. Large enterprise customers purchasing services over OCn loops[935] enter into long-term contracts committing to revenue streams and associated early termination charges that provide the ability for carriers to recover their substantial non-recurring "set-up" or construction costs.[936] Customers obtaining services at the OCn level also understand that transitioning such services to a new provider is not an overnight process. Because of their level of business planning sophistication, as a practical matter, they begin the process of seeking a new or alternative service provider well in advance of their actual need for the service.[937] Accordingly, they are more receptive to the inherent provisioning delays associated with constructing these high-capacity loops to meet their particular needs than smaller business customers served by lower capacity loops.[938] Competitive carriers deploying fiber at the OCn capacity level are therefore able to accommodate provisioning delays and additional expense at the start of the construction process, mitigating obstacles to self-deploying they may face in gaining access to public and private rights-of-way.[939]

317. Furthermore, enterprise customers requiring OCn level capacity are often located in multiunit premises where they may have the ability to exert greater influence over building

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[935] We recognize that large enterprise customers may also have remote business locations that do not require the capacity of an OCn loop. We reiterate that we do not tailor our rules to restrict or limit unbundling based on the size or class of the customer served. A large enterprise customer's particular loop capacity demand at a given service location is determined by multiple factors unique to that customer's needs at that specific location, rather than the size of that customer. Merely because large enterprise customers are typically the only type of customer that purchase OCn capacity loops does not equate to the fact that OCn loops are the only type of loop such customers demand.

[936] *See supra* note 932; *see also* Declaration of Alfred E. Kahn and William E. Taylor, RM No. 10593 at 32-33 (discussing generally how long-term contracts and associated termination penalties are used to ensure cost recovery) *in* Verizon Jan. 31, 2003 Special Access *Ex Parte* Letter. Long-term contracts are used to minimize risk exposure and stabilize construction costs over time when the seller incurs heavy sunk costs as part of a transaction. *Id.*

[937] If this customer's competitive OCn loop is to be provisioned at their current business location, we understand they will generally begin the process of looking at alternative service providers months in advance of the expiration date of their current contract for service, which will usually include a provision for month-to-month service thereafter for as long as needed. If service is to be provided at a brand new location that the customer is moving to, or having built, at an OCn level of capacity, decisions regarding which service provider will provision that service will similarly be made months before occupancy. Each of these scenarios mitigates the impact of the lead time to build new loops with respect to serving these customers.

[938] *See, e.g.*, Sprint Comments at 23; WorldCom Fleming Decl. at paras. 9-10.

[939] To the extent these initial obstacles are in the form of unreasonably high costs for rights-of-way access, competitive LECs deploying fiber to serve customers at the OCn level are better able to overcome these barriers as the revenues associated with OCn capacity service contracts are quite high. *See generally* AT&T Comments at 134; WorldCom Comments at 76; *see also* TDS Jackson Aff. at para. 8.

access because: (1) their operations are so substantial that they own the premises outright; (2) they control the access to the premise; or (3) they have sufficient influence over the landlord/building owner to overcome building access impairments the competitive provider may encounter due to the amount of leased occupancy space for which this enterprise customer has committed.[940]

318. Competitive carriers requiring OCn capacity "lit" loops to serve customers will also have the ability to purchase dark fiber, including unbundled dark fiber loops, and attach their own optronics to activate such loops to serve their customers at those locations where unbundled dark fiber is available. In circumstances where competitive LECs may be unable to self-deploy the underlying OCn fiber loop, the record demonstrates that there is no impairment with respect to obtaining and attaching the requisite optronics necessary to light dark fiber at the OCn level to provide service. Based on record evidence that self-deployment of the loop transmission facility at the OCn level is generally feasible, it necessarily follows that the lesser cost of self-providing just the optronics to light the fiber at the OCn level is economically feasible. While we recognize that dark fiber may not be available at every customer location nationwide, a competitive carrier may also access "lit" loops. Because the record demonstrates, however, that competitive carriers routinely self-deploy when customer demand is three DS3s (or optical capacity) as discussed further below, we limit the availability of "lit" DS3 loops to a maximum of two unbundled DS3 loops per carrier at each customer location.[941]

319. Finally, as we have noted, at least in the BOC regions, the record reflects that competitive LECs have not obtained unbundled loops at the OCn level.[942] Thus, there are few, if any, transition issues with regard to OCn loops. In the event a competitive LEC of which we are not aware is currently providing service over an unbundled OCn loop, the transition scheme that we have adopted herein governs such situation.[943]

(iii) DS3 Loops

320. We make a national finding that requesting carriers are impaired on a customer-location-specific basis without access to unbundled DS3 loops. The inability to recover the significant fixed and sunk construction costs of DS3 loops, coupled with the additional barriers to loop deployment associated with accessing rights-of-way; obtaining and paying for building access; and other service provisioning delays impair the ability of requesting carriers to self-provision single DS3 loops.[944] Unlike deployment at even the lowest OCn level, the record

940 *See, e.g.*, AT&T Reply at 174-77.

941 *See infra* para. 321.

942 *See supra* para. 299.

943 *See supra* Part VIII.D (addressing the transition process adopted herein).

944 *See supra* Part VI.A.3 for a discussion of the general economic characteristics of loop deployment. Because the cost of constructing a fiber loop facility does not vary to any significant degree with loop capacity, to economically justify a particular loop construction expenditure, a competitive carrier must have some reasonable expectation of being able to recover its cost over time.

indicates that a single DS3 loop, generally, can not provide a sufficient revenue opportunity to overcome these barriers.[945] Because our impairment analysis rests most heavily on the ability of a self-deploying carrier to recover its sunk and fixed costs, the inability to recover such costs at a single DS3 level results in impairment. In finding impairment based on the inability to recover sunk costs, we find that the other economic and operational barriers faced by competitive LECs in self-deploying loops generally, *i.e.*, difficulties in acquiring municipal and private rights-of-ways as well as gaining building access from owners of multiunit premises,[946] exist for competitive LECs with respect to single DS3 loop deployment.[947]

321. Despite the economic barriers that a competitive LEC faces in deploying single DS3 loops, the record indicates that some carriers have been able to overcome these barriers when providing multiple DS3s to a specific customer location.[948] Because the record does not, however, provide sufficient evidence to determine the specific factors that make such deployment feasible at these locations, we are unable to conclude with any precision exactly where requesting carriers would not be similarly impaired without access to unbundled DS3 loops.[949] Similarly, the record reflects a small but potentially growing wholesale alternative DS3 loop market.[950] Once again, however, the record in this proceeding does not specify exactly

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[945] *See supra* note 860. The potential revenue stream associated with a customer commitment for a single DS3 loop is far less than the revenue stream associated with an OCn loop, yet the cost to construct the loop facility is the same. At the smallest OCn level, *i.e.*, OC3, there are 2,016 voice-grade equivalent lines. A single DS3 is equivalent to 672 voice-grade equivalent lines. A simple comparison of the relative voice-grade equivalent lines demonstrates that a customer commitment in terms of potential revenue stream for a DS3 is many times smaller than that of an OC3 loop. Accordingly, it takes a longer period of time for a competitive LEC to recover its costs of deploying a single DS3 loop facility.

[946] *See, e.g.*, AT&T Reply at 174-79 (discussing other barriers linked to the incumbent LECs' historical monopoly that preclude competitive loop deployment independent of cost factors); *see also* NuVox *et al.* Comments at 74; KMC Duke Aff. at paras. 7-9 (citing proprietary information); SNiP LiNK Polito Aff. at paras. 3-7; Sprint Comments at 22; Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Oct. 25, 2002) (discussing building access barriers) (WorldCom Oct. 25, 2002 Building Access *Ex Parte* Letter); ALTS *et al.* Comments at 56.

[947] *See supra* Part VI.A.3. for evidence of the existence of the other operational barriers to DS3 loop capacity deployment.

[948] The record indicates that some competitive carriers have economically self-deployed DS3 capacity loops to certain customer locations where the aggregate demand for DS3 capacity at those locations is *three* or more. *See supra* note 860; *see also* Letter from David L. Lawson, Counsel for AT&T to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 02-33 at 1 n.2 (filed Feb. 3, 2003) (AT&T Feb. 3, 2003 Lawson *Ex Parte* Letter) (citing AT&T Nov. 25, 2002 *Ex Parte* Letter indicating competitors can economically self-deploy at 3 DS3s worth of traffic).

[949] Indeed, we note that competitive carriers do not have an incentive to volunteer such information in our record. The record does provide sufficient information to enable us to impose a limitation on the number of DS3 unbundled loops that a requesting carrier can obtain to any single customer location. *See infra* para. 324.

[950] *See* AT&T Comments at 150 n.110 (citing confidential information that indicates that some of its DS3 level loop capacity is obtained from non-incumbent LEC sources).

where this deployment has occurred. Therefore, as discussed below, we delegate to the states the authority to collect and analyze more specific evidence of DS3 loop deployment on a customer location-specific basis, applying uniform national triggers that measure self-provisioning or wholesale alternative availability to determine customer locations where competitive carriers are not impaired without access to incumbent LEC unbundled DS3s.[951]

322. If, as the incumbent LECs argue, "a small number of buildings in each metropolitan area typically account for a large fraction of the traffic,"[952] we expect that the triggers that we adopt today will provide incumbent LECs substantial relief from their unbundling obligations while simultaneously ensuring that competitive carriers get unbundled high-capacity loop access only where they are unable to economically self-deploy or use alternative facilities.[953]

323. In finding that competitive carriers are impaired without unbundled access to DS3 loops, we disagree with incumbent LECs' claims that market evidence of DS3 deployment in certain situations demonstrates that, in *all* situations, traffic and revenue potential justify a nationwide finding of DS3 non-impairment. The limited record evidence we have of self-deployment does not permit such broad extrapolation.

324. *Limitation on Multiple Unbundled DS3 Loops.* Finally, consistent with our finding of no impairment at the OCn loop capacity level, and because the record confirms that it is economically possible to self-deploy at a three DS3 loop level to a particular customer location, we limit an incumbent LEC's unbundling obligation to a total of two DS3s per requesting carrier to any single customer location.[954] We find that as a carrier approaches customer demand for three DS3s of capacity at a particular customer location, it is feasible for that carrier to self-deploy its own high-capacity facilities. Our unbundled DS3 loop quantity

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[951] *See infra* Part VI.A.4.b.(ii)(d) (discussing in detail the state reviews on a customer-location specific basis applying the defined Self-Provisioning Trigger and Competitive Wholesale Facilities Trigger).

[952] *BOC UNE Rebuttal Report* at 45.

[953] One commenter indicates that 200 to 300 out of 15,000 multiunit premises in a typical Tier-I MSA generate 80% of the data revenues. *Id.* Verizon indicates a Tier I MSA is typically defined as an MSA with a population of one million or more. *See* Verizon Jan. 31, 2003 Special Access *Ex Parte* Letter at 13 n.62.

[954] We note that our unbundled DS3 loop cap is smaller than the unbundled DS3 transport cap. *See infra* Part VI.C.4.c.(ii). The unbundled DS3 loop cap is based on record evidence indicating the feasibility of DS3 loop self-deployment at a 3 DS3 level. Indeed, AT&T's record evidence indicates economic feasibility at about 2.75 DS3s or 77 DS1s worth of traffic. *See* AT&T Jan. 14, 2003 *Ex Parte* Letter at 4 (citing AT&T Nov. 25, 2002 *Ex Parte* Letter, Attach. B). Once a competitive carrier's customer demand at a location exceeds 2 DS3 loops, the competitive carrier should plan to self-deploy DS3 capacity to that customer location. The record evidence for the self-provisioning feasibility level for DS3 transport varies, but because it generally is within a higher range than for DS3 loops, establishing the DS3 transport limit at a higher number is appropriate.

limit is location specific, maintaining consistency with our impairment conclusions about OCn capacity loop deployment,[955] as well as DS3 loop deployment.

(iv) DS1 Loops

325. We find that requesting carriers generally are impaired without access to unbundled DS1 loops.[956] The record contains little evidence of competitive LECs' ability to self-deploy single DS1 capacity loops[957] and scant evidence of wholesale alternatives for serving customers at the DS1 level.[958] Commenters expressly state that a competitive carrier would not construct its own DS1 or lower capacity loops.[959] Indeed, incumbent LECs recognize a distinction between provisioning DS1 level loops and other higher capacity loops.[960] The record shows that requesting carriers seeking to serve DS1 enterprise customers face extremely high economic and operational barriers in deploying DS1 loops to serve these customers.[961]

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[955] We have noted that the lowest common OCn capacity standard, OC3, is equivalent to three DS3 circuits in terms of capacity. *See supra* note 931.

[956] DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, *e.g.*, two-wire and four-wire HDSL or SHDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve unless otherwise specifically indicated. *See supra* Part VI.A.4.a.(v) (discussing FTTH). The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers. *See supra* Part VI.A.4.a.(v)(b)(i).

[957] We note that at least two competitive LECs have provided evidence that indicates that they self-provide some DS1 capacity loops to certain customer locations. *See supra* note 859. It is important to note, however, that this evidence of self-provisioning has been possible where that same carrier is already self-provisioning OCn or a 3 DS3 level of loop capacity to that same customer location. Thus, this evidence does not support the ability to self-deploy stand-alone DS1 capacity loops nor does it impact our DS1 impairment finding. *See* AT&T Comments at 150 n.10 (citing confidential information); WorldCom Slocum Decl. at paras. 3-6.

[958] *See* Covad Reply at 56 (discussing no alternative DS1 capacity providers); NewSouth Comments at 13-17; NewSouth Reply at 17; WorldCom Comments at 74; AT&T Jan. 14, 2003 *Ex Parte* Letter at 2; WorldCom Oct. 30, 2002 *Ex Parte* Letter; AT&T Feb. 3, 2003 Lawson *Ex Parte* Letter at 13. The record indicates that even competitive carriers that have deployed their own loop facilities do not have the back office support systems in place that are necessary to offer any excess capacity on a wholesale basis to other competitive LECs. *See, e.g.*, KMC Duke Aff at para. 13 (discussing what systems are necessary to wholesale service to other carriers).

[959] *See* AT&T Jan. 14, 2003 *Ex Parte* Letter at 3 n.5; Covad Comments at 47; Allegiance Reply at 38.

[960] SBC Comments at 100-01; SBC Reply at 156 (recognizing that impairment may exist for certain DS1 loops and proposing a carve-out).

[961] *See supra* Part VI.A.4.b.(ii)(a) for a discussion of the economic and operational barriers to DS1 loop capacity deployment. The record indicates that many competitive carriers providing DS1 capacity loops to enterprise market customers serve the small to medium-sized segment of this market which is characterized as typically underserved by incumbent LECs. Indeed, many of these competitive LECs, which are themselves small to medium size businesses, have entered the competitive telecommunications market specifically to serve these smaller business customers requiring primarily DS1 level capacity. The DS1 loop unbundling rule we adopt today recognizes the dependency that smaller business customers and carriers have on DS1 capacity loops and accommodates those needs consistent with our impairment framework. *See also* NuVox Cadieux Jan. 24, 2003 *Ex Parte* Aff. (for general discussion of (continued....)

Customers demanding services over DS1 loops possess significantly different economic characteristics for competitive carriers than large enterprise market customers. In particular, small and medium enterprise customers served by DS1 loops provide much lower revenue opportunities than large enterprise market customers and, generally, resist long-term contract obligations.[962] These factors lead to a greater potential to change providers on a more frequent basis, *i.e.*, churn, resulting in the inability of competitive LECs to rely on a long-term DS1 revenue stream, as they can with much higher loop capacity demands. Taken together, these factors make it economically infeasible for competitive LECs to deploy DS1 loops, which require the same significant sunk and fixed construction costs as higher capacity loops.

326. While DS1 loops are typically used to serve small to medium-sized business customers associated with the enterprise market, they are also used to serve customers associated with the mass market. Although we recognize different characteristics between these two markets, *e.g.*, enterprise customers are more concentrated in urban locations, in multiunit premises, and demand greater variety and higher quality services than mass market customers, the economics of constructing DS1 loop facilities to serve these different customer classes are not significantly different. The average revenue available per customer in either of these markets is very low relative to larger enterprise market customers using higher capacity loops.[963] While we recognize that retail business customer rates are typically higher than residential rates, the record reflects that the revenues generated from small and medium enterprise customers are not sufficient to make self-deploying DS1 loops economically feasible from a cost recovery perspective.[964] As we have stated, our impairment findings rely most heavily on the economic feasibility of competitive LECs to self-deploy and recover sunk costs.[965] Competitive LECs do not have the ability to recover sunk costs in self-deploying DS1 loops. Furthermore, the other economic and operational barriers faced by competitive LECs in self-deploying loops generally, *e.g.*, the inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and bringing it into a building thereafter,[966] as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop

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serving small to medium business customers with DS1 capacity); NuVox *et al.* Comments, attached Profiles & Affidavits; Covad Reply at 54; NewSouth Reply at 16-17; Allegiance Reply at 36-38.

962 *See, e.g.*, NewSouth Reply at 18 (discussing the lower traffic volumes and revenue potential that can be generated from a DS1); *see also* TDS Jackson Aff. at para. 10.

963 This fact can be most easily demonstrated by simply comparing voice-grade line equivalents, *i.e.*, a single DS1 is equivalent to 24 voice-grade lines whereas 3 DS3s (the number of DS3 capacity loops where self-provisioning begins to be economically feasible) is equivalent to 2016 voice-grade equivalents.

964 *See supra* note 962.

965 *See supra* para. 206.

966 *See, e.g.*, AT&T Reply at 174-79; ALTS *et al.* Comments at 56 (discussing, generally, some of the other barriers competitive LECs face to self-deployment).

facilities exist with DS1 loop self-deployment.[967] Indeed, because the ability to absorb the additional "costs" associated with these other economic and operational barriers over time becomes increasingly more difficult at lower loop capacity levels, these barriers impact the ability to self-deploy at a DS1 level to an even greater extent than at higher loop capacity levels.[968]

327. Because the record does not demonstrate that carriers can economically self-provision at the DS1 level, we do not delegate to the states the authority to consider DS1 loop impairment on a location-specific basis based on a self-provisioning trigger.[969] On the other hand, although the record indicates little evidence of wholesale alternative DS1 loop capacity, evidence of alternative providers at the DS3 and higher capacity levels suggests that there may be specific locations where competitive carriers have deployed fiber and could offer excess capacity at the DS1 loop level. Thus, we recognize the possibility that non-incumbent LEC DS1 loop alternatives may be available now or in the near future at particular customer locations. As explained below, we delegate to the states the authority to collect and analyze more specific evidence of wholesale alternatives to DS1 loops on a customer location-specific basis, applying a uniform national trigger that measures the availability of wholesale competitive alternatives to determine customer locations where competitive carriers are not impaired without access to incumbent LEC unbundled DS1s.[970]

(d) Location-Specific Review Conducted By States Applying Federal Triggers

328. In making affirmative impairment findings on a nationwide basis for dark fiber loops, DS3 loops, and DS1 loops, we recognize that limited alternative deployment has occurred at particular customer locations not specified in our record for certain of these high-capacity loop types which could lead to a finding of no impairment for that loop type at that location. Thus, for these loop types, a more granular impairment analysis should be applied on a customer-by-customer location basis. To that end, we delegate to states a fact-finding role to identify where competing carriers are not impaired without unbundled high-capacity loops pursuant to two triggers. If a state commission finds that the federal triggers for a finding of non-impairment have been satisfied for a specific type of high-capacity loop at a particular customer location, the incumbent LEC will no longer be required to unbundle that loop type at that location according to the transition schedule adopted by the state commission.[971] Incumbent LECs must make the unbundled high-capacity loops for which we find impairment on a nationwide basis available to

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[967] *See supra* Part VI.A.3., Part VI.A.4.b(ii)(a) for evidence of the existence of the other operational barriers to DS1 loop capacity deployment.

[968] *See supra* para. 315 (discussing the ability to absorb these costs at the OCn loop level).

[969] *See infra* Part VI.A.4.b(ii)(d) (discussing in detail the state reviews on a customer-location specific basis) and para. 334 (describing why states will not apply the Self-Provisioning Trigger to DS1).

[970] *See infra* Part VI.A.4.b(ii)(d) (discussing in detail the Competitive Wholesale Facilities Trigger).

[971] *See infra* Part VIII.D (discussing the transition process).

qualifying requesting carriers except at those customer locations where a state commission's granular review has confirmed that no impairment exists and unbundling is no longer required. In the event a state commission declines to exercise the authority we delegate to it, a party may petition this Commission to conduct such analysis.[972]

329. We establish two different types of triggers to identify the specific customer locations where there may be no impairment for the high-capacity loops we identify below and the incumbent LEC unbundling obligation can be eliminated at that customer location: 1) where a specific customer location is identified as being currently served by two or more unaffiliated competitive LECs with their own loop transmission facilities at the relevant loop capacity level (Self-Provisioning Trigger); or 2) where two or more unaffiliated competitive providers have deployed transmission facilities to the location and are offering alternative loop facilities to competitive LECs on a wholesale basis at the same capacity level (Competitive Wholesale Facilities Trigger). Although both triggers focus on whether there are two alternative loop providers at a particular customer location, they are different because the Competitive Wholesale Facilities Trigger can be satisfied by alternative loop providers that have deployed their own facilities *or* by alternative providers that are using unbundled network elements but otherwise satisfy the "wholesaling" requirement of the Competitive Wholesale Facilities Trigger. For example, unbundled dark fiber loops obtained from the incumbent LEC and activated by the alternative provider through attaching its own optronics to offer wholesale "lit" loop capacity may be used to satisfy the Competitive Wholesale Facilities Trigger to remove the unbundling obligation for DS3 and DS1 loops at a particular customer location. Unbundled dark fiber loops, however, may not be used to satisfy the Self-Provisioning Trigger. It is possible, however, that the Self-Provisioning Trigger could, in some circumstances, overlap with the Competitive Wholesale Facilities Trigger. On the other hand, the Competitive Wholesale Facilities Trigger will capture loop alternatives even where barriers have prevented competitive LECs from entirely deploying their own facilities[973] These triggers, tailored to respond to specific record evidence demonstrating that self-deployment is economically feasible or competitive alternatives are available at particular customer locations, will identify those locations where a more granular analysis is required to overcome the finding of **impairment.**[974]

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[972] *See supra* Part V.E.2 (discussing the role of the states).

[973] *See infra* paras. 333, 340. Thus, while a particular customer location may not satisfy the Self-Provisioning trigger because one or both of the alternative providers "lights" unbundled dark fiber to self-provide loops to customers at that location, these providers could satisfy the Competitive Wholesale Facilities Trigger at that location to eliminate loop unbundling requirements.

[974] We establish the number of competitors to the incumbent LEC necessary to satisfy each trigger for high-capacity loops subject to a finding of impairment at two in order to ensure that multiple competitive entry at each location is feasible. *See USTA*, 290 F.3d at 427. Limiting our high-capacity loop triggers to only one competitor runs the risk of failing to accommodate unusual circumstances unique to that single provider that may not reflect the ability of other competitors to similarly deploy. Establishing a higher number, for example three, would likely render our high-capacity loop triggers meaningless for the many customer locations where the potential aggregate customer demand would never support more than two competitive alternatives to the incumbent LEC. Moreover, establishing the trigger at too high a number could discourage competitive buildout because would-be competitive facilities-based (continued....)

330. We establish the number of competitors to the incumbent LEC necessary to satisfy each trigger for high-capacity loops subject to a finding of impairment at two in order to ensure that multiple competitive entry at each location is feasible.[975] We choose a lower threshold for our high-capacity loops self-provisioning trigger than we did for the self-provisioning triggers for transport and switching (*i.e.*, two versus three) for two reasons. First, we are taking into consideration the more limited ability of the market to support multiple carriers providing their own loops to a particular location, compared to the demand available to support multiple carriers using their own self-provisioned transport and switching. Unlike both transport and switching, few customers can be served over a single loop facility, and the traffic of multiple customers is generally not aggregated over loops. Thus, establishing a higher number, for example three, would likely render our high-capacity loop triggers meaningless for the many customer locations where the potential aggregate customer demand would never support more than two facilities-based competitive alternatives to the incumbent LEC.[976] Second, we are concerned that this limited demand could provide a greater disincentive to build out any alternative loops if the trigger were set at three. The more limited demand for loops means that there is a lesser likelihood that a third competitive provider would build out to a particular location. This, in turn, creates a greater disincentive for the first and second providers to build out to the location, because if the trigger were set at three, they will likely have to compete against unbundled incumbent LEC loop facilities at TELRIC-based prices for a significant period of time.

331. We choose these specific triggers because we find that: (1) evidence of actual deployment indicates barriers to entry can be overcome; and (2) the availability of competitive wholesale alternatives eliminates impairment for competitive LECs. Eliminating unbundling obligations where no impairment exists furthers the goals of the Act by ensuring that the availability of unbundled network elements at cost-based rates does not discourage the deployment of facilities by competitive LECs where such deployment is economically feasible.

(i) Self-Provisioning Trigger

332. *Trigger Defined.* Where two or more competitive LECs have self-provisioned loop transmission facilities, either intermodal[977] or intramodal facilities, to a particular customer location at the loop capacity level for which the state impairment analysis is being conducted,

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providers would know that two additional competitors would have to first deploy their own facilities before unbundled loop facilities at TELRIC-based prices would no longer be available at that location.

975 *See USTA*, 290 F.3d at 427.

976 Moreover, limiting our high-capacity loop triggers to only one competitor runs the risk of failing to accommodate unusual circumstances unique to that single provider that may not reflect the ability of other competitors to similarly deploy.

977 *See supra* Part V.B.1.d.(ii) (describing intermodal alternatives generally, and factors affecting differences in the extent to which various intermodal alternatives are considered); Part VI.A.3. *supra* (describing how intermodal alternatives are considered for loops generally); paras. 308-309 *supra* (describing how intermodal alternatives are considered for enterprise market loops).

competitive LECs are not impaired without access to unbundled incumbent LEC loops at that capacity level at those particular customer locations.[978] This determination involves a finding that there are two competitive LECs that have existing facilities in place serving customers at that location over the relevant loop capacity level.[979] If the state commission makes a finding of no impairment based on the application of the Self-Provisioning Trigger, it is not necessary to separately apply the Competitive Wholesale Facilities Trigger.

333. *Trigger Applied.* In conducting its proceeding with respect to the Self-Provisioning Trigger, the state commission must verify that the two competitive providers identified to satisfy this trigger are unaffiliated with the incumbent LEC and each other.[980] In addition, the facilities these competitors use must be their *own facilities* and not facilities owned or controlled by one of the other two providers to the premises, *i.e.*, the incumbent LEC and the other competitive provider. To be clear, a competitive LEC using the special access facilities of the incumbent LEC or the transmission facilities of the other competitive provider in the building would *not* satisfy the definition of a self-provisioning competitor for purposes of satisfying the trigger. We find, however, that when a competitive carrier has obtained dark fiber on a long-term indefeasible-right-of-use (IRU) basis, that dark fiber facility can be counted as a separate, unaffiliated facility for self-provisioning determination purposes.[981]

334. *Special Considerations For Dark Fiber and DS1 Loops.* When applying the Self-Provisioning Trigger to eliminate an incumbent LEC's requirement to unbundle dark fiber loops at a particular customer location, the mere existence of two unaffiliated competitive providers (in addition to the incumbent LEC) that have deployed fiber to that location, *whether or not they are offering dark fiber to other carriers to serve end-user customers at that location*, will satisfy the Self-Provisioning Trigger for dark fiber loops and require a finding of no impairment at that

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[978] If two or more competitive LECs have been able to economically self-deploy at a particular location at the loop capacity level being considered by the state, based on information contained in the record, we determine that the barriers to self-deployment at that customer location for that loop capacity level are likely able to be similarly overcome by other competitive entrants.

[979] For example in applying the Self-Provisioning Trigger to DS3 loops, the state commission must determine that two or more competitive LECs provide DS3 loops *over their own facilities* to customers at that particular customer location.

[980] We use the term affiliated and affiliate as the Act defines "affiliate." Section 3 of the Act defines the term "affiliate" as "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent." 47 U.S.C. § 153(1).

[981] For purposes of the "own facilities" prong of the Self-Provisioning Trigger, a competitive carrier that has obtained dark fiber transmission facilities from the incumbent LEC on a long-term IRU basis will be considered to operate its own unaffiliated facilities. We believe that dark fiber IRU type contracts protect against short-term gaming by the incumbent LEC. Moreover, we do not want to foreclose incumbent LECs from negotiating long term dark fiber leases with competitive LECs. To be clear, however, because we want to be certain of the independent ownership of the loop transmission facilities, we find that loop transmission facilities transferred on an IRU basis is limited only to dark fiber and does not include "lit" fiber IRUs obtained from the incumbent LEC or the other provider.

location. Therefore, we do not apply a wholesale trigger to unbundled dark fiber loops because such trigger would necessarily overlap with the Self-Provisioning Trigger.[982] Because there is little record evidence demonstrating that carriers construct facilities to serve customers exclusively at the DS1 level, as well as the lack of economic evidence showing such self-deployment is possible, the Self-Provisioning Trigger *will not* be applied to DS1 loops.

335. *State Analytical Flexibility.* In applying the Self-Provisioning Trigger to high-capacity loops, we find that actual competitive deployment is the best indicator that requesting carriers are not impaired, and therefore emphasize that this quantitative trigger is the primary vehicle through which non-impairment findings will be made. We recognize, however, that this high-capacity loop trigger measures only the existence of *actual* deployed competitive alternatives at a customer location rather than whether that particular customer location *could* be economically served by competitive carriers through deployment of alternative loop transmission facilities. Thus, when conducting its customer location specific analyses, a state must consider and may also find no impairment at a particular customer location even when this trigger has not been facially met *if* the state commission finds that no material economic or operational barriers at a customer location preclude competitive LECs from economically deploying loop transmission facilities to that particular customer location at the relevant loop capacity level. In making a determination that competitive LECs *could* economically deploy loop transmission facilities at that location at the relevant capacity level, the state commission must consider various factors affecting the ability to economically deploy at that particular customer location. These factors include: evidence of alternative loop deployment at that location; local engineering costs of building and utilizing transmission facilities; the cost of underground or aerial laying of fiber or copper; the cost of equipment needed for transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; availability of reasonable access to rights-of-way; building access restrictions/costs; availability/feasibility of similar quality/reliability alternative transmission technologies at that particular location.

336. In other circumstances, by contrast, state commissions may believe notwithstanding satisfaction of this trigger for a particular customer location, that continued access to unbundled loops at the capacity level under analysis should be maintained at the customer location because impairment, in fact, remains due to the existence of a barrier to further competitive facilities deployment at that location. An example of such a situation might be where a municipality has imposed a long-term moratorium on granting additional rights-of way permits along the routes necessary to serve the particular customer location.[983] In these circumstances, a state commission may file a petition for waiver with the Commission to maintain the incumbent LEC's unbundling obligation at that location until the barrier identified in the waiver petition no longer exists.

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[982] Because dark fiber loops are not typically retail offerings like "lit" loops, it is necessary to modify somewhat the application of the Self-Provisioning Trigger for dark fiber loops to ensure that the granular state analyses include all those locations where at least two alternative carriers to the incumbent LEC have deployed fiber.

[983] This example is provided for illustrative purposes only and is not meant to be exclusive or dispositive.

(ii) Competitive Wholesale Facilities Trigger

337. *Trigger Defined.* Where competitive LECs have two alternative choices (apart from the incumbent LEC's network) to purchase wholesale high-capacity loops, including intermodal alternatives, at a particular premises, we conclude that impairment does not exist at that location for that type of high-capacity loop.[984] Specifically, where the relevant state commission determines that two or more unaffiliated alternative providers, including alternative transmission technology providers that offer an equivalent wholesale loop product at a comparable level of capacity, quality, and reliability, have access to the entire multiunit customer premises, and offer the specific type of high-capacity loop over their own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location, then incumbent LEC loops at the same loop capacity level serving that particular building will no longer be unbundled.[985] Similar to including dark fiber IRUs as facilities that satisfy the "own facilities" prong of the Self-Provisioning Trigger,[986] dark fiber IRUs also satisfy the "own facilities" prong of the Competitive Wholesale Facilities Trigger. Furthermore, in addition to dark fiber IRUs, we also include the use of dark fiber obtained on any other lease/purchase basis, *including obtaining it from the incumbent LEC on an unbundled basis*,[987] as long as the alternative provider has attached its own optronics to "light" the dark fiber in order to make "lit" fiber loops available to competitive LECs on a wholesale basis.[988]

338. *Trigger Applied.* In evaluating the two competitive wholesale loop providers, states should not undertake a financial viability analysis with respect to each provider. However, there should be some reasonable expectation that these providers are operationally capable of

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[984] For example, in applying the Competitive Wholesale Facilities Trigger to DS3 loops, the state must find that two alternative providers to the incumbent LEC offer wholesale DS3 loops to competitive LECs at that particular customer location.

[985] While the record indicates little evidence of wholesale DS1 loop capacity presently, evidence of some alternative providers at the DS3 and higher capacity levels suggests that there may be specific locations where competitive carriers have deployed fiber and might offer unused capacity at the DS1 loop level. Because we expect our loop unbundling rules to encourage greater facilities-based deployment where it is economically feasible, it is not unreasonable to accommodate the possibility that non-incumbent LEC DS1 loop alternatives may be available now or in the near future at particular customer locations. By accommodating this possibility in the trigger mechanism we craft today, we seek to ensure that our DS1 loop unbundling rules are not in conflict with *USTA*.

[986] See *supra* note 981.

[987] By counting wholesale loop offerings over dark fiber UNEs, an incumbent LEC could be relieved of its unbundling obligation at a specific loop capacity level at certain customer locations even where no other "alternative" fiber has been deployed, but where alternatives to incumbent LEC unbundled "lit" loops are nevertheless available.

[988] Similarly, as we determine in our dark fiber transport requirements, when applying this trigger to dark fiber loop impairment, the state may ensure that dark fiber wholesalers have sufficient quantity of dark fiber available. *See infra* para. 416.

continuing to provide wholesale loop capacity to that customer location.[989] We recognize that, while the record indicates that there are presently a limited number of alternative wholesale loop providers serving multiunit premises, we anticipate that a competitive wholesale market will continue to develop, particularly where competitive LECs have already deployed fiber and seek to derive revenue from excess capacity. We expect this granular trigger to encourage alternative high-capacity transmission providers to deploy more facilities and offer them on a wholesale basis, creating a more robust competitive market for high-capacity loop facilities to many areas nationwide.

(iii) State Action Under Both Triggers

339. We expect states to complete their initial reviews applying the triggers and other analysis discussed above within nine months from the effective date of this Order. Unbundled DS1, DS3, and dark fiber loops will remain available to all customer locations until the state commission determines that unbundled loops at particular capacities serving specific customer locations are no longer required. States that conduct this review need only address specific customer locations for which there is relevant evidence in the proceeding that the customer location satisfies one of the triggers or the potential deployment analysis specified in this Part.[990] To the extent that a state commission does not complete its proceedings in this nine month period,[991] aggrieved parties may file a petition with this Commission demonstrating a state's failure to act pursuant to the procedures we outline today.[992] We expect that states will require an appropriate period for competitive LECs to transition from any unbundled loops that the state finds should no longer be unbundled.

340. After completion of their initial reviews, we expect state commissions to conduct further granular reviews, pursuant to the procedures the state commissions adopt, to identify additional customer locations that satisfy the triggers. Such proceedings shall be completed

[989] We note that carriers operating under chapter 11 bankruptcy are still capable of providing service while they reorganize their operations. Relatedly, in the case of a chapter 7 liquidation, the physical transmission facility assets of a competitive provider will continue to exist at that location as the purchaser of those assets will likely provide similar wholesale service or use such facilities to self-provide retail service. Under either scenario, the triggers which resulted in a finding of no impairment at that location will continue to be met. *See infra* Part VI.C.4. (discussing similar financial viability issues with respect to wholesale transport providers).

[990] *See supra* para. 335.

[991] By "complete," we mean that a state commission, upon receiving sufficient evidence, has an affirmative obligation to review the relevant evidence associated with any customer location submitted by an interested party, and to apply the trigger and any other analysis specified in this Part to such evidence.

[992] As discussed above, if a state fails to act, we set forth procedures for the Commission to step into the role of the state. *See supra* Part V.E. (discussing the role of the states).

within six months of the filing of a petition or other pleading submitted in accordance with the prescribed state commission procedures.[993]

(e) Other Loop Unbundling Proposals.

341. Commenters have proposed various alternatives to the method we have adopted herein for conducting our loop impairment analysis and reaching our resulting conclusions. To the extent the methods we use and the conclusions we reach differ from those proposed, we expressly decline to incorporate them herein. We note, however, that we agree with the proposals of SBC and other commenters that the Commission distinguish among loop types and make capacity-based distinctions. The analysis we have undertaken has, indeed, distinguished not only among the various loop capacities, *e.g.*, DS0, DS3, OCn, but also the type of loop technology where appropriate, *e.g.*, "lit" fiber, dark fiber, copper, as well as the customer market class typically served by such loops. Through our approach, we recognize the different economic characteristics of serving customers demanding services provided over different loop capacity levels, eliminating or limiting unbundling obligations accordingly.[994] We disagree with SBC,[995] Verizon,[996] and BellSouth[997] to the extent each proposes that we base our loop unbundling analyses and conclusions consistent with our special access pricing flexibility rules.[998] Evidence of competitive LECs' ability to self-deploy local loop facilities or have wholesale non-incumbent LEC alternative loop facilities available to them is the proper inquiry in our loop impairment analysis. This analysis serves a host of statutory goals beyond the goal of the *Pricing Flexibility Order,* which is limited to protecting consumers from anticompetitive pricing. While each of

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[993] Subsequent to the initial review, states have the flexibility to adopt reasonable and timely procedures for the periodic collection and evaluation of evidence indicating the satisfaction of the loop triggers at additional customer locations to remove unbundling obligations. For example, a state may decide to include self-reporting information regarding alternative loop deployment in an annual or semi-annual report, either as an independent obligation or as part of the competitive carriers' periodic filing obligations. Alternatively, a state may decide to accept evidence of alternative deployment through petitions filed during prescribed filing windows or through rulemaking proceedings. Regardless of the procedures adopted, however, states that conduct further reviews must complete their evaluation of the evidence and reach a determination within six months of the filing of a petition or other pleading filed pursuant to the state procedures.

[994] As we have noted above, we expect that the triggers that we adopt today for use by the states will provide incumbent LECs substantial relief from their unbundling obligations while simultaneously ensuring that competitive carriers get unbundled high-capacity loop access only where they are unable to economically self-deploy or use alternative facilities. *See supra* para. 322.

[995] *See, e.g.*, SBC Comments at 101 (proposing a DS1 trigger at two or more fiber-based collocators, serving 15,000+ business lines, and $150,000 or more per month in special access revenues and no unbundling at all above the DS1 level).

[996] *See, e.g.*, Verizon Comments at 119-20 (proposing, generally, the elimination of high-capacity loop unbundling where the incumbent LEC has obtained pricing flexibility for special access circuits).

[997] *See, e.g.*, BellSouth Comments at 67 n.240 (stating it makes no sense to find impairment where BellSouth has obtained pricing flexibility for special access circuits).

[998] *See Pricing Flexibility Order*, 14 FCC Rcd at 14221.

these pricing flexibility proposals vary somewhat, they are consistent in arguing that wherever and whenever incumbent LECs have received pricing flexibility for special access services, unbundled high-capacity loops, to some degree, should not be required.[999] Incumbent LECs have received special access pricing flexibility in numerous MSAs throughout their regions, based almost exclusively on meeting the *Pricing Flexibility Order's* triggers based on special access revenues.[1000] As we note below in our transport unbundling analysis, because the special access revenue triggers require only a single collocated competitor to purchase substantial amounts of special access in a concentrated area, this test provides little, if any, indication that even that competitor has been able to widely, if at all, self-deploy alternative loop facilities in that area.[1001] Evidence of self-deployment of transport facilities is not necessarily evidence of the economic ability of a competitive LEC to self-deploy loops. Moreover, the presence of a single competitive LEC's collocated transport facility as a trigger for purposes of protecting consumers from anticompetitive pricing, *i.e.*, the purpose of our pricing flexibility rules, is not sufficient evidence that facilities-based competitive entry into a market at the local loop level is economically feasible. Under a special access pricing flexibility trigger, such as suggested by incumbent LECs, DS1 loops would no longer be unbundled in many large geographic areas nationwide. This conclusion would clearly contravene our unbundling mandate due to the pervasive competitive LEC impairment at the DS1 loop level resulting from an economic inability to self-deploy and limited available wholesale alternatives. Similarly, we reject geographic zone distinctions for analyzing impairment for high-capacity local loops.[1002] Like we find in rejecting a pricing flexibility approach, the record simply does not contain evidence that loop impairment/non-impairment determinations can be appropriately made on a zone basis due

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[999] Phase I pricing flexibility related to special access revenue is triggered on an MSA basis when wire centers accounting for at least 30% of (non-channel termination) special access revenues have at least one competitor that has collocated using non-incumbent transport. Phase II pricing flexibility related to special access revenues is triggered on an MSA basis when wire centers accounting for at least 65% of (non-channel termination) special access revenues have at least one competitor that has collocated using non-incumbent transport.

[1000] *See* Letter from Jake E. Jennings, NewSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98 at 2 (filed Dec. 12, 2002) (NewSouth Dec. 12, 2002 *Ex Parte* Letter) (describing details of where and how BellSouth has received special access pricing flexibility); *see also* BellSouth Oct. 15, 2002 Transport and Loop *Ex Parte* Letter, Attach. at 5 (stating that BellSouth has received Phase I and Phase II special access pricing flexibility in 100% of its national top 150 MSAs); Verizon Dec. 17, 2002 *Ex Parte* Letter at 7 (stating that Verizon has pricing flexibility in 37% of its wire centers); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 5 (filed Oct. 11, 2002) (Qwest Oct. 11, 2002 Transport *Ex Parte* Letter) (stating that Qwest has been granted pricing flexibility in 33 of its 45 MSAs, many of which are not national top 100 MSAs).

[1001] Covad Reply at 57-58 (arguing SBC's proposal of two or more fiber-based collocators is no indication that competitive networks serve any more than a limited number of buildings in the area, much less the wire center's entire service area).

[1002] Incumbent LECs argue that the Commission should consider geographic distinctions, such as MSAs or even individual wire centers, for some or all UNEs, where there are differing levels of alternatives. *See, e.g.*, BellSouth Reply at 11-12 (arguing that the appropriate geographic market for the impairment analysis is the MSA). Competitive carriers, however, argue that there is no geographic area or market anywhere in the United States today where a geographic consideration would find no-impairment for any UNE. *See, e.g.*, NuVox *et al.* Comments at 53.

to the location-specific factors which impact impairment determinations at most high-capacity loop levels.

342. Finally, several commenters argue that the Commission should remove or modify its unbundling obligations for incumbent LECs based on evidence of adequate incumbent LEC performance in provisioning network elements.[1003] These parties argue that incumbent LECs should be required to demonstrate certain levels of compliance with existing unbundling performance measurements, such as section 271 performance metrics, for a commercially reasonable period of time prior to any removal of an unbundling obligation.[1004] Commenters suggest such a rule would provide incentives to incumbent LECs to comply with their performance obligations.[1005] The record, however, does not reveal that incumbent LEC performance has a significant, if any, direct relationship to the ability of competitive LECs to economically self-deploy local loops. Rather, the record demonstrates that competitive LEC deployment is primarily driven by general economic considerations. While these economic considerations are influenced by factors which the incumbent LEC did not, or does not, similarly face, *i.e.*, its historical ability to maximize scale economies and benefit from first–mover advantages, these factors are not so related to performance measurement compliance that consideration of such compliance would inform our impairment analysis.

B. Subloops For Multiunit Premises Access and NIDs

1. Background

343. In the *Triennial Review NPRM*,[1006] the Commission sought comment on whether it should maintain unbundling requirements for subloops[1007] and NIDs.[1008] A subloop is a smaller included segment of an incumbent LEC's local loop plant, *i.e.*, a portion of the loop from some

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[1003] *See, e.g.*, CompTel Comments at 86-87; NARUC Comments at 10.

[1004] *See, e.g.*, CompTel Comments at 86-87; Maine CLEC Coalition Comments at 5-7; *see also* Pennsylvania Commissioner Wilson Comments at 8 (arguing that although the Commission should not remove unbundling obligations based on UNE or special access performance data, the states should have the authority to do so).

[1005] *Id.*

[1006] *Triennial Review NPRM*, 16 FCC Rcd at 22803, para. 48.

[1007] Subloops were first included in the list of specific UNEs in the *UNE Remand Order* as a means of providing competitive carriers "maximum flexibility to interconnect their own facilities" to various accessible points within the incumbent LEC's outside loop plant closer to a customer's premises. Subloops were defined as "any portion of the loop that is technically feasible to access at terminals in the incumbent LEC's outside plant, including inside wire." *UNE Remand Order*, 15 FCC Rcd at 3801, para. 234; *see also* 47 C.F.R. § 51.319(a)(2).

[1008] NIDs were included in the initial set of UNEs and defined as "a cross-connect device used to connect loop facilities to inside wiring." *Local Competition Order*, 11 FCC Rcd at 15697, para. 392. The Commission later modified the definition of a NID to be more flexible and technology neutral, recognizing that its rules enabled methods other than just a cross-connect device for interconnecting customer premises wiring with the incumbent LEC's loop distribution plant. *UNE Remand Order*, 15 FCC Rcd at 3790, para. 207; *see also* 47 C.F.R. § 51.319(b).

conversion.[1962] Competitors have commented broadly that no termination liabilities should apply to any conversions from special access to UNEs.[1963] While much of their focus appears directed toward those penalties triggered by long-term contracts, including stand-alone loop facilities, we are not persuaded to grant them relief from termination liabilities for special construction.[1964]

VIII. REMAINING ISSUES

A. Section 271 Issues

1. Background

649. As detailed above, section 251 of the Act is the source of incumbent LECs' unbundling obligations. Section 251(c)(3) requires all incumbent LECs (including BOCs) to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[1965] Section 251(d)(2) directs the Commission to determine whether access to particular proprietary elements is *necessary* and whether the unavailability of non-proprietary elements would *impair* a competitor's ability to provision service.[1966] These section 251 obligations are referenced and incorporated as obligations of BOCs under section 271(c)(2)(B)(ii) of the Act.[1967]

650. Section 271 establishes both the procedures by which a BOC may apply to provide interLATA services in one of its in-region states and the substantive standards by which that application must be judged. In particular, section 271(c)(2)(B) of the Act specifies the "competitive checklist" of access and interconnection requirements that BOCs must meet before

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[1962] Accordingly, the incumbent LEC concerns about lack of compensation are misplaced. *See, e.g.*, Qwest Comments at 40 ("Qwest agrees to undertake this construction only because the CMRS providers promised to compensate Qwest the tariffed price for these circuits. Qwest would not have constructed, nor would it have been obligated under the Commission's rules to construct, the circuits at the non-compensatory rates demanded by the CMRS providers.") (citations omitted).

[1963] *See, e.g.*, NuVox *et al.* Reply at 52 ("As part of this [fresh look] proposal, all special access circuits (whether equivalent to standalone UNEs, EELs or some other UNE combination) should be subject to conversion without termination penalties or imposition of nonrecurring charges other than a cost-based conversion charge designed exclusively to recover administrative expenses associated with converting associated billing from special access to UNE billing."); ALTS *et al.* Comments at 103 ("Furthermore, the FCC should mandate that no termination liability charges are to be assessed to CLECs converting circuits to UNE pricing.")

[1964] We address the specific issue of granting "fresh look" relief for conversions of EELs ordered during the vacatur of the Commission's combination rules in Part VIII.C. below.

[1965] 47 U.S.C. § 251(c)(3).

[1966] *Id.* § 252(d)(2). We note that to the extent an incumbent LEC is providing network elements pursuant to section 251(c)(3), section 252(d)(1) further requires that it provide such elements at rates that are nondiscriminatory and cost-based. *Id.* § 252(d)(1).

[1967] *Id.* § 271(c)(2)(B)(ii).

they are allowed to offer in-region long-distance services.[1968] Four of these checklist items relate to network elements in earlier orders the Commission has deemed to be UNEs under the standards of section 251(c)(3). In particular, checklist items 4 through 6 and 10 require: "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services;"[1969] "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services;"[1970] "[l]ocal switching unbundled from transport, local loop transmission, or other services,"[1971] and "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."[1972]

651. In the *Triennial Review NPRM*, the Commission sought comment on how the access requirements specified in the section 271 competitive checklist relate to the unbundling requirements derived from sections 251(c)(3) and 251(d)(2). The Commission first noted its conclusion in the *UNE Remand Order* that BOCs must continue to provide access to those network elements described in checklist items 4-6 and 10, even if such access is not mandated under section 251 (and checklist item 2).[1973] The Commission also concluded, in that Order, that market prices should be permitted to prevail for such network elements, rather than requiring forward-looking prices.[1974] The *Triennial Review NPRM* sought additional comment on these conclusions, on "how to evaluate a checklist item where there is no unbundling requirement for the network element that corresponds to that checklist item, and on the appropriateness of evaluating a tariffed service that corresponds to that network element."[1975]

652. Some commenters seek to alter the Commission's determination in the *UNE Remand Order* that section 271 establishes a separate BOC access obligation for network elements no longer listed under section 251(c)(3) and its conclusion that the marketplace, rather than our TELRIC methodology, should determine the price for delisted network elements under section 271. For example, Verizon argues that once the Commission has determined that a network element is not necessary under section 251(d)(2), the corresponding checklist item

[1968] *Id.* § 271(c)(2)(B).

[1969] *Id.* § 271(c)(2)(B)(iv).

[1970] *Id.* § 271(c)(2)(B)(v).

[1971] *Id.* § 271(c)(2)(B)(vi).

[1972] *Id.* § 271(c)(2)(B)(x).

[1973] We note that section 271(c)(2)(B)(ii)'s requirement that BOCs provide nondiscriminatory access to network elements is referred to herein as checklist item 2.

[1974] *UNE Remand Order*, 15 FCC Rcd at 3906, para. 473, *see also Triennial Review NPRM*, 16 FCC Rcd at 22814, para. 72.

[1975] *Triennial Review NPRM*, 16 FCC Rcd at 22814, para. 72; *see also Bell Atlantic New York 271 Order*, 15 FCC Rcd at 4126-27, para. 340.

should be construed as being satisfied.[1976] Several competitive carriers counter that section 271 requires BOCs to provide access to loops, switching, transport, and signaling regardless of impairment under section 251.[1977] Z-Tel further argues that competitors are entitled to access to loops, switching, transport, and signaling at TELRIC rates, even if the Commission were to remove these items from the list of UNEs under section 251.[1978] For the reasons outlined below, we reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates.

2. Discussion

653. *Independent Access Obligation.* For reasons set forth below, we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

654. First, the plain language and the structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271. Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3).[1979] Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling,[1980] without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2.[1981] Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of

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[1976] Verizon Comments at 66-67. Verizon argues, in the alternative, that the Commission should forbear from applying checklist items (4) through (6) and (10) "once the corresponding elements no longer need to be unbundled under section 251(d)(2)." Verizon Petition for Forbearance of the Verizon Telephone Companies Pursuant to Section 160(c), CC Docket 01-338 at 3 (filed July 29, 2002). We do not address Verizon's forbearance petition in this *Triennial Review* proceeding. Rather, we will address the petition separately consistent with the procedures outlined in section 10 of the Act.

[1977] ALTS *et al.* Comments at 117-18; NuVox *et al.* Comments at 115-16; CompTel Comments at 20; UNE-P Coalition Comments at 17; Z-Tel Comments at 4-15.

[1978] Z-Tel Comments at 7; *see also* UNE-P Coalition Reply at 37 (noting that the "Coalition agrees with Z-Tel . . .").

[1979] *See* 47 U.S.C. § 271(c)(2)(B)(ii).

[1980] *See* 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x).

[1981] *Bates v. U.S.*, 522 U.S. 23, 29-30 (1997) (stating that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). As such, our decision is entitled to deference because the interpretation involves matters about which the Act is silent. *Chevron*, 467 U.S. at 843.

statutory construction: to give effect, if possible, to every clause and word of a statute.[1982] Verizon asserts that an interpretation of the Act that recognizes the independence of sections 271 and 251(d)(2) places these sections in conflict with each other.[1983] We disagree. Verizon's reading of section 271 would provide no reason for Congress to have enacted items 4, 5, 6, and 10 of the checklist because checklist item 2 would have sufficed.

655. Second, it is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs.[1984] In fact, section 271 places specific requirements on BOCs that were not listed in section 251. These additional requirements 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.[1985] Before the 1996 Act's passage, the BOCs, the local progeny of the once-integrated Bell system, were barred by the terms of the MFJ from entering certain lines of business, including providing interLATA services.[1986] The ban on BOC provision of long distance services was based on the MFJ court's determination that such a restriction was "clearly necessary to preserve free competition in the interexchange market."[1987] 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. The same historical underpinning, however, is not relevant to section 251, which is a mandatory provision designed to ensure a minimum level of openness in the local market. Therefore, we reject Verizon's claim that any interpretation of section 271 that recognizes its independence from section 251 would improperly single out BOCs for treatment different from other incumbent LECs.[1988] As explained above, recognizing an independent obligation on BOCs under section

[1982] *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

[1983] Verizon Comments at 67; Verizon Reply at 54-55.

[1984] This fact alone demonstrates that section 271 is not dependent on section 251 because a more limited set of carriers was made subject to the demands of section 271. It is consistent with norms of statutory construction that section 251 as a general statutory provision does not control the more specific section 271. *See Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (a specific provision controls over one of a more general application).

[1985] Section 271 is the direct progeny of the Modification of Final Judgment (MFJ) that contained the terms of the settlement of the Department of Justice's antitrust suit against AT&T. *See United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States,* 460 U.S. 1001 (1983). The MFJ sought to avoid the emergence of an unregulated telecommunications monopoly by imposing specific line-of-business restrictions that explicitly barred the BOCs from providing service for calls that occurred between LATAs. Although the Telecommunications Act of 1996 generally superseded the MFJ, section 271 conditionally continued the interLATA line-of-business restriction in the form of the competitive checklist.

[1986] The MFJ contained the terms of the settlement of the Department of Justice's antitrust suit against AT&T. *See id.*

[1987] *Id.* at 188.

271 would by no means be inconsistent with the structure of the statute. Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[1989]

656. *Prices, Terms and Conditions.* It is a different question, however, as to what pricing standard applies to network elements that are unbundled by BOCs solely because of the requirements set forth in section 271. Where there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements. Contrary to the claims of some commenters, TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 *where impairment is found to exist.* Here, however, we are discussing the appropriate pricing standard for these network elements where there is no impairment. Under the no impairment scenario, section 271 requires these elements to be unbundled, but not using the statutorily mandated rate under section 252. As set forth below, we find that the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.[1990]

657. By their own terms, neither section 252(d)(1) nor section 271(c)(2)(B) requires that the section 252(d)(1) pricing standard be applied to checklist network elements. Section 252(d)(1) provides the pricing standard "for network elements for purposes of [section 251(c)(3)],"[1991] and does not, by its terms, apply to network elements that are required only under section 271. Indeed, section 252(d)(1) is quite specific that it only applies for the purposes of implementation of section 251(c)(3) – meaning only where there has been a finding of impairment with regard to a given network element. Moreover, as noted above, while checklist item 2 provides that a BOC must provide access to UNEs "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," the checklist items establishing the specific, separate network element obligations do not contain this language. We disagree with Z-Tel's argument that the cross-reference in checklist item 2 should be read into the later checklist items, and is

(Continued from previous page)

[1988] Verizon Comments at 67; Verizon Reply at 54-55.

[1989] We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3).

[1990] 47 U.S.C. §§ 201, 202.

[1991] *Id.* § 252(d)(1).

implicit in them.[1992] Reading this language into these provisions would change their plain meaning, and Z-Tel offers no indication that this is what Congress intended. Moreover, we reject Z-Tel's argument that the cross-references were omitted simply to conserve space or to avoid repetition.[1993] To the contrary, we find Congress' decision to omit cross-references particularly meaningful in this instance: half of the checklist items contain explicit cross-references to other statutory provisions, and it is reasonable to conclude that Congress would have inserted a cross-reference into items 4-6 and 10 had that been its intention.

658. We also decline to use section 271, as suggested by Z-Tel, to broaden the unbundling obligations of section 251. Z-Tel notes that section 251(d)(2) directs the Commission to consider "impair[ment]" "at a minimum" in determining which network elements must be unbundled, and thus argues that the Commission may require unbundling pursuant to section 251 and 252 even in the absence of an impairment finding.[1994] In analyzing section 252(d)(2) the D.C. Circuit in *USTA* determined that the "at a minimum" language potentially could justify the imposition of unbundling obligations under that provision even in the "absence" of impairment.[1995] However, the *USTA* decision contained key limitations to the exercise of such authority. In order to apply the "at a minimum" language in the absence of impairment, the *USTA* court required that the Commission "point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible."[1996] Were we to accept Z-Tel's argument, we would again impose a virtually unlimited standard to unbundling, based on little more than faith that more unbundling is better, regardless of context. Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2). Rather, the checklist independently imposes unbundling obligations, but simply does so with less rigid accompanying conditions.

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict.[1997] 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. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not

[1992] Letter from Christopher J. Wright, Counsel for Z-Tel, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 11 (filed Dec. 20, 2002) (Z-Tel Dec. 20, 2002 *Ex Parte* Letter).

[1993] Z-Tel Dec. 20, 2002 *Ex Parte* Letter at 11.

[1994] Z-Tel Comments at 17.

[1995] *USTA*, 290 F.3d at 425.

[1996] *Id.*

[1997] *See Washington Market Co. v. Hoffman,* 101 U.S. 112 (1879).

gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

660. We reject arguments by Z-Tel and certain other competitive LECs that the proper way to reconcile any such conflict is to find that our section 251 impairment determinations with respect to unbundled local loops, switching and transport would apply only to non-BOC incumbent LECs.[1998] Z-Tel's argument posits that particular network elements enumerated in the section 271 checklist are the "core" elements, and thus concludes that while the standards in section 251 would still apply to all carriers as to any network elements not mentioned in the checklist, section 271 requirements (as construed by Z-Tel) would supercede section 251 standards as to the most critical network elements delineated by Congress. We think that this reading of the two provisions is illogical. BOCs control 85.9 percent of incumbent LEC local switched access lines.[1999] Of the remaining lines, 11.6 percent of the lines are served by certain rural telephone companies that section 251(f) expressly exempts from the unbundling obligations set forth in 251(c). So, under the Z-Tel interpretation of sections 251 and 271, Z-Tel would have section 251(c), which is arguably the most important market-opening provision of the Act, apply to a mere 2.5 percent of incumbent LEC lines on the issues and facilities that matter most to local competition.[2000] The section 271 checklist cannot be read to have such a broad effect – while it does set forth particular conditions Congress wished to impose on entry into the in-region interLATA market, Congress could not have intended the checklist to render section 251 itself superfluous.

661. Our recognition that pricing pursuant to section 252 does not apply to network elements that are not required to be unbundled is consistent with the Commission's general approach in the *UNE Remand Order*, and has been applied – apparently with no adverse effect – with respect to access to directory assistance and operator services. The Commission removed directory assistance and operator services from the list of UNEs in the *UNE Remand Order*.[2001] These network elements, like loops, transport, switching and signaling databases, are separately listed in the competitive checklist.[2002] Accordingly, as explained in subsequent section 271 orders, access to directory assistance and operator services remains a condition of long distance entry – but the standard applicable to rates and conditions is not derived from sections 251 and 252.[2003] We note that no party has sought to overturn this aspect of the seventeen section 271 orders that have applied this analysis since directory assistance and operator services were removed from the list of section 251 UNEs, and no party has suggested in this proceeding that

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[1998] Z-Tel Comments at 7-8.

[1999] *Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2003*, Submitted by the Universal Service Administrative Company (filed Nov. 1, 2002).

[2000] *Id.*

[2001] *UNE Remand Order*, 15 FCC Rcd at 3891-92, paras. 441-42.

[2002] *See* 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III).

[2003] *See, e.g., SWBT Texas 271 Order*, 15 FCC Rcd at 18527, para. 348.

the Commission's interpretation of the statute has produced a perverse policy impact with respect to a BOC's provision of these network elements.

662. We note, however, that in the *UNE Remand Order* the Commission stated that "[i]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)."[2004] We reach essentially the same result here, but we clarify our reasoning below.

663. The Supreme Court has held that the last sentence of section 201(b), which authorizes the Commission "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," empowers the Commission to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996.[2005] Section 271 is such a provision.[2006] 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.[2007] 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.

664. Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

[2004] *UNE Remand Order*, 15 FCC Rcd at 3905, para. 470.

[2005] *Iowa Utils. Bd.*, 525 U.S. at 377-81.

[2006] The Court found that this grant of authority was "unaffected by" the jurisdictional limitation regarding intrastate matters that was contained in section 2(b) of the 1934 Act. *Id.* at 379. The Court found that since new sections 251 and 252 applied to interstate as well as intrastate matters, section 201(b) authorized the Commission to adopt rules implementing the full scope of those provisions. *Id.* at 379-81.

[2007] *See* 47 U.S.C. §§ 201(b), 202(a). Therefore, we reject the argument of Z-Tel that section 252(d)(1) is the only basis for the Commission to evaluate checklist elements not required to be unbundled under section 251.

665. *Post Entry Requirements.* In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271. In particular, this section provides the Commission with enforcement authority where a BOC "has ceased to meet any of the conditions required for such approval."[2008] We conclude that for purposes of section 271(d)(6), BOCs must continue to comply with any conditions required for approval, consistent with changes in the law. While we believe that section 271(d)(6) established an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that the "conditions required for such approval" would not change with time. Absent such a reading, the Commission would be in a position where it was imposing different backsliding requirements on BOCs solely based on date of section 271 entry, rather than based on the law as it currently exists. We reject this approach as antithetical to public policy because it would require the enforcement of out-of-date or even vacated rules.

666. Two commenters in this proceeding ask the Commission to adopt special procedural vehicles for re-examining section 271 authorizations, in light of potential rule changes that would change a BOC's obligations under section 251. First, Z-Tel asserts that the Commission must revisit every section 271 authorization to consider "[a]ny significant change to the availability of the UNE platform."[2009] Second, Talk America asks the Commission to adopt a procedure that would freeze in place a BOC's unbundling obligations under section 251, at least pending a review of potential backsliding under section 271(d)(6).[2010] Specifically, Talk America contends that, for a BOC that has previously received section 271 authorization, the "anti-backsliding" requirements of section 271(d)(6) would require it to continue providing unbundled local switching (and UNE-P) at TELRIC prices in the event it is no longer required to do so under section 251. Talk America suggests that any rule change that lessens a BOC's obligation to provide access to unbundled switching could decrease the level of facilities-based competition in either residential or business markets, thereby potentially causing a "backsliding" violation under section 271(d)(6) to the extent the BOC relied on UNE-P based competition to support its showing under section 271(c)(1)(A) (Track A). Accordingly, to address this risk of this type of "backsliding," Talk America would require BOCs to file a petition with the Commission – *before* they may be permitted to cease providing switching and UNE-P at TELRIC-based rates – demonstrating the existence of facilities-based competition from carriers that do not rely in any material part on the availability of unbundled local switching or UNE-P at TELRIC-based rates.[2011]

[2008] 47 U.S.C. § 271(d)(6).

[2009] Z-Tel Comments at 83-84.

[2010] Letter from Brad A. Mutschelknaus, Counsel for Talk America and Broadview Networks, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 15 (filed Dec. 6, 2002) (Talk America/Broadview Networks Dec. 6, 2002 *Ex Parte* Letter); *see also* Letter from Brad A. Mutschelknaus, Counsel for Talk America, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 3 (filed Dec. 30, 2002) (Talk America Dec. 30, 2002 *Ex Parte* Letter).

[2011] Talk America Dec. 30, 2002 *Ex Parte* Letter at 3.

667. We decline to adopt the extraordinary procedural steps requested by Z-Tel and Talk America. With respect to Talk America's proposal, by reexamining whether a BOC continues to qualify for "Track A" *before* conditions change in the market ignores the reality that competitors may take steps to retain customers served by UNE-P. For example, it is entirely possible that a competitive LEC may transition customers from UNE-P to an arrangement using unbundled loops combined with its own switching – thereby retaining the same level of facilities-based competition. Accordingly, the before-the-fact review proposed by Talk America would necessarily require speculation and would hold a BOC to a higher standard than under its initial section 271 application. Finally, there is no suggestion that the procedure proposed by Talk America is necessary to detect discrimination or bad conduct – indeed, the harm alleged by Talk America would result from a BOC's *compliance with* federal unbundling rules. Accordingly, we do not believe the public interest warrants adoption of this special procedural step. For similar reasons, we decline Z-Tel's request to "revisit" every section 271 authorization to consider changes regarding UNE-P.

B. Clarification of TELRIC Rules

1. Background

668. Section 252(d)(1) of the Act provides that rates for interconnection and unbundled elements shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element" and "may include a reasonable profit."[2012] In the *Local Competition Order*, the Commission adopted guidelines to be applied by state commissions when they are called on to arbitrate disputes regarding the prices for interconnection and UNEs pursuant to section 252(d).[2013] Specifically, the Commission adopted a forward-looking economic cost methodology, which it called "Total Element Long Run Incremental Cost" or "TELRIC." The Supreme Court affirmed the Commission's TELRIC rules in *Verizon v. FCC*.[2014]

669. Based on the Commission's finding that prices in a competitive market will tend towards long-run incremental cost,[2015] the TELRIC methodology is designed to derive prices for particular elements in the incumbent LEC's network that "replicate[], to the extent possible," what the incumbent LEC would be able to charge in a competitive market.[2016] Specifically, TELRIC equates the current market value of the existing network of an incumbent telecommunications provider with the cost the incumbent LEC would incur today if it built a

[2012] 47 U.S.C. § 252(d)(1).

[2013] *Local Competition Order*, 11 FCC Rcd at 15515, para. 29. The Commission also concluded that rates for reciprocal compensation under section 252(d)(2) should be based on the same principles. *Id.* at 16023, para. 1054.

[2014] *Verizon*, 535 U.S. at 467

[2015] *Local Competition Order*, 11 FCC Rcd at 15845, para. 675.

[2016] *Id.* at 15846, para. 679.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by BellSouth Corporation,	)	
BellSouth Telecommunications, Inc., and	)	WC Docket No. 02 – 307
BellSouth Long Distance, Inc., for	)	
Authorization To Provide In-Region,	)	
InterLATA Services in Florida and Tennessee	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 2002 **Released:** December 19, 2002

By the Commission: Chairman Powell and Commissioner Copps issuing separate statements; Commissioner Adelstein not participating.

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I. INTRODUCTION

1. On September 20, 2002, BellSouth Corporation and its subsidiaries, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, BellSouth) filed an application pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA service originating in the states of Florida and Tennessee.[2] We grant BellSouth's application in this Order based on our conclusion that BellSouth has taken the statutorily required steps to open its local exchange markets in these states to competition. BellSouth therefore becomes the first Bell Operating Company (BOC) to obtain section 271 authority for interLATA service throughout its region.[3]

2. In ruling on BellSouth's application, we wish to acknowledge the effort and dedication of the Florida Public Service Commission (Florida Commission) and the Tennessee

[1] We refer to the Communications Act of 1934, as amended, as the Communications Act or the Act. *See* 47 U.S.C. §§ 151 *et seq.*

[2] *See Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02-307 (filed Sept. 20, 2002) (BellSouth Application); *see also Comments Requested on the Joint Application by BellSouth Corporation for Authorization under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the States of Florida and Tennessee*, WC Docket No. 02-307, Public Notice, 17 FCC Rcd 17435 (Wireline Comp. Bur. 2002).

[3] *See Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, Memorandum Opinion and Order, 17 FCC Rcd 17595 (2002) (*BellSouth Multistate Order*); *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018 (2002) (*BellSouth Georgia/Louisiana Order*).

BellSouth has committed itself to making capacity information available to competitive LECs in a form similar to that provided to the Commission.[451]

h. Training, Technical Assistance, and Help Desk Support

131. As we did in the *BellSouth Georgia/Louisiana* and the *BellSouth Multistate Orders*, we find that BellSouth adequately assists competing carriers in their use of available OSS functions.[452] We reject Network Telephone's assertion that BellSouth's "Care Team" service is inadequate because Network Telephone provides no evidence that BellSouth has failed to enable Network Telephone to understand, implement, and use all of the OSS functions available to them.[453] In fact, the record shows that from April 17–19, 2002, seventeen BellSouth employees traveled to Florida to meet with Network Telephone to discuss operational assistance issues.[454] An outcome of this meeting was the discussion of a single point of contact ("SPOC") for Network Telephone on operational issues. If Network Telephone believes that BellSouth has failed to uphold its responsibilities in these areas, it may either avail itself of the change management plan's dispute resolution process or initiate an enforcement proceeding. However, given the lack of substantiating evidence in this proceeding, we find that BellSouth's showing in this area is the same as, if not better than, that which we found sufficient to meet the requirements of section 271 in the *BellSouth Georgia/Louisiana* and the *BellSouth Multistate Orders*.

V. OTHER CHECKLIST ITEMS

A. Checklist Item 4 - Unbundled Local Loops

132. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[455] Based on the evidence in the record, we conclude, as did the state commissions,[456] that BellSouth demonstrates that it provides unbundled local loops in accordance with the requirements of section 271 and our rules. As in past section 271 orders, our conclusion

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451 BellSouth Nov. 20 *Ex Parte* Letter – #1 at 5-6.

452 *See BellSouth Multistate Order* 17 FCC at 17712-13, para. 208; *BellSouth Georgia/Louisiana Order,* 17 FCC at 9132, para. 198.

453 Network Telephone Comments at 11-12. Network Telephone states that the Care Team cannot quickly provide answers to complicated questions, that deadlines are missed, that team members do not have the appropriate level of expertise, and that the Care Team does not have access to the appropriate personnel at BellSouth. *Id.* at 11.

454 *See* BellSouth Ruscilli/Cox Reply Aff. at paras. 54-58.

455 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. Dark fiber and loop conditioning equipment are among the features, functions, and capabilities of the loop. *UNE Remand* Order, 15 FCC Rcd at 3772-73, paras. 166-67 n.301. *See* Appendix D at paras. 48-52.

456 *See* Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

is based on our review of BellSouth's performance for all loop types, including voice grade loops, xDSL-capable loops, high capacity loops, and digital loops, as well as our review of BellSouth's hot cut, line-sharing, and line splitting processes. We note that, as of July 31, 2002, BellSouth states that it had provisioned 166,168 loops in Florida and 50,886 loops in Tennessee.[457]

133. Consistent with our prior section 271 orders, we do not address in detail aspects of BellSouth's loop performance where there is little, if any, dispute in the record that BellSouth's performance complies with the parity and benchmark measures established in the relevant states.[458] As in past section 271 proceedings, in the course of our review we look for patterns of systemic performance disparities that have resulted in competitive harm or that otherwise have denied new entrants a meaningful opportunity to compete.[459] Although several parties have raised issues with respect to BellSouth's loop performance,[460] our own review of the record shows that BellSouth's performance overall has been satisfactory. Thus, we do not engage in detailed discussion of BellSouth's loop performance. Instead we focus on concerns raised by commenters, where the record indicates significant discrepancies between BellSouth's performance for its competitors and BellSouth's performance for its own retail operations.

134. *Voice Grade Loops*. We find, as did the state commissions,[461] that BellSouth provisions voice grade loops to competitors in a nondiscriminatory manner. BellSouth generally meets the benchmark and parity standards for order processing timeliness, installation timeliness, installation quality, and maintenance and repair timeliness and quality of voice grade loops in Florida and Tennessee, with few exceptions.[462] We find that the exceptions to BellSouth's

457 *See* BellSouth Application at 84.

458 *See, e.g., BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219; *Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9.

459 *See, e.g., Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122. We note that in its comments, AT&T lists various performance metrics missed by BellSouth. Although AT&T relates some of these missed metrics to alleged competitive impact, much of what AT&T lists demonstrates nothing more than isolated instances, or instances of near-compliance that, as we have found in previous orders, have no competitive impact. Accordingly, we decline to make a finding of noncompliance based upon AT&T's unsubstantiated allegations. *See generally AT&T* Norris Decl. However, the draft order fully treats those portions of the Norris Declaration that correlate BellSouth performance data to any competitive impact alleged by AT&T in its comments. *See also supra* n.201.

460 *See, e.g.,* Covad Comments at 25-29; KMC Comments at 15-17

461 *See* Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

462 *See, e.g.,* Florida/Tennessee B.1.12.8 – B.1.12.9 (FOC Timeliness – Partially Mechanized – 10 Hours, 2 Wire Analog Loops); Florida/Tennessee B.2.18.8 – B.2.18.9 (% Missed Installation Appointments, 2 Wire Analog Loops); Tennessee B.2.19.8 – B.2.19.9 (% Provisioning Troubles Within 30 Days, 2 Wire Analog Loops); Tennessee B.3.1.8 – B.3.1.9 (Missed Repair Appointments, 2 Wire Analog Loops); Florida/Tennessee B.3.4.8 – B.3.4.9 (% Repeat Troubles Within 30 Days, 2 Wire Analog Loops).

generally nondiscriminatory performance are not competitively significant.[463] We therefore find that a finding of checklist compliance is warranted despite these exceptions. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

135. *Hot Cut Activity.* We find, as did the state commissions,[464] that BellSouth is providing voice grade loops through hot cuts in accordance with the requirements of checklist item 4.[465] As in the Georgia/Louisiana proceeding, Mpower alleges that BellSouth's failure to provide an adequate frame due time (FDT) process violates BellSouth's obligation to provide nondiscriminatory access to OSS and to unbundled loops.[466] The Commission did not find

[463] BellSouth missed several months under an order processing timeliness benchmark (95% within 3 hours). *See* Florida B.1.9.8 (FOC Timeliness – Mechanized, 2 Wire Analog Loops)(indicating misses in June, July and August). However, competitive LECs experienced an average of 95.08% within 3 hours for the relevant period. Although BellSouth also missed parity from May-Sept. in Florida under a provisioning timeliness metric (the order completion interval metric), we note that its performance under another measure of installation timeliness, the percent missed installation appointments metric, indicates parity performance throughout the relevant period. *See* Florida B.2.1.9.1.4 (Order Completion Interval, 2 Wire Analog Loops Non-Design/Dispatch) (indicating a disparity from May-Sept.); *see also* Florida B.2.18 (% Missed Installation Appointments, 2 Wire Analog Loops). In previous orders, we have found the percent missed installation appointments metric more persuasive under comparable circumstances. *See, e.g., Bell Atlantic New York Order,* 15 FCC Rcd at 4063-66, paras. 205-10. BellSouth also suggests that some disparity under the order completion interval metric may be attributable to the fact that competitive LEC orders are scheduled based on the standard ordering guide which carries a minimum four-day interval, while the retail analogue for the majority of these orders is residence and business type plain old telephone service (POTS) orders that are scheduled on the due date calculator, and may be completed in less than a day. BellSouth Varner Aff., Ex. PM-2 at para.139. BellSouth missed parity in Florida for three months under a provisioning quality measure. *See* Florida B.2.19.9.1.4 (% Provisioning Troubles Within 30 Days, 2 Wire Analog Loops). We give little weight to this reported performance failure, however, in light of BellSouth's explanation that the misses correspond to a small number of trouble reports that do not provide a valid comparison to the retail analogue. The low competitive LEC volume of 9 in September makes it difficult to draw further conclusions regarding the data. BellSouth Varner Aff., Ex. PM-2 at para.143. BellSouth also missed several months under a maintenance and repair measure. *See* Florida B.3.2.9.1 (Customer Trouble Report Rate, 2 Wire Analog Loops, Non-Design/Dispatch). However, BellSouth still provided over 97% trouble-free services under this measurement, and the difference in the trouble report rate for competitive LEC lines was less than 1% higher than the BellSouth retail analogue. BellSouth Varner Aff., Ex. PM-2 at para. 148. Therefore, we find that that reported performance failure has little, if any, competitive impact. Finally, we note that BellSouth missed three months in Florida under the missed appointments metric for non-dispatch orders. *See* Florida B.3.1.9.2 (Missed Repair Appointments, 2 Wire Analog Loops, Non-Design/Non-Dispatch). BellSouth states that two of the six missed appointments in May were missed by less than thirty minutes each, and the other four were due to improper order close-out procedures associated with a multi-trouble order for the same customer. BellSouth further states that two of the eighteen total missed appointments in July were closed as Tested OK/ Found OK, and fifteen of the remaining 16 missed appointments were the result of 2 multiple troubles. BellSouth Varner Aff., Ex. PM-2 at para.147. We are persuaded by BellSouth's explanations for these performance disparities and find that they have little, if any, competitive impact.

[464] *See* Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

[465] *See generally* Appendices B and C.

[466] *See* Mpower Comments at 12-13

Mpower's arguments persuasive in the *BellSouth Georgia/Louisiana Order*,[467] and Mpower provides no new evidence to support its claim in the instant proceeding. Accordingly, we dismiss Mpower's allegations.

136. *Digital Loops.* We find, as did the state commissions,[468] that BellSouth's performance with respect to digital loops complies with checklist item 4.[469] We recognize, however, that BellSouth's performance in Florida with respect to one installation timeliness measure – the order completion interval metric (dispatch) – was out of parity from May through September.[470] BellSouth explains, however, that within the mix of competitive LEC orders under this measurement, more than half were for unbundled digital channel (UDC) circuits, which are designed circuits requiring approximately 10 days for completion as compared to the retail analogue which is heavily weighted toward ADSL circuits requiring approximately 4 days to complete.[471] Due to BellSouth's explanation, we do not find that the disparity in BellSouth's performance under this metric raises an issue of checklist noncompliance. In addition, the data under another installation timeliness metric – percent missed installation appointments – shows that BellSouth provisioned digital loops in a timely fashion during the relevant period.[472] In these circumstances, as in previous orders, we conclude that BellSouth's performance under the order completion interval metric has not denied competitive LECs a meaningful opportunity to compete in Florida.[473]

137. Contrary to the argument propounded by KMC, we conclude that BellSouth's provisioning and maintenance and repair performance for digital loops warrants a finding of checklist compliance.[474] Although BellSouth's installation quality measure for digital loops – the percentage of provisioning troubles within 30 days – was out of parity in Florida from May to

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467 *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9146, para. 222.

468 *See* Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

469 BellSouth missed several months under an order processing timeliness benchmark (85% within 10 hours). *See* Florida B.1.12.14 (FOC Timeliness – Partially Mechanized – 10 Hours) (Other Design). This category comprises several loop types, including digital and high capacity loops. However, competitive LECs experienced an average of 87.03% within 10 hours for the relevant period. Thus, we do not find these misses to be competitively significant. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

470 The order completion interval metric measures the amount of time it takes BellSouth to actually provide service on the orders it receives from competitive LECs and its own customers. *See* Florida B.2.1.18.1.1 (Order Completion Interval, Digital Loops <DS1/<10 Circuits/Dispatch) (indicating intervals of 8.89, 7.64, 7.77, 8.24, and 7.99 days for competitive LECs and 4.77, 3.69, 3.58, 3.27, and 3.17 days for BellSouth's retail operations).

471 *See* BellSouth Varner Aff., Ex. PM-2 at para. 151. BellSouth also states that UDC circuits are not offered as retail products. *Id.*

472 *See* Florida B.2.18.18.1.1 (% Missed Installation Appointments, Digital Loops <DS1/<10 Circuits/Dispatch).

473 *See, e.g., BellSouth Multistate Order*, 17 FCC Rcd at 17729-30. para. 240.

474 KMC Comments at 15-17.

September,[475] BellSouth demonstrates that the majority of these misses were caused by defective plant facilities, central office wiring problems, or incidents where trouble reports were resolved as "tested OK/found OK".[476] Specifically, BellSouth provides the number of total trouble reports for each month that would be classified under the above categories of troubles, and explains how troubles under these categories often do not reflect the quality of the installation performed by BellSouth.[477] BellSouth further states that it is retraining plant technicians on proper testing and order turn-up procedures.[478] We agree that several troubles reported under this measure appear to be attributed to causes other than BellSouth's provisioning process, and accordingly find that BellSouth's performance in this area satisfies checklist item 4.

138. Similarly, BellSouth's maintenance and repair performance for digital loops was generally in parity during the applicable period.[479] This performance constitutes checklist compliance notwithstanding that one measure of that performance – the customer trouble report rate – was out of parity in Florida and Tennessee throughout much of the relevant period.[480]

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[475] *See* Florida B.2.19.18.1.1 (% Provisioning Troubles within 30 Days, Digital Loops<DS1/<10 Circuits/Dispatch) (indicating trouble rates from May to September of 7.22%, 6.61%, 6.99%, 8.28%, and 6.96% for competitive LECs, and rates of 4.63%, 4.63%, 5.18%, 4.81%, and 4.03% for BellSouth retail).

[476] *See* BellSouth Varner Aff., Ex. PM-2 at para. 154.

[477] For example, BellSouth explains that incidents of defective plant facilities may occur after BellSouth has installed and tested the facility when a cable gets wet or foreign voltage finds its way onto the facility. Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 4 (filed Nov. 13, 2002)(BellSouth Nov. 13 *Ex Parte* Letter – #2). Furthermore, troubles that fall under the tested OK/found OK category would also not appear to indicate that there was an actual problem with the quality of the installation performed by BellSouth. As BellSouth describes, the tested OK/found OK category includes competitive LEC reported troubles where a technician conducts tests in either the repair center, the central office or outside, and finds that the loop is operating without a problem. *See* Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 3 (filed Nov. 18, 2002)(BellSouth Nov. 18 *Ex Parte* Letter – #1). BellSouth shows that when tested OK/found OK reports are removed from the percent provisioning troubles in 30 days metric, the competitive LEC results from May-Sept. are reduced to 6.4%, 5.8%, 6.2%, 7.4% and 5.8% respectively. *Id.* at 2.

[478] *See* BellSouth Varner Aff., Ex. PM-2 at para. 154.

[479] *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 (filed Nov. 21, 2002) (BellSouth Nov. 21 *Ex Parte* Letter – #1) (listing BellSouth's disaggregated performance under the % Missed Repair Appointments, Maintenance Average Duration, and % Repeat Troubles within 30 Days metrics for digital and high capacity loops). We note that while BellSouth has provided disaggregated maintenance and repair data for digital loops, the Florida interim and Tennessee measurements do not have established metrics for this data. Disaggregated metrics are included under the Florida permanent measurements.

[480] *See Id.* (listing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops<DS1/Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through September); *id.* (listing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital (continued....)

BellSouth states that in spite of this disparity, 95 percent of the competitive LEC circuits for dispatch and non-dispatch digital loop orders were trouble-free during the relevant period.[481] Because the overall trouble report rate for digital loops that BellSouth provided competitive LECs was low during the relevant period, we find that these disparities lack competitive significance.[482] Moreover, contrary to KMC's assertions, BellSouth was consistently in parity, with very few repeat troubles, with regard to its measure for repeat troubles within 30 days of maintenance or repair of digital loops.[483]

139. *High Capacity Loops*. We find, as did the state commissions,[484] that BellSouth's performance with respect to high capacity loops complies with checklist item 4.[485] We reach this conclusion despite the fact that BellSouth's performance with respect to some provisioning metrics – including the percentage of missed installation appointments and the percentage of troubles found within 30 days of installation – is out of parity for several months during the applicable period.[486] As we discuss below, however, this performance does not warrant a finding of checklist noncompliance. Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[487]

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Loops<DS1/Non-Dispatch in Florida/Tennessee) (out of parity in Florida from May through September, and out of parity in Tennessee in May); *see also* KMC Comments at 16.

481 BellSouth Reply at 42; BellSouth Varner Reply Aff. at para. 150.

482 BellSouth missed parity with regard to digital loops requiring dispatch in Florida from May through September with customer trouble rates of 1.34%, 1.49%, 1.74%, 1.57%, and 1.40% for competitive LECs, and rates of 0.26%, 0.28%, 0.34%, 0.36%, and 0.28% for BellSouth retail; BellSouth also missed parity in Tennessee from May through September with customer trouble rates of 1.11%, 1.14%, 1.10%, 1.49%, and 0.95% for competitive LECs, and rates of 0.34%, 0.37%, 0.44%, 0.44%, and 0.40% for BellSouth retail. *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1. BellSouth missed parity with respect to non-dispatch digital loops in Florida from May through September with customer trouble rates of 0.66%, 0.55%, 0.47%, 0.57%, and 0.49% for competitive LECs, and rates of 0.35%, 0.28%, 0.32%, 0.33%, and 0.31% for BellSouth retail; BellSouth only missed parity in Tennessee in May with a customer trouble rate of 0.71% for competitive LECs, and a rate of 0.32% for BellSouth retail. *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1; *see also BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9150, para. 230. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

483 *See* KMC Comments at 16-17; *but see* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the % Repeat Troubles within 30 Days metrics for digital and high capacity loops); BellSouth Varner Reply Aff. at para. 151.

484 *See* Florida Commission Comments – Hearing at 123-124; Tennessee Authority Comments at 33-34.

485 *See generally* Appendices B and C; *see also supra* n.469.

486 *See* Florida/Tennessee B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops≥DS1/<10 Circuits/Dispatch); Florida/Tennessee B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops≥DS1/<10 Circuits/Dispatch).

487 *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219; *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17468-69, para. 90 (finding that even (continued....)

140. First, we recognize that BellSouth's performance with respect to the missed installation appointments metric was out of parity in Florida and Tennessee for several months during the relevant period.[488] BellSouth states that there were only 29 missed appointments in Florida under the missed installation appointment metric from May through July for over 1,200 orders, and that the majority of these missed due dates were caused by facility issues where installation of the loop required the construction of additional facilities.[489] Given that the majority of installation appointments were met, and that BellSouth's overall loop performance is satisfactory, we do not find that lack of parity under the missed installation appointments metric for high capacity loops warrants a finding of noncompliance in Florida and Tennessee for checklist item 4.

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"poor" performance with regard to high capacity loops did not warrant a finding of checklist noncompliance for all loop types where high capacity loops represented only a small percentage of all loops ordered by competitors in a state). High capacity loops appear to represent approximately 3.5% and 7.6% of the unbundled loops provisioned to competitive LECs in Florida and Tennessee, respectively. *See* BellSouth Application App. A, Vol. 3a, Tab F, Affidavit of W. Keith Milner (BellSouth Milner Aff.) at paras. 96, 98.

[488] *See* Florida B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops≥DS1/<10 Circuits/Dispatch) (indicating missed installation appointment rates from May to September of 2.16%, 1.81%, 3.15%, 4.01%, and 4.37% for competitive LECs, and rates of 0.60%, 0.00%, 1.30%, 0.69%, and 1.33% for BellSouth retail); Tennessee B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops≥DS1/<10 Circuits/Dispatch) (indicating missed installation appointment rates in May, June, August and September of 6.77%, 9.17%, 7.25%, and 6.38% for competitive LECs, and rates of 2.93%, 4.22%, 3.14%, and 1.98% for BellSouth retail). KMC argues that BellSouth's loop assignment practices are discriminatory, and result in a greater percentage of competitive LEC high capacity loop orders being "held, pending facility" and placed in jeopardy status. KMC Comments at 11; *see also* Letter from Andrew M. Klein, Counsel to KMC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307, Attach. at 6 (filed Dec. 5, 2002) (KMC Dec. 5 *Ex Parte* Letter). According to KMC, BellSouth's jeopardy performance in Georgia and Louisiana has also declined in recent months. *See* KMC Dec. 5 *Ex Parte* Letter, Attach. at 7-8. KMC states that this high percentage of jeopardies under BellSouth's facility assignment approach leads to more missed appointments for competitive LECs. KMC Comments at 14; KMC Reply at 8. BellSouth, however, explains that the difference in the percentage of competitive LEC and BellSouth orders placed in jeopardy status is primarily a reflection of the fact that competitive LECs are targeting business customers in customer locations that are typically heavily congested and capacity constrained, whereas BellSouth's retail orders are more widely distributed across a statewide area. *See* Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1-2 (filed Dec. 11, 2002)(BellSouth Dec. 11 *Ex Parte* Letter – #1). According to BellSouth, the percentage of jeopardies issued for competitive LEC orders in Georgia and Louisiana has increased, but BellSouth notes that jeopardies for BellSouth retail have also increased to an even greater degree than for competitive LEC orders. BellSouth Dec. 11 *Ex Parte* Letter – #1 at 3. BellSouth states that despite the issuance of jeopardies in Florida and Tennessee, many orders were still completed as scheduled. BellSouth Varner Reply Aff. at paras. 127, 129. *But see* Letter from Andrew M. Klein, Counsel to KMC, Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1 (filed Dec. 17, 2002) (KMC Dec. 17 *Ex Parte* Letter). In addition, BellSouth states that the majority of missed appointments that did occur were not caused by discriminatory practices, but instead were due to the fact that the competitive LEC orders were placed to end-users where facility projects were required to meet the demand. BellSouth Varner Reply Aff. at para. 129. We note that BellSouth's performance reflected by another measure of installation timeliness – the order completion interval metric – indicates parity in both states for all relevant months. *See* Florida/Tennessee B.2.1.19.1.1 (Order Completion Interval, Digital Loops≥DS1/<10 Circuits/Dispatch).

[489] *See* BellSouth Varner Aff., Ex. PM-2 at para. 153.

141. Next, KMC argues that BellSouth fails to achieve parity under the provisioning quality metric measuring the percentage of troubles found within 30 days of high capacity loop installation.[490] BellSouth states that in Florida the majority of the misses were caused by defective plant facilities, central office wiring problems or incidents where trouble reports were resolved as tested OK/found OK.[491] BellSouth also specifically states that in Tennessee, forty percent of the reports were closed as no trouble found, while the remainder were equally spread between outside facilities and equipment within the central office.[492] As discussed above, we agree that several troubles reported under this measure appear to be attributed to causes other than BellSouth's own provisioning process. Data provided by BellSouth show for example that 13 of the 39 total trouble reports reported in September for high capacity loops in Florida fell under the category of loops that actually were tested OK or found OK.[493] Given this evidence, and recognizing BellSouth's generally acceptable performance for other categories of loops, we find that BellSouth's performance is in compliance with checklist item 4.[494]

142. KMC also contends that BellSouth's maintenance and repair performance for high capacity loops precludes a finding of checklist compliance.[495] In particular, KMC points to BellSouth's performance under the percentage of repeat troubles within 30 days and the customer trouble report rate.[496] With respect to BellSouth's performance under the repeat troubles metric in Florida and Tennessee, we find that contrary to KMC's claim, results during the relevant period indicate nondiscriminatory performance for BellSouth's maintenance and

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490 KMC Comments at 15-16. As with missed appointments, KMC suggests that the high percentage of jeopardies under BellSouth's facility assignment approach contributes to the greater number of provisioning troubles. *See supra* n.488; KMC Reply at 8-9. *See also* Florida/Tennessee B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops≥DS1/<10 Circuits/Dispatch) (BellSouth missed parity in Florida in May, July, August and September with trouble rates of 11.17%, 10.57%, 9.93%, and 12.04% for competitive LECs, and rates of 6.89%, 5.41%, 6.36%, and 2.07% for BellSouth retail; BellSouth missed parity in Tennessee in May, July, August, and September with trouble rates of 19.23%, 14.41%, 18.92%, and 16.58% for competitive LECs, and rates of 5.51%, 6.63%, 3.52%, and 3.92% for BellSouth retail). Performance under these measures is within the range accepted in previous BellSouth applications.

491 *See* **BellSouth Varner Aff., Ex.** PM-2 at para. 154; *see also* BellSouth Dec. 11 *Ex Parte* Letter – #1 at 5-6. *But see* KMC Dec. 17 *Ex Parte* Letter at 3.

492 *See* BellSouth Varner Aff., Ex. PM-3 at para. 149.

493 *See* BellSouth November 13 *Ex Parte* Letter – #2 at 4. BellSouth shows that when tested OK/found OK reports are removed from the percent provisioning troubles in 30 days metric, the competitive LEC results in May, July, August and September are reduced to 8.6%, 7.3%, 6.5%, and 8.0% respectively. BellSouth Nov. 18 *Ex Parte* Letter – #1.

494 Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

495 KMC Comments at 17.

496 KMC Comments at 16-17. As with missed appointments, KMC suggests that the high percentage of jeopardies under BellSouth's facility assignment approach contributes to the greater number of customer trouble reports. *See supra* n.488; KMC Reply at 8-9.

repair of high capacity loops.[497] The customer trouble report rate, however, was out of parity in Florida and Tennessee throughout the relevant period.[498] BellSouth states that one explanation for this disparity is that the retail analogue for these circuits includes many interoffice circuits that use fiber facilities running between central offices at the DS-3 level, and which are less complex, and thus less prone to the technical problems that give rise to customer trouble reports, than the DS-1 competitive LEC circuits that have additional circuit equipment.[499] BellSouth also states that, in spite of the performance disparity, 95 percent of the competitive LEC circuits for dispatch and non-dispatch high capacity loop orders were trouble free during the relevant period.[500] Because the overall trouble report rate for high capacity loops that BellSouth provided competitive LECs was low during the relevant period, we find that these disparities lack competitive significance, and that BellSouth's maintenance and repair performance for high capacity loops warrants a finding of checklist compliance.[501]

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[497] *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the % Repeat Troubles Within 30 Days metric for digital and high capacity loops) (indicating parity performance from May-Sept. for dispatch/non-dispatch high capacity loop orders in Tennessee, and parity performance for every month during the relevant period except August for dispatch/non-dispatch high capacity loop orders in Florida). *See also* BellSouth Dec. 11 *Ex Parte* Letter – #1 at 7.

[498] *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops>=DS1/Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through September); *id.* (discussing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops>=DS1/Non-Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through September); *see also* KMC Comments at 9, 16 (stating that despite the fact that in most cases high capacity loops constitute a small percentage of overall loops provided, the out of parity trouble rate for high capacity loops affects a competitive LEC customer base equivalent to between 156,240 and 4,374,720 voice grade lines depending on whether all of the 6,510 circuits are on DS-1 or DS-3 high capacity loops).

[499] *See* BellSouth Varner Reply Aff. at para. 150. BellSouth also notes that KMC's argument regarding the voice grade line equivalent for these high capacity loops assumes that each DS-1 and DS-3 is completely full, which is not the case. *See* BellSouth Varner Reply Aff. at para. 150.

[500] BellSouth Reply at 42; BellSouth Varner Reply Aff. at para. 150; *see also* BellSouth Dec. 11 *Ex Parte* Letter – #1 at 6.

[501] BellSouth missed parity with regard to high capacity loops requiring dispatch in Florida from May through September with customer trouble rates of 3.55%, 3.34%, 3.59%, 3.10%, and 3.03% for competitive LECs, and rates of 0.26%, 0.28%, 0.34%, 0.36%, and 0.28% for BellSouth retail; BellSouth also missed parity in Tennessee from May through September with customer trouble rates of 3.30%, 3.03%, 4.40%, 3.91%, and 3.25% for competitive LECs, and rates of 0.34%, 0.37%, 0.44%, 0.44%, and 0.40% for BellSouth retail. *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1. BellSouth missed parity with respect to non-dispatch high capacity loops in Florida from May through September with customer trouble rates of 1.44%, 1.32%, 1.44%, 1.26%, and 1.31% for competitive LECs, and rates of 0.35%, 0.28%, 0.32%, 0.33%, and 0.31% for BellSouth retail; BellSouth missed parity in Tennessee from May through September with customer trouble rates of 1.38%, 1.48%, 1.43%, 1.60%, and 1.46% for competitive LECs, and rates of 0.32%, 0.32%, 0.35%, 0.38%, and 0.28% for BellSouth retail. *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1; *see also BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9150, para. 230.

143. AT&T asserts that BellSouth fails to satisfy checklist item 4 because it fails to provide a reasonable and cost-based method of converting special access DS-1 circuits to TELRIC-priced unbundled loops.[502] Specifically, AT&T states that BellSouth's conversion process requires the issuance of a disconnect order for the special access DS-1 in addition to a new connect order for the UNE loop, risking disruption of service.[503] AT&T further states that BellSouth does not dispute AT&T's right to convert the special access circuit to an unbundled loop, only the process of conversion.[504] In response, BellSouth argues that its interconnection agreement provides only for the conversion of special access to UNE combinations and does not provide for, or require, conversions of access or tariffed services to stand-alone UNEs.[505] Based on the limited factual record, and the time constraints associated with section 271 proceedings, we find that this competitive LEC-specific dispute is more appropriately addressed in an adjudicatory proceeding in the appropriate forum. Thus we find that a finding of checklist compliance is warranted despite AT&T's allegations.

144. *Line Sharing.* We find, as did the state commissions,[506] that BellSouth offers nondiscriminatory access to the high frequency portion of the loop in Florida and Tennessee.[507] BellSouth has provisioned 2,850 line sharing arrangements in Florida and 931 line sharing arrangements in Tennessee, as of July 2002.[508] We recognize that BellSouth's performance in Florida and Tennessee, with respect to one installation timeliness measure – the order completion interval metric (dispatch) – was out of parity for several months.[509] We note, however, that the data under another installation timeliness metric – percent missed installation appointments – shows that BellSouth generally provisioned line shared loops in a timely fashion

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502 AT&T Comments at 19-20.

503 AT&T Comments at 19-20. AT&T also suggests that current single order alternatives are cost prohibitive. *Id.* at 20.

504 AT&T Comments at 19 n.13.

505 BellSouth Ruscilli/Cox Reply Aff. at para. 25. BellSouth submits that its project management offer to facilitate the conversion of special access to stand-alone UNEs goes beyond its obligations. BellSouth Ruscilli/Cox Reply Aff. at paras. 26-27.

506 *See* Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

507 The D.C. Circuit recently stated that "the *Line Sharing Order* must be vacated and remanded." *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002). The court also stated that it "grant[ed] the petitions for review[] and remand[ed] the *Line Sharing Order* . . . to the Commission for further consideration in accordance with the principles outlined." *Id.* at 430. We are addressing the line sharing rules as part of our *Triennial Review Proceeding*. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781, 22805, paras. 53-54 (2001).

508 *See* BellSouth Application at 97.

509 *See* Florida B.2.1.7.3.1 (Order Completion Interval, <6 Circuits/Dispatch); Florida B.2.1.7.3.2 (Order Completion Interval, <6 Circuits/Non-Dispatch); Tennessee B.2.1.7.3.2 (Order Completion Interval, <6 Circuits/Non-Dispatch).

during the relevant period.[510] Accordingly, we find that BellSouth's provisioning of line-shared loops satisfies checklist item 4. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

145. Covad raises issues regarding BellSouth's performance under the percent provisioning troubles within 30 days of installation, the maintenance average duration, and the percent repeat troubles within 30 days metrics.[511] BellSouth states that despite the disparity under the provisioning troubles within 30 days of installation metric, the results indicate a very high incidence of trouble reports that were resolved as tested OK/found OK in Florida for both dispatch and non-dispatch orders.[512] BellSouth further states that misses in Tennessee under the maintenance average duration metric are again largely due to delays caused by a very high incidence of trouble reports closed as tested OK/found OK.[513] Given the totality of circumstances, we conclude that BellSouth's performance under these metrics is consistent with satisfactory performance of this checklist item. We also note that despite Covad's claims of discriminatory performance under the percent repeat troubles within 30 days metric, BellSouth achieved parity under this metric for all relevant months in Tennessee, and all but one month in Florida.[514]

146. *UNE ISDN Loops*. We find, as did the state commissions,[515] that BellSouth provides ISDN loops to competitors in a nondiscriminatory manner. BellSouth's performance

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[510] *See* Florida B.2.18.7.1.1 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Dispatch); Florida B.2.18.7.1.2 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Non-Dispatch); Tennessee B.2.18.7.1.2 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Dispatch).

[511] Covad Comments at 25-29. As in prior section 271 orders, performance data relative to competitive LECs on an aggregate basis is the most persuasive evidence of whether a BOC meets the checklist requirements. *See, e.g., BellSouth MultiState Order*, 17 FCC Rcd at 17727, para. 237; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9148, para. 226. Thus, although Covad claims that its data show discriminatory performance, allegedly anomalous results for a single carrier in this instance are insufficient to rebut BellSouth's evidence demonstrating checklist compliance. If evidence becomes available to the Commission in the future sufficient to show systemic performance disparities, we will pursue appropriate enforcement action.

[512] BellSouth Reply at 40; BellSouth Varner Reply Aff. at para. 143 (indicating that 39% of the troubles for dispatch line sharing orders were closed as tested OK/found OK in May, 23% in June, 50% in July, and 31% in August). BellSouth states that when tested OK/found OK reports are removed from this metric for non-dispatch line sharing orders in Florida, the results in May, June, July, and August are 4.6%, 9.6%, 5.4% and 4.5% respectively. BellSouth Varner Reply Aff. at para.144. BellSouth also states that when tested OK/found OK reports are removed from Tennessee results, the percentage of troubles within 30 days are quite small. BellSouth Reply at 41; BellSouth Varner Reply Aff. at para. 144 (indicating that results under this metric would have been 2.8% and 4.2% respectively if the tested OK/found OK reports are removed for July and August).

[513] BellSouth Reply at 41; BellSouth Varner Reply Aff. at para. 146. As noted above, troubles that fall under the tested OK/found OK category would not appear to indicate that there was an actual problem with the quality of the installation performed by BellSouth. *See supra* n.477.

[514] *See* BellSouth Reply at 41.

[515] *See* Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

data demonstrate that, for the most part, it met the relevant benchmarks and parity standards,[516] notwithstanding that the data reveal some performance issues with respect to ordering and a maintenance and repair measure. First, with respect to the order processing timeliness metric, Firm Order Confirmation (FOC) timeliness, we recognize that BellSouth's performance misses the relevant benchmarks for partially mechanized orders for several months.[517] BellSouth explains that the volumes decreased to such low levels in recent months that to meet the 85 percent in 10-hours benchmark in any given month, BellSouth could not miss more than four LSRs in Florida and could not miss any LSRs in Tennessee.[518] BellSouth adds that steps have been taken to improve performance, such as the implementation of new computer tools and periodic operational reviews.[519] Given this, and the fact that the order volumes were low for this submetric, we find that that these performance discrepancies are not competitively significant. We also reject AT&T's claim that BellSouth's performance for the percentage of jeopardy notices for mechanized ISDN loops, which is out of parity throughout the relevant period in Florida and Tennessee, demonstrates BellSouth's noncompliance with this checklist item.[520] We believe that BellSouth's failing to meet the parity standard for such jeopardy notices has little competitive impact because BellSouth ultimately provisioned the ISDN loop in a timely manner.[521] Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

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[516] *See, e.g.*, Florida/Tennessee B.2.1.6.3.1 (Order Completion Interval, UNE ISDN/<6 Circuits/Dispatch); Florida/Tennessee B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN/<10 Circuits/Dispatch).

[517] *See* Florida B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)) (in Florida, BellSouth missed the 85% within 10 hours benchmark from June-Sept., the results are 82.05%, 70.83%, 80.95%, 83.33%, respectively); Tennessee B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)) (in Tennessee, BellSouth missed the 85% within 10 hours benchmark in June and July, the results are 81.82% and 80.00%, respectively). We note that AT&T generally comments about BellSouth's performance in Florida and Tennessee with respect to the FOC timeliness partially mechanized submetric. AT&T Norris Decl. at paras. 18, 51; *see also supra* n.201.

[518] BellSouth Varner Reply Aff. at paras. 160-61. Volumes dropped off substantially after May 2002 in Florida and Tennessee. In Florida, on average, from June-Sept., there were approximately 25 orders a month. In Tennessee, for these same months, there were approximately 7 orders a month, on average. *See* Florida/Tennessee B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)).

[519] BellSouth Varner Reply Aff. at para. 161.

[520] *See* AT&T Norris Decl. at paras. 20, 56; Florida B.2.5.6 (% Jeopardies - Mechanized, UNE ISDN) (out of parity in May-Sept.); Tennessee B.2.5.6 (% Jeopardies - Mechanized, UNE ISDN) (out of parity in May, July-Sept.).

[521] Jeopardy notices warn competitive LECs that BellSouth may miss an installation appointment. BellSouth Varner Aff., Ex. PM-2 at para. 141. In its reply, BellSouth points out that AT&T failed to mention that BellSouth met almost all of the % Missed Installation Appointment metrics and added that "the jeopardy percentage was not indicative of whether the appointment was actually made." BellSouth Varner Reply Aff. at para. 129. BellSouth met or exceeded the missed installation appointment submetric with one minor exception in Florida. *See* Florida B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN/<10 Circuits/Dispatch).

147. Finally, even though BellSouth's data reveal some performance disparities with respect to the maintenance and repair of ISDN loops, BellSouth's overall performance in this area complies with checklist item 4. Specifically, BellSouth was out of parity with respect to the customer trouble report rate for several months in Florida.[522] BellSouth states that a large proportion of the reported troubles were due to defective cable pairs or circuit cards that had to be "reseated."[523] BellSouth adds that with respect to the circuit cards, the problem may be attributable to a customer's defective modem or computer[524] and claims that its performance is excellent when viewing the metric from the converse perspective – trouble-free lines – which is 97 percent for both wholesale and retail customers.[525] The record shows that BellSouth has not identified any persistent problems and seeks ways to improve performance by holding monthly Outside Plant Improvement committees aimed at addressing these types of problems.[526] Moreover, the disparity between BellSouth retail and competitive LEC performance is small for this submetric.[527] Accordingly, we find that BellSouth's performance overall for ISDN loops warrants a finding of checklist compliance.

B. Checklist Item 11 – Number Portability

148. Section 271(c)(2)(B)(xi) of the Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.[528] Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[529] Based on the evidence in the

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522 *See* Florida B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch) (out of parity May-Sept.). However, we note that BellSouth met or exceeded the parity standard for metrics measuring the percentage of missed repairs, maintenance average duration, and the percentage of repeat troubles with two minor exceptions. *See* Florida B.3.3.6.2 (Maintenance Average Duration, UNE ISDN/Non-Dispatch) (out of parity in June and September); Florida B.3.4.6.1 (% Repeat Troubles within 30 days, UNE ISDN/Dispatch) (out of parity in June).

523 BellSouth Application at 95; BellSouth Varner Reply Aff. at para. 164; Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 2 (filed Nov. 12, 2002) (BellSouth Nov. 12 *Ex Parte* Letter). BellSouth explains that when a circuit card has to be "reseated" this means that a technician removes a plug-in card associated with an ISDN line and then reinserts that card into the same slot. BellSouth Nov. 12 *Ex Parte* Letter at 2.

524 *Id.* According to BellSouth, a defective modem or computer may seize the line but does not release when the transmission is complete. *Id.* As a result, the line is unavailable. *Id.*

525 BellSouth Varner Reply Aff. at para. 162.

526 *Id.* at para. 164.

527 Florida B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch) (generally equal to or less than 1.5% difference between BellSouth retail and wholesale performance).

528 47 U.S.C. § 271(c)(2)(B)(xi).

529 47 U.S.C. § 251(b)(2).

attachments in any case where such matters are regulated by a State."[159] As of 1992, nineteen states, including Connecticut, had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.[160]

D. Checklist Item 4 – Unbundled Local Loops

48. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[161] The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types of loops, including two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.[162]

49. In order to establish that it is "providing" unbundled local loops in compliance with checklist item 4, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops.[163] Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible

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[159] *Id.* § 224(c)(1). The 1996 Act extended the Commission's authority to include not just rates, terms, and conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(f). Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(c)(1); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4093, para. 264.

[160] *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992); 47 U.S.C. § 224(f).

[161] 47 U.S.C. § 271(c)(2)(B)(iv).

[162] *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

[163] *SWBT Texas Order*, 15 FCC Rcd at 18481-81, para. 248; *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637, para. 185.

to condition the loop facility to support the particular functionality requested. In order to provide the requested loop functionality, such as the ability to deliver xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities. The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor.

50. On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL).[164] HFPL is defined as "the frequency above the voiceband on a copper loop facility that is being used to carry traditional POTS analog circuit-switched voiceband transmissions." This definition applies whether a BOC's voice customers are served by cooper or by digital loop carrier equipment. Competing carriers should have access to the HFPL at either a central office or at a remote terminal. However, the HFPL network element is *only* available on a copper loop facility.[165]

51. To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*. Specifically, a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates, and repeat trouble report rates. In addition, a successful BOC applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases.

52. Section 271(c)(2)(B)(iv) also requires that a BOC demonstrate that it makes line splitting available to competing carriers so that competing carriers may provide voice and data service over a single loop.[166] In addition, a BOC must demonstrate that a competing carrier, either alone or in conjunction with another carrier, is able to replace an existing UNE-P

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[164] *See Line Sharing Order*, 14 FCC Rcd at 20924-27, paras. 20-27; *see also* n.63 at C-12 *supra.*

[165] *See Deployment of Wireline Services offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101, 2106-07, para. 10 (2001).

[166] *See generally SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. § 51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers "to provide any telecommunications service that can be offered by means of that network element").

configuration used to provide voice service with an arrangement that enables it to provide voice and data service to a customer. To make such a showing, a BOC must show that it has a legal obligation to provide line splitting through rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment, and combine it with unbundled switching and shared transport.[167]

E. Checklist Item 5 – Unbundled Local Transport

53. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[168] The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.[169] Dedicated transport consists of BOC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by BOCs or requesting telecommunications carriers, or between switches owned by BOCs or requesting telecommunications carriers.[170] Shared transport consists of transmission facilities shared by more than one carrier, including the BOC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the BOC's network.[171]

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[167] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6348, para. 220.

[168] 47 U.S.C. § 271(c)(2)(B)(v).

[169] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20719, para. 201.

[170] *Id.* A BOC has the following obligations with respect to dedicated transport: (a) provide unbundled access to dedicated transmission facilities between BOC central offices or between such offices and serving wire centers (SWCs); between SWCs and interexchange carriers points of presence (POPs); between tandem switches and SWCs, end offices or tandems of the BOC, and the wire centers of BOCs and requesting carriers; (b) provide all technically feasible transmission capabilities such as DS1, DS3, and Optical Carrier levels that the competing carrier could use to provide telecommunications; (c) not limit the facilities to which dedicated interoffice transport facilities are connected, provided such interconnections are technically feasible, or restrict the use of unbundled transport facilities; and (d) to the extent technically feasible, provide requesting carriers with access to digital cross-connect system functionality in the same manner that the BOC offers such capabilities to interexchange carriers that purchase transport services. *Id.* at 20719.

[171] *Id.* at 20719, n.650. The Commission also found that a BOC has the following obligations with respect to shared transport: (a) provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same transport facilities that a BOC uses for its own traffic; (b) provide shared transport transmission facilities between end office switches, between its end office and tandem switches, and between tandem switches in its network; (c) permit (continued....)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by BellSouth Corporation,	)	
BellSouth Telecommunications, Inc., And	)	WC Docket No. 02 - 150
BellSouth Long Distance, Inc. for Provision	)	
of In-Region, InterLATA Services in	)	
Alabama, Kentucky, Mississippi, North	)	
Carolina, and South Carolina	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 2002 **Released: September 18, 2002**

By the Commission: Commissioner Copps issuing a statement.

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I. INTRODUCTION

1. On June 20, 2002, BellSouth Corporation and its subsidiaries, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, BellSouth) filed an application pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA service originating in the states of Alabama, Kentucky, Mississippi, North Carolina, and South Carolina.[2] We grant BellSouth's application

[1] We refer to the Communications Act of 1934, as amended, as the Communications Act or the Act. *See* 47 U.S.C. §§ 151 *et seq.*

[2] *See Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150 (filed June 20, 2002) (BellSouth Application); *see also Comments Requested on the Joint Application by BellSouth Corporation for Authorization under Section 271 of the Communications Act to Provide In-region InterLata Service in the States of Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, Public Notice, 17 FCC Rcd 11303 (2002).

commission's distinction between those calls subject to access charges and those subject to reciprocal compensation.[879]

230. In any event, as AT&T itself recognizes, the interconnection agreement between AT&T and BellSouth expressly covers the LATA-wide calling issue.[880] Indeed, AT&T's principal complaint is that "BellSouth refuses to perform *according to the terms in its interconnection agreements*."[881] Interpretive disputes concerning interconnection agreements are for the state commissions to decide in the first instance, and this Commission will not normally preempt a state commission's decisionmaking process.[882]

231. For the foregoing reasons, we reject commenters' allegations of error and find that BellSouth complies with checklist item 1.

B. Checklist Item 4 - Unbundled Local Loops

232. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[883] Based on the evidence in the record, we conclude, as did the state commissions,[884] that BellSouth demonstrates that it provides unbundled local loops in accordance

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879 AT&T Comments at 28. AT&T also asserts that "nothing in the *Virginia Arbitration Order* established that ILECs may deny CLECs equal flexibility to define their local calling areas." AT&T August 23 Pricing and Growth Tariff *Ex Parte* Letter at 9 (citing *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited* Arbitration, CC Docket Nos. 00-218, 00-249, and 00-251, Memorandum Opinion and Order, DA 02-1731 (rel. July 15, 2002) (*Virginia Arbitration Order*). Consistent with the *Local Competition Order*, however, the definition of a local calling area is the prerogative of a state commission. *Local Competition Order*, 12 FCC Rcd at 16013, para. 1035.

880 AT&T Comments App., Ex. A, Declaration of Denise Berger (AT&T Berger Decl.) at paras. 9-11.

881 *Id.* at para. 15 (emphasis added). AT&T states that this is not an interconnection agreement dispute because of BellSouth's belief that "CLEC[s] do not have a right to LATA-wide calling." AT&T August 23 Pricing and Growth Tariff *Ex Parte* Letter at 10 (citation omitted). We believe that a more accurate characterization of the issue is whether state commissions have the authority to define the local calling area as they see fit. *See Local Competition Order*, 12 FCC Rcd at 16013, para. 1035.

882 *Verizon Pennsylvania Order*, 16 FCC Rcd at 17484, para. 118; *Verizon New Jersey Order,* 17 FCC Rcd at 12354, para. 159.

883 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. Dark fiber and loop conditioning equipment are among the features, functions, and capabilities of the loop. *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67 n.301. For a discussion of the requirements of checklist item 4, *see* Appendix H at paras. 48-52, *infra*.

884 *See* Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 206; South Carolina Commission Comments at 1.

with the requirements of section 271 and our rules. As in past section 271 orders, our conclusion is based on our review of BellSouth's performance for all loop types, including voice grade loops, xDSL-capable loops, high capacity loops, and digital loops, as well as our review of BellSouth's hot cut, line-sharing, and line splitting processes. We note that, as of June 30, 2002, BellSouth states that it had provisioned 15,913 loops in Alabama, 3,841 loops in Kentucky, 6,258 loops in Mississippi, 51,229 loops in North Carolina, and 14,901 loops in South Carolina.[885]

233. Consistent with our prior section 271 orders, we do not address aspects of BellSouth's loop performance where our review of the record satisfies us that BellSouth's performance complies with the parity and benchmark measures established in the relevant states.[886] Instead, we focus our discussion on those areas where the record indicates discrepancies between BellSouth's performance for its competitors and BellSouth's performance for its own retail operations. As in past section 271 proceedings in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that otherwise have denied new entrants a meaningful opportunity to compete.[887] Where BellSouth's competitive LEC volumes in a particular state are too small to provide a meaningful assessment of BellSouth's loop-provisioning capabilities, we look to BellSouth's recent performance in Georgia to help us determine whether BellSouth meets this checklist item.[888]

234. *Hot Cut Activity.* Like the state commissions,[889] we find that BellSouth is providing voice grade loops through hot cuts in each state in accordance with the requirements of checklist item 4.[890] BellSouth provides hot cuts in each of the states within reasonable time intervals,[891] at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.[892]

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885 *See* BellSouth August 14 OSS and Loops *Ex Parte* Letter at 3.

886 *See, e.g., BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219; *Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9.

887 *See, e.g., Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

888 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6254, paras. 36-37 (determining that recent data regarding SWBT's performance in Texas provides a reliable indicator of SWBT's performance in Kansas and Oklahoma).

889889 *See* Alabama Commission Comments at 204; Kentucky Commission Comments at 32; Mississippi Commission Comments at 3; North Carolina Commission Comments at 197; South Carolina Commission Comments at 1.

890 A hot cut is the process of converting a customer from one network, usually a UNE-platform served by an incumbent LEC's switch, to a UNE-loop served by another carrier's switch. The "cut" is said to be "hot" because telephone service on the specific customer's loop is interrupted for a brief period of time during the conversion process. *Bell Atlantic New York Order*, 15 FCC Rcd 3953, 4104, para. 291 n.925.

891 *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.12.1-B.2.12.2 (Coordinated Customer Conversions); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.13.1-B.2.13.4 (% Hot Cuts>15 (continued....)

235. *Voice Grade Loops.* We find, as did the state commissions,[893] that BellSouth provisions voice grade loops to competitors in a nondiscriminatory manner. BellSouth met the benchmark and parity standards for installation timeliness,[894] installation quality,[895] and maintenance and repair timeliness and quality with regard to voice grade loops in each of the states in each relevant month, with minor exceptions.[896] These exceptions are relatively slight and are not competitively significant to competitive LECs.[897] We therefore find that these exceptions do not warrant a finding of checklist noncompliance.

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Minutes Early); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.14.1-B.2.14.4 (Hot Cut Timeliness); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.15.1-B.2.15.4 (% Hot Cuts>15 Minutes Late); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.16.1-B.2.16.2 (Average Recovery Time – CCC). *But see* KMC Comments at 10 (alleging that BellSouth's hot cut coordination is substandard).

[892] *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.17.1.1-B.2.17.2.2 (% Provisioning Troubles within 7 Days – Hot Cuts). We note that, while BellSouth failed to meet one of these benchmarks during June in South Carolina, it exceeded that benchmark on average during March through June in South Carolina. *See* South Carolina B.2.17.1.1 (% Provisioning Troubles within 7 Days, Hot Cuts, UNE Loop Design/Dispatch). We therefore find that the disparity in June does not rise to the level of checklist noncompliance. We also note that although BellSouth's volumes were low for certain hot cut measures in the applicable states, BellSouth's hot cut performance in Georgia raises no issues regarding checklist compliance. *See* Georgia B.2.12.1-B.2.17.2.2 (Hot Cut Provisioning).

[893] *See* Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 190; South Carolina Commission Comments at 1.

[894] *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.1.9.8.-B.1.9.13, B.1.12.8-B.1.1.12.13, B.1.13.8-B.1.13.13 (FOC Timeliness, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.1.8.1.1-B.2.1.13.2.4 (Order Completion Interval, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.18.8.1.1-B.2.18.13.2.4 (% Missed Installation Appointments, 2 Wire Analog Loops).

[895] *See* Kentucky/Mississippi/North Carolina/South Carolina B.2.19.8.1.1-B.2.19.13.2.4 (% Provisioning Troubles within 30 Days, 2 Wire Analog Loops); Alabama B.2.19.8.1.2-B.2.19.13.2.4 (% Provisioning Troubles within 30 Days, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi B.3.2.8.1-B.3.2.9.2 (Customer Trouble Report Rate, 2 Wire Analog Loops).

[896] *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.1.8.1-B.3.1.9.2 (% Missed Repair Appointments, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.3.8.1-B.3.3.9.2 (Maintenance Average Duration, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.3.8.1-B.3.3.9.2 (% Repeat Troubles within 30 Days, 2 Wire Analog Loops).

[897] *See* Alabama B.3.1.8.1 (Missed Repair Appointments, 2 Wire Analog Loops, Design/Dispatch) (out of parity in June with a 11.54% trouble report rate for competitive LECs and a 6.79% trouble report rate for BellSouth's retail operations, but a 4.50% overall trouble report rate for competitive LECs and a 6.30% overall trouble report rate for BellSouth's retail operations during March through June); South Carolina B.3.2.9.1 (Customer Trouble Report Rate, 2 Wire Analog Loops, Non-Design/Dispatch) (out of parity in two months with a 4.38% trouble report rate during March and a 7.05% trouble report rate during April for competitive LECs and a 1.60% trouble report rate during March and a 1.82% trouble report rate during April for BellSouth's retail operations, but a 4.13% overall trouble report rate for competitive LECs and a 1.83% overall trouble report rate for BellSouth's retail operations (continued....)

236. *xDSL-Capable Loops.* We find, as did the state commissions,[898] that BellSouth demonstrates that it provides stand-alone xDSL-capable loops in accordance with checklist item 4. BellSouth's performance with respect to the percentage of provisioning troubles within 30 days, a metric that measures installation quality, appears to be out of parity in Kentucky, Mississippi, North Carolina, and South Carolina for recent months.[899] We find, however, that this performance does not warrant a finding of checklist noncompliance in view of the low number of installation troubles reported in each of the five states. We recognize, as we have in prior section 271 orders, that a small handful of observations can cause seemingly large variations in the performance measures.[900] Moreover, given BellSouth's parity of performance with respect to this metric in Georgia for the relevant period, we find that BellSouth provisions xDSL loops in a nondiscriminatory manner in all five states.[901] Next, we note that BellSouth's

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from March through June); Georgia B.1.12.12 (FOC Timeliness, Partially Mechanized, 2 Wire Analog Loops with LNP, Design) (under benchmark requiring that BellSouth provide firm order confirmations within 10 hours at least 85% of the time, out of parity in May with an 83.41% score and June with a 78.71% score, but 86.13% overall average during March through June); Georgia B.2.1.13.1.4 (Order Completion Interval, 2 Wire Analog Loops with LNP/Non-Design/<10 Circuits/Dispatch) (out of parity from March through June with average intervals of 4.90 days for competitive LECs and 1.56 days for BellSouth's retail operations; competitive LEC volume of 54 orders represents only about 5.15% of total voice grade loops that competitive LECs ordered for Georgia during the same period). We consider these data for Georgia because BellSouth volumes under these metrics were low in certain of the applicable states. *See, e.g.,* Kentucky B.1.12.12 (FOC Timeliness, Partially Mechanized, 2 Wire Analog Loops with LNP, Design); Kentucky B.2.1.13.1.4 (Order Completion Interval, 2 Wire Analog Loops with LNP/Non-Design/<10 Circuits/Dispatch).

898 *See* Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 192; South Carolina Commission Comments at 1.

899 Specifically, BellSouth's performance data show that it was out of parity in Kentucky, Mississippi, North Carolina, and South Carolina in April, and missed parity in North Carolina in May and South Carolina in March. In Mississippi, BellSouth's performance data show that competitive LECs experience an average of 7.01% trouble reports within 30 days after installation of an xDSL loop, compared to an average of 3.14% for BellSouth retail operations from March through June. In North Carolina, competitive LECs experience an average of 8.15%, compared to an average of 3.09% for BellSouth retail. *See* Mississippi/North Carolina B.2.19.5.1.1 (% Provisioning Troubles within 30 Days, ADSL, HDSL and UCL<10 Circuits/Dispatch). We note that BellSouth's performance data is based on low volumes in Kentucky and South Carolina. Further, there are no volumes reported for BellSouth retail operations in Kentucky in March, May, and June. In Kentucky, competitive LECs experience an average of 5.26% provisioning trouble reports within 30 days, compared to an average of 0.00%, while in South Carolina competitors experience an average of 13.04% trouble reports within 30 days, compared to an average of 3.05% for BellSouth retail operations. *See* Kentucky/South Carolina B.2.19.5.1.1 (% Provisioning Troubles within 30 Days, ADSL, HDSL and UCL<10 Circuits/Dispatch).

900 *See Verizon Massachusetts Order*, 16 FCC Rcd at 8988, para. 93 n.296. BellSouth's installation quality performance data show that competitive LECs volumes were, on average, 44 in Alabama, 10 in Kentucky, 39 in Mississippi, 58 in North Carolina, and 6 in South Carolina during the relevant period. *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.19.5.1.1 (% Provisioning Troubles within 30 Days, ADSL, HDSL and UCL<10 Circuits/Dispatch).

901 In Georgia, BellSouth's performance data show that it achieved parity for this metric for all months during the relevant period. *See* Georgia B.2.19.5.1.1 (% Provisioning Troubles within 30 Days, ADSL, HDSL and UCL<10 Circuits/Dispatch).

order processing timeliness performance was slightly out of parity in Kentucky, Mississippi, and North Carolina on a few occasions.[902] We find that these performance discrepancies are slight, episodic, and do not appear to be competitively significant.

237. Covad alleges that its own data show that BellSouth's UCL-ND order completion interval,[903] installation quality,[904] and maintenance average duration[905] performance demonstrates discriminatory treatment.[906] BellSouth, however, contends that its performance with respect to this type of loop has been excellent and that it installs UCL-ND loops in a timely manner.[907] We find that Covad-specific data is outweighed by evidence of BellSouth's overall performance. As in prior section 271 orders, performance data relative to competitive LECs on an aggregate basis is the most persuasive evidence of whether a BOC meets the checklist requirements.[908] BellSouth's performance data demonstrate that BellSouth met or exceeded the parity standard for the order completion interval.[909] In addition, BellSouth's maintenance and repair performance, which measures the timeliness and quality of the maintenance and repair functions,

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[902] BellSouth met the vast majority of its order processing timeliness benchmarks. In Kentucky, BellSouth missed the benchmark (95% within 3 hours) for mechanized orders in March. However, competitive LECs experience an average of 97.20% within 3 hours for the relevant period. *See* Kentucky B.1.9.5 (FOC Timeliness, Mechanized, ADSL, HDSL and UCL). For partially mechanized orders in Mississippi and North Carolina, BellSouth missed the benchmark (85% within 10 hours) in March and May, respectively. In Mississippi, competitive LECs experience an average of 90.60% within 10 hours, and in North Carolina competitive LECs experience an average of 88.57% within 10 hours. *See* Mississippi/North Carolina B.1.12.5 (FOC Timeliness, Partially Mechanized, ADSL, HDSL and UCL).

[903] Covad contends that for orders of this loop requiring dispatch, BellSouth completed orders for its own customers one day faster than Covad's orders in North Carolina, two days faster in Alabama, and five days faster in Kentucky. Covad Comments at 27.

[904] Covad maintains that BellSouth failed to properly provision 38 of 50 UCL-ND orders in Florida in January 2002. Covad Comments at 24.

[905] Specifically, Covad states that in Alabama for UCL-ND loops not requiring dispatch, BellSouth fixed problems for its own customers in 8.10 hours, while taking 24 hours to get Covad's customers back to service. Covad Comments at 29-30.

[906] *See generally* Covad Comments at 22-31. In fact, Covad contends that BellSouth's provisioning problems with the UCL-ND loop have been so bad that Covad was forced to stop ordering the loop entirely in every state in the BellSouth region except Florida. *Id.* at 23.

[907] BellSouth Reply Comments at 55; BellSouth Varner Reply Aff. at paras. 117, 120. Concerning Covad's claim that BellSouth provides retail customers faster repair services on average than it provides for Covad's UCL-ND orders, BellSouth states that Covad fails to note the differences in sample size and the effect even a single "miss" can have on the reported performance for the competitive LEC product. *Id.*

[908] *See, e.g., BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9148, para. 226.

[909] *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.2.2 (Order Completion Interval within 7 Days, ADSL, HDSL and UCL/Loop without Conditioning<6 Circuits/Dispatch).

has shown parity during the relevant period.[910] Moreover, as discussed above, we find that BellSouth provisions xDSL-capable loops of a quality sufficient to afford competitors a meaningful opportunity to compete. Thus, although Covad claims that its data show discriminatory performance, allegedly anomalous results for a single carrier in this instance do not qualify as a pattern of systemic performance disparities that result in competitive harm.[911]

238. *UNE ISDN Loops*. Like the state commissions,[912] we find that BellSouth provides ISDN loops to competitors in a nondiscriminatory manner. BellSouth's performance under the order completion interval and the percentage missed installation appointment submetrics shows that BellSouth has been timely in the provisioning of ISDN loops.[913] Further, BellSouth's performance data demonstrate that it generally met the parity standard for the percentage of provisioning troubles within 30 days (dispatch) of installation metric.[914]

239. BellSouth's data, however, reveal some performance issues with respect to the maintenance and repair of ISDN loops. Specifically, while BellSouth met or exceeded the parity standard for metrics measuring the percentage of missed repairs, maintenance average duration,

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[910] BellSouth met or exceeded parity with respect to the percentage of missed repair appointments, customer trouble report rate, and maintenance average duration metrics in each of the states during the relevant period. *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.1.5.1-B.3.1.5.2 (% Missed Repair Appointments, ADSL, HDSL and UCL/Dispatch and Non-Dispatch); B.3.2.5.1-B.3.2.5.2 (Customer Trouble Report Rate, ADSL, HDSL and UCL/Dispatch and Non-Dispatch); B.3.3.5.1-B.3.3.5.2 (Maintenance Average Duration, ADSL, HDSL and UCL/Dispatch and Non-Dispatch). BellSouth met the standard for repeat troubles within 30 days, with two minor exceptions. *See* South Carolina B.3.4.5.2 (% Repeat Troubles within 30 Days, ADSL, HDSL and UCL/Non-Dispatch). BellSouth missed this metric in April and June.

[911] If evidence becomes available to the Commission in the future sufficient to show systemic performance disparities, we will pursue appropriate enforcement action.

[912] *See* Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 192; South Carolina Commission Comments at 1.

[913] BellSouth met the benchmark for installation timeliness and missed installation appointments for each month in all five states during the relevant period. *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.1.6.3.1 (Order Completion Interval, UNE ISDN<6 Circuits/Dispatch); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN<10 Circuits/Dispatch).

[914] BellSouth's performance data show that it provides an installation quality sufficient to afford competitors a meaningful opportunity to compete. *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.19.6.1.1 (% Provisioning Troubles within 30 Days, UNE ISDN<10 Circuits/Dispatch). However, BellSouth missed one month in Kentucky and two months in North Carolina. In Kentucky, competitive LECs experienced an average of 8.00% provisioning troubles within 30 days of installation, compared to 6.79% for BellSouth retail operations. *See* Kentucky B.2.19.6.1.1 (% Provisioning Troubles within 30 Days, UNE ISDN<10 Circuits/Dispatch). In North Carolina, competitors experienced an average of 8.22% compared to 5.82% for BellSouth retail for the same period. *See* North Carolina B.2.19.6.1.1 (% Provisioning Troubles within 30 Days, UNE ISDN<10 Circuits/Dispatch. We find, however, that BellSouth's overall performance for this metric show that BellSouth provides competitors with sufficient installation quality.

and the percentage of repeat troubles with few minor exceptions,[915] BellSouth was out of parity with the customer trouble report rate for several months in each of the five states.[916] We do not find, however, that these performance discrepancies are competitively significant. Further, we note that no commenter has commented on BellSouth's ISDN loop performance with respect to this metric. Accordingly, in light of BellSouth's competitive carrier ISDN loop record overall, we do not find that BellSouth's performance demonstrates that it fails to meet the requirements of checklist item 4.

240. *Digital Loops.* We find, as did the state commissions,[917] that BellSouth's performance with respect to digital loops complies with checklist item 4. BellSouth's performance in this area generally met the parity standards established by the state commissions for installation timeliness.[918] We recognize, however, that BellSouth's performance in North

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[915] Specifically, BellSouth's missed repair appointment performance (dispatch) was out of parity for two months in North Carolina and one month in South Carolina during the relevant period. *See* North Carolina/South Carolina B.3.1.6.1 (% Missed Repair Appointments, UNE ISDN/Dispatch). In North Carolina, competitive carriers experienced an average of 1.19% missed repair appointments compared to 1.03% for BellSouth retail operations from March through June. In South Carolina, competitors experienced an average of 7.14% compared to 3.09% for BellSouth retail for the same period. *Id.* In Alabama, BellSouth was only out of parity in May for non-dispatch loops. *See* Alabama B.3.1.6.2 (% Missed Repair Appointments, UNE ISDN/Non-Dispatch). BellSouth's maintenance average duration (dispatch) was only out of parity for one month in South Carolina. *See* South Carolina B.3.3.6.1 (Maintenance Average Duration, UNE ISDN/Dispatch). BellSouth performance data show that it was out of parity for one month in Alabama and South Carolina for maintenance average duration (non-dispatch). In North Carolina, BellSouth missed parity for two months, and competitive carriers experience an average of 2.75% misses compared to an average of 1.73% for BellSouth's retail operations for the relevant period. *See* Alabama/North Carolina/South Carolina B.3.3.6.2 (Maintenance Average Duration, UNE ISDN/Non-Dispatch). BellSouth was also slightly out of parity for the percentage of repeat troubles within 30 days metric. However, BellSouth's performance data for this metric show that BellSouth was out of parity for one month in Alabama (dispatch), and one month in Mississippi and North Carolina (non-dispatch). *See* Alabama B.3.4.6.1 (% Repeat Troubles within 30 Days, UNE ISDN/Dispatch); Mississippi/North Carolina B.3.4.6.2 (% Repeat Troubles within 30 Days, UNE ISDN/Non-Dispatch). Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

[916] Specifically, BellSouth's customer trouble report rate (dispatch) was out of parity for one month in South Carolina, two months in Alabama and Kentucky, three months in Mississippi, and four months in North Carolina. *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch). In Mississippi, competitive carriers experienced an average of 1.33% dispatch trouble reports compared to an average of 0.61% for BellSouth retail operations for the relevant period. In North Carolina, competitors experienced an average of 1.18% dispatch trouble reports compared to an average of 0.64% for BellSouth retail. *See* Mississippi/North Carolina B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch). BellSouth's customer trouble report rate (non-dispatch) performance data show that BellSouth was in parity for all months reported. *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.2.6.2 (Customer Trouble Report Rate, UNE ISDN/Non-Dispatch).

[917] *See* Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 192; South Carolina Commission Comments at 1.

[918] *See* Kentucky/Mississippi/South Carolina B.2.1.18.1.1 (Order Competition Interval, Digital Loops<DS1/<10 Circuits/Dispatch); Kentucky/Mississippi/North Carolina/South Carolina B.2.1.18.1.2-B.2.1.18.2.2 (Order (continued....)

Carolina with respect to an installation timeliness measure – the order completion interval metric (dispatch) – was out of parity for March through June.[919] The record shows, however, that no facilities were available for a disproportionate percentage of the competitive LEC orders reflected in this metric and that completing these orders required BellSouth to dispatch technicians to provision new loops.[920] We find that BellSouth reasonably assigned these orders longer intervals than it assigned to orders that did not involve the dispatch of technicians. Because the retail orders reflected in this metric typically did not involve the dispatch of technicians, we also find that the disparity in BellSouth's performance under this metric does not raise an issue of checklist noncompliance.[921] In addition, the data for the other installation timeliness metric – percent missed installation appointments – show that BellSouth missed no installation appointments for competitive LECs during the relevant period in North Carolina.[922] In these circumstances, we conclude that BellSouth's performance under this order completion interval metric has not denied competitive LECs a meaningful opportunity to compete in North Carolina.

241. We reject KMC's argument that BellSouth's provisioning and maintenance and repair performance for digital loops preclude a finding of checklist compliance.[923] BellSouth's installation quality measure for digital loops – the percentage of provisioning troubles within 30 days – was out of parity for certain months in Kentucky, Mississippi, North Carolina, and South Carolina.[924] The record shows, however, that BellSouth has implemented several initiatives to

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Competition Interval, Other Digital Loops<DS1); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.18.18.1-B.2.18.18.2.2 (% Missed Installation Appointments, Digital Loops<DS1/<10 Circuits).

[919] *See* **North Carolina B.2.1.18.1.1 (Order Competition Interval, Digital Loops<DS1/<10 Circuits/Dispatch)** (monthly averages ranging from 8.72 days to 9.69 days for competitive LECs and from 3.74 days to 5.51 days for BellSouth's retail operations).

[920] BellSouth August 14 *Ex Parte* Letter at 3; BellSouth Varner Reply Aff. at para. 224.

[921] BellSouth August 14 *Ex Parte* Letter at 3.

[922] *See* BellSouth Varner Reply Aff. at para. 224; North Carolina B.2.18.18.1.1 (% Missed Installation Appointments, Digital Loops<DS1/<10 Circuits/Dispatch) (no missed installation appointments for competitive LECs from March through June, versus an overall 3.70 % missed installation appointment rate for BellSouth's retail operations during the same period).

[923] KMC Comments at 15-16.

[924] *See* Kentucky/Mississippi/North Carolina/South Carolina B.2.19.18.1.1 (% Provisioning Troubles within 30 Days, Digital Loops<DS1/<10 Circuits/Dispatch). Specifically, BellSouth was below parity for this metric for May in Kentucky (11.76% of installations for competitive LECs having troubles within 30 days, versus 1.25% for BellSouth's retail operations); for April in Mississippi (8.97% of installations for competitive LECs having troubles within 30 days, versus 3.29% for BellSouth's retail operations); for March through May in North Carolina (6.25%, 10.12%, and 10.14% of installations for competitive LECs having troubles within 30 days, versus 3.58%, 2.21%, and 3.52% for BellSouth's retail operations); and for March and April in South Carolina (15.63% and 9.43% of installations for competitive LECs having troubles within 30 days, versus 3.24% and 3.71% for BellSouth's retail operations). *Id.*

reduce provisioning troubles.[925] These initiatives include working with competitive LECs to rectify any issues and concerns prior to completing a service order.[926] In addition, at the competitive LEC's request, BellSouth will engage in cooperative testing to ensure that the loop being provisioned meets the relevant technical criteria.[927] Given this evidence, and recognizing BellSouth's generally acceptable performance for other categories of loops, we find that BellSouth's performance under this installation quality metric does not warrant a finding of checklist noncompliance.

242. Similarly, although BellSouth's maintenance and repair performance for digital loops was generally in parity during the applicable period,[928] one measure of that performance – the customer trouble report rate – was out of parity for the applicable states throughout much of the relevant period.[929] Because the overall trouble report rate for digital loops that BellSouth provided competitive LECs was low during the relevant period,[930] we find that these disparities lack competitive significance.[931] BellSouth also was out of parity with regard to another measure of maintenance and repair quality – maintenance average duration – during certain months in Alabama, Mississippi, North Carolina, and South Carolina.[932] However, BellSouth's overall

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925 *See* BellSouth August 14 OSS and Loops *Ex Parte* Letter at 4.

926 BellSouth Ainsworth Aff. at para. 139.

927 *Id.*

928 *See* BellSouth August 14 OSS and Loops *Ex Parte* Letter at 9, 11-14, 21, 23-27, 29-32 (discussing % Missed Repair Appointments, Maintenance Average Duration, and % Repeat Troubles within 30 Days, Digital Loops). We note that while BellSouth has provided disaggregated maintenance and repair data for digital loops, no metrics have been established for these data.

929 *See* BellSouth August 14 OSS and Loops *Ex Parte* Letter at 15, 17-20 (discussing Customer Trouble Report Rate, Digital Loops<DS1/Dispatch) (out of parity in applicable states throughout relevant period); *id.* (discussing Customer Trouble Report Rate, Digital Loops<DS1/Non-Dispatch) (out of parity in Alabama during April and May, in Mississippi during June, in North Carolina during March through May, and in South Carolina during March).

930 During that period, the average trouble report rate for digital loops provided competitive LECs was 1.12% in Alabama, 1.27% in Kentucky, 1.54% in Mississippi, 1.64% in North Carolina, and 1.63% in South Carolina. *See* BellSouth August 14 *Ex Parte* Letter at 15, 17-20 (discussing Customer Trouble Report Rate, Digital Loops<DS1).

931 *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9150, para. 230.

932 *See* BellSouth August 14 OSS and Loops *Ex Parte* Letter at 27, 29-32 (discussing Maintenance Average Duration, Digital Loops<DS1/Non-Dispatch). Specifically, in Alabama, BellSouth's performance for this measure was out of parity in April with an average duration of 5.01 hours for competitive LECs and 2.28 hours for BellSouth's retail operations, and in May with an average duration of 7.03 hours for competitive LECs and 2.55 hours for BellSouth's retail operations. In Mississippi, BellSouth's performance was out of parity in June with an average duration of 5.63 hours for competitive LECs and 2.50 hours for BellSouth's retail operations. In North Carolina, BellSouth's performance was out of parity in June with an average duration of 4.29 hours for competitive LECs and 2.29 hours for BellSouth's retail operations. In South Carolina, BellSouth's performance was out of parity in March with an average duration of 4.87 hours for competitive LECs and 1.99 hours for BellSouth's retail operations, and in June with an average duration of 3.92 hours for competitive LECs and 1.88 hours for BellSouth's retail operations. *Id.*

performance for this measure during the applicable period for competitive LECs was comparable to its performance for its own retail operations.[933] We therefore find that the disparities in maintenance average duration also lack competitive significance. Moreover, contrary to KMC's assertion, BellSouth was consistently in parity, with very few repeat troubles, with regard to its measure for repeat troubles within 30 days of maintenance or repair of digital loops.[934]

243. *High Capacity Loops.* We find, as did the state commissions,[935] that BellSouth's performance with respect to high capacity loops complies with checklist item 4. We reach this conclusion despite the fact that BellSouth's performance with respect to certain performance metrics – including the percentage of missed installation appointments for high capacity loops and the percentage of troubles found within 30 days following installation of a high capacity loop – is out of parity for several recent months.[936] As we discuss below, however, this performance does not warrant a finding of checklist noncompliance. As the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[937]

244. First, we recognize that BellSouth's performance with respect to an installation timeliness measure – the missed installation appointments metric – was out of parity for most of the months in Alabama.[938] The record shows, however, that BellSouth missed few installation

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[933] During the relevant period, BellSouth's maintenance intervals for digital loops averaged 4.76 hours for competitive LECs and 4.25 hours for BellSouth's retail operations in Alabama, 4.52 hours for competitive LECs and 3.78 hours for BellSouth's retail operations in Kentucky, 4.83 hours for competitive LECs and 4.09 hours for BellSouth's retail operations in Mississippi, 3.71 hours for competitive LECs and 3.83 hours for BellSouth's retail operations in North Carolina, and 5.14 hours for competitive LECs and 3.39 hours for BellSouth's retail operations in South Carolina. *See* BellSouth August 14 OSS and Loops *Ex Parte* Letter at 27, 29-32 (discussing Maintenance Average Duration, Digital Loops<DS1).

[934] *See* KMC Comments at 16. Specifically, the record shows that during the relevant period, competitive LECs reported only 77 repeat troubles for digital loops in the applicable states. BellSouth August 14 OSS and Loops *Ex Parte* Letter at 21, 23-26 (discussing % Repeat Troubles within 30 Days, Digital Loops<DS1).

[935] *See* Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 206; South Carolina Commission Comments at 1.

[936] *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops≥DS1/<10 Circuits/Dispatch); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops≥DS1/<10 Circuits/Dispatch). Notes 941 and 944, *infra*, provide the relevant data regarding BellSouth's performance under these metrics.

[937] *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 619; *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 22; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17468-69, para. 90 (finding that even "poor" performance with regard to high capacity loops did not warrant a finding of checklist noncompliance for all loop types where high capacity loops represented only a small percentage of all loops ordered by competitors in a state). Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

[938] *See* Alabama B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops≥DS1/<10 Circuits/Dispatch). BellSouth's data for Alabama show that, from March through June, BellSouth missed 4.62% of its installation appointments for its retail high capacity loop operations and 9.51% of its installation appointments for competitive (continued....)

appointments for either wholesale or retail high capacity loops in Alabama during the applicable period.[939] Therefore, a very small increase in the number of missed installation appointments for competitive LEC customers can cause BellSouth to fail to achieve parity for this metric in a given month.[940] BellSouth's data show that it missed a total of 29 high capacity loop appointments for competitive LECs during the relevant period and that 14 fewer missed installation appointments would have allowed BellSouth to achieve parity with respect to this metric throughout that period.[941] Moreover, we note that BellSouth's performance reflected by an installation timeliness metric – the order completion interval metric for high capacity loops – satisfies the benchmark for all months.[942] Given this evidence, we do not find that lack of parity on this missed installation appointments metric warrants a finding that BellSouth fails to meet checklist item 4 in Alabama.[943]

245. Next, in each applicable state, the percentage of troubles reported within 30 days following installation was statistically out of parity during much of the relevant period.[944] The

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LECs' high capacity loop operations. *Id.* We note that BellSouth was out of parity for this metric for May in Kentucky and North Carolina. Kentucky/North Carolina B.2.1.19.1.1 (Order Completion Interval, Digital Loops≥DS1/<10 Circuits/Dispatch). BellSouth, however, failed to keep only three high capacity loop appointments for May in Kentucky and only one high capacity loop appointment for May in North Carolina. These isolated disparities in performance do not undercut BellSouth's otherwise acceptable level of performance and, thus, do not require a finding of checklist noncompliance. *See, e.g., Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

939 **BellSouth Varner Reply Aff. at para.** 226; Alabama B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops≥DS1/<10 Circuits/Dispatch).

940 BellSouth Varner Reply Aff. at para. 226.

941 BellSouth's data show that of its high capacity loop appointments for competitive LECs in Alabama, it missed a total of eight in March, nine in April, six in May, and six in June. While BellSouth achieved parity for this metric in Alabama during March, four fewer missed appointments during April, five fewer missed appointments during May, and five fewer missed appointments during June would have enabled BellSouth to achieve parity for this metric in Alabama during each relevant month. *See* Alabama B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops≥DS1/<10 Circuits/Dispatch.

942 *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.1.19.1.1 (Order Completion Interval, Digital Loops≥DS1/<10 Circuits/Dispatch); *see also* BellSouth August 15 Non-pricing *Ex Parte* Letter at 9-10 (arguing that the need to construct or rearrange facilities serving particular end users caused many of the missed installation appointments for high capacity loops); BellSouth Varner Reply Aff. at para. 226 (stating that BellSouth missed six high capacity loop appointments in March and seven high capacity loop appointments in April because it failed to add needed facilities at a single location prior to the scheduled installation dates).

943 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6344, para. 213.

944 Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops≥DS1/<10 Circuits/Dispatch). In Alabama, competing carriers experienced an average of 12.26% trouble reports within 30 days after installation of a high capacity digital loop, compared to an average of 2.98% for BellSouth retail operations from March through June. *See* Alabama B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops≥DS1/<10 Circuits/Dispatch). Kentucky performance data show that competitive carriers experienced an average of 7.38% trouble reports, compared to an average of 2.28% for BellSouth retail operations for the same period. *See* Kentucky B.2.19.19.1.1 (% Provisioning Troubles within 30 (continued....)

record makes clear, however, that many of the troubles competitive LECs reported during that period were closed without any trouble being found.[945] Adjusting BellSouth's reported performance data to eliminate these trouble reports would improve the reported results significantly.[946] In addition, BellSouth has implemented an ongoing program to ensure installation quality for high capacity loops throughout its region.[947] This program has allowed BellSouth to identify and, in some instances, eliminate the problems that cause installation problems with high capacity loops.[948] As with digital loops, this program includes an opportunity for the competitive LEC to engage in cooperative testing with BellSouth to ensure that a high capacity loop meets relevant technical criteria prior to its being handed off to the competitive LEC.[949] BellSouth indicates, however, that, even with cooperative testing, some problems arise cannot be detected until the customer premises equipment is connected to the loop, which typically does not happen until several days after BellSouth hands it off to the competitive LEC.[950] Given this evidence, and recognizing BellSouth's generally acceptable performance for other categories of loops, we find that BellSouth's performance is in compliance with checklist item 4.

246. We reject KMC's contentions that BellSouth's provisioning and maintenance and repair performance for high capacity loops precludes a finding of checklist compliance.[951] Given

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Days, Digital Loops≥DS1/<10 Circuits/Dispatch). In Mississippi, the comparable figures were 16.44% for competitive LECs and 5.92% for BellSouth. *See* Mississippi B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops≥DS1/<10 Circuits/Dispatch). In North Carolina, they were 12.79% for competitive LECs and 5.00% for BellSouth. *See* North Carolina B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops≥DS1/<10 Circuits/Dispatch). In South Carolina, they were 12.18% for competitive LECs and 4.15% for BellSouth. South Carolina B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops≥DS1/<10 Circuits/Dispatch). We note that in the *BellSouth Georgia/Louisiana Order*, the Commission considered performance data showing averages for trouble reports within 30 days of 7.87% for competitive LECs and 1.76% for BellSouth's retail operations in Georgia, and 6.93% for competitive LECs and 1.00% for BellSouth retail operations in Louisiana. *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9152 n.907.

945 *See* BellSouth Varner Reply Aff. at para. 219.

946 *See id.*

947 BellSouth August 14 OSS and Loops *Ex Parte* Letter at 4; BellSouth Ainsworth Aff. at para. 139; BellSouth Varner Reply Aff. at paras. 217; *see also BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9152-53, para. 233. This program also addressed digital loops. *See* para. 241, *supra.*

948 BellSouth August 14 OSS and Loops *Ex Parte* Letter at 4; BellSouth Varner Reply Aff. at paras. 216-18. For instance, to help assure that its technicians test high capacity loops before reporting that installations are complete, BellSouth now requires that the technicians post the test results. BellSouth Varner Reply Aff. at para. 216.

949 BellSouth Ainsworth Aff. at para. 139; BellSouth August 14 OSS and Loops *Ex Parte* Letter at 4.

950 *See* BellSouth Varner Reply Aff. at para. 215 (stating that the customer premises equipment adds loop length and resistance to the circuit that may push it beyond viable limits).

951 KMC Comments at 15-16. KMC also asserts that facilities-based carriers like KMC will have no meaningful opportunity to compete unless the Commission forces BellSouth to improve its high capacity loop performance by denying this application. KMC Comments at 8-9.

BellSouth's generally acceptable performance with regard to other types of loops, and BellSouth's continuing efforts to ensure installation quality for high capacity loops, we cannot conclude that BellSouth's performance with regard to high capacity loops denies competitive LECs a reasonable opportunity to compete.[952] Contrary to KMC's assertion,[953] repeat troubles are not a major problem with respect to high capacity loops. During the relevant four-month period, competitive LECs reported only 283 repeat troubles for high capacity loops, a reporting rate generally in parity with the retail analogue.[954] Moreover, BellSouth generally maintained parity performance under the missed repair appointment and the mean time to repair measures during the relevant period.[955] Although one measure of BellSouth's maintenance and repair performance for high capacity loops – the customer trouble report rate – was out of parity for the applicable states throughout much of the relevant period,[956] the overall trouble report rate for high capacity loops that BellSouth provided competitive LECs was low during the relevant period.[957] We therefore find that these disparities lack competitive significance,[958] and that BellSouth's maintenance and repair performance for high capacity loops warrants a finding of checklist compliance.

247. We also reject KMC's argument that BellSouth's performance for the percentage of jeopardy notices for mechanized high capacity loops, which is significantly out of parity throughout the four-month period,[959] demonstrates that BellSouth assigns high capacity loops in a

952 *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17468-69, para. 90.

953 *See* KMC Comments at 16.

954 BellSouth August 14 OSS and Loops *Ex Parte* Letter at 21, 23-26 (discussing % Repeat Troubles within 30 Days, Digital Loops≥DS1) (parity during the applicable months except with regard to high capacity loop troubles requiring dispatch in Mississippi in April, and high capacity loop troubles not requiring dispatch in South Carolina in April and Mississippi in May).

955 *See* BellSouth August 14 OSS and Loops *Ex Parte* Letter at 9, 11-14 (discussing Missed Repair Appointments, Digital Loops≥DS1) (parity throughout the applicable states for the relevant period except with regard to high capacity loop maintenance requiring dispatch in North Carolina in May); *id.* at 27-33 (discussing Maintenance Average Duration, Digital Loops≥DS1) (parity throughout the applicable states for the relevant period except with regard to high capacity loop maintenance requiring dispatch in North Carolina in May).

956 *See* BellSouth August 14 OSS and Loops *Ex Parte* Letter at 15, 17-20 (discussing Customer Trouble Report Rate, Digital Loops≥DS1/Dispatch) (out of parity in applicable states throughout relevant period); *id.* (discussing Customer Trouble Report Rate, Digital Loops≥DS1/Non-Dispatch) (out of parity in Alabama, Mississippi, North Carolina, and South Carolina throughout relevant period and in Kentucky from April through June).

957 During that period, the average trouble report rate for high capacity loops was 3.19% in Alabama, 4.04% in Kentucky, 7.82% in Mississippi, 3.84% in North Carolina, and 4.22% in South Carolina. *See id.* (Customer Trouble Report Rate, Digital Loops≥DS1).

958 *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9150, para. 230.

959 Alabama/Kentucky/Mississippi/North Carolina/South Carolina Metric B.2.5.19 (% Jeopardies, Digital Loops≥DS1, Mechanized). BellSouth's monthly performance data for this metric range from 3.93% to 35.87% during the four-month period; for competitive LECs, the percentages range from 60.87% to 93.22%.

discriminatory manner.[960] This difference in the jeopardy rates simply reflects differences between the types and locations of facilities reflected in this metric. Because virtually all of the high capacity loops ordered by competitive LECs terminate at an end user's premises, it is likely that a temporary facilities shortage would place a competitive LEC's order in jeopardy.[961] In contrast, a significant percentage of the high capacity circuits included in the retail analogue for this metric carry traffic between BellSouth central offices, where temporary facility shortages are significantly less likely.[962] We therefore give this performance data minimal weight with respect to whether BellSouth's loop assignment practices are nondiscriminatory.[963]

248. *Line Sharing.* We find, as did the state commissions,[964] that BellSouth offers nondiscriminatory access to the high frequency portion of the loop in each applicable state.[965] We note that competitive LECs in Mississippi and South Carolina have not yet ordered any line-sharing arrangements from BellSouth.[966] Because order volumes for line-shared loops are low in each of the states, we look to BellSouth's line-sharing performance in Georgia to inform our analysis.[967] We further note that no party has alleged that BellSouth's line-sharing offerings in

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960 KMC Comments at 11. We note that KMC makes no claim that BellSouth provides jeopardy notices for high capacity loops in a discriminatory manner. *See id.*

961 BellSouth Varner Reply Aff. at para. 127.

962 *Id.*

963 We note that BellSouth's systems and procedures are designed to ensure that high capacity loops are assigned on a nondiscriminatory basis. BellSouth Milner Reply Aff. at para. 10. Specifically, BellSouth shows that it uses a mechanized system, LFACS, to assign high capacity loops, among other facilities, on a "first come, first served" basis to its wholesale and retail customers. If LFACS cannot find a suitable facility, the service order is referred to BellSouth's Address and Facilities Inventory Group (AFIG) or its Service Advocate Center (SAC). These groups assign high capacity loops and other facilities in the order in which BellSouth originally received the service orders. *Id.* We also note that BellSouth's data make clear that it provides jeopardy notices to competitive LECs significantly in advance of scheduled installation dates. *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.8.19 (Average Jeopardy Notice Interval, Digital Loops≥DS1, Mechanized) (showing compliance with benchmark requiring that jeopardy notices be provided at least 48 hours prior to scheduled installation). We therefore reject KMC's argument that competitive LECs do not receive adequate notice that the change in service providers will not take place as scheduled. KMC Comments at 14.

964 *See* Alabama Commission Comments at 211; Kentucky Commission Comments at 32-33; Mississippi Commission Comments at 3; North Carolina Commission Comments at 200; South Carolina Commission Comments at 1.

965 As discussed in note 61, *supra*, the D.C. Circuit recently stated that "the *Line Sharing Order* must be vacated and remanded." *USTA v. FCC*, 290 F.3d 415, 429. The court also stated that it "grant[ed] the petitions for review[] and remand[ed] the *Line Sharing Order* . . . to the Commission for further consideration in accordance with the principles outlined." *Id.* at 430. We are addressing the line sharing rules as part of our *Triennial Review Proceeding*. *See Triennial Review Notice*, 16 FCC Rcd at 22805, paras. 53-54.

966 BellSouth Milner Aff. at para. 114.

967 *See* para. 233, *supra*.

Mississippi and South Carolina fail to provide nondiscriminatory access to the high frequency portion of the loop.

249. BellSouth has generally met the benchmark and parity standards for installation timeliness,[968] installation quality,[969] and maintenance and repair quality for line sharing in the other relevant states.[970] Because BellSouth's performance data show that it installs line-sharing arrangements in accordance with the standards approved by the state commissions,[971] we reject Covad's reliance on BellSouth's alleged failure to provision line-sharing arrangements within the time frame specified in its interconnection agreement with Covad.[972] Given that BellSouth's

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968 *See* Alabama/Kentucky/North Carolina B.1.9.7-B.1.13.7 (Firm Order Confirmation, Line Sharing); Alabama/Kentucky/North Carolina B.2.1.7.3.1-B.2.7.5.2 (Order Completion Interval, Line Sharing); *see also* Georgia B.2.1.7.3.1-B.2.1.7.5.2 (Order Completion Interval, Line Sharing); Georgia B.2.1.7.3.1-B.2.1.7.5.2 (Order Completion Interval, Line Sharing); Alabama/Kentucky/North Carolina/Georgia B.2.18.7.1.1-B.2.18.7.2.2 (% Missed Installation Appointments, Line Sharing).

969 *See* Alabama/Kentucky/North Carolina/Georgia B.2.19.7.1.2-B.2.19.7.2.1 (% Provisioning Troubles within 30 Days, Line Sharing); Alabama/Kentucky/North Carolina/Georgia B.3.2.7.1-B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing).

970 *See* Alabama/Kentucky/North Carolina/Georgia B.3.1.7.1-B.3.1.7.2 (% Missed Repair Appointments, Line Sharing); Alabama/Kentucky/North Carolina/Georgia B.3.3.7.1-B.3.3.7.2 (Maintenance Average Duration, Line Sharing); Alabama/Kentucky/North Carolina/Georgia B.3.4.7.1-B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing). While Covad complains that BellSouth took longer to perform line-sharing maintenance for competitive LECs than for its own retail operations, BellSouth's performance under the metrics for maintenance average duration is generally in parity, with very low volumes, in Alabama, Kentucky, and North Carolina from March through June. Covad Comments at 29-30; *see* Alabama B.3.3.7.1-B.3.3.7.2 (Maintenance Average Duration, Line Sharing) (parity in all four months for both dispatch and non-dispatch); Kentucky B.3.3.7.1-B.3.3.7.2 (Maintenance Average Duration, Line Sharing) (parity in all four months for both dispatch and in three months for non-dispatch); North Carolina B.3.3.7.1-B.3.3.7.2 (Maintenance Average Duration, Line Sharing) (parity in all four months for both dispatch and non-dispatch).

971 *See* Alabama/Kentucky/North Carolina B.2.1.7.3.1-B.2.1.7.3.2 (Order Completion Interval, Line Sharing/<6 Circuits). We note that BellSouth's order completion interval performance was out of parity during June in Alabama, Kentucky, and North Carolina, and during much of the relevant period in Georgia. *See* Alabama/Kentucky/North Carolina B.2.1.7.3.2 (Order Completion Interval, Line Sharing/<6 Circuits/Non-Dispatch) (average June intervals of 4.00 for competitive LECs and 2.43 days for BellSouth's retail operations in Alabama, 3.85 days for competitive LECs and 2.46 days for BellSouth's retail operations in Kentucky, and 3.63 days for competitive LECs and 2.39 days for BellSouth's retail operations in North Carolina); Georgia B.2.1.7.3.1-B.2.1.7.5.2 (Order Completion Interval, Line Sharing) (average monthly intervals ranging from 3.88 days to 5.96 days for competitive LECs and 2.39 days to 4.07 days for BellSouth's retail operations). The data indicate, however, that, on average during the applicable period, BellSouth's order completion intervals were 0.49 days shorter in Alabama, 0.46 days longer in Kentucky, 0.15 days shorter in North Carolina, and 0.66 days longer in Georgia for competitive LECs than for BellSouth's retail operations. Alabama/Kentucky/North Carolina/Georgia B.2.1.7.3.1-B.2.1.7.3.2 (Order Completion Interval, Line Sharing/<6 Circuits). We find these differences to be competitively insignificant.

972 *See* Covad Comments at 22-23, 27 (asserting that BellSouth's failure to provision line-sharing arrangements within the three-day time frame specified in the interconnection agreement adversely affects Covad's ability to serve its customers with the speed and efficiency they expect).

line-sharing provisioning intervals for its retail customers and competitive LECs are comparable, and recognizing BellSouth's timeliness performance during the relevant period in Georgia, we find that BellSouth's installation performance does not warrant a finding of checklist noncompliance.[973] We do not, however, exclude the possibility that Covad might prevail in the event it chose to pursue this as a dispute under its agreement with BellSouth.

250. We also reject Covad's claim that BellSouth's line-sharing provisioning and maintenance and repair performance precludes a grant of long distance authority.[974] Although BellSouth's performance with regard to certain measures – customer trouble reports within 30 days of installation and repeat trouble reports within 30 days of maintenance or repair -- is out of parity in certain months,[975] we find these disparities in reported performance do not warrant a finding of checklist noncompliance. First, as BellSouth argues, certain disparities reflect only a few trouble reports.[976] Second, because only a small percentage of the line-sharing arrangements provided by BellSouth resulted in initial trouble reports, the total volume of repeat troubles is too

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[973] We note that Covad provides no data regarding the provisioning intervals for the line-shared loops it obtains from BellSouth. *See* Covad Comments at 27 (alleging line-sharing provisioning intervals of 3.88 days in Alabama, 4.07 days in Kentucky, and 3.78 days in North Carolina). In any event, this proceeding is not the proper forum for redressing any interconnection agreement violations by BellSouth. Covad may seek enforcement of its interconnection agreement by the state commissions.

[974] Covad Comments at 27-29.

[975] Alabama B.2.19.7.1.2 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Non-Dispatch) (out of parity during three months with an average trouble rate of 8.43% for competitive LECs and 1.95% for BellSouth's retail operations); North Carolina B.2.19.7.1.2 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Non-Dispatch) (out of parity throughout relevant period with an average trouble rate of 20.62% for competitive LECs and 2.38% for BellSouth's retail operations); Georgia B.2.19.7.1.1-B.2.19.7.1.2 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits) (out of parity throughout relevant period with trouble rates ranging from 11.30% to 39.42% for competitive LECs and from 2.06% to 5.27% for BellSouth); North Carolina B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Non-Dispatch) (out of parity in April and June with overall repeat trouble rates of 36.00% for competitive LECs and 22.19% for BellSouth's retail operations during March through June); Georgia B.3.4.7.1 (% Repeat Troubles within 30 Days, Line Sharing/Dispatch) (out of parity in March, May, and June with overall repeat trouble rates of 47.22% for competitive LECs and 26.94% for BellSouth's retail operations during March through June); Georgia B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Non-Dispatch) (out of parity in June with overall repeat trouble rates of 29.91% for competitive LECs and 26.04% for BellSouth's retail operations during March through June).

[976] BellSouth Varner Reply Aff. at para. 121 (*citing confidential data*); *id.* at para. 227; Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-150 (filed Sept. 6, 2002) (BellSouth September 6 *Ex Parte* Letter); Alabama B.2.19.7.1.1 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Dispatch) (out of parity during March and April with monthly volumes of seven for competitive LECs); North Carolina B.2.19.7.1.1 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Dispatch) (out of parity during March with volume of five for competitive LECs); Kentucky B.2.19.7.1.2 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Non-Dispatch) (out of parity during April, May, and June with respective monthly volumes of three, four, and three for competitive LECs).

small to yield statistically significant results.[977] BellSouth generally performed at or above parity with regard to line-sharing maintenance, as measured by its trouble report rate for line-sharing arrangements, during the relevant period.[978] In these circumstances, we conclude that BellSouth's customer trouble report and repeat trouble report rates for line sharing do not support a finding of checklist noncompliance.

251. *Line Splitting*. We find that BellSouth also provides nondiscriminatory access to line splitting in accordance with our rules.[979] BellSouth states that it facilitates line splitting by cross connecting an unbundled loop to a competitive LEC's collocation space. Moreover, BellSouth implemented permanent OSS for line splitting on January 5, 2002, and competitive LECs have raised no complaints about this process.[980]

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[977] Kentucky B.3.2.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Dispatch) (out of parity in May with two repeat troubles); North Carolina B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Non-Dispatch) (out of parity in April with four repeat troubles and in June with three repeat troubles); Georgia B.3.4.7.1 (% Repeat Troubles within 30 Days, Line Sharing/Dispatch) (out of parity in four months with repeat trouble counts ranging from three to 16).

[978] *See, e.g.,* Alabama B.3.2.7.1 (Customer Trouble Report Rate, Line Sharing/Dispatch) (overall trouble report rates of 20.00% for competitive LECs and 50.57% for BellSouth for dispatch orders); Alabama B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch) (overall trouble report rates of 3.70% for competitive LECs and 3.49% for BellSouth for non-dispatch orders); Kentucky B.3.2.7.1 (Customer Trouble Report Rate, Line Sharing/Dispatch) (overall trouble report rates of 0.32% for competitive LECs and 1.24% for BellSouth for dispatch orders); Kentucky B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch) (overall trouble report rates of 1.41% for competitive LECs and 2.03% for BellSouth for non-dispatch orders); North Carolina B.3.2.7.1 (Customer Trouble Report Rate, Line Sharing/Dispatch) (overall trouble report rates of 0.18% for competitive LECs and 0.81% for BellSouth for dispatch orders); North Carolina B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch) (overall trouble report rates of 1.32% for competitive LECs and 1.61% for BellSouth for non-dispatch orders); Georgia B.3.2.7.1 (Customer Trouble Report Rate, Line Sharing/Dispatch) (overall trouble report rates of 0.78% for competitive LECs and 1.17% for BellSouth for dispatch orders); Georgia B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch) (overall trouble report rates of 2.58% for competitive LECs and 2.85% for BellSouth for non-dispatch orders).

[979] *See Line Sharing Reconsideration Order*, 16 FCC Rcd at 2111, para. 20 n.36.

[980] *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9157, para. 243.

C. Checklist Item 5 – Unbundled Transport

252. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[981] Based on the evidence in the record, we conclude, as did the state commissions,[982] that BellSouth complies with the requirements of checklist item 5.[983]

253. The Commission has previously relied on the missed installation appointment rate to determine whether a BOC is provisioning transport to its competitors in a nondiscriminatory manner.[984] Despite the low transport order volume for competitive LECs in each of the five states, BellSouth's performance data show that it missed installation appointments for provisioning transport at a lower rate for its competitors than for its own retail customers during the relevant period.[985] Given this evidence, and recognizing BellSouth's parity performance in Georgia, we conclude that BellSouth's provisioning of transport to competitive LECs is nondiscriminatory.[986]

254. We note that US LEC alleges that the current rules regarding loop-transport combinations, EELs, have impeded US LEC's ability to compete with BellSouth in violation of checklist item 5.[987] New South also claims that BellSouth does not comply with the Commission's orders regarding EELs audits and contends that it has experienced delays in the conversion of special access circuits to EELs.[988] We address these claims in our discussion of checklist item 2, above.[989]

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981 47 U.S.C. § 271(c)(2)(B)(v).

982 **Alabama Commission Comments at 213-15; Mississippi Commission Comments at 3; Kentucky Commission** Comments at 33; North Carolina Commission Comments at 209; South Carolina Commission Comments at 1.

983 BellSouth Application at 117-18; BellSouth Milner Aff. at paras. 137-45.

984 *See, e.g., BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9158, para. 246; *Verizon Massachusetts Order*, 16 FCC Rcd at 9106-07, para. 210.

985 *See* B.2.18.2.1.1 (% Missed Installation Appointments, Local Interoffice Transport/<10 Circuits/Dispatch). We note that, during the months with reported competitive LEC data, BellSouth achieved parity in Alabama (June), Kentucky (April, May, and June), Mississippi (April, May, and June), and North Carolina (March, April, May, and June). *See* Alabama/Kentucky/Mississippi/North Carolina B.2.18.2.1.1 (% Missed Installation Appointments, Local Interoffice Transport/<10 Circuits/Dispatch).

986 Because order volumes for transport were nonexistent or low in the five states during the relevant period, we look to Georgia data to inform our analysis. *See* Georgia B.2.18.2.1.1 (% Missed Installation Appointments, Local Interoffice Transport/<10 Circuits/Dispatch).

987 US LEC Comments at 7-19; US LEC Reply at 4-5.

988 New South August 5 *Ex Parte* Letter at 6.

989 *See* section IV.B.3, *supra*.

apply to, or to give the Commission jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in [section 224(f)], for pole attachments in any case where such matters are regulated by a State."[159] As of 1992, nineteen states, including Connecticut, had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.[160]

D. Checklist Item 4 – Unbundled Local Loops

48. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[161] The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types of loops, including two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.[162]

49. In order to establish that it is "providing" unbundled local loops in compliance with checklist item 4, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops.[163] Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested. In order to provide the requested loop functionality, such as the ability to deliver xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities. The BOC must provide

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[159] *Id.* § 224(c)(1). The 1996 Act extended the Commission's authority to include not just rates, terms, and conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(f). Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(c)(1); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4093, para. 264.

[160] *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992); 47 U.S.C. § 224(f).

[161] 47 U.S.C. § 271(c)(2)(B)(iv).

[162] *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

[163] *SWBT Texas Order*, 15 FCC Rcd at 18481-81, para. 248; *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637, para. 185.

competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor.

50. On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL).[164] HFPL is defined as "the frequency above the voiceband on a copper loop facility that is being used to carry traditional POTS analog circuit-switched voiceband transmissions." This definition applies whether a BOC's voice customers are served by cooper or by digital loop carrier equipment. Competing carriers should have access to the HFPL at either a central office or at a remote terminal. However, the HFPL network element is *only* available on a copper loop facility.[165]

51. To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*. Specifically, a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates, and repeat trouble report rates. In addition, a successful BOC applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases.

52. Section 271(c)(2)(B)(iv) also requires that a BOC demonstrate that it makes line splitting available to competing carriers so that competing carriers may provide voice and data service over a single loop.[166] In addition, a BOC must demonstrate that a competing carrier, either alone or in conjunction with another carrier, is able to replace an existing UNE-P configuration used to provide voice service with an arrangement that enables it to provide voice and data service to a customer. To make such a showing, a BOC must show that it has a legal obligation to provide line splitting through rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable

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[164] *See Line Sharing Order*, 14 FCC Rcd at 20924-27, paras. 20-27; *see also* n.63 at C-12 *supra*.

[165] *See Deployment of Wireline Services offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101, 2106-07, para. 10 (2001).

[166] *See generally SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. § 51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers "to provide any telecommunications service that can be offered by means of that network element").

loop terminated to a collocated splitter and DSLAM equipment, and combine it with unbundled switching and shared transport.[167]

E. Checklist Item 5 – Unbundled Local Transport

53. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[168] The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.[169] Dedicated transport consists of BOC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by BOCs or requesting telecommunications carriers, or between switches owned by BOCs or requesting telecommunications carriers.[170] Shared transport consists of transmission facilities shared by more than one carrier, including the BOC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the BOC's network.[171]

F. Checklist Item 6 – Unbundled Local Switching

54. Section 271(c)(2)(B)(vi) of the 1996 Act requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[172] In the *Second*

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[167] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6348, para. 220.

[168] 47 U.S.C. § 271(c)(2)(B)(v).

[169] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20719, para. 201.

[170] *Id.* A BOC has the following obligations with respect to dedicated transport: (a) provide unbundled access to dedicated transmission facilities between BOC central offices or between such offices and serving wire centers (SWCs); between SWCs and interexchange carriers points of presence (POPs); between tandem switches and SWCs, end offices or tandems of the BOC, and the wire centers of BOCs and requesting carriers; (b) provide all technically feasible transmission capabilities such as DS1, DS3, and Optical Carrier levels that the competing carrier could use to provide telecommunications; (c) not limit the facilities to which dedicated interoffice transport facilities are connected, provided such interconnections are technically feasible, or restrict the use of unbundled transport facilities; and (d) to the extent technically feasible, provide requesting carriers with access to digital cross-connect system functionality in the same manner that the BOC offers such capabilities to interexchange carriers that purchase transport services. *Id.* at 20719.

[171] *Id.* at 20719, n.650. The Commission also found that a BOC has the following obligations with respect to shared transport: (a) provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same transport facilities that a BOC uses for its own traffic; (b) provide shared transport transmission facilities between end office switches, between its end office and tandem switches, and between tandem switches in its network; (c) permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table that is resident in the BOC's switch; and (d) permit requesting carriers to use shared (or dedicated) transport as an unbundled element to carry originating access traffic from, and terminating traffic to, customers to whom the requesting carrier is also providing local exchange service. *Id.* at 20720, n.652.

[172] 47 U.S.C. § 271(c)(2)(B)(vi); *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722. A switch connects end user lines to other end user lines, and connects end user lines to trunks used for transporting a call to (continued....)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by BellSouth Corporation,	)	
BellSouth Telecommunications, Inc.,	)	CC Docket No. 02-35
And BellSouth Long Distance, Inc for	)	
Provision of In-Region, InterLATA Services	)	
In Georgia and Louisiana	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2002 **Released: May 15, 2002**

By the Commission: Commissioner Copps issuing a statement.

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I. INTRODUCTION

1. On February 14, 2002, BellSouth Corporation and its subsidiaries, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, BellSouth) filed this application pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA service originating in the states of Georgia and Louisiana. Although BellSouth initially filed for in-region, interLATA authority for the states of Georgia and Louisiana on October 2, 2001,[2] that application was subsequently withdrawn by

[1] We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act or the Act. *See* 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. *See* Telecommunications Act of 1006, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] *See Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Georgia and Louisiana*, CC Docket No. 01-277 (filed October 2, 2001) (BellSouth GALA I (continued....)

B. Checklist Item 4 – Unbundled Local Loops

218. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide, "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[852] Based on the evidence in the record, we conclude, as did the Georgia and Louisiana Commissions,[853] that BellSouth demonstrates that it provides unbundled local loops in accordance with the requirements of section 271 and our rules. Our conclusion is based on our review of BellSouth's performance for all loop types, which include, as in past section 271 orders, voice grade loops, hot cut provisioning, xDSL-capable loops, high capacity loops, and digital loops, and our review of BellSouth's processes for line sharing and line splitting. As of October 2001, competitors have acquired and placed into use more than 80,000 loops in Georgia, and 19,000 loops in Louisiana.[854]

219. Consistent with our prior section 271 orders, we do not address every aspect of BellSouth's loop performance where our review of the record satisfies us that BellSouth's performance is in compliance with the parity and benchmark measures established in Georgia and Louisiana.[855] Instead, we focus our discussion on those areas where the record indicates minor discrepancies in performance between BellSouth and its competitors in Georgia and Louisiana. As in past section 271 proceedings, in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete.[856] Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[857]

220. *Hot Cut Activity*. Like the Georgia and Louisiana Commissions,[858] we find that BellSouth is providing voice grade loops through hot cuts in Georgia and Louisiana in

[852] 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. Dark fiber and loop conditioning equipment are among the features, functions, and capabilities of the loop. *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67 n.301. For a discussion of the requirements of checklist item 4, *see* Appendix D at paras. 48-52, *infra*.

[853] Georgia Commission GALA I Comments at 166; Louisiana Commission GALA II Comments at 1-2.

[854] BellSouth GALA II Stockdale Aff., Exh. ES-5 and ES-6 (*citing confidential information*). As of February 2002, BellSouth had provisioned over 70,000 stand-alone loops (including DSL loops), 8,934 digital loops, and 3,145 high capacity loops. *See* Milner GALA I Aff. at para. 115; Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth, to Marlene R. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed April 17, 2002) (BellSouth Apr. 17 *Ex Parte* Letter). In Louisiana, BellSouth had provisioned over 15,000 stand-alone loops (including DSL Loops), 3,500 digital loops, and 3,154 high capacity loops. *Id.*

[855] *See, e.g.*, *Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9.

[856] *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

[857] *See id.*

[858] Georgia Commission GALA I Comments at 161; Louisiana Commission GALA I Comments at 57.

accordance with the requirements of checklist item 4. BellSouth provides hot cuts in Georgia and Louisiana within a reasonable time interval,[859] at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.[860]

221. We reject the argument made by AT&T that BellSouth fails to meet the "standards" the Commission developed in the *Bell Atlantic New York Order*.[861] AT&T claims that when using the loop cutover calculation measures analyzed by the Commission in the *Bell Atlantic New York Order*, BellSouth's on-time performance for completing hot cuts is deficient.[862] In the Texas proceedings, AT&T similarly argued that SWBT could not establish checklist compliance because the Texas performance metrics differed from those employed in New York.[863] As the Commission noted in the *SWBT Texas Order*, "[w]ith each application we are presented with a different set of circumstances: new and differently designed performance measurements, state proceedings with different histories, new processes by which BOCs perform necessary functions for competing carriers, and new competing carrier concerns."[864] In fact, this Commission has recognized that "individual states and BOCs may define performance measures in different ways."[865] As a result, although our hot cut inquiry examines the same criteria as our inquiry in prior section 271 applications, we necessarily base our conclusion on the evidence presented in this application.[866] In particular, as noted above, we evaluate BellSouth's hot cut process, and the timeliness and quality of the hot cuts it provides to competing carriers, and find that BellSouth's hot cut performance for the five-month period, October through February, met or exceeded the checklist requirements.

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[859] *See* Georgia/Louisiana B.2.12.1 (Coordinated Customer Conversions, Loops with INP); Georgia/Louisiana B.2.12.2 (Coordinated Customers Conversions, Loops with LNP); Georgia/Louisiana B.2.14.1-B.2.14.4 (Hot Cut Timeliness); Georgia/Louisiana B.2.15.1-B.2.15.4 (% Hot Cuts>15 Minutes Late); Georgia/Louisiana B.2.16.1-B.2.16.2 (Average Recovery Time – CCC); Georgia/Louisiana B.2.13 (% Hot Cuts>15 minutes early); Georgia/Louisiana B.2.15 (% Hot Cuts>15 minutes late). *But see* Xspedius GALA I Comments at 5-6 (asserting that BellSouth does not perform coordinate customer conversions as scheduled).

[860] *See* Georgia/Louisiana B.2.17.1.1-B.2.17.2.2 (% Provisioning Troubles Within Seven Days – Hot Cuts). KMC claims that, when BellSouth completes the physical hot cut, BellSouth fails to perform timely switch translations and loop cutovers in a manner that prevent end users from losing service. KMC Comments at 7. We address KMC's claim in checklist item 11, below.

[861] *See* AT&T GALA I Comments at 40-41.

[862] *Id.*

[863] *SWBT Texas Order*, 15 FCC Rcd at 18485, para. 257.

[864] *Id.*

[865] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17462-63, para. 79 n.275. In many cases, such differences are the product of state proceedings where provisioning processes and performance measurements were developed and refined with input from both the BOC and competing carriers.

[866] *SWBT Texas Order*, 15 FCC Rcd at 18485, para. 257.

222. We also reject Mpower's claim that BellSouth's failure to provide an adequate automated frame due time (FDT) violates BellSouth's obligation to provide reasonable and nondiscriminatory access to OSS and to unbundled loops.[867] Mpower asserts that BellSouth should be required to provide an adequate automated FDT process or, at least, not separately charge for coordination of hot cuts.[868] Competing carriers can now chose freely between the CHC and FDT hot cut processes in Georgia and Louisiana. In the *SWBT Texas and Kansas/Oklahoma Orders*, however, the Commission expressly chose not to rely upon SWBT's FDT showing in demonstrating compliance with checklist item 4 and relied instead on SWBT's coordinated method (for which there was no charge).[869] Absent further substantiation, we cannot find that BellSouth does not provide an adequate automated FDT process. The evidence in this record demonstrates that BellSouth provisions FDT hot cuts in a timely manner and with a minimum number of troubles following installation. Concerning BellSouth's separate charge for coordinated hot cuts (CHCs), the Commission has never required BOCs to provide CHCs at no charge.[870] By contrast, the Commission has found that competitive carriers have a meaningful opportunity to compete if a BOC makes available a non-automated CHC process with a charge.[871] We therefore believe that Mpower's challenge to the cost basis of these charges is in reality a challenge to the pricing determinations of the Georgia Commission and, to the extent that Mpower is requesting a hot cut process that BellSouth does not currently offer, we note that a section 271 application is not an appropriate forum for the resolution of such inter-carrier disputes. Given that BellSouth demonstrates that it provisions CHCs in a timely manner and at an acceptable level of quality, with a minimal service disruption and a minimum number of troubles following installation, we find that Mpower's concerns do not warrant a finding of checklist noncompliance. Thus, we do not believe that we have a sufficient basis for finding that these claims warrant checklist noncompliance.

223. *Voice Grade Loops*. Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,[872] that BellSouth provisions voice grade loops to competitors in Georgia and Louisiana in a nondiscriminatory manner. In order to determine that

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867 Mpower GALA I Comments at 6; Mpower GALA II Comments at 15.

868 Mpower GALA II Comments at 16. Mpower states that BellSouth's automated FDT is very unsatisfactory and compares unfavorably with the process of the other BOCs because BellSouth will only specify a business day on which the automated transfer will occur, which could result in customers being without service for several hours or more if the transfer fails. *Id.* at 15. According to Mpower, SBC and Verizon make a commitment to perform a transfer of service within a time frame of 60 or 90 minutes. *Id.*

869 *SWBT Texas Order*, 15 FCC Rcd at 18487, paras. 260-61; *see also SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6337, para. 201.

870 *See SWBT Texas Order*, 15 FCC Rcd at 18494-95, para. 276.

871 *See id.* at 18494-95, paras. 275-77. In the *SWBT Texas Order*, the Commission found that time and material charges imposed during the CHC process were valid because of the Texas Commission's demonstrated commitment to the Commission's pricing rules. *Id.* at paras. 276-77.

872 Georgia Commission GALA I Comments at 154; Louisiana Commission GALA I Comments at 57.

BellSouth's performance reflects parity, we review performance measures comparable to those we have relied upon in prior section 271 orders.[873]

224. In both Georgia and Louisiana, BellSouth has generally met the benchmark and parity standards for installation timeliness, installation quality, and the quality of the maintenance and repair functions.[874] We recognize that BellSouth's performance with respect to a provisioning timeliness metric – the order completion interval metric – appears to be slightly out of parity in Georgia and Louisiana for several recent months.[875] However, recognizing that BellSouth performed at parity with respect to the majority of the voice grade loop "order completion interval" metrics, we find that BellSouth's performance does not warrant a finding of checklist noncompliance. Should BellSouth's performance in this area deteriorate, we may pursue appropriate enforcement action. In addition, we note that BellSouth's performance under the missed installation appointment metric suggests that BellSouth has generally been timely in the provisioning of voice grade loops.[876]

225. We also recognize that BellSouth does not achieve parity under the missed repair appointments metric for three months during the relevant October through February period in Georgia.[877] BellSouth explains that the primary reason for the disparity is the small volume of competitive LEC reports.[878] BellSouth's performance data demonstrate that it did not miss any competitive LEC repair appointments in January and February.[879] Given this improving trend in

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873 *See Verizon Massachusetts Order*, 16 FCC Rcd at 9078-79, para. 162.

874 *See* Georgia/Louisiana B.2.19.8.1.1-B.2.19.13.2.4 (% Provisioning Troubles within 30 Days, 2W Analog Loop); Georgia/Louisiana B.2.18.8.1.1-B.2.18.3.2.4 (% Missed Installation Appointments, 2W Analog Loop); Georgia/Louisiana B.3.2.8.1-B.3.2.9.2 (Customer Trouble Report Rate, 2W Analog Loop); Georgia/Louisiana B.3.3.8.1-B.3.3.9.2 (Maintenance Average Duration, 2W Analog Loop); Georgia/Louisiana B.3.4.8.1-B.3.4.9.2 (% Repeat Troubles within 30 Days, 2W Analog Loop).

875 *See* Louisiana B.2.1.8.1.1 (Order Completion Interval, 2W Analog Loop-Design/<10 circuits/Dispatch); Louisiana B.2.1.12.1.1 (Order Completion Interval, 2W Analog Loop with LNP-Design/<10 circuits/Dispatch). For B.2.1.8.1.1, BellSouth performed better for its own retail affiliate in November and December in Louisiana. For B.2.1.12.1.1, the competitive LEC average measure was 5.47 for October-February and 3.47 for BellSouth retail in Louisiana.

876 *See generally* Georgia/Louisiana B.2.18.8.1.1-B.2.18.13.2.4 (% Missed Installation Appointments, 2W Analog Loop); Georgia/Louisiana B.3.3.8.1-B.3.3.9.2 (Maintenance Average Duration, 2W Analog Loop).

877 For October-February, BellSouth missed an average of 6.66% of competitive LEC repair appointments, compared to an average of 1.52% for BellSouth retail in Georgia. *See* Georgia B.3.1.9.2 (Missed Repair Appointments, 2W Analog Loop, Non-Design/Non-Dispatch).

878 *See* Letter from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed March 14, 2002) (BellSouth Mar. 14 *Ex Parte* Letter). For the months of October, November, and December 2001, the competitive LEC volumes for this measure were 21, 13, and 20, respectively, with only two appointments missed each month. *Id.*

879 *Id.* In January, the reported results show zero missed appointments for the 26 competitive LEC appointments scheduled in Georgia, exceeding the retail analogue with 0.00% for competitive LECs compared to 1.06% for the (continued....)

January and February, and the fact that competitive LEC volumes are low compared to other relevant missed repair appointment metrics, we do not find that this disparity rises to the level of checklist noncompliance.

226. KMC provides its own data to demonstrate that BellSouth's Georgia and Louisiana performance for missed installation appointments and provisioning troubles within 30 days for voice grade loops show discriminatory performance for competitive LECs.[880] Xspedius also claims that BellSouth's missed installation appointment performance for voice grade loops with LNP for October through January does not achieve parity.[881] We do not find that KMC and Xspedius's claims warrant a finding of checklist noncompliance. In making this finding, we rely on aggregate competitive carrier performance data, which we have found above to be accurate and reliable, to show that BellSouth's performance meets the requirements of checklist item four in this case.[882] According to the carrier-to-carrier reports for both Georgia and Louisiana, with the exception of November 2001 in Louisiana,[883] BellSouth's performance data for the relevant four month period show that it is provisioning voice grade loops in a timely manner in Georgia and Louisiana. Moreover, despite relatively low competitive carrier volumes, BellSouth's Georgia and Louisiana performance data for installation quality of voice grade loops show nondiscriminatory treatment.[884] Given this evidence, and recognizing that BellSouth is meeting the service installation dates for competitive LECs at higher rates than for its own retail customers,[885] and provisions voice grade loops of a quality sufficient to afford competitors a meaningful opportunity to compete, we do not find that KMC and Xspedius's claims warrant a finding of checklist noncompliance. Thus, although KMC and Xspedius claim that its data show discriminatory performance, anomalous results for a single carrier in this instance does not qualify as a pattern of systemic performance disparities that result in competitive harm.[886]

(Continued from previous page)
retail analogue. BellSouth's data show zero missed appointments for the ten competitive LEC appointments scheduled in February. *Id.*

[880] KMC GALA I Comments at 3-4. In Georgia, KMC claims that BellSouth missed over 10% of the basic 2 Wire Analog Loop installs for KMC over an 8 month period ending January 2002; 26% of KMC's analog loop orders with LNP in December 2001; and 13% of KMC's analog installs failed within 30 days of installation. *See* KMC GALA II Comments at 6. In Louisiana, KMC asserts that 16% of the analog loop installs failed within 30 days of being installed in December 2001. *Id.*

[881] Xspedius GALA II Comments at 8-9.

[882] For a discussion of the evidentiary case, *see* section IIIB, *supra.*

[883] *See* Georgia/Louisiana B.2.18.8.1.1-B.2.18.3.2.4 (% Missed Installation Appointments, 2W Analog Loop). BellSouth missed 4.06% of its appointments for its own customers, and 20.00% of the five appointments of those for its competitors in November in Louisiana. *See* Louisiana B.2.1810.1.1 (% Missed Installation Appointments, 2W Analog Loop with INP Design<10 circuits/Dispatch).

[884] *See* Georgia/Louisiana B.2.19.8.1.1-B.2.19.13.2.4 (% Provisioning Troubles within 30 Days, 2W Analog Loop).

[885] *See* Georgia/Louisiana B.2.18.8.1.1-B.2.18.3.2.4 (% Missed Installation Appointments, 2W Analog Loop).

[886] *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

227. We also reject Mpower's claim that BellSouth will not provide access to SL1 voice grade loops for end users that BellSouth serves through remote terminals.[887] In particular, Mpower asserts that when a requested loop is served by a DLC system, BellSouth insists on providing a more expensive SL2 loop to the competitive carrier.[888] The record reflects, however, that BellSouth will fill an SL1 loop order whenever the facilities are available, and it imposes no requirement that competitive LECs order a more expensive loop simply because DLC equipment is present.[889] Because we are not persuaded by Mpowers' contention that BellSouth will not provide access to SL1 voice grade loops for end users that BellSouth serves through remote terminals, we do not believe that we have a sufficient basis for finding that these concerns warrant a finding of noncompliance with checklist item 4. We also note that no other carrier raises similar claims in this proceeding.

228. *xDSL-Capable Loops*. Based upon the evidence in the record, we find, as did the Georgia and Louisiana Commissions,[890] that BellSouth demonstrates that it provides xDSL-capable loops in accordance with the requirements of checklist item 4.[891] BellSouth makes available xDSL-capable loops in Georgia and Louisiana through interconnection agreements and pursuant to tariffs approved by the Georgia and Louisiana Commissions.[892] In analyzing BellSouth's showing, we review performance measures comparable to those we have relied upon in prior section 271 orders: order processing timeliness, installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of the maintenance and repair functions.[893] Based on our analysis of BellSouth's performance under these measures, we conclude that BellSouth's performance for competitive LECs has generally met the benchmark and parity standards established in Georgia and Louisiana.

229. While BellSouth's performance with respect to a maintenance and repair measure – the customer trouble report rate – appears to be out of parity in October and December in Georgia, we find that these disparities are slight and thus not competitively significant. Indeed, in Georgia, BellSouth's performance data show that BellSouth performed slightly better for its

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887 Mpower GALA I Comments at 30-31.

888 *Id.* at 32.

889 BellSouth GALA I Reply App., Tab H, Reply Affidavit of Wiley G. Latham, Jr. at para. 7 (BellSouth GALA I Latham Reply Aff.).

890 Georgia Commission GALA I Comments at 157; Louisiana Commission GALA I Comments at 61-62.

891 We note that competing carriers in Georgia and Louisiana rely principally on two types of unbundled xDSL-capable loops: the xDSL loop and the ISDN loop. The Georgia and Louisiana Commissions developed separate loop-type performance measurement categories for xDSL loops (including, but not limited to, loops provisioned for ADSL, HDSL, and UCL) and ISDN loops, which can be used by some competing carriers to provide IDSL services.

892 *See* BellSouth GALA I Latham Aff. at para. 3.

893 *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17462-63, para. 79; *Verizon Connecticut Order*, 16 FCC Rcd at 15153-56, paras. 15-20; *Verizon Massachusetts Order*, 16 FCC Rcd at 9056, 9059, paras. 123, 130; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6326-27, paras. 181-82.

retail affiliate from October through February.[894] Moreover, no commenter has indicated that the maintenance and repair performance of xDSL loops is a problem in Georgia. We therefore find that these issues are not fatal to BellSouth's showing, and do not warrant a finding of checklist noncompliance. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action. Moreover, contrary to DIRECTV Broadband's assertion,[895] we are not persuaded that BellSouth is making fundamental changes to its DSL architecture that would severely limit the existing capability of DSL circuits to support advanced services.[896]

230. *ISDN Loops*. Based on the evidence in the record, we also find, as did the Georgia and Louisiana Commission,[897] that BellSouth provides ISDN loops to competitors in Georgia and Louisiana in accordance with the requirements of checklist item 4. Although BellSouth's data reveal some performance issues with ISDN loops, we conclude that these issues are not fatal to BellSouth's showing.[898] We find that the performance issues are relatively slight and do not appear to be competitively significant to competing LECs. Accordingly, in light of BellSouth's competitive carrier xDSL-capable loop record overall, we do not find that BellSouth's performance demonstrates that it fails to meet the requirements of checklist item 4.

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[894] The October-February average for this measure is 0.82% for competitive LECs and 0.81% for BellSouth retail. *See* Georgia B.3.2.5.1 (Customer Trouble Report Rate, xDSL (ADSL, HDSL, and UCL)/Dispatch).

[895] DIRECTV Broadband GALA I Comments at 5

[896] *See* BellSouth GALA I Milner Reply Aff. at para. 44 (explaining that BellSouth has not changed the way DSL is provisioned, nor does it have plans currently do so).

[897] Georgia Commission GALA I Comments at 157; Louisiana Commission GALA I Comments at 61-62.

[898] Specifically, in Louisiana, BellSouth's customer trouble report rate (dispatch) was out of parity for all months reported. *See* Louisiana B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch). However, the customer trouble report rate has remained low in Louisiana, with competitive carriers experiencing an average of 1.40% dispatch trouble reports compared to an average of 0.58% for BellSouth retail operations from October through February. *Id.* In addition, the UNE ISDN customer trouble report rate (non-dispatch) was in parity for all months reported, with competitive LECs experiencing an average of 0.79% non-dispatch customer trouble reports compared to an average of 1.03% for BellSouth retail operations from October-February. *See* Louisiana B.3.2.6.2 (Customer Trouble Report Rate, UNE ISDN/Non-Dispatch). BellSouth has also generally met the benchmark for installation timeliness and missed installation appointments for each month from October-February in Georgia and Louisiana. *See* Georgia/Louisiana B.2.1.6.3.1 (Order Completion Interval, UNE ISDN<6 circuits/Dispatch); Georgia/Louisiana B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN<10 circuits/Dispatch). BellSouth's Georgia performance data show that it provides an installation quality sufficient to afford competitors a meaningful opportunity to compete. *See* Georgia B.2.19.6.1.1 (% Provisioning Troubles within 30 Days, UNE ISDN<10 circuits/Dispatch). Competitive LECs experience an average of 4.90% trouble reports within 30 days after installation of an ISDN loop, compared to an average of 5.70% for BellSouth retail operations from October-February in Georgia. *See id.* In addition, BellSouth's maintenance and repair performance, which measure the timeliness and quality of the maintenance and repair functions, has shown parity or very low repeat trouble rates during the same period. *See* Georgia/Louisiana B.3.1.6.1-B.3.16.2 (Missed Repair Appointments, UNE ISDN); Georgia/Louisiana B.3.4.6.1-B.3.4.6.2 (% Repeat Troubles within 30 Days, UNE ISDN).

231. *Digital Loops.* Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,[899] that BellSouth's performance with respect to digital loops complies with checklist item 4. We recognize that BellSouth's performance with respect to the order completion interval metric in Georgia has been out of parity for competitive LECs for almost all months reported.[900] We find, however, that this performance does not warrant a finding of checklist noncompliance. BellSouth's parity performance for all relevant months under the missed appointment metric in Georgia and Louisiana indicates that BellSouth provisions digital loops in a timely manner. We also note that, for every month during the relevant period, BellSouth maintained parity under the installation quality measure in Georgia and Louisiana.[901] Disaggregated maintenance and repair performance is not available for digital loops. Rather, digital loop maintenance and repair performance is subsumed under a broader category ("UNE Other Design"), which include unbundled port and transport data. BellSouth generally maintained parity during the relevant months for measures of repair and maintenance timeliness and quality.[902] Given this evidence, we do not find that BellSouth's digital loop performance warrants a finding of checklist noncompliance.

232. *High Capacity Loops.* Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,[903] that BellSouth's performance with respect to high capacity loops complies with checklist item 4. We reach this conclusion despite the fact that BellSouth's performance with respect to two specific performance metrics – the percentage of troubles found within 30 days following installation of a high capacity loop and the percentage of missed installation appointments – appear to be out of parity for several recent months.[904] As we discuss below, however, this performance does not warrant a finding of checklist noncompliance. As the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[905] Moreover, given BellSouth's generally acceptable performance for all other categories of loops, and recognizing that high capacity loops make up a small percentage of

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899 Georgia Commission GALA I Comments at 166; Louisiana Commission GALA I Comments at 56.

900 *See* Georgia B.2.1.18.1.1 (Order Competition Interval, Digital Loop<DS1/<10 circuits/Dispatch).

901 *See* Georgia/Louisiana B.2.19.18.1.1 (% Provisioning Troubles within 30 Days, Digital Loop<DS1/<10 circuits/Dispatch).

902 Georgia/Louisiana B.3.1.10.1-B.3.1.10.2 (Missed Repair Appointments, Other Design); Georgia/Louisiana B.3.2.10.1-B.3.1.10.2 (Customer Trouble Report Rate, Other Design); Georgia/Louisiana B.3.3.10.1-B.3.3.10.2 (Maintenance Average Duration, Other Design); Georgia/Louisiana B.3.4.10.1-B.3.4.10.2 (% Repeat Troubles within 30 Days, Other Design).

903 Georgia Commission GALA I Comments at 166; Louisiana Commission GALA I Comments at 56.

904 *See* Georgia/Louisiana B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loop >= DS1/< 10 circuits/Dispatch); Louisiana B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loop>=DS1/<10 circuits/Dispatch).

905 *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 22.

overall loop orders in Georgia and Louisiana, we find that BellSouth's performance is in compliance with checklist item 4.[906]

233. In Georgia and Louisiana, BellSouth's performance for a high capacity loop installation quality measure, the percentage of troubles found within 30 days following installation, has been statistically out of parity for the five-month period.[907] According to BellSouth, however, when its performance under this metric is recalculated to not reflect troubles "found O.K.," "no trouble" found, and competitive LEC caused reports its performance improves.[908] In Georgia, BellSouth explains that the competitive LEC troubles are approximately half central office problems and half facility problems.[909] BellSouth states that its review of the competitive LEC trouble reports in Louisiana indicates the majority of the reports are attributable to facility issues.[910] More significant, BellSouth claims that competitive LECs received approximately 95 percent actual trouble free installations from December through February when troubles found O.K., no troubles found, and competitive LEC caused reports are removed from the calculations. In light of these facts, we give credence to statements made by BellSouth in this proceeding and are encouraged that BellSouth has instituted new procedures in Georgia and Louisiana to reduce the trouble reports for this metric.[911] Moreover, prior to the completion of any high capacity loop, BellSouth states that its technicians in the customer wholesale

[906] Through February 2002, BellSouth had provisioned 3,145 and 3,154 high capacity loops in Georgia and Louisiana, respectively. *See* BellSouth Apr. 17 *Ex Parte* Letter.

[907] Competing carriers experienced an average of 7.87% trouble reports within 30 days after installation of an high capacity digital loop, compared to an average of 1.76% for BellSouth retail operations from October through February in Georgia. *See* Georgia B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loop>= DS1/< 10 circuits/Dispatch). Louisiana performance data show that competitive carriers experienced an average of 6.93% trouble reports, compared to an average of 1.00% for BellSouth resale operations for the same period. *See* Louisiana B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loop>=DS1/<10 circuits/Dispatch.

[908] *See* BellSouth Mar. 14 *Ex Parte* Letter at Att. 7; BellSouth Apr. 17 *Ex Parte* Letter.

[909] *See* BellSouth Apr. 17 *Ex Parte* Letter.

[910] *Id.*

[911] BellSouth GALA I Varner Aff. at para. 236. BellSouth states that it has implemented specific action plans in Georgia to bring the high capacity loop measure into parity with their retail analogue. *See* BellSouth Apr. 17 *Ex Parte* Letter. First, BellSouth states that the Louisiana Service Advocacy Centers (SACs) have increased their readiness to resolve any and all service order jeopardies. *See id.* Second, BellSouth claims that it is providing a "maintenance spare" DS1 circuit (where possible) in service areas with known defective pairs. In Georgia, BellSouth states that it has instituted an action plan requiring the appropriate Network supervisor to review all provisioning trouble reports to determine the report's cause and the necessary action to keep it from recurring. *Id. But see* Letter from Patrick J. Donovan, Counsel to Cbeyond, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed April 26, 2002) (Mar. 14 *Ex Parte* Letter); Letter from Tricia Brekenridge, Executive Vice President, Industry Affairs, KMC Telecom, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed May 2, 2002) (Mar. 14 *Ex Parte* Letter).

interconnection network service (CWINS) center, central office, and field will do a simultaneous test to make sure that the loop meets the appropriate specifications.[912]

234. We also note that BellSouth's performance with respect to a provisioning timeliness metric – the missed installation appointments metric for dispatch orders – has been out of parity for October through February in Louisiana.[913] However, BellSouth's performance reflected by another provisioning timeliness metric – the order completion interval metric – satisfies the benchmark for most months.[914] In addition, BellSouth's satisfies the benchmark for all relevant months with respect to the non-dispatch missed installation appointment metric.[915] We are encouraged that BellSouth has initiated specific action plans to address missed installations, and BellSouth states that, for December 2001, the majority of the missed installations were a result of facility issues.[916] Because we look to the totality of circumstances in evaluating BellSouth's performance in providing loops in accordance with the checklist requirements, we do not find that lack of parity on these high capacity loop measurements warrant a finding that BellSouth fails to meet checklist item 4.[917]

235. KMC provides its own data to demonstrate that BellSouth misses firm loop installation appointments for high capacity loops, and that a large percentage of its high capacity loop installs fail within 30 days of installation.[918] We find, however, that this KMC-specific data does not warrant a finding of checklist noncompliance for checklist item 4. We discuss above BellSouth's aggregate performance under the installation quality and missed installation appointment metrics, and do not find that lack of parity on these high capacity loop measurements warrant a finding of checklist noncompliance.

236. We also note that KMC has expressed concern about BellSouth's high capacity loop maintenance and repair performance for the percentage of repeat troubles within 30 days.[919]

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[912] *Id.* We note that we will monitor BellSouth's compliance with its commitment to improve its high capacity loop performance. Deterioration of BellSouth's performance could result in enforcement action.

[913] *See* Louisiana B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loop>=DS1/<10 circuits/Dispatch). The October-February average for this measure is 7.13% for competitive LECs and 2.23% for BellSouth retail.

[914] *See generally* Louisiana B.2.1.18.1.1-B.2.1.19.2.2 (Order Completion Interval, Digital Loop).

[915] *See* Louisiana B.2.18.18.1.1 (% Missed Installation Appointments, Digital Loop<DS1/<10 circuits/Non Dispatch).

[916] BellSouth GALA II Varner Reply Aff. at para. 97.

[917] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6344, para. 213.

[918] *See generally* KMC GALA I Comments at 8.

[919] KMC GALA I Comments at 3; KMC GALA II Comments at 10. KMC claims that BellSouth's own reported performance indicates that over one-third of KMC's DS1 and higher loop troubles in both Georgia and Louisiana from August 2001 to March 2002 experienced a trouble report within 30 days of installation. *See* KMC GALA II Comments at 10.

As discussed above, disaggregated maintenance and repair performance is not available for high capacity loops. Rather, high capacity loop maintenance and repair performance is subsumed under a broader category ("UNE Other Design"), which include unbundled port and transport data. BellSouth has maintained parity performance with respect to the maintenance and repair timeliness under the mean time to repair measure. Moreover, BellSouth's disaggregated maintenance and repair performance for high capacity loops shows repair timeliness under the mean time to repair measure. Georgia and Louisiana UNE Other Design maintenance and repair performance, which measure the timeliness and quality of the maintenance and repair functions, has shown parity or very low trouble rates in recent months.[920] Given this evidence, we do not find that BellSouth's maintenance and repair performance warrants a finding of checklist noncompliance.

237. We also reject Cbeyond's allegations that BellSouth provides competitive carriers inferior quality DS1 loops and does not charge competitors correctly.[921] The record reflects that BellSouth delivers DS1 loops with a four-wire interface, regardless of the particular technology developed.[922] Significantly, the Georgia Commission has investigated and dismissed Cbeyond's claim, finding no basis to conclude that BellSouth has violated its interconnection agreement with Cbeyond in this respect.[923] Given this, we do not find that we have a sufficient basis for finding that Cbeyond's claims warrant a finding of checklist noncompliance.

238. *Line Sharing.* Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,[924] that BellSouth demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop.[925] BellSouth offers line sharing in Georgia and

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[920] Georgia/Louisiana B.3.1.10.1-B.3.1.10.2 (Missed Repair Appointments, Other Design); Georgia/Louisiana B.3.2.10.1-B.3.1.10.2 (Customer Trouble Report Rate, Other Design); Georgia/Louisiana B.3.3.10.1-B.3.3.10.2 (Maintenance Average Duration, Other Design); Georgia/Louisiana B.3.4.10.1-B.3.4.10.2 (% Repeat Troubles within 30 Days, Other Design).

[921] Cbeyond GALA I Comments at 22-26. Cbeyond claims that BellSouth is violating the parties' interconnection agreement because BellSouth does not provide the four-wire DS1 loops ordered by Cbeyond; instead, BellSouth frequently provides inferior quality 2-wire DS1 loops, which result in service degradation and inferior quality. *Id.* at 25. Cbeyond further claims that it is unfairly compensating BellSouth for its inappropriate provisioning of 2-wire DS1 loops. *Id.*

[922] *See* BellSouth Milner GALA I Reply Aff. at paras. 25, 27-29.

[923] Georgia Commission GALA I Comments at 107.

[924] Georgia Commission GALA I Comments at 164; Louisiana Commission GALA I Comments at 64.

[925] *Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 98-147, Fourth Report and Order, CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*) (*pet. for rehearing pending sub nom. USTA v. FCC*, DC Cir. No. 00-102 (filed Jan. 18, 2000)); *Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration, CC Docket No. 98-147, Fourth Report and Order on Reconsideration, CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking; CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking; CC Docket No. 96- (continued....)

Louisiana under its interconnection agreements and the terms of its tariff, in accordance with the requirements of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*.[926]

239. BellSouth's performance with regard to the customer trouble report rate is out of parity for several recent months in Louisiana.[927] According to BellSouth, however, several of the customer trouble reports in November and December 2001, and January 2002, were actually information reports from competitive LECs and were not an indication of actual trouble.[928] Moreover, BellSouth's performance data show that customer trouble reports for competitive LECs decreased from 9.60 percent in January to 2.11 percent in February in Louisiana. We find that, given BellSouth's generally acceptable performance for all other categories of line-shared loops, BellSouth's performance is in compliance with checklist item 4.[929] As the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[930] No commenter has raised concerns with BellSouth's line sharing customer trouble report rate in Louisiana.

240. While not addressing specific instances of line-shared performance disparities, AT&T raises broader policy and legal issues regarding BellSouth's line-sharing obligations.[931] AT&T contends that BellSouth does not permit competitive LECs to obtain access to the entire capabilities of the unbundled next generation digital loop carrier loop at the central office and at

(Continued from previous page)
98, 16 FCC Rcd 2101 (2001) (*Line Sharing Reconsideration Order*); *see also SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6345-46, para. 215.

926 *See* BellSouth GALA I App., Tab W, Affidavit of Thomas G. Williams at para. 17 (Williams GALA I Aff.).

927 In Louisiana, the October-February average for this measure is 5.10% for competitive LECs and 1.47% for BellSouth retail. *See* Louisiana B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch).

928 *See* Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed April 9, 2002) (BellSouth Apr. 9 *Ex Parte* Letter). BellSouth explains that a breakdown of the trouble report rate show that, during November and December 2001, and January 2002, the number of reports for which there were "no trouble found" ranged from 50% in November 2001 to 72% in February 2002. *See id.*

929 Georgia and Louisiana performance for installation timeliness and installation quality show nondiscriminatory treatment between competitors and BellSouth retail customers for line-shared loops. *See* Georgia/Louisiana B.2.18.7.1.1-B.2.18.7.2.2 (% Missed Installation Appointments, Line Sharing); Georgia/Louisiana B.2.19.7.1.2-B.2.19.7.2.1 (% Provisioning Troubles within 30 Days, Line Sharing). In addition, BellSouth's performance demonstrates that competing carriers experience comparable repair times for line shared loops as BellSouth retail operations, and in both states, the percentage of competitive LEC missed repair appointments and repeat troubles were out of parity for only one of the five months reported. *See* Georgia/Louisiana B.3.4.7.1 (% Repeat Troubles within 30 Days, Line Sharing/Dispatch); Georgia/Louisiana B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Non-Dispatch); Georgia/Louisiana B.3.3.7.1 (Maintenance Average Duration, Line Sharing/Dispatch); Georgia/Louisiana B.3.3.7.2 (Maintenance Average Duration, Line Sharing/Non-Dispatch).

930 *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 22.

931 AT&T GALA I Comments at 42-45.

the remote terminal through the installation of integrated splitter/DSLAM cards.[932] We reject AT&T's allegation because although incumbent LECs are required to provide unbundled access to the entire loop, we have found that "the high frequency portion of the loop network element is limited by technology, *i.e.*, is only available on a copper facility."[933] Furthermore, competitive LECs may provide data services to BellSouth voice customers served by digital loop carriers by either collocation in the remote terminal or, in the event that the Commission's four-part test for packet switching is met, access to unbundled packet switching. In fact, BellSouth states that competitive LECs can choose whether to access the high frequency portion of the loop at a BellSouth central office or remote terminal, and competitive LECs can engage in line sharing or line splitting whether the customer is served by an all-copper loop, or by a combination of copper and digital loop carrier equipment.[934] Therefore, we disagree with AT&T that BellSouth's policies and practices concerning the provisioning of line sharing, as explained to us in the instant proceeding, violate the Commission's unbundling rules.[935] Accordingly, we decline to find that these allegations warrant a finding of checklist non-compliance.

241. *Line Splitting.* Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,[936] that BellSouth complies with its line-splitting obligations and provides access to network elements necessary for competing carriers to provide line splitting.[937]

242. We disagree with AT&T's claim that BellSouth must provide splitters for "voice" competitive LECs that seek to engage in line splitting.[938] The Commission rejected this precise argument in the *SWBT Texas Order*, explaining that "[t]he Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter, and incumbent LECs, therefore have no current obligation to make the

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[932] *Id.*

[933] *See Line Sharing Reconsideration Order*, 16 FCC Rcd at 2107, para. 10.

[934] BellSouth GALA I Reply at 78.

[935] As we have stated in other section 271 orders, new interpretative disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding. *See Verizon Massachusetts Order,* 16 FCC Rcd at 8993, para. 10; *SWBT Texas Order,* 15 FCC Rcd at 18366, para. 23. We note that many of these allegations with respect to competitive access to fiber-fed loops are being addressed in pending proceedings before the Commission. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297, 15 FCC Rcd 17806, 17856-62, paras. 118-33 (Aug. 10, 2000); *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2127-30, paras. 55-64.

[936] Georgia Commission GALA I Comments at 165; Louisiana Commission GALA I Comments at 65.

[937] *See Line Sharing Reconsideration Order*, 16 FCC Rcd at 2111, para. 20 n.36.

[938] AT&T GALA I Comments at 44.

splitter available."[939] BellSouth, however, explains that it will allow a competitive carrier to provide its own splitter, or lease a BellSouth owned splitter for both line sharing and line splitting for central office based deployments and for both existing and new customers.[940] Thus, we do not find that AT&T's claims warrant a finding of checklist noncompliance.

243. We also disagree with AT&T's claim that BellSouth's OSS does not comply with our *Line Sharing Reconsideration Order*.[941] Specifically, AT&T asserts that BellSouth does not provide electronic OSS for ordering, provisioning and maintaining line splitting.[942] Pursuant to the Georgia Commission's mandate to make such OSS available for line splitting, BellSouth implemented permanent OSS for line splitting on January 5, 2002, and competitive LECs have raised no complaints about this new process. We find, therefore, that given the record before us, BellSouth's process for line splitting orders is in compliance with the requirements of the checklist at this time.

244. *Other Issues.* KMC contends that BellSouth takes weeks to accomplish the actual loop disconnect when requested by KMC.[943] KMC estimates that, in Georgia, between 20 percent and 30 percent of the facilities underlying loop disconnect orders remain unavailable 30 days after the loop disconnect, and in Louisiana, BellSouth's failure to disconnect loops properly has led to customer outages and delay in the release of the facility for use by KMC and other competitive carriers.[944] We conclude, however, that there is no evidence that the difficulties KMC may have encountered with BellSouth's loop disconnect processes reflect systemic defects with BellSouth's provisioning of unbundled local loops, and thus cannot find checklist noncompliance.

C. Checklist Item 5 – Unbundled Transport

245. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[945] Based on our review of the record, we conclude, as did both the

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[939] *See SWBT Texas Order*, 15 FCC Rcd at 18516, para. 327.

[940] BellSouth GALA I App., Tab T, Reply Affidavit of Thomas G. Williams at para. 8 (Williams GALA I Reply Aff.).

[941] AT&T GALA I Comments at 45-46; AT&T GALA I Turner Decl. at para. 24.

[942] AT&T GALA I Comments at 45; AT&T GALA I Turner Decl. at 24.

[943] KMC GALA I Comments at 10.

[944] *Id.*

[945] 47 U.S.C. § 271(c)(2)(B)(v).

FCC 271 Checklist Item 4 Line sharing Quotes

REGION	STATE	FCC DOCKET NO.	FCC PROCEEDING	PAGE	PARA	
BellSouth	AL, KY, MS, NC and SC	WC Docket No. 02-150	FCC 02-260	130	232	As in past Section 271 orders, our conclusion is based on a review of BellSouth's performance for all loop types, including voice grade loops, x-DSL capable loops, high capacity loops and digital loops, as well as our review of BellSouth's hot cut, line-sharing and line splitting processes.
BellSouth	AL, KY, MS, NC and SC	WC Docket No. 02-150	FCC 02-260	143	248	*Line Sharing.* We find, as did the state commissions, that Bellsouth offers nondiscriminatory access to the high frequency portion of the loop in each applicable state. We note that competitive LECs in Mississippi and South Carolina have not yet ordered any line-sharing arrangements from Bellsouth. Because order volumes for line-shared loops are low in each of the states, we look to BellSouth's line-sharing performance in Georgia to inform our analysis. We further note that no party has alleged that BellSouth's line-sharing offerings in Mississippi and South Carolina fail to provide nondiscriminatory access to high frequency portion of the loop.
BellSouth	AL, KY, MS, NC and SC	WC Docket No. 02-150	FCC 02-260	144	250	We also reject Covad's claim that BellSouth's line-sharing provisioning and maintenance and repair performance precludes a grant of long distance authority. Although BellSouth's performance with regard to certain measures-customer trouble reports within 30 days of installation and repeat trouble reports within 30 days of maintenance or repair-is out of parity in certain months, we find these disparities in reported performance do not warrant a finding of checklist noncompliance.
BellSouth	AL, KY, MS, NC and SC	WC Docket No. 02-150	FCC 02-260	145	250	BellSouth generally performed at or above parity with regard to line-sharing maintenance, as measured by its trouble report rate for line-sharing arrangements, during the relevant period. In these circumstances, we conclude that BellSouth's customer trouble report and repeat trouble report rates for line sharing do not support a finding of checklist noncompliance.
BellSouth	AL, KY, MS, NC and SC	WC Docket No. 02-150	FCC 02-260	143-144	249	Because BellSouth's performance data show that it installs line-sharing arrangements in accordance with the standards approved by the state commissions, we reject Covad's reliance on BellSouth's alleged failure to provision line-sharing arrangements within the time frame specified in its interconnection agreement with Covad. Given that BellSouth's line-sharing provisioning intervals for its retail customers and competitive LECs are comparable, and recognizing BellSouth's timeliness performance during the relevant period in Georgia, we find that BellSouth's installation performance does not warrant a finding of checklist noncompliance.
BellSouth	AL, KY, MS, NC and SC	WC Docket No. 02-150	FCC 02-260	H-27	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)

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BellSouth	AL, KY, MS, NC and SC	WC Docket No. 02-150	FCC 02-260	H-27	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.
BellSouth	FL and TN	WC Docket No. 02-307	FCC 02-331	68	132	As in past Section 271 orders, our conclusion is based on a review of BellSouth's performance for all loop types, including voice grade loops, x-DSL capable loops, high capacity loops, and digital loops, as well as our review of BellSouth's hot cut, line-sharing and line splitting processes.
BellSouth	FL and TN	WC Docket No. 02-307	FCC 02-331	77-78	144	*Line Sharing.* We find, as did the state commissions, that Bellsouth offers nondiscriminatory access to the high frequency portion of the loop in Florida and Tennessee. BellSouth has provisioned 2,850 line sharing arrangements in Florida and 931 linesharing arrangements in Tennessee, as of July 2002. We recognize that BellSouth's performance in Florida and Tennessee, with respect to one installation timeliness measure...was out of parity for several months. We note, however, that the data under another installation timeliness metric-percent missed installation appointments-shows that BellSouth generally provisioned line shared loops in timely fashion during the relevant period. Accordingly, we find that BellSouth's provisioning of line-shared loops satisfies checklist item 4. Should Bellsouth's performance in this area deteriorate, we will pursue appropriate enforcement action.
BellSouth	FL and TN	WC Docket No. 02-307	FCC 02-331	D-30	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
BellSouth	FL and TN	WC Docket No. 02-307	FCC 02-331	D-30	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.
BellSouth	GA and LA	CC Docket No. 02-35	FCC 02-147	128-9	218	Our conclusion is based on our review of BellSouth's performance for all loops types which include, as in past section 271 orders, voice grade loops, xDSL-capable loops, digital loops, and high capacity loops, and our review of Bellsouth's processes for hot cuts, line sharing and line splitting.
BellSouth	GA and LA	CC Docket No. 02-35	FCC 02-147			Based on the evidence in the record, we find, as did the Georgia Commission, that Bellsouth demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop. BellSouth offers line sharing in Georgia and Louisiana under its interconnection agreements and the terms of its tariff, in accordance with the requirements of the Line Sharing Order and the Line Sharing Reconsideration Order.

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Qwest	AZ	WC Docket No. 03-309	FCC 03-309	14	26	Our conclusion is based on our review of Qwest's performance for all loop types-which include, as in past section 271 orders, voice grade loops, xDSL capable loops and high capacity loops-as well as hot cut provisioning and our review of Qwest's processes for line sharing and line splitting.
Qwest	AZ	WC Docket No. 03-309	FCC 03-309	C-27	51	To determine whether a BOC makes Line Sharing available consistent with Commission rules set out in the Line Sharing Order, the Commission examines categories of performance measurements identified in the Bell Atlantic New York and SWBT Texas orders.
Qwest	CO, ID, IA, MT, NB, ND, UT, WA, and WY	WC Docket No. 02-314	FCC 02-332	182	335	Our conclusion is based on our review of Qwest's performance for all loop types-which include, as in past section 271 orders, voice grade loops, xDSL capable loops and high capacity loops-as well as hot cut provisioning and our review of Qwest's processes for line sharing and line splitting.
Qwest	CO, ID, IA, MT, NB, ND, UT, WA, and WY	WC Docket No. 02-314	FCC 02-332	189	342	*Line Sharing and Line Splitting.* We find that Qwest demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop, and access to network elements necessary for competing carriers to provide line splitting. Qwest provides line sharing pursuant to its SGAT and state-approved interconnection agreements. According to Qwest, as of September 30, 2002, it had in service approximately 5,885 unbundles shared loops in Colorado, 4 unbundled shared loops in Idaho, 312 unbundled shared loops in Iowa, 309 unbundled shared loops in Montana, 126 unbundled shared loops in Nebraska, no unbundled shared loops in North Dakota, 1,858 unbundled shared loops in Utah, 5,850 unbundled shared loops in Washington, and 95 unbundled shared loops in Wyoming.
Qwest	CO, ID, IA, MT, NB, ND, UT, WA, and WY	WC Docket No. 02-314	FCC 02-332	189	343	Both Covad and Touch America argue that Qwest's performance under measures of maintenance and repair timeliness reveals multiple disparities. We recognize that Qwest's performance with regard to line sharing maintenance and repair measure-the All Troubles Cleared Within 24 Hours metric-is out of parity for some months in Colorado, Utah, and Washington, but we do not find that these disparities warrant a finding of checklist noncompliance given the relatively low volumes observed during these months and the difficulties associated with drawing strong conclusions based on low volumes of data.
Qwest	CO, ID, IA, MT, NB, ND, UT, WA, and WY	WC Docket No. 02-314	FCC 02-332	190	344	We note that Qwest's performance with regard to two other line-sharing maintenance and repair measures-the All Troubles Cleared Within 48 Hours and the Mean Time to Restore metrics-is also out of parity for some recent months in Colorado, Utah and Washington. First, the All Troubles Cleared Within 48 Hours metric shows that Qwest missed the parity standard for two of the relevant months in Colorado, Utah and Washington. Next, Qwest's performance for the Mean Time to Restore metric indicates that Qwest missed parity for dispatch orders for two of the relevant months in Colorado and Utah, and for three of the relevant months in Washington.

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Qwest	CO, ID, IA, MT, NB, ND, UT, WA, and WY	WC Docket No. 02-314	FCC 02-332	192	347	Covad also argues that maintenance and repair performance for line shared loops would improve if Qwest provided competitive LECs with the same "router test" for end-to-end data continuity that Qwest provides for its own customers as part of the provisioning process. Specifically, Covad states that many of the line shared loop orders for which it receives a service order completion notice suffer from missing or incomplete cross-connects in the central office that would be detected by the use of the router test, and could be corrected prior to delivery of the line shared loop.
Qwest	CO, ID, IA, MT, NB, ND, UT, WA, and WY	WC Docket No. 02-314	FCC 02-332	193	347	As noted above, we find that Qwest's overall performance with respect to maintenance and repair of the line shared loops is nondiscriminatory.
Qwest	CO, ID, IA, MT, NB, ND, UT, WA, and WY	WC Docket No. 02-314	FCC 02-332	K-27	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
Qwest	CO, ID, IA, MT, NB, ND, UT, WA, and WY	WC Docket No. 02-314	FCC 02-332	K-27	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York and SWBT Texas Orders*.
Qwest	MN	WC Docket No. 03-90	FCC 03-142	29	53	Our conclusion is based on our review of Qwest's performance for all loop types-which include, as in past section 271 orders, voice grade loops, xDSL capable loops and high capacity loops-as well as hot cut provisioning and our review of Qwest's processes for line sharing and line splitting.
Qwest	MN	WC Docket No. 03-90	FCC 03-142	C-26	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
Qwest	MN	WC Docket No. 03-90	FCC 03-142	C-27	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.
Qwest	NM, OR, and SD	WC Docket No. 03-11	FCC 03-81	53	93	Our conclusion is based on our review of Qwest's performance for all loop types-which include, as in past section 271 orders, voice grade loops, xDSL capable loops and high capacity loops-as well as hot cut provisioning and our review of Qwest's processes for line sharing and line splitting.
Qwest	NM, OR, and SD	WC Docket No. 03-11	FCC 03-81	F-27	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)

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Qwest	NM, OR, and SD	WC Docket No. 03-11	FCC 03-81	F-28	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.
SBC	AR and MO	CC Docket No. 01-194	FCC 01-338	26	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the Line Sharing Order, the Commission examines categories of performance measurements identified in the Bell Atlantic New York and SWBT Texas orders.
SBC	AR and MO	CC Docket No. 01-194	FCC 01-338	50	104	We find that SWBT demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop. SWBT offers linesharing in Missouri and Arkansas pursuant to its interconnections agreements in accordance with the Commission's Line Sharing Order and Line Sharing Reconsideration Order.
SBC	AR and MO	CC Docket No. 01-194	FCC 01-338	47-48	97	Our conclusion is based on our review of SWBT's performance for all loop types-which include, as in past section 271 orders, voice grade loops, hot cuts, xDSL-capable loops, digital loops, and high capacity loops, and on our review of SWBT's processes for hot cuts, line sharing and line splitting.
SBC	CA	WC Docket No. 02-306	FCC 02-330	71	123	Our conclusion is based on our review of Pacific Bell's performance for all loop types, which include voice-grade loops, x-DSL-capable loops, digital loops high-capacity loops, as well as our review of Pacific Bell's processes for hot cut provisioning, and line sharing and line splitting.
SBC	CA	WC Docket No. 02-306	FCC 02-330	76	132	*Line Sharing and Line Splitting.* Based on the evidence in the record, we find, as did the California Commission, that Pacific Bell provides non discriminatory access to the high frequency portion of the loop. For the relevant five-month period, Pacific Bell provisioned over 16,000 line sharing orders in California for unaffiliated competitive LECs. Pacific Bell's performance data for line-shared loops demonstrates that it is generally in compliance with the parity and benchmark measures established in California.
SBC	CA	WC Docket No. 02-306	FCC 02-330	C-30	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
SBC	CA	WC Docket No. 02-306	FCC 02-330	C-30	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.

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SBC	IL, IN, OH, and WI	WC Docket No. 03-167	FCC 03-243	88	142	Our conclusion is based on our review of Qwest's performance for all loop types-which include, as in past section 271 orders, voice grade loops, xDSL capable loops and high capacity loops-as well as hot cut provisioning and our review of Qwest's processes for line sharing and line splitting.
SBC	IL, IN, OH, and WI	WC Docket No. 03-167	FCC 03-243	91	145	Based on the evidence in the record, we find that SBC demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop. SBC's performance data for line shared loops demonstrate that it is generally in compliance with the parity and benchmark measures established in the application states.
SBC	KS and OK	CC Docket No. 00-217	FCC 01-129	109	215	We find that SWBT demonstrates that, as of June 1, 2000, it has been making line sharing available in both Kansas and Oklahoma. SWBT makes line sharing available to competing carriers in an optional amendment to the K2A and the O2A.
SBC	KS and OK	CC Docket No. 00-217	FCC 01-129	110	217	Only recently have competing carriers started purchasing the unbundled high-frequency portion of the loop from SWBT, and even then, only one competing carrier ordered a single line shared loop. SWBT has been providing line sharing to competing carriers in Texas, however, and has been using the same provisioning and maintenance processes in Texas as it uses in Kansas and Oklahoma. In addition, because SWBT has been providing line sharing to its separate affiliate in Kansas, Oklahoma, and Texas, we can rely on SWBT's performance towards its separate affiliate to evaluate its operations in these states.
SBC	MI	WC Docket No. 03-138	FCC 03-228	73	127	Our conclusion is based on our review of Michigan Bell's performance for all loop types, which include voice grade loops, xDSL-capable loops, digital loops, high capacity loops, as well as our review of Michigan Bell's processes for hot cut provisioning, and line sharing and line splitting.
SBC	MI	WC Docket No. 03-138	FCC 03-228	78	133	*Line Sharing and Line Splitting.* Based on the evidence in the record, we find, as did the Michigan Commission, that Michigan Bell provides nondiscriminatory access to the high frequency portion of the loop (line sharing.) Michigan Bell had approximately 73,000 high frequency portion of the loop (HFPL) UNEs in service as of the end of 2002. Michigan Bell's performance data for the line shared loops demonstrate that it is generally in compliance with the parity and benchmark measures established in Michigan.
SBC	MI	WC Docket No. 03-138	FCC 03-228	81	140	...the Michigan Commission required Michigan Bell to establish procedures for migrations from line sharing to line splitting, line sharing to UNE-P, and UNE-P to line splitting.

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SBC	NV	WC Docket No. 03-10	FCC 03-80	33	65	*Line Sharing and Line Splitting.* Based on the evidence in the record, we find, as did the Nevada Commission, that Nevada Bell demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop. Given the low number of orders in Nevada...we examine Pacific Bell's performance in California. To the extent that there were discrepancies in Pacific Bell's California performance, with regard to line sharing and line splitting trouble reports after provisioning, such discrepancies in Pacific Bell's California performance with regard to lie sharing and line splitting trouble reports after provisioning, such discrepancies do not appear to be competitively significant. Moreover, as discussed in the high-capacity loop section above, Pacific Bell's new line testing procedures have lowered the percentage of trouble reports.
SBC	NV	WC Docket No. 03-10	FCC 03-80	D-27	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
SBC	NV	WC Docket No. 03-10	FCC 03-80	D-27	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the Bell Atlantic New York and SWBT Texas Orders.
SBC	TX	CC Docket No. 00-238	FCC 00-65	164	321	As with the aspects of the UNE Remand Order's revised rule 319 that were not yet in effect at the time SWBT filed its application, we conclude that it would be unfair to require SWBT to demonstrate full compliance with the requirements of the Line Sharing Order in its initial application, at a time well in advance of the implementation deadline established by the Order.
SBC	TX	CC Docket No. 00-238	FCC 00-65	164	322	We find the depth and scope of this evidence sufficient to overcome the speculative concerns of some competing carriers regarding SWBT's line sharing readiness, and reject competing carrier arguments that the Commission that the Commission should deny SWBT's section 271 application on the basis of its alleged failure to comply with the requirements of the Line Sharing Order.
Verizon	CT	CC Docket No. 01-100	FCC 01-208	6	10	We focus our analysis in this section on the four loop types which present issues in controversy under this checklist item, beginning with the ordering, provisioning, and maintenance repair of stand-alone x-DSL-capable loops and digital loops. We also address linesharing and high capacity loops.
Verizon	CT	CC Docket No. 01-100	FCC 01-208	7	12	Verizon relies mainly on New York performance data to support its application in Connecticut, and our analysis is based primarily on that data.

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Verizon	CT	CC Docket No. 01-100	FCC 01-208	11-12	23	We find that Verizon demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop. Verizon offers line sharing in Connecticut under its interconnection agreements and the terms of its tariff, in accordance with the Commission's Line Sharing Order and Line Sharing Reconsideration Order. There is currently only one line-sharing arrangement in Verizon's Connecticut territory, and the Connecticut performance data shows no competitive LEC activity for line shared DSL services in March and April.
Verizon	MA	CC Docket No. 01-9	FCC 01-130	69	124	We find that Verizon has demonstrated that it has a line-sharing and line-splitting provisioning process that affords competitors nondiscriminatory access to these facilities. In so doing, we acknowledge that the Massachusetts Department also concludes that Verizon complies with this checklist item.
Verizon	MA	CC Docket No. 01-9	FCC 01-130	96	166	The Department of Justice recognizes that "Verizon is making efforts to resolve its line sharing implementation difficulties" and the Massachusetts Department urges us to find that Verizon provides nondiscriminatory access to the high frequency portion of the loop.
Verizon	MA	CC Docket No. 01-9	FCC 01-130	97	168	We recognize the Department of Justice's concerns that some of the line sharing completion interval data may be inaccurate. Like the Massachusetts Department, however, we conclude that the data adequately show that Verizon has met its line sharing obligation.
Verizon	MA	CC Docket No. 01-9	FCC 01-130	94-95	165	Because the linesharing volumes in Massachusetts have escalated only recently, however, we look to Verizon's line sharing performance in New York as well, where line sharing volumes are larger for additional evidence that Verizon is providing nondiscriminatory access to line sharing. We conclude that Verizon's line sharing OSS in New York and Massachusetts uses the same systems and offers the same functionality. Accordingly, we shall consider Verizon's limited commercial line sharing performance in Massachusetts.
Verizon	MD DC WV	WC Docket No. 02-384	FCC 03-57	71	119	Our conclusion is based on our review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, hot cut provisioning, x-DSL capable loops, digital loops, high capacity loops, as well as our review of Verizon's processes for line sharing and line splitting.
Verizon	MD DC WV	WC Docket No. 02-384	FCC 03-57	F-27	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
Verizon	MD DC WV	WC Docket No. 02-384	FCC 03-57	F-28	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.

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Verizon	ME	CC Docket No. 02-61	FCC 02-187	31	44	Our conclusion is based on our review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, xDSL-capable loops, digital loops, and high capacity loops, and our review of Verizon's processes for hot cuts, line sharing and line splitting.
Verizon	ME	CC Docket No. 02-61	FCC 02-187	36	51	Based on the evidence in the record, we find, as did the Maine Commission, that Verizon demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop. Through March 2002, Verizon had provisioned 800 line sharing orders in Maine for unaffiliated competitive LECs. Verizon's performance data for lineshared DSL loops demonstrates that it is in compliance with the parity and benchmark measures established in Maine.
Verizon	ME	CC Docket No. 02-61	FCC 02-187	D-27	50	On December 9, 1999, the Commission released the *Line Sharing Order,* which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
Verizon	ME	CC Docket No. 02-61	FCC 02-187	D-27	51	To determine whether a BOC makes Line Sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the Bell Atlantic New York and SWBT Texas orders.
Verizon	NH and DE	WC Docket No. 02-157	FCC 02-262	62	105	Our conclusion that Verizon complies with checklist item 4 is based on our review of Verizon's performance for all loop types, which include, as in past 271 orders, voice grade loops, x-DSL capable loops, digital loops, and high capacity loops, as well as our review of Verizon's processes for hot cuts, line sharing, and line splitting.
Verizon	NH and DE	WC Docket No. 02-157	FCC 02-262	F-27	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
Verizon	NH and DE	WC Docket No. 02-157	FCC 02-262	F-27	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas orders*.
Verizon	NJ	WC Docket No. 02-67	FCC 02-189	68	136	Our conclusion is based on our review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, xDSL-capable loops, digital loops, and high capacity loops, and our review of Verizon's processes for hot cuts, line sharing and line splitting.

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Verizon	NJ	WC Docket No. 02-67	FCC 02-189	76-77	152	*Line Sharing and Line Splitting.* We find that Verizon demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop, and access to network elements necessary for competing carriers to provide line splitting. Verizon provides line sharing pursuant to its interconnection agreements and in accordance with our rules. Verizon states that it provides line sharing to competitive LECS using substantially the same methods and procedures as in the other states where the Commission has found Verizon to be checklist compliant. According to Verizon, it had in service approximately 1,800 line sharing arrangements in New Jersey as of February 2002. We note that Verizon generally has met the relevant performance standards for provisioning, maintaining and repairing line-shared loops for competitors in New Jersey. We also note that the commenters in this proceeding do not criticize Verizon's performance with regard to the provisioning, maintenance and repair of line shared loops.
Verizon	NJ	WC Docket No. 02-67	FCC 02-189	C-27	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
Verizon	NJ	WC Docket No. 02-67	FCC 02-189	C-27	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.
Verizon	NY	CC Docket No. 99-295	FCC 99-404			The commission did not consider linesharing Check List Item.
Verizon	PA	CC Docket No. 01-138	FCC 01-269	40	76	Our conclusion is based on our review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, hot cuts, xDSL-capable loops, digital loops, and high capacity loops, and our review of Verizon's processes for line sharing and line splitting.
Verizon	PA	CC Docket No. 01-138	FCC 01-269	40	77	Finally, we note that commenter have not raised any significant issues with voice grade loops, which comprise the overwhelming majority of loops ordered by competitive LECs. [272]
Verizon	PA	CC Docket No. 01-138	FCC 01-269	40	272 (footnote)	[272] The record reflects that in Pennsylvania, Verizon has provisioned approximately...1000 line sharing arrangements to competitive LECs as of June 21, 2001.
Verizon	PA	CC Docket No. 01-138	FCC 01-269	46	88	*Line Sharing*. We find that Verizon demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop, pursuant to its interconnection agreements and in accordance with our rules. Although ordering volumes have been low, Pennsylvania performance data demonstrate that Verizon's performance for provisioning and maintaining line-shared DSL loops to competitors is generally in parity.

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Verizon	PA	CC Docket No. 01-138	FCC 01-269	C-23	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)
Verizon	PA	CC Docket No. 01-138	FCC 01-269	C-24	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the Bell Atlantic New York and SWBT Texas orders.
Verizon	RI	CC Docket No. 01-324	FCC 02-63	37	76	Our conclusion is based on our review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, xDSL-capable loops, digital loops, and high capacity loops, and our review of Verizon's processes for hot cuts, line sharing and line splitting.
Verizon	RI	CC Docket No. 01-324	FCC 02-63	43-44	89	Based on the evidence in the record, we find, as did the Rhode Island Commission, that Verizon demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop. Through September 2001, Verizon had completed approximately four line sharing orders in Rhode Island for unaffiliated competitive LECs and the Rhode Island performance data show almost no competitive LEC activity for lineshared DSL services in September or October. Although there has been very little ordering activity in Rhode Island for line sharing for the months reported, there has been much ordering activity in Massachusetts during the same period of time. Verizon's Massachusetts performance data demonstrate that it is provisioning lineshared DSL loops to competitors at parity with its own retail provisioning, and that its maintenance and repair performance is also acceptable.
Verizon	VA	WC Docket No. 02-214	FCC 02-297	80	138	Our conclusion is based on our review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, hot cut provisioning, x-DSL capable loops, digital loops, high capacity loops, as well as our review of Verizon's processes for line sharing and line splitting.
Verizon	VA	WC Docket No. 02-214	FCC 02-297	87	151	Line Sharing and Line Splitting. Covad argues that Verizon discriminates against competitors by refusing to provision UNE shared loops for customers served by resale voice providers. Covad complains that when it submits orders for UNE line shared loops for customers served by resellers of Verizon's voice service, Verizon refuses to provision the line sharing UNE, returning a rejection notice indicating "third party voice." We disagree with Covad that Verizon is obligated to provide access to the high frequency portion of the loop when the customer's voice service is being provided by a reseller, and not by Verizon.
Verizon	VA	WC Docket No. 02-214	FCC 02-297	C-27	50	On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL.)

REGION	STATE	FCC DOCKET NO.	FCC PROCEEDING	PAGE	PARA	
Verizon	VA	WC Docket No. 02-214	FCC 02-297	C-27	51	To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.
Verizon	VA	WC Docket No. 02-214	FCC 02-297			Our rules do not require incumbent LECs to provide access to the high frequency portion of the loop when the incumbent LEC is not providing voice service over that loop. We disagree with Covad that Verizon is still considered the voice provider when a reseller is providing resold voice service to an end user customer. We agree, therefore, with Verizon that it is not required to provide access to the high frequency portion of the loop under these circumstances. We note that Verizon does permit the resale of its DSL service over resold voice lines so that customers purchasing resold voice are able to obtain DSL services from a provider other than Verizon.
Verizon	VT	CC Docket No. 02-7	FCC 02-118	28	48	Our conclusion is based on our review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, xDSL-capable loops, digital loops, and high capacity loops, and our review of Verizon's processes for hot cuts, line sharing and line splitting.
Verizon	VT	CC Docket No. 02-7	FCC 02-118	32	55	Based on the evidence in record, we find, as did the Vermont Board, that Verizon demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee	WC Docket No. _____

BRIEF IN SUPPORT OF APPLICATION BY BELLSOUTH FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN FLORIDA AND TENNESSEE

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September 20, 2002

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in various negotiated and arbitrated interconnection agreements, BellSouth continues to offer nondiscriminatory access to poles, ducts, conduits, and rights-of-way within reasonable time frames in both Florida and Tennessee. *See Milner Aff.* ¶ 89 & Exh. WKM-4. BellSouth's provision of this checklist item to CLECs in Florida and Tennessee is no different than in Georgia and Louisiana or any of the five states covered by BellSouth's recently approved application. *See id. See also FPSC Staff Checklist Rec.* at 114, 118; *TRA Trans.* at 21-22.

BellSouth's satisfaction of Checklist Item 3 is borne out by the fact that CLECs are executing license agreements and requesting access to BellSouth's poles, ducts, conduits, and rights-of-way in Florida and Tennessee in numbers proportional to Georgia and Louisiana. As of August 15, 2002, 61 CLECs have executed license agreements for access to BellSouth's poles, ducts, conduits, and rights-of-way in Florida, and 55 have executed such agreements in Tennessee. *Milner Aff.* ¶ 90. As of the same date, 23 of the Florida CLECs with license agreements had made 380 applications for access to BellSouth's poles, ducts, conduits, and rights-of-way; 16 Tennessee CLECs had made 728 applications for access. *Id.*

In sum, BellSouth plainly satisfies the requirements of Checklist Item 3. Indeed, BellSouth's compliance is so clear that no party challenged that conclusion during the Florida or Tennessee state proceedings. *See Ruscilli/Cox Joint Aff.* ¶ 3 n.3. Nor did any party dispute BellSouth's compliance with this checklist item in the recent Georgia/Louisiana and Five State proceedings before this Commission. *GA/LA Order* ¶ 278; *Five State Order* ¶ 270.

D. Checklist Item 4: Unbundled Local Loops

As the Commission found in the *GA/LA Order*, BellSouth "provides unbundled local loops in accordance with the requirements of section 271 and [Commission] rules." *GA/LA Order* ¶ 218. *See also Five State Order* ¶ 232. Because BellSouth provides nondiscriminatory

access to unbundled local loops in Florida and Tennessee in substantively the same manner as in the other seven states in BellSouth's region that have already received section 271 approval, that finding is similarly true of this Application. *See Milner Aff.* ¶ 91. BellSouth fully complies with all of its obligations under this checklist item. *See FPSC Staff Checklist Rec.* at 119, 132-40; *TRA Trans.* at 23-24.

BellSouth has a concrete and specific legal obligation in both Florida and Tennessee to provide local loop facilities on an unbundled basis, the terms of which are set forth in BellSouth's SGATs and in interconnection agreements with multiple CLECs. *See Ruscilli/Cox Joint Aff.* ¶¶ 8-9. As in the seven states for which BellSouth has already received section 271 approval, BellSouth provisions high-quality loops in a timely manner in both Florida and Tennessee, and has demonstrated its ability to satisfy all levels of reasonable customer demand. Moreover, BellSouth utilizes the same processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services throughout its region that the Commission examined and found nondiscriminatory in BellSouth's previous 271 applications. BellSouth has also complied fully with its obligations under the *Line Sharing Order*,[58] the *Line Sharing Reconsideration Order*,[59] and the *UNE Remand Order*.

BellSouth offers CLECs local loop transmission from the central office to the customer's premises, unbundled from local switching and other services. As of July 31, 2002, BellSouth

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[58] Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[59] Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101 (2001) ("*Line Sharing Reconsideration Order*").

had provisioned 166,168 loops in Florida and 50,886 in Tennessee. *See Milner Aff.* ¶ 98. Overall, throughout BellSouth's region, BellSouth has provisioned more than 400,000 loops. *See id.*

1. Stand-Alone Loops

In both Florida and Tennessee, BellSouth offers a variety of loop types to CLECs, including SL1 voice grade loops, SL2 voice grade loops, 2-wire ISDN digital grade loops, 56 or 64 kbps digital grade loops, 4-wire DS1 loops, and various high-capacity and xDSL-capable loops. *See Milner Aff.* ¶ 96.[60] In addition, BellSouth provides CLECs with unbundled loops in those instances where the customer was previously served by IDLC. *See id.* ¶ 99. CLECs can access unbundled loops at any technically feasible point, and BellSouth provides access to all the features, functions, and capabilities of the loop. *See id.* ¶ 92; *New York Order* ¶¶ 273, 275. CLECs seeking additional loop types can take advantage of BellSouth's BFR process. *See Milner Aff.* ¶ 97; *Ruscilli/Cox Joint Aff.* ¶¶ 12-13.

As demonstrated below, comprehensive performance data demonstrate that BellSouth's processes and procedures for the ordering, provisioning, and maintenance of unbundled loop facilities offer CLECs in both Florida and Tennessee a meaningful opportunity to compete in the local service market. *See GA/LA Order* ¶¶ 224, 228 (analyzing BellSouth's compliance with Checklist Item 4 through performance measurements covering order processing timeliness, installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of maintenance and repair functions).

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[60] Both SL1 and SL2 are voice grade loops, but SL2 loops are designed. SL2 loops come with test points for mechanized trouble isolation (SMAS points), and the CLEC gets a Detailed Layout Record ("DLR") depicting the composition of the loop (what cable and pair, gauge, length to crossbox, etc.).

BellSouth's SQM plans in Florida and Tennessee are disaggregated by loop type. As demonstrated in the affidavit of Alphonso Varner and its exhibits, and as further demonstrated below, those plans provide highly disaggregated data for different loop types – including data for analog loops (designed and nondesigned, and with and without LNP), various kinds of digital loops, xDSL loops, and line-shared loops. BellSouth's performance in the pre-ordering, ordering, and provisioning of unbundled loops, as captured by these comprehensive measures, demonstrates that CLECs have nondiscriminatory access to local loop transmission. *See generally Varner Aff.* Exhs. PM-2 ¶¶ 106-161 (Florida), PM-3 ¶¶ 104-159 (Tennessee).

a. Hot Cuts

BellSouth provides nondiscriminatory access to hot-cut loops in Florida and Tennessee in accordance with the Commission's standards, utilizing the exact same hot-cut processes and procedures that the Commission approved in its *Five State* and *GA/LA Orders*. *See GA/LA Order* ¶ 220; *Five State Order* ¶ 234. Specifically, BellSouth performs coordinated conversions in a timely manner, with minimal service disruption, and with few troubles following installation. *See GA/LA Order* ¶ 220; *Five State Order* ¶ 234.

BellSouth has developed three different hot-cut processes, allowing CLECs to select the particular method that best fits their business plan and their customers' needs. Two of these processes (the time-specific cutover and the non-time-specific cutover) involve order coordination between BellSouth and the requesting CLEC, while the third process (the date-specific cutover) does not involve any such coordination. *See Milner Aff.* ¶¶ 124-125. In the third method, the CLEC simply specifies a date for the desired conversion to occur. *See id.* ¶ 126.

The time-specific and non-time-specific processes are largely analogous: the difference is the time for determining the cutover. When a CLEC places an order for a time-specific conversion, the CLEC simultaneously selects the date and time for the desired conversion. *See id.* ¶ 124. For a non-time-specific conversion, the CLEC selects only the cutover *date* at the time it places the original order. *See id.* ¶ 125. Then, within 24 to 48 hours of that cutover date, BellSouth and the CLEC jointly select a mutually acceptable time for the coordinated conversion to occur. *Id.*

The Commission has noted that "[t]he ability of a BOC to provision working, trouble-free loops through hot cuts is critically important in light of the substantial risk that a defective hot cut will result in competing carrier customers experiencing service outages for more than a brief period." *Texas Order* ¶ 256. As in the seven states for which BellSouth has already received 271 approval, BellSouth's performance data for Florida and Tennessee demonstrate that it is doing exceptionally well in performing this "critically important" task.

In Florida, between May and July 2002, BellSouth met or exceeded every benchmark for each of the hot-cut submetrics. *See Varner Aff.* Exh. PM-2 ¶ 156. BellSouth provisioned 99.9% of scheduled conversions on time, and in fewer than 15 minutes, during this three-month time period. *See id.* Exh. PM-2 ¶¶ 5, 157 (B.2.12). BellSouth also performed these cutovers with less than 1% of service outages each month. *See id.* Exh. PM-2 Attachs. 1-3 (B.2.12.2, B.2.16.2). This is far superior to the applicable standard. *See KS/OK Order* ¶ 204; *New York Order* ¶ 302. In addition, CLECs reported trouble on only 1.2% of converted circuits (B.2.17), which is well-within the benchmark established by BellSouth's SQM and in line with this Commission's standards. *See Varner Aff.* Exh. PM-2 ¶ 161.

BellSouth's Tennessee performance is also excellent, meeting or exceeding every benchmark for each of the hot-cut submetrics. *See id.* Exh. PM-3 ¶ 151. From May through July 2002, BellSouth completed 809 of the 809 scheduled conversions on time between May and July 2002. *See id.* Exh. PM-3 ¶ 152 (B.2.12). BellSouth performed these cutovers with less than 1% of service outages each month, again exceeding the applicable standard. *See id.* Exh. PM-3 Attachs. 1-3 (B.2.12.2, B.2.16.2). During that time period, CLECs reported trouble on only 31 of 509 provisioned circuits, meeting the benchmarks in two out of three months. *See Varner Aff.* Exhs. PM-3 ¶ 156.[61]

There can be no serious dispute that BellSouth satisfies this Commission's standards for hot cuts in Florida and Tennessee. *See GA/LA Order* ¶¶ 220-221 (BellSouth demonstrates compliance by providing hot cuts in a timely manner, at an acceptable level of quality, with minimal service disruptions, and with a minimum number of troubles following installation); *Five State Order* ¶ 234.

b. Stand-Alone Loop Performance

In reviewing a BOC's performance for stand-alone loop provisioning, the Commission focuses upon the following categories: (i) installation timeliness; (ii) installation quality; and (iii) the quality of maintenance and repair functions. *See GA/LA Order* ¶ 224. In both Florida and Tennessee, across all loop types, BellSouth's performance has been excellent.

BellSouth provisions high-quality, unbundled voice-grade loops in a timely manner, affording CLECs serving end users in Florida and Tennessee a meaningful opportunity to compete. In Tennessee, between May and July 2002, reported performance data for analog loops

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[61] In July 2002, an inadvertent central office error disconnected 9 lines after they had been accepted by the CLEC. Once identified, these lines were immediately put back in service. *See Varner Aff.* Exh. PM-3 ¶ 156.

demonstrate that BellSouth has consistently met or exceeded the parity standard for both order completion intervals (or "OCIs") (B.2.1.8, B.2.1.9) and the percentage of missed installation appointments (B.2.18.8, B.2.18.9). *See Varner Aff.* Exh. PM-3 ¶¶ 134, 137. In Florida, during that same time period, BellSouth met or exceeded the retail analogues for 11 of the 16 OCI submetrics with CLEC activity,[62] and all 16 submetrics with CLEC activity for percentage of missed installation appointments. *See id.* Exh. PM-2 ¶¶ 139, 142.

The quality of BellSouth's loop provisioning, as well as the timeliness and quality of its maintenance and repair services, has been solid in both Florida and Tennessee. *See id.* Exhs. PM-2 ¶¶ 143-148, PM-3 ¶¶ 138-143. In the few instances in which BellSouth missed an installation quality submetric, the small volume of trouble reports precluded a meaningful comparison to the retail analogue. *See id.* Exh. PM-2 ¶ 143. For those I-30 (troubles within 30 days of installation) submetrics for which there are sufficient volumes to offer a statistically significant portrait of BellSouth's performance, BellSouth has consistently met the parity standard. *See id.* Exhs. PM-2 ¶ 143, PM-3 ¶ 138 (B.2.19.8.1.1) (2-wire analog loop design/<10 circuits/dispatch).

For designed two-wire analog loops, between May and July 2002, in both Florida and Tennessee, BellSouth met a greater percentage of maintenance and repair appointments for CLEC customers than it did for its own retail customers (B.3.1.8). *See id.* Exhs. PM-2 ¶ 146 (6 of the 6 submetrics in Florida), PM-3 ¶ 142 (5 of the 6 submetrics in Tennessee). For non-

[62] CLEC orders in these submetrics are scheduled based on the standard ordering guide, which carries a minimum four-day interval for these orders. *See Varner Aff.* Exh. PM-2 ¶ 139. The retail analogue for the majority of CLEC orders in these measurements, however, is residence and business (POTS) type orders, which are scheduled based on the due date calculator, and thus may be scheduled and completed in less than one day. *See id.* Thus, these misses do not raise any systemic issues.

designed two-wire analog loops, BellSouth met all 6 submetrics in Tennessee. *See id.* Exh. PM-3 ¶ 143 (B.3.1.9).[63] And, in both states, BellSouth completed maintenance and repair work for both design and non-design analog loops in substantially less time for CLEC loops than for BellSouth's own retail customers (B.3.3.8, B.3.3.9). *See id.* Exhs. PM-2 ¶ 149, PM-3 ¶ 144. Finally, with respect to both design and non-design analog loops, BellSouth provides high-quality maintenance and repair services, such that CLEC customers generally suffered a lower percentage of repeat troubles than did BellSouth retail customers. *See id.* (B.3.4.8, B.3.4.9).

c. High-Speed Digital Loops

BellSouth has provisioned high-quality DS1 loops in a timely manner to CLECs in both Florida and Tennessee, and, though rarely ordered, BellSouth continues to offer unbundled loops of greater transmission capacity. In Florida, BellSouth met 7 of the 10 submetrics with CLEC activity between May and July 2002, missing only 29 of the more than 1,200 scheduled appointments for provisioning digital loops. *See Varner Aff.* Exh. PM-2 ¶ 153 (B.2.18). In Tennessee, BellSouth met or exceeded the retail analogues for 4 of the 6 submetrics with CLEC activity in May through July 2002, missing only 46 of the 603 scheduled appointments for provisioning digital loops within that same time period. *See id.* ¶ 148. Moreover, as was the

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[63] In Florida, BellSouth met the retail analogue requirement for 3 of the 6 submetrics that had CLEC activity in May through July 2002. *See Varner Aff.* Exh. PM-2 ¶ 147. For the May "Dispatched" measurement, 60 of the 104 total missed appointments were due to wet or damaged feeder cable, while another 16 were missed by less than one hour. For the May "Non-Dispatched" measurement, two of the six missed appointments were missed by less than 30 minutes each, while the other four missed appointments were due to improper order close-out procedures associated with a multi-trouble order for the same customer. Maintenance technicians have been retrained on appropriate order close-out procedures. There were 18 total missed appointments for the Non-Dispatched measurement in July. Two of the 18 were closed as Test OK/Found OK, and 15 of the remaining 16 were the result of two multiple troubles – one involving five circuits and the other involving 10 circuits. *See id.*

case in both states, the majority of these missed appointments were caused by facility issues that required construction to add facilities. *See id.* Exhs. PM-2 ¶ 153, PM-6 ¶ 148.

The average OCI for DS1 loops has also been substantially shorter for CLECs than it has been for BellSouth retail customers. *See id.* Exhs. PM-2 ¶ 151, PM-3 ¶ 146 (B.2.1.18, B.2.1.19). In Tennessee, BellSouth met or exceeded the retail analogues for 6 of the 6 submetrics with CLEC activity in the months of May through July 2002 for both the digital loops < & => DS1. *See id.* Exh. PM-3 ¶ 144. In Florida, BellSouth met or exceeded the retail analogues for 5 of the 9 submetrics with CLEC activity in the months of May through July 2002 for both the digital loops < & => DS1. *See id.* Exh. PM-2 ¶ 151. The misses, however, were the result mainly of differences between the product mix of CLEC orders and the retail analogue. Specifically, mre than one-half of CLEC orders in this measurement were Unbundled Digital Channel ("UDC") circuits, which are designed circuits that require approximately 10 days completion, compared to the retail analogue, which is heavily weighted toward ADSL circuits requiring approximately 4 days completion. *See id.*[64]

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[64] With respect to the number of provisioning troubles within 30 days, BellSouth in Florida met or exceeded the retail analogues for 3 of the 9 submetrics with CLEC activity in May through July 2002. *See Varner Aff.* Exh. PM-2 ¶ 154. Three of the six misses were in the "< DS1 / < 10 Circuits / Dispatch" measurement. Two misses were associated with >= DS1 / < 10 Circuits / Dispatch" orders. *See id.* The majority of the missed submetrics for these measures were caused by defective plant facilities, CO wiring problems, or Test OK/Found OK reports. *See id.* Similarly, BellSouth in Tennessee met or exceeded the retail analogues for 2 of the 6 submetrics with CLEC activity in May through July 2002. *See id.* Exh. PM-3 ¶ 149. There were 2 missed submetrics in May and June for digital loops <DS1 and 2 missed submetrics in June and July for digital loops =>DS1. *See id.* The <DS1 loops showed greater than 20% of the reports being closed as "no trouble found" with the =>DS1 having approximately 40% of the reports closed as "no trouble found." *See id.* The remainder of the reports were spread equally between the outside facilities and the equipment within the central office. *See id.* In both states, however, no trends or systemic installation issues were identified for these items. *See id.* Exh. PM-2 ¶ 154, PM-3 ¶ 149.

2. Access to Subloop Elements

In addition to the unbundled loops themselves, BellSouth offers CLECs the same nondiscriminatory access to subloop elements in Florida and Tennessee that it offers in its other states. *See Milner Aff.* ¶ 107. The subloop UNE has been defined as a portion of the local loop that can be accessed at accessible points on the loop. *See id.* This includes any technically feasible point near the customer's premises (such as the pole or pedestal, the network interface device, or minimum point of entry to the customer's premises), the feeder distribution interface, the Main Distributing Frame, remote terminals, and various other terminals. *See id.* BellSouth offers the following subloop elements: loop concentration/multiplexing; loop feeder; loop distribution; intrabuilding network cable; and network terminating wire. *See id.* Moreover, CLECs can request additional subloop elements via the BFR process. *See id.* As of July 31, 2002, BellSouth has provided CLECs 587 unbundled loop distribution subloop elements region-wide, of which 566 are in Florida. *See id.* ¶ 108. CLECs in Tennessee have not purchased the unbundled loop distribution subloop elements. *See id.*

3. Access to xDSL-Capable Loops

As the Commission previously found, "BellSouth demonstrates that it provides xDSL-capable loops in accordance with the requirements of checklist item 4." *GA/LA Order* ¶ 228. *See also Five State Order* ¶ 236. BellSouth utilizes the same nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services in Florida and Tennessee as it does in the other states in BellSouth's region, offering CLECs a meaningful opportunity to compete in the advanced services market. As BellSouth explained in its previous section 271 applications, because the various flavors of xDSL have different technical prerequisites and disparate tolerance for disturbing devices, CLECs requested that BellSouth create xDSL loop offerings with distinct parameters. In response to these

requests, BellSouth developed a variety of unbundled loop types for CLECs to choose from. Because BellSouth signed interconnection agreements obligating it to continue provisioning these different loop types, however, multiple product offerings have been and remain available over time. The historical evolution of BellSouth's specific xDSL loop offerings – which currently include the ADSL-capable loop; HDSL-capable loop; ISDN loop; Unbundled Digital Channel ("UDC"); Unbundled Copper Loop ("UCL"), Short and Long; and UCL-Nondesign ("UCL-ND") – is recounted in Exhibit WKM-5 to the affidavit of W. Keith Milner.[65]

BellSouth also performs loop conditioning as requested, regardless of whether BellSouth offers advanced services to the end-user customer on that loop. CLECs may select the precise conditioning (*i.e.*, loop modification) that they desire on their loop and will pay only for the level of conditioning selected. *See Milner Aff.* ¶ 104 & Exh. WKM-5 ¶ 24. Through BellSouth's Unbundled Loop Modification ("ULM") process, a CLEC can request that BellSouth modify any existing loop to be compatible with the CLEC's particular hardware requirements. *See id.* Exh. WKM-5 ¶ 24.

Under the direction of its in-region state commissions, BellSouth has also developed comprehensive, disaggregated performance metrics that capture its performance in the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services. In both Florida and Tennessee, BellSouth's performance has been nondiscriminatory across each of the categories upon which this Commission has focused its attention: (i) order processing timeliness; (ii) installation timeliness; (iii) missed installation appointments; (iv) installation

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[65] As of July 31, 2002, BellSouth has provisioned the following volumes of xDSL-capable loops in Florida: 5,170 2-wire ADSL loops; 141 2-wire HDSL loops; 263 UCL (Long and Short) loops; and 5,301 UDC loops. In Tennessee, BellSouth had provisioned the following volumes of xDSL-capable loops: 1,698 2-wire ADSL loops; 46 2-wire HDSL loops; 425 UCL (Long and Short) loops; and 1,099 UDC loops. *See Milner Aff.* ¶ 96.

quality; and (v) quality and timeliness of maintenance and repair. *See GA/LA Order* ¶ 228. BellSouth's comprehensive performance data clearly support the conclusion that BellSouth provides nondiscriminatory access to xDSL-capable loops and related services in compliance with Checklist Item 4.

In both Florida and Tennessee, across all five of the relevant categories and across each of its xDSL-related metrics, BellSouth's performance has been excellent. BellSouth returns LMU to CLECs in substantially the same time and manner as it is available to BellSouth's personnel. *See Stacy Aff.* ¶ 365. In Florida, BellSouth returned timely responses for 91% of the 12,087 CLEC requests for electronic loop make-up information during the period May through July 2002. *See Varner Aff.* Exh. PM-2 ¶ 82 (F.2.2). In Tennessee, BellSouth returned timely responses for 94% of the 2,392 CLEC requests. *See id.* Exh. PM-3 ¶ 79. A root-cause analysis identified a DOM system queuing problem that resulted in longer responses for both CLECs and BellSouth alike. After BellSouth corrected the problem on June 27, it met the relevant benchmark – 95% in 1 minute – in July 2002 in both Florida and Tennessee. *See id.* Exhs. PM-2 ¶ 82 & Attachs. 1-3 (99.1% in Florida), PM-3 ¶ 79 & Attachs. 1-3 (99.6% in Tennessee).

BellSouth additionally installs high-quality xDSL-capable loops in a timely manner in Florida and Tennessee. BellSouth provisions xDSL-capable loops well within the seven-day benchmark established in its state-approved performance plans, *see id.* Exhs. PM-2 ¶ 111, PM-3 ¶ 108 (B.2.2), and BellSouth has met or exceeded the applicable parity standard for missed installation appointments in May through July 2002, *id.* Exhs. PM-2 ¶ 115, PM-3 ¶ 112 (B.2.18.5). Once provisioned, CLEC-ordered xDSL-capable loops experience few technical problems. Between May and July 2002, BellSouth met or exceeded the parity standard for

trouble reports within 30 days of installation for all submetrics in Tennessee and Florida. *Id.* Exhs. PM-2 ¶ 117, PM-3 ¶ 113 (B.2.19.5).

When CLECs did experience trouble on xDSL-capable loops, BellSouth handled the troubles in substantially less time than it handled the troubles for its retail units (B.3.3.5). *See id.* Exhs. PM-2 ¶ 124, PM-3 ¶ 120. BellSouth consistently made a greater percentage of repair appointments for CLECs than for its own retail customers, *see id.* Exhs. PM-2 ¶ 120, PM-3 ¶ 116 (B.3.1.5), and provided superior quality repair service, as CLECs suffered fewer repeat troubles, *see id.* Exhs. PM-2 ¶ 125, PM-3 ¶ 121 (B.3.4.5).

4. ISDN-BRI Loop Provisioning

BellSouth's performance in provisioning ISDN-BRI loops has also been excellent across each of the categories to which this Commission has directed its attention. *See GA/LA Order* ¶ 230 ("BellSouth provides ISDN loops to competitors in Georgia and Louisiana in accordance with the requirements of checklist item 4."); *Five State Order* ¶ 238. In both Florida and Tennessee, BellSouth has met or exceeded the parity standard for ISDN-BRI loops for average OCI, *see Varner Aff.* Exhs. PM-2 ¶ 129, PM-3 ¶ 124 (B.2.1.6.3), and for meeting installation appointments during each month from May through July 2002, s*ee id.* Exhs. PM-2 ¶ 131, PM-3 ¶ 126.

With respect to the customer trouble report rate, in Tennessee, BellSouth met the retail analogue comparison for 6 of the 6 submetrics during the May through July 2002 time period. *See id.* Exh. PM-3 ¶ 129. Although BellSouth in Florida missed the retail analogue comparison for 3 of the 6 submetrics during the May through July 2002 time period, a large proportion of the reported troubles were due to defective cable pairs or circuit cards that had to be reseated. *See id.* Exh. PM-2 ¶ 134. Moreover, CLECs in Florida reported 157 troubles for the 6,643 lines in service for this submetric in May 2002, 168 troubles for the 6,570 lines in service in June 2002,

and 193 troubles for the 6,557 lines in service in July 2002. *See id.* Thus, because both CLECs and BellSouth retail averaged over 97% trouble free service (including both dispatched and non-dispatched orders) in May through July 2002, CLECs were not denied a meaningful opportunity to compete. *See id.*

When CLECs do experience troubles, BellSouth has provided timely and high-quality maintenance and repair services. In both Florida and Tennessee, BellSouth routinely meets or exceeds the parity standard for missed repair appointments, *see id.* Exhs. PM-2 ¶ 133, PM-3 ¶ 128 (B.3.1.6), average maintenance duration, *see id.* Exhs. PM-2 ¶ 135, PM-3 ¶ 130 (B.3.3.6), and percent repeat reports within 30 days, *see id.* Exhs. PM-2 ¶ 136, PM-3 ¶ 131 (B.3.4.6).

5. Line Sharing

BellSouth has implemented line sharing in both Florida and Tennessee in full compliance with the terms of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*, allowing CLECs to offer high-speed data service to BellSouth voice customers. *See Milner Aff.* ¶¶ 111, 120 & Exh. WKM-6. Specifically, line sharing is available to a single requesting carrier on loops that carry BellSouth's POTS so long as the xDSL technology deployed by the requesting carrier does not interfere with the analog voice-band transmissions. *See id.* Exh. WKM-6 ¶ 5. BellSouth allows line-sharing CLECs to deploy any version of xDSL that is presumed acceptable for shared-line deployment in accordance with Commission rules and that will not significantly degrade analog voice service. *See id.* At the request of the data CLECs, BellSouth voluntarily provides line splitters in 96-line unit, 24-line unit, and 8-line unit complements in Florida, and in 96-line unit, 24-line unit, and 1-line unit complements in Tennessee. *See id.* ¶ 17. BellSouth utilizes the exact same processes and procedures for the pre-ordering, ordering, and provisioning of line-shared loops in Florida and Tennessee as it follows in each of the seven states for which BellSouth has received interLATA authority. *See id.* ¶ 19. Accordingly, the Commission's

conclusion that "BellSouth offers line sharing in Georgia and Louisiana . . . in accordance with the requirements of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*," *GA/LA Order* ¶ 238; *Five State Order* ¶ 248, applies with equal force here.

BellSouth developed its line-sharing product in a collaborative effort with CLECs and is continuing to work cooperatively with CLECs on an ongoing basis to resolve issues as they arise. *See Milner Aff.* ¶ 115 & Exh. WKM-6 ¶¶ 6-15. BellSouth invited all interested CLECs to collaborative meetings beginning in January 2000, and 12 CLECs participated in these meetings. *See id.* Exh. WKM-6 ¶ 6. The participants agreed to form several working collaborative teams to develop processes and procedures for central-office-based line sharing, which were then implemented, tested, and improved. *See id.* As a result of these efforts, BellSouth was able to implement commercial line sharing by this Commission's June 6, 2000 deadline. *See id.* ¶¶ 6-13. As of July 2002, BellSouth had provisioned 2,850 line-sharing arrangements in Florida, 931 line-sharing arrangements in Tennessee, and 9,770 such arrangements region-wide. *See Milner Aff.* ¶ 112.

The pre-ordering, ordering, provisioning, and maintenance and repair processes for the line-sharing product are very similar to the processes for xDSL-capable loops. *Id.* Exh. WKM-6 ¶¶ 20-27. CLECs obtain access to LMU in the exact same manner whether they are seeking to obtain an xDSL-capable loop or the high-frequency portion of the loop. *Id.* ¶¶ 20-21. As BellSouth has demonstrated, it offers access to the exact same LMU available to and used by its retail personnel, and in the same time and manner. *See Stacy Aff.* ¶¶ 363-372. *See also Five State Order* ¶ 141; *GA/LA Order* ¶ 112.

BellSouth provisions line sharing in a timely, accurate, and nondiscriminatory manner. *See Massachusetts Order* ¶ 165 ("[A] successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates.") (internal quotation marks omitted).

BellSouth routinely meets substantially the same percentage of CLEC and retail installation appointments for line shared loops. *See Varner Aff.* Exhs. PM-2 ¶ 116, PM-3 ¶ 112 (B.2.18.7). In Tennessee, BellSouth met the parity benchmark of every month between May and July 2002. *See id.* Exh. PM-3 ¶ 112. In Florida, BellSouth met the benchmark for 5 of the 6 submetrics, meeting 97.4% of installation appointments. *See id.* Exh. PM-2 ¶ 116.

Although BellSouth missed the parity benchmark in both Florida and Tennessee for many of the OCI submetrics with CLEC activity for this measure during May through July 2002, a detailed analysis has indicated that the major difference is in how BellSouth was handling the scheduling of the CLEC orders. *See id.* Exhs. PM-2 ¶ 113, PM-3 ¶ 110. To address this issue, BellSouth changed how it schedules the ADSL portion of the line sharing order. *See id.* Initial indications show that for the first two weeks after this change was implemented, the CLEC results for dispatched orders were reduced by more than three days and for non-dispatched orders by approximately 1.5 days from the actual July results. *See id.* This would have reduced the dispatched result to approximately 3.5 days and to less than 2.5 days for the non-dispatched results if applied to the full July data month. *See id.* Exhs. PM-2 ¶ 113, PM-3 ¶ 110.

With respect to provisioning troubles within 30 days, although BellSouth has not met the benchmarks in Florida, analysis of the trouble reports revealed a large number that were closed as Test OK/Found OK. *See id.* Exh. PM-2 ¶ 118. In Tennessee, although BellSouth met or exceeded the retail analogue for 3 of the 6 submetrics with CLEC activity during the months of May through July 2002, there were only 14 troubles out of 149 orders completed for the entire three-month period. There were no systemic issues identified for any of the 14 troubles during the period. *See id.* Exh. PM-3 ¶ 114.

BellSouth has met substantially the same percentage of repair appointments for CLECs as for its retail customers. *See id.* Exhs. PM-2 ¶ 121, PM-3 ¶ 117 (B.3.1.7). BellSouth additionally met or exceeded the parity standard for repeat troubles for all six relevant submetrics in both Florida and Tennessee. *See id.* Exhs. PM-2 ¶ 126, PM-3 ¶ 121 (B.3.4.7).

6. Line Splitting

As in its other states, BellSouth facilitates CLEC efforts to engage in line splitting in Florida and Tennessee in full compliance with the Commission's instructions. *Milner Aff.* Exh. WKM-6 ¶¶ 34-46; *see also GA/LA Order* ¶ 241 ("BellSouth complies with its line-splitting obligations and provides access to network elements necessary for competing carriers to provide line splitting."); *Five State Order* ¶ 241. Specifically, BellSouth facilitates line splitting by cross-connecting an unbundled loop to a CLEC's collocation space. *Milner Aff.* ¶ 120 & Exh. WKM-6 ¶ 34. Once the CLEC has separated the voice from the data service, and sent the latter onto its packet-switched network, BellSouth will cross-connect the voice signal back to the BellSouth circuit switch. *Id.* Exh. WKM-6 ¶ 42. In other words, BellSouth offers the same arrangement to CLECs as the Commission described in the *Texas Order* and the *Line Sharing Reconsideration Order*, and approved in its *GA/LA Order*. *See GA/LA Order* ¶ 241.

E. Checklist Item 5: Unbundled Local Transport

In compliance with the Act, BellSouth provides "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C. § 271(c)(2)(B)(v). Interoffice transmission facilities include both dedicated transport and shared transport. *Second Louisiana Order* ¶ 201. Dedicated transport is defined as "incumbent LEC transmission facilities . . . dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina	WC Docket No. _____

BRIEF IN SUPPORT OF APPLICATION BY BELLSOUTH FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN ALABAMA, KENTUCKY, MISSISSIPPI, NORTH CAROLINA, AND SOUTH CAROLINA

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interconnection agreements, BellSouth continues to offer nondiscriminatory access to poles, ducts, conduits, and rights-of-way within reasonable time frames in each of the five states. *See Milner Aff.* ¶ 94 & Exh. WKM-4. BellSouth's provision of this checklist item to CLECs in each of the five states is no different than in Georgia and Louisiana. *See id.*

BellSouth's satisfaction of Checklist Item 3 is borne out by the fact that CLECs are executing license agreements and requesting access to BellSouth's poles, ducts, conduits, and rights-of-way in the five states in numbers proportional to Georgia and Louisiana. As of April 12, 2002, 54 CLECs have executed license agreements for access to BellSouth's poles, ducts, conduits, and rights-of-way in Alabama; 53 in Kentucky; 54 in Mississippi; 53 in North Carolina; and 52 in South Carolina. *Id.* ¶ 95 & Exh. WKM-4 ¶ 27. As of the same date, 15 of the 54 Alabama CLECs with license agreements had made 121 applications for access to BellSouth's poles, ducts, conduits, and rights-of-way; 7 CLECs had made 55 applications for access in Kentucky; 7 CLECs had made 29 applications in Mississippi; 18 CLECs had made 604 applications in North Carolina; and 11 CLECs had made 968 applications in South Carolina. *Id.* ¶ 95 & Exh. WKM-4 ¶ 28.

In sum, BellSouth plainly satisfies the requirements of Checklist Item 3. Indeed, BellSouth's compliance is so clear that no party in any of the five states' checklist-compliance proceedings challenged that conclusion. *See Ruscilli/Cox Joint Aff.* ¶ 3 n.2. Nor did any party dispute BellSouth's compliance with this checklist item in the recent Georgia/Louisiana proceeding. *GA/LA Order* ¶ 278.

D. Checklist Item 4: Unbundled Local Loops

BellSouth offers CLECs local loop transmission from the central office to the customer's premises, unbundled from local switching or other services. As of March 31, 2002, BellSouth

had provisioned more than 16,000 loops in Alabama, more than 4,100 in Kentucky, more than 5,900 in Mississippi, more than 51,000 in North Carolina, and more than 15,000 in South Carolina. *See Milner Aff.* ¶ 100.

BellSouth fully complies with all of its obligations under this checklist item. BellSouth has a concrete and specific legal obligation in each of the five states to provide local loop facilities on an unbundled basis, the terms of which are set forth in BellSouth's Alabama, Kentucky, Mississippi, North Carolina, and South Carolina SGATs, and in interconnection agreements with multiple CLECs. ***See Ruscilli/Cox Joint Aff.* ¶¶ 6-7.** As in Georgia and Louisiana, BellSouth provisions high-quality loops in a timely manner throughout each of the five states, and has demonstrated its ability to satisfy all levels of reasonable customer demand. Moreover, BellSouth utilizes the same nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services throughout its region that the Commission examined in its Georgia/Louisiana proceeding. BellSouth has complied fully with its obligations under the *Line Sharing Order*,[60] the *Line Sharing Reconsideration* ***Order*,**[61] **and the *UNE Remand Order*.**

1. Stand-Alone Loops

In each of the five states, BellSouth offers a variety of loop types to CLECs, including SL1 voice grade loops, SL2 voice grade loops, 2-wire ISDN digital grade loops, 56 or 64 kbps

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[60] Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded, United States Telecom Ass'n v. FCC*, No. 00-1012, *et al.* (D.C. Cir. May 24, 2002).

[61] Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101 (2001) ("*Line Sharing Reconsideration Order*").

digital grade loops, 4-wire DS1 loops, and various high-capacity and xDSL-capable loops. *See Milner Aff.* ¶ 98. In addition, BellSouth provides CLECs with unbundled loops in those instances where the customer was previously served by IDLC. *See id.* ¶ 101. CLECs can access unbundled loops at any technically feasible point, and BellSouth provides access to all the features, functions, and capabilities of the loop. *See id.* ¶ 97; *New York Order* ¶¶ 273, 275. CLECs seeking additional loop types can take advantage of BellSouth's BFR process. *See Milner Aff.* ¶ 99; *Ruscilli/Cox Joint Aff.* ¶¶ 10-11.

Comprehensive performance data demonstrate that BellSouth's processes and procedures for the ordering, provisioning, and maintenance of unbundled loop facilities offer CLECs in each of the five states a meaningful opportunity to compete in the local service market. *See GA/LA Order* ¶¶ 224, 228 (analyzing BellSouth's compliance with Checklist Item 4 through performance measurements covering order processing timeliness, installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of maintenance and repair functions).

As in Georgia and Louisiana, BellSouth's SQM plans in each of the five states are disaggregated by loop type. The SQM plans were developed through a collaborative process with significant CLEC participation, and they have been approved by the regulatory commission in each of the five states. As demonstrated in the affidavit of Alphonso Varner and its exhibits, and as further demonstrated below, those plans provide highly disaggregated data for different loop types – including data for analog loops (designed and nondesigned, and with and without LNP), various kinds of digital loops, xDSL loops, and line-shared loops. BellSouth's performance in the pre-ordering, ordering, and provisioning of unbundled loops, as captured by these comprehensive measures, demonstrates that CLECs have nondiscriminatory access to local

loop transmission. *See generally Varner Aff.* Exhs. PM-2 ¶¶ 104-159 (Alabama), PM-3 ¶¶ 104-159 (Kentucky), PM-4 ¶¶ 103-153 (Mississippi), PM-5 ¶¶ 103-157 (North Carolina), PM-6 ¶¶ 103-153 (South Carolina).

a. Hot Cuts

BellSouth provides nondiscriminatory access to hot-cut loops in each of the five states in accordance with the Commission's standards, utilizing the exact same hot-cut processes and procedures that the Commission approved in its *GA/LA Order*. Specifically, BellSouth performs coordinated conversions in a timely manner, with minimal service disruption, and with few troubles following installation. *See MPSC 271 Order* at 78 ("BellSouth has met, and in some cases gone beyond, the explicit [hot-cut] requirements delineated by the FCC"); *KPSC 271 Order* at 32; *SCPSC 271 Order* at 83.

BellSouth has developed three different hot-cut processes, allowing CLECs to select the particular method that best fits their business plan and their customers' needs. Two of these processes (the time-specific cutover and the non-time-specific cutover) involve order coordination between BellSouth and the requesting CLEC, while the third process (the date-specific cutover) does not involve any such coordination. *See Milner Aff.* ¶¶ 122-123. In the third method, the CLEC simply specifies a date for the desired conversion to occur. *Id.* ¶ 124.

The time-specific and non-time-specific processes are largely analogous: the difference is when the time for the cutover is determined. When a CLEC places an order for a time-specific conversion, the CLEC selects up-front the date and time for the desired conversion. *Id.* ¶ 122. For a non-time-specific conversion, the CLEC selects only the cutover *date* at the time it places the original order. *Id.* ¶ 123. Then, within 24 to 48 hours of that cutover date, BellSouth and the CLEC jointly select a mutually acceptable time for the coordinated conversion to occur. *Id.*

The Commission has noted that "[t]he ability of a BOC to provision working, trouble-free loops through hot cuts is critically important in light of the substantial risk that a defective hot cut will result in competing carrier customers experiencing service outages for more than a brief period." *Texas Order* ¶ 256. As in Georgia and Louisiana, BellSouth's performance data for the five states demonstrate that it is doing exceptionally well in performing this "critically important" task.

Alabama. Between January and March 2002, BellSouth met or exceeded every benchmark in Alabama for each of the hot-cut submetrics. *See Varner Aff.* Exh. PM-2 ¶ 152. BellSouth provisioned 100% of scheduled conversions on time, and in fewer than 15 minutes, during the three-month period of January, February, and March 2002. *Id.* Exh. PM-2 ¶ 153. BellSouth also performed these cutovers without causing a single outage. *Id.* Exh. PM-2 ¶ 157. In addition, CLECs reported trouble on only one of 236 (0.4%) converted circuits (B.2.17), well within the benchmark established by BellSouth's SQM and in line with this Commission's standards. *See id.* Exh. PM-2 ¶ 158.

North Carolina. BellSouth's North Carolina performance is also excellent. From January through March 2002, BellSouth completed 2,744 of the 2,754 (99.6%) scheduled conversions within the 15-minute benchmark. *See id.* Exh. PM-5 ¶ 151. BellSouth performed more than 99.4% of coordinated conversions without causing an outage, again far superior to the applicable standard. *See id.* Exh. PM-5 ¶ 155. During that time period, CLECs reported trouble on only 19 of 2,752 (0.69%) provisioned circuits, again well within the Commission's standard. *See id.* Exh. PM-5 ¶ 156.

South Carolina. BellSouth's South Carolina performance has been almost perfect. Between January and March 2002, BellSouth completed all 454 scheduled conversions on time,

and without a single outage on conversion. *See id.* Exh. PM-6 ¶¶ 147, 151. During that time period, CLECs reported trouble on only eight of 554 (1.44%) provisioned circuits, easily satisfying the Commission's standard. *See id.* Exh. PM-6 ¶ 152.

Kentucky and Mississippi. Hot-cut volumes have been comparatively small in both Kentucky and Mississippi, as BellSouth performed hot cuts on only four circuits in Kentucky and 21 circuits in Mississippi between January and March 2002. BellSouth's performance was perfect: BellSouth completed all hot-cut conversions on a timely basis in both Kentucky and Mississippi; BellSouth did not cause a single outage on conversion; and there were no reported troubles on any of the provisioned facilities within seven days of conversion. *See id.* Exhs. PM-3 ¶¶ 152-158, PM-4 ¶¶ 147-153. Because BellSouth utilizes the exact same hot-cut processes and procedures throughout its region, the Commission can look to other BellSouth states with larger hot-cut volumes (such as Georgia and North Carolina) for evidence that BellSouth's performance continues to be excellent when faced with substantially greater volumes of orders. *See KS/OK Order* ¶ 180 ("We also look to SWBT's performance in Texas (where SWBT has been handling commercial volumes to a greater degree and for a longer period of time) as evidence relevant to this checklist item because volumes in Kansas and Oklahoma are low."). In Georgia, BellSouth continues to meet all applicable Commission hot-cut standards. *See Varner Aff.* Exhs. PM-11 to -13.

In light of this evidence, there can be no serious dispute that BellSouth satisfies this Commission's standards for hot cuts throughout the five states. *See GA/LA Order* ¶¶ 220-221 (BellSouth demonstrates compliance by providing hot cuts in a timely manner, at an acceptable level of quality, with minimal service disruptions, and with a minimum number of troubles following installation).

b. Stand-Alone Loop Performance

In reviewing a BOC's performance for stand-alone loop provisioning, the Commission focuses upon the following categories: (i) installation timeliness; (ii) installation quality; and (iii) the quality of maintenance and repair functions. *GA/LA Order* ¶ 224. Throughout the five states, and across loop types, BellSouth's performance has been excellent.

In each of the five states, BellSouth provisions high-quality, unbundled voice-grade loops in a timely manner, affording CLECs a meaningful opportunity to compete. Reported performance data for analog loops demonstrate that BellSouth has consistently met or exceeded the parity standard for both OCIs (B.2.1.8, B.2.1.9) and the percentage of kept installation appointments (B.2.18.8, B.2.18.9) throughout the five states. *Varner Aff.* Exhs. PM-2 ¶¶ 135, 138 (Alabama), PM-3 ¶¶ 135, 138 (Kentucky), PM-4 ¶¶ 129, 132 (Mississippi), PM-5 ¶¶ 134, 137 (North Carolina), PM-6 ¶¶ 129, 132 (South Carolina).

The quality of BellSouth's loop provisioning, as well as the timeliness and quality of its maintenance and repair services, have also been solid in each of the five states. In the few instances in which BellSouth missed an installation quality submetric (B.2.19.8, B.2.19.9), the small volume of CLEC orders is predominantly responsible for the disparity. In North Carolina, for example, BellSouth missed the parity standard for three submetrics in February 2002 (B.2.19.8.2.1, B.2.19.9.1.4, B.2.19.9.2.1) because CLECs reported trouble on a total of five analog loops. *See id.* Exh. PM-5 ¶ 138 & Attach. 1. For those I-30 (troubles within 30 days of installation) submetrics where there are sufficient volumes to offer a statistically significant portrait of BellSouth's performance, by contrast, BellSouth has consistently met the parity standard. *See* B.2.19.8.1.1 (2-wire analog loop design/<10 circuits/dispatch). Between January and March 2002, BellSouth additionally met a greater percentage of maintenance and repair

appointments for CLEC customers than it did for its own retail customers in each of the five states (B.3.1.8, B.3.1.9), and completed maintenance and repair work in substantially less time for CLEC loops than for BellSouth's own retail customers (B.3.3.8, B.3.3.9). *See id.* Exhs. PM-2 ¶¶ 142-145 (Alabama), PM-3 ¶¶ 142-145 (Kentucky), PM-4 ¶¶ 136-139 (Mississippi), PM-5 ¶¶ 141-143 (North Carolina), PM-6 ¶¶ 136-139 (South Carolina).

Finally, BellSouth provides high-quality maintenance and repair services, such that CLEC customers generally suffered a lower percentage of repeat troubles than did BellSouth retail customers (B.3.4.8, B.3.4.9). *See id.* Exhs. PM-2 ¶ 145 (Alabama), PM-3 ¶ 145 (Kentucky), PM-4 ¶ 139 (Mississippi), PM-5 ¶ 143 (North Carolina), PM-6 ¶ 139 (South Carolina).

c. High-Speed Digital Loops

BellSouth has additionally provisioned high-quality DS1 loops to CLECs throughout the five states, and BellSouth continues to offer, although CLECs have yet to order, unbundled loops of greater transmission capacity. Between January and March 2002, BellSouth missed a smaller percentage of installation appointments for CLECs in provisioning DS1 loops than it did for its own retail customers (B.2.18.19). In North Carolina, where BellSouth had the largest volume of DS1 loop orders among the five states, BellSouth missed only two out of 403 installation appointments for DS1 loops. *See id.* Exh. PM-5 Attach. 1. In South Carolina, BellSouth missed only one out of 349 installation appointments during that same time period. *See id.* Exh. PM-6 Attach. 1. The average OCI for DS1 loops has also been substantially shorter for CLECs than it has been for BellSouth retail customers (B.2.1.19). While CLECs have, at times, reported trouble within 30 days of provisioning for a greater percentage of DS1 loops than have BellSouth retail customers, the CLECs themselves are responsible for a large percentage of the disparity.

As was true in Georgia, nearly half of all CLEC trouble reports for DS1 loops result in a finding of "no trouble." *See GA/LA Order* ¶ 233; *Varner Aff.* Exh. PM-6 ¶ 144 (South Carolina), PM-4 ¶ 144 (Mississippi), PM-2 ¶ 150 (Alabama). BellSouth's performance substantially improves when these improperly filed reports are factored out. *See GA/LA Order* ¶ 233.

2. Access to Subloop Elements

In addition to the unbundled loops themselves, BellSouth offers CLECs the same nondiscriminatory access to subloop elements throughout the five states that it offers in Georgia and Louisiana. *See Milner Aff.* ¶ 109. The subloop UNE has been defined as a portion of the local loop that can be accessed at accessible points on the loop. *Id.* This includes any technically feasible point near the customer's premises, such as the pole or pedestal, the network interface device, or minimum point of entry to the customer's premises, the feeder distribution interface, the Main Distributing Frame, remote terminals, and various other terminals. *See id.* BellSouth offers the following subloop elements: loop concentration/multiplexing; loop feeder; loop distribution; intrabuilding network cable; and network terminating wire. *See id.* Moreover, CLECs can request additional subloop elements via the BFR process. *See id.* As of March 31, 2002, BellSouth has provided CLECs 568 unbundled loop distribution subloop elements region-wide. *See id.* ¶ 110.

3. Access to xDSL-capable Loops

BellSouth utilizes the same nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services in the five states as it does in Georgia and Louisiana, offering CLECs a meaningful opportunity to compete in the advanced services market. As BellSouth explained in its Georgia/Louisiana Application, because the various flavors of xDSL have different technical prerequisites and disparate tolerance for disturbing devices, CLECs requested that BellSouth create xDSL loop offerings

with distinct parameters. In response to these requests, BellSouth developed a variety of unbundled loop types for CLECs to choose from. Because BellSouth signed interconnection agreements obligating it to continue provisioning these different loop types, however, multiple product offerings have been and remain available over time. The historical evolution of BellSouth's specific xDSL loop offerings – which currently include the ADSL-capable loop; HDSL-capable loop; ISDN loop; Universal Digital Channel ("UDC"); Unbundled Copper Loop ("UCL"), Short and Long; and UCL-Nondesign ("UCL-ND") – is recounted in Exhibit WKM-5 to the affidavit of W. Keith Milner.[62]

As in Georgia and Louisiana, for the pre-ordering of xDSL-capable loops, BellSouth offers CLECs in the five states nondiscriminatory access to the actual loop makeup information ("LMU") contained in its records and databases. *See generally Stacy Aff.* ¶¶ 241-250. In full compliance with the obligations set forth in the *UNE Remand Order*, BellSouth provides CLECs access to the exact same LMU available to and used by its retail personnel, and in the same manner. *See id.*; *GA/LA Order* ¶ 112 ("Based on the evidence in the record, we find . . . that

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[62] As of March 31, 2002, BellSouth had provisioned the following volumes of xDSL-capable loops in each of the five states:

Alabama: 1,200 2-wire ADSL loops; 63 2-wire HDSL loops; 316 UCL (Long and Short) loops; and 666 UDC loops.

Kentucky: 387 2-wire ADSL loops; 1 2-wire HDSL loop; 10 UCL-ND loops; and 404 UDC loops.

Mississippi: 807 2-wire ADSL loops; 42 2-wire HDSL loops; 53 UCL (Long and Short) loops; 108 UCL-ND loops; and 480 UDC loops.

North Carolina: 1,827 2-wire ADSL loops; 22 2-wire and 7 4-wire HDSL loops; 121 UCL (Long and Short) loops; 49 UCL-ND loops; and 2,454 UDC loops.

South Carolina: 419 2-wire ADSL loops; 6 2-wire HDSL loops; 121 UCL (Long and Short) loops; 24 UCL-ND loops; and 778 UDC loops.

See Milner Aff. ¶ 98.

BellSouth provides competitive LECs with access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*.").

LMU consists of the detailed information about the loop facilities serving a particular end-user address needed to determine the feasibility of providing a desired xDSL service over a loop. BellSouth's LENS and TAG interfaces allow CLECs to obtain real-time electronic access to the LMU contained in BellSouth's Loop Facilities Assignment & Control System ("LFACS"). *Stacy Aff.* ¶¶ 242-244. BellSouth also has implemented an enhancement such that when LFACS does not contain the requested LMU, LFACS automatically will send an electronic query to BellSouth's Corporate Facilities Database – a digitized version of the plats available in Georgia, North Carolina, South Carolina, Florida, and 13 Alabama wire centers. *Id.* ¶ 245. In the remaining in-region states, where outside plant information is stored on paper records, CLECs can request that BellSouth's outside plant engineers perform a manual lookup should LFACS lack the desired LMU. *Id.* ¶¶ 246-247; *Milner Aff.* Exh. WKM-5 ¶¶ 23-24. With LMU in hand, CLECs can make their own determination as to the suitability of particular loops for the desired xDSL service.[63]

BellSouth also performs loop conditioning as requested, irrespective of whether BellSouth offers advanced services to the end-user customer on that loop. CLECs may select the precise conditioning (*i.e.*, loop modification) they desire on their loop and will only pay for the level of conditioning selected. *See Milner Aff.* ¶ 106 & Exh. WKM-5 ¶ 24. Through BellSouth's Unbundled Loop Modification ("ULM") process, a CLEC can request that BellSouth modify any

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[63] BellSouth additionally offers CLECs access to its Loop Qualification System ("LQS"), a database designed for Network Service Providers ("NSPs") to enable them to inquire as to whether plain old telephone service ("POTS") lines will support BellSouth's wholesale ADSL service. CLECs have electronic access to the exact same LQS database, and in the same time and manner, as NSPs. *See Stacy Aff.* ¶¶ 249-250.

existing loop to be compatible with the CLEC's particular hardware requirements. *See id.* Exh. WKM-5 ¶ 24.

Under the direction of its in-region state commissions, BellSouth has also developed comprehensive, disaggregated performance metrics that capture its performance in the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services. In each of the five states, BellSouth's performance has been nondiscriminatory across each of the categories upon which this Commission has focused its attention: (i) order processing timeliness; (ii) installation timeliness; (iii) missed installation appointments; (iv) installation quality; and (v) quality and timeliness of maintenance and repair. *See GA/LA Order* ¶ 228. BellSouth's comprehensive performance data clearly support the conclusion that BellSouth provides nondiscriminatory access to xDSL-capable loops and related services in compliance with Checklist Item 4.

Across the five states, across all five of the relevant categories, and across each of its xDSL-related metrics, BellSouth's performance has been excellent. BellSouth returns LMU to CLECs in substantially the same time and manner as it is available to BellSouth's personnel. *See Stacy Aff.* ¶ 241. Between January and March 2002, BellSouth returned electronic LMU within five minutes for more than 99% of such requests in each of Alabama, Kentucky, Mississippi, and South Carolina. *See Varner Aff.* Exhs. PM-2 ¶ 77 (Alabama), PM-3 ¶ 77 (Kentucky), PM-4 ¶ 76 (Mississippi), PM-6 ¶ 76 (South Carolina). In North Carolina, BellSouth returned electronic LMU within five minutes for more than 97.5% of such requests, well above the applicable 95% benchmark. *See id.* Exh. PM-5 ¶ 76.

BellSouth additionally installs high-quality xDSL-capable loops in a timely manner in each of the five states. BellSouth provisions xDSL-capable loops well within the seven-day

benchmark established in its state-approved performance plans, *see id.* Exhs. PM-2 ¶ 108 (Alabama), PM-3 ¶ 108 (Kentucky), PM-4 ¶ 107 (Mississippi), PM-5 ¶ 107 (North Carolina), PM-6 ¶ 107 (South Carolina) (B.2.2), and BellSouth has met or exceeded the applicable parity standard for missed installation appointments in January through March 2002, *id.* Exhs. PM-2 ¶ 112, PM-3 ¶ 112, PM-4 ¶ 110, PM-5 ¶ 111, PM-6 ¶ 110 (B.2.18.5).

Once provisioned, CLEC-ordered xDSL-capable loops experience few technical problems. Between January and March 2002, BellSouth met or exceeded the parity standard for trouble reports within 30 days of installation in each of the five states. *Id.* Exhs. PM-2 ¶ 113, PM-3 ¶ 113, PM-4 ¶ 111, PM-5 ¶ 112, PM-6 ¶ 111.

When CLECs did experience trouble on xDSL-capable loops, BellSouth handled the troubles in substantially less time than it handled the troubles for its retail units (B.3.3.5). BellSouth consistently made a greater percentage of repair appointments for CLECs than for its own retail customers (B.3.1.5), and provided superior quality repair service, as CLECs suffered fewer repeat troubles (B.3.4.5). *See id.* Exhs. PM-2 ¶ 121, PM-3 ¶ 121, PM-4 ¶ 116, PM-5 ¶ 120, PM-6 ¶ 116.

4. ISDN-BRI Loop Provisioning

BellSouth's performance in provisioning ISDN-BRI loops has also been excellent across each of the categories to which this Commission has directed its attention. In each of the five states, BellSouth has met or exceeded the parity standard for ISDN-BRI loops for average OCI (B.2.1.6.3) and for meeting installation appointments during each month from January through March. *See Varner Aff.* Exhs. PM-2 ¶¶ 125, 127 (Alabama), PM-3 ¶¶ 125, 127 (Kentucky), PM-4 ¶¶ 119, 121 (Mississippi), PM-5 ¶¶ 124, 126 (North Carolina), PM-6 ¶¶ 119, 121 (South Carolina). CLEC ISDN loops experience few technical problems within 30 days of installation, and more than 95% of CLEC ISDN-BRI loops are consistently trouble free throughout the five

states (B.3.2.6). And when CLECs do experience troubles, BellSouth has provided timely and high-quality maintenance and repair services. In each of the five states, BellSouth routinely meets or exceeds the parity standard for missed repair appointments (B.3.1.6), average maintenance duration (B.3.3.6), and percent repeat reports within 30 days (B.3.4.6). In the rare instances where BellSouth has fallen just short of parity, the small number of CLEC ISDN-BRI loops experiencing trouble skews the picture of BellSouth's performance. *See id.* Exh. PM-4 ¶ 126. None of these minor deviations is competitively significant to CLECs. *See GA/LA Order* ¶ 230.

5. Line Sharing

BellSouth has implemented line sharing in each of the five states in full compliance with the terms of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*, allowing CLECs to offer high-speed data service to BellSouth voice customers. Specifically, line sharing is available to a single requesting carrier, on loops that carry BellSouth's POTS, so long as the xDSL technology deployed by the requesting carrier does not interfere with the analog voice-band transmissions. *See Milner Aff.* Exh. WKM-6. BellSouth allows line-sharing CLECs to deploy any version of xDSL that is presumed acceptable for shared-line deployment in accordance with Commission rules, and will not significantly degrade analog voice service. At the request of the data CLECs, BellSouth voluntarily provides line splitters in 96-line unit, 24-line unit, and 8-line unit compliments. *Id.* ¶ 17. BellSouth utilizes the exact same processes and procedures for the pre-ordering, ordering, and provisioning of line-shared loops in the five states as it does in Georgia and Louisiana. *Id.* ¶ 19. Accordingly, the Commission's conclusion that "BellSouth offers line sharing in Georgia and Louisiana . . . in accordance with the requirements of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*," *GA/LA Order* ¶ 238, applies with equal force here.

BellSouth developed its line-sharing product in a collaborative effort with CLECs and is continuing to work cooperatively with CLECs on an ongoing basis to resolve issues as they arise. *See Milner Aff.* Exh. WKM-6 ¶¶ 6-15. BellSouth invited all interested CLECs to collaborative meetings beginning in January 2000, and at least 11 CLECs participated in these meetings. The participants agreed to form several working collaborative teams to develop processes and procedures for central-office-based line sharing, which were then implemented, tested, and improved. As a result of these efforts, BellSouth was able to implement commercial line sharing by this Commission's June 6, 2000 deadline. As of April 2002, BellSouth had provisioned 702 line-sharing arrangements in Alabama, 518 line-sharing arrangements in Kentucky, 585 line-sharing arrangements in North Carolina, and 7,900 such arrangements region-wide. *See Milner Aff.* ¶ 114.

The pre-ordering, ordering, provisioning, and maintenance and repair processes for the line-sharing product are very similar to the processes for xDSL-capable loops. *Id.* Exh. WKM-6 ¶¶ 20-27. CLECs obtain access to LMU in the exact same manner whether they are seeking to obtain an xDSL-capable loop or the high-frequency portion of the loop. *Id.* ¶¶ 20-21. As BellSouth has demonstrated, it offers access to the exact same LMU available to and used by its retail personnel, and in the same time and manner.

BellSouth provisions line sharing in a timely, accurate, and nondiscriminatory manner. *See Massachusetts Order* ¶ 165 ("[A] successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates.") (internal quotation marks omitted). BellSouth has met or exceeded the parity standard for order

completion throughout the five states (B.2.1.7), and BellSouth routinely meets substantially the same percentage of CLEC and retail installation appointments (B.2.18.7).

BellSouth's performance data additionally demonstrate that it offers high-quality line-shared facilities, as well as timely and quality maintenance and repair service. In North Carolina, for example, more than 97% of CLEC line-sharing arrangements were trouble-free between January and March 2002. Moreover, a full two-thirds of reported troubles in January were closed with "no trouble found," indicating that the percentage of trouble-free line-shared loops is actually higher than reported. *Varner Aff.* Exh. PM-5 ¶ 118. *See also id.* Exh. PM-2 ¶ 119 (over 70% of reported troubles in Alabama were closed as "no trouble found"). BellSouth has met substantially the same percentage of repair appointments for CLECs as for its retail customers. *See id.* Exhs. PM-2 ¶ 117 (Alabama), PM-3 ¶ 117 (Kentucky), PM-5 ¶ 116 (North Carolina). BellSouth additionally met or exceeded the parity standard for repeat troubles for all six relevant submetrics in Kentucky, and for five of six relevant submetrics in Alabama and North Carolina. *See id.* Exhs. PM-2 ¶ 122, PM-3 ¶ 122, PM-5 ¶ 121.

Moreover, although BellSouth has discovered a PMAP 2.6 problem that caused it to miss some line-sharing provisioning activity, the April results generated by PMAP 4.0 (which has corrected this problem) confirm that BellSouth's performance is compliant. In areas with activity, BellSouth met all OCI submetrics except one, and met every submetric on held orders, percent jeopardies, percent missed installation appointments, and average completion notice interval. *See Varner Aff.* ¶¶ 292-294.

6. Line Splitting

As in Georgia and Louisiana, BellSouth facilitates CLEC efforts to engage in line splitting throughout the five states in full compliance with the Commission's instructions. *Milner Aff.* Exh. WKM-6 ¶¶ 36-43; *see also GA/LA Order* ¶ 241 ("BellSouth complies with its

line-splitting obligations and provides access to network elements necessary for competing carriers to provide line splitting"). Specifically, BellSouth facilitates line splitting by cross-connecting an unbundled loop to a CLEC's collocation space. *Milner Aff.* ¶ 118 & Exh. WKM-6 ¶ 36. Once the CLEC has separated the voice from the data service, and sent the latter onto the packet-switched network, BellSouth will cross-connect the voice signal back to the BellSouth circuit switch. *Id.* Exh. WKM-6 ¶ 43. In other words, BellSouth offers the same arrangement to CLECs as the Commission described in the *Texas Order* and the *Line Sharing Reconsideration Order*, and approved in its *GA/LA Order*. *See GA/LA Order* ¶ 241.

E. Checklist Item 5: Unbundled Local Transport

In compliance with the Act, BellSouth provides "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C. § 271(c)(2)(B)(v). Interoffice transmission facilities include both dedicated transport and shared transport. *Second Louisiana Order* ¶ 201. Dedicated transport is defined as "incumbent LEC transmission facilities . . . dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers." 47 C.F.R. § 51.319(d)(1)(i). Shared transport is defined as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." *Id.* § 51.319(d)(1)(iii).

In the *GA/LA Order*, this Commission concluded that BellSouth complies "with the requirements of this checklist item." *GA/LA Order* ¶ 245. Because BellSouth's terms and conditions for local transport in the five states at issue here are substantively the same as those in

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana	CC Docket No. _____

To: The Commission

BRIEF IN SUPPORT OF APPLICATION BY BELLSOUTH FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN GEORGIA AND LOUISIANA

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October 2, 2001

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GPSC or LPSC during those agencies' checklist-compliance proceedings challenged that conclusion.

D. Checklist Item 4: Unbundled Local Loops

BellSouth offers CLECs local loop transmission from the central office to the customer's premises, unbundled from local switching or other services, thereby enabling CLECs to provide local service without replicating BellSouth's sunk investment in an infrastructure connecting each end user to the public switched telephone network. As of July 31, 2001, BellSouth had provisioned more than 84,000 loops in Georgia and more than 17,000 loops in Louisiana. *See id.* ¶ 117.

BellSouth fully complies with all of its obligations under this checklist item. BellSouth has a concrete and specific legal obligation in both Georgia and Louisiana to provide local loop facilities on an unbundled basis, the terms of which are set forth in BellSouth's Georgia and Louisiana SGATs and in interconnection agreements with multiple CLECs. **BellSouth** provisions high-quality loops in a timely manner, and has demonstrated its ability to satisfy all levels of reasonable customer demand. Moreover, working largely through collaborative meetings with CLECs, BellSouth has developed nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services. BellSouth has complied fully with its obligations under the *Line Sharing Order*,[80] the *Line Sharing Reconsideration Order*,[81] and the *UNE Remand Order*.

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[80] Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999).

[81] Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC

1. Stand-Alone Loops

In both Georgia and Louisiana, BellSouth offers a variety of loop types to CLECs, including SL1 voice grade loops, SL2 voice grade loops, 2-wire ISDN digital grade loops, 56 or 64 kbps digital grade loops, and various high-capacity and xDSL-capable loops. *See Milner Aff.* ¶ 115. In addition, BellSouth provides CLECs with unbundled loops in those instances where the customer was previously served by Integrated Digital Loop Carrier ("IDLC"). *See id.* ¶ 118; *Kansas/Oklahoma Order* ¶ 178. CLECs can access unbundled loops at any technically feasible point, and BellSouth provides access to all the features, functions, and capabilities of the loop. *See Milner Aff.* ¶ 114; *New York Order* ¶ 275. CLECs seeking additional loop types can take advantage of BellSouth's BFR process. *See Milner Aff.* ¶ 110; *Ruscilli/Cox Joint Aff.* ¶¶ 12-13.

Comprehensive performance data unequivocally demonstrate that BellSouth's processes and procedures for the ordering, provisioning, and maintenance of unbundled loop facilities offer CLECs a meaningful opportunity to compete in the local service market. *See New York Order* ¶¶ 270, 283 (performance measurements showing provisioning intervals and success in meeting due dates are instructive in proving nondiscriminatory access); *Texas Order* ¶ 249; *Kansas/Oklahoma Order* ¶ 208 (the Commission continues to rely primarily upon missed installation appointments and average installation intervals).

In its *Second Louisiana Order*, the Commission suggested that it was unable to find that BellSouth complied with Checklist Item 4 because BellSouth's performance metrics were not disaggregated by loop type, and lacked sufficient underlying documentation. *See Second Louisiana Order* ¶¶ 192-198. BellSouth's SQM plans in Georgia and Louisiana fully address

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Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101 (2001).

those issues. As BellSouth has explained, the SQM plans were developed through a collaborative process with significant CLEC participation, and they have been modified and approved by both the GPSC and the LPSC. As explained in the affidavits of Alphonso Varner, and further demonstrated below, those plans provide highly disaggregated data for different loop types – including data for analog loops (designed and non-designed, and with and without LNP), various kinds of digital loops, xDSL loops, and line-shared loops. BellSouth's performance in the pre-ordering, ordering, and provisioning of unbundled loops, as captured by these comprehensive measures, demonstrates that CLECs have nondiscriminatory access to local loop transmission. *See generally Varner Ga. Aff.* ¶¶ 189-244; *Varner La. Aff.* ¶¶ 203-257. The Varner affidavits and their attachments additionally contain a detailed explanation of how these PSC-approved measurements are derived, and provide sufficient documentation so that their results can be (and have been) subject to audit by independent parties. *See Second Louisiana Order* ¶ 198 ("in future applications, we expect BellSouth to explain how it derives and calculates its data and why its performance data demonstrates that competitive LECs have nondiscriminatory access to unbundled loops").

a. Hot Cuts

BellSouth provides nondiscriminatory access to hot cut loops in accordance with the Commission's standards. Specifically, BellSouth performs coordinated conversions in a timely manner, with minimal service disruption, and with few troubles following installation. *See LPSC Staff Final Recommendation* at 77.

BellSouth has developed three different hot cut processes, allowing CLECs to select the particular method that best fits their business plan and their customers' needs. Two of these processes – the time-specific cutover and the non-time-specific cutover – involve order

coordination between BellSouth and the requesting CLEC, while the third process – the date-specific cutover – does not involve any such coordination. *See Milner Aff.* ¶ 142. In the third method, the CLEC simply specifies a date for the desired conversion to occur. *Id.* ¶ 144.

The time-specific and non-time-specific processes are largely analogous: the difference is when the specific time for the cutover is determined. When a CLEC places an order for a time-specific conversion, the CLEC selects up-front the date and time for the desired conversion. *Id.* ¶ 142. For a non-time specific conversion, the CLEC selects only the cutover *date* at the time it places the original order. Then, within 24 to 48 hours of that cutover date, BellSouth and the CLEC will jointly select a mutually acceptable time for the coordinated conversion to occur. *Id.* ¶ 143.

As the Commission has noted, "[t]he ability of a BOC to provision working, trouble-free loops through hot cuts is critically important in light of the substantial risk that a defective hot cut will result in competing carrier customers experiencing service outages for more than a brief period." *Texas Order* ¶ 256. BellSouth's performance data for both Georgia and Louisiana demonstrate that it is doing exceptionally well in performing this "critically important" task.

Georgia. Between May and July 2001, BellSouth met every benchmark in Georgia for each of the hot cut sub-metrics. *See Varner Ga. Aff.* ¶ 238. BellSouth provisioned 6,615 of the 6,673 scheduled conversions (or greater than 99%) on time during the three-month period of May, June, and July 2001. *Id.* ¶ 239. The average interval for each cutover was a mere 2.53 minutes. *Id.* In July, BellSouth completed 97.92% of time-specific and 99.39% of non-time-specific SL1 loop conversions in fewer than 15 minutes; during that same month, it completed 98.94% of time-specific and 100% of non-time-specific SL2 loop conversions in fewer than 15 minutes. *See* BellSouth Monthly State Summary – Georgia, July 2001 (B.2.14) (*Varner Affs.*

Exh. PM-4). BellSouth also performed these cutovers with a minimum of service disruption, causing only 15 outages while performing 6,673 conversions. *Varner Ga. Aff.* ¶ 243. *See also Pennsylvania Order* ¶ 79 n.275 ("We note that individual states and BOCs may define performance measures in different ways. We look to those measurements however, that provide data most similar to data we have relied on in past orders."). This outage rate of only 0.22% easily satisfies the Commission's 5% standard. In addition, CLECs reported trouble on only 108 of 4,956 (2.17%) converted circuits (B.2.17), well within the benchmark established by the Georgia PSC and in line with this Commission's standards. *See Varner Ga. Aff.* ¶ 244.

Louisiana. BellSouth's Louisiana performance is, if anything, even better than its Georgia performance. From May through July, BellSouth completed all 1,391 scheduled conversions within the 15-minute benchmark. *See Varner La. Aff.* ¶ 252. The average completion interval was 2.76 minutes. *See id.* BellSouth performed more than 99.7% of coordinated conversions without causing an outage, again far superior to the applicable 95% standard. *See id.* ¶ 256. During that time period, CLECs reported trouble on only 17 of 1,310 (1.3%) provisioned circuits, well within the Commission's 2% standard. *See* ¶ 257.

In light of this evidence, there can be no serious dispute that BellSouth satisfies this Commission's standards for hot cuts in both Georgia and Louisiana. *See Kansas/Oklahoma Order* ¶ 201; *Massachusetts Order* ¶ 110 (BOC demonstrates compliance by providing hot cuts in a timely manner; at an acceptable level of quality; with minimal service disruptions; and with a minimum of troubles following installation).

b. Stand-Alone Loop Performance

In reviewing a BOC's performance for stand-alone loop provisioning, the Commission focuses upon the following categories: (i) average completion interval (for BellSouth, this is tracked through an analogous metric known as order completion interval or "OCI"); (ii) missed

installation appointments; (iii) trouble reports after provisioning; and (iv) the timeliness and quality of maintenance and repair measures. *Kansas/Oklahoma Order* ¶¶ 208-212. Across loop types, and in both Georgia and Louisiana, BellSouth's performance has been excellent.

Georgia. BellSouth provisions quality unbundled voice grade loops in a timely manner, guaranteeing Georgia CLECs a meaningful opportunity to compete. BellSouth consistently meets a greater percentage of installation appointments for Georgia CLECs than for its own retail customers, and provisions voice grade loops for CLECs in substantially the same time as it does for its own retail customers. Between May and July, for example, BellSouth met or exceeded the applicable benchmark for 12 of the 13 installation appointment sub-metrics for analog loops. *Varner Ga. Aff.* ¶ 223.[82] Likewise, BellSouth's reported OCI performance data for analog loops indicate that it met or exceeded the applicable benchmark for each of the relevant sub-metrics during that same time period. *See Varner Ga. Aff.* ¶ 220.

The quality of BellSouth's loop provisioning in Georgia, as well as the timeliness and quality of its maintenance and repair services, has also been exemplary. Between May and July, BellSouth met or exceeded the parity standard for all sub-metrics that capture provisioning troubles for analog loops. *See Varner Ga. Aff.* ¶ 225. During that same time period, BellSouth also met a greater percentage of maintenance and repair appointments for CLEC customers than it did for its own retail customers (B.3.1.8, B.3.1.9), and completed maintenance and repair work in substantially less time for CLEC loops than for BellSouth's own retail customers (B.3.3.8, B.3.3.9). *See id.* ¶¶ 228-230. Finally, BellSouth provides high-quality maintenance and repair

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[82] The only sub-metric that BellSouth missed – B.2.18.9.2.1 (June 2001) (2-wire analog loop non-design/>=10 circuits/dispatch) – involved only two orders.

services, such that CLEC customers suffered a lower percentage of repeat troubles than did BellSouth retail customers (B.3.4.8, B.3.4.9). *See id.* ¶ 230.

Louisiana. BellSouth also provisions unbundled voice grade loops in Louisiana in a manner that provides Louisiana CLECs a meaningful opportunity to compete. BellSouth consistently meets more installation appointments for Louisiana CLECs than for its own retail customers, exceeding parity for all seven sub-metrics with reported data (B.2.18.8, B.2.18.9) between May and July. *See Varner La. Aff.* ¶ 237. While the order completion intervals have been substantially the same for CLEC and BellSouth retail customers (B.2.1.8), the limited CLEC order volume has accentuated any minor deviations that have occurred. *See* BellSouth Monthly State Summaries – Louisiana, May-July 2001 (*Varner Affs.* Exhs. PM-14 to PM-16). This minimal deviation has not affected CLECs' opportunity to compete in the Louisiana local service market.

As in Georgia, the quality of BellSouth's provisioning in Louisiana has also been superb. Between May and July, BellSouth missed none of the nine sub-metrics that capture provisioning troubles for analog loops. *See Varner La. Aff.* ¶ 238 (B.2.19.8, B.2.19.9). Likewise, as captured by the "customer trouble report rate" metric, Louisiana CLEC customers consistently experienced a smaller percentage of troubles than did BellSouth's retail customers. *See id.* ¶ 243 (B.3.2.8, B.3.2.9). BellSouth has also provided Louisiana CLECs maintenance and repair services that are on par with, if not superior to, that provided to BellSouth's retail customers. Between May and July, BellSouth missed a smaller percentage of installation appointments for CLECs than for its retail customers (B.3.1.8, B.3.1.9), and BellSouth completed maintenance and repair work in substantially less time for CLECs than for its own retail customers (B.3.3.8). *See id.* ¶¶ 241, 243. In July alone, BellSouth completed maintenance work for CLEC more than

three times faster than for its retail customers. *See* BellSouth Monthly State Summary – Louisiana, July 2001 (B.3.3.8) (*Varner Affs.* Exh. PM-16). CLECs have also received superior quality maintenance and repair services, as BellSouth met or exceeded parity for all six of the repeat trouble report sub-metrics (B.3.4.8). *Varner La. Aff.* ¶ 243.

c. High-Speed Digital Loops

Georgia. BellSouth has additionally provisioned high-quality digital loops to Georgia CLECs at speeds of DS1 and greater. From May through July, BellSouth has missed a smaller percentage of installation appointments for CLECs in provisioning such high-speed digital loops than it has for its own retail customers (B.2.18.19). *See Varner Ga. Aff.* ¶ 234. Likewise, the average order completion interval for digital loops of DS1 capacity or greater has consistently been shorter for CLECs than it has been for BellSouth retail customers (B.2.1.19). *See id.* ¶ 232. BellSouth has also instituted a new turn-up process to address concerns with some provisioning troubles. *See id.* ¶ 236.

Louisiana. BellSouth additionally provides nondiscriminatory access to digital loops of DS1 capacity or greater in Louisiana. BellSouth's provisioning performance has been excellent. During each of the past three months, BellSouth has missed a smaller percentage of installation appointments when provisioning high-speed digital loops for CLECs than it has when provisioning such loops to its retail customers. *See Varner La. Aff.* ¶ 247 (B.2.18.19). Likewise, the average order completion interval for digital loops of DS1 capacity or greater has consistently been shorter for Louisiana CLECs than it has been for BellSouth retail customers. *See id.* ¶ 245 (B.2.1.19).

2. Access to Subloop Elements

In addition to the unbundled loops themselves, BellSouth offers CLECs nondiscriminatory access to subloop elements. *See Milner Aff.* ¶ 124. The subloop UNE has been defined as a portion of the local loop that can be accessed at accessible points on the loop. This includes any technically feasible point near the customer premises, such as the pole or pedestal, the network interface device ("NID"), or minimum point of entry to the customer's premises, the feeder distribution interface, the Main Distributing Frame, remote terminals and various other terminals. *See id.* BellSouth offers the following subloop elements: loop concentration/multiplexing; loop feeder; loop distribution; intrabuilding network cable; and network terminating wire. *See id.* Moreover, CLECs can request additional subloop elements via the bona fide request process. *See id.* As of July 31, 2001, BellSouth has provided CLECs over 600 unbundled subloop loop distribution elements region-wide. *See id.* ¶ 125.

3. Access to xDSL-capable Loops

BellSouth has developed and implemented nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services, providing Georgia CLECs a meaningful opportunity to compete in the advanced services market. Because the various flavors of xDSL have different technical prerequisites and disparate tolerance for disturbing devices, CLECs requested that BellSouth create xDSL loop offerings with distinct parameters. In response to these requests, BellSouth developed a variety of unbundled loop-types for CLECs to choose among. Because BellSouth signed interconnection agreements obligating it to continue provisioning these different loop types, multiple product offerings have been and remain available over time. The historical evolution of BellSouth's specific xDSL loop offerings – which currently include the ADSL-capable loop; HDSL-capable

loop; ISDN loop; Universal Digital Channel ("UDC"); Unbundled Copper Loop ("UCL"), Short and Long; and UCL-Nondesign ("UCL-ND") – is recounted in the affidavit of Jerry Latham. *See generally Latham Aff.* ¶¶ 3-19 (App. A, Tab M). By July 31, 2001, BellSouth had provisioned 3,391 2-wire ADSL loops, 80 2-wire HDSL loops, 737 UCL (Long and Short) loops, and 3,091 UDC loops in Georgia, as well as 1,781 2-wire ADSL loops, 71 2-wire HDSL loops, 934 UCL (Long and Short) loops, and 752 UDC loops in Louisiana. *See Milner Aff.* ¶¶ 115, 138.

For pre-ordering of xDSL-capable loops, BellSouth offers CLECs nondiscriminatory access to the actual loop make-up information ("LMU") contained in its records and databases. *See generally Stacy Aff.* ¶¶ 227-249. In compliance with the *UNE Remand Order*, BellSouth provides CLECs access to the exact same LMU available to and used by its retail personnel and in the same manner. *See id.* ¶¶ 227-278 231-32.

LMU consists of the detailed information about the loop facilities serving a particular end-user address needed to determine the feasibility of providing a desired xDSL service over a loop. BellSouth's LENS, TAG, and RoboTAG interfaces allow CLECs to obtain real-time electronic access to the LMU contained in BellSouth's Loop Facilities Assignment & Control System ("LFACS"). *Id.* ¶ 228. Should LFACs lack the desired LMU, CLECs can request that BellSouth's outside plant engineers perform a manual lookup in BellSouth's Corporate Facilities Database. *Id.* ¶ 231-32; *Latham Aff.* ¶ 25; *see also Massachusetts Order* ¶ 68 (approving mix of manual and electronic processes); *Kansas/Oklahoma Order* ¶ 122; *Texas Order* ¶ 165. With

LMU in hand, CLECs can make their own determination as to the suitability of particular loops for the desired xDSL service. *See Latham Aff.* ¶ 23.[83]

BellSouth also performs loop conditioning as requested, irrespective of whether BellSouth offers advanced services to the end-user customer on that loop. CLECs may select the precise conditioning (*i.e.*, loop modification) they desire on their loop and will only pay for the level of conditioning selected. *See Latham Aff.* ¶ 25; *Milner Aff.* ¶ 122.[84] Through BellSouth's Unbundled Loop Modification ("ULM") process, CLECs can request that BellSouth modify any existing loop to be compatible with the CLEC's particular hardware requirements. *See Latham Aff.* ¶ 25.

Under the direction of the Georgia and Louisiana PSCs, BellSouth has also developed comprehensive, disaggregated performance metrics that capture its performance in the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services. BellSouth's performance has been excellent across each of the five categories upon which this Commission has focused its attention: (i) order processing timeliness; (ii) average installation intervals; (iii) missed installation appointments; (iv) quality; and (v) quality and timeliness of maintenance and repair. *See Massachusetts Order* ¶ 130. Based on these performance data, the Commission should conclude that BellSouth "provisions xDSL-capable loops for competing carriers in substantially the same time and manner that it installs xDSL-capable loops for its own retail operations." *Kansas/Oklahoma Order* ¶ 185.

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[83] BellSouth additionally offers CLECs access to its Loop Qualification System ("LQS"), a database designed for Network Service Providers ("NSPs") to enable them to inquire as to whether POTS lines will support BellSouth's wholesale ADSL service. CLECs have electronic access to the exact same LQS database, and in the same time and manner as NSPs. *See Stacy Aff.* ¶¶ 234-236.

[84] By order dated June 11, 2001, the GPSC set rates for loop conditioning at zero for a

Georgia. BellSouth provides nondiscriminatory access to xDSL-capable loops in Georgia, as demonstrated by its performance across all five of the relevant categories. BellSouth returns loop makeup information to CLECs in substantially the same time and manner as it is available to BellSouth's personnel. *See Stacy Aff.* ¶¶ 227-28, 231-32. Between May and July, BellSouth returned electronic loop makeup information within five minutes for 100% of such requests. *See Varner Ga. Aff.* ¶ 165 (F.2.2.1). BellSouth additionally returned 98% (160 of 164) of manual requests within the established three-day benchmark during that same time frame. *See id.* ¶ 164 (F.2.1.1).

BellSouth also provisions CLEC xDSL-capable loop orders well within the seven-day benchmark established by the GPSC. *See id.* ¶ 193 (B.2.1.5, B.2.2). In absolute terms, the average order completion interval fell during each month from May through July. *See* BellSouth Monthly State Summaries – Georgia, May-July 2001 (*Varner Affs.* Exhs. PM-2 to PM-4). Likewise, BellSouth met or exceeded the applicable parity standard for missed installation appointments in each of the past three months. *Varner Ga. Aff.* ¶ 197 (B.2.1.8.5).

BellSouth not only delivers xDSL-capable loops and related services in a timely manner but also provisions high-quality loops that present few technical problems. During the months of May to July 2001, only 5.1% of provisioned xDSL-capable loops experienced trouble within 30 days of their installation. *See* BellSouth Monthly State Summaries – Georgia, May-July 2001 (B.2.19.5) (*Varner Affs.* Exhs. PM-2 to PM-4). During that same time period, more than 99% of CLEC xDSL-capable loops were trouble free. *See Varner Ga. Aff.* ¶ 203. And while BellSouth just missed the parity measure for Customer Trouble Report Rate for xDSL (B.3.2.5), the

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period of 18 months. *See Latham Aff.* ¶ 25.

absolute percentage of troubles was so small as to be competitively insignificant. *See id.; Pennsylvania Order* ¶ 77; *Massachusetts Order* ¶ 122.

When CLECs did experience trouble on xDSL-capable loops, BellSouth handled the troubles in substantially less time than it handled the troubles for its retail units. In July, for example, BellSouth completed maintenance work for CLEC xDSL-capable loops in an average of 5.38 hours for dispatch (B.3.3.5.1) and 3.08 hours for non-dispatch (B.3.3.5.2) repair service. By way of comparison, BellSouth completed the analog retail maintenance work in an average of 62.47 hours for dispatch and 18.49 hours for non-dispatch repair service. *See* BellSouth Monthly State Summaries – Georgia, July (*Varner Affs.* Exh. PM-4). BellSouth consistently made a greater percentage of repair appointments for CLECs than for its own retail customers (B.3.1.5), and provided superior quality repair service as CLECs suffered substantially fewer repeat troubles (B.3.4.5). *See Varner Ga. Aff.* ¶¶ 201, 206.

Louisiana. BellSouth also provides nondiscriminatory access to xDSL-capable loops in Louisiana. As in Georgia, BellSouth returns loop makeup information to Louisiana CLECs in substantially the same time and manner as that information is available to BellSouth's own personnel. Between May and July 2001, BellSouth returned electronic loop makeup information within five minutes for 100% of such requests. *See Varner La. Aff.* ¶ 179 (F.2.2.1). There was only one manual request for loop makeup information submitted between May and July. *See id.* ¶ 178.

BellSouth also provisions high-quality xDSL-capable loops to Louisiana CLECs in a timely manner. During each of the past three months, BellSouth satisfied CLEC xDSL-capable loop orders well within the seven-day benchmark established by the LPSC. *See Varner La. Aff.* ¶ 207 (B.2.1.5, B.2.2). Likewise, BellSouth met or exceeded the applicable parity standard for

missed installation appointments in each of the three months. *Id.* ¶ 211 (B.2.18.5). BellSouth xDSL-capable loops faced few technical problems once provisioned, as BellSouth met or exceeded the retail analog for troubles within 30 days of installation during each of the past three months. *Id.* ¶ 212 (B.2.19.5). During that same time period, more than 99% of CLEC xDSL-capable loops were trouble free. *See id.* ¶ 217. When CLECs did experience trouble on xDSL-capable loops, BellSouth provided timely and high-quality repair service. BellSouth missed fewer CLEC repair appointments (B.3.1.5), and it handled CLEC reported troubles in substantially less time than it handled the troubles for its retail analog units (B.3.3.5). *See id.* ¶¶ 215, 219. In light of this comprehensive evidence, there can be no doubt but that Louisiana CLECs have been provided a meaningful opportunity to compete in the advanced services market.

4. ISDN-BRI Loop Provisioning

BellSouth's performance in provisioning ISDN-BRI loops has also been excellent across each of the categories upon which this Commission has directed its attention. In both Georgia and Louisiana, BellSouth has met or exceeded the parity standard for ISDN-BRI loops for average order completion interval (B.2.1.6.3) during each of the past three months. *See Varner Ga. Aff.* ¶ 210; *Varner La. Aff.* ¶ 224. Likewise, BellSouth has consistently met a greater percentage of ISDN-BRI installation appointments for CLECs than it has for its own customers (B.2.18.6.1). *See Varner Ga. Aff.* ¶ 212; *Varner La. Aff.* ¶ 226. The customer trouble report rate has been significantly lower for Georgia CLECs than for BellSouth during each of the past three months (B.3.2.6), *see Varner Ga. Aff.* ¶ 215, and BellSouth has just missed the parity standard for two sub-metrics in Louisiana, *see Varner La. Aff.* ¶ 229. In each instance, however, more than 98% of CLEC ISDN-BRI loops were trouble free. *See id.* Moreover, when CLECs have

experienced troubles, BellSouth has provided timely and high-quality maintenance and repair services. In both Georgia and Louisiana, BellSouth has met or exceeded the parity standard for missed repair appointments (B.3.1.6), average maintenance duration (B.3.3.6), and percent repeat reports within thirty days (B.3.4.6) for every available sub-metric. *See Varner Ga. Aff.* ¶¶ 214, 216, 217; *Varner La. Aff.* ¶¶ 228, 230, 231.

5. Line Sharing

BellSouth has implemented line sharing in full compliance with the Commission's requirements, allowing CLECs to offer high-speed data service to BellSouth voice customers. Like SWBT, BellSouth developed its line-sharing product in a collaborative effort with CLECs and is continuing to work cooperatively with the CLECs on an ongoing basis to resolve issues as they arise. *See Williams Aff.* ¶ 7 (App. A, Tab W); *see also LPSC Staff Final Recommendation* at 84. BellSouth invited all interested CLECs to collaborative meetings beginning in January 2000, and at least 11 CLECs participated in these meetings. The participants agreed to form several working collaborative teams to develop processes and procedures for central-office-based line sharing, which were then implemented, tested, and improved. As a result of these efforts, BellSouth was able to implement commercial line sharing by this Commission's June 6, 2000 deadline. As of August 31, 2001, BellSouth had provisioned 824 line-sharing arrangements in Georgia, 418 line-sharing arrangements in Louisiana, and 3,856 such arrangements region-wide. *See Milner Aff.* ¶ 134.

BellSouth provides line sharing in accordance with the obligations set forth in the Commission's *Line Sharing Order* and *Line Sharing Reconsideration Order*. Specifically, line sharing is available to a single requesting carrier, on loops that carry BellSouth's plain old telephone service ("POTS"), so long as the xDSL technology deployed by the requesting carrier

does not interfere with the analog voice-band transmissions. *See Williams Aff.* ¶¶ 5-6. BellSouth allows line-sharing CLECs to deploy any version of xDSL that is presumed acceptable for shared-line deployment in accordance with Commission rules and will not significantly degrade analog voice service. *Id.* At the request of the data CLECs, BellSouth provides line splitters in both Georgia and Louisiana. *Id.* ¶ 18.

The pre-ordering, ordering, provisioning, and maintenance and repair processes for the line-sharing product are very similar to the processes for xDSL-capable loops. *Id.* ¶¶ 21-28. For loop makeup information, the process is the same whether the CLEC wishes to obtain an xDSL-capable loop, or the high-frequency portion of the loop. *Id.* ¶ 21.

BellSouth provisions line sharing in a timely, accurate, and nondiscriminatory manner. *See Massachusetts Order* ¶ 165 ("a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates").

Georgia. In Georgia, BellSouth has completed orders for line sharing arrangements in substantially the same time as for the retail analog. BellSouth has met or exceeded the parity standard for five of six relevant OCI sub-metrics over the past three months (B.2.1.7). *Varner Ga. Aff.* ¶ 195. BellSouth just missed the sixth sub-metric, and the minimal disparity is largely explained by the limited sample size. *See id.* BellSouth also has consistently met or exceeded the parity standard for missed installation appointments during each of the past three months, *see id.* ¶ 197, and CLECs have suffered a smaller percentage of provisioning troubles within 30 days, *see id.* ¶ 199. BellSouth has met substantially the same percentage of repair appointments for CLECs as for its retail customers. *See id.* ¶ 202. Because so few CLECs' line-sharing

arrangements have required repair work, the limited sample size results in figures that understate BellSouth's record of high-quality maintenance service. *See id.* ¶ 207.

Louisiana. BellSouth also provides nondiscriminatory access to line-shared loops in Louisiana. BellSouth provisions line sharing arrangements in substantially the same time as it does for the retail analog, and BellSouth misses a smaller percentage of CLEC installation appointments. *See Varner La. Aff.* ¶¶ 209, 211. Likewise, BellSouth provisions high-quality loops, meeting the parity standard for three of four sub-metrics for provisioning troubles. *See id.* ¶ 213. In those instances where BellSouth has missed the parity standard, the limited sample size is largely responsible for skewing the record of high quality provisioning and maintenance services that BellSouth has demonstrated across loop types.

6. Line Splitting

BellSouth facilitates CLEC efforts to engage in line splitting in full compliance with the Commission's instructions. *Williams Aff.* ¶ 35. Specifically, BellSouth facilitates line splitting by cross-connecting an unbundled loop to a CLEC's collocation space. *Id.* ¶ 39. Once the CLEC has separated the voice from the data service, and sent the latter onto the packet switched network, BellSouth will cross-connect the voice signal back to the BellSouth circuit switch. In other words, BellSouth offers the same arrangement to CLECs as that described by the Commission in the *Texas Order* and the *Line Sharing Reconsideration Order*. *See* Ga. SGAT § II.B.9.b; La. SGAT § II.A.9.b. BellSouth's current offerings meet all Commission requirements for line splitting. *Texas Order* ¶¶ 323-329.

E. Checklist Item 5: Unbundled Local Transport

In compliance with the Act, BellSouth provides "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by SBC Communications	)	
Inc., Illinois Bell Telephone Company,	)	WC Docket No. 03 - 167
Indiana Bell Telephone Company	)	
Incorporated, the Ohio Bell Telephone	)	
Company, Wisconsin Bell, Inc., and	)	
Southwestern Bell Communications Services,	)	
Inc. for Authorization To Provide In-Region,	)	
InterLATA Services in Illinois, Indiana, Ohio,	)	
and Wisconsin	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 2003 **Released: October 15, 2003**

By the Commission: Commissioners Copps, Martin and Adelstein issuing separate statements.

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I. INTRODUCTION

1. On July 17, 2003, SBC Communications Inc., and its subsidiaries, Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. (collectively, SBC or applicant) jointly filed this multi-state application pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA services originating in the states of Illinois, Indiana, Ohio, and Wisconsin.[2] We grant SBC's application in this Order based on our conclusion that SBC has taken the statutorily required

[1] We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act or the Act. *See* 47 U.S.C. §§ 151 *et seq*. We refer to the Telecommunications Act of 1996 as the 1996 Act. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] *See Application of SBC, Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization To Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin,*, WC Docket No. 03-167 (filed July 17, 2003) (SBC Application).

steps to open its local exchange markets in these states to competition.

2. We note that the outstanding work of the state commissions in conjunction with SBC's extensive efforts to open its local exchange markets has resulted in competitive entry in each of these states. As of May 2003, SBC estimates competitive local exchange carriers (LECs) were serving at least 2.3 million access lines in Illinois, or 29% of all access lines in **Illinois;**[3] **at** least 393,000 access lines in Indiana, or 15% of all access lines in Indiana;[4] at least 885,000 access lines in Ohio, or 20% of all access lines in Ohio;[5] and at least 633,000 access lines in Wisconsin, or 25% of all access lines in Wisconsin.[6] These figures include approximately 319,000 UNE loops and 779,000 UNE-platform lines in Illinois,[7] 53,000 UNE loops and 157,000 UNE platform lines in Indiana,[8] 125,000 UNE loops and 547,000 UNE-platform lines in Ohio,[9] and 229,000 UNE loops and 146,000 UNE-platform lines in Wisconsin.[10]

3. We wish to acknowledge the Illinois Commerce Commission (Illinois Commission), the Indiana Utility Regulatory Commission (Indiana Commission), the Public Utility Commission of Ohio (Ohio Commission), and the Public Service Commission of Wisconsin (Wisconsin Commission) for their considerable effort and dedication in overseeing SBC's implementation of the requirements of section 271 of the Act. By diligently and actively conducting proceedings to set UNE prices, to implement performance measures, to develop Performance Remedy Plans (PRPs), and to evaluate SBC's compliance with section 271, these state commissions laid the necessary foundation for our review of this application.

II. BACKGROUND

4. In the 1996 amendments to the Communications Act, Congress required that the Bell Operating Companies (BOCs) demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long

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3 SBC Application App. A, Vol. 9, Tab 24, Affidavit of Deborah O. Heritage Regarding Illinois (SBC Heritage Illinois Aff.) at para. 4.

4 SBC Application App. A, Vol. 9, Tab 25, Affidavit of Deborah O. Heritage Regarding Indiana (SBC Heritage Indiana Aff.) at para. 4.

5 SBC Application App. A, Vol. 9, Tab 26, Affidavit of Deborah O. Heritage Regarding Ohio (SBC Heritage Ohio Aff.) at para. 4.

6 SBC Application App. A, Vol. 9, Tab 27, Affidavit of Deborah O. Heritage Regarding Wisconsin (SBC Heritage Wisconsin Aff.) at para. 4.

7 SBC Heritage Illinois Aff. at para. 6.

8 SBC Heritage Indiana Aff. at para. 6.

9 SBC Heritage Ohio Aff. at para. 6.

10 SBC Heritage Wisconsin Aff. at para. 6.

distance service.[11] Congress provided for Commission review of BOC applications to provide such service in consultation with the relevant state commissions and the U.S. Attorney General.[12] In our examination of this application, we rely heavily on the work completed by the state commissions. We summarize the individual state proceedings below.

5. *Illinois.* On October 24, 2001, the Illinois Commission issued an order initiating a proceeding to investigate the status of SBC's compliance with section 271 of the Act, to hold hearings, and to develop a comprehensive factual record for purposes of its anticipated consultation with this Commission.[13] The Illinois Commission conducted a number of workshops open to all participants that identified and refined relevant issues including those related to Track A, the 14-point checklist, and the public interest.[14] On May 13, 2003, the Illinois Commission issued a final order finding that SBC's application was in the public interest and that SBC met the 14-point checklist and the Track A requirements in Illinois.[15]

6. *Indiana.* On February 2, 2000, SBC formally requested that the Indiana Commission commence a process to review its application to provide long distance services in Indiana.[16] SBC requested that the Indiana Commission review checklist compliance separate from overseeing the testing of the operational support system (OSS) and performance measures.

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[11] *See* 47 U.S.C. § 271.

[12] 47 U.S.C. §§ 271(d)(2)(A), (B). The Commission has summarized the relevant statutory framework in prior orders. *See, e.g., Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Sprint v. FCC*); *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18359-61, paras. 8-11 (2000) (*SWBT Texas Order*).

[13] *Illinois Commerce Commission On its Own Motion, Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271of the Telecommunications Act of 1996,* ICC Docket No. 01-0662, Order Initiating Investigation (Illinois Commission October 24, 2001) (*Illinois Section 271 Proceeding Initiating Order*).

[14] SBC Application at 3-6; SBC Application App. A, Vol. 11, Tab 29, Affidavit of Rhonda J. Johnson (SBC Johnson Aff.) at paras. 12-23. As we discuss below, we find that SBC has satisfied the requirements of Track A. *See* para. 13, *infra*.

[15] *Illinois Commerce Commission On its Own Motion, Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271of the Telecommunications Act of 1996,* ICC Docket No. 01-0662, Order on Investigation (Illinois Commission May 13, 2003) (*Illinois Section 271 Order*).

[16] *Petition of Indiana Bell Telephone Company, Incorporated, D/B/A Ameritech Indiana or SBC Indiana Pursuant to I.C. 8-1-2-61 for a Three Phase Process for Commission Review of Various Submissions of SBC Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996,* Cause No. 41657, Petition (filed with Indiana Commission February 2, 2000) (*SBC Indiana Petition*).

On March 19, 2001, the Indiana Commission issued an order authorizing the OSS test.[17] The Indiana Commission ensured the process was open to participation by all interested parties and held numerous and lengthy workshops between SBC and the competitive LECs to discuss, among other things, OSS enhancements, performance measures, and checklist items.[18] On July 2, 2003, the Indiana Commission issued an order indicating that it would support SBC's application, subject to the filing of compliance plans developed in Michigan and subsequently filed in Illinois.[19] On August 6, 2003, the Indiana Commission filed comments in this proceeding, which concluded that SBC is largely in compliance with the section 271 requirements. The Indiana Commission did, however, defer to this Commission the ultimate determination of whether local markets have been fully and irreversibly open to competition, and whether SBC has demonstrated sufficient accuracy of its systems data and wholesale billing reliability.[20]

7. *Ohio.* On June 1, 2000, the Ohio Commission initiated a proceeding to review SBC's section 271 application for Ohio.[21] The Ohio Commission held numerous and detailed collaborative workshops between SBC and the competitive LECs focused on OSS enhancements, development and supervision of OSS tests, performance measurements, and checklist items including UNE combinations.[22] On June 26, 2003, the Ohio Commission issued an order concluding that SBC has opened the local markets in Ohio to competition and has satisfied all the requirements for section 271 approval.[23]

8. *Wisconsin.* On September 14, 2001, the Wisconsin Commission issued a notice

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[17] *Petition of Indiana Bell Telephone Company, Incorporated, D/B/A Ameritech Indiana or SBC Indiana Pursuant to I.C. 8-1-2-61 for a Three Phase Process for Commission Review of Various Submissions of SBC Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996*, Cause No. 41657, Order (Indiana Commission March 19, 2001) (*Indiana OSS Order*).

[18] SBC Application at 6-7; SBC Application App. A, Vol. 1, Tab 8, Affidavit of Jolynn B. Butler (SBC Butler Aff.) at paras. 9-24.

[19] *Petition of Indiana Bell Telephone Company, Incorporated, D/B/A Ameritech Indiana or SBC Indiana Pursuant to I.C. 8-1-2-61 for a Three Phase Process for Commission Review of Various Submissions of SBC Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996,* Cause No. 41657, Compliance Order (Indiana Commission July 2, 2003) (*Indiana Compliance Order*).

[20] Indiana Commission Comments at 1-2.

[21] *Investigation into SBC Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunication Act of 1996*, Case No. 00-942-TP-COL, Order (Ohio Commission June 1, 2000).

[22] SBC Application at 7-11; SBC Application App. A, Vol. 11, Tab 32, Affidavit of Daniel R. McKenzie (SBC McKenzie Aff.) at paras. 9-20.

[23] *Investigation into SBC Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunication Act of 1996*, Case No. 00-942-TP-COL, Order (Ohio Commission June 26, 2003) (*Ohio Commission 271 Order*).

opening the section 271 docket in Wisconsin.[24] Interested parties conducted technical hearings and participated in a number of collaborative workshops to resolve some of the outstanding issues.[25] The Wisconsin Commission issued two separate orders. On July 1, 2003, it issued a "Phase I" order concluding that SBC had satisfied Track A and each of the fourteen checklist items in Wisconsin subject to its determinations in its "Phase II" proceeding.[26] On July 7, 2003, it issued a "Phase II" order concluding that SBC provides nondiscriminatory access to OSS in Wisconsin and that it provides unbundled network elements (UNEs) at TELRIC-based rates in Wisconsin.[27]

9. On July 17, 2003, SBC filed the instant application. Comments were filed with the Commission on August 6, 2003 and reply comments were filed on August 29, 2003. The Department of Justice filed an evaluation on August 26, 2003, expressing concerns about SBC's wholesale billing, manual handling of orders, line splitting, pricing, and data reliability.[28] According to the Department of Justice, billing accuracy problems continue to persist that were noted in the Michigan proceeding.[29] Regarding manual handling of orders, the Department of Justice notes that, because of software problems, competitive LECs often must rely on manual processes instead of SBC's normal mechanized interfaces to handle orders. It questions the adequacy of SBC's pre-release testing and defect resolution processes.[30] Moreover, the Department of Justice still questions, as it did in the Michigan proceeding, whether SBC's current processes provide nondiscriminatory access to line splitting and UNE-platform services.[31] The Department of Justice also questions whether SBC may be implementing state commission-ordered TELRIC rates in a way that violates our rules and the Act.[32] Finally, the Department of Justice notes that "the Commission should ensure that the current performance metrics are reliable, and that a stable and reliable reporting system will be in place to help ensure

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[24] *Petition of Wisconsin Bell, Inc. for a Section 271 Checklist Proceeding*, 6720-TI-170, Notice of Proceeding and Investigation and Assessment of Costs and Technical Hearing (Wisconsin Commission September 14, 2001).

[25] SBC Application at 11-12; SBC Application App. A, Vol. 11, Tab 40, Affidavit of Scott T. Vandersanden (SBC Vandersanden Aff.) at paras. 13-23.

[26] *Petition of Wisconsin Bell, Inc. for a Section 271 Checklist Proceeding*, 6720-TI-170, Determination Phase I (Wisconsin Commission July 1, 2003) (*Wisconsin Commission Phase I Order*).

[27] *Petition of Wisconsin Bell, Inc. for a Section 271 Checklist Proceeding*, 6720-TI-170, Determination Phase II (Wisconsin Commission July 7, 2003) (*Wisconsin Commission Phase II Order*).

[28] Department of Justice Evaluation at 2.

[29] *Id.* at 9.

[30] *Id.* at 15-16.

[31] *Id.* at 16.

[32] *Id.* at 17

that these local markets remain open after SBC's application is ultimately granted."[33] As a result, the Department of Justice states that it "is not in a position to support this application based on the current record," but states that the Commission may "be able to satisfy itself regarding these [issues] prior to the conclusion of its review."[34]

A. Compliance With Unbundling Rules

10. One part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules governing UNEs.[35] In the *UNE Remand* and *Line Sharing Orders*, the Commission established a list of UNEs that incumbent LECs were obliged to provide: (1) local loops and subloops; (2) network interface devices; (3) switching capability; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) OSS; and (7) the high frequency portion of the loop.[36] The D.C. Circuit vacated these orders and instructed the Commission to reevaluate the network elements subject to the unbundling requirement.[37] The court's mandate was stayed first until January 3, 2003, and then until February 20, 2003. On February 20, 2003, we adopted new unbundling rules as part of our *Triennial Review* proceeding, which became effective on October 2, 2003.[38]

11. Although the former unbundling rules were not in force at the time SBC filed its application in this proceeding, SBC states that it continues to provide nondiscriminatory access

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[33] *Id.* at 19.

[34] *Id.* at 20.

[35] In order to comply with the requirements or checklist item 2, a BOC must show that it is offering "[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3)." 47 U.S.C. § 271(c)(2)(B)(ii).

[36] *See* 47 C.F.R. § 51.319; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

[37] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 123 S.Ct. 1571 (2003 Mem.).

[38] *See FCC Adopts New Rules For Network Unbundling Obligations Of Incumbent Local Phone Carriers*, News Release (rel. Feb. 20, 2003) (announcing adoption of an Order on Remand and Further Notice of Proposed Rulemaking in CC Docket No. 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*) (*Triennial Review News Release*); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003) (*Triennial Review Order*); *Effective Date for New Rules and Comment and Reply Comment Dates*, Public Notice, DA 03-2778 (WCB rel. Sept. 2, 2003) (*Triennial Review Public Notice*).

to these network elements.[39] As the Commission found in the *Bell Atlantic New York Order*, we believe that using the network elements identified in the former unbundling rules as a standard in evaluating SBC's application, filed during the interim period between the time the rules were vacated by the D.C. Circuit and the effective date of the new rules, is a reasonable way to ensure that the application complies with the checklist requirements.[40] We find it significant that no commenter disputes that SBC should be required to demonstrate that it provides these network elements in a nondiscriminatory way. Accordingly, for the purposes of this application, we will evaluate whether SBC provides nondiscriminatory access to the network elements identified under the former unbundling rules. We emphasize that, on an ongoing basis, SBC must comply with all of the Commission's rules implementing the requirements of sections 251 and 252 upon the dates specified by those rules.[41]

III. COMPLIANCE WITH SECTION 271(C)(1)(A)

12. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[42] To meet the requirements of Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."[43] The Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another

The Commission has further held that a BOC must show that at least one "competing

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[39] *See* SBC Application at 39, 42-43, 92-93, 95. Consistent with the *Bell Atlantic New York Order*, we will not require SBC to demonstrate compliance with rules that were not in effect at the time the application was filed. *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3967, para. 31 (1999) (*Bell Atlantic New York Order*), *aff'd, AT&T Corp v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

[40] *Bell Atlantic New York Order*, 15 FCC Rcd at 3966-67, para. 30. A similar procedural situation was presented in the *Bell Atlantic New York* proceeding. Bell Atlantic filed its application for section 271 authorization in New York after the unbundling rules had been vacated but before the *UNE Remand Order* had taken effect and, thus, at a time when no binding unbundling rules were in effect. Bell Atlantic suggested, and the Commission agreed, that it would be reasonable for the Commission to use the original seven network elements identified in the former unbundling rules in evaluating compliance with checklist item 2 for the application. *See id.* at 3966-67, paras. 29-31.

[41] *See SWBT Texas Order,* 15 FCC Rcd at 18368, para. 29; *Bell Atlantic New York Order*, 15 FCC Rcd at 3967, para. 31.

[42] 47 U.S.C. § 271(d)(3)(A).

[43] 47 U.S.C. § 271(c)(1)(A).

[44] *Id.*

LEC's request.[578] SBC has also demonstrated that it allows competitors to combine their own UNE combinations.[579] Finally, we note that no commenter has expressed any concern about SBC's provision of UNE combinations.

C. Checklist item 4 – Unbundled Local Loops

142. Section 271(c)(2)(B) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[580] Based on the evidence in the record, we conclude, consistent with the state commissions, that SBC provides unbundled local loops in accordance with the requirements of section 271 and our rules.[581] Our conclusion is based on our review of SBC's performance for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, and high-capacity loops, as well as our review of SBC's processes for hot cut provisioning, and line sharing and line splitting. SBC has provisioned thousands of stand-alone loop UNEs in the four application states; 319,000 in Illinois; 53,000 in Indiana; 125,470 in Ohio; and 229,539 in Wisconsin.[582]

143. *xDSL-Capable Loops.* We find that SBC provides xDSL-capable loops to competitors in a nondiscriminatory manner.[583] Although SBC missed one installation interval

[578] SBC Alexander Illinois Aff. at paras. 82-83; SBC Alexander Indiana Aff. at paras. 82-83; SBC Alexander Ohio Aff. at paras. 82-83; SBC Alexander Wisconsin Aff. at paras. 82-84.

[579] SBC Application at 42 (citing, as an example, SBC Alexander Illinois Aff. at paras. 39-53, 80 and SBC Application App. A, Vol. 3, Tab 13, Affidavit of William C. Deere Regarding Illinois (SBC Deere Illinois Aff.) at para. 9).

[580] 47 U.S.C. § 271(c)(2)(B)(iv); *see also* Appendix F (setting forth the requirements under checklist item 4).

[581] Illinois Commission Comments at 96; Ohio Commission Comments at 186; Wisconsin Commission Comments at 1. We note that the Indiana Commission deferred the determination of whether SBC is in compliance with checklist item 4 to the Commission. Indiana Commission Comments at 17-18. As we discuss below, we find that SBC has demonstrated compliance in all four states, including Indiana.

[582] SBC Application at 91; SBC Heritage Illinois Aff. at Appendix A; SBC Heritage Indiana Aff. at Appendix A; SBC Heritage Ohio Aff. at Appendix E; SBC Heritage Wisconsin Aff. at Appendix E.

[583] SBC generally met the relevant parity or benchmark standard regarding provisioning and maintenance and repair of xDSL-capable loops. *See, e.g.*, PM 58-04 (Percent Ameritech-Caused Missed Due Dates; DSL; No Line Sharing); PM 59-04 (Percent Trouble Reports Within 30 Days of Installation; DSL; No Line Sharing); PM 65-04 (Trouble Report Rate; DSL; No Line Sharing); PM 67-04 (Mean Time to Restore; Dispatch; DSL; No Line Sharing); PM 67-19 (Mean Time to Restore; No Dispatch; DSL; No Line Sharing); PM 69-04 (Percent Repeat Trouble Reports; DSL; No Line Sharing); *see also* Appendices B-E. We note that SBC missed the benchmark PM 67-04 (Mean Time to Restore; Dispatch; DSL; No Line Sharing) in Wisconsin by 1.28 hours in March 2003 and 0.45 hours in July 2003. SBC also missed the benchmark PM 69-04 (Percent Repeat Trouble Reports; DSL; No Line Sharing) in Indiana by 2.29% in March 2003 and 1.33% in June 2003. Since the misses to both metrics were by small margins, we do not find the misses to be competitively significant.

metric for DSL loops for several months in Wisconsin,[584] as the Commission has noted in prior section 271 orders, we accord the installation interval metrics little weight because results can be affected by a variety of factors outside the BOC's control that are unrelated to provisioning timeliness.[585] Instead, we conclude that the missed due date metric is a more reliable indicator of provisioning timeliness. In this regard, SBC met the applicable standard for missed due dates for all months under review.[586] In addition, MCI complains that SBC is unable to include a DSL line in a "hunt group" that also contains non-DSL lines. However, we note that MCI raised this issue in the *SBC Michigan II* proceeding, and as we determined there, we find that MCI's complaints do not warrant a finding of checklist noncompliance.[587]

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[584] SBC missed PM 55-12 (Average Installation Interval; DSL Loops Requiring No Conditioning; Line Sharing) in Wisconsin in March through May 2003 by an average of 0.47 days. However, since SBC has shown improvement by achieving parity for PM 55-12 in Wisconsin for the months of June and July 2003, we do not find that the earlier misses indicate a systemic problem with SBC's performance. Appendices B-E; SBC Ehr Reply Aff., Attach. C at 18. In June 2003, the average installation interval was 2.97 days for SBC versus 2.94 days for competitive LECs and, in July 2003, SBC's average was 2.96 days versus 2.89 days for competitive LECs. Appendices B-E. Therefore, we reject ACN Group's arguments that SBC's installation intervals for stand-alone DSL loops were much longer than those for its retail affiliate. ACN Group Comments at 37.

[585] *See, e.g., SBC Michigan II Order* at para. 128 n. 429; *Bell Atlantic New York Order*, 15 FCC Rcd at 4061, paras. 202-10 (listing factors beyond the BOC's control that affect the average installation interval metric: "(1) competitive LECs are choosing installation dates beyond the first installation date made available by Bell Atlantic's systems (the 'W-coding' problem); (2) for non-dispatch orders, competitive LECs are ordering a relatively larger share of services and UNEs that have long standard intervals (the 'order mix' problem); and (3) for dispatch orders, competitive LECs are ordering a relatively larger share of services in geographic areas that are served by busier garages and, as a result, reflect later available due dates (the 'geographic mix' problem)."; *see also Qwest Nine State Order*, 17 FCC Rcd at 26402, para. 163; *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02-307, Memorandum Opinion and Order, 17 FCC Rcd 25828, 25896-97, para. 136 and n.463 (2002) (*BellSouth Florida/Tennessee Order*).

[586] PM 58-04 (Percent Ameritech-Caused Missed Due Dates; DSL; No Line Sharing). Although SBC missed the benchmark PM IN 1-01 (Percent Loop Acceptance Test (LAT) Completed on or Prior to the Completion Date of the Order – DSL Loops without line sharing) in Wisconsin by 3.3% in March, 27.5% in April, and 10% in June, the volume of orders was low (*e.g.* only 16 competitive LEC orders in April). Appendices B-E; SBC Ehr Reply Aff., Attach. C. at 19. Since a small number of missed due dates led to the missed metric, we do not find the misses of PM IN 1-01 to be competitively significant.

[587] *See SBC Michigan II Order* at para. 131. A hunt group is a series of telephone lines, and their associated telephone numbers and switch ports, which are organized so that if a call comes in to a line in the hunt group that is busy, the call will be passed to the next line in the hunt group until a free line is found. *SBC Michigan II Order* at para. 131 n.442. SBC responds that while it currently does not provide such a feature, MCI only recently raised this issue in June, 2003. Moreover, SBC explains that it does have a currently available process that emulates the hunting functionality between a ULS-ST port and a UNE-P hunt group by using existing switch feature technology (*i.e.* the use of Busy Line Transfer), and if competitive LECs are not satisfied with the Busy Line Transfer option, they have the ability to formally request the development of a process that allows actual hunt groups containing both UNE-P and stand alone ULS-ST ports either through a BFR or through Change Management. *See* SBC Chapman Reply Aff. at paras. 33-34.

144. *Voice-Grade Loops, Digital Loops, Dark Fiber and Hot Cuts.* Based on the evidence in the record we find that SBC demonstrates that it provides voice-grade loops,[588] digital loops,[589] dark fiber,[590] and hot cuts[591] in accordance with the requirements of checklist item

[588] *See, e.g.,* PM 58-05 (Percent Ameritech-Caused Missed Due Dates; 8.0 dB Loops); PM 59-05 (Percent Trouble Reports Within 30 Days of Installation; 8.0 dB Loops); *see also* Appendices B-E. SBC has satisfied the performance standards for these important metrics in all four states over the relevant five months. Therefore, we disagree with ACN Group's arguments that SBC's performance regarding voice grade loops is problematic. ACN Group Comments at 38. SBC generally met the relevant parity or benchmark standard regarding maintenance and repair of voice grade loops. *See, e.g.*, PM 66-04 (Percent Missed Repair Commitments; UNE; 2 Wire Analog 8 dB Loops); PM 67-05 (Mean Time to Restore (Hours); Dispatch; 8.0 dB Loops); PM 67-20 (Mean Time to Restore (Hours); No Dispatch; 8.0 dB Loops); PM 68-01 (Percent Out Of Service (OOS) < 24 Hours; 2 Wire Analog 8.0 dB Loops); PM 69-05 (Percent Repeat Reports; 8.0 dB Loops).

[589] *See, e.g.*, PM 58-06 (Percent Ameritech-Caused Missed Due Dates: BRI Loops with Test Access); PM 58-08 (Percent Ameritech-Caused Missed Due Dates; DS1 Loops); PM 59-06 (Percent Trouble Reports Within 30 Days of Installation; BRI Loops with Test Access); PM 59-08 (Percent Trouble Reports Within 30 Days of Installation; DS1 Loops with Test Access); *see also* Appendices B-E. SBC missed an ordering metric for loops for several of the application months. SBC missed the 95% benchmark for PM 5-34 (Percent of FOCs Returned within 24 Clock Hours; Manually Submitted Requests UNE Loop (1-49 loops)) in Illinois by an average of over 5% for March through June 2003. SBC also missed PM 55-03 (Average Installation Interval; UNE DS1 Loop (includes PRI)) in Indiana from March through July 2003, in Illinois from April through July 2003, and in Wisconsin from May through July 2003. SBC also missed PM 56-03 (Percentage of Installations Completed within Customer Requested Due Date-UNE-DS1) in Indiana in May through July 2003. However, in Illinois and Wisconsin, SBC met PM 56-03 (Percent Installations Completed Within the Customer Requested Due Date) during four of the five application months and, in Indiana, SBC only missed ten installations during the five application months, resulting in 96.3% of all Indiana competitive LECs' DS1 loops since March being installed within the requested due date. SBC Ehr Reply Aff., Attach. C at 11. Therefore, we find that overall, SBC installed DS1 loops in a timely manner as requested by the competitive LECs, and we do not find SBC's misses of the installation metrics to be competitively significant. In addition, SBC generally met the relevant parity or benchmark standard regarding maintenance and repair of digital loops. *See, e.g.*, PM 67-06 (Mean Time to Restore (Hours); Dispatch; BRI Loops with Test Access); PM 67-21 (Mean Time to Restore (Hours); No Dispatch; BRI Loops with Test Access); PM 69-06 (Percent Repeat Reports; BRI Loops with Test Access); PM 67-08 (Mean Time to Restore (Hours); Dispatch; DS1 Loops with Test Access); PM 67-23 (Mean Time to Restore (Hours); No Dispatch; DS1 Loops with Test Access); PM 69-08 (Percent Repeat Reports; DS1 Loops with Test Access); *see also* Appendices B-E. However, SBC missed PM 65-06 (Trouble Report Rate; BRI Loops with Test Access) in Illinois by an average of 0.3 trouble reports per month per 100 UNE loops. Similarly, since the performance difference was less than one trouble report (0.3) per 100 circuits, we again do not find the misses to be competitively significant. Appendices B-E; SBC Ehr Reply Aff., Attach. C at 7. SBC also missed PM 65-08 (Trouble Report Rate; DS1 Loops with Test Access) in Illinois and Ohio by an average of .9 trouble reports per month per 100 UNE loops. Nonetheless, since the performance difference was less than one trouble report (0.9) per 100 circuits, we do not find the misses to be competitively significant. Appendices B-E; Ehr Reply Aff., Attach C. at 7, 14. We therefore reject ACN Group's arguments that SBC's performance regarding voice grade loops is discriminatory. ACN Group Comments at 38.

[590] SBC Deere Illinois Aff. at paras. 92-98; SBC Application App. A, Vol. 3, Tab 14, Affidavit of William C. Deere Regarding Indiana SBC Deere Indiana Aff.) at paras. 92-98; SBC Application App. A, Vol. 3, Tab 15, Affidavit of William C. Deere Regarding Ohio (SBC Deere Ohio Aff.) at paras. 92-98; SBC Application App. A, Vol. 3, Tab 16, Affidavit of William C. Deere Regarding Wisconsin (SBC Deere Wisconsin Aff.) at paras. 92-98.

[591] *See* PM 114 (Percentage Premature Disconnects (Coordinated Cutovers)); PM 114.1 (CHC/FDT LNP w/Loop Provisioning Interval); PM 115 (Percent Ameritech-Caused Delayed Coordinated Cutovers)). We note that SBC (continued....)

four. We disagree with ACN Group's arguments that SBC has failed to provide nondiscriminatory access to unbundled DS1 and DSL loops.[592] In particular, ACN Group argues that SBC's trouble rate in Illinois for DS1 loops has generally been far below the trouble rate for Mpower and the trouble rate for all competitive LECs.[593] As we stated previously, contrary to ACN Group's claims, we found that, although SBC did not meet parity every month for PM 65-08 (Trouble Report Rate; DS1 Loops with Test Access) in Illinois, the misses were not competitively significant.[594]

145. *Line Sharing and Line Splitting.* Based on the evidence in the record, we find that SBC provides nondiscriminatory access to the high frequency portion of the loop (line sharing). SBC's performance data for line shared loops demonstrate that it is generally in compliance with the parity and benchmark measures established in the application states.[595]

146. SBC also provides access to network elements necessary for competing providers to provide line splitting. Line splitting is the shared use of an unbundled loop for the provision of voice and data services where the incumbent LEC provides neither voice nor data services.[596] SBC states that it supports line splitting where a competitive LEC purchases separate elements (including unbundled loops, unbundled switching, and cross connects for these UNEs) and

(Continued from previous page)
missed the benchmark PM 114 (Percentage Premature Disconnects (Coordinated Cutovers) by 2% in March and .15% in June 2003. However, since both of those misses were by small margins, we do not find the misses to be competitively significant.

[592] ACN Group Comments at 39.

[593] ACN Group Comments at 39.

[594] *See* note 588, *supra*. *See also* SBC Chapman Reply Aff. at paras. 22-27 (describing SBC's processes for reporting and resolving trouble in connection with line splitting).

[595] *See, e.g.*, PM 58-03 (Percent Ameritech-Caused Missed Due Dates; DSL; Line Sharing); PM 65-03 (Trouble Report Rate; DSL; Line Sharing); PM 66-03 (Percent Missed Repair Commitments; DSL; Line Sharing); PM 67-03 (Mean Time to Restore; Dispatch; DSL; Line Sharing); PM 67-18 (Mean Time to Restore; No Dispatch; DSL; Line Sharing); PM 69-03 (Percent Repeat (Trouble) Reports; DSL; Line Sharing); *see also* Appendices B-E. We note that SBC missed the parity PM 65-03 in Illinois (Trouble Report Rate; DSL; Line Sharing) in March 2003 by .26 trouble reports per 100 circuits and in April 2003 by .13 trouble reports per 100 circuits. However, SBC has shown improvement by meeting the parity metric in each of the past three application months. Therefore, we do not find the misses to be competitively significant. Although SBC missed the parity metric PM 59-03 (Percent Installation Trouble Reports Within 30 days (I-30) of Installation) in Illinois by an average of approximately .9% between March and June 2003, competitive LECs achieved parity in July. Appendices B-E; SBC Ehr Reply Aff., Attach. C at 7. Given SBC's improved performance, we disagree with ACN Group's arguments that SBC's performance regarding the installation interval metrics for line shared loops is discriminatory. ACN Group Comments at 38. Moreover, as discussed above, we accord the installation interval metrics little weight because results can be affected by a variety of factors outside the BOC's control that are unrelated to provisioning timeliness. *See, e.g.*, *Qwest Nine State Order*, 17 FCC Rcd at 26402, para. 163; *BellSouth Florida/Tennessee Order*, 17 FCC Rcd at 25896-97, para. 136 and n.463; *Bell Atlantic New York Order*, 15 FCC Rcd at 4061, paras. 202-10.

[596] SBC Chapman Aff. at para. 82.

combines them with their own (or a partner competitive LEC's) splitter in a collocation arrangement.[597] SBC demonstrates that it has a legal obligation to provide line splitting through nondiscriminatory rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment, and to combine it with unbundled switching and shared transport.[598]

147. Competitive LECs raise a number of claims in this proceeding regarding SBC's procedures and costs for ordering, installing and disconnecting line splitting arrangements.[599] The Department of Justice also notes that for the same reasons as in the *SBC Michigan II* proceeding, the "Commission should determine whether SBC's processes provide non-discriminatory access to line-splitting and UNE-platform services."[600] We note that these claims were raised and rejected in the *SBC Michigan II* proceeding.[601] Therefore, we incorporate and reference the *SBC Michigan II Order*, and find it unnecessary to readdress these issues here. We conclude, as we did in the *SBC Michigan II Order*, that SBC's line splitting policies do not warrant a finding of checklist noncompliance.[602]

148. *Facilities Provisioning.* We do not find that ACN Group's claims that SBC

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[597] *Id.*

[598] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6348, para. 220.

[599] We note that AT&T withdrew its comments related to SBC's non-recurring charges for line splitting. *See AT&T Motion to Withdraw.* As a result, AT&T no longer raises this issue for our consideration. We do, however, consider the related cost issues that MCI raises.

[600] Department of Justice Evaluation at 16.

[601] *See SBC Michigan II Order* at paras. 133-143. Specifically, commenters assert that if a competitive LEC's customer wishes to discontinue xDSL service provided through line splitting, SBC requires installation of a new loop, rather than simply changing out cross-connects using the existing loop that is already in service, and this increases the cost to the competitive LEC. AT&T Comments at 10-22; MCI Comments at 1-5; AT&T Reply at 6-11; MCI Reply at 1-5; Letter from Kimberly A. Scardino, Director, Federal Regulatory, MCI, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-167 at 1-2 (filed September 5, 2003) (MCI September 5 *Ex Parte* Letter). Furthermore, commenters argue that SBC's process is more complicated, creates unnecessary service outages, risks service quality problems, and allows SBC to levy a substantial non-recurring charge for the establishment of a new unbundled loop. AT&T Comments at 14; MCI Comments at 1-4; MCI September 5 *Ex Parte* Letter at 2. Commenters also argue that none of these problems are incurred by SBC retail customers who purchase DSL and subsequently disconnect it, as SBC removes the DSL on the existing line without installation of a new line. AT&T Comments at 17; MCI Comments at 2; MCI September 5 *Ex Parte* Letter at 3. Competitive LECs further complain that data LECs are unable to submit line splitting orders on behalf of competitive LECs unless they are on the same version of EDI. AT&T Comments at 21-22; MCI Comments at 5.

[602] *See SBC Michigan II Order* at paras. 133-143. In the circumstances brought before us here, where there is no clear state error and MCI raises fact-specific and technical issues which may involve underlying cost studies, we defer to the states for determining pricing for line splitting.

charges competitive LECs erroneous trip charges rise to the level of checklist noncompliance.[603] Specifically, ACN Group argues that SBC mistakenly bills Mpower for dispatches to other competitive LECs and also bills Mpower trip charges for repairs, even though the problem was with SBC's facilities.[604] In response to the claim that SBC mistakenly bills Mpower for dispatches to other competitive LECs, SBC states that it has no knowledge of such instances, and that ACN Group fails to provide the Commission with sufficient specificity to evaluate this complaint.[605] Regarding the trip charges for repairs, the record shows that SBC and Mpower are working together to investigate the improper billing of Mpower for trip charges for repairs.[606] As part of that process, SBC and Mpower are taking a random sampling of SBC's trouble tickets and investigation of closure codes used by SBC's outside technicians.[607] Upon completion of the investigation, Mpower and SBC will determine the next step in the dispute process, including whether any potential adjustments need to be made.[608] Based on SBC's current performance and its efforts thus far to work with competitive LECs to resolve this issue, we do not find that the issue rises to the level of checklist noncompliance.

149. We also reject ACN Group's argument that SBC has a different facilities provisioning policy if it has a section 271 application pending in a state than it does once it has section 271 authority granted for the state.[609] Specifically, ACN Group argues that when SBC has a section 271 application pending, if a facility a competitive LEC ordered needs additional equipment, such as a line card or repeater, SBC will add the additional equipment at no additional charge.[610] However, ACN Group argues that once section 271 authority has been granted, requests concerning facilities needing additional equipment are rejected on a "no facilities available basis," requiring competitive LECs to order the facility out of SBC's special access tariff.[611] We do not find that this issue rises to the level of checklist noncompliance. First, we note that ACN Group does not raise an issue that is currently in existence in the application states. Second, the record shows that SBC Midwest's entire facilities modification policy was developed collaboratively in conjunction with competitive LECs and the state commissions.[612] If

[603] ACN Group Comments at 40.

[604] *Id.*

[605] SBC Muhs Reply Aff. at para. 38.

[606] SBC Muhs Reply Aff. at para. 37.

[607] SBC Muhs Reply Aff. at paras. 36-37

[608] SBC Muhs Reply Aff. at para. 37.

[609] ACN Group Comments at 40-41.

[610] ACN Group Comments at 40-41.

[611] ACN Group Comments at 41.

[612] SBC Reply at 77; SBC Application Reply App., Vol. 2a, Tab 7, Reply Affidavit of William C. Deere (SBC Deere Reply Aff.) at para. 7 n.4.

competitive LECs have concerns with SBC's facilities modification policy, those concerns should be addressed with either the state commissions or the Commission's Enforcement Bureau.

150. *Unbundled IDLC/NGDLC.* ACN Group contends that SBC is required to provide integrated digital loop carrier (IDLC) facilities and next generation digital loop carrier (NGDLC) facilities and associated packet switching facilities to competitive LECs on an unbundled basis and at TELRIC rates, but does not do so in Illinois.[613] According to ACN Group, SBC's denial of access to these facilities renders approval of this application contrary to the public interest. We disagree. First, the rules under which we evaluate this application do not require SBC to unbundle its digital loop carrier (DLC) facilities under all circumstances.[614] When a competitive LEC orders a loop that is being served using IDLC, SBC will migrate the loop to spare copper facilities at no additional charge to the competitor so long as such facilities exist.[615] If no spare facilities exist, SBC will perform the construction necessary to install a copper loop in accordance with its "facilities modification" policy.[616] Thus, SBC's policies do not deprive competitors of access to transmission facilities, even where its loops are fed by DLC that SBC will not or cannot unbundle. Second, the applicable rules require SBC to provide access to its packet switching facilities only if, among other things, it has refused to permit a requesting carrier "to deploy a Digital Subscriber Line Access multiplexer in the remote terminal, pedestal or environmentally controlled vault or other interconnection point [or to provide] a virtual collocation arrangement at these subloop interconnection points."[617] SBC, however, permits competitive LECs to deploy DSLAMs at its remote terminals,[618] and no commenter has claimed otherwise. Thus, SBC's policies with respect to IDLC and NGDLC loops, and the associated packet switching facilities, do not warrant rejection of this application.

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[613] ACN Group contends that SBC either: (1) does not offer such access or at all; or (2) denies any obligation to price such offerings at TELRIC levels. *See* ACN Group Comments at 44, 52.

[614] The Commission made clear in the *UNE Remand Order* that, notwithstanding earlier hopes that IDLC-fed loops could feasibly be unbundled, such unbundling "ha[d] not proven practicable," and "[c]ompetitors [were] not yet able economically to separate and access IDLC customers' traffic on the wire-center side of the IDLC multiplexing devices." *UNE Remand Order*, 15 FCC Rcd at 3794, para. 217 n.418.

[615] *See* SBC Deere Illinois Aff. at para. 101

[616] *See id.* at paras. 101, 103-119.

[617] 47 C.F.R. § 51.319(c)(5) (2000).

[618] *See* SBC Chapman Aff. at para. 79.

D. Checklist Item 4 – Unbundled Local Loops

48. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[161] The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types of loops, including two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.[162]

49. In order to establish that it is "providing" unbundled local loops in compliance with checklist item 4, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops.[163] Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested. In order to provide the requested loop functionality, such as the ability to deliver xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities. The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor.

50. On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL).[164] HFPL is defined as "the frequency above the voiceband on a copper loop facility that is being used to carry traditional POTS analog circuit-switched voiceband transmissions." This definition applies whether a BOC's voice customers are served by cooper or by digital loop carrier equipment. Competing carriers should have

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[161] 47 U.S.C. § 271(c)(2)(B)(iv).

[162] *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

[163] *SWBT Texas Order*, 15 FCC Rcd at 18481-81, para. 248; *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637, para. 185.

[164] *See Line Sharing Order*, 14 FCC Rcd at 20924-27, paras. 20-27; *see also* n.63 at C-12 *supra*.

access to the HFPL at either a central office or at a remote terminal. However, the HFPL network element is *only* available on a copper loop facility.[165]

51. To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*. Specifically, a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates, and repeat trouble report rates. In addition, a successful BOC applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases.

52. Section 271(c)(2)(B)(iv) also requires that a BOC demonstrate that it makes line splitting available to competing carriers so that competing carriers may provide voice and data service over a single loop.[166] In addition, a BOC must demonstrate that a competing carrier, either alone or in conjunction with another carrier, is able to replace an existing UNE-P configuration used to provide voice service with an arrangement that enables it to provide voice and data service to a customer. To make such a showing, a BOC must show that it has a legal obligation to provide line splitting through rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment, and combine it with unbundled switching and shared transport.[167]

E. Checklist Item 5 – Unbundled Local Transport

53. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[168] The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.[169] Dedicated transport consists of BOC transmission

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[165] *See Deployment of Wireline Services offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101, 2106-07, para. 10 (2001).

[166] *See generally SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. § 51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers "to provide any telecommunications service that can be offered by means of that network element").

[167] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6348, para. 220.

[168] 47 U.S.C. § 271(c)(2)(B)(v).

[169] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20719, para. 201

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

BellSouth Telecommunications, Inc.	)	
Petition for Forbearance	)	**WC Docket No.** 04-48
Under 47 U.S.C. § 160(c)	)	
	)	

PETITION FOR FORBEARANCE

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Dated: March 1, 2004

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Before the
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In the Matter of

BellSouth Telecommunications, Inc.	)	
Petition for Forbearance	)	**WC Docket No. _____**
Under 47 U.S.C. § 160(c)	)	
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PETITION FOR FORBEARANCE

I. Introduction and Summary

Pursuant to 47 U S C § 160 (c) and 47 C.F.R. § 1.53, BellSouth Telecommunications, Inc. ("BellSouth") requests that to the extent the Commission determines § 271(c)(2)(B) to impose the same unbundling obligations on BOCs as established by § 251(c) that the Commission forbear from applying any stand-alone unbundling obligations on broadband elements. While BellSouth believes that no such obligations exist, it files this Petition in an abundance of caution to ensure that the Commission does not impose such obligations where there is ample evidence to demonstrate that the unbundling obligations required by § 251 are unnecessary to meet the purposes of § 271. Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 24, 2003.[1]

[1] *See* Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Chairman Michael Powell, Commissioner Kathleen Abernathy, Commissioner Kevin Martin, Commissioner Michael Copps and Commissioner Jonathan Adelstein, CC Docket No. 01-338 (filed Oct. 24, 2003), and *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, CC Docket No. 01-338, *Public Notice*, FCC 03-263 (rel. Oct. 27, 2003) (noting that the Verizon October 24 letter will be treated as a new forbearance petition and establishing comment cycle for same).

In the *Triennial Review Order*,[2] the Commission, pursuant to its obligations under § 251(d)(2), established an impairment analysis to determine when an incumbent local exchange carrier ("ILEC") must provide access to an unbundled network element ("UNE"). Through this analysis, once a competitive local exchange carrier ("CLEC") is no longer impaired without access to the network element, the ILEC no longer has an obligation to provide access to the element on an unbundled basis. In the same *Order*, however, the Commission indicated that § 271 of the Act establishes an independent unbundling obligation on ILECs to provide unbundled access to network elements, even where the Commission has found that access to such elements is no longer necessary under the statutory impairment standard. This position cannot be reconciled with the other portions of the *Triennial Review Order* or the Commission's own decisions under § 271 or in the context of the D.C. Circuit's decision in *USTA*.[3]

BellSouth believes any language in the *Triennial Review Order* that could be conceived as establishing an independent § 251-type unbundling obligation under § 271 is incorrect and filed a Petition for Reconsideration ("PFR") of this matter.[4] BellSouth is confident that the Commission will clarify its finding on this matter and find that once an UNE is removed from the list of UNEs that an ILEC must provide, then the ILEC is also free from unbundling obligations, if any, that exist under § 271. Regardless of when the Commission rules on

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

3 *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").

4 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, BellSouth Petition for Clarification and/or Partial Reconsideration (filed Oct. 2, 2003)

BellSouth's PFR, or even if it retains its initial decision in the *TRO*, the Commission should forbear from applying unbundling obligations, if any, that an ILEC has under § 271. ILECs should have no stand-alone unbundling obligation for broadband network elements that no longer meets the § 251(d)(2) standard, as determined by the Commission in the *Triennial Review Order* or any subsequent review order [5]

As the Commission recognized in the *Triennial Review Order*, "broadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age."[6] To assure that this objective is realized, the Commission decided to "refrain from unbundling incumbent LEC next-generation networks,"[7] explaining that "applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706."[8]

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[5] BellSouth does not believe that § 271 places any unbundling obligations on RBOCs over what the RBOCs offer through their tariffed wholesale services. Section 271 is very specific regarding the elements that a BOC must provide unbundled from other elements. There is no broad "any technically feasible point" standard. For example, in checklist item 4 the statute specifically states that access is limited to a "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." This specific access element cannot be expanded to include all of the sub-loop elements that the Commission requires under § 251. Any attempt by the Commission to impose § 251-type unbundling obligations on BOCs would be an extension of the "terms used in the competitive checklist." *See* 47 U.S.C. § 271(d)(4) Without waiving any rights regarding this position, BellSouth files this Petition seeking forbearance from any § 251-type unbundling obligations the Commission appears to indicate RBOCs may have.

[6] *Triennial Review Order*, 18 FCC Rcd at 17125, ¶ 241.

[7] *Id* at 17141, ¶ 272.

[8] *Id* at 17149, ¶ 288; *see also id* at 17145, 17150, 17323, ¶¶ 278 (excluding fiber to the home from unbundling "will promote [the] deployment of the network infrastructure necessary

All of the policy reasons that led to the sound conclusion not to require unbundling of broadband in the § 251 context compel the Commission to forbear from unbundling obligations, if any, that the Commission considers to be required under § 271. The Commission could not rationally conclude that unbundling under § 251 would "blunt the deployment of advanced telecommunications infrastructure," but that unbundling under § 271 would not have this pernicious effect. Any forced unbundling at potentially regulated rates would undermine incentives to deploy next-generation networks by forcing the BOC to share with its competitors the potential benefits of a risky investment. Moreover, such compulsory unbundling would force BOCs to redesign their networks in order to accommodate requests from competitors for individual piece-parts. Such re-design imposes considerable inefficiencies and added costs, precluding the BOC, which, like all competitors, has a finite supply of capital, from deploying broadband as extensively and efficiently as it otherwise could.

Broadband services are provided in a highly competitive market, and access arrangements should be left to commercial negotiations in order to assure that all providers operate according to appropriate economic incentives which in turn will result in consumers reaping the benefits of the "race to build next generation networks and the increased competition in the delivery of broadband services"[9] that the Commission sought to unleash by excluding broadband from unbundling. The Commission should therefore forbear from applying unbundling obligations, if any, that apply to facilities – especially broadband facilities – under § 271 where such facilities have been delisted under § 251.

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to provide broadband services to the mass market"), 290 (limiting the unbundling obligation for hybrid loops "promotes our section 706 goals"), 541 (same for packet switching).

[9] *Id.* at 17142, ¶ 272.

Interpreting § 271 unbundling to be the same as unbundling under § 251 flies in the face of applicable case law as well as statutory construction. In *USTA*, the D. C. Circuit held that unbundling should not be required in the absence of impairment because "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[10] Moreover, the court explained that Congress did not wish to perpetuate the "completely synthetic competition"[11] resulting from overbroad reliance on UNEs Requiring that BOCs provide unbundling in perpetuity under § 271 defies the Act's deregulatory imperative; overrides Congress' and the Supreme Court's direction that access to unbundled elements should be subject to limits; and blatantly disserves the Act's fundamental goal of promoting facilities-based competition.

Clearly, § 271 cannot be read to require unbundling in perpetuity. It is nonsensical to suggest that Congress, recognizing the harmful effect of unbundling on investment, would have imposed strict limits on forced access to UNEs in the provision that establishes the unbundling obligation, only to exclude carriers serving more than 80 percent of the nation's access lines from those limits in another section of the Act Although the Commission suggests that disparate treatment of the BOCs is not illogical because § 271 reflects Congress' finding that the BOCs should face additional hurdles before being allowed to provide interLATA services, that rationale cannot support a requirement of perpetual unbundling. Section 271 should be read to give meaning to all the subparts of that section. A better reading of § 271 – one that acknowledges the fact that items 4-6 and 10 must have meaning separate from item 2, but does not do violence to the statute – is that the former checklist items reflect Congress' minimum

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10 *USTA*, 290 F.3d at 427.

11 *Id.* at 424.

expectations at the time the Act was passed, in case § 271 applications were filed before the Commission adopted rules implementing § 251. Unlike the logic in the *Triennial Review Order*, that interpretation respects cardinal principles of statutory construction by furthering rather than undermining, Congress' intent.

For these reasons the Commission should grant BellSouth's PFR and eliminate any indication that § 251-type unbundling obligations are required under § 271. As BellSouth explained in its PFR, this decision is wrong and cannot be squared with the findings of *Triennial Review Order*, especially as it relates to broadband If the Commission does not amend its decision in the *Triennial Review Order*, it must, pursuant to its obligations under the forbearance statute, forbear from applying § 251-type unbundling obligations for broadband elements, if any, under § 271. The factors of § 10 are met; the Commission must forbear from applying such unbundling obligations.

II. The Commission Should Forbear from Requiring Unbundling Under § 271 of Elements Delisted Under § 251

Section 10 of the Communications Act of 1934 provides that the Commission "shall forbear from applying any regulation or any provision of," the Communications Act "to a telecommunications carrier or telecommunications service," if "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers, and (3) forbearance from applying such provision or regulation is consistent with the public interest."[12]

[12] 47 U S C. § 160(a).

There can be no question that these three tests have been met regarding unbundling requirements in § 271 where the Commission has found a CLEC no longer to be impaired without access to that element pursuant to § 251(c). Any other finding cannot be squared with the statute

III. The Conditions of § 160(c) Are Satisfied

A. Continued § 251-Type Unbundling Obligations Under § 271 Are Not Necessary to Ensure That Charges, Practices, Classifications, or Regulations are Just and Reasonable and Are Not Unjustly or Unreasonably Discriminatory

There is no need to require § 251-type unbundling obligations through § 271 in order to ensure that charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory. The Commission's determination that CLECs are not impaired without access to a network element, and, thus, unbundling is not required under § 251, concludes that the provision of that element is competitive. This was recognized by the Commission[13] and the D.C Circuit in the *USTA* decision.[14] Once the provision of an element is competitive, there can be no argument that continued unbundling of that element is necessary in order for a competitor to provide a telecommunications service using that element.

B. Continued § 251-Type Unbundling Obligations are Not Necessary for the Protection of Consumers

Clearly, once a competitor is no longer deemed to be impaired without access to an element, unbundling is not necessary "for the protection of consumers." The fact that a CLEC is not impaired without access to an element fully demonstrates that consumers are protected by

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13 *See Triennial Review Order*, 18 FCC Rcd at 17035, ¶ 84 (the conclusion that CLECs are not impaired without access to a network element reflects the Commission's determination that "lack of access" to that element does not "pose[] a barrier or barriers to entry . . . likely to make entry into a market uneconomic").

14 The Court found that a Commission conclusion that CLECs are not impaired without access to a network element reflects the Commission's determination that the element is capable of "competitive supply." *USTA*, 290 F 3d at 427.

competition Forced unbundling when there is no impairment, however, has very damaging affects on consumers through neglected investment. If CLECs are allowed to obtain § 251-type unbundling of elements without impairment, then the incentive for all carriers to innovate and to deploy new facilities will be significantly reduced.[15] Indeed, the Commission recognized this very point in finding that CLECs were not impaired in next-generation network elements and, thus, declined to unbundle them under § 251 To the extent unbundling obligations exist under § 271, the same analysis applies. More importantly, consumers will benefit from the rivalry and competition among facilities-based competitors that would otherwise be muted by continued unbundling.

C. Forbearance from Applying Continued § 251-Type Unbundling Obligations is Consistent with the Public Interest

Forbearance from § 251-type unbundling obligations under § 271 is consistent with the public interest when CLECs are no longer impaired without access to an element. Section 10 provides that in making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the

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15 *See Triennial Review Order*, 18 FCC Rcd at 17141, ¶ 272 ("[t]hus, we conclude that relieving incumbent LECs from unbundling requirements for [fiber and packet-based] networks will promote investment in, and deployment of, next-generation networks ").

public interest.[16] As discussed above, a determination that a CLEC is no longer impaired for an element under § 251 means that the market for that element is competitive

The D C Circuit found that the Act does not provide the Commission "a license . . . to inflict on the economy" the costs of unbundling "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition."[17] Just as the Act does not provide the Commission a license to impose unbundling costs under § 251, it equally does not have such a license under § 271. Indeed, it would completely contradict the court's finding for the Commission to conclude that a CLEC is no longer impaired without access to an element under § 251, thus finding that the element is being provided on a competitive basis, yet find that there would continue to be a "significant enhancement to competition" to continue to require the element to be unbundled under § 271. These conclusions are mutually exclusive and would lead to excessive unbundling that the court warned against [18]

Accordingly, continued § 251-type unbundling under § 271 will produce the same ill effects of "disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource"[19] and create "synthetic competition"[20] In light of the Court's clear findings in *USTA*, application of § 271 unbundling would plainly be contrary to the public interest.

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16 47 U.S C. § 160(b)

17 *USTA*, 290 F.3d at 429.

18 *Id* (as the Supreme Court recognized in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999), "unbundling is not an unqualified good").

19 *Id*

20 *Id* at 424.

That is especially true considering the Commission' obligation to consider whether forbearance would "promote competitive market conditions."[21] Any regulatory regime that distorts the incentive to invest in new facilities because of the ability of competitors to obtain those facilities on an unbundled basis does not promote competition within that market. When CLECs are not impaired without access to a particular element, forced unbundling of that element will not "bring on a significant enhancement of competition," and will instead undermine competitive market conditions. Considering this outcome, forbearance of § 271 unbundling obligations, if any, is consistent with the public interest.

D. The Requirements of § 271 Have Been Fully Implemented

Section 10 provides that the Commission may not forbear from applying the requirements of § 251(c) or § 271 until it determines that those requirements have been fully implemented.[22] The best reading of the Act is that "fully implemented" should be read consistently with the use of the same term in § 271(d): a provision of the Act has been "fully implemented" once the Commission determines that a BOC has met the criteria for grant of its § 271 **applications**[23] **and** the Commission has determined not to impose the particular unbundling obligation under § 251(d)(2). The Commission cannot find that BellSouth has fully implemented § 271 for approval purposes in obtaining interLATA relief but has not "fully implemented" § 271 for forbearance purposes. Because BellSouth now has obtained § 271 authority throughout its

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21 47 U.S.C. § 160(b).

22 47 U.S.C. § 160(d).

23 47 U.S.C. § 271(d)(3)(A)(i)

region, it must be considered to have "fully implemented" the requirements of § 271 in its entire nine (9) state service territory [24]

Respectfully submitted,

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Dated March 1, 2004

[24] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , And BellSouth Long Distance, Inc for Provision of In-Region. InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, *Memorandum Opinion and Order*, 17 FCC Rcd 9018 (2002), *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , And BellSouth Long Distance, Inc for Provision of In-Region. InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina,* WC Docket No. 02-150, *Memorandum Opinion and Order*, 17 FCC Rcd 17595 (2002); *In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc , for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee.* WC Docket No. 02-307, *Memorandum Opinion and Order*. 17 FCC Rcd 25828 (2002)

CERTIFICATE OF SERVICE

I do hereby certify that I have this 1st day of March 2004 served a copy of the foregoing **Petition for Forbearance** via hand delivery or electronic mail to the following parties:

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