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February 16, 2004

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Blanca S. Bayo, Director
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Re: Docket No.: 000121A-TP

Dear Ms. Bayo:

On behalf of DIECA Communications, d/b/a Covad Communications Company, enclosed for filing and distribution are the original and fifteen copies of the following:

- CLEC Coalition's Request for Official Recognition

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

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Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies (BELLSOUTH TRACK)

Docket No.: 000121-A-TP
Filed: February 16, 2004

/

CLEC COALITION'S REQUEST FOR OFFICIAL RECOGNITION

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), AT&T Communications of the Southern States ("AT&T"), and MCImetro Access Transmission Services, LLC ("MCI") (collectively, the "CLEC Coalition") file this Request for Official Recognition of the North Carolina Utilities Commission's Order Denying BellSouth Telecommunications, Inc.'s (BellSouth) Motion to Modify SEEM Plan in Docket No. P-100, Sub 133k, dated February 13, 2004, which is attached hereto. In this Order, the North Carolina Utilities Commission denied BellSouth's Motion to remove line sharing from the SEEM plan because it is obligated to provide it pursuant to the 271 Checklist.

The North Carolina Commission's Order is appropriate for Official Recognition as it constitutes an official action of the North Carolina Commission which is cognizable pursuant to §90.202(5), Florida Statutes.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Request for Official Recognition has been furnished by (*) Hand Delivery or U.S. Mail this 16th day of February, 2004 to:

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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 <u>are</u> "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 <u>is</u> 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

Gail L. Mount, Deputy Clerk

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