State of Florida

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Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: April 21, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Christensen, Keating)
Division of Competitive Markets and Enforcement (Harvey, Hallenstein)

RE: Docket No. 000121A-TP – Investigation Into The Establishment Of Operations Support Systems Permanent Performance Measures For Incumbent Local Exchange Telecommunications Companies.

AGENDA: 05/03/04 – Regular Agenda – Issue 1 – Procedural – Issue 2 – Proposed Agency Action - Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\000121A.RCM.DOC

Case Background

By Order No. PSC-01-1819-FOF-TP (Final Order), issued September 10, 2001, the Commission established permanent performance measures and benchmarks as well as a voluntary self-executing enforcement mechanism (Performance Assessment Plan) for BellSouth. As part of Order No. PSC-01-1819-FOF-TP, the parties stipulated that, within the first two years of implementation, BellSouth would participate in six-month review cycles to discuss any proposed changes to the Performance Assessment Plan. By Order No. PSC-02-0187-FOF-TP, issued February 12, 2002, as amended by Order No. PSC-01-0187A-FOF-TP, issued March 13, 2002, BellSouth's Performance Assessment Plan was approved.

By Order No. PSC-02-0989-PAA-TP, issued July 22, 2002; BellSouth was required to file a specific action plan designed to improve flow-through and to adjust the Self-Effectuating Enforcement Mechanism (SEEM) for the flow-through metric by July 30, 2002, for the August 2002 results. Additionally, BellSouth was ordered to establish defect correction metrics to be effective August 1, 2002, as part of the Service Quality Measures in Docket No. 000121A-TP.

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On September 25-26, 2002 and October 17-18, 2002, staff conducted the first six-month review workshops to gauge the effectiveness of BellSouth's permanent performance measures and to determine whether the current remedy structure is effective in driving BellSouth's performance toward the required standards. The six-month review process consisted of a collaborative work group, which included BellSouth, interested CLECs, and the Commission. The group reviewed the Performance Assessment Plan for additions, deletions, and other modifications.

By Order No. PSC-02-1736-PAA-TP, issued December 10, 2002, the Commission adopted the proposed changes to BellSouth's Performance Assessment Plan that were agreed upon by the parties participating in the six-month review process set forth in Order No. PSC-02-0187-FOF-TP in Docket 000121A-TP. By Order No. PSC-03-0529-PAA-TP, issued April 22, 2003, the Commission adopted changes to BellSouth's Performance Assessment Plan that were not agreed upon by the parties participating in the six-month review process.

Nature of this Recommendation

On October 17, 2003, BellSouth filed a Motion to Modify the SEEM (Self-Effectuating Enforcement Mechanism) Plan and Request to Offset or Escrow Penalty Payments. On November 20, 2003, 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, CLEC Coalition, or CLECs) filed a Response in Opposition to BellSouth's Motion to Modify. BellSouth filed its Reply to the CLEC Response on November 14, 2003. However, the Commission does not have rules which allow for a Reply to a Response. Accordingly, BellSouth withdrew its Motion and Reply and, on December 18, 2003, filed an Amended Motion. On January 8, 2004, the CLEC Coalition filed a Response and Motion to Strike the Amended Motion to Modify SEEM Plan. This recommendation addresses both the Motion to Strike, as well as BellSouth's request to modify the SEEM Plan.

This Commission is vested with jurisdiction over this matter pursuant to Sections 364.01(3) and (4)(g), Florida Statutes. Pursuant to Section 364.01(3), Florida Statutes, the Florida legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry. To that end, Section 364.01 (4) (g), Florida Statutes, provides, in part, that we shall exercise exclusive jurisdiction in order to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior. Furthermore, it is noted that the FCC has encouraged the states to implement performance metrics and oversight for purposes of evaluating the status of competition under the Telecommunications Act of 1996.

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Discussion of Issues

Issue 1: Should the CLEC Coalition's Motion to Strike BellSouth's Amended Motion to Modify SEEM Plan be granted?

Recommendation: No. The CLEC Coalition's Motion to Strike BellSouth's Amended Motion to Modify SEEM Plan should be denied. (**Christensen**)

Staff Analysis:

As stated in the Case Background, on January 8, 2004, the CLEC Coalition filed a Response and Motion to Strike the Amended Motion to Modify SEEM Plan filed by BellSouth on December 18, 2003.

CLEC Coalition Motion to Strike

The CLECs' contend that BellSouth has used an improper avenue to circumvent this Commission's rules and the Uniform rules. The CLEC Coalition states that consideration of the Amended Motion will establish a procedural precedent by which a party files a motion, receives and reviews the adverse party's response, and then withdraws the motion and files an amended motion in order to avoid the bar on replies. The CLEC Coalition requests that BellSouth's Amended Motion be stricken and that BellSouth raise this issue in the next six-month review of the SEEM Plan.

BellSouth's Response

BellSouth contends that there is no prohibition in the Rules of this Commission or the Florida Rules of Civil Procedure against withdrawing a motion, nor a prohibition against filing a new motion, even one that argues additional facts or law beyond that contained in the original Motion.

Analysis

Staff can find nothing in the law preventing a party from withdrawing a motion and resubmitting it. This is analogous to a petitioner's absolute right to voluntarily dismiss its petition without prejudice. Fears v. Lundsford, 314 So.2d 578, 579 (Fla. 1975). It does not appear to staff that the fact that the petitioner received and reviewed the adverse party's response is of significance.

For this reason, staff recommends that the CLEC's Motion to Strike not be granted.

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Issue 2: Should BellSouth's Amended Motion to Modify SEEM Plan to remove penalties relating to line sharing and Request to Offset or Escrow Penalty Payments be granted?

Recommendation: No. BellSouth's Motion to Modify SEEM Plan to remove penalties relating to line sharing and Request to Offset or Escrow Penalty Payments should be denied. **(Christensen, Harvey, Hallenstein)**

Staff Analysis:

Staff recommends that BellSouth continue to report and pay all line sharing penalties in the SEEM plan through October 2004 for the four ordering performance measurements and continue to report and pay penalties beyond October 2004 for all provisioning performance measurements that may be affected by new line sharing orders received during the transitional period. In addition, staff recommends that BellSouth continue to report and pay line sharing penalties for the five maintenance and repair performance categories until the three-year transitional period outlined by the FCC in the TRO ends in October of 2006.

I. BellSouth's Motion

In its Amended Motion, BellSouth states that it filed its Motion to Modify SEEM Plan to remove penalties relating to line sharing because the FCC's Triennial Review Order[1] removed the obligation of incumbent LECs to provide line sharing as an unbundled network element (UNE), pursuant to Section 251. BellSouth requests that the payment of such penalties cease as of the date the TRO became effective, October 2, 2003.

a. Line Sharing is No Longer Required Under Section 251

BellSouth contends that the performance measure plan, and more specifically the penalty component of the plan, is not required by any portion of the Telecommunications Act. BellSouth asserts that the FCC clearly stated this in the Order approving BellSouth's Georgia and Louisiana applications, when it said:

> 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

[1] 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., (rel. August 21, 2003). (Triennial Review Order or TRO)

> performance monitoring and enforcement mechanisms is probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority.[2]

BellSouth contends that the performance measurement plan, including SEEM penalties, is simply a mechanism that can be used to ensure that an BOC meets its obligations under 251, after it is granted 271 authority. BellSouth states that because of 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. These obligations include unbundled network elements, interconnection, and resold services. Other products that BellSouth may provide CLECs that are not encompassed within Section 251 have not been included in the SEEM plan, BellSouth argues. BellSouth contends that pursuant to the Triennial Review Order, line sharing is no longer a UNE; thus, it should no longer be subject to penalties under the SEEM Plan.

Further, BellSouth states, Section 251(c)(3) places upon ILECs the duty to provide "nondiscriminatory access to network elements on an unbundled basis." The FCC reasoned in Section 251(d)(2)(b) that "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." BellSouth reasons, therefore, that whether a network element is required to be offered pursuant to Section 251, depends in part, on whether the lack of this element would impair the CLEC's ability to do business.

BellSouth adds that in ¶ 84 of the Triennial Review Order, the FCC interpreted that a requesting carrier was impaired ". . . when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into the market uneconomic." BellSouth states that the FCC found that line sharing did not meet this impairment test because, although carriers are "generally impaired on a national basis without unbundled access to an incumbent LEC's local loops, unbundled access to conditioned stand-alone copper loops "is sufficient to overcome such impairment for the provision of broadband services." TRO at ¶ 248. BellSouth states the FCC also ruled that "subject to the grandfather provision and transition period explained below, incumbent LECs do not have to unbundle the HFPL [High Frequency Portion of the Loop] for requesting telecommunications carriers." Id. BellSouth adds that the FCC stated it disagreed with its prior finding that competitive LECs were impaired without unbundled access to the HFPL, and noted that line splitting is available as a means to obtain the HFPL. TRO at ¶ 258-259.

In addition, BellSouth asserts, the FCC rejected earlier FCC findings that line sharing will "level the competitive playing field."[3] In fact, BellSouth contends, the FCC found it could have the opposite effect:

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[2] 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 9018,9181-82,¶291 (2002)(Georgia, Louisiana Application).

> . . . [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.

TRO at ¶ 261. BellSouth adds that although modifications to the Service Quality Measurements (SQM) plan or the SEEM plan are usually limited to the review process outlined in the Orders adopting the SQM and SEEM, the FCC's recent decision constitutes a change in the law that places line sharing outside of the framework of the SEEM plan, and therefore, it should no longer be included in SEEM after October 2, 2003. Therefore, since the FCC has ruled that line sharing does not meet the impairment test, and need not be offered on an unbundled basis pursuant to Section 251, and since this Commission has limited the application of SEEM penalties to the offerings that an incumbent must provide under Section 251, BellSouth asks that this Commission enter an Order allowing BellSouth to cease making penalty payments, effective October 2, 2003, for the portion of any SEEM penalties that apply to line sharing.

b. Line Sharing is Not Required by Section 271

BellSouth states that there is no requirement in the Florida Statutes that a performance assessment plan be developed, or that line sharing be offered on an unbundled basis. In addition, BellSouth adds, although the CLECs contend that there will be an anticompetitive result if penalties are not paid for line sharing, there is no basis for that assumption. BellSouth contends that the argument that CLECs must obtain line sharing from incumbent LECs to compete in the market was made to the FCC and rejected. The FCC stated:

> 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 fifty million consumer customers' through line splitting.

TRO at ¶ 259.

BellSouth maintains that it has no obligation to offer line sharing pursuant to Section 271. It states that the Performance Assessment Plan was created to ensure BellSouth's compliance

[3]¶ 261, quoting, 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, CC Docket Nos. 98-147 & 96-98, Third Report and Order in CC Docket No. 98-147; Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, 20975,¶ 137 (1999).

with its obligations under Section 251. The TRO discussion of Section 271 does not mention "line sharing," or "the high frequency portion of the loop."

BellSouth asserts that in the Line Sharing Order[4] the FCC designated the HFPL as separate from the UNE loop, and therefore the CLECs' argument that the TRO's discussion of loop unbundling in the context of Section 271 applies equally to the HFPL UNE is unfounded. BellSouth maintains that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for the purposes of applying Section 251, and therefore would not have lumped these two separate UNEs together for the purposes of applying Section 271, without making a distinction. This is especially true, BellSouth adds, since the FCC found line sharing to be competitive, while reaching a different conclusion regarding whole loops.

Further, although the CLECs maintain the TRO states "BOCs must continue to comply with any conditions required for [271] approval consistent with the changes in law" (TRO at ¶ 665), Section 271 requirements are based on current law at any given point in time. BellSouth states the FCC explained 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 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 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.

Id. Therefore, BellSouth argues, the particular standards that the FCC applied for Section 271 purposes prior to the effective date of the TRO are different than the standards that will apply after the TRO.

BellSouth states that the CLECs now base their argument on one Section 271 application approved 13 days after the effective date of the TRO, in which line sharing continues to be considered as part of the loop for checklist 4 analysis.[5] However, BellSouth states, in the SBC order on which the CLECs rely the FCC acknowledges that it adopted new unbundling rules as part of the Triennial Review Order, but for the purposes of that application, the former unbundling rules would apply.

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[4]¶ 25, 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) (Line Sharing Order), vacated and remanded, USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1571 (2003).

[5]¶ 11, 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).

c. Line Sharing Should Not be Subject to Penalties During the Transitional Period

Although the TRO extends the time that line sharing must be offered, BellSouth contends that the three-year transitional period and the grandfathering rule set forth in the TRO are designed solely to ensure that carriers using line sharing have adequate time to implement alternative arrangements, and to avoid the disruption of service to end users. In contrast, BellSouth states, the treatment of line sharing as a UNE ends immediately. TRO at ¶ 656. Line Sharing will be priced immediately at an amount that equals 25 percent of the state-approved recurring rates for stand alone copper loops. TRO at ¶ 265. Thus, BellSouth argues, the TRO effects an immediate change in the regulatory treatment of line sharing.

BellSouth states that its proposal allows for a transitional process, because line sharing measurements will not be immediately removed from the SQM, but will continue to be reported until this Commission determines that such reporting is not necessary. In fact, BellSouth states, the continuation of the requirement to pay penalties relating to line sharing throughout the transitional period will slow the desired migration of customers to other alternatives instead of encouraging them to find other arrangements. CLECs will then have an added incentive to continue to utilize line sharing under the present arrangement for as long as possible.

d. BellSouth's Request to Escrow or Offset Penalties

BellSouth states that since the Triennial Review Order became effective October 2, 2003, the first month for which penalties relating to line sharing should not be paid is October of 2003. Tier I and Tier II payments under the SEEM plan are paid 45 days after the end of the month in which performance occurs. Thus, BellSouth maintains that payments for October 2003 would be due on or about December 15, 2003. If this Commission determines that line sharing penalties should not be paid, BellSouth would then have to recoup the payments from a number of CLECs. BellSouth states this would create an administrative burden on BellSouth, and if some CLECs declined to return the payments, BellSouth would be deprived of the monies. To mitigate this situation, BellSouth proposes that it escrow the payments made after December 15, 2003, until the Commission rules on this Motion to Modify the SEEM Plan. Depending on how the Commission rules, the payments would be returned to BellSouth or promptly remitted to the CLECs.

BellSouth further requests that it be allowed to offset any SEEM payments made for line sharing on or about December 15, 2003, which the Commission subsequently determines are not required, against subsequent penalty payments due under Tier I and Tier II. In other words, if BellSouth owes penalty payments to a given CLEC, it would reduce the amount of the payments by the amount of the line sharing penalties that BellSouth paid on or about December 15, 2003.

In the alternative, if BellSouth's Motion to Modify is granted, BellSouth requests that it be allowed to offset all line sharing payments made prior to this ruling against other penalty payments. BellSouth adds that this approach would be acceptable if the Commission rules quickly, but that if it anticipates any delay, BellSouth be allowed to offset the payments for the month of October 2003 and escrow all subsequent line sharing payments, pending a ruling by the Commission.

II. CLECs' Response

The CLEC Coalition requests that BellSouth's Amended Motion to Modify the SEEM Plan and Request to Offset or Escrow Penalty Payments be denied because (1) BellSouth remains obligated to provide non-discriminatory access to line sharing both under the FCC's Triennial Review Order and under Section 271(c)(2)(B)(iv) of the Telecommunications Act of 1996; and (2) excusing BellSouth from providing non-discriminatory access to line sharing under the SEEM Plan is against the public interest and the purpose of the SEEM Plan.

The CLEC Coalition asserts that the Commission's jurisdiction over the SEEM Plan is based on Section 364.01(3), Florida Statutes, ensuring the development of fair and effective competition, and Section 364.01(4)(g), Florida Statutes, preventing anticompetitive behavior. The CLECs add that BellSouth itself has stated "the purpose of the enforcement provisions of the [SEEM] plan is to prevent 'backsliding' after BellSouth obtains authority to provide interLATA service." p. 1, BellSouth Brief of the Evidence, filed May 31, 2001 in Docket No. 000121-TP.

In addition, the CLECs contend that the FCC Order granting 271 authority to BellSouth in Georgia and Louisiana, as quoted on p.5 of this Recommendation, expressly states that the performance plan is intended to ensure that a BOC meets its 271 obligations. The CLECs maintain that line sharing, although delisted as a 251 UNE, remains a 271 UNE.

The CLEC Coalition maintains that the Triennial Review Order supports this argument, stating:

> 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."

TRO at ¶ 268. Further, the FCC expressly stated in the TRO that "BOC obligations under section 271 are not necessarily relieved based on any determination we make under section 251 unbundling analysis." TRO at ¶ 655. Therefore, the CLECs assert, BellSouth remains obligated to provision, maintain and repair line sharing on a non-discriminatory basis. The CLECs assert that this is the same obligation that the SEEM Plan currently enforces.

The CLECs state that the North Carolina, Alabama, and Kentucky state commissions agree that SEEM penalties should remain in place until the three-year transition period outlined in the TRO comes to an end.[6] In addition, they state that the Georgia Public Service Commission denied BellSouth's Motion based on determinations that BellSouth is obligated to provide access to line sharing under both Section 271 and the TRO.

Further, the CLECs maintain that line sharing is a local loop transmission facility under Section 271(c)(2)(B)(iv) (Checklist item 4) to which BellSouth is obligated to provide access irrespective of any Section 251 unbundling determinations. Checklist item 4, they argue, requires the provision of access to "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." The CLECs assert that the HFPL is a form of loop transmission that BellSouth uses to provide xDSL services separately from narrowband voice services. In the Line Sharing Order at ¶ 18, the FCC stated that "requesting carriers may access unbundled loop functionalities, such as non-voiceband transmission frequencies, separate from other loop functions."

The CLECs assert that in every FCC 271 Order granting an RBOC long distance authority, the FCC placed line sharing and line splitting in the section of the Order considering Checklist item 4, not in the sections addressing 251.

The CLECs' point out that the FCC 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 251, and yet continue the identical requirement under section 271 by stating:

> 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.

TRO at ¶ 659. So, the CLECs contend that although the price for a delisted UNE may change, the obligation to provide nondiscriminatory access remains if that UNE falls under Section 271(c)(2)(B)(iii)-(vi).

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[6] North Carolina Public Service Commission: In the Matter of Generic Docket to Address Performance Measurements and Enforcement Mechanisms, Comments of the Public Staff, Docket No. P-100, Sub 133k (November 25,2003); Alabama Public Service Commission, December 9, 2003 Recommendation of the Commission's Legal Division that BellSouth's Motion to Modify SEEM Plan, and the relief requested by BellSouth, be denied by the Commission until the transitional period specified in the TRO ends. Docket No. 25835 (Order not currently available.); Kentucky Public Service Commission: In the Matter of Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996, Order, Case No. 2001-00105 (Issued December 15,2003).

Last, the CLECs argue that it is strongly in the public interest that the customers of the CLEC Coalition are protected from discriminatory treatment by BellSouth. Therefore, they contend, the SEEM Plan is necessary to discourage anticompetitive behavior and encourage fair and effective competition. The CLECs state that the SEEM Plan is necessary to enforce BellSouth's obligations.

III. Analysis

Staff believes that it is premature to remove line sharing from the SEEM Plan effective October 2, 2003, since the TRO contemplates that line sharing would continue to be provided at a minimum through the transition period, apparently subject to the same non-discriminatory provisioning standards. In addition, maintaining the SEEM penalties, at least through the transition period, will ensure that CLECs' customers do not see a dip in their service quality due to BellSouth's perception that it is no longer obligated to provide line sharing.

The FCC outlined the following three-year transition period in the TRO:

> 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. ... [U]ntil the next biennial review, a proceeding that will 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.
>
> 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. 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. After the transition period, any new customer must be served through a line splitting arrangement, through the 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.

TRO at ¶ 264, 265.

Performance monitoring systems were developed because this Commission determined it was necessary to ensure that ILECs were "meeting their obligation to provide unbundled access, interconnection and resale to ALECs in a nondiscriminatory manner." Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, in Docket No. 000121-TP. Until such time as all CLECs have transitioned from line sharing to another form of access, staff believes the Commission has a continuing duty to ensure that the CLECs receive nondiscriminatory treatment. Without continuing the line sharing components in the Self-Effectuating Enforcement Program it is impossible to effectively monitor the service BellSouth is providing the CLECs.

The state commissions of North Carolina, Alabama, Kentucky and Georgia also agree that SEEM penalties should remain in place until the three-year transition period, outlined in the TRO, comes to an end.

Line sharing is presently included as a level of disaggregation in the major measurement categories of the Service Quality Measurement (SQM) plan. BellSouth's SQM is designed to evaluate the quality of service delivered to BellSouth's wholesale customers. BellSouth currently reports line sharing in four ordering, eight provisioning, and five maintenance and repair, performance measures.

Since the TRO requires the grandfathering of existing line sharing customers and the offering of new line sharing services until October 2004, staff recommends that BellSouth continue to report and pay all line sharing penalties in the SEEM plan through October 2004 for the four ordering performance measurements. Some of the provisioning measures may be affected for a few months beyond October 2004. For example, the *Percent Provisiong Troubles within 30 Days of Service Order Completion* performance measurement would capture any reported line sharing troubles within 30 days of the order completion date. Given this, staff recommends that BellSouth should continue to report and pay penalties beyond October 2004 for all provisioning performance measurements that may be affected by new line sharing orders received during the transitional period.

Staff further recommends that BellSouth continue to report and pay line sharing penalties for the five maintenance and repair performance categories until the three-year transitional period specified in the TRO ends in October of 2006. Although BellSouth is not obligated to offer new line sharing services as UNEs after October 2004, staff believes BellSouth remains obligated to provide maintenance and repair services to existing line sharing customers until the three-year transitional period ends in October of 2006. This will ensure that line sharing is provided in a timely manner and customers do not see a lessening in the level of service they receive because BellSouth no longer feels obligated to provide line sharing as a UNE.

Therefore, staff recommends that the line sharing components remain in the SEEM plan, following the guidelines that the FCC outlined in the TRO.

Finally, staff acknowledges that the CLEC's have made the argument that LEC obligations under Sections 251 and 271 of the Telecommunications Act may differ and that while line sharing has been removed from the list of 251 UNEs, it remains a 271 obligation. Staff believes that the answer to this argument is not clear at this time. However, it is not necessary for the Commission to address this issue, which appears premature, because the FCC has clearly outlined a three-year transition period for line sharing. As such, the Commission need not address this argument now. As TRO proceedings in court and at the state level proceed, it is hoped that the law on this point will be clarified.

Staff also believes it is not necessary to address BellSouth's escrow argument at this time, because staff has concluded that at this time BellSouth is still responsible for making SEEM penalty payments for line sharing.

On March 4, 2004, the United States Court of Appeals for the District of Columbia issued its order addressing the FCC's TRO. See, United Telecom Association v. Federal Communications Commission, et al., 359 F.3d. 554 (DC Cir. 2004). The Court, in its decision, upheld the FCC's determination to delist the line sharing UNE. The Court stated:

> We therefore uphold the Commission's rules concerning hybrid loops, FTTH, and line sharing on the grounds that the decision not to unbundle these elements was reasonable, even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and the intermodal competition from cable ensures the persistence of substantial competition in broadband.

Id. at p. 585. Thus, staff's recommendation is consistent with the DC Circuit's recent decision.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issue 2, the resulting Order will be issued as Proposed Agency Action. The Order will become final upon issuance of a Consummating Order if no person whose substantial interests are affected timely files a protest within 21 days of the issuance of the Order. This Docket should remain open thereafter to continue the six-month review process outlined in the Final Order. **(Christensen)**

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 2, the resulting Order will be issued as Proposed Agency Action. The Order will become final upon issuance of a Consummating Order if no person whose substantial interests are affected timely files a protest within 21 days of the issuance of the Order. Staff recommends that this Docket should remain open thereafter to continue the six-month review process outlined in the Final Order.