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July 15, 2005

Mrs. Blanca S. Bayó
Director, Commission Clerk and
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Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

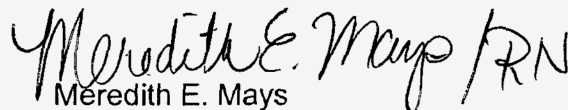
Re: Docket No. 041269-TP
In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Summary Final Order or, in the Alternative, Motion for Declaratory Ruling, which we ask that you file in the above captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



Meredith E. Mays

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
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CERTIFICATE OF SERVICE
Docket No. 041269-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 15th day of July, 2005 to the following:

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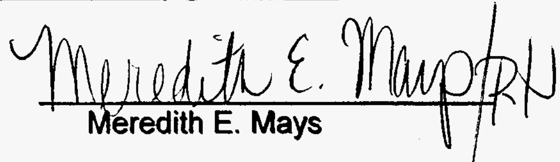

Meredith E. Mays

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	Docket No. 041269-TL
Petition to Establish Generic Docket to	)	
Consider Amendments to Interconnection	)	
Agreements Resulting From Changes of Law	)	Filed: July 15, 2005
	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR SUMMARY FINAL ORDER
OR, IN THE ALTERNATIVE,
MOTION FOR DECLARATORY RULING

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth"), through its undersigned counsel, submits this Motion, which BellSouth asks that the Florida Public Service Commission ("Commission") treat in part as a Motion for Summary Final Order and in part as a Motion for Declaratory Ruling. This Motion is intended to resolve, without hearing, a number of the issues the parties have raised in this proceeding and to declare what the law is with respect to other issues. Doing so will allow for the efficient and timely resolution of the issues raised in this proceeding.

This case began when BellSouth filed a Petition to Establish Generic Docket to consider amendments to interconnection agreements resulting from changes of law. BellSouth's petition sought to require the amendment of existing interconnection agreements to effectuate the Federal Communications Commission's ("FCC') *Triennial Review Order*[1] and the *Triennial Review*

[1] 18 FCC Rcd 16978, 17145, *corrected by Errata*, 18 FCC Rcd 19020, *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert.* [illegible] interchangeably as the "[illegible] *Review Order*" or the

Remand Order[2] and to resolve any disputes arising out of such orders that may be raised in pending negotiations or arbitrations. In many instances, the disputes that have arisen between the parties involve legal questions that can and should be resolved as a matter of law prior to a hearing. In other instances, by declaring what the law is, the Commission can provide needed guidance to BellSouth and Competitive Local Exchange Carriers ("CLECs"), which the parties can use to implement interconnection agreement amendments. By resolving the issues that are matters of law and by declaring the law where the parties have disputed interpretations, the Commission will make the most efficient use of its own resources and the limited resources of the parties.

The issues that BellSouth will address in this Motion are highlighted in Exhibit 1 for ease of reference, using the issues list this Commission established in ORDER NO. PSC-05-0736-PCO-TP. Despite any CLEC protestations to the contrary, this Motion is neither premature nor an invitation to perform work twice -- BellSouth's Motion is designed to allow efficient resolution of the issues before the Commission – nothing more and nothing less.

In resolving this Motion, BellSouth is not asking the Commission to adopt specific contractual language. Rather, in each instance BellSouth asks that the Commission address the legal question underlying the issue and either resolve the issue completely, or provide a clear statement of the law, after which the parties can implement the Commission's decision. Even if the parties are unable to reach mutually agreed-upon language for a particular issue after this Commission addresses the legal questions, a preliminary ruling is vital to efficient proceedings. That is because the hearing can then focus on the precise area of disagreement, which should

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2 *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005) (referred to, interchangeably, as the "*Triennial Review Remand Order*" or "TRRO")

revolve around the language needed to implement the law, rather than a dispute about what the law requires. Witnesses can explain the basis for their proposed contractual language based on what the law is, rather than based on their opinion of what the law should be, and the Commission will not be subjected to resolving different contractual language based on competing legal theories at the hearing.

BellSouth anticipates that, in response to its Motion, some or all of the other parties to this proceeding will claim that this Commission should refrain from addressing any issues until after a hearing on the merits. The Commission should reject any such argument. The inherent fallacy in the argument of the other parties is their assertion that "the parties are well aware of the law."[3] If the parties were "well aware" of the law, then presumably the fundamental legal disagreements between certain parties would not exist. The reality, of course, is that the parties have diametrically opposed views of the law in many instances, and those disagreements prevent resolution of certain issues. The only remedy the CLECs propose for reconciling these disparate views of the law is to have this Commission consider each issue on Exhibit 1 after a full evidentiary hearing with witness testimony. This would mean longer hearings with lay witnesses opining on a number of legal issues and attempting to support contract language based on that party's interpretation of the law, which may be completely wrong. No one disputes that these issues must ultimately be addressed, but the most logical course to resolution should minimize unnecessary time in the hearing room and eliminate cross-examinations that debate legal principles. There is simply no need to subject this Commission to protracted hearings on disputed topics that can and should be addressed now, as a matter of law.

[3] *See* CompSouth's May 6, 2005 in which CompSouth opined that none of the identified issues are strictly legal.

BACKGROUND

On August 21, 2003, the FCC released its *TRO*, in which it modified BellSouth's legal obligations under Section 251 of the Act.[4] Following the *TRO,* various legal challenges ensued with subsequent orders further clarifying the scope of BellSouth's Section 251 unbundling obligations. These orders culminated in the permanent unbundling rules released with the *TRRO* on February 4, 2005. In many instances, the FCC has removed significant unbundling obligations formerly placed on incumbent local exchange carriers ("ILECs") and has adopted transition plans to move the embedded base of these former unbundled network elements ("UNEs") to alternative serving arrangements. The *TRRO* explicitly requires change of law processes and certain transition periods to be completed by March 10, 2006.[5]

To date, BellSouth and certain CLECs have not yet successfully modified their interconnection agreements in Florida to reflect the current state of the law. While there are those CLECs with whom BellSouth has successfully negotiated the changes necessitated by the *TRO* and the *TRRO,* there are other CLECs with whom discussions continue. Still other CLECs have ignored BellSouth's repeated efforts to modify interconnection agreements. It is clear from the negotiations that have occurred thus far, however, that BellSouth and certain CLECs interpret the law differently, which differences prevent the negotiation of mutually agreeable contractual language.

In many instances, the differences between BellSouth and CLECs result from divergent positions concerning the subjects that must be included within interconnection agreements. These differences affect many of the issues presented in this proceeding and are purely questions

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[4] The *Telecommunications Act of 1996* amended the *Communications Act of 1934*, 47 U.S.C. §§ 151 et seq. References to "*the Act*" refer collectively to these Acts.

[5] *See TRRO* ¶¶ 14[illegible], 144, 196, 197 and [illegible]

of law. The inclusion of Section 271 elements in a Section 252 agreement, which BellSouth will discuss in more detail below, is a prime example of the type of disagreement over the law that can and should be resolved now, as a matter of law. BellSouth asserts that state commissions do not have the authority to order the inclusion of Section 271 elements in a Section 252 interconnection agreement. Evidently some CLECs believe differently. There is, however, no factual dispute for the Commission to consider. Either a state commission has the legal authority to force BellSouth to include Section 271 elements in a contract or it does not.

If the Commission fails to resolve questions of law in advance of the hearing, BellSouth and the other parties will be forced to address a number of other issues, such as whether the state commissions can establish "just and reasonable rates" for Section 271 elements and what the language to implement the inclusion of Section 271 elements in a Section 252 agreement should be. If the Commission declines to address the preliminary legal issues, the parties will have to prepare, and the Commission will have to hear, testimony on these issues unnecessarily. If the Commission defers making the legal determination regarding its jurisdiction until after the matter is heard, and it then concludes that the Commission does not have the legal authority to require that Section 271 elements be included in a Section 252 agreement, the time and resources spent on the related issues will have simply been wasted.

Similarly, there are other issues where the parties agree that they need to arrive at language to include in the interconnection agreement, but they have differing views of what the law requires and, therefore, have completely different views of what the language should be. These issues are in addition to the type of issue discussed in the prior paragraph, in which the legal question can be answered and the issue is then resolved in its entirety. In contrast to the issues discussed above, this second type of issue involves determining what the law requires and

then determining what language should be drafted to implement the law. An example of this type of issue relates to "commingling," which is Issue No. 14. That issue asks what the scope of "commingling" is, and then it asks what language should be used to implement "commingling," including rates. The scope of "commingling" is a legal issue that the Commission can and should resolve now as a matter of law. After the Commission resolves this issue, setting the rates for "commingling" would involve factual determinations that would be properly considered in a hearing.

For clarity and efficiency, BellSouth will group the issues in this Motion into two separate sections. The first section will address the issues that can be completely resolved as a matter of law – the issues upon which BellSouth seeks summary judgment. The second section will include those issues that have mixed questions of law and fact. With regard to the second group of issues, BellSouth asks the Commission to state what the law is – either by granting partial summary judgment or by issuing a declaratory ruling – so that a proper context can be established for resolving any factual disputes.

DISCUSSION

Legal Standard

Under Rule 28-106.204(4), Florida Administrative Code, "[a]ny party may move for summary final order whenever there is no genuine issue of material fact." A summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order.[6] The purpose of a summary final order is to avoid the expense and delay of

trial when no dispute exists as to the material facts.[7] When a party establishes that there is no material fact relating to any disputed issue the burden shifts to the opponent to demonstrate the falsity of the showing.[8] "If the opponent does not do so, summary judgment is proper and should be affirmed."[9] There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.[10] In this docket, BellSouth satisfies both requirements and is entitled to a judgment in its favor. Alternatively, if the Commission so chooses, it can resolve the issues posed in this Motion by issuing a declaratory ruling. *See* Section 120.565, Florida Statutes.

I. ISSUES THAT SHOULD BE RESOLVED, IN THEIR ENTIRETY, AS A MATTER OF LAW.

Issue 5: HDSL Capable Copper Loops: -- *Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?*

The FCC has established certain "thresholds" that apply in determining in which wire centers CLECs are not impaired without access to BellSouth's high capacity loops and dedicated transport. Specifically, as a condition precedent to a finding of "no impairment," a wire center must have a certain number of "business lines" or a certain number of "fiber-based collocators" or some combination of the two. In defining "business line," the FCC stated in Rule 51.5, that:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched

[7] *See* Order No. PSC-01-1427-FOF-TP, p. 13; *and* Order No. PSC-03-1469-FOF-TL.
[8] Order No. PSC-01-1427-FOF-TP, p. 13.
[9] *Id.*

services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

It could not be clearer that each DS1 line in a wire center is to be counted as 24 "business lines" for the purpose of determining how many "business lines" there are in a wire center. The import of this is that, even though a particular DS1 loop may only have 10 of the 24 channels actually activated, the entire capacity of the loop, 24 channels, is to be counted.

What Issue 5 raises is the question of whether an HDSL-capable copper loop should be treated as a DS1 for the purpose of counting business lines. That is, should an HDSL-capable copper loop be counted, for the purpose of determining the number of business lines in a wire center, as one business line, or should it be counted on a 64 kbps equivalency, which means it should be counted as 24 business lines? BellSouth's position is that, as a matter of law, the FCC has declared that an HDSL loop is the equivalent of a DS1 loop, and, therefore, each HDSL loop must be included in the "business line" count at its full capacity, 24 channels. The basis for BellSouth's legal position is found in the *TRO*, where the FCC said:

> We note throughout the record in this proceeding [that] parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. Carriers frequently use a form of DSL service, i.e., High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers. We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps.

TRO, n. 634. Because the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity, and because the FCC declared that HDSL loops are used to deliver T1 services, it follows as night follows day that HDSL loops must be counted, for the purpose of determining business lines in an office, on a 64 kbps equivalent basis, or as 24 business lines.

<u>Issue 6: High Capacity Loops and Transport – Changed Circumstances:</u> -- *Once a determination is made that CLECs are not impaired without access to high capacity loops or dedicated transport pursuant to the FCC's rules, can changed circumstances reverse that conclusion, and if so, what process should be included in Interconnection Agreements to implement such changes?*

Issue 6 asks whether a wire center, once determined to be "not impaired" for the purposes of unbundling high capacity loops and dedicated transport, can revert to being an "impaired" wire center if circumstances change. The unambiguous answer is that the *TRRO* and the applicable federal rules expressly state that changed circumstances cannot reverse the classification of unimpaired wire centers. *See TRRO,* ¶ 167 (at n. 466); 47 C.F.R. §§ 51.319(a)(4); 51.319(a)(5); 51.319(e)(3). Specifically, for DS1 and DS3 loops, "Once a wire center exceeds [certain] thresholds, *no future DS1 [or DS3] loop unbundling will be required in that wire center*." 47 C.F.R. §51.319(a)(4) and (a)(5) (emphasis supplied). Likewise, for dedicated transport in Tier 1 or Tier 2 wire centers, the federal rules make clear that "[o]nce a wire center is determined to be a Tier 1 [or Tier 2] wire center, that wire center is not subject to later reclassification." 47 C.F.R. §51.319(e)(3). The FCC explained that any other result "could be disruptive as applied to a dynamic market if modest changes in competitive conditions resulted in the reimposition of unbundling obligations." *TRRO,* n. 466. Consequently, this Commission should enter an order finding that changed circumstances cannot cause a wire center to revert to impaired status once a determination has been made that CLECs are not impaired without access to certain UNEs in that wire center. BellSouth also notes that, in other states, CompSouth has conceded this is not a disputed issue between the parties. CompSouth should concede as much in Florida also.

Issue 7(a): Section 271 and State Law: -- *Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?*

BellSouth has presented the issues for which summary final order in its entirety is appropriate in numerical sequence in order to efficiently present the issues. However, Issue 7(a) is clearly the most important of the issues for which summary judgment is appropriate. Some CLECs are desperately seeking to avoid making the investments in switching facilities so that the Act's primary purpose – "genuine, facilities-based competition"[11] - can occur. The CLECs have created two schemes to attempt to subvert the clear purpose of the Act and the direction that the FCC has provided. The first machination involves a claim by some CLECs that: (1) they are entitled to have Section 271 network elements included in Section 252 interconnection agreements; (2) these Section 271 elements, which must be priced at "just and reasonable rates" under the terms of Section 271, should be priced at total element long run incremental cost ("TELRIC"); and (3) that BellSouth is required to combine remaining Section 251(c)(3) UNEs with Section 271 network elements.

The second theory these CLECs advance is that: (1) switching can be made an unbundled network element under state law, rather than federal law; (2) it can be priced at TELRIC under state law; and (3) somehow it can be included in a federally-mandated Section 252 interconnection agreement. Then, these CLECs reason, BellSouth can be required to combine

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[11] *USTA II*, 359 F.3d at 576 ("After all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition--preferably genuine, facilities-based competition.").

251(c)(3) UNEs (say the loop for instance), with this state law-mandated unbundled network element, and *voila*, the CLECs have once again created the very UNE-P that the FCC has eliminated.

Both schemes are absolutely contrary to the law, and the Commission should find, as a matter of law, that neither theory has any legal basis as explained more fully below.[12]

A. Issue 7(a) -- There Is No Legal Basis For A State Commission To Compel The Inclusion Of Section 271 Network Elements In A Section 252 Interconnection Agreement.

Pursuant to the Act, when BellSouth receives "a request for interconnection, services, or network elements *pursuant to Section 251*," it is obligated to "negotiate in good faith *in accordance with Section 252* the particular terms and conditions" of agreements that address those Section 251 obligations. Stated simply, interconnection agreements address Section 251 obligations, and those obligations are the only topics that are required to be included in a Section 252 interconnection agreement. The resulting Section 251/252 agreements are submitted to state commissions for approval under Section 252 (e). A state commission's authority is explicitly limited to those agreements entered into "pursuant to Section 251" and, when arbitration occurs, state commission's must ensure that agreements "meet the requirements of Section 251." 47 U.S.C. § 252(e)(2)(B).

Consequently, upon receiving a request for "network elements pursuant to section 251," an ILEC may negotiate and enter into an agreement voluntarily, or an ILEC may enter into an agreement after compulsory arbitration. 47 U.S.C. § 252(a), (b). An ILEC is *not required,*

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[12] Issue 2, which asks how existing interconnection agreements or agreements pending in arbitration should be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations, relates to this issue. That is, if the Commission agrees with BellSouth's Motion and finds that Section 252 interconnection agreements are limited to Section 251 obligations, then the [illegible] necessary [illegible] to [illegible]

however, to negotiate, in the context of a Section 252 agreement, any and all issues CLECs may wish to discuss, such as access to elements ILECs may be required to provide under Section 271. Without doubt, an ILEC may voluntarily agree to negotiate things that would normally be outside the purview of its Section 251 obligations, if it chooses to do so;, when it does that, such matters may properly be considered by the state commissions under prevailing law. However, where an ILEC refuses to negotiate more than is required by Section 251, that is its right, and it cannot be forced to do more. BellSouth has steadfastly refused to negotiate the inclusion of Section 271 elements in any of the "change of law" negotiations that have lead to this generic proceeding.

The law is quite clear on this point. As the Eleventh Circuit has recognized, "The scheme and text of [the Act] ... lists only a limited number of issues on which incumbents are mandated to negotiate." *MCI Telecom.Corp. et al. v. BellSouth Telecommunications, Inc. at al.,* 298 F.3d 1269, 1274 (11th Cir. 2002). The Fifth Circuit also recognized this distinction, explaining that "[a]n ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to § 251 and 252." *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.,* 350 F.3d 482, 488 (5th Cir. 2003).

In addressing this issue, BellSouth asks the Commission to follow the applicable law, which clearly provides that while BellSouth and other regional Bell Operating Companies ("RBOCs") must currently provide certain services and elements under 47 U.S.C. § 271 ("Section 271") of the Act, it is the FCC, not state commissions, that has exclusive authority to enforce Section 271 and that it is not proper to include Section 271 elements in a Section 252 agreement.

While the Fifth and the Eleventh Circuits have made general pronouncements on this subject, there are other federal court decisions and state commission decisions that bear directly on this point. Indeed, decisions from Washington to Mississippi demonstrate that state commissions have no Section 271 regulatory authority.

In an arbitration decision involving Qwest and Covad, for example, the Washington Utilities and Transportation Commission ("Washington Commission") explained that "state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271." *In re: Petition for Arbitration of Covad with Qwest,* Docket No. UT-043045, Order No. 06 (Feb. 9, 2005), *2005 Wash. UTC LEXIS 54.* The Washington Commission distinguished a contrary opinion from Maine,[13] finding the Maine commission had relied on Verizon's commitments to the state commission and to the FCC to file a tariff in the context of a Section 271 proceeding.[14]

With respect to Section 252 in particular, the Washington Commission found that even if the parties agreed to negotiate the issue of including Section 271 elements in a Section 252

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[13] *Order*, Docket No. 2002-682, Maine Public Service Commission (Mar. 17, 2005) ("*Maine Order*").

[14] In Verizon's territory, the New Hampshire Commission followed the reasoning of the *Maine Order*, explaining "like our Maine counterparts, we do not assert independent authority to define the scope of Verizon's section 271 obligations nor its compliance with those obligations under that section. We are performing our duty as the initial arbiter of disputes over whether Verizon continues to meet the specific commitments previously made to this Commission as a condition for its recommendation that Verizon receive section 271 interLATA authority." *In re: Proposed Revisions to Tariff NHPUC No. 84*, DT 03-201, 04-176, Order Following Briefing, New Hampshire Public Utilities Commission (Mar. 11, 2005). In contrast, the Rhode Island Commission accepted Verizon's proposed TRO revisions to its wholesale tariff, holding the FCC should make determinations as to what is required under Section 271 and that it should not [illegible] authority when it was likely to be preempted. *In re: Verizon-Rhode Island's Filing of October 2, 2003* to Amend Tariff No. 18, Rhode Island Public Utilities Commission Docket No. 3556 (Oct. 12, 2004), 2004 R.I. PUC LEXIS 31. Finally, the Pennsylvania Commission weighed in on Verizon's tariff filings, ruling it was without authority to permit certain tariff revisions absent FCC guidance because "the state commission's role [with respect to Section 271] is consultative and that the ultimate adjudicative authority lies with the FCC." *Opinion and Order*, Pennsylvania Public Service Commission [illegible]00038871C0001 (July 8, 2004).

arbitration (which BellSouth has not done), the parties could *not* confer state commission authority over this exclusively federal aspect of the Act. Thus, the Washington Commission held that "requiring Qwest to include Section 271 elements in the context of arbitration under Section 252 would conflict with the federal regulatory scheme in the Act, as Section 271 of the Act provides authority only to the FCC and not to state commissions."

In an analogous arbitration proceeding, the Utah Public Service Commission ("Utah Commission") held that "Section 252 was clearly intended to provide mechanisms for parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law." *In re: Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005), *2005 Utah PUC LEXIS 16.* The Utah Commission reasoned that "Section 271 on its face makes quite clear that the FCC retains authority over the access obligations contained therein. Furthermore, Section 271 elements are distinguishable from Section 251 elements precisely because the access obligations regarding these elements arise from separate statutory bases. The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case for us to do so." *Id.*

The Alabama Commission has also concluded that the responsibility for overseeing BellSouth's obligations under Section 271 remains with the FCC, not the Commission. In an order in Docket No. 29393, which involved a petition filed by CompSouth -- a party to these

proceedings -- seeking emergency relief in connection with the "no new adds" controversy, the Alabama Commission said:

> With regard to MCI's argument that BellSouth has an independent obligation to provision UNE-P switching pursuant to § 271 of the Telecommunications Act of 1996, we conclude, as did the court in [the *Mississippi Order*, infra n. 14], that given the FCC's decision "to not require BOCs to combine § 271 elements no longer required to be unbundled under § 251, it (is) clear that there is no federal right to § 271 based UNE-P arrangements. This conclusion is further bolstered by the fact that the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission. MCI's argument that there is an independent obligation under § 271 to provide UNE-P is accordingly rejected.[15]

Similarly, in Docket P-55, Sub 1550, the North Carolina Utilities Commission, when also considering various emergency petitions concerning the recent "no new adds" controversy, addressed a similar claim by MCI, saying:

> MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.[16]

Of course, the decisions of the Washington, Utah, Alabama, and North Carolina commissions are fully consistent with several district court orders that touch on this subject. Indeed, on appeal from a decision from the Mississippi Public Service Commission, the United States District Court explained:

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[15] *Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief*, Alabama Public Service Commission Docket No. 29393 (May 25, 2005) ("May 25, 2005 Order"), at p. 18 (footnotes omitted).

[16] *Order Concerning New Adds, In re: Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order,* North Carolina Public Service Commission Docket No. P-55, Sub 1550 (Apr. 25, 2005)

Even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may (i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company ... or (iii) suspend or revoke such company's approval to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.

Mississippi Order.[17]

Similarly, the United States District Court in Kentucky confirmed:

While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.

Kentucky Order.[18]

The foregoing decisions are also consistent with *Indiana Bell v. Indiana Utility Regulatory Com'n et al.*, 359 F.3d 493, 497 (7th Cir. 2004) (*"Indiana Bell"*), in which the Seventh Circuit described a state commission's role under Section 271 as "limited" to "issuing a recommendation." Consequently, when the Indiana Commission attempted to "parlay its limited role in issuing a recommendation under section 271" into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service, the Seventh Circuit preempted that attempt. Finally, the New York Commission recognized that "[g]iven the FCC's decision to not require BOCs to combine 271 elements no longer required to be

17 *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n, et al.*, Civil Action No. 3:05CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005) (*"Mississippi Order"*), *2005 U.S. Dist. LEXIS 8498*, p. 17 of slip opinion.

18 *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order*, (E.D. Ky. Apr. 22, 2005) (*"Kentucky Order"*), p. 12 of slip opinion.

unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements."[19]

Most recently, on June 9, 2005, a federal district court held that Section 252 did not authorize a state commission even to approve a negotiated agreement for line sharing between Qwest and Covad. It reasoned that Section 252 did not apply to this "commercial agreement" because line sharing "is not an element or service that must be provided under Section 251."[20] This decision squarely conflicts with any CLEC contention that, under Section 271(c)(2)(A), Section 271 elements must be contained in a Section 252 interconnection agreement. That is because if a state commission cannot even approve a negotiated agreement that does not involve Section 251 items, it certainly cannot *arbitrate* terms that are not mandated by Section 251, where, as discussed above, Congress expressly limited the state commissions' authority to implementing Section 251.

All of these decisions, which hold that it is the *FCC* that has jurisdiction over matters related to Section 271 elements, are obviously correct as a matter of law. States have no authority to regulate access to network elements provided pursuant to Section 271, including any attempt to require the inclusion of Section 271 elements in a Section 252 interconnection agreement. Section 271 vests authority in the *FCC* to regulate network elements provided pursuant to that section. Thus, to obtain long distance relief, a BOC may apply to the *FCC* for authorization to provide such services, and the *FCC* has exclusive authority for "approving or denying" the requested relief. 47 U.S.C. § 271(d)(1),(3). Once a BOC obtains Section 271

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[19] *See also Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, New York Public Service Commission Case No. 05-C-0203 (March 16, 2005).

[20] [illegible]

authority (as BellSouth has throughout its region), continuing enforcement of Section 271 obligations rests solely with the FCC under Section 271(d)(6)(A) of the Act.

The FCC made clear in the *TRO* that the prices, terms, and conditions of Section 271 checklist item access, and a BOC's compliance with them, are within the FCC's exclusive purview in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).[21] Section 271 vests authority exclusively in the FCC to "regulate" network elements provided pursuant to that section and for which no impairment finding has been made.[22] The role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271-approval process.[23] State commissions' authority to approve interconnection agreements entered into "pursuant to section 251," to impose arbitrated results under Section 251(c)(1) in order to ensure that any agreements "meet the requirements of section 251," and to set rates under Section 252 "for purposes of" the interconnection and access to network elements required by 251(c)(2) and (c)(3) are specifically limited by the terms of the statue to implementing Section 251 obligations, not Section 271

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21 *See TRO*, ¶ 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake ...."); also TRO ¶ 665 ("In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271"). Nothing in *USTA II* or in the *TRRO* disturbed this FCC ruling.

22 47 U.S.C. § 271. For example, Section 271(d)(1) provides that to obtain interLATA relief, a BOC "may apply to the [FCC] for authorization to provide interLATA services." Congress gave the FCC the exclusive authority for "approving or denying the authorization requested in the application for each State." 47 U.S.C. §271(d)(3). "It is," the Commission has determined, "the [FCC's] role to determine whether the factual record supports a conclusion that particular requirements of 271 have been met." *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, *Memorandum Opinion and Order*, 13 FCC Rcd 539, 555, ¶ 29 (1997). And once a BOC obtains Section 271 authority (as BellSouth has in each of the 9 states in which it provides telephone service), continuing enforcement of Section 271 obligations, by the express terms of the statute, rest solely with the FCC. 47 U.S.C. § 271(d)(6).

23 47 U.S.C. § 271(d)(2)(B)

obligations. Moreover, the FCC refused to graft Section 251 pricing and combination requirements onto Section 271 in its *TRO*,[24] a decision upheld by the *USTA II* court, which characterized the cross-application of § 251 to § 271 as "erroneous."[25] In sum, Section 252 grants state commissions authority only over the implementation of Section 251 obligations, not Section 271 obligations.[26]

Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do so. That choice must be respected. As the FCC has explained, Congress intended that a single federal agency, not 51 separate bodies, exercise "exclusive authority" over "the Section 271 process."[27] In the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BOC compliance with Section 271.[28] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section.

In seeking to make an end run around the statutory language, CLECs have suggested that references in section 271(c)(1) to agreements "approved under section 252" support a state commission's assertion of authority over Section 271 rates and terms. Such arguments cannot

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[24] *Triennial Review Order*, ¶¶ 656-664.

[25] *USTA II*, 359 F.3d at 590.

[26] *See also MCI Telecomm. Corp.*, 298 F.3d at 1274 (requirement that ILEC negotiate items outside of Section 252 is "contrary to the scheme and the text of that stature, which lists only a limited number of issues on which incumbents are mandated to negotiate."); *and* 47 U.S.C. §§ 251(b), (c) (setting forth the obligations of all [illegible] the incumbent local exchange carriers, respectively).

[27] Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, NSD-L-97-6, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, 14401, ¶ 18 (1999) ("*InterLATA Boundary Order*").

withstand scrutiny. The statutory language the CLECs have previously relied on does not purport to grant states authority to set rates. And, by tying state authority to section 252, that language confirms that states *cannot* establish prices for facilities unless they are subject to unbundling under section 251(c)(3). That is because section 252(d)(1) of the Act expressly limits state rate-setting authority to items that must be offered "under subsection (c)(3) of that section [251]."

More importantly, however, CLECs have previously cited to a single federal case -- *Qwest Corporation v. Minnesota Public Service Commission,* 2004 WL 1920970 (D. Minn. 2004) -- as support for the claim that Section 271 elements belong in Section 252 agreements. That decision, however, is clearly distinguishable because the FCC, ruling on the same fact pattern, reached a different conclusion about Section 252 in the *Qwest ICA Order*. In the *Qwest ICA Order*, the FCC found that "*only* those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under [Section] 252(a)(1)."[29] The FCC reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under Section 252(a)(1)," "settlement contracts that *do not affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed*."[30] This finding is consistent with the FCC's Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations. *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-

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[29] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) ("Qwest ICA Order") (emphasis added).

[30] Qwest ICA Order, ¶ 12 (emphasis added); *see also Id*, ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in Sections 251(b) and (c)" must be filed under Section 252).

IH-0263, FCC 04-57 (2004). Moreover, in light of *USTA II,* it is obvious that when Congress assigns a certain responsibility to the FCC, the FCC, and not state commissions, must make the relevant determinations.

B. <u>Issue 7(a) - There Is No Legal Basis For A State Commission To Force BellSouth To Include Delisted Network Elements In A Section 252 Interconnection Agreement Based On Supposed State Law Authority.</u>

In addition to the spurious argument that state commissions can somehow require that BellSouth include Section 271 network elements in a Section 252 interconnection agreement, certain CLECs also advance the theory that state commissions can require ILECs to offer UNEs created under state law that are identical to the federally delisted UNEs, and to include these so-called state UNEs in a federally-mandated Section 252 interconnection agreement. There are any number of reasons why this theory is completely devoid of any legal support and cannot provide the basis for requiring BellSouth to include now delisted UNEs in its Section 252 interconnection agreements.

First, the plain language of the Act defeats this claim. Pursuant to the Act, when BellSouth receives "a request for interconnection, services, or network elements *pursuant to Section 251"* it is obligated to "negotiate in good faith *in accordance with Section 252* the particular terms and conditions" of agreements that address those Section 251 obligations. Stated simply, interconnection agreements address Section 251 obligations, and those obligations are the only topics that are required to be included in a Section 252 interconnection agreement. The resulting Section 251/252 agreements are submitted to state commissions for approval under Section 252(e). A state commission's authority is explicitly limited to those agreements entered into "pursuant to Section 251" and, when arbitration occurs, state commission's must ensure that agreements "meet the requirements of Section 251." 47 U.S.C. § 252(e)(2)(B). There is no

authority to include in such Section 252 agreements other network elements that might be available under state law. As the Fifth and the Eleventh Circuits have plainly stated, the ILECs' duty to negotiate a Section 252 interconnection agreement is not unlimited, and in fact, absent voluntary agreement by the ILEC, that duty is limited to the ILEC's Section 251 obligations. Clearly there is no room in a Section 252 interconnection agreement for a state law-mandated UNE.

Second, and perhaps more compelling, is that any attempt to include switching in a Section 252 interconnection agreement under some state law theory would simply be inconsistent with federal law. CLECs cannot realistically avoid the impact of the clear statutory language by relying upon state law. In enacting the 1996 Act, "Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission." *Indiana Bell,* 359 F.3d at 494. As the Supreme Court has held, Congress "unquestionably" took regulation of local telecommunications competition away from the States on all "matters addressed by the 1996 Act." *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 378 n.6 (1999).

This is especially true with respect to those network elements as to which the FCC has found no impairment and that Congress did not require BOCs to provide as Section 271 elements. Section 271 "does not gratuitously reimpose the very same requirements that" section 251 "has eliminated." *TRO,* at ¶ 659. Nor does it permit return to "virtually unlimited ... unbundling, based on little more than faith that more unbundling is better." *Id.* ¶ [illegible] Therefore, once the FCC has concluded that such elements need not be provided as UNEs, state

commissions (or, for that matter, the FCC, *see* 47 U.S.C. § 271(d)(4)) have no authority to require BOCs to provide unbundled access to those elements.

<u>Issue 7(b): Section 271 and State Law:</u> -- *If the answer to part (a) is affirmative in any respect, does the Commission have the authority to establish rates for such elements?*

Issue 7(b) asks, if the state commissions had the authority to require the inclusion of Section 271 network elements or network elements unbundled under state law in a Section 252 interconnection agreement (which they do not), would the state commissions have the authority to set rates for those elements? While the state commission may well have the authority to establish rates to network elements unbundled under state law (provided that there ever could be any), the answer with regard to Section 271 elements is clearly that the state commissions have no authority to establish rates for such elements, which also demonstrates state commissions do not have the authority to require inclusion of the Section 271 elements in the first place.

Section 271 "establish[es] a comprehensive framework governing Bell operating company (BOC) provision of 'interLATA service'" and, as shown above, provides only an extremely limited role for state commission participation within that framework. *E.g.*, Memorandum Opinion and Order, *Petition of SBC Communications for Forbearance,* 19 FCC Rcd 5211, ¶ 7 (2004). In addition, Section 271 arose out of the Modification of Final Judgment (MFJ), *see TRO,* at ¶ 655 *at* n. 1986, and "the states had no jurisdiction" over the implementation of the MFJ. *InterLATA Boundary Order,* 14 FCC Rcd 14392, 14401, ¶ 16. And the FCC has already ruled that it is *federal* law – namely, sections 201 and 202 – that establishes the standard that BOCs must meet in providing access to 271 elements. *See TRO*, at ¶ 656; *UNE Remand Order,*[31] ¶ 470; *USTA II, 359 F.3d* at 588-90.

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[31] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of* [illegible]

State commissions, therefore, cannot assert state law authority to regulate Section 271 elements, which "are a purely federal construct." *InterLATA Boundary Order,* 14 FCC Rcd 14392, 14401, ¶ 18. In particular, state commissions cannot rely on state law to expand the list of Section 271 elements or to regulate the rates, terms, and conditions under which BOCs must provide access to those elements.

The FCC has held that, in Section 271, Congress identified a limited set of specific network elements to which BOCs must provide access, irrespective of whether their competitors would be impaired without access to those elements as UNEs. *See TRO,* at ¶ 653. Congress also expressly prohibited the FCC from "extend[ing] the terms used in the competitive checklist" to include additional network elements. 47 U.S.C. § 271(d)(4); *see also* 47 U.S.C. § 160(a), (d) (permitting the FCC to eliminate the obligation to provide Section 271 elements once "it determines that th[e] requirements [of section 271] have been fully implemented"). It necessarily follows that any decision by a state commission purporting to create new Section 271 obligations under state law or to regulate them in any way, including setting rates, conflicts with Congress's determination and, therefore, is preempted. *See, e.g. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001); *International Paper Co. v. Ouellette,* 479 U.S. 481, 494 (1987).

More generally, any efforts by state commissions to regulate the prices of Section 271 elements are preempted because they are inconsistent with the FCC's determination (affirmed by the D.C. Circuit) that sections 201 and 202 establish the standard for assessing the rates, terms, and conditions under which BOCs must provide access to 271 elements. *See TRO,* at ¶ 656; *UNE Remand Order,* ¶ 470; *USTA II,* 359 F.3d at 588-90. As the FCC has explained, this means

("*UNE Remand Order*"), *petitions for review granted, Unites Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

that, for Section 271 elements, "the market price should prevail." *UNE Remand Order* ¶ 470; *USTA II,* 359 F.3d at 588-90. Thus, a BOC satisfies that federal law standard when it offers Section 271 elements at market rates, terms, and conditions, such as where it has entered in "arms-length agreements" with its competitors. *TRO,* at ¶ 664. Permitting "state law to determine the validity of the various terms and conditions agreed upon" by BOCs and their wholesale customers "will create a labyrinth of rates, terms and conditions" that "violates Congress's intent in passing the Communications Act." *Boomer v. AT&T Corp.,* 309 F.3d 404, 420 (7th Cir. 2002); *see also TRO,* at ¶ 664 (question whether BOC's provision of Section 271 element satisfies sections 201 and 202 requires "a fact-specific inquiry"). This potential for "patchwork contracts" resulting from "the application of fifty bodies of law" "... conflicts with Section 202's prohibition on providing advantages or preferences to customers based on their 'locality.'" *Boomer,* 309 F.3d at 418-19. Section 201, moreover, "demonstrates Congress's intent that *federal law* determine the reasonableness of the terms and conditions" of 271 elements. *Id.* at 420 (emphasis added).[32]

The FCC has clearly recognized this limitation, stating unequivocally that it has "exclusive authority" over "the section 271 process."[33] Moreover, clear precedent establishes that the FCC has the power to preempt state determinations where a facility is used both for interstate and intrastate purposes and it is not practicable to regulate those components

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[32] *See also Order on Reconsideration, Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as Amended*, 7 FCC Rcd 4123, ¶¶ 14-18 (1992) (preempting state law based, in part, on its finding that rulings "in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations," thereby "frustrating [Congress's] objectives of certainty and uniformity").

[33] *See US West* [illegible] FCC Rcd [illegible] 14401-02, ¶ [illegible]

separately.[34] As the FCC has stated to the United States Supreme Court, that analysis applies directly to the pricing of facilities that must be provided by ILECs under the 1996 Act. The FCC explained to the Court that it had concluded in the *Local Competition Order* that "it would be economically and technologically nonsensical ... for the FCC and the state commissions to treat the rates for interconnection with and unbundled access to [ILEC] facilities like retail rates, such that the ultimate rate a competing carrier must pay an incumbent LEC would reflect a combination of an 'intrastate' rate set by a state commission and an 'interstate' rate set by the FCC."[35] Accordingly "*the [FCC] may ensure effective regulation of the interstate component ... by preempting inconsistent state regulation of the matter in issue*."[36] The Supreme Court agreed that the FCC had the authority to resolve such matters under the 1996 Act and thus to "draw the lines to which [state commissions] must hew."[37]

This limitation on state rate-making authority must be given effect. If Congress had wanted state commissions to set rates for "purposes of subsection (c)(3) of such section [251]" *and* separately for purposes of the competitive checklist contained in subsection (c)(2)(B) of section 271, it could easily have said so. It said nothing of the kind. As the Supreme Court has explained in a related context involving the relationship between sections 251 and 271,

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34 *See Louisiana PSC v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045-46 (4th Cir. 1977) ("NCUCII"). *See also Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251, released March 25, 2005 (*"DSL Preemption Order")* (The FCC recently described its preemption power, explaining, in paragraph 19, that "in addition to section 251(d)(3) jurisdiction in the 1996 Act, Congress accorded to the [FCC] direct jurisdiction over certain aspects of intrastate communications pursuant to section 251 of the 1996 Act ... We conclude that the plain language of section 251 and of the *Triennial Review Order* empowers the [FCC] to declare whether a state commission decision is inconsistent with, or substantially prevents implementation of the Commission's unbundling rules."

35 *Opening Brief for the Federal Petitioners*, FCC v. Iowa Utils. Bd., No. 97-831, at 36-37 (U.S. filed Apr. 3, 1998) ("FCC S. Ct. Brief").

36 *Id.* at 36 (emphasis added).

"Congress'[s] decision to omit cross-references [is] particularly meaningful" in this context, given that such cross-references are plentiful elsewhere in the relevant provisions.[38]

Indeed, *nowhere* in the federal statute are states authorized to impose any obligations, much less to set rates, to ensure compliance with section 271 – a provision that, as the FCC and the D.C. Circuit have emphasized, contains obligations that are independent of section 251.[39] Rather, as confirmed by the *limited* authority granted to the states by section 252, all authority to implement those separate requirements in section 271 is vested with the FCC.

Therefore, even if state commissions had authority to require ILECs to include Section 271 elements in an Section 252 interconnection agreement (which they do not), the state commissions, as a matter of law, have no authority to set rates for those elements, and this Commission should so find.

<u>Issue 16 –Line Sharing:</u> -- *Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?*

There should be no dispute that the *TRO* establishes a binding transition mechanism for access to the high frequency portion of the loop ("HFPL"). In fact, the FCC articulated, as clearly as it could, the ILECs' obligation to provide new line sharing to the CLECs, at paragraph 265 of the *TRO*:

> 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

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[38] *Id.*

[39] *See id.* at 17385-86, ¶ 655 ("Section 251 and 271 ... operat[e] independently"); *USTA II*, 359 F.3d at 588 ("The FCC reasonably concluded that checklist items four, five, six, and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52.").

> 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 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. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary.

How much clearer could the FCC have been? The CLECs were allowed to add new line sharing customers during the first year following the effective date of the *TRO*. *See also* 47 C.F.R. § 51.319(a)(1)(i)(B). Under this transition, the FCC established specific limitations on CLEC access to the HFPL and specific rates that CLECs must pay in those limited instances where they can still obtain the HFPL.[40] There is no legal question about the FCC's line sharing plan, nor any factual issue that prevents a conclusive answer to this issue.[41] Under the CLECs' theory, however, the FCC's elaborate and carefully crafted transition applies only to non-BOC ILECs very few, if any, of whom sell line sharing.[42] It defies logic that the FCC created such a transition plan for such a handful of lines.

Notwithstanding this clear statement of what the law requires, certain CLECs have refused to include the FCC's transition plan in Section 252 interconnection agreements, thus

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40 *See TRO,* ¶ 265.

41 Even if Covad argues that under *Coserv* there is a factual question as to whether BellSouth has voluntarily negotiated access to line sharing (which BellSouth disputes and which is contrary to Covad's filings in other dockets), such an argument presupposes that BellSouth has a legal obligation– outside of the FCC's limited transition plan – to provide line sharing (which it does not). Thus, Covad cannot defeat a ruling on the legal question by relying upon *Coserv*.

42 *Id.*, ¶660 (only approximately 2.5 percent of ILEC switched access lines are served by LECs that are

necessitating a resolution of this issue before state commissions. The CLECs' argument is that, notwithstanding the clear language of the FCC in its *TRO*, CLECs can obtain the HFPL indefinitely and at rates other than the ones the FCC specifically established in its transition plan simply by requesting access to those facilities under section 271 instead of section 251.[43] This Commission can and should resolve this line sharing question now.[44] The CLECs' position is deeply illogical and inconsistent with both the statutory scheme and the FCC's binding decisions.

First, if for no other reason, the CLECs' argument must fail for the same reason that it fails in response to Issue 7 (a). Even if line sharing could be construed to be a Section 271 network element, the state commissions have no authority to require an ILEC to include Section 271 elements in a Section 252 interconnection agreement for all of the reasons discussed above in connection with Issue 7 (a).

Second, if that is not sufficient, the CLECs' theory that line sharing is still available as a Section 271 element is illogical because it would render irrelevant the FCC's carefully calibrated scheme to wean CLECs away from the use of line-sharing and to transition them to other means of accessing an ILEC's facilities, such as access to whole loops and line-splitting, that do not have the same anti-competitive effects that the FCC concluded are created by line-sharing. As the FCC explained, "Access to the whole loop and to line splitting but not requiring the HFPL to

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[43] While many CLECs have interconnection agreements that contain line sharing language that needs to be amended [illegible] CLECs have active line sharing arrangements in place in BellSouth's region, and of those [illegible] only Covad has actively pursued continued entitlement to line sharing under Section 271 in other dockets. Consequently, BellSouth frequently refers to Covad, as opposed to CLECs generally, in this portion of its pleading.

[44] In so doing, the Commission will also bring to conclusion the Covad-BellSouth line sharing dispute in Docket No. 040601. For the reasons discussed below, no party can credibly argue that the FCC has found that line [illegible] the contr[illegible] decisions can only lead to [illegible]

be separately unbundled *creates better competitive incentives*."[45] Because of the inherent difficulties in pricing access to just the HFPL (difficulties that exist regardless whether access is required under section 251 or 271), allowing competitive LECs to purchase a whole loop or to engage in line-splitting "but *not* requiring the HFPL to be separately unbundled" puts CLECs "in a more fair competitive position."[46]

Indeed, the FCC expressly found continued unlimited access to line-sharing to be anticompetitive and contrary to the core goals of the 1996 Act. Allowing continued line sharing "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*." [47]

There is no basis to conclude that the FCC, having eliminated these anti-competitive consequences under section 251, has allowed these *same* untoward effects to go on unchecked under section 271. On the contrary, subsequent FCC orders confirm that the federal agency continues to believe that it has required CLECs to obtain a whole loop or engage in line-splitting. Thus, in its very recent *BellSouth Declaratory Ruling Order*,[48] the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop." (¶ 35). Moreover, far from suggesting an open-ended section 271 obligation to allow line-sharing, this very recent FCC decision reiterates that line sharing was required "*only* under an express three-year phase out

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45 *Triennial Review Order* ¶ 260.

46 *Id.*

47 *Id.* ¶ 261 (emphasis added).

48 *See Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251 (Mar. 25, 2005) ("BellSouth Declaratory Order")

plan." *Id.* ¶ 5 n. 10 (emphasis added). The FCC's statement cannot be squared with the notion that line-sharing is also required indefinitely under section 271.

Moreover, there is not a single mention of line sharing in Section 271. By its plain text, section 271 does not require line-sharing when such access is no longer mandated as a separate UNE (and thus required under section 271 checklist item 2). Instead, checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."[49] The FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises.[50] BellSouth thus meets its checklist item 4 obligation by offering access to complete loops and thus all the "transmission" capability on those facilities. Nothing in checklist item 4 requires more.

A simple but appropriate analogy makes the point --- it is as if one ordered a birthday cake from a bakery but received only the icing. Certainly the buyer would not consider the icing alone a "form" of birthday cake. On the contrary, the requirement was a whole cake, not just a portion of it, just as checklist item 4 requires the entire transmission facility, not just the high frequency portion of the transmission facility.

But even if section 271 did require line-sharing, the FCC's recent forbearance decision would have removed any such obligation.[51] BellSouth understands that Covad disputes the fact that line sharing is included in the relief granted in the *Broadband 271 Forbearance Order*. A review of the record in that case, however, demonstrates that the relief granted extended to all broadband elements, including the HFPL. As stated by Commissioner Martin:

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[49] 47 U.S.C. § 271(d)(2)(B)(iv).

[50] 47 C.F.R. § 51.319(a).

[51] *Memorandum Opinion and Order*, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released [illegible] *Forbearance Order*.")

While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of section 271 with respect to line sharing [citing *Verizon Petition for Forbearance*]. Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any Section 271 obligatio-n with respect to line-sharing. Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.

Statement of Commissioner Kevin J. Martin, *Broadband 271 Forbearance Order.*[52]

As stated by Commissioner Martin, the Bell Operating Companies, including BellSouth, included line sharing in their Petitions for Forbearance filed with the FCC, and the relief granted therefore also included line sharing. BellSouth's Petition in particular "[sought] forbearance from the same broadband elements as sought by Verizon,"[53] and was patterned after an earlier petition filed by Verizon. Verizon's petition, in turn, asked the FCC to forbear from imposing any 271 obligation on the broadband elements that the FCC had eliminated in the *TRO*. BellSouth's FCC Petition likewise requested, in relevant part, that:

To the extent the Commission determines § 271 (c)(2)(B) to impose the same unbundling obligations on BOCs as established by § 251 (c) that the Commission forbear from applying any stand-alone unbundling obligations on broadband elements. *While BellSouth believes that no such obligations exist, it files this Petition in an abundance of caution to ensure that the Commission does not impose such obligations where there is ample evidence to demonstrate that the unbundling obligations required by § 251 are unnecessary to meet the purpose of § 271.* Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 1, 2003.

(Emphasis added).

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52 *Id.*

53 *Broadband 271 Forbearance Order*, at ¶ 9.

In its forbearance order, the FCC stated, "Although Verizon's Petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under section 251(c)." *Broadband 271 Forbearance Order, at ¶ 2, n. 9.* In this regard, the FCC cited to a March 26, 2004 *ex parte* letter filed by Verizon. In relevant part, Verizon's March 26, 2004 letter included a white paper that specifically referred to line sharing. Indeed, referring to *USTA II,* Verizon stated:

> The court reached similar conclusions with respect to *other broadband elements.* ... *With respect to line sharing,* the court again concluded that, even if CLECs were impaired to some degree without mandatory line sharing, the Commission had properly concluded given the 'substantial intermodal competition from cable companies' that, 'at least in the future, line sharing is not essential to maintain robust competition in this market.' [54]

BellSouth's request for relief, which relies on the Verizon filing, thus includes line sharing.

Indeed, the only logical conclusion is that the RBOCs included in their petitions for forbearance all of the broadband elements the FCC eliminated in the *TRO.* The FCC eliminated unbundling of most of the broadband capabilities of residential loops in the *TRO,* and its rationale was consistent for each of these capabilities. It eliminated unbundling of fiber-to the-home loops, the packetized portion of hybrid loops, and packet switching (all broadband elements), based on "the impairment standard and the requirement of section 706 of the 1996 Act to provide incentives for all carriers, including the ILECs, to invest in broadband facilities."[55] It

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[54] Verizon's March 26, 2004 filing, attached as Exhibit 2.

used the same rationale to eliminate the HFPL broadband element.[56] As stated by the D.C. Circuit in affirming these portions of the *TRO:*

> The Commission declined to require ILECs to provide unbundled access to most of the broadband capabilities of mass market loops. In particular, it decided ... not to require unbundling of the broadband capabilities of hybrid copper-fiber loops, Order ¶¶ 288-89, or fiber-to-the-home ("FTTH") loops, id. ¶ 273-77, and it also decided not to require ILECs to unbundle the high frequency portion of copper loops, a practice known as "line sharing," id. ¶¶ 255-63.

359 F.3d 554, at 226.

As noted in the *Broadband 271 Forbearance Order*, the D.C. Circuit expressly upheld the FCC's finding that it was appropriate to relieve the BOCs from the unbundling on a national basis "for the broadband elements at issue."[57] And the D.C. Circuit Court's opinion clearly contemplates that "the broadband elements at issue" included line sharing.[58] There is simply no rational basis for excluding one broadband element – line sharing – from the broadband relief the FCC granted.

Likewise, there is every reason to conclude that the FCC did, in fact, forbear from imposing any Section 271 obligations on each of these broadband elements. The benefits to broadband competition of forbearing from imposing 271 obligations on the fiber loop elements apply equally to forbearance of line sharing arrangements. For example, the FCC held that:

> The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.[59]

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56 *Triennial Review Order* ¶¶ 258-63.

57 *Broadband 271 Forbearance Order*, n. 73, *citing USTA II*, 359 F.3d at 578-85.

58 The D.C. Circuit's discussion of the CLEC challenges to "Unbundling of Broadband Loops" includes hybrid loops, fiber-to-the-home loops, and line sharing. *USTA II* at 578-85.

This holding mirrors the FCC's conclusion about the effect of removing line sharing from the UNE list in the *TRO*.[60] The FCC also explained that "[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for … wireline broadband service."[61] Finally, the FCC concluded:

> Broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.[62]

Just as forbearance from 271 obligations for fiber to the home and fiber to the curb loops is good for broadband competition, so is forbearance from any line sharing obligations.

Even if the FCC's forbearance order did not expressly address line sharing, under Section 160(a), any petition for forbearance not denied within the statutory time period is deemed granted.[63] Thus, as explained by Commissioner (now Chairman) Martin in his concurring statement, "Regardless of whether it was affirmatively granted, because the [FCC's] decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute."[64] Neither Covad nor any other CLEC can identify any

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[60] *TRO*, at ¶ 263 ("We anticipate that the [FCC's] decisions in this Order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options").

[61] *Broadband 271 Forbearance Order* ¶ 22.

[62] *Broadband 271 Forbearance Order* ¶ [illegible].

[63] 47 U.S.C. § 160(c) ("[a]ny such petition shall be deemed granted if the Commission does not deny the petition ….").

[64] BellSouth acknowledges that the separate statement of former FCC Chairman Powell – which [illegible] press [illegible] the [illegible] of the Broadband [illegible]

place where the FCC denied the forbearance petition as to line-sharing. Thus, as a matter of law, the petition was granted as to that functionality.

Finally, state commission decisions in Rhode Island and Illinois also support BellSouth's position. In Rhode Island, for example, Verizon had previously filed tariffs setting forth certain wholesale obligations. Following the *TRO,* Verizon filed tariff revisions, including a revision that eliminated line sharing from the classification as a UNE. Covad objected to Verizon's revision, claiming that Verizon had a Section 271 line sharing obligation. The Rhode Island Commission rejected Covad's arguments and approved Verizon's tariff modifications.[65] Likewise, the Illinois Commission has rejected CLEC arguments that line sharing is a Section 271 obligation. In relevant part, in an arbitration decision addressing SBC's obligations under the *TRO,* the Illinois Commission held, "As for XO's contention that the ICA should reflect line-sharing obligations under Section 271 and state law, the Commission notes that the HFPL is not a [Section] 271 checklist item ... Patently, no reference to Section 271 obligations belongs in the ICA."[66] Finally, in BellSouth's region, the Tennessee Regulatory Authority ("TRA"), in

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however, does not address section 160(c) of the Act, which obligates the FCC to rule on forbearance petitions within fifteen months of the filing date of the petition. Moreover, the FCC did not deny any part of the BellSouth petition that asked for forbearance for all broadband elements delisted under section 251. Consequently, the lack of any additional language that explicitly addresses line sharing means that the FCC must forbear from enforcing any 271 obligations that may exist with respect to line sharing, as recognized by Chairman Martin. Also, while Mr. Powell that indicated line sharing is excluded from the Broadband 271 Forbearance Order, he did not explain the basis for his conclusion nor did he address the legal argument that the FCC's failure to deny the petitions results in granting forbearance for line sharing as well as the other cited elements.

[65] Report and Order, 2004 R.I. PUC LEXIS 31, In re: Verizon-Rhode Island's Filing of October 2, 2003 to Amend Tariff No. 18, Rhode Island Public Utilities Commission, Docket No. 35556 (October 12, 2004).

addressing a parallel docket, has determined that the FCC's transition plan constitutes the only obligation BellSouth has regarding line sharing.[67] This Commission should do the same.

<u>Issue 19 – Sub-Loop Concentration (a):</u> -- *What is the appropriate ICA language, if any, to address sub-loop feeder or sub-loop concentration?*

The question raised by this issue is whether BellSouth has any obligation to provide sub-loop-feeder or sub-loop concentration as a UNE. By way of background, the local loop can be subdivided into its component "sub-loop" parts: loop feeder facilities, loop concentrator/multiplexer facilities which BellSouth uses in some but not all cases, and loop distribution facilities.[68] The loop feeder is often referred to as the "first mile," as those are the loop facilities directly connected to the central office. The loop distribution component, often referred to as the "last mile," is the portion of the loop extending to the loop demarcation point at the customer's premises. In some cases, the loop feeder pairs are joined to the loop distribution pairs at an interconnection device referred to as the "Feed/Distribution Interface" or "FDI," which is sometimes also referred to as the "cross connection box" or simply the "cross box." In other cases, electronic equipment is used to connect the loop feeder and loop distribution facilities. Digital Loop Carrier ("DLC") equipment is one form of such electronic equipment.

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[67] The TRA has not yet issued a written order. BellSouth acknowledges that the Maine commission is currently investigating line sharing under state law and that the New Hampshire commission has determined that Verizon is obligated to continue providing line sharing. *Order No. 24, 442, In re: Proposed Revisions to Tariff NHPUC No. 84* (Statement of Generally available Terms and Conditions) *Petition for Declaratory Order re Line Sharing*, DT 03-201, DT 04-176 (Mar. 11, 2005). The core rationale underlying the New Hampshire (and Maine) decisions was the commissions' belief that Verizon had voluntarily committed [illegible] an intrastate wholesale tariff (and did file such a tariff) embodying the rates, terms, and conditions of its wholesale obligations (including line sharing), which commitment was included in the FCC order granting Verizon long distance relief. Indeed, in both cases, the state commissions "[did] not assert independent authority to define the scope of the [RBOC's] section 271 obligations nor its compliance with those obligations under that section." Instead, the commissions purported only to exercise the authority they believed had been conferred upon them by virtue of the filed tariffs. No such state tariff exists here, and these decisions are therefore distinguishable.

DLC equipment is sometimes referred to as loop concentrator/multiplexer equipment because modern DLC equipment accommodates both the concentrating and multiplexing functions. Conversely, the loop architecture as viewed from the customers' premises is composed of loop distribution facilities which are gathered or "concentrated" into a smaller number of "loop feeder" lines that carry traffic from that point to the local switch.[69]

The FCC answered this issue very clearly in the *TRO* where it said:

> Consistent with our section 706 goal to spur deployment of advanced telecommunications capability, *we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE.*

TRO, at ¶ 253 (emphasis added). The FCC continued:

> The rules we adopt herein do not require incumbent LECs to provide unbundled access to their feeder loop plant as stand-alone UNEs, thereby *limiting incumbent LEC subloop unbundling obligations to their distribution loop plant.*

Id. ¶ 254 (emphasis added). It is clear that the FCC has "delisted" sub-loop feeder. It is equally clear that BellSouth's unbundling obligation is limited to the sub-loop distribution. The FCC has expressly stated the unbundling obligation applies only to that portion of the copper loop necessary to access the end-user's premises, that is, loop distribution. *See* 47 C.F.R. 51.319(b). Consequently, BellSouth has no legal obligation to unbundle sub-loop concentration, which, for simplicity, is that electronic equipment that in some cases is installed between the sub-loop feeder and the sub-loop distribution. Thus, there is no need for any interconnection agreement to contain language with respect to sub-loop feeder or sub-loop concentration, and this Commission should so rule as a matter of law.

<u>Issue 26 – Packet Switching:</u> -- *What is the appropriate ICA language, if any, to address packet switching?*

It is clear from the unequivocal language of the *TRO* that ILECs are not required to provide unbundled packet switching[70] to CLECs; therefore, the Commission should find as a matter of law that there should be no language in Section 252 interconnection agreements requiring the unbundling of packet switching.

There is no legal basis to include language regarding packet switching in interconnection agreements. The FCC unequivocally concluded that "on a national basis ... competitors are not impaired without access to packet switching, including routers and DSLAMs." *TRO,* at ¶ 537. In making this decision, the FCC specifically repudiated the limited exception set forth in the *UNE Remand Order* regarding situations in which an ILEC had deployed DLC systems. *Id.* The FCC reasoned that its decision was consistent with both the impairment standard of Section 251, and with the "goals of section 706 of the 1996 Act." *Id.* The extensive evidence of competitive deployment of packet switches led the FCC to state that "there do not appear to be any barriers to the deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching." *TRO,* at ¶ 539. No CLEC appealed the FCC's decision on this element. Thus, as a matter of law, this Commission should confirm that interconnection agreements should not include any packet switching language. CompSouth has conceded that there is no disputed issue with respect to packet switching in other states and should do the same in Florida.

<u>Issue 22 – Greenfield Areas:</u> -- *a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is*

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70 Packet switching is "routing or forwarding packets, frames, cells or other data units based on [illegible] in the [illegible] other data units" as well as

predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?

In the *TRO,* the FCC determined that ILECs have no obligation to unbundle FTTH mass market loops[71] serving greenfield areas or areas of new construction.[72] *TRO,* at ¶ 275. Subsequent to the *TRO*, the FCC expanded this ruling to include fiber to the curb ("FTTC") loops in its Order on Reconsideration, *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-248 at ¶¶ 1, 9 (Oct. 18, 2004) ("*FTTC Reconsideration Order*"). A FTTC loop is a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises." *FTTC Reconsideration Order* at ¶ 10. Thus, the same unbundling framework (including any unbundling relief) established by the FCC in the *TRO* for FTTH loops also applies to FTTC loops.

Additionally, the FCC subsequently determined in *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-191 at ¶ 1 (Aug. 9, 2004) ("*MDU Reconsideration Order*") that the FTTH rules in the *TRO* apply to predominantly residential multiple dwelling units ("MDU"). "General examples of MDUs include apartment buildings, condominium buildings, cooperatives, or planned unit developments." *Id.* at ¶ 4. The FCC further stated that the existence of businesses in MDUs does not exempt such buildings from the FTTH unbundling

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[71] A FFTH loop is a "local loop consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark fiber, that connects a customer's premises with a wire center (i.e., from the demarcation point at the customer's premises to the central office)." *TRO*, at ¶ 273, n. 802.

[72] The FCC also determined in the *TRO* that ILECs do not have an obligation to unbundle FTTH loops in overbuild situations, except where the ILEC elects to retire existing copper loops, in which case

framework established in the *TRO*. For instance, the FCC stated that "a multi-level apartment that houses retail stores such as a dry cleaner and/or a mini-mart on the ground floor is predominantly residential, while an office building that contains a floor of residential suites is not." *Id.*

Moreover, the FCC in the *MDU Reconsideration Order* established that FTTH loops include any "fiber loops deployed to the minimum point of entry ("MPOE") of predominantly residential MDUs, regardless of the ownership of the inside wiring." *MDU Order on Reconsideration* at ¶ 10. The FCC has defined MPOE as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.105(b). Consequently, the MPOE is effectively the demarcation point between the inside wire facilities at the MDU and BellSouth's loop facilities.[73] Thus, regardless of whether the ILEC owns or controls the inside wire beyond the demarcation point or MPOE in a MDU, when the fiber portion of a loop extends to a MDU and that fiber connects to in-building copper cable facilities owned or controlled by an ILEC, the ILEC has no obligation to unbundled the fiber portion of the loop.[74] Finally, to avoid any disparate treatment between FTTC loops and FTTH loops, the FCC has held that its rules relating to MDUs applies to both FTTH and FTTC loops. *See FTTC Reconsideration Order,* at ¶ 14.

Based on the above, the Commission should find as a matter of law that (1) BellSouth has no obligation to unbundle FTTH or FTTC mass market loops in greenfield areas; (2) BellSouth

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[73] Indeed, in describing this section of the *MDU Order on Reconsideration*, the FCC referred to the section as the "MDU Demarcation Point." *MDU Order on Reconsideration* at 10.

[74] In reaching this decision, the FCC specifically addressed BellSouth's request for clarification that "'the fiber portion of a loop that extends to a multi-unit building and that connects to in-building copper cable owned or controlled by the ILEC is considered a [FTTH] loop.'" *MDU Order on Reconsideration*

has no obligation to unbundle FTTH or FTTC mass market loops serving predominantly residential MDUs; (3) BellSouth has no obligation to unbundle fiber loop facilities that are deployed to the MPOE of a MDU, regardless of whether the ILEC owns or controls any cooper cable facilities in the MDU; and (4) the MPOE should be defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." There are no genuine issues of material fact for these fundamental principles and, pursuant to the *TRO*, *FTTC Order on Reconsideration*, *MDU Order on Reconsideration*, and FCC Rules, BellSouth is entitled to judgment as a matter of law.

Issue 23 – Hybrid Loops: -- *What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?*

Hybrid loops are "local loops consisting of both copper and fiber optic cable (and associated electronics, such as DLC systems)." *TRO*, at fn. 832. The FCC recognized that hybrid loops reflect the network deployment plan pursuant to which ILECS "pursue their construction and network modification projects in incremental ways – first, the deployment of fiber in the feeder plant and associated equipment like DLC systems ... followed by fiber-to-the-curb, followed by FTTH." *TRO*, at ¶ 285.

This Commission should rule that BellSouth is not obligated to unbundle "the next generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market." *TRO*, at ¶ 288.[75] The FCC has already reached this conclusion based on the fact that requiring ILECs to unbundle next-generation network

[75] In other words, ILECs are not required to "unbundle any transmission path over a fiber transmission facility ... that is used to transmit packetized information."

elements "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities ...." *Id.*

The D.C. Circuit Court of Appeals affirmed the FCC's holding that BellSouth is not obligated to unbundle the broadband capabilities of a hybrid loop. As a general proposition, the D.C. Circuit held that "the [FCC] reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment." *USTA II*, at 37. More specifically, the D.C. Circuit affirmed the FCC's application of that analysis to hybrid loops and concluded that "the [FCC's] decisions not to order unbundling of the broadband capacity of hybrid loops was based on permissible statutory considerations and supported by substantial evidence." *USTA II*, at 41.

Based on these holdings of the FCC and the D.C. Circuit, the Commission should make clear that BellSouth is not obligated to unbundle the next-generation elements of its hybrid loops.

Issue 24: End User Premises: -- *Under the FCC's definition of a loop found in 47 C.F.R. §51.319(a), is a mobile switching center or cell site an "end user customer's premises"?*

The federal rules define the local loop network element as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer's premises." 47 C.F.R. § 51.319(a). Facilities that terminate at a mobile switching center or cell site do not fall within this definition. A mobile switching center or cell site is part of the transmission facility used to provide service to a wireless customer. The FCC has determined that such cell sites or base stations should be considered part of the transmission facilities that exist *outside* the incumbent LEC's local network. *TRO,* at ¶ 366. Consequently, the FCC denied mobile wireless carriers access to

incumbent LECs' unbundled dedicated transport. *TRO,* at ¶ 368. The FCC confirmed this finding in the *TRRO,* where the FCC made it clear CLECs were denied all unbundled access to incumbent LEC network elements for the exclusive provision of mobile wireless service. *TRRO,* n 99. This Commission should rule on this legal issue and make clear that a mobile switching center or cell site cannot constitute an "end user customer premises."

Issue 29 – Entire Agreement Rule: -- *What is the appropriate language to implement the FCC's "entire agreement" rule under Section 252(i)?*

On July 13, 2004, the FCC replaced the "pick-and-choose" rule with an "all-or-nothing" rule.[76] The modified rule, codified in the federal rules at 47 C.F.R. § 51.809, requires a requesting carrier seeking to avail itself of terms in an interconnection agreement to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement. The FCC reasoned that its new rule would promote more "give-and-take" negotiations, which will produce creative agreements that are better tailored to meet carriers' individual needs.[77] Also, the FCC reiterated its policy objective of advancing facilities based competition.[78]

There can be no debate that, as a matter of law, CLECs can no longer obtain "piecemeal" adoptions of interconnection agreements or cherry pick certain provisions or terms out of one existing agreement and combine them with provisions or terms out of other existing agreements. Instead, a CLEC can only adopt an interconnection agreement in its entirety. This Commission should expressly confirm that there are no exceptions to the "all-or-nothing" rule and address this legal issue forthwith.

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[76] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Second Report and Order*, 19 FCC Rcd 13494 (2004).

[77] *Id.* at ¶ 11.

Issue 31 – Binding Nature Of Commission Order: -- *How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?*

By including Issue 31 as a question for resolution, however, BellSouth sought to ensure that one proceeding would be conducted to decide all outstanding questions, with that proceeding to derive language with which to amend the interconnection agreements in lieu of expensive and time-consuming individual negotiations and, possibly, arbitrations. Consequently, the outcome of this docket should be binding upon both active parties and upon those CLECs that have elected not to actively participate.

II. PARTIAL SUMMARY JUDGMENT ISSUES, OR ALTERNATIVELY, ISSUES THAT THE COMMISSION CAN ADDRESS BY ISSUING A DECLARATION SETTING FORTH THE APPLICABLE LAW, SO THAT THE PARTIES MAY EFFICIENTLY PRESENT THE FACTUAL DISPUTES SUCH ISSUES PRESENT.

The issues that BellSouth discussed in the preceding section of this Motion are issues that the Commission can and should decide as a matter of law in their entirety, thus completely disposing of the issue. There are other issues, however, that include both questions of law and questions of fact. BellSouth respectfully requests that the Commission address the legal questions posed by the following issues by providing a clear statement of what the law requires, either by issuing partial summary judgment as to each of the following issues, or, alternatively, by issuing a declaratory ruling, from which the parties can frame their factual disputes accordingly.

Issue 1: *TRRO* Transition Plan -- *What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?*

Issue 10 – UNEs That Are Not Converted – *What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?*

These issues, as framed by the parties, ask the Commission to decide upon particular interconnection agreement language. In addressing these issues in this Motion, BellSouth is not asking the Commission to write contract language. Instead, BellSouth asks the Commission to enter an order that finds that the transition periods for former UNEs will end at a date certain.[79] Answering that legal question is straightforward because the FCC detailed transition plans for switching, high capacity loops, and dedicated transport in the *TRRO* and in its rules. *See TRRO,* ¶¶ 143, 144, 196, 197, 227 *and* 47 C.F.R. §§ 51.319(a)(4)(iii); 51.319(a)(5)(iii); 51.319(a)(6)(ii); 51.319(d)(2)(iii); 51.319(e)(2)(ii)(C); 51.319(e)(2)(iii)(C). Specifically, BellSouth is obligated to provide certain loops and access to certain transport routes from March 11, 2005 through March 10, 2006 at 115% of the rate that was in effect on June 15, 2004.[80] For dark fiber loops and transport, BellSouth's obligation continues until September 10, 2006. With respect to local circuit switching, BellSouth is obligated to provide access to the embedded base through March

[79] The FCC has definitively ruled that CLECs must transition from former UNEs to other serving arrangements by March 10, 2006 and September 10, 2006 respectively. *See TRRO,* ¶¶ 143, 144, 196, 197, 227 *and* 47 C.F.R. §§ 51.319(a)(4)(iii); 51.319(a)(5)(iii); 51.319(a)(6)(ii); 51.319(d)(2)(iii); 51.319(e)(2)(ii)(C); 51.319(e)(2)(iii)(C). Given the explicit deadlines, there is no legal basis for this Commission to extend additional time to CLECs, thus rewarding CLECs that fail to take steps to convert UNEs in time to meet the federal deadline. This issue is particularly acute, considering the number of CLECs that have failed to take any action whatsoever to respond to BellSouth's repeated requests to modify contractual language. Accordingly, this Commission should make clear that CLECs cannot elect to ignore the federal timeframes and effectively extend the FCC's transition plans – if CLECs fail to convert former UNEs, loss of service may result.

[80] Or, at 115% of the rate the state commission has established or establishes, if any, between June [illegible]

10, 2006 at the rate that was in effect on June 15, 2004 plus one dollar.[81] In addressing this issue, BellSouth respectfully requests that the Commission enter an order that declares, as a matter of law, that BellSouth's legal obligations to effectuate the FCC's transition plans are exactly as specified in the *TRRO* and the corresponding federal rules, as BellSouth has recited them. BellSouth also requests that the Commission state unequivocally that BellSouth's transition obligation is limited as a matter of law and that CLECs have no reasonable expectation of receiving a longer or more favorable transition plan than what is specified in the federal rules.

There is nothing factual about this issue – the FCC requires CLECs to elect alternative serving arrangements and also expects transitions to be completed by specified dates. This is a straightforward legal question, with a clear answer. BellSouth's concern is that, absent a Commission ruling that confirms the applicable law, some CLECs may choose inaction, and, as March 10, 2006 approaches, will then file a host of "emergency" petitions in an attempt to disguise or delay the inevitable, thus reprising the recent "no new adds" controversy. By confirming that CLECs cannot game the FCC's rules to obtain a longer transition period, the Commission will stave off future "emergencies" and eliminate arguments to the contrary in witness testimony.

Likewise, the Commission should make clear that CLECs cannot reasonably expect to receive, absent a mutual agreement otherwise, rates that are lower than the rates specified for the transition period. While such a finding may seem perfectly obvious, CLECs have suggested in various pleadings that commissions can set Section 271 rates (BellSouth disagrees) and that current UNE rates would suffice. BellSouth's concern is that CLECs may then try to claim

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[81] Or, at the rate the state commission has established or establishes, if any, between June 16, 2004

entitlement to rates lower than those established in the *TRRO*, claiming that BellSouth is providing access to former UNEs after March 11, 2005 as Section 271 services. Taking such CLEC arguments to their logical conclusion would mean that potentially *lower* rates would apply during the transition period. While this Commission cannot and should not address Section 271, confirming that CLECs are not entitled to rates lower than the transition rates contained in the federal rules will eliminate any arguments to the contrary -- arguments that lack any legal foundation.

Issue 13 – Commingling -- *What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)*?

There are two aspects of this issue that can be resolved as a matter of law. First, there is the question of whether the scope of commingling includes the commingling of Section 251(c)(3) UNEs with Section 271 network elements. Second, there is the question of whether the scope of commingling includes the provision of DSL over UNE-P. Both of these questions can be resolved as matters of law, thus narrowing the breadth of the commingling issue.

A. Section 271 Elements.

As discussed extensively in connection with Issue 7 above, this Commission cannot regulate the terms by which BellSouth complies with its Section 271 obligations. Because the FCC alone has that authority, as detailed above, this Commission must reject out of hand any suggestion that Section 271 services must be commingled with other UNEs.

More significantly, however, the *TRO,* and its *Errata,* demonstrates BellSouth has no obligation to commingle Section 271 elements with 251 elements.[82] The FCC has defined commingling as "the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services."[83] In discussing commingling, the FCC originally stated, that "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements *unbundled pursuant to section 271* and any services offered for resale pursuant to section 251(c)(4) of the Act."[84] Later, however, when the FCC issued its *Errata,* it deleted the phrase "unbundled pursuant to section 271."[85] Thus, the language of the *TRO,* as corrected by the *Errata*, requires "incumbent LECs [to] permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements and any services offered for resale pursuant to section 251(c)(4) of the Act."

There is no other discussion of 271 elements in the commingling section of the *TRO.* In the Section 271 section of the *TRO,* however, the FCC made clear that "[w]e decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's

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82 *See TRO,* at ¶ 655, n. 1990; also USTA II, 359 F.3d at 589-90.

83 47 C.F.R. § 51.5.

84 *TRO,* at ¶ 584 (emphasis supplied).

85 [illegible]

competitive checklist contain no mention of 'combining' and ... do not refer back to the combination requirement set forth in section 251(c)(3)."

The dispute BellSouth has with certain CLECs centers on the meaning of the term "wholesale" and is exacerbated to some degree because of the deletions of certain phrases in the *TRO's Errata*. Specifically, at the same time the FCC deleted the phrase "unbundled pursuant to Section 271" from its discussion of commingling in that portion of the *TRO,* it also deleted the sentence, "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to these checklist items" from its discussion in the section 271 portion of the *TRO.* Thus, the dispute is whether the wholesale services referred to in the federal commingling rules include Section 271 services. The federal rules do not expressly define "wholesale services" in the context of the commingling obligation.

The FCC clearly intended, however, to limit the types of wholesale services that are subject to commingling. This is clear because, in describing wholesale services in the *TRO*, the FCC referred only to *tariffed access services,* explaining, in relevant part, as follows. First, "We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff)." Next, "Competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff)." Third, "We do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.*, a ... circuit at rates based on special access services and UNEs)." Then, "We require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations." Finally, "Commingling allows a competitive

LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services."[86]

The foregoing passages, along with the deletion of Section 271 in the description of commingling in the *Errata,* show clearly that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 elements. Moreover, language within the *TRRO,* read in conjunction with the *TRO,* is consistent. In addressing conversion rights in the *TRO,* the FCC referred to "wholesale services," concluding, "Carriers may both convert UNEs and UNE combinations to *wholesale services* and convert wholesale services to UNEs and UNE combinations ...."[87] Then, when describing this conversion holding in the *TRRO,* the FCC explicitly limited its discussion to the conversion of *tariffed services* to UNEs: "We determined in the *TRO* that competitive LECS may convert *tariffed incumbent LEC services* to UNEs and UNE combinations ...."[88] It is clear, therefore, that the FCC narrowly interprets "wholesale services" as limited to tariffed services, and it does not expect or require BellSouth to combine Section 271 network elements with Section 251 network elements.[89]

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[86] *TRO, at* ¶¶ 579 – 581, 583.

[87] *TRO,* at ¶ 585 (emphasis supplied).

[88] *TRRO,* at ¶ 229 (emphasis supplied).

[89] State commissions have reached different conclusions on this issue. Of the decisions that BellSouth is aware of, Utah and Illinois correctly determined that ILECs have no obligation to commingle Section 271 elements with Section 251 elements. See In re: Petition for Arbitration of Covad with Qwest, Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005) ("ILECs are required to commingle wholesale elements obtained by means other than Section 251(c)(3), except for Section 271 elements") and In re: [illegible], 04-0371 Ill. C.C., 2004 WL [illegible] at 15 (Oct. 28, 2004) ("SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271. The FCC specifically removed that requirement from the *TRO* [in ¶] 584 when it issued its *TRO* Errata."). In contrast, however, the Washington Commission, although it properly recognized its lack of Section 271 authority, erroneously determined that "BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale services, such as Section 271 elements." In addition, [illegible] reached [illegible] *In re: Metro Access* [illegible]

Any other interpretation of BellSouth's commingling obligation would undermine the FCC's findings in the *TRRO* that decline to require unbundling of UNE-P due to the investment disincentives previous unbundling rulings had created.[90] This is because certain CLECs claim that Section 271 provides an independent basis to obtain UNE-P at just and reasonable rates. As federal district courts have already explained, however, the enforcement authority for Section 271 unbundling lies with the FCC, and the CLECs cannot reasonably blind themselves to applicable law.[91] Consequently, even if the CLECs claim there is a factual dispute as to whether BellSouth offers Section 271 services as wholesale services, such a claim presupposes that the Commission can then regulate or enforce Section 271 services, which it clearly cannot. The FCC alone has that responsibility as a matter of law.

B. DSL over UNE-P

In addition to the legal question of whether state commissions can require ILECs to commingle 251(c)(3) UNEs with Section 271 network elements, some CLECs have raised the issue of whether DSL over UNE-P is an allowable form of "commingling." The FCC has put this matter to rest in its *DSL Preemption Order,* where it specifically said:

> Based on the language and clear intent of the *Triennial Review Order*, we reject Cinergy's assertion that our commingling rules apply to the provisioning of wholesale DSL services over a UNE loop facility. In the *Triennial Review Order*, the Commission required incumbent LECs to commingle UNEs (and combinations of UNEs) with other incumbent LEC services. The Commission expressly defined commingling as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." Thus, the purpose of this provision is to allow a requesting carrier the opportunity to provide service to its customers by "connecting, attaching or otherwise

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reconciled its earlier XO decision. The Colorado state commission has also ruled in a manner adverse to BellSouth.

90 *TRRO*, at ¶ 218.

linking" facilities obtained by UNE offerings and wholesale services. Accordingly, *we conclude that the Commission's commingling requirements do not apply where a competitive LEC leases an entire loop facility and seeks to have an incumbent LEC provide services over the competitive LEC's facility.*

DSL Preemption Order, ¶ 35 (emphasis supplied). Therefore, BellSouth requests that the Commission find, as a matter of law, that not only is BellSouth not required to allow commingling of Section 251(c)(3) UNEs with Section 271 network elements, but also that DSL over UNE-P is not an acceptable form of commingling.[92] CompSouth has confirmed this is not a disputed issues in other states and should do so as well in Florida.

Issue 18 – Line Splitting: -- *What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?*

Line splitting occurs when one competitive LEC provides narrowband voice service over the low frequency portion of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter. *TRO* at ¶ 251; *Line Sharing Reconsideration Order,* at ¶ 33.[93] In the *Line Sharing Reconsideration Order*, the FCC held that ILECs "must permit competing carriers providing voice services using the UNE-platform [UNE-P] to either self-provision necessary equipment or partner with a competitive data carrier to provide xDSL service on the same line." *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order on Reconsideration in CC Docket No. 98-147,16 FCC Rcd 2101, FCC 01-26 ("*Line Sharing Reconsideration*

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92 BellSouth notes that, as recent amendments to Title 37 of the *Code of Alabama*, particularly §37-2A-4, become effective [illegible] law" issue will become moot, as the Commission will not have jurisdiction to regulate any aspect of broadband service or to order local exchange carriers to unbundle their networks in a manner that differs from unbundling ordered by the FCC. See the Commission's May 25, 2005 Order in Docket No. 29323, p. 18.

93 Line splitting differs from line sharing in that, with the former, a competitive carrier provides the voice service and another competitive carrier provides the data service. With line sharing, the ILEC provides the [illegible] competitive [illegible] provides the data service. *Line Sharing*

Order") at ¶ 16. Accordingly, in the *Line Sharing Reconsideration Order*, the FCC established that UNE-P CLECs could "replace [their] existing UNE-platform arrangement with a configuration that allows provisioning of both data and voice services." *Id.* at ¶ 19.

The FCC, in the *TRO*, expanded its decision in the *Line Sharing Reconsideration Order* by stating that line splitting also applied when the CLEC purchases stand-alone loops: "We find that when competitive carriers opt to take an unbundled stand-alone loop, the incumbent LEC must provide the requesting carrier with the ability to engage in line splitting arrangements." *TRO* at ¶ 251. Regarding line splitting with UNE-P, the FCC further stated in the *TRO* that, so long as UNE-P is available in a particular state, an ILEC must continue to allow line splitting between a UNE-P CLEC and a data LEC ("DLEC"). *Id.* at ¶ 252.

In the *TRRO*, the FCC found that ILECs have no section 251 unbundling obligation to provide mass market local circuit switching. *TRRO,* at ¶ 199. As noted by the FCC, "Competitive LECs have used unbundled local circuit switching exclusively in combination with incumbent LEC loops and shared transport in an arrangement knows as the unbundled network element platform (UNE-P)." *Id.* at n. 526. Thus, in the *TRRO*, the FCC held that BellSouth has no obligation to provide UNE-P. The FCC further found that CLECs must convert their embedded base of UNE-P customers to alternative arrangements within a twelve-month transition period (or by March 11, 2006) and that CLECs were prohibited from adding any new UNE-P customers during this transition period. *Id.* at ¶ 199. Recently, federal courts in Georgia, Kentucky, and Mississippi have confirmed the FCC's findings in the *TRRO* regarding UNE-P and unbundled local circuit switching.

Because the *TRRO* established that BellSouth no longer has an obligation to provide UNE-P or unbundled local circuit switching, the Commission should find, as a matter of law,

that BellSouth's obligation to permit line splitting is limited to when a CLEC purchases a stand-alone loop and provides its own splitter. The *TRO* recognized that an ILEC's line splitting obligation with UNE-P would be permitted "so long as the unbundled loop-switch combination is permitted in a particular state ...." *TRO,* at ¶ 252. The *TRRO* made it clear that UNE-P or the "unbundled loop-switch combination" was *not permitted in any state* as it established that there was "no section 251 unbundling requirement for mass market local circuit switching nationwide." *TRRO* at ¶ 199. Thus, the Commission should find that, as a matter of law, BellSouth's line splitting obligations are limited to when a CLEC purchases a stand-alone loop and provides its own splitter and that BellSouth has no obligation to provide line splitting under any other service arrangement.

<u>Issue 21 – Call Related Databases:</u> -- *What is the appropriate ICA language, if any, to address access to call related databases?*

Call-related databases, as defined by the FCC, are "databases that are used in signaling networks for billing and collection or for the transmission, routing or other provision of telecommunications services." *TRO,* at ¶ 549. The specific database requirements included by the FCC in the definition of call-related databases are the Line Information Database ("LIDB"); the Caller ID with Name database ("CNAM"); the Toll Free Calling database; Local Number Portability database ("LNP"); Advanced Intelligent Network database ("AIN"); and E911.

Interconnection agreements should not contain any language regarding the provision of unbundled access to call-related databases other than 911 and E911. Pursuant to the *TRO*, ILECs are not obligated to unbundle call-related databases for CLECs who deploy their own switches. *TRO,* at ¶ 551 ("We find that competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases, with the

exception of the 911 and E911 databases as discussed below"). The FCC's rules provide that ILECs must only provide access to signaling, call-related databases, and shared transport facilities on an unbundled basis to the extent that local circuit switching is unbundled. 47 C.F.R. 51.319(d)(4)(i). This decision applied on a nationwide basis, both to enterprise and mass-market switching. *TRO,* at ¶ 551.

The D.C. Circuit affirmed the FCC's decision on call-related databases. On appeal, the CLECs argued that the only reason that alternatives existed to ILEC databases was because the FCC had previously ordered access to such databases. *USTA II,* at 50. The Court rejected this argument and held that, "As it stands, CLECs evidently have adequate access to call-related databases. If subsequent developments alter this situation, affected parties may petition the [FCC] to amend its rule." *Id.* To date, no party has filed such a petition.

Because CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases. Consequently, BellSouth's legal obligation is expressly limited to providing databases only in connection with switching provided under the FCC's transition plan. Therefore BellSouth requests that the Commission determine that as a matter of law, BellSouth's obligation to provide call-related databases on an unbundled basis is limited to the situations where CLECs have access to unbundled switching pursuant to the FCC's transition plan.

Issue 25 – Routine Network Modification: -- *What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?*

BellSouth has an obligation to provide routine network modifications ("RNM") to unbundled loop facilities where the requesting loop facility has already been constructed. *TRO,* at ¶ 632; 47 C.F.R. § 51.319(a)(8). The FCC has defined RNMs as "those activities that

incumbent LECs regularly undertake for their own customers." *TRO,* at ¶ 632. RNMs do not include the construction of new wires (*i.e.*, installation of new aerial or buried cable). *Id.* Further, in providing RNMs, BellSouth does not have an obligation to "alter substantially [its] network[] in order to provide superior quality interconnection and unbundled access." *TRO*, at ¶ 630 (quoting, *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997)).

Simply put, under the *TRO*, an ILEC has to make the same RNMs to their existing loop facilities for CLECs that they make for their own customers. *TRO,* at ¶ 633. As stated by the FCC, "By way of illustration, we find that loop modification functions that the incumbent LEC routinely performs for their own customers, and therefore must perform for competitors, include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer." *Id.* at 634 (footnotes omitted). The FCC described these and other activities that would constitute RNMs as the "'routine, day-to-day work of managing an [incumbent LEC's] network.'" *Id.* at 637.

The D.C. Circuit in *USTA II* interpreted the FCC's RNM requirements in the *TRO,* and its analysis is entirely consistent with BellSouth's position on this issue.

> The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. The FCC has established a clear and reasonable limiting principle: the distinction between a "routine network modification" and a "superior quality" alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for its own customers. While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be "nondiscriminatory."

USTA II, 359 F.3d at 578.

Accordingly, the Commission should find, as a matter of law, that a RNM is an activity that BellSouth regularly undertakes for its own customers on demand. The Commission should further find that BellSouth has no obligation to perform as a RNM any activity that BellSouth does not regularly undertake for its own customers or which results in the substantial alteration of BellSouth's network or in a superior quality network for CLECs.

Concurrent with this finding, the Commission should also find that BellSouth is obligated to perform line conditioning on the same terms and conditions that BellSouth provides for its own customers. In paragraph 643 of the *TRO*, the FCC stated that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." *TRO,* at ¶ 643. The FCC went on further to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services *at parity* with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations." *Id.* (emphasis added).

In its discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*: "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules." *TRO,* at ¶ 635. The FCC echoed these sentiments in paragraph 250 of the *TRO*: "As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service." *TRO,* at ¶ 250.

Accordingly, as a matter of law, the Commission should find that BellSouth's obligation to perform line conditioning for CLECs is limited to line conditioning that it regularly undertakes for its own customers. Any other interpretation would result in a finding that BellSouth is obligated to perform line conditioning that exceeds what it provides for its own customers. Such an interpretation violates not only the FCC's express findings in the *TRO* that BellSouth's line conditioning obligations are premised on Section 251(c)(3)'s nondiscrimination obligations, but also the FCC's holding in the *TRO* that line conditioning does not result in the creation of a "superior network." *TRO,* at ¶¶ 630, 643.

<u>Issue 27 – Fiber To The Home:</u> -- *What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?*

A FTTH loop is a "local loop consisting entirely of fiber optic cable (and associated electronics), whether lit or dark fiber, that connects a customer's premises with a wire center." *TRO,* at n. 802; *see also* 47 C.F.R. 51.319(a)(3). A Fiber-to-the-Curb ("FTTC") loop "brings fiber from the central office to a location near – but not all the way to – the customer's premises." *Order on Reconsideration,* n. 1. In these loops, "fiber is connected to an optical network unit ("ONU") or similar electronics at that location ... An ONU typically serves, for example, eight to 12 homes." *Id.*

In response to a Motion for Reconsideration filed by BellSouth, the FCC held that FTTC loops shall be subject "to the same unbundling framework that the [FCC] established for fiber-to-the-home (FTTH) loops." *Order on Reconsideration,* at ¶ 1.[94] Thus, the rules adopted for FTTH loops apply equally to FTTC loops.

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[94] See Order on Reconsideration, at ¶ 14 ("We do not require incumbent LECs to provide unbundled access to new mass market [illegible] loops for either narrowband or broadband services. In overbuild situations . . . we conclude that competitive LECs should have continued access to either a

With respect to FTTH/FTTC loops, the FCC held that "requesting carriers are not impaired without access to FTTH loops," but further concluded that the level of non-impairment varied depending on whether the FTTH/FTTC loop was a new loop or a replacement of a pre-existing copper loop.

In overbuild situations, where BellSouth is replacing the copper with fiber and elects to retire the copper, BellSouth must offer unbundled access to the fiber loops for narrowband services only. *TRO,* at ¶ 273. In the alternative, BellSouth could choose to keep the existing copper loop connected to the customer after deploying the FTTH/FTTC loop. *TRO,* at ¶ 277.[95] This requirement, however, is "very limited" and "intended only to ensure continued access to a local loop suitable for providing narrowband services to the mass market in situations where an incumbent LEC has deployed overbuild FTTH and elected to retire the pre-existing copper loops." *TRO,* at ¶ 277.

To capture this requirement, the Commission should order that the parties include language in the interconnection agreement specifying that BellSouth only is obligated to unbundle FTTH/FTTC loops in the limited situation of fiber overbuilds where it retires the copper facility, and only to the extent the CLEC is seeking narrowband access.

BellSouth does "not have to offer unbundled access to newly deployed or 'greenfield' fiber loops." *TRO,* at ¶ 273. BellSouth is not obligated to unbundle either the broadband or the narrowband services in this situation. *TRO,* at ¶ 275. The FCC reached this conclusion because

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copper loop or a 64 kbps transmission path in those situations. Finally, we note that, consistent with our recent MDU Reconsideration Order, FTTC loops serving predominantly residential MDUs will be subject to the same unbundling relief as FTTH loops.").

[95] In the event BellSouth maintains the copper facility, BellSouth "need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access ... in which case the incumbent LEC shall restore the copper loop to serviceable condition upon request." 47 C.F.R. 51.319(a)(3)(ii)(B).

it found that the entry barriers for greenfield situations appear to be the same for both ILECs and CLECs. *TRO,* at ¶ 275. Thus, the FCC concluded that ILECs are "not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to a residential unit that previously has not been served by any loop facility." 47 C.F.R. 51.319(a)(3)(i). For these reasons, the Commission should rule that interconnection agreements should not include any language around unbundling of FTTH/FTTC loops in new or greenfield situations.

<u>Issue 28 – Enhanced Extended Link ("EEL") Audits:</u> -- *What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?*

An EEL consists of a combination of an unbundled loop and unbundled dedicated transport, together with any facilities, equipment, or functions necessary to combine those network elements. 47 C.F.R. § 51.5. A CLEC may obtain an EEL as long as the underlying UNEs (the loop and transport elements) are available under Section 251(c)(3). *TRO* ¶ 575. Under the *TRO,* the FCC established specific eligibility criteria that a CLEC must satisfy to obtain access to high capacity EELs. Eligibility criteria include, but are not limited to: (1) an EEL must have 911 capability; (2) an EEL must terminate in a collocation arrangement; and (3) an EEL must be served by a switch capable of switching local voice traffic. *See* 47 C.F.R. § 51.318. To obtain an EEL, a CLEC must certify that it is using the EEL in compliance with the *TRO*'s eligibility criteria. *TRO,* at ¶ 623. BellSouth has no ability to challenge a CLEC's certification on the front end; instead, the *TRO* provides BellSouth with audit rights to ensure compliance with the EEL eligibility criteria and to prevent gamesmanship. *TRO,* at ¶ 626.

When the FCC issued the *TRRO*, it modified its prior rules, which evaluated access to UNEs (and EELs) using a "qualifying services approach." Under this approach, CLECs could

obtain EELs only for the provision of services to compete with core ILEC offerings. CLECs that obtained EELs to provide such "qualifying services" were permitted to use UNEs to provide other services. The FCC amended its framework with the *TRRO*, deleting the qualifying services consideration and replacing it with an absolute prohibition against obtaining UNEs to provide exclusively mobile wireless or interexchange services. 47 C.F.R. § 51.309(b). Except for the change from qualifying services to the prohibition on using UNEs exclusively for wireless or long distance services, the FCC did not otherwise modify its EEL eligibility criteria nor ILECs audit rights.

As a matter of law, therefore, there can be no dispute that BellSouth has the right to conduct an annual audit to determine whether CLECs have complied with the EELs eligibility requirements. While the parties may desire to negotiate language that implements BellSouth's audit rights, there can be no legitimate dispute that BellSouth has an absolute legal right to conduct an audit to ensure that CLECs satisfy the EELs eligibility criteria. BellSouth requests that, as a matter of law, the Commission declare that BellSouth has the right to conduct an annual audit of each CLEC it chooses to determine whether the CLEC has complied with the EELs eligibility requirements.

CONCLUSION

BellSouth respectfully requests that this Commission address each of the issues discussed above so that all parties can negotiate final language for inclusion in their Section 251/252 interconnection agreements based on a common understanding of the law.

Respectfully submitted, this 15th day of July 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

____

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EXHIBIT 1

No.	ISSUE DESCRIPTION
	TRRO / FINAL RULES: What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's Triennial Review Remand Order ("TRRO"), issued February [illegible], 2005?
	TRRO / FINAL RULES: a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations? b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?
	TRRO / FINAL RULES: What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined? (i) Business Line (ii) Fiber-Based Collocation (iii) Building (iv) Route
	TRRO / FINAL RULES: a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate? b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport? c) What language should be included in agreements to reflect the procedures identified in (b)?
5	**TRRO / FINAL RULES:** Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?
6	**TRRO / FINAL RULES:** Once a determination is made that CLECs are not impaired without access to high capacity loops or dedicated transport pursuant to the FCC's rules, can changed circumstances reverse that conclusion, and if so, what process should be included in Interconnection Agreements to implement such changes?

NO.	ISSUE DESCRIPTION
	TRRO / FINAL RULES: (a) Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251? (b) If the answer to part (a) is affirmative in any respect, does the Commission have the authority to establish rates for such elements? (c) If the answer to part (a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements, and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?
	TRRO / FINAL RULES: What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?
	TRRO/FINAL RULES: What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?
0	**TRRO / FINAL RULES:** What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms and conditions that apply in such circumstances?
1	**TRRO / FINAL RULES:** Should identifiable orders properly placed that should have been provisioned before March 11, 2005, but were not provisioned due to BellSouth errors in order processing or provisioning, be included in the "embedded base?"
2	**TRRO / FINAL RULES:** Should network elements de-listed under Section 251(c) (3) be removed from the SQM/PMAP/SEEM?
3	**TRO - COMMINGLING:** What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)?

NO.	ISSUE DESCRIPTION
4	**TRO - CONVERSIONS:** Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?
5	**TRO – CONVERSIONS:** What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?
6	**TRO – LINE SHARING:** Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?
7	**TRO – LINE SHARING – TRANSITION:** If the answer to foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?
8	**TRO – LINE SPLITTING:** What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?
9	**TRO – SUB-LOOP CONCENTRATION:** a) What is the appropriate ICA language, if any, to address sub loop feeder or sub loop concentration? b) Do the FCC's rules for sub loops for multi-unit premises limit CLEC access to copper facilities only or do they also include access to fiber facilities? c) What are the suitable points of access for sub-loops for multi-unit premises?
0	**TRO – PACKET SWITCHING:** What is the appropriate ICA language, if any, to address packet switching?
1	**TRO – CALL-RELATED DATABASES:** What is the appropriate ICA language, if any, to address access to call related databases?
2	**TRO – GREENFIELD AREAS:** a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?
3	**TRO – HYBRID LOOPS:** What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?
24	**TRO – END USER PREMISES:** Under the FCC's definition of a loop found in 47 C.F.R. §51.319(a), is a mobile switching center or cell site an "end user customer's premises"?

NO.	ISSUE DESCRIPTION
5	**TRO – ROUTINE NETWORK MODIFICATION**: What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?
6	**TRO – ROUTINE NETWORK MODIFICATION**: What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?
7	**TRO – FIBER TO THE HOME**: What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?
8	**TRO – EELS AUDITS**: What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?
9	**252(i):** What is the appropriate language to implement the FCC's "entire agreement" rule under Section 252(i)?
0	**ISP Remand Core Forbearance Order:** What language should be used to incorporate the FCC's *ISP Remand Core Forbearance Order* into interconnection agreements?
1	**General Issue:** How should the determinations made in this proceeding be incorporated into existing Section 252 interconnection agreements?

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March 26, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 01-337, 01-338, 02-33 and 02-52

Dear Ms. Dortch:

Verizon is providing the attached as a follow up to its March 18, 2004 meeting with representatives from the Office of General Counsel and the Wireline Competition Bureau. Please let me know if you have any questions.

Sincerely,

Dee May

Attachments

cc: P. Arluk
M. Carey
J. Dygert
T. Hanbury
T. Navin
A. Schlick
P. Silberthau
J. Stanley
D. Weiner

THE RECENT D.C. CIRCUIT DECISION AFFIRMING THE BROADBAND PORTIONS OF THE *TRIENNIAL REVIEW ORDER* PROVIDES FURTHER STRONG SUPPORT FOR GRANTING VERIZON'S PETITION FOR FORBEARANCE FROM ANY SECTION 271 UNBUNDLING OBLIGATIONS FOR BROADBAND

As Verizon discussed in its October 24 *ex parte* submission and its reply comments,[1] the findings underlying the elimination of section 251 broadband unbundling requirements in the *Triennial Review Order* establish the complete legal and factual predicate for forbearance from any stand-alone section 271 broadband unbundling requirement under section 10(a) of the Communications Act, 47 U.S.C. § 160(a). As Part I of this white paper explains, the D.C. Circuit's recent opinion in *United States Telecomm. Ass'n v. FCC*, No. 00-1012, slip op. (D.C. Cir. Mar. 2, 2004) ("*USTA II*"), provides further strong support for the same conclusion, both by upholding the broadband portions of the *Triennial Review Order* generally and, more specifically, by affirming the Commission's conclusion that, in the already competitive broadband market, the interests of competition and consumers, both in the near term and in the long term, will best be served by refraining from imposing unbundling obligations. Those conclusions are directly relevant to, and dispositive of, the inquiry required under the forbearance criteria set out in section 10(a) of the Act. Part II of this white paper then briefly refutes arguments, raised in a recent *AT&T ex parte* letter,[2] principally that section 10(a)(1) somehow requires the continued enforcement of broadband unbundling obligations for hybrid loops simply to promote AT&T's private interests even though, as the Commission and D.C.

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[1] Letter from Susanne A. Guyer, Verizon, to Chairman Michael Powell and Commissioners, CC Docket No. 01-338, (filed Oct. 24, 2003) ("*Verizon Ex Parte Letter*"); Reply Comments of Verizon, *Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (filed Nov. 26, 2003) ("*Verizon Reply Comments*").

[2] Letter from David Lawson, AT&T, to Marlene Dortch, CC Docket. Nos. 01-338 *et al.*, (filed March 3, 2004) ("*AT&T Letter*").

Circuit have found, enforcement of those obligations would harm consumers and competition overall.[3]

I. *USTA II* CONFIRMS THAT SECTION 10(a) IS SATISFIED

A. As discussed in Verizon's previous filings, the *Triennial Review Order*—which holds unequivocally that ILECs "do not have to offer unbundled access" to broadband facilities[4]—adopts all of the legal and factual findings needed to meet the forbearance criteria of section 10(a) for broadband elements, including fiber-to-the-premises ("FTTP") loops, packet switching, and the packetized functionality of hybrid loops.

As an initial matter, consistent with its own conclusion that broadband constitutes a separate product market,[5] the Commission's *Triennial Review* Order correctly evaluated

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[3] This white paper addresses issues arising only under section 10(a). Verizon relies on its previous submissions with respect to AT&T's arguments concerning section 10(d) or any other provision.

[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd. 16978 ¶¶ 7, 23 (2003) ("*Triennial Review Order*").

[5] The FCC has consistently found that broadband services are in a separate market from traditional narrowband telephone services. *See, e.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd. 11857, ¶ 18 (2000); Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd. 2398, ¶ 48 (1999) ("*First Advanced Services Report*"). This finding has likewise been echoed by the Department of Justice and the Federal Trade Commission. *See* Department of Justice, Antitrust Division Competitive Impact Statement, *United States v. AT&T Corp. and MediaOne Group, Inc.*, No. 00-1176 (D.D.C. filed May 25, 2000); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd. [illegible], ¶ 63 (2001); Federal Trade Commission Complaint ¶ 21, *American Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000).

impairment with respect to the broadband market, and took into account the "state of intermodal competition" for broadband service. *Triennial Review Order* ¶¶ 288, 292. In doing so, the Commission heeded the injunction of *USTA I* that the impairment inquiry must focus on "specific markets or market categories," and, in the broadband market, must "consider the relevance of competition in broadband services coming from cable" and other technologies. *United States Telecomm. Ass'n v. FCC*, 290 F.3d 415, 426; 428 (D.C. Cir. 2002) ("*USTA I*"). Based on that analysis, the Commission concluded that there simply was no impairment with respect to most of the broadband capabilities of the ILECs' networks. *See Triennial Review Order* ¶¶ 273-276 (no impairment with respect to the broadband capabilities of "fiber-to-the-home" loops); *id. at* ¶ 537-538 (no impairment with respect to packet switching); *id.* at ¶¶ 258-260 (no impairment with respect to high frequency portion of the loop). As the Commission later explained to the D.C. Circuit (*see* Brief for Respondents, No. 00-1012, at 50 (D.C. Cir. filed Dec. 31, 2003)), it found some limited evidence of impairment only with respect to "hybrid" loops, but noted that "this impairment at least partially diminishes with the increasing deployment of fiber," and determined that access to copper subloops "adequately addresses" any limited impairment that may exist. *Triennial Review Order* ¶ 286, 291.

In addition, the Commission went further and considered two additional factors that caused it to conclude that declining to impose unbundling obligations ultimately would best serve the interests of competition and therefore consumers. *First*, consistent with the Court's directive in *USTA I*, the Commission paid particular attention to "the state of intermodal competition for broadband service," and the fact that "broadband services [] are currently provided in a competitive market." *Triennial Review Order* ¶ 292. In particular, the Commission emphasized that cable companies have "a leading position in the marketplace," with

by far the largest share of the broadband market, and that cable's rate of growth "continues to outpace" the rate of growth of local telephone companies' broadband services. *Id.*; *see also id.* ¶ 262 ("cable modem service is the most widely used means by which the mass market obtains broadband services," and "the gap between cable modem and ADSL subscribership continues to widen"). Under these circumstances, the Commission explained, the potential benefit of unbundling "appears to be obviated to some degree by the existence of a broadband service competitor with a leading position in the market place." *Id.* ¶ 292. The Commission also pointed out that it consistently "has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines." *Id.* ¶ 263.[6] In the

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[6] The Commission repeatedly has found that the broadband market is developing on a competitive basis and the preconditions for monopoly are absent. *See, e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Report, 14 FCC Rcd. 2398, ¶ 48 (1999) "*First Advanced Services Report*") ("The preconditions for monopoly appear absent . . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio"); Inquiry *Concerning the Deployment of Advanced Telecommunications Capability*, Third Report, 17 FCC Rcd. 2844, ¶¶ 79-88 (2002) (describing development of intermodal competition in broadband market); Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd. 22,745 ¶ 5 (2001) ("[T]he one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Report and Order and Memorandum Opinion and Order, 15 FCC Rcd. 11857, ¶¶ 17, 19 (2000) (noting with approval "a continuing increase in consumer broadband choices within and among the various delivery technologies," which indicates that "no group of firms or technology will likely be able to dominate the provision of broadband services"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd. 9816, ¶ 116 (2000) (finding that cable operators, despite having a commanding share of the broadband

Commission's judgment, "the fact that broadband service is actually available through another network platform and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon" unbundled access to the broadband capabilities of local telephone company networks. *Id.*

Second, in addition to concluding that unbundling was unnecessary, the Commission also found that imposing unbundling obligations was affirmatively harmful in that it would discourage investment in and deployment of broadband facilities and services by ILECs and CLECs alike to compete with the dominant cable providers. As the Commission explained, imposing unbundling obligations "would blunt the deployment of advanced telecommunications infrastructure by *incumbent* LECs and the incentive for *competitive* LECs to invest in their own facilities." *Triennial Review Order* ¶ 288 (emphasis added). In contrast, declining to impose unbundling obligations "gives *incumbent* LECs an incentive to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings. *Id.* ¶ 290 (emphasis added). Likewise, "by prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate *competitive* LEC deployment of next-generation networks, . . . including the deployment of their own facilities necessary for providing broadband services to the mass market." *Id.* (emphasis added). The Commission therefore concluded that "the costs associated with unbundling these packet-based facilities outweigh the potential benefits," *id.* at ¶ 295, and that "[t]he end result" of removing those unbundling obligations "is that consumers will benefit from this race to build

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market, face "significant actual and potential competition from . . . alternative broadband providers").

next generation networks and the increased competition in the delivery of broadband services." *Id.* ¶ 272.

Accordingly, based on its comprehensive analysis of conditions in the broadband market, the Commission concluded that the interests of competition and consumers would best be served by declining to impose unbundling obligations on the broadband capabilities of ILECs' networks.

B. The D.C. Circuit's recent decision in *USTA II* strongly reinforces these conclusions and, as discussed below, takes them one step further.

In their challenge to the broadband portions of the *Triennial Review Order*, AT&T and other CLECs focused principally on the Commission's findings with respect to hybrid loops, and argued that the Commission was barred from considering factors such as the impact of unbundling on investment incentives so long as *any* degree of impairment is present. More specifically, they urged that the Commission "may not tolerate an impairment of competition today in order to create incentives for investment" that it predicts will benefit "consumers of tomorrow." *USTA II*, slip op. 37, 39a. The court squarely rejected those arguments. It reasoned that, while the statutory provision at issue there, section 251(d)(2), *does* require consideration of impairment, it is only the "minimum" consideration that must be taken into account. Accordingly, the court found that the Commission properly considered the broader impact of unbundling obligations when it determined that the interests of competition and consumers ultimately would best be served by declining to impose unbundling obligations. *Id.* at 37-40. In particular, the court found that "an unbundling order's impact on investment" must be considered given the Act's goal of "boosting competition in broader markets,'" as well as section 706's

goal of moving beyond "competition piggy-backed on ILEC facilities . . . [by] removing barriers to infrastructure investment." *Id.*

Having dispatched the argument that formed the principal basis for AT&T's challenge, the court then proceeded to affirm each of the Commission's broadband-related rulings. For example, in the context of hybrid loops, the court endorsed the Commission's conclusion that declining to impose an unbundling requirement would provide ILECs with "greater incentives . . . to deploy the additional electronic equipment needed to provide broadband access over a hybrid loop" and that, "because deployment of fiber feeder is the first step toward FTTH," declining to unbundle those "fiber facilities increases incumbents' incentives to develop and deploy FTTH". *Id.* at 39-40.[7] And the court also affirmed the Commission's "conclusion that unbundling hybrid loops would deter *CLECs* themselves from investing in deploying their own facilities, possibly using different technology, "whereas declining to impose an unbundling obligation could be "effective in stimulating investment in all-fiber loops." *Id.* (emphasis in original).

Significantly, the court expressly affirmed the Commission's authority to balance competing considerations in determining what ultimately is in the best interest of competition and consumers. Thus, the court pointedly noted that, even if "the Commission's judgment entails increasing consumer costs today in order to stimulate technological innovations" that may benefit consumers tomorrow, "there is nothing in the Act barring such trade-offs." *Id.* at 40. In the context of the competitive broadband market, however, the court affirmed the Commission's

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[7] Notably, the CLECs did not even challenge the Commission's decision that packet switches generally need not be unbundled, but instead challenged that conclusion only as it relates to the packet-switched capabilities of hybrid loops.

conclusion that any such concerns are largely obviated in any event, because "any damage to broadband competition from denying unbundled access to the broadband capacities of hybrid loops is likely to be mitigated by the availability of loop alternatives or intermodal competition." *Id.* at 41. This is true, moreover, even if the various loop alternatives available to CLECs are only a "partial substitute" that will "mitigate, not eliminate CLEC impairment." *Id.* As the court put it, *"[m]ore important*, we agree with the Commission that robust intermodal competition from cable providers – the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60% – means that even if all CLECs were driven from the broadband market, *mass market consumers will still have the benefits of competition between cable providers and ILECs*." *Id.* (citation omitted) (emphasis added).

The court reached similar conclusions with respect to other broadband elements. For example, with respect to FTTH loops, the court concluded that the Commission would have been justified in declining to impose an unbundling obligation even if CLECs were impaired to some degree given that "deployment is still very limited," that "both the costs and potential benefits of deployment are high," and that "ILECs and CLECs face similar entry barriers." *Id.* at 44. Under these circumstances, an unbundling requirement is "likely to delay infrastructure investment," while the absence of unbundling "will give all parties an incentive to take a shot at this potentially lucrative market." *Id.* And with respect to line sharing, the court again concluded that, even if CLECs were impaired to some degree without mandatory line sharing, the Commission had properly concluded given the "substantial intermodal competition from cable companies" that, "at least in the future, line sharing is not essential to maintain robust competition in this market." *Id.* at 45-46.

In sum, therefore, the court upheld the Commission's decision that *not* imposing an unbundling obligation for any of these broadband elements was in the best interest of competition and consumers, *"in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband."* *Id.* at 46 (emphasis added).

C. Although the court's analysis focused on the unbundling standards of section 251(d)(2), the same focus on what ultimately is in the best interest of competition and consumers is all the more appropriate to the broader inquiry required by section 10(a). And even apart from the breadth of that provision on its own terms, section 706 independently reinforces the need to perform such an inquiry, both because it incorporates Congress's considered judgment that the interest of consumers will best be served by encouraging deployment of broadband capabilities, and because, in furtherance of that judgment, it directs the Commission to "remove barriers to infrastructure investment" in order to "promot[e] competition" for broadband services. Indeed, in the *Advanced Services Order*, the Commission made clear that section 706 "direct[s] the Commission to use the authority granted in other provisions, *including the forbearance authority under section 10(a)*, to encourage the deployment of advanced services."[8] Accordingly, just as the *Triennial Review Order* and *USTA II* confirm that section 706 is relevant to the broadband unbundling analysis,[9] the *Advanced Services Order* confirms that section 706 is relevant to the Commission's application of section 10. Because section 10 allows the Commission even

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8 *Advanced Services Order* ¶ 69.

9 *See Triennial Review Order* ¶ 288 (broadband unbundling obligations would stand "in direct opposition to the express statutory goals authorized in section 706" because they would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities").

greater flexibility than section 251(d)(2) to remove unbundling obligations that would harm competition overall, the D.C. Circuit's decision in *USTA II* confirms the Commission's authority to forbear from any stand-alone broadband unbundling obligations under section 271.

This conclusion is further reinforced by an analysis of the specific requirements of section 10. Section 10(a)(1)-(3) provides that the Commission "shall forbear from applying any regulation or any provision of this Act" to any "telecommunications carrier" if it determines that: (1) enforcement "is not necessary to ensure that the charges, practices, classifications, or regulations" by that carrier for a telecommunications service "are just and reasonable and are not unjustly or unreasonably discriminatory;"[10] (2) enforcement is not "necessary for the protection of consumers" in those or other respects; and (3) forbearance would be "consistent with the public interest."[11] As the D.C. Circuit's decision strongly confirms, each of these criteria is abundantly satisfied here.

1. Section 10(a)(1) is satisfied because enforcement of any unbundling obligations that may apply to broadband elements under section 271 is not necessary to ensure that charges, practices or classifications are just and reasonable. As an initial matter, while this provision does

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[10] 47 U.S.C. § 160(a)(1).

[11] These statutory inquiries are closely related, and each logically builds on its predecessor. Therefore, the fact that the third criterion in the statutory standard may be sufficiently broad to encompass the first two, or that the second criterion may be sufficiently broad to encompass the first, does not render the first two criteria superfluous. On the contrary, reading the criteria in the order they were included in the statute by Congress shows that the analysis merely progresses from certain specific considerations that must be taken into account to more general considerations. Moreover, there will be circumstances under which one or both of the first two criteria are not relevant, but where the subsequent criterion or criteria are. For example, if the requirement at issue is one designed to protect consumer privacy, the first criterion addressing rates would not be [illegible] the latter two criteria would. Or, if the requirement is one affecting law enforcement access to communications, the first two criteria would not necessarily be relevant, but the third presumably would.

not specify what particular charges are the subject of its inquiry, the obvious focus here is on charges in the competitive broadband market, and ultimately the analysis must focus on charges to consumers.[12] Indeed, the very theory of regulation is that it exists to protect the interests of consumers, and the Communications Act is no different in this respect. The Act itself provides that its purpose is to make available to "*the people* of the United States . . . communication service with adequate facilities at reasonable charges. . . ." 47 U.S.C. § 151 (emphasis added).

In that respect, the forbearance provision reflects the basic antitrust principle that the government should intervene in the marketplace only "for the 'protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The Commission has long identified that same principle with the 1996 Act more generally. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, 11 FCC Rcd. 15499, ¶ 618 (1996) (local competition rules should be, as "Congress intended, *pro-competition*" rather than "*pro-competitor*"); Recommended Decision, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd. 6153, 6195 (Dec. 22, 2000) ("Consumers are and should be the ultimate beneficiary of the 1996 Act"). Similarly, the purpose of section 10 is not to favor the private interests of particular carriers, but "to allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest." 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler).

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[12] To be sure, there may be some instances in which wholesale rates to other carriers are also relevant to this analysis, particularly to the extent those rates may effect the charges ultimately borne by consumers. There is no issue as to wholesale rates that is implicated here, however. Rather, whether and on what terms carriers have an obligation to provide wholesale broadband services to other carriers is currently under consideration in separate proceedings.

Here, the interest of ensuring reasonable rates for consumers in the broadband market is adequately protected without imposing unbundling obligations under *Section 271* for the same reasons that the Commission and the D.C. Circuit concluded that the interests of consumers would best be served by declining to impose unbundling obligations under *Section 251*.

First, the market forces produced by robust intermodal competition guarantee that consumers will have access to broadband services at just and reasonable terms. As the Commission itself has previously recognized in conducting the section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."[13] Following that principle, the Commission recently concluded that Verizon's, SBC's, and BellSouth's request for forbearance with respect to their international directory assistance services satisfied section 10(a)(1) because these carriers "would be new entrants in the market for [these services]" and, [a]s such, . . likely would face competition from interexchange carriers . . . , Internet service providers, and others in the provision of those services."[14] The Commission also found it highly relevant that there was "no indication that the petitioners have used, or could use, their ownership interests in dominant foreign carriers to control access by other domestic carriers to directory listing information for the countries where those carriers operate." *SBC IDA Order* ¶ 19.

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[13] Memorandum Opinion Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory* Assistance, 14 FCC Rcd. 16252, ¶ 31 (1999) ("*US West NDA Order*").

[14] Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, FCC 04-67 ¶ 16 (rel. Mar. 19, 2004) ("*SBC IDA Order*").

That reasoning applies with at least as much force here, because Verizon likewise "do[es] not exercise control over the components used to provide" (*id.* ¶ 20) the broadband services of its intermodal competitors and because it faces competition in the broadband market at least as rigorous as that found in the international directory assistance market. According to the Commission's most recent *High-Speed Services Report*, as of June 2003, cable providers controlled more than two-thirds of all high-speed lines provided to residential and small-business customers,[15] which is the segment of the broadband market that cable operators target.[16] As of that same date, cable also controlled more than *83 percent* of the most rapidly growing segment of mass-market broadband lines—those capable of over 200 kbps in both directions.[17] More recent data confirm that cable has continued to extend its lead; in the second half of 2003, cable providers added just over two million subscribers, compared to only 1.6 million added by DSL providers.[18]

As discussed above, moreover, the Commission and the D.C. Circuit themselves have emphasized the importance of intermodal competition in the broadband market. For example, the Commission emphasized that broadband services are "currently provided in a competitive

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[15] Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2003* at Tables 3 & 4 (Dec. 2003) ("*High-Speed Services Report*").

[16] *Compare id.* at Table 3 (Cable provides 13,660,541 high-speed lines to residential and small-business customers) *with id.* at Table 1 (Cable provides a total of 13,684,225 high-speed lines).

[17] *See id.* at Table 4. Residential and small-business high-speed lines capable of over 200 kbps in both directions represented 85 percent of all residential and small-business high-speed lines added between June 2002 and June 2003, and 78 percent of all high-speed lines added during that same period. *See id.* at Tables 1, 3 & 4.

[18] J. Hodulik & A. Bourkoff, UBS, *High-Speed Data Update for 3Q3* at Table 3 (Dec. 1, 2003).

market," that cable companies have "a leading position in the marketplace," and that cable's rate of growth "continues to outpace" the growth of telephone companies' broadband services. *Triennial Review Order,* ¶ 292. The Commission also emphasized the important potential of other intermodal platforms and technologies. *Id.* at ¶ 262. Likewise, the D.C. Circuit emphatically "agree[d] with the Commission that robust intermodal competition from cable providers . . . means that even if all CLECs where driven from the broadband mass market, *mass market consumers will still have the benefits of competition between cable providers and ILECs.*" *USTA II,* slip op. at 41 (emphasis added). And, of course, the fact that "intermodal competition from cable ensures the persistence of substantial competition in broadband," *id.* at 46, ultimately provides, in the Commission's own words, "the most effective means of ensuring that . . . charges . . . are just and reasonable," *U S West NDA Order,* ¶ 31.

Second, in addition to the existence of vigorous intermodal competition, the *Triennial Review Order* also found that the interests of consumers, including their interest in reasonable rates, would be further protected by other alternatives that remain available to CLECs. For example, the *Order* determines that, because "competitive LECs retain alternative methods of accessing loop facilities in hybrid loop situations," including "unbundled access to incumbent LEC copper subloops," and "broad availability of TDM-based loops," *Triennial Review Order* ¶¶ 291 & n.839; 295, they will have "a range of options for providing broadband capabilities." *Id.* at ¶ 291. In addition, as noted above, the *Order* also finds that any impairment with respect to hybrid loops "diminishes with the increasing deployment of fiber." *Id.* ¶ 286.

Of course, the existence of intermodal competition is relevant in this respect as well. This is so because, in addition to directly ensuring that rates will be just and reasonable, intermodal competition also creates the incentive for ILECs to provide wholesale service

offerings over their next-generation networks on negotiated, commercially reasonable terms. *See Triennial Review Order* ¶ 253. Because ILECs face intense intermodal competition from the more prevalent cable modem platform, they will need to find ways to keep traffic "on-net" to cover their enormous capital investments, including through the provision of wholesale service offerings to independent providers. As Verizon previously explained at length,[19] such market-based services are entirely distinct from the *unbundling requirements* at issue here, which would subject ILECs to as-yet undefined and (if experience is any guide) constantly shifting regulatory prescriptions as to what must be unbundled and at what price, accompanied by "the tangled management inherent in shared use of a common resource." *USTA I*, 290 F.3d at 429. As AT&T itself told the Commission scarcely three years ago, "fundamental economic truths" establish that "[n]egotiated agreements, rather than government mandates, are the most appropriate means for creating and defining access relationships."[20] Those truths still hold.

Third, even in a *different* case where the combination of intermodal competition and other alternatives were *not* present to ensure competitive rates in the near term, the Commission nonetheless would be entitled to balance any potential short term risks against the longer term benefits of promoting investment in and accelerating deployment of innovative services at reasonable rates. Indeed, the Commission has squarely held that such short-term effects impose no bar to forbearance where, "*on balance*, the pro-consumer benefits of [forbearance] . . .

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[19] Verizon Reply Comments at 14-15.

[20] Comments of AT&T Corp., *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket 00-185, at 80 (filed Dec. 1, 2000). Whether these voluntary service offerings would be subject to traditional common carriage obligations is a separate question presented in the Commission's pending inquiry into wireline broadband obligations. *See* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019 ¶ 51 (2002).

outweigh any potential competitive advantage that may accrue to [the carrier requesting forbearance]."[21] The D.C. Circuit likewise has made this same point. For example, in *USTA II* itself, the court pointedly noted that even if the Commission's judgment resulted in some "increas[e] [in] consumer costs today in order to stimulate technological innovations" to benefit consumers tomorrow, "there is nothing in the Act barring such tradeoffs." *USTA II,* slip op. at 40. Likewise, the D.C. Circuit previously has concluded that this principle extends to determining what policies will best promote deployment of innovative services at reasonable rates. Thus, in *Consumer Electronics Ass'n v. FCC,* 347 F.3d 291, 301-03 (D.C. Cir. 2003), the D.C. Circuit upheld a Commission rule that required all televisions of a certain size to include a DTV tuner, notwithstanding the fact that some consumers would have to pay more for a feature they do not need. In doing so, the court deferred to the Commission's predictive judgment that its rule would ultimately "bring digital tuners to the market in quantity and at reasonable prices," because it would "increase production volumes and, through economies of scale, lower the price of digital tuners for all television purchasers." *Id.* at 301. It also expressly rejected complaints that this might require consumers who do not need these tuners to bear some of "the cost of

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[21] *U S West NDA Order* ¶ 44. The Commission reasoned:

> Although U S WEST will retain its advantageous use of the 411 dialing code until its local markets are open to competition, we do not find it necessary to prohibit its use of the code until this time. Rather, we find that, on balance, the pro-consumer benefits of permitting U S WEST to use the 411 or 1-411 dialing during this time outweigh any potential competitive advantage that may accrue to U S WEST. Moreover, we find that prohibiting U S WEST from using the 411 dialing code for nonlocal directory assistance service for a finite period of time, and then reinstating its use of such code after section 271 authority has been granted, would not only be unduly disruptive to U S WEST's provision of directory assistance service, but would likely cause significant customer confusion.

Id.

making the tuners more affordable," holding that this balancing of interests is "well within the authority of the responsible agency." *Id.* Similarly, in *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), the D.C. Circuit held that whether charges and practices meet the "just, reasonable, and nondiscriminatory" standard in the first place depends on the degree of competition in the market, and that, in conducting that analysis, "the Commission [is] 'entitled to value the free market, the benefits of which are well-established.'" *Id.* at 420 (*quoting MCI WorldCom v. FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000)).

Fourth, the Commission's authority to take a long view of the policy considerations relevant to the forbearance inquiry is strongly reinforced by the Commission's overarching obligation under section 706 to resolve statutory ambiguities in a way that promotes the long-term deployment of greater broadband infrastructure.[22] Here, as noted, forbearance is needed to give both ILECs and CLECs appropriate incentives to build out broadband facilities of their own to compete with the dominant cable providers. Thus, just as the Commission is entitled to take the long view in requiring digital tuners to be included in every television because it ultimately will bring digital tuners to "the market in quantity and at reasonable prices," *Consumer Electronics Ass'n.*, 347 F.3d at 301, so too is it entitled to conclude that declining to impose

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[22] *See* 47 U.S.C. § 157; *Advanced Services Order* ¶ 69. Forbearance here is also consistent with the Commission's decision to forbear from applying tariffing requirements to SBC's provision of advanced services through its affiliate, ASI. Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd. 27000 (2002). In that order, the Commission concluded that tariff regulation is not "necessary for ensuring that the rates, terms, and conditions for ASI's advanced services are just, reasonable, and are not unjustly or unreasonably discriminatory," instead finding that "the better policy is to allow ASI to respond to technological and market developments without our reviewing in advance the rates, terms, and conditions under which ASI provides service." *Id.* ¶ 22.

unbundling obligations on broadband will best ensure reasonable prices because "consumers will benefit from this race to build next-generation networks and the increased competition in the delivery of broadband services." *Triennial Review Order* ¶ 272. And this is all the more true where promoting investment in broadband infrastructure will further the Act's goal of "?boosting competition in broader markets.'" *USTA II*, slip op. at 36 (quoting *USTA I*). Here, encouraging investment will promote competition both for broadband Internet access services and, in the case of new fiber networks in particular, for video services that cable also dominates. Accordingly, promoting investment also will help to ensure reasonable rates in those "broader markets" as well.

Finally, any determination made in the context of a forbearance petition necessarily requires the Commission to make a predictive judgment as to whether the requirement at issue is necessary under current and future market conditions. Any such predictive judgment obviously is entitled to great deference. *See, e.g., Consumer Electronics Ass'n*, 347 F.3d at 300. Moreover, precisely because that judgment is inherently predictive, it also is subject to being revisited in the event that actual experience provides evidence of a demonstrable market failure that warrants regulatory intervention. But the fact that the Commission cannot know with absolute, metaphysical certainty how future market conditions will develop cannot justify retaining requirements that the Commission has found to be both unnecessary and affirmatively harmful. Indeed, as Chairman Powell has explained, government regulation is a "fundamental intrusion on free markets and potentially destructive, particularly where innovation and

experimentation are hallmarks of an emerging market."[23] Accordingly, "[s]uch interference should be undertaken only where there is weighty and extensive evidence of abuse."[24] In the extremely unlikely event that market experience provides evidence of abuse, therefore, the Commission can intervene to address it. But imposing anticipatory regulations in the absence of such evidence is fundamentally destructive to the very innovation that the Commission and Congress have concluded will best serve consumers.

That is all the more true here, given the weighty burden of other anticipatory regulations that local telephone companies' broadband services already must bear. Those services today remain subject to the full gamut of Title II regulations that were designed for a different market in a different era. These range from tariffing requirements, to cost-plus regulation of rates, to archaic requirements imposed under the *Computer II* and *Computer III* decisions that require telephone companies to offer transmission components of their broadband services separately, under tariff, at regulated rates, and to unbundle those services into any component parts. And these regulations continue to apply today only to telephone companies and not to the dominant cable companies with whom they compete. Accordingly, while we believe the Commission should move promptly to remove these other requirements in separate proceedings now underway, there simply is no basis to impose still further obligations such as those at issue here.

2. Section 10(a)(2) and (3) are satisfied as well: *i.e.*, continued unbundling is unnecessary to protect consumers (with respect to non-rate issues as well as rates), *see* 47 U.S.C.

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23 Remarks of Michael K. Powell, Chairman, FCC, at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," p. 4 (Feb. 8, 2004).

24 *Id.*

§ 160(a)(2), and forbearance is in the public interest, 47 U.S.C. § 160(a)(3). Indeed, while we need not belabor the point, the analysis outlined above makes it abundantly clear that these provisions are satisfied for the same reasons that section 10(a)(1) is satisfied. Just as the Commission concluded in its *SBC IDA Order* that forbearance satisfied both of these provisons because the petitioners' "entry into the market . . . likely will increase competition in the provision of these services," which, in turn, "is likely to benefit consumers," *SBC IDA Order* ¶¶ 20-21, forbearance here is clearly in the public interest. In short, these criteria are satisfied for the simple reason that the Bell companies "are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment." *Triennial Review Order* ¶ 3.[25] The Commission's and D.C. Circuit's analysis of investment incentives, *see, e.g., USTA II* slip op., 37, 41, reinforce that conclusion. As discussed above, Section 706 provides still further support by singling out broadband for special attention and by "direct[ing] the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services." *Advanced Services Order* ¶ 69.

3. Moreover, actual market experience provides concrete evidence demonstrating that section 10(a)'s criteria are met. Market activity since the Commission's adoption of the *Triennial Review Order* in February 2003, when it announced that it would remove any

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[25] *See Triennial Review Order* ¶ 272 ("consumers will benefit from [the] race to build next generation networks and the increased competition in the delivery of broadband services"). The same is necessarily true of the section 10(b) mandate to consider whether forbearance will promote "competitive market conditions." 47 U.S.C. § 160(b).

unbundling obligations for broadband elements, confirms that removing unbundling obligations results in reasonable, competitive rates, spurs competition with cable and thereby benefits consumers and the public interest generally. In the intervening year, Verizon alone has invested more than $600 million to increase the availability of its DSL services, such as by adding more than 10 million extra DSL-qualified lines.[26] Verizon also slashed DSL prices, increased output, and introduced new and improved service offerings. For example, in May 2003, Verizon lowered its monthly DSL rate by 30% to $34.95, increased its download speed from 768 kbps to 1.5 Mbps, and also has since introduced new symmetrical services tailored to the needs of business customers.[27] As described further below and in the accompanying fact report, these same trends are observed throughout the industry.

Moreover, this and similar moves by other companies have prompted cable companies to respond in kind by reducing prices, offering new promotional or discount rates, improving the speed of their own services, and expanding aggressively to target small and medium businesses with services tailored to their needs. All of this is but a taste of things to come. Presuming that the Commission's rules are conducive to further investment, Verizon intends to devote one billion dollars this year alone to the service networks capable of challenging cable in its core video market, as well as in the broadband Internet access market. And for their part, cable

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[26] Letter from William P. Barr, Verizon, to Chairman Michael Powell, CC Docket No. 01-338, at 2 (filed Jan. 7, 2004).

[27] Transmittal No. 311 and 317, filed April 14 and 28, 2003. *See also* G. Campbell, *et al.*, Merrill Lynch, *3Q03 Broadband Update: The Latest on Broadband Data and VoIP Services in North America* at Table 4 (Nov. 3, 2003) ("*Merrill Lynch 3Q03 Broadband Update*"); J. Hodulik & A. Bourkoff, UBS, *High-Speed Data Update for 3Q03* at 9 (Dec. 1, 2003) ("*UBS High-Speed Data Update*"); A. Breznick, *Major MSOs Scramble To Boost Cable Modem Download Speeds*, Communications Daily at 6 (Dec. 15, 2003); S. Emling, *Battle for Broadband Is on as Phone Industry Cuts Prices*, Cox News Service (May 21, 2003).

companies are expanding aggressively in the voice telephone market. Indeed, as detailed in the accompanying fact report, cable companies already offer voice telephone service to more than 15 percent of U.S. households and have announced plans that would increase that figure to 35 percent by the end of this year alone. Removing remaining barriers to infrastructure investment will further the virtuous cycle of investment, innovation and competition.

II. THE ARGUMENTS SET FORTH IN AT&T'S EX PARTE LETTER ARE MERITLESS

1. In its recent *ex parte* letter, AT&T argues that, under section 10(a)(1), the Commission's limited impairment finding for hybrid loops precludes the Commission from exempting those loops from any stand-alone section 271 unbundling requirement.[28] This argument is just a warmed-over version of the same argument the D.C. Circuit dismissed in *USTA II*. As discussed above, AT&T there argued that, upon any finding of "impairment," the Commission must single-mindedly protect the private interests of particular *competitors* as "an end in itself" rather than promoting the public interest in *competition* generally. *USTA II*, slip op. at 36 (internal quotes omitted). The D.C. Circuit squarely rejected that argument, observing, among other things, that section 706 and the Act's overarching goals require the Commission to "boost[] competition in broader markets" by "removing barriers to infrastructure investment," *id.* (internal quotes omitted), and by attaching due weight to the overwhelming market share of cable modem providers. *See* Part I, *supra*. As the court held, "impairment" is indeed the "touchstone" of the analysis under section 251(d)(2), but the Act more broadly mandates

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[28] By resting its section 10(a)(1) argument on the Commission's qualified impairment findings with respect [illegible] loops, AT&T presumably concedes that section 10(a)(1) provides no bar to forbearance from broadband elements (such as fiber to the premises) as to which the Commission found *no* impairment. *See Triennial Review Order* ¶ 273.

countervailing consideration "of factors such as an unbundling order's impact on investment." *USTA II*, slip op. at 37.

It follows *a fortiori* that a finding of "impairment"—particularly the highly qualified finding at issue here—is even less dispositive under section 10(a), which does not even mention that concept, than under section 251(d)(2), where it features prominently. AT&T nonetheless contends that, because there is no "at a minimum" clause in section 10, "no such balancing is permitted under section 10(a)(1)," and the Commission is rigidly constrained to protect individual CLECs even when doing so will harm competition and consumers. AT&T Letter at 9. This makes no sense. As explained above, just as the *Triennial Review Order* makes clear that section 706 is relevant to the broadband unbundling analysis,[29] the *Advanced Services Order* unequivocally confirms that section 706 is relevant to the Commission's application of section 10, which is at least as subject to interpretation as section 251(d)(2). There is no plausible basis for second-guessing that determination here.

AT&T's interpretation of section 10(a)(1) also suffers from fatal circularity. That provision directs the Commission to consider whether continued application of "any regulation" to a particular telecommunications service is "necessary to ensure that the charges [and] practices" associated with that service "are just and reasonable." 47 U.S.C. § 160(a)(1). Significantly, however, Verizon is not seeking forbearance from the terms of a "service" it will otherwise provision. To the contrary, Verizon is seeking forbearance from an underlying

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[29] *See Triennial Review Order* ¶ 288 (broadband unbundling obligations would stand "in direct opposition to the express statutory goals authorized in section 706" because they would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities").

facilities-unbundling obligation. If, as Verizon argues, there should be no such unbundling obligation to begin with, section 10(a)(1) can impose no barrier to forbearance on the grounds that the rates for *that* "service" need to be regulated to ensure they are just and reasonable. AT&T, however, appears to read section 10(a)(1) to mean that the Commission may never forbear from a requirement to unbundle particular elements on particular terms unless it finds that, if the requirement were eliminated, the exact same elements would still be unbundled on those same terms. Nothing in section 10(a)(1) compels that absurd interpretation, which would effectively read section 10 out of the Act as it relates to unbundling obligations.

2. AT&T argues that the Commission may not forbear from these broadband unbundling obligations because ILECs do not "fac[e] effective competition in broadband markets." AT&T Letter at 11. This, too, is a retread of the same argument that AT&T unsuccessfully pressed in the *Triennial Review Proceeding* and on appeal in *USTA II.* Indeed, as discussed above, the elimination of broadband-related section 251 unbundling requirements is premised on findings by the Commission and the D.C. Circuit that cable modem providers have a wide and still-expanding lead over DSL providers in the broadband market.

AT&T's submission that "in many areas the Bells' DSL offerings face no cable competition," AT&T Letter at 11, is also simply false as an empirical matter. JP Morgan has estimated that, as of December 2003, three-quarters of all U.S. households were able to choose between cable modem and DSL or could receive cable modem but not DSL, while only 5 percent

of households were able to receive DSL but not cable modem.[30] AT&T's claim that "[c]able is not generally available in business districts at all" (AT&T Letter at 11-12) similarly misses the mark. Five of the six largest cable system operators (which, collectively, represent over 90 percent of consumer cable modem subscribers) already offer broadband services specifically tailored to small businesses.[31] Indeed, these cable operators already have been very successful in attracting small-business subscribers.[32] Several recent studies—including a March 2004 study commissioned by the Small Business Administration and a December 2003 study by In-Stat/MDR—confirm that cable modem service is now the *most used* broadband technology by small businesses.[33] In fact, as detained in the accompanying fact report, cable has moved well beyond small businesses to provide service to large and enterprise businesses as well.

The most recent competitive offerings and promotions from DSL and cable operators also belie AT&T's claim that "at best," there is duopoly competition where "both participants . . . have the incentive and ability to maintain prices above competitive levels rather than attempting

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[30] J. Bazinet, *et al.*, JP Morgan, *Broadband 2003* at Figure 9 (Dec. 5, 2002). *See also* Kevin J. Martin, Commissioner, FCC, *FCC: Looking Forward*, presentation before the NARUC Telecommunications Committee at 11 (July 28, 2003) (citing JP Morgan).

[31] *See* M. Lauricella, *et al.*, Yankee Group, *Cable MSOs: Ready to Take Off in the Small and Medium Business Market* at 4 (Mar. 2002).

[32] *See, e.g., A Snapshot of the Cox Business Strategy*, Interview with Coby Sillers, Vice President and General Manager for Cox Business Services, Xchange Mag. (June 1, 2003) ("Cox Business Services now serves more than 65,000 business customers, and the company's business efforts have grown in the past three years from less than 1 percent of Cox's overall revenue to just more than 5 percent of Cox's consolidated revenue."); J. Barthold, *Small Business, Big Money, No Guarantees*, Telephony Online (Aug. 12, 2002) (Kevin Curran, senior vice president of marketing and sales for Cablevision Lightpath: Cablevision "can't keep up with demand" for Cablevision's Business Class Optimum Online service for small businesses).

[33] Telenomic Research, LLC, *A Survey of Small Businesses' Telecommunications Use and Spending* (Mar. 2004) (finding that for all three categories of small businesses studied, both penetration and monthly expenditures are higher for cable modem service than for DSL).

to ruthlessly compete with [each] other." AT&T Letter at 11. In the past few months, as Verizon's own experience described above exemplifies, each of the Bell companies has cut its national DSL prices considerably.[34] A study by Current Analysis "shows that nationwide average consumer DSL service prices plunged to their lowest levels ever . . . dropping below average cable modem service prices for the first time in broadband's history."[35] Cable operators have responded with promotional and targeted price reductions, and, more broadly, by increasing data speeds that effectively offer consumers more bandwidth at a lower price than those operators' previous offerings.[36] And because these price wars began *after* the Commission's decision to phase out line-sharing, they also vindicate the Commission's recent finding in the *Triennial Review Order* that propping up intramodal DSL competition is both unnecessary and

[34] *See* G. Campbell, *et al.*, Merrill Lynch, *3Q03 Broadband Update: The Latest on Broadband Data and VoIP Services in North America* at Table 4 (Nov. 3, 2003); D. Barden, *et al.*, Banc of America Securities, *SBC Communications Inc.* at 2 (Feb. 2, 2004).

[35] Current Analysis Press Release, *Current Analysis Finds Average DSL Prices Have Dropped Below Those of Cable Modem Service for the First Time Ever* (Sept. 15, 2003) (noting results of Current Analysis Broadband MarketTrack quarterly study).

[36] *See, e.g.*, AT&T Business, *Small & Medium Business: DSL Internet Service*, http://businessesales.att.com/products_services/dslinternet_available.jhtml?_requestid=76704; Road Runner, *Products & Services: Access*, http://www.rrbiz.com/products/acc.asp; Road Runner Business Class, *Pricing & Services*, http://www.roadrunnerbiz.com/packages.shtml (pricing for 1.5-2 Mbps downstream/384 kbps-1.5 Mbps upstream packages); Comcast Business Communications, *Comcast Workplace*, http://work.comcast.net/workplace.asp#pricing; Lightpath, *Internet: BusinessClass Optimum Online*, http://www.lightpath.net/solutions/internet/business/bcinfo.html; Lightpath, *Internet: BusinessClass Optimum Online*, http://www.lightpath.net/solutions/internet/business/pricepage.html; *see also Merrill Lynch 3Q03 Broadband* [illegible] (cable operators "are increasingly moving 'off the rate card,' with market-specific pricing and increased use of promotional and bundled-price discounts specific to certain markets").

counterproductive.[37] In short, prices have plummeted, output has soared, and AT&T's claim that this market bears the hallmarks of "cozy duopoly" is wholly untenable.[38]

There is also no merit to AT&T's claim that "continued unbundling of broadband loops is necessary to protect competition for consumers that increasingly demand *bundles* of voice and data services." AT&T Letter at 10 (emphasis in original). First, the Commission has properly defined the relevant market, for purposes of assessing the need for any unbundling of broadband-specific elements, as the *broadband market*, *see, e.g., Triennial Review Order* ¶¶ 212-13; 292, and, as discussed above, that market is indisputably subject to fierce competition, *id.* at ¶ 292.

Second, contrary to the claim that cable telephony "is available to only a small percentage of customers," AT&T Letter at 10, this service is already available to more than 15 million U.S. homes—approximately 15 percent of the mass market. And cable telephony will become even more widely available in the near future, reaching some 35 percent of U.S. homes this year alone (as shown in the accompanying fact report), as every major cable operator throughout the country has either begun commercial deployment of IP telephony services or has announced aggressive plans to do so in the immediate future.[39] Many smaller cable operators

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[37] *See Triennial Review Order* ¶ 263.

[38] These observations likewise undermine MCI's absurd contention that forbearance from broadband unbundling obligations would "expose[] consumers to the unchecked market power of an incumbent LEC." Letter from Richard Metzger *et al.* to Marlene Dortch, CC Docket No. 01-338 *et al.*, at 4 (Mar. 23, 2004).

[39] *See* J. Halpern, *et al.*, Bernstein Research Call, *US Telecom & Cable: Faster Roll-Out of Cable Telephony Means More Risk to RBOCs; Faster Growth for Cable* at 2 (Dec. 17, 2003) ("*Bernstein Cable Telephony Report*") ("Nearly every major cable MSO has indicated over the past month that it will offer cable telephony service to every or nearly every household in its footprint by 2005, with Time Warner Cable and Cablevision targeting year-end 2004"); *Merrill Lynch 3Q03 Broadband Update* at 9 ("In the third quarter, all of the major cable operators continued to push ahead with their VoIP plans and deployments.").

have done so as well.[40] In light of these developments, analysts now expect "all the major MSOs to offer cable telephony to nearly 100% of their in-franchise homes over the next two to three years."[41] Investment analysts have pointed to cable companies' rollout of cable telephony as "the largest risk to Bell fundamentals over the next 5 years," noting that "the impact on margins is increasingly evident today."[42]

Third, cable modem service can serve as a platform for high-quality voice applications *even if the cable provider itself does not provide them*. As AT&T's CEO David Dorman has noted, voice is the "killer application for broadband . . .and will be the biggest driver of broadband adoption in the next couple of years."[43] Evidence to date shows that cable is attracting the vast majority of customers that use their broadband connection for voice. For example, Vonage reports that 70 percent of its subscribers use cable, compared to only 30 percent that use DSL.[44] AT&T recently announced that, in 2004, it will deploy IP telephony

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[40] BrightHouse Networks plans to deploy IP telephony commercially in 2004. Insight and Mediacom also have trials planned for 2004. *See* M. Stump, *MSOs, AT&T Set Table for VoIP Rollouts*, Multichannel News (Dec. 15, 2003). Adelphia will conduct IP telephony trials in 2004, and plans a commercial launch for 2005. *See Bernstein Cable Telephony Report* at 5.

[41] *Bernstein Cable Telephony Report* at 1; *id.* at 4 ("We now believe that by 2006, roughly 82% of total US households will be cable telephony marketable, up from a prior forecast of approximately 70%); *see also UBS High-Speed Data Update* at 12 ("By the end of 2005/2006" the four major "cable operators will have rolled out a cable telephony service across substantially all of their respective footprints, representing total homes of approximately 70 million.").

[42] John Hodulik, *Cable Telephony Competition: Who Gets It?*, UBS Investment Research, at 1 (Aug. 7, 2003).

[43] *Creation of Regulatory Distinctions in VoIP said to Concern AT&T*, Comm. Daily (Feb. 12, 2004).

[44] T. Hearn, *Cable Companies Accustomed to Large Capital Outlays Are in for a Pleasant Surprise*, MultiChannel News (Feb. 16, 2004), http://www.vonage.com/corporate/press_news.php?PR=2004_02_16_0 (citing Vonage CFO John Rego).

service to residential and business consumers in the top 100 MSAs.[45] AT&T expects to have at least one million customers by 2005.[46] Vonage already serves at least 124,000 VoIP subscribers, and is adding "over 4,000 lines . . . every week."[47] And these services are capable of being delivered *today* to 85 percent of U.S. homes that have access to cable modem services, a figure that will increase to 90 percent this year alone.[48]

Fourth, in addition to cable and DSL, there are numerous additional platforms and technologies already competing in or poised to enter the broadband mass market, including power lines, fixed wireless, 3G mobile wireless, and satellite.[49] Indeed, many of these technologies are already being used to provide service offerings that are competitive with DSL and cable modem services, both for residential and small business customers. For example, the Commission has estimated that residential fixed wireless Internet access is already available in

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[45] Cathy Martine, SVP Internet Telephony & Consumer Product Management, AT&T, *Voice over IP* at 27 (Feb. 25, 2004).

[46] *Id.*

[47] C. Haley, *Vonage Goes Courting for Cable*, InternetNews (Mar. 10, 2004).

[48] *See* J. Halpern, *et al.*, Bernstein Research Call, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust* at Exhibits 1 & 6 (Mar. 10, 2004) (cable broadband available to 92.3 percent of total cable homes passed; 110.0 million U.S. households in 2003); NCTA, *Industry Overview: Statistics and Resources*, http://www.ncta.com/Docs/PageContent.cfm?pageID=86 (102.9 million occupied homes passed by cable as of Dec. 2003).

[49] *See, e.g.*, Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 17 FCC Rcd. 2844 ¶¶ 79-88 (2002); *Triennial Review Order* ¶ 263 ("[T]he Commission also has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines.") (*citing Third Section 706 Report 2002*, 17 FCC Rcd. 2844 ¶¶ 79-88 (2002)); R. Mark, *Broadband over Power Lines: FCC Plugs In*, Internetnews.com (Apr. 23, 2003), http://dc.internet.com/news/article.php/2195621 (Chairman Powell: "[t]he development of multiple broadband-capable platforms – be it power lines, Wi-Fi, satellite, laser or licensed wireless – will transform the competitive broadband landscape").

counties that contain approximately 62 million people, or 22 percent of the U.S. population.[50] Independent industry analysts estimate that "[Broadband over Power Line] will encompass six million power lines by 2006, promising revenues of $3.5 billion."[51] Satellite is another broadband alternative that has begun a resurgence. As one industry observer has recently noted, "satellite broadband will be on the upswing again in 2004."[52]

3. AT&T contends that Verizon cannot satisfy either section 10(a)(2) or (3) because "there could be no sustainable finding that the unbundling imposed by section 271 would have a material, negative impact on the Bell's investment incentives," AT&T Letter at 12. Here again, however, the Commission has *already concluded*, with the D.C. Circuit's approbation, that unbundling requirements "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology," *Triennial Review Order* ¶ 3, and that relief from broadband unbundling requirements is thus necessary to "promote investment in, and deployment of, next-generation networks." *Id.* ¶ 272. As the Commission has observed, "incumbent LECs are unlikely to make the enormous investment required [by broadband

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[50] Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd. 14783, A-4 at n.709 (2003).

[51] *At CompTel Fall 2003: What's The Next Big Thing*, Comm. Today (Oct. 13, 2003) (citing Gartner Group research).

[52] R. Brown, et al., *Smooth Sailing or the Perfect Storm?*, CED (Jan. 1, 2004); *see also ISCE Panelists See Big Satellite Broadband Growth*, Satellite Week (Aug. 25, 2003) ("Michael Agnostelli, SES Americom vp-business strategy, said that for the first time DBS TV services cost less . . . than cable TV. 'There's no reason satellite broadband can't cost less than [DSL or cable modem],' he said: 'The technology is well positioned to hit the cost point and performance point that consumers are looking for'"). One of the two main broadband satellite providers – Hughes Network Systems – reported 177,000 customers for its DIRECWAY service as of third quarter 2003. *See* Hughes Electronics Corp., Form 10-Q (SEC filed Nov. 7, 2003) (residential and small office/home-office customers in North America).

deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment." *Id.* ¶ 3.

Application of a section 271 unbundling requirement to Verizon's broadband elements would create the same investment disincentives that the Commission intended to eliminate in the *Triennial Review Order*, even though the pricing of those elements would be governed by yet-to-be-determined standards under section 201 rather than TELRIC. As the D.C. Circuit has recognized, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *USTA I*, 290 F.3d at 427. These concerns are most pronounced in the case of next-generation networks because, as Verizon explained in its October 24 *ex parte* (at 9-13), that is the context in which research and development costs are most forbidding and where "the tangled management inherent in shared use of a common resource," *USTA I*, 290 F.3d 429, is most problematic.[53]

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[53] *See also Verizon Communications Inc. v. Law Offices of Curtis Y. Trinko, LLP*, No. 02-682, slip op. 8 (U.S. Jan. 13, 2004) ("Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of the antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in relevant part, dissenting on other grounds) ("Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement. The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious.") (citing 1 H. Demsetz, Ownership, Control, and the Firm: The Organization of Economic Activity 207 (1988)); 3A Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 773b1 at 204 (revised ed. 1996) ("competition [is] increased by encouraging [firms] to [develop rival facilities], rather than taking the easier and less competitive course of obtaining access to another's facilities"); *id.*, ¶ 771c, at 175 (when the government "order[s] the [owner] to provide the facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether").

Unbundling obligations would further undermine investment incentives by subjecting Verizon to a shifting range of regulatory requirements. As demonstrated by Verizon's experience in the context of its section 251 obligations, any unbundling requirement evolves over time as it is interpreted and applied, and thus requires carriers to continually modify both their underlying networks and the accompanying network operations and support systems in order to comply with the changing regulations. Applying an unbundling obligation to broadband facilities would add another layer of uncertainty and financial risk that would depress the investment incentives of any rational business. An unbundling requirement also would subject Verizon to the threat of intrusive state regulation,[54] as well as investment-deterring litigation over the pricing of elements. In sum, for all these reasons, AT&T's claim that imposing broadband unbundling obligations under section 271 would not have a negative impact on investment is specious.

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[54] As noted in Verizon's October 24 *ex parte*, although the Commission clarified in the *Triennial Review* [illegible] the TELRIC rules do not apply to elements unbundled under section 271 alone, CLECs have already argued to state regulators that they have a right to oversee—*i.e.*, intrusively regulate—these federal obligations.