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November 30, 2005

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2540 Shumard Oak Boulevard
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Re: Docket No. 041269-TP

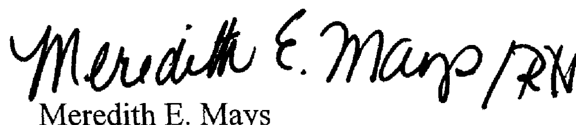
Dear Ms. Bayó:

BellSouth Telecommunications Inc. respectfully submits, for filing in this docket, an original and 15 copies of its Post-Hearing Brief. By copy of this letter, BellSouth is serving its Post-Hearing Brief on all parties of record to this docket.

BellSouth cites to a number of agency decisions, court decisions, and related documents in its Brief. While most of these items are readily accessible, some are more difficult to obtain. If the Commission or its Staff has any difficulty obtaining copies of any of these items, BellSouth is committed to working with the Commission and the parties in order to submit copies of such items to the Commission in an appropriate and efficient manner.

BellSouth has also included a cover page and table of contents with its brief. BellSouth has not counted these pages in the 100 page limitation applicable to this brief. To the extent it is necessary to do so, BellSouth requests the Commission permit the inclusion of these additional pages as a means to facilitate efficient review of this document.

Sincerely,



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Enclosure
cc: All Parties of Record
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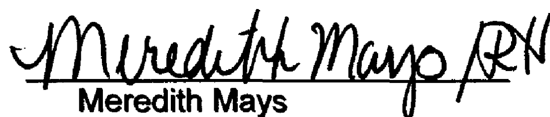

Meredith Mays

(+)signed Protective Agreement
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	Docket No. 041269-TP
Petition to Establish Generic Docket to	)	
Consider Amendments to Interconnection	)	
Agreements Resulting From Changes of Law	)	Filed: November 30, 2005

BELLSOUTH TELECOMMUNICATIONS, INC.'S POST-HEARING BRIEF

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INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") filed a petition to open this docket following the issuance of *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) *("USTA II"), cert. denied, NARUC v. United States Telecom Ass'n,* 125 S. Ct. 313 (2004), as a generic proceeding to address federal changes in law. This Commission entered its order establishing the procedures governing this case on July 11, 2005.[1] The specific changes that BellSouth seeks to effectuate are those resulting from the Federal Communications Commission's ("FCC") rules adopted in its *Triennial Review Order*[2] and *Triennial Review Remand Order.*[3] This Commission has previously addressed some of the issues raised in this proceeding in its *No New Adds Order*[4] and its *Embedded Base Order.*[5] Additional issues were addressed in the *Joint Arbitration Order.*[6] Most recently, in Docket No. 040156-TP, the Commission adopted a staff recommendation resolving additional issues similar to matters pending here.[7]

Many CLECs who originally participated in this docket to oppose BellSouth have now entered into amendments or commercial agreements,[8] but some continue to avoid the changes the

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[1] See *Order Establishing Procedure,* Order No. PSC-05-0736-PCO-TP, July 11, 2005.
[2] 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,* 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *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. denied, NARUC v. United States Telecom Ass'n,,* 125 S. Ct. 313 (2004).
[3] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *oral argument scheduled February 24, 2006, Covad et al. v. FCC,* Case No. 05-1095 (D.C. Cir.).
[4] *See* Order No. PSC-05-0492-FOF-TP (May 5, 2005) ("*No New Adds Order*").
[5] *See* Order No. PSC-05-1127-FOF-TP (November 8, 2005) ("*Embedded Base Order*").
[6] *See* Order No. PSC-05-0975-FOF-TP (October 11, 2005) ("*Joint Arbitration Order*").
[7] *See* September 22, 2005 Staff Recommendation, Docket No. 040156 *and* November 1, 2005 vote sheet. At the time this brief was finalized a written order in Docket 040156 was not available.
[8] BellSouth's witness Kathy Blake testified that BellSouth has entered into over 150 commercial agreements through which BellSouth satisfies its Section 271 switching obligation. (Blake Rebuttal at 4). Some of CompSouth's member companies are included in this number. (Gillan Deposition at 66, Hearing Exhibit 7). In addition, over 130 CLECs in Florida have amended or entered into new Section 252 interconnection agreements that reflect the new

FCC has implemented at the direction of Congress and the federal courts.[9] These CLECs have attempted to circumvent federal law by proposing that the Commission adopt contract language that does not accurately reflect the *TRO* and *TRRO*. Instead, their language would perpetuate the same outdated regulatory regime the FCC discarded, and would retain network elements for which the FCC has determined there is no impairment. To support their position, these CLECs rely on arguments that the FCC, federal courts, and the majority of state commissions already have considered and rejected – most notably, that a state commission can and should dictate the rates, terms, and conditions of BellSouth's Section 271 obligations.

The starting and ending dates of the FCC's mandatory transition plan does not depend on any particular contract terms. Consequently, none of BellSouth's interconnection agreements had to be amended before implementation of the FCC's prohibition on new orders for de-listed UNEs at the outset of the transition period – March 11, 2005. The CLECs fought that conclusion to the point that the federal courts in some states had to effectuate the law.[10]

Proper implementation of the transition plan and all of the remaining unbundling limitations is of critical public policy importance. CLEC rhetoric predicting diminished competition is flatly contradicted by the FCC's findings -- the FCC has already decided it was necessary to de-list UNEs to promote real competition. The CLECs have tried to obscure these important legal and regulatory policy decisions, but, in affirming the *Georgia Order,* the

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unbundling rules and which remain subject to state commission oversight. Tr. at 244. Finally, a number of CLEC intervenors in this docket have withdrawn from the case.

[9] *See* Hearing Exhibit 4 at pp. 133-137.

[10] State commission orders allowing CLECs to continue ordering de-listed UNEs beyond March 11, 2005 were enjoined by federal courts in Georgia, Mississippi, and Kentucky. *See BellSouth Telecoms. Inc. v. MCI Metro Access Transmission Servs. LLC,* 2005 U.S. Dist. LEXIS 9394 (N.D. Ga. Apr. 5, 2005) ("*Georgia Order*"); *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 84981; 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*"). The Georgia Court Order recently was affirmed by the Eleventh Circuit Court of Appeals. *See BellSouth Telecoms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 2005 U.S. App. LEXIS 19819 (11th Cir. Ga., Sept. 15, 2005) ("*11th Circuit Order*").

Eleventh Circuit explained "CLECs are clinging to the former regulatory regime in an attempt to cram in as many new customers as possible before they are forced to bow to the inevitable ...."[11]

Just like they tried to delay the starting date of the transition period, these CLECs seek to delay the ending date, by advancing arguments that would effectuate an unlimited transition period and that would simply replace the rejected federal regulatory scheme with an identical state regulatory scheme, under the guise of Section 271. To the extent existing interconnection agreements perpetuate out-dated obligations that the FCC eliminated in the *TRO* and *TRRO*, those agreements must be revised – finally – to reflect federal law. To that end, BellSouth has proposed contract amendments that accurately implement the requirements of Section 251 of the 1996 Act and the FCC's implementing rules adopted in the *TRO* and the *TRRO*.[12]

ISSUE BY ISSUE ANALYSIS

I. 271-Related Issues (Overview of Issues 7, 13, 16, 17, 21)

One of the most important issues between the CLECs and BellSouth involves the interplay between Section 271 and de-listed UNEs. Stated simply, the CLECs have developed their argument as a way to coax state commissions to ignore the FCC's national policy decisions and continue the discredited UNE-P regime. The CLECs' proposed contract language and testimony seek to perpetuate UNE-P at a price at least as favorable as they previously had, if not a better price.[13]

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[11] *See 11th Circuit Order*, at *13.

[12] BellSouth requests that in the Commission's order it approve *specific contractual language* that can be promptly executed by parties (subject to the individual carrier negotiations, as applicable). BellSouth's Late Filed Hearing Exhibit 35 includes the specific contractual language that BellSouth asks the Commission to adopt relating to each disputed issue. While the Commission may need to issue statements of policy in resolving the issues, it is crucial that this docket end with actual contract language.

[13] Gillan Deposition, Hearing Exhibit 7 at 68. Mr. Gillan claims that, because CompSouth is willing to agree to "interim" 271 rates that are consistent with the transitional rates set in the *TRRO*, he is not actually advocating lower Section 271 prices than Section 251 prices. This is simply unbelievable, given that "interim" rates, in the normal sense, are subject to later true up, and Mr. Gillan's belief is that a Section 271 price could be lower than a Section 251 price. Thus, even if the Commission accepted Mr. Gillian's testimony (it should not) and applied the FCC's

In fact, the CLEC's witness and consultant, Mr. Gillan, has openly contended that no matter what the FCC has done, the CLECs should be able to keep UNE-P forever. Indeed, in prefiled testimony in Docket 030851-TP, he claimed that CLECs were entitled to a Section 271 UNE-P ***indefinitely.***[14] A Section 271 UNE-P however, is exactly the same arrangement as a Section 251 UNE-P that the FCC, federal courts, and this Commission have clearly said BellSouth is not required to provide to CLECs.

The entire 271-based argument defies logic and would completely undermine the FCC's prior policy findings about the damage that UNE-P has done to competition. Consequently, even if the Commission had the jurisdiction to address the 271 issues or establish 271 rates (despite contrary findings by the FCC, federal courts, and numerous state commissions), the Commission should nonetheless support the FCC's decision to end UNE-P – not undermine that decision by creating a surrogate for that rejected regime. Thus, even if the Commission ***could*** do as the CLECs urge (which it cannot legally), it ***should*** not, for all the same legal, factual, and policy reasons that compelled the FCC to end the UNE-P regime. This is not an academic or theoretical discussion about the Commission's jurisdiction. Rather, the CLECs have concocted this argument in order to minimize the impact of the *TRO* and *TRRO* on their business plans. Accepting the CLECs' position would place this Commission squarely at odds with the FCC's decision to ***change*** – not ***perpetuate*** – the regulatory nature of the telecom market in order to incent real, facilities-based competition.

"interim" rates, it would not foreclose CompSouth from seeking a lower rate at some unspecified future date. As BellSouth explains herein, it vigorously opposes the establishment of state commission Section 271 rates, "interim" or otherwise.

[14] Hearing Exhibit 40. While Mr. Gillan tried to distance himself from this testimony at the hearing (Tr. 509-511), his exact words were that UNE-P must be provided indefinitely. Moreover, even in attempting to distance this testimony, he made clear that the price "for UNE-P under a 271 just and reasonable standard ***could*** be higher than the price that would result from a TELRIC standard." Tr. at 510 (emphasis supplied) (i.e., it could also be lower).

Finally, it would be exceedingly odd for all of the FCC's decisions, deliberations, and conclusions about the adverse impact of the de-listed UNEs on competition to be rendered moot by reference to 271. Yet that is exactly what the 271 argument is all about – ignoring the FCC's national policy. This disregard for the law renders the CLECs' proposed interconnection agreement language on each of the 271-related issues fatally flawed, and the Commission should reject all such language.

A. **Issue 7(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,*[15] *or pursuant to Section 271 or any other federal law other than Section 251?*

*** **Summary of BellSouth's Position:** State commissions do not have authority to require BellSouth to include in §252 interconnection agreements any element not required by §251. ***

1. Section 271 – Summary of Argument

Faced with the FCC's decision that the UNE-P regime was not providing the right incentives for real facilities-based competition and should end, the CLECs have scrambled to find a way to avoid the business impact of that decision. They have concocted their Section 271 arguments in a last ditch effort to obtain from state commissions what they were unable to obtain from the FCC and federal courts – continued access to UNE-P as if nothing has changed. If there were any merit to the notion that all the changes the FCC created in the *TRO* and *TRRO* could be wiped away or ignored by reference to another section of the very same act then the FCC would surely have saved itself the trouble of all of its work on these issues.

Not only is the 271 argument at odds with the FCC's ultimate and underlying decisions about impairment and competition, it is also unpersuasive as a matter of statutory interpretation. The CLECs' argument on Section 271 starts with language contained within that section, which

[15] In its prehearing order - PSC-05-1054-PHO-TP – this Commission cited the Joint CLEC position which made clear they were "not requesting" state law unbundling, which renders this sub-issue moot.

refers to agreements under Section 252. From that reference, the CLECs concoct an argument that ***presumes*** that because state commissions arbitrate and approve ***Section 251*** obligations in the context of a Section 252 agreement, they must take similar steps concerning Section 271.

This argument cannot withstand logical scrutiny because, although Section 271 refers to Section 252, the simple fact is that Section 252 explicitly ***limits*** the rate-setting and arbitration powers of state commissions to ***Section 251*** elements. This express limitation precludes the Commission from requiring BellSouth to include Section 271 elements in a Section 252 agreement.

The CLECs are asking the Commission to impermissibly read one portion of the statute but ignore the remainder as they do. Section 252 never refers to Section 271, yet it contains express references to Section 251. The CLECs ignore this express limitation, inexplicably claiming that "[i]t is immaterial that § 252 does not refer to § 271 ..."[16] The Commission, however, cannot and should not ignore the plain language of the statute. The Section 252 rate-setting, negotiation, arbitration, and approval process clearly is limited to Section 251 obligations, and it cannot legitimately be read to extend to the separate and distinct obligations set forth in Section 271.

It is not as if the FCC just forgot about 271. Rather, the FCC discussed its role on these issues in the *TRO*, explaining that

> [w]hether 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*** in the context of a BOC's application for [S]ection 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6).[17]

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[16] *CompSouth's Response to BellSouth's Motion for Summary Final Order or Declaratory Ruling and CompSouth's Cross Motion for Summary Final Order or, In the Alternative, for Declaratory Ruling,* filed in Docket No. 041269-TP, on July 22, 2005, at 8 ("*SJ Response*").

[17] *TRO* ¶ 664. (emphasis added).

Indeed, when the FCC first addressed the interplay between section 251(c) and the competitive checklist network elements of section 271 in its *UNE Remand Order,* the FCC was very clear that "the prices, terms, and conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271."[18] The FCC has also stated that, once long distance authority has been granted, "[S]ection 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of [S]ection 271."[19] The FCC made no mention whatsoever of a state commission role in this process; the regulatory agency charged with Section 271 oversight is the FCC.[20]

Despite these clear pronouncements by the FCC, the CLECs' primary witness claims the ***only*** way that BellSouth can satisfy its Section 271 obligations is through a state-approved interconnection agreement or an SGAT.[21] This claim is contrary to the weight of authority, which confirms that the FCC has ***exclusive*** oversight over Section 271 obligations. As explained below, federal courts in Mississippi, Kentucky and Montana, and the majority of state commissions have addressed Section 271. These decisions have all concluded, in some fashion, that the FCC is charged with Section 271 authority.

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[18] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 469 (1999) ("*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). The FCC very clearly stated that

> [i]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a).

UNE Remand Order at 470.

[19] *TRO* ¶ 665.

[20] *See also TRO* at ¶ 663. ("The Supreme Court has held that the last sentence of section 201(b), which authorized the [FCC] 'to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' empowers the [FCC] to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996. Section 271 is such a provision.") (citations omitted).

[21] Gillan Deposition, Hearing Exhibit 7, at 60.

Finally, the CLECs' proposed contract language and positions do not reflect reality. The FCC has explained that unbundling at cost-based rates is only required in situations where CLECs are genuinely impaired without access to particular network elements. When unbundling is not required it means that a market is "suitable for competitive supply" and that "competition is possible" without access to UNEs.[22] Likewise, courts have recognized that unnecessary unbundling imposes costs.[23] In practical terms, the CLECs' positions and proposed language in this proceeding simply extend the transitional pricing of the *TRRO* indefinitely, and retain all other terms and conditions for de-listed UNEs.[24] However, where unbundling is not required, and Section 271 access is required, the terms of independent Section 271 access are imposed under "less rigid accompanying conditions."[25] De-listing means that CLECs can and should compete using alternative, market-based arrangements, rather than under a state-imposed Section 271 regime that is designed to mirror the Section 251 framework, which is what CompSouth advocates.

After more than a decade of synthetic competition, the Commission must ensure that the transition to sustainable facilities based competition is unhampered by CLEC created hurdles aimed at extending indefinitely a specified transition period. BellSouth explains more fully below each of these points.

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[22] *USTA II,* 359 F.3d at 571.
[23] *Id.* at 572; *USTA I,* 290 F.3d at 428.
[24] CompSouth's witness, Mr. Gillan, is quite explicit on this point, claiming "the Commission should require that § 271 offerings should be identical – except as to price – to the § 251 offerings they replace." Gillan Direct at 47. Concerning price, Mr. Gillan alleges that § 271 prices are "potentially" different. *Id.* at 4. CompSouth glibly suggests that the FCC's transitional rates could serve as "interim" § 271 pricing, until an undetermined future time, relying on a Missouri Order that is the subject of an active appeal in federal district court. *See Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. Missouri Public Service Commission,* Case No. 4:05-CV-01264-CAS, United State District Court, Eastern District of Missouri. Setting aside the numerous deficiencies with Mr. Gillan's arguments, BellSouth does not agree that "interim" Section 271 rates are either legitimate or acceptable. In this regard, the Ninth Circuit vacated and remanded a district court order that denied Verizon's preliminary injunction request to set aside interim TELRIC rates in *Verizon Cal., Inc. v. Peevey*, 413 F.3d 1069 (9th Cir. 2005). Moreover, the Commission lacks authority to set such rates as explained herein.
[25] *TRO* at ¶ 658.

2. Issue 7(a): There Is No Legal Basis For A State Commission To Force BellSouth to Include Section 271 Network Elements In A Section 252 Interconnection Agreement.

Contrary to CompSouth's position, a state commission's authority to arbitrate Section 252 agreements is limited ***to ensuring the contracts comply with Section 251.*** The Act provides that 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. Thus, 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 commissions must ensure that agreements "meet the requirements of Section 251."[26]

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.[27] An ILEC is ***not required***, 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. When it does so, such matters may properly be considered by the state commissions under prevailing law. However, where an ILEC chooses not to negotiate more than is required by Section 251, that is its right, and it cannot be forced to do more. BellSouth has

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[26] 47 U.S.C. § 252(e)(2)(B).
[27] 47 U.S.C. § 252(a), (b).

steadfastly refused to negotiate the inclusion of Section 271 elements in Section 252 agreements and there was no testimony or record evidence that suggested otherwise here. Consequently, the contract language that results from this proceeding must be limited to Section 251 obligations.

The law is quite clear that Section 251 obligations form the basis of Section 252 agreements. As the Eleventh Circuit recognized, "The scheme and text of [the Act] ... lists only a limited number of issues on which incumbents are mandated to negotiate."[28] 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."***[29] Congress did not grant state commissions any authority to arbitrate compliance with the requirements of Section 271. That decision resolves this issue – state commissions have authority to arbitrate Section 252 agreements, but only so far as such agreements comply with Section 251. Neither the CLECs nor the Commission can force BellSouth to include Section 271 obligations in Section 252 agreements.

3. Issue 7(a): Section 252 Limits State Commission Rate-Setting Authority to Section 251 Elements.[30]

The CLECs' purpose in arguing for the Commission to engage in 271 rate-setting is to avoid precisely what the FCC has set in motion – a move away from commission rate-making and toward market negotiation. The bottom line on all of the 271-related arguments is the common-sense reality that if the CLECs were to prevail on this argument, then the CLECs will have effectively used the Commission to override the FCC's decisions about market-based, real competition. That simply cannot be the right answer.

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[28] *MCI Telecom. Corp. et al. v. BellSouth Telecommunications, Inc. at al.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

[29] *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 488 (5th Cir. 2003). (emphasis added.)

[30] Although Issue 7(b) also addresses rate-setting for Section 271 that sub-issue presumes that the answer to the threshold question – does a state commission have authority to require BellSouth to include Section 271 network elements in a Section 252 interconnection agreement – is affirmative. As BellSouth explains herein the answer is negative in all respects, including rate-setting.

Despite the express limitations contained in Section 252, the CLECs in this case suggest the Section 252 negotiation, arbitration, and approval process applies equally to Section 251 elements and Section 271 elements. This suggestion is misplaced. CompSouth ignores that ***there is no language in Section 252 that refers to Section 271***. Congress allowed states to "set" rates only "for the purposes of subsection (c)(3) of such Section [251]" and to arbitrate agreements to "ensure that such resolution and conditions meet the requirements of Section 251 . . . ."

State commissions do not have the authority to set rates for Section 271 elements. This is clear because the language in Section 252 limits state commission rate-setting authority to Section 251 elements. Section 252(d)(1) provides that state commissions may set rates for network elements ***only*** "for purposes of subsection (c)(3) of such Section [251]." The FCC has stated that this Section "is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required under Section 271."[31] This express limitation in Section 252(d)(1) on state commission pricing authority in arbitrations cannot be blindly brushed aside by the CLECs.

Even if there could be any legitimate question about how to read these statutes, the FCC has already answered the question. In addition to the express language of Section 252, the FCC has confirmed that Section 251's pricing standards (over which the state commissions have authority) do not apply to checklist elements under Section 271.[32] It "clarif[ied] that the FCC will determine whether or not the applicable pricing standards are met," either in the context of a Section 271 application for long distance authority or, thereafter, in an enforcement

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[31] *TRO* at ¶ 657.
[32] *TRO,* at ¶¶ 662, 664.

proceeding.[33] The FCC plainly stated that "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of Sections 201 and 202" is a fact-specific inquiry that the [FCC] will undertake in the context of a BOC's application for Section 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6)".[34]

Finally, the FCC held that "[w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to ***Section 271*** and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements."[35] The FCC went on to hold that "[s]ection 252(d)(1) provides the pricing standard 'for network elements for purposes of [Section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under Section 271."[36]

The FCC has further held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 – statutes applied and enforced by the FCC.[37] Courts, moreover, uniformly have held that claims based on Sections 201(b) and 202(a) are within the FCC's jurisdiction. Section 201(b) speaks in terms of "just and reasonable" which are

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[33] *Id.*

[34] The FCC further explains that BellSouth might meet its burden of proof in such a proceeding by demonstrating that the rate for a Section 271 element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate. *TRO* at ¶ 664. As Ms. Blake made clear, BellSouth has entered into over 150 commercial agreements. Blake Rebuttal at 4. Ms. Blake also explained that BellSouth satisfies its 271 obligations to provide de-listed loops and transport through its special access and private line tariffs. Blake Rebuttal at 4-5.

[35] *TRO* at ¶ 656 (emphasis added).

[36] *Id.* at ¶ 657 (brackets in original).

[37] *See TRO* at ¶¶ 656; 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* at ¶ 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.").

determinations that "Congress has placed squarely in the hands of the [FCC]."[38] As the D.C. Circuit has noted, Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory."[39] The idea of FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. The Supreme Court has determined that Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act" and required that state commission regulation be guided by FCC regulations.[40]

The CLECs will likely contend that while the FCC spoke of itself as the "regulator" in charge of compliance with the Section 271 just and reasonable standard, "[i]t did not, however, establish itself as the agency in charge of arbitrating the rate levels when they are in dispute."[41] The distinction the CLECs may attempt to draw is one without a difference. It is merely an excuse for continuing to rely on commissions to set rates rather than participating in market-based negotiation.

The entity charged with "regulating" the rates (which in this case the CLECs admit is the FCC) is by definition the entity that must resolve the issue when the rates "are in dispute." Starting from a presumption of old-style, pre-competition rate-setting, the CLECs assume that a regulatory body must set the rates in the first instance, but that is not the case in today's competitive market. Instead, rather, the provider sets the rates in accordance with the just and

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[38] *In Re: Long Distance Telecommunications Litigation*, 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D. D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F.3d 448 (D.C. Cir. 1997).

[39] *Competitive Telecommunications Association v. FCC*, 87 F.3d 522 (D.C. Cir. 1996).

[40] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999); *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004).

[41] *See, e.g., SJ Response* at 29.

reasonable standard, and the ***FCC*** resolves any disputes that arise surrounding those rates.[42] In a competitive market, regulators should not step in until there is a need, but the CLECs want the regulators to step in and over-ride the market that has produced both intermodal competition and more than 150 negotiated commercial agreements between CLECs and BellSouth.

The FCC is right to treat 271 elements differently. It makes sense that the FCC rules regarding Section 271 elements (*i.e.,* that the provider can set the rate initially as opposed to the regulator) are – and should be – less stringent than those under Section 251. Section 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without which a CLEC is legally "impaired" within the meaning of Section 251(c)(1). Congress thus ensured that state commissions have authority to arbitrate the rates, terms and conditions of access to these elements. ***Conversely, the FCC has determined that CLECs are not impaired without access to Section 271 elements that no longer meet the Section 251 test.*** The FCC's conclusions cannot – and should not – be brushed aside. The FCC has reached these conclusions based on an evidentiary finding that competitive alternatives for such elements are readily available in the marketplace.[43] Congress did not subject access to these 271 elements to the same regulatory scrutiny. Rather, consistent with Congress's

[42] CompSouth has implied that BellSouth's ability to change its special access prices requires state commission action under Section 271. CompSouth is wrong. While the FCC did not accept ILECs' arguments concerning the availability of special access as an alternative to UNEs in situations in which CLECs are impaired (*see, e.g., TRRO* at ¶ 59), when Section 251 UNEs are no longer available "a competitor is not impaired in its ability to offer services without access to that element" and it would be "counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate ...." *UNE Remand Order* at ¶ 473. Indeed, in the *TRRO* the FCC clearly contemplated that CLECs could transition to special access services and commercial agreements. *TRRO* at ¶¶ 142, 195, 228.

[43] *See e.g., UNE Remand Order* at ¶ 471 (where a checklist item is no longer required under Section 251, a competitor is "not impaired in its ability to offer services without access to that element," which can be "acquire[d] ... in the marketplace at a price set by the marketplace.").

overriding intent to "reduce regulation," parties should be allowed to contract freely as to those items.[44]

To make their case, the CLECs ignore all of the express limitations on state commission authority in Section 252 and the relevant case law; instead, they rely almost exclusively on Section 271(c)(1)'s reference to "agreements that have been approved under Section 252."[45] By its terms, however, that Section expressly refers ***only*** to "approv[al]" of agreements under Section 252. ***It says nothing about state commission arbitration or rate-setting authority.*** The limitations on rate-setting and arbitration are directly relevant here because the CLECs want the Commission to arbitrate issues around, and set rates for, the Section 271 elements. The issue before the Commission, therefore, goes far beyond the scope of the Commission's authority to approve agreements, yet that is the extent of the statutory provision in Section 271 upon which the CLECs rely.

Just as the Commission is bound to heed the General Assembly's limits on its jurisdiction, the FCC (and the state commissions when the FCC or Congress delegates duties to them) must heed carefully the words of Congress. The CLECs' argument utterly disregards the words that expressly limit state rate-setting authority. Crucially, Congress made no mention of including Section 271 elements in negotiations under Sections 251(c)(1) and 252(a)(1), arbitration under Section 252(b), or state commission resolution of open issues under Section 252(c). Most importantly for present purposes, Congress did not give state commissions ***any*** rate-setting authority for Section 271 requirements in Section 252(d)(1). On the contrary, ***all***

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[44] *Id.* Under these circumstances, the FCC concluded that "it would be counterproductive to mandate that the incumbent offer[] the element" at forward looking prices." Instead, "the market price should prevail, as opposed to a regulated rate".

[45] Gillan Direct at 43.

of those Sections are explicitly linked – and limited – to implementation of Sections 251(b) and (c).

Mr. Gillan also suggests that Section 271(c)(1) means that "checklist items [must] be offered through interconnection agreements approved under Section 252 of the Act. "[46] Section 271(c)(1) says nothing of the sort. Section 271(c)(1) provides that to comply with Section 271, a BOC must meet the requirements of either subparagraph (A) or (B). Subparagraph (A), in turn, provides that a BOC meets the requirements of the Section if it "has entered into one or more binding agreements that have been approved under Section 252 …." The reference to Section 252 agreements refers to agreements that incorporate the required Section 251 elements – nothing is said about Section 271 elements. Section 271(c)(1) only requires approved Section 252 agreements or an SGAT to obtain Section 271 authority; it does not require Section 271 elements incorporated into Section 252 agreements (nor would it, because such a requirement would conflict with the express limitations in Section 252 addressed above).

4. Issue 7(a): The FCC Has Exclusive Authority Over the Enforcement of Section 271 Elements.

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] Once a BOC obtains Section 271 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.

[46] Gillan Direct at 42; Gillan Deposition, Hearing Exhibit 7 at 60.
[47] 47 U.S.C. § 271(d)(1),(3).

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).[48] 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.[49] The role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271-approval process.[50] 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 obligations. Moreover, the FCC refused to graft Section 251 pricing and combination requirements onto Section 271 in its *TRO*,[51] a decision upheld by the *USTA II* court, which characterized the cross-application of Section 251 to Section 271 as "erroneous."[52] In sum,

[48] *See TRO* at ¶ 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* at ¶ 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.
[49] 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).
[50] 47 U.S.C. § 271(d)(2)(B).
[51] *TRO* at ¶¶ 656 – 664.
[52] *USTA II*, 359 F.3d at 590.

Section 252 grants state commissions authority only over the implementation of Section 251 obligations, not Section 271 obligations.[53]

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."[54] 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.[55] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section.

If there is an issue of whether BellSouth is meeting its Section 271 obligations through approved agreements or otherwise, Congress was explicit as to what body should address whether BellSouth is in compliance. Section 271(d) authorizes the FCC, not the Commission, both to approve 271 applications and to determine post-approval compliance. If the CLECs are concerned about BellSouth's Section 271 compliance, the place to raise that concern is the FCC, not the Commission. In the FCC's words, that federal agency has ***"exclusive authority"*** over the entire "Section 271 process."[56]

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[53] *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 statute, 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 obligation of all local exchange carriers and incumbent local exchange carriers, respectively).

[54] *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").*

[55] *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

[56] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona,* 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999) (emphasis added).

The CLECs have previously attempted to distinguish what they concede to be the FCC's exclusive enforcement authority over Section 271 from what they call the state commission's Section 252 authority.[57] The obvious flaw in the CLECs' argument is that, as demonstrated above, Section 252 does not confer any jurisdiction over Section 271 elements to the state commissions – in fact, it expressly limits state commission authority to set rates and arbitrate to ***Section 251*** obligations.

Furthermore, the arrangement advocated by the CLECs would be unworkable as a practical matter. Under the CLECs' argument, Section 252 interconnection agreements would contain both Section 251 and 271 elements. The CLECs concede, however, that the state commission has no enforcement authority over Section 271 elements.[58] Thus, under the CLECs' theory, state commissions would enforce certain parts of an interconnection agreement (*i.e.*, the 251 elements) and the FCC would enforce other parts (*i.e.*, the 271 elements) of the same contract. That scenario, of course, makes no sense.[59]

5. Issue 7(a): Federal Decisions and State Commission Decisions Confirm the FCC's Exclusive Authority Over Section 271 Elements.

Despite numerous federal and state commission decisions, CompSouth contends that the Commission has the authority to make BellSouth include its Section 271 obligations in Section 252 interconnection agreements. As outlined above, however, CompSouth ignores completely that interconnection agreements result from a Section 251 request and are evaluated to ensure compliance with Section 251. Indeed, decisions from Washington to Mississippi demonstrate that state commissions have no Section 271 regulatory authority.

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[57] *See, SJ Response* at 35.

[58] *Id.* ("CompSouth does not contend that if the Section 271 checklist items are not in the ICA that the Commission has the enforcement authority to revoke BellSouth's long distance entry or otherwise sanction BellSouth").

[59] It is also inconsistent with the FCC's statements in the *UNE Remand Order* that "***the prices, terms, and conditions*** set forth in sections 251 and ***252*** do not presumptively apply to the network elements on the competitive checklist of section 271." *UNE Remand Order* at ¶ 469 (emphasis supplied).

a. Federal Court Decisions

Three recent federal decisions address this issue. First, on appeal from a decision from the Mississippi Public Service Commission, the United States District Court in Mississippi explained:

> 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.[60]

Second, 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.[61]

Third, on June 9, 2005, a federal district court in Montana 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."[62] This decision squarely conflicts with Mr. Gillan's contention that, under Section 271(c)(2)(A),

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[60] *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*, at 17 of slip opinion.

[61] *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, 2004) (*"Kentucky Order"*) p. 12 of slip opinion. The foregoing decisions are 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.

[62] *Qwest Corp. v. Schneider, et al.*, 2005 U.S. Dist. LEXIS 17110, CV-04-053-H-CSO, at 14 (D. Mont. June 9, 2005).

Section 271 elements ***must*** be contained in a Section 252 interconnection agreement.[63] 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.

b. State Commission Decisions

In addition to the foregoing federal decisions, many state commissions have given proper effect to the federal statutory scheme. In numerous decisions outside of BellSouth's region the question of whether a state commission can include Section 271 obligations in Section 252 interconnection agreements has been answered "no" repeatedly. Other state commissions have confirmed the FCC, rather than state commissions, is charged with Section 271 oversight. The relevant decisions are detailed below.[64]

Washington Utilities and Transportation Commission ("Washington Commission")

The Washington Commission explained "state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271."[65] 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 arbitration proceeding (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

[63] Gillan Direct at 43.
[64] Of the state commission orders referenced in this section, the CLECs have appealed the Texas order referenced herein, and various parties have appealed orders preceding the Pennsylvania decision cited below.
[65] *In re: Petition for Arbitration of Covad with Qwest,* Docket No. UT-043045, Order No. 06 (Feb. 9, 2005), *2005 Wash. UTC LEXIS 54*. Hereinafter "Washington Covad/Qwest Decision."

> 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.[66]

Utah Public Service Commission ("Utah Commission")

In an analogous arbitration proceeding, the Utah Commission held "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."[67] 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.[68]

Iowa Utilities Board

The Iowa Utilities Board issued a similar ruling on May 24, 2005. That commission acknowledged a state commission has only "a consulting role" in addressing Section 271. The Iowa commission concluded it lacked "jurisdiction or authority to require that Qwest include [Section 271] elements in an interconnection agreement arbitration brought pursuant to § 252."[69]

Idaho Public Utilities Commission ("Idaho Commission")

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[66] *Washington Covad/Qwest Decision*, 2005 Wash. UTC LEXIS *38.

[67] *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* ("Utah Covad/Qwest Decision").

[68] *Id.*

[69] *In re: Petition for Arbitration of Covad with Qwest,* Iowa Utilities Board, Docket No. ARB-05-1 (May 24, 2005), *2005 Iowa PUC LEXIS 186.* ("Iowa Covad/Qwest Decision").

On July 18, 2005, the Idaho Commission entered its arbitration order between Covad and Qwest in Case No. CVD-T-05-1.[70] It concluded "that the Commission does not have the authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement."

South Dakota Public Service Commission ("South Dakota Commission")

The South Dakota Commission acted in a consistent manner, finding it

> does not have the authority to enforce Section 271 requirements within this section 252 arbitration. Section 252(a) provides that interconnection negotiations are limited to requests for interconnection, services, or network elements pursuant to section 251 .... In addition ... section 252(c)(1) requires the Commission to ensure that [its] resolution of open issues meet the requirements of section 251 of this title, including the regulations prescribed by the FCC pursuant to section 251 of this title .... The language in these sections clearly anticipates that section 252 arbitrations will concern section 251 requirements, not section 271 requirements.[71]

Oregon Public Utility Commission, Minnesota Public Utilities Commission

On September 6, 2005, the Oregon Commission adopted an arbitrator's decision, which found, in relevant part, that:

> Every state within the Qwest operating region that has examined [the Section 271] issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and [the Oregon Commission] adopt[s] the legal conclusions that they all hold in common ....[72]

The Oregon Commission expressly adopted the following legal conclusions reached by an arbitrator and confirmed by the Minnesota state commission:

> There is no legal authority in the Act, the *TRO,* or in state law that would require the inclusion of section 271 terms in the interconnection agreement over Qwest's objection

[70] Order No. 29825; *2005 Ida. PUC LEXIS* 139. Hereinafter "Idaho Covad/Qwest Decision."
[71] *In re: Petition for Arbitration of Covad with Qwest,* South Dakota Public Service Commission Docket No. TC05-056 (July 26, 2005), *2005 S.D. PUC LEXIS 137* ("South Dakota Covad/Qwest Decision").
[72] *In re: Petition for Arbitration of Covad with Qwest,* Oregon Public Utility Commission, Order No. 05-980, ARB 584 (Sept. 6, 2005), *2005 Ore. PUC LEXIS 445* ("Oregon Covad/Qwest Decision").

... both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271.[73]

Pennsylvania Public Utility Commission

In addition to the arbitration decisions between Covad and Qwest, other state commissions have issued similar rulings on Section 271. On June 10, 2005, the Pennsylvania Commission ruled Verizon was not obligated to file state tariffs including its Section 271 obligations because:

> [T]he enforcement responsibilities of Section 271 compliance lies with the FCC. Therefore, the Commission will not oblige Verizon PA to produce tariff amendments that reflect its Section 271 obligations. However, the Commission will continue to monitor Verizon PA's compliance with its Section 271 obligations and, if necessary, initiate appropriate complaint proceedings before the FCC. [74]

Massachusetts Department of Telecommunications and Industry

On July 14, 2005, the Massachusetts Commission entered its Arbitration Order in Docket No. D.T.E. 04-33. The Massachusetts Commission held that

> our authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements.[75]

Kansas Corporation Commission

The Kansas Corporation Commission entered its Order No. 15: Commission Order on Phase II UNE Issues addressing a prior recommendation of an arbitrator in Docket Nos. 05-

[73] The Minnesota Public Service Commission issued its Order Resolving Arbitration Issues in Docket No. P-5692, 421/IC-04-549 on March 14, 2005 in which it adopted, in part, the December 16, 2004 Arbitrator's Report in that docket.

[74] *Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc., et al;* R-00049524; R-00049525; R-00050319; R-00050319C0001; Docket No. P-00042092, 2005 Pa. PUC LEXIS 9 (June 10, 2005). In the Pennsylvania decision, the Commission referred to various appeals of prior orders pending the United States District Court, Middle District of Pennsylvania.

[75] *In re: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* D.T.E. 04-33, Arbitration Order (July 14, 2005). ("Massachusetts Arbitration Order").

BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005 ("Kansas Order"). In relevant part, the Kansas Commission held that "the FCC has preemptive jurisdiction over 271 matters."[76]

Public Utility Commission of Texas

On June 17, 2005, the Texas Commission issued an order in which it declined to include terms and conditions for provisioning of UNEs under Section 271 in an interconnection agreement, explaining that it

> declines to include terms and conditions for provisioning of UNEs under FTA § 271 in this ICA. The Commission finds that the FTA provides no specific authorization for the Commission to arbitrate Section 271 issues; § 271 only gives states a consulting role in the 271 application approval process.[77]

Rhode Island Public Utilities Commission

The Rhode Island Commission addressed Section 271 in connection with proposed tariff changes made by Verizon. In a July 28, 2005 order in Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18* ("Rhode Island Order"), that commission rejected CLEC attempts to include obligations arising under "applicable law" such as Section 271 in Verizon's wholesale tariff. The commission explained "Section 271 is a federal statute and it is inherently logical to have the FCC interpret the statute." The Rhode Island Commission concluded that "[a]t this time, it is apparent to the Commission that at the bistro serving up the BOCs' wholesale obligations, the kitchen door numbered 271 is for 'federal employees only.'"

Arkansas Commission

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[76] *See Kansas Order*, at 6.

[77] Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas P.U.C. Docket No. 28821* (June 17, 2004) ("Texas Order"). The Texas Order has been appealed to the United States District Court, Western District of Texas.

The Arkansas Commission addressed Section 271 in an October 31, 2005 *Memorandum Opinion and Order.* In relevant part, the Commission acknowledged "this Opinion will not attempt to resolve Section 271 issues because they are not subject to arbitration under Section 252 of the Act." Likewise, it recognized that "ICA arbitrations are limited to establishing the rates, terms and conditions to implement the obligations of 47 U.S.C. 251. This Commission's obligations under Section 271 of the Act are merely advisory to the FCC."[78]

Ohio

On November 9, 2005, the Ohio Commission entered its arbitration order in Case No. 05-0887-TP-UNC ("Arbitration Order"). Addressing Section 271, that commission held "[a]lthough SBC's obligations under Section 271 are not necessarily relieved based on the FCC's § 251 unbundling analysis, these obligations should be addressed in the context of carrier-to-carrier agreements, and not § 252 interconnection agreements, inasmuch as the components will not be purchased as network elements."[79]

Alabama, North Carolina, New York

Other state commissions have addressed Section 271 obligations more generally. For example, the Alabama Commission 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 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

[78] *Memorandum Opinion and Order,* October 31, 2005, *In re: Petition of Southwestern Bell Telephone L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for Successor Interconnection Agreement to the Arkansas 271 Agreement,* Docket No. 05-081-U
[79] *Arbitration Order,* p. 27.

> 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.[80]

In Docket P-55, Sub 1550, the North Carolina Commission, when considering various emergency petitions concerning the recent "No New Adds" controversy, addressing a claim from MCI seeking 271 based UNE-P said:

> 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.[81]

Likewise, 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 unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements."[82]

All of these decisions, which hold the FCC 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. 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.

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[80] *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) ("Alabama No New Adds Order").

[81] *Order Concerning New Adds,* North Carolina Utilities Commission, Docket No. P-55, Sub 1550, April 25, 2005, at p. 13 ("North Carolina No New Adds Order").

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

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."[83] 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.[84] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section. 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.

<u>Decisions Previously Relied Upon by CompSouth Are Clearly Distinguishable</u>

CLECs have previously cited to dicta contained in a one federal case – *Qwest Corp v. Minnesota Public Service Commission,* 2004 WL 1920970 (D. Minn. 2004) ("Qwest case") – to support their claim that Section 271 elements belong in Section 252 agreements. That decision 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)."[85] 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***

[83] 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").*

[84] *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

[85] *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).

affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed."[86] More importantly, the *Qwest Case* predates the 2005 federal court decisions in Mississippi, Kentucky, and Montana.

CompSouth also attempted previously to distinguish the recent federal decisions in Kentucky and Mississippi, which attempt should be rejected. Both the Kentucky and Mississippi courts specifically held that decisions regarding 271 obligations rested with ***the FCC***.[87] An attempt by a state commission to set rates or terms and conditions for Section 271 elements would directly conflict with federal court precedent.

In terms of state commission authority, CompSouth's witness relied on a July 11, 2005 arbitration order from the Missouri Public Service Commission.[88] The Missouri decision has been appealed to United States District Court, Eastern District of Missouri; indeed, the CLECs ***agreed*** to the entry of a preliminary injunction which ***prevented*** CLECs from adding new switching arrangements under purported Section 271 Commission.[89]

CompSouth's reliance on decisions from Tennessee, Maine, Oklahoma, Illinois is likewise misplaced. BellSouth filed a preemption petition before the FCC after the Tennessee Regulatory Authority's ("TRA") vote, but before that 2-1 Tennessee vote was memorialized into a written decision (a written decision was released on October 20, 2005). BellSouth has filed a motion asking the TRA to reconsider its 2-1 written decision. In addition, the TRA has

[86] 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). 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-IH-0263, FCC 04-57 (2004).

[87] *Mississippi Order*, at 17 of slip opinion; *Kentucky Order*, at 12 of slip opinion.

[88] *See* Gillan Direct at 46.

[89] *See* Sept. 9, 2005, Preliminary Injunction Order, *Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. Missouri Public Service Commission,* Case No. 4:05-CV-01264-CAS, ¶ 1 (the "PSC's July 11, 2005 Arbitration Order as well as related orders approving interconnection agreements ... are hereby enjoined to the extent they require SBC Missouri to fill new orders for unbundled local switching or UNE-P pursuant to the Federal Telecommunications Act of 1996").

acknowledged since its vote that the FCC "could provide clarification regarding state authority for 271 elements." *See* July 20, 2005 Order, p. 7 in Docket No. 04-00186. Also, Verizon has appealed the Maine decision; SBC Illinois has appealed the Illinois decision, the Oklahoma commission has apparently delayed taking action on an arbitrator's decision that CompSouth has cited to previously, and the Michigan Commission rejected the Joint CLECs language concerning Section 271.[90]

B. **<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?*

*** **<u>Summary of BellSouth's Position:</u>** State commissions have no authority to require BellSouth to include in §252 interconnection agreements any element not required by §251; this Commission has no authority to set rates, or impose terms or conditions for network elements offered pursuant to section 271. ***

As explained above, state commissions have no authority in any respect to force BellSouth to include Section 271 network elements or network elements unbundled under state law in Section 252 interconnection agreements. Consequently, if the Commission gives proper effect to the existing limitations on its authority under federal law, this sub-issue is easily addressed – the Commission need not discuss it at all. Moreover, for all the reasons discussed above, even if the Commission ***could*** legally set rates, it ***should*** not. Engaging in commission-driven rate setting would be flatly inconsistent with the FCC's decisions in the *TRO* and *TRRO*.

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[90] *See, e.g.*, *Verizon v. Public Utilities Commission of Maine et al.*, Case No. 1:05-CV-53 (U.S. Dist. Ct. D. Me). There are two appeals pending against orders of the Illinois Commission, *Illinois Bell Telephone Co. v. Edward C. Hurley et al.*, Case No. 05-C-1149 (U.S. Dist. Ct. E.D. Ill.), and an appeal to the appellate court of the Fourth Judicial District. BellSouth believes the latter appeal may be the direct appeal of the case cited in CompSouth's *SJ Response* at 16. In its most recent post-hearing briefs, CompSouth cited to a September 20, 2005 Illinois decision as favorable to it. Any such citation is incomplete given that the Illinois Commission recognized it "has no jurisdiction to enforce the provisions of Section 271 absent an agreement." Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision*, November 2, 2005, p. 60. The Illinois Commission has previously exercised limited 271 authority based upon explicit contractual provisions in which SBC made reference to Section 271 elements in interconnection agreements. BellSouth has not done so here. In Michigan, the Commission found "that the disputed language proposed by both parties [addressing Section 271] should not be included in the amendment" because "[t]hose obligations may be argued and decided at a different time and in a more appropriate proceeding." Order, p. 15, Case No. U-14447, Michigan Public Service Commission, Sept. 20, 2005.

It is important to recognize that Section 271 rate-setting has particular legal ramifications. That is, even if a state commission were to construe Section 271 as requiring an agreement to be approved by a state commission under Section 252, the scope of that state commission approval is expressly limited to ensuring agreements comply with ***Section 251*** and, state commissions clearly have no authority to establish rates for such elements, which underscores that state commissions have no authority to require inclusion of the Section 271 elements to begin with.

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.[91] In addition, section 271 arose out of the Modification of Final Judgment (MFJ),[92] and "the states had no jurisdiction" over the implementation of the MFJ.[93] And the FCC has already ruled that it is ***federal*** law – namely, sections 201 and 202 – that established the standard that BOCs must meet in offering access to 271 elements.[94]

State commissions, therefore, cannot assert state law authority to regulate Section 271 elements, which "are a purely federal construct."[95] 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.[96] Congress also expressly prohibited the FCC from "extend[ing] the terms used in the competitive checklist" to include additional network elements.[97] It necessarily

[91] *E.g.*, Memorandum Opinion and Order, *Petition of SBC Communications for Forbearance,* 19 FCC Rcd 5211, ¶ 7 (2004).
[92] *see TRO* at ¶ 655 *at* n. 1986,
[93] *InterLATA Boundary Order,* 14 FCC Rcd 14392, 14401, ¶ 16.
[94] *See TRO* at ¶ 656; *UNE Remand Order* at ¶ 470; *USTA II, 359 F.3d* at 588-90.
[95] *InterLATA Boundary Order,* 14 FCC Rcd 14392, 14401, ¶ 18.
[96] *See TRO* at ¶ 653.
[97] 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").

follows that any decision by a state commission purporting to regulate Section 271 obligations in any way, including setting rates, conflicts with Congress's determination and, therefore, is preempted.[98]

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.[99] As the FCC has explained, this means that, for Section 271 elements, "the market price should prevail."[100] 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.[101] Rate-setting by commissions is the opposite of the development of market-based prices discussed in the *USTA II* decision. The two concepts of "market-based" rates on the one hand and "commission-set" rates on the other, are fundamentally at great odds, and if this commission ignored the work that BellSouth has done to reach commercial agreements it would undermine such efforts going forward.

Moreover, the failure by certain CLECs to reach an agreed rate – in contravention of the FCC's calls for commercial agreements – should not be rewarded. By engaging in any form of state-based, Commission-run rate making, the CLECs are rewarded with the same out-dated regulatory regime rejected by the FCC.

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

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[98] *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).
[99] *See TRO* at ¶ 656; *UNE Remand Order* at ¶ 470; *USTA II,* 359 F.3d at 588-90.
[100] *UNE Remand Order* at ¶ 470; *USTA II,* 359 F.3d at 588-90.
[101] *TRO* at ¶ 664.

conditions" that "violates Congress's intent in passing the Communications Act."[102] 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.'"[103] Section 201, moreover, "demonstrates Congress's intent that ***federal law*** determine the reasonableness of the terms and conditions" of 271 elements.[104]

The FCC has clearly recognized this limitation, stating unequivocally that it has "exclusive authority" over "the section 271 process."[105] 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 separately.[106] As the FCC has stated to the 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.[107]

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[102] *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").
[103] *Boomer,* 309 F.3d at 418-19.
[104] *Id.* at 420 (emphasis added).
[105] *See US West Order*, 14 FCC Rcd at 14401-02, ¶ 18.
[106] *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.")
[107] *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").

Accordingly "***the [FCC] may ensure effective regulation of the interstate component ... by preempting inconsistent state regulation of the matter in issue.***"[108] 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."[109]

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 FCC has explained in a related context involving the relationship between Sections 251 and 271, "Congress' decision to omit cross-references [is] particularly meaningful" in this context, given that such cross-references are plentiful elsewhere in the relevant provisions.[110]

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.[111] 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. Perhaps most

[108] *Id.* at 36 (emphasis added).
[109] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.
[110] *TRO*, ¶ 657.
[111] *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.").

importantly, the Commission, even if it ***could, should*** not accept the CLECs' invitation to set rates that the FCC has decided should be set by the market.

C. **Issue 7(c): Section 271** *If the answer to 7 (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?*

*** **Summary of BellSouth's Position:** This Commission has no authority to set rates, or impose terms or conditions for network elements offered pursuant to section 271; nor may the Commission require the inclusion of such elements in §252 agreements. ***

Based upon the language in the Act, the applicable federal court decisions, and the majority of state commission decisions, there is no basis whatsoever to require BellSouth to include language addressing Section 271 obligations in Section 252 interconnection agreements over BellSouth's objection. BellSouth's proposed contract language properly recognizes that its unbundling obligations are performed "in accordance with its obligations under Section 251(c)(3) of the Act."[112] Because the Commission cannot legally answer issues 7 (a) and (b) in the affirmative, this subpart (c) must be resolved in BellSouth's favor.

The Commission cannot and should not address the rates, terms, and conditions that govern BellSouth's Section 271 obligations. The CLECs cannot circumvent the Commission's lack of rate-setting authority by proposing "interim Section 271 rates." Indeed, the CLECs propose as "interim Section 271 rates" the FCC's transitional rates. Those rates unequivocally end at a date certain, thus, what the CLECs want would extend the transitional rates beyond their ending date until some unknown rate setting proceeding occurs and permanent state commission 271 rates are ordered. In an attempt to bolster their "interim" rate proposal, the CLECs rely on testimony BellSouth filed in South Carolina in an effort to show that "interim 271 rates" that are close to TELRIC rates recover BellSouth's costs. However, the FCC has

[112] PAT-1, Section 1.1.

addressed various CLEC "just and reasonable" rate claims in its appellate papers filed in the D.C. Circuit Court of Appeals and explained:

> The CLECs dispute the [FCC's] finding that unbundled mass market switching creates investment disincentives. They contend that TELRIC rates are much higher than the [FCC's] analysis suggests. The CLECs' characterization of TELRIC rates is just not credible. If (as the CLECs assert) TELRIC switching rates are at or above "the upper end" of a "just and reasonable range", then presumably CLECs would have stopped paying high UNE rates and started serving their mass market customers with the switches they had already purchased and deployed to serve enterprise customers.
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>
> The CLECs question the reasonableness of *any* rate increase. They assert that rates for unbundled switching were already at or above the "high end" of "the just and reasonable range" before the FCC prescribed the interim rate increase ... The CLECs' own conduct is inconsistent with their claim that TELRIC-based switching rates are high or excessive. THE CLECs continued to pay TELRIC rates even though they could have served their mass market customers with non-ILEC switches that they had already purchased and deployed to serve enterprise customers. Competitors' persistent reliance on UNE-P - even after extensive deployment of competitive switches – provides powerful evidence that TELRIC-based switching rates were not even close to "the high end" of the permissible range of rates under the "just and reasonable" standard of section 201(b).[113]

As the FCC makes clear, using rates that are at, or close to TELRIC, would perpetuate the investment disincentives that existed under the UNE-P regime. CompSouth's attempt to obtain such rates shows that it wishes to evade the regulatory changes mandated by the *TRRO.*

Just as the CLECs tried to avoid the definitive start date of the *TRRO,* this is simply an attempt to circumvent the ending date, in an effort – in the words of the Eleventh Circuit – "to cram as many new customers as possible before they are forced to bow to the inevitable."[114] This clinging to the former regulatory regime also undermines the results of BellSouth's

[113] *See* Hearing Exhibit 36 at 32, 36 (citations omitted).
[114] *Eleventh Circuit Order* at * 13.

commercial negotiations – negotiations that have resulted in over one hundred and fifty agreements.[115] The Commission cannot and should not allow such an outcome.

The Commission must recognize that the FCC meant what it said about the No New Adds date, and it must likewise recognize that the FCC's end date for imposing transitional rates is equally important. It is clear that the FCC intended that those rates convert to market rates at that point. Had the FCC intended the transitional rates to last until replaced by state-set rates, it would have said so. It did not say so, because that is not what the law requires. Having recognized that the de-listed UNEs should not be required to be provided at the rates previously in place, due to their adverse impact on competition, the FCC set a firm end date to its transition plan, which states must not ignore.

D. 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)?*

*** **Summary of BellSouth's Position:** Commingling is properly interpreted to include the combining of Section 251 UNEs with the ILEC's resale services and switched and special access services. Section 252 agreements should also include language that BellSouth has no obligation to combine Section 251 UNEs with Section 271 checklist items. ***

The basic dispute between BellSouth and the CLECs concerning commingling involves Section 271, and whether a state commission can dictate the rates, terms, and conditions that apply to BellSouth's Section 271 obligations. The Commission has already addressed this issue in its *Joint Arbitration Order,* and should confirm that ruling applies to all CLECs in Florida, as explained below.[116]

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[115] Blake Rebuttal at 4.

[116] In Docket No. 040156-TP, the Commission adopted its staff recommendation to allow CLECs to commingle UNEs and UNE combinations with switched access, special access and resale services. *Staff Recommendation* at 83. The specific dispute in this docket involves Section 271 services, not access or resale services.

The fundamental problem with CompSouth's proposed contract language is that it improperly asserts state commission regulation over Section 271 obligations.[117] As discussed in connection with Issue 7 the Commission cannot regulate the terms by which BellSouth complies with its Section 271 obligations. Accordingly, this Commission must reject any suggestion that Section 271 services must be commingled with other UNEs.

Even if the Commission had some Section 271 authority (it does not), a careful review of commingling indicates the FCC does not require BellSouth to combine 251 services with 271 services. The FCC's intent is clear by reviewing the term "commingling" as it was first used -- in the *Supplemental Order on Clarification*, FCC 00-183, CC Docket No. 96-98, which was released on June 2, 2000 ("*SOC*"). In the *SOC*, the FCC defined commingling as combining loops or loop-transport combinations with ***tariffed special access services:***

> We further reject the suggestion that we eliminate the prohibition on "commingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above."[118]

The FCC explicitly used the abbreviation "i.e." in describing commingling. That abbreviation – "i.e." - means "that is."[119] It does not mean "for example", "such as", or any other broadly descriptive phrase.[120] Consequently, the FCC understood commingling in the *SOC* to refer to the combination or connection of UNEs and tariffed access services.

The commingling rule that forms the basis of the parties' dispute in this docket was enacted after the *SOC* in the FCC's *TRO* at paragraphs 579 through 584. Ultimately, the commingling discussion in the *TRO* was consistent with the *SOC*, a point that will be addressed

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[117] Notably, CompSouth's proposed commingling language explicitly sets the rates for Section 271 services. *See* Hearing Exhibit at 34, Section 1.11.3.
[118] *SOC* at ¶ 28.
[119] *See, e.g., http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=i.e.*
[120] Mr. Gillan makes the absurd contention that because, in certain portions of the *TRO*, the FCC uses the abbreviation "e.g." that commingling is not limited to UNEs and tariffed access services. Gillan Rebuttal at 30. This argument fails due to the FCC's language in the *SOC*. *See also* Hearing Exhibit 2, p. 22.

more fully below. Notwithstanding the importance of commingling as it relates to tariffed access services, it is also significant to understand that the FCC used the verb "combining" in explaining the commingling obligation.

At paragraph 579 of the *TRO* the FCC 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.[121]

Thus, although CLECs attempt to create some type of distinction between an ILEC's commingling obligation and the combination obligation,[122] the FCC did not. The FCC explicitly used the terms "commingling" and "combining" interchangeably.[123]

The FCC was very clear that BellSouth and other RBOCs have no obligation to combine 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act. Indeed, the FCC explicitly stated 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."[124] The CLECs appealed this aspect of the *TRO,* and the FCC's finding was upheld. The D.C. Circuit Court, addressing the issues of Section 271 pricing and combinations, made clear that the FCC had "decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network

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[121] *TRO,* ¶ 579 (emphasis added). *See also* 47 C.F.R. § 51.5.

[122] *See* Gillan Direct at 47-50; *see also* Hearing Exhibit 3 (various CLEC responses describing commingling and combining).

[123] Mr. Gillan's testimony on this point is illogical. He describes the FCC's use of the terms combining and commingling as a matter of "semantic construction," claims BellSouth is "not technically required to 'combine' § 271 elements," then claims BellSouth has an obligation to "connect § 271 elements." Gillan Direct at 47-48. Mr. Gillan's word choice – connect, instead of combine – is of no consequence. The definition of commingling at 47 C.F.R. §51.5 includes "the combining of an unbundled network element ... with one or more such facilities or services." Since Mr. Gillan testifies that BellSouth is not required to "combine" § 271 elements, and the definition of commingling includes the obligation of combining a UNE with other facilities or services, Mr. Gillan effectively concedes BellSouth has no obligation to commingle § 271 network elements with UNEs.

[124] *See TRO* at ¶ 655, n. 1989. The *TRO,* as originally issued, had this language at note 1990. After the *TRO Errata* the footnotes were renumbered, and the remaining language appears at note 1989.

elements."[125] Consequently, it is obvious that the FCC and the D.C. Circuit have found that there is no requirement to commingle or combine UNEs with independent Section 271 checklist items. Indeed, the D.C. Circuit noted that "none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist."[126]

In an effort to overcome the express findings of the FCC and the D.C. Circuit Court of Appeals, the CLECs make a "double-strike" argument about commingling that cannot withstand scrutiny. This dispute centers on two deletions from the *TRO,* which deletions were made in the *TRO Errata.* Prior to its *Errata,* the FCC originally stated,

> [a]s 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.[127]

Notably, when the *Errata* was issued however, the phrase "unbundled pursuant to section 271" ***was deleted.***[128] 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 services offered for resale pursuant to section 251(c)(4) of the Act.[129]

Hence, the first "strike."

The second "strike" also occurred in the *TRO Errata.* At the same time the FCC deleted the phrase "unbundled pursuant to Section 271" from its discussion of commingling in paragraph 584 of the *TRO,* it also deleted the sentence, "We also decline to apply our commingling rule, as

[125] *USTA II,* 359 F.3d at 589. Significantly, the Section 271 checklist obligates BellSouth to provide local loop transmission "*unbundled from local switching and other services*", local transport "*unbundled from switching or other services*", and switching "*unbundled from transport, local loop transmission or other services.*" BellSouth's Section 271 obligation was referred to by the FCC and the D.C. Circuit Court of Appeals as an "independent" obligation. *See USTA II* at 590; *TRO* at ¶ 653. It defies logic to rely to essentially impose a "bundling" requirement – by making BellSouth connect Section 251 UNEs to Section 271 checklist items – to an independent obligation that is not required to be provided in conjunction with any other service.

[126] *Id.*

[127] *TRO* at ¶ 584 (emphasis supplied).

[128] *TRO Errata*, at ¶ 27.

[129] The *TRO*, incorporating all errata changes, is publicly available at www.fcc.gov.

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*.[130] The CLECs claim that, read together, these two deletions simply eliminated any potential conflict. That argument fails – had the FCC desired to impose some type of commingling, or combining obligation on BellSouth it would have only needed to delete the language at footnote 1990, yet retain its original language in paragraph 584, which, as originally issued, appeared to impose an obligation to commingle UNEs with Section 271 network elements. That was not the course the FCC took – it made two deletions, one of which clearly removed any commingling of Section 251 UNEs with Section 271 network elements. That deletion has meaning and cannot be ignored as though it never happened.

Ultimately, by making its deletions, the federal commingling rule issued by the TRO became consistent with the definition of commingling in the SOC. That is because the words "wholesale services" were repeatedly referred to as tariffed access services. The FCC's commingling mandate specifically required ILECs "to ***effectuate commingling by modifying their interstate access service tariffs*** to expressly permit connections with UNEs and UNE combinations."[131] This command shows the FCC's intention and CLECs cannot ignore it as well as the FCC's deletion of the reference to Section 271 by simply focusing on the words "wholesale services." The FCC clearly intended to limit the types of wholesale services that are subject to commingling. This is because, in describing wholesale services in the *TRO*, the FCC referred repeatedly to ***tariffed access services***. 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). (*TRO*, ¶ 579).

[130] *See TRO*, n. 1989 (prior to the *TRO Errata*, this was footnote 1990).
[131] *TRO*, ¶ 581 (emphasis supplied).

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). (*TRO*, ¶ 579).

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.* ... rates based on special access services and UNEs). (*TRO*, ¶ 580).

Then,

> We conclude that . . . section 251(c)(3) of the Act grants authority for the [FCC] to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate access services. (*TRO*, ¶ 581 *see also* n. 1786).

The explicit command,

> we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations. (*TRO*, ¶ 580).

And,

> our rules permit incumbent LECs to assess the rates for UNEs . . . commingled with tariffed access services on an element-by-element and a service-by-service basis (*TRO* ¶ 582 *see also* n. 1795).

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. (*TRO*, ¶ 583).

The foregoing passages, along with the deletion of Section 271 in the description of commingling in the *Errata*, evidence the FCC never intended for ILECs to commingle or combine Section 271 elements with Section 251 UNEs. Indeed, the *TRRO*, read in conjunction with the *TRO*, is also consistent. In addressing conversion rights in the ***TRO*** at ¶ 585 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 ...." Then, when describing this conversion holding in the ***TRRO*** at ¶ 229, 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 ...." It is clear, therefore, that the FCC narrowly interprets "wholesale services" and it does not expect or require BellSouth to combine or commingle Section 271 network elements with Section 251 network elements.

Indeed, although Mr. Gillan erroneously suggests that BellSouth's commingling position is somehow discriminatory, the FCC's resolved any potential discrimination problem by explaining that CLECs could commingle UNEs with resold services. *See TRO* ¶ 584. The FCC made no such finding with respect to Section 271 and, when discussing discrimination concerns at paragraph 581 of the *TRO*, the FCC referred to Sections 201 and 202, which, as explained above, are federal statutes applied and enforced by the FCC, and not state commissions. Consequently, CompSouth's discrimination argument fails.

More importantly, 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.[132] Significantly, if BellSouth is required to combine or commingle 251 elements – such as loops – with services BellSouth provides only pursuant to Section 271 – such as switching – the result will be to effectively recreate UNE-P under the guise of commingling. The FCC made clear in the *TRRO*, however, that there is "no section 251 unbundling requirement for mass market local circuit switching nationwide."[133] And, both the New York Public Service Commission as well as the Mississippi Federal District Court have indicated that the "FCC's decision 'to not require BOCs

[132] *TRRO* at ¶ 218.
[133] *TRRO* at ¶ 199.

to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to 271-based UNE-P arrangements.'"[134] UNE-P is abolished and state commissions cannot recreate it disguised as a Section 271 commingling obligation.

As Ms. Tipton's testimony makes clear, BellSouth's proposed contract language properly implements the FCC's commingling definition.[135] Ms. Tipton explained the *TRO Errata* addressed any Section 271 argument, showing BellSouth is not required to commingle UNEs with section 271 elements.[136] Indeed, BellSouth is willing to include the FCC's commingling rule in its interconnection agreements; BellSouth's proposed contract language essentially mirrors the federal commingling rule.[137]

CompSouth's language, in contrast, improperly asserts state commission authority over Section 271 obligations and would resurrect UNE-P. In making this proposal CompSouth explicitly sought to require BellSouth "to offer § 271 elements under the same terms and conditions as apply (or in the case of switching, applied) to the parallel § 251 offering, except as

[134] *BellSouth v. Mississippi Public Serv. Comm'n*, Civil Action No. 3:05CV173LN at 16-17 (stating that the court would agree with the New York Commission's findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (Mar. 16, 2005)).
[135] Tipton Direct at 52-56; Tipton Rebuttal Exhibit PAT-5 at 35-39.
[136] Tipton Direct at 53-54.
[137] BellSouth's proposed contract language, *see* Exhibits PAT-1, Section 1.11, PAT-2, Section 1.11. provides, in relevant part, as follows:

> 1.11 <u>Commingling of Services</u>
>
> 1.11.1 Commingling means the connecting, attaching, or otherwise linking of a Network Element, or a Combination, to one or more Telecommunications Services or facilities that <<customer_short_name>> has obtained at wholesale from BellSouth, or the combining of a Network Element or Combination with one or more such wholesale Telecommunications Services or facilities. <<customer_short_name>> must comply with all rates, terms or conditions applicable to such wholesale Telecommunications Services or facilities.
>
> * * * *
>
> 1.11.5 Notwithstanding any other provision of this Agreement, BellSouth shall not be obligated to commingle or combine Network Elements or Combinations with any service, network element or other offering that it is obligated to make available only pursuant to Section 271 of the Act.

to price."[138] And, to the extent that CompSouth's language includes commingling of Section 251 loops or transport UNEs with Section 271 loops or transport checklist items, the CLECs' proposed terminology is completely unnecessary and is offered as a red herring. BellSouth complies with the FCC's commingling requirements because BellSouth combines UNEs with its tariffed services. BellSouth satisfies its Section 271 loop and transport obligations via its access tariffs. BellSouth's choice to meets its 271 obligation via its access tariffs in no way obligates BellSouth to otherwise combine Section 251 elements with Section 271 elements. CompSouth's language is simply designed to deflect attention from the CLECs' attempt to resurrect UNE-P under the guise of commingling.[139]

Other state commissions have issued rulings consistent with this Commission's finding in the *Joint Arbitration Order.* The North Carolina Commission in a proceeding between BellSouth and NuVox in Docket No. P-772, Sub 8, ruled:

> The Commission believes that ... the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.[140]

The Kansas Commission held: (1) Southwestern Bell Texas ("SWBT") was "not under the obligation to include 271 commingling provisions in successor agreements"; (2) "271 commingling terms and conditions had ***no home*** in [interconnection] agreements"; and (3) if it ordered SWBT to provide commingling and SWBT refused the commission "would have no

[138] Gillan Direct at 52.
[139] Because BellSouth satisfies its Section 271 loop and transport obligations through its tariffed access services, BellSouth combines a Section 251 loop with tariffed transport, which transport happens to serve as BellSouth's Section 271 offering. That is why the CLECs' listing of loop and transport commingling arrangements they propose to include in their interconnection agreement contract language is a red herring. The CLECs know full well that BellSouth already connects 251 UNEs with tariffed access services. Indeed, CLECs have no need for any "retroactive" commingling language for that reason.
[140] *See* NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 24.

enforcement authority against SWBT because that Commission ... resides with the FCC."[141]

Most recently, the Ohio commission held

> the FCC concluded, in footnote 1990 of the *TRO,* that § 271 checklist items that are not UNEs under § 251(c)(3) are not subject to the UNE combination requirements and, in fact in § 271 of the 1996 Act there is no mention of 'combining' and it does not reference back to the combination requirement set forth in § 251(c)(3).
>
> Applying the same analysis as applied by the FCC to reach its conclusion not to require combinations of checklist items, we decline to require the commingling of § 271 competitive checklist items with other wholesale services, including but not limited to UNEs. We find that the CLECs in their arguments failed to demonstrate how a combination, which is clearly not required per *TRO* footnote 1990, would be different from a commingled arrangement, as proposed by the CLECs.[142]

These rulings were and are correct, and this Commission should confirm its holding in the *Joint Arbitration Order* applies throughout Florida.

E. **<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?*

*** **<u>Summary of BellSouth's Position:</u>** BellSouth is not obligated to provide new line sharing arrangements after 10/1/2004. CLECs have many options to provide broadband services that create better competitive incentives. There is no Section 271 line sharing obligation, and, if such an obligation existed (it does not), the FCC has forborne from applying it. ***

The FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004.[143] BellSouth asks the Commission to implement this aspect of the *TRO* and require CLECs to either eliminate line sharing from their

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[141] *See Kansas Order* at ¶¶ 13-14 (emphasis added). BellSouth acknowledges the Kentucky Commission in its region entered an order that required commingling of Section 251 UNEs and Section 271 obligations; however, that commission has granted rehearing. And, state commissions outside BellSouth's region that have properly recognized their lack of Section 271 authority have erroneously determined that ILECs must allow requesting carriers to commingle Section 251(c)(3) UNEs with Section 271 elements relying on their Section 251 authority. *E.g., Washington Covad/Qwest Decision, Massachusetts Arbitration Order.* Any such rulings are logically inconsistent, and while CompSouth will undoubtedly cite to some of these decisions to support its position, such commissions would have no avenue to enforce their commingling rulings as the Kansas Commission recognized. Indeed, to the extent state commissions relied upon Section 251 to impose a commingling obligation that relates to Section 271, such rulings violate *USTA II* as the D.C. Circuit made clear that Section 271 checklist items do not incorporate ***any*** of the specific requirements of Section 251(c)(3).

[142] *Arbitration Order,* Ohio Case No. 05-0887-TP-UNC (Nov. 9, 2005) at 104.

[143] Fogle Direct at 5; *citing TRO* at ¶¶ 199, 260-262, 264-265.

interconnection agreements entirely or to include language that implements the *TRO's* binding transition rules if a CLEC has active line sharing arrangements. BellSouth's request is eminently reasonable given that only nine CLECs region wide have active line sharing arrangements in place.[144]

To avoid implementing the federal rules concerning line sharing, however, the CLECs (primarily Covad) claim that line sharing is a Section 271 obligation. This argument fails for several reasons. For one, the language of Section 271 does not require line-sharing. Checklist item 4 requires BOCs to offer "local loop transmission, ***unbundled*** from local switching and other services."[145] Clearly, when line sharing occurs, transmission, local switching, and other services are being provided over a single line.[146] Consequently, providing line sharing would conflict with the statutory language. 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.[147] BellSouth thus meets its checklist item 4 obligations by offering access to unbundled loops and the "transmission" capability on those facilities.[148] The CLECs argue that because the high frequency portion of the loop ("HFPL") is "a complete transmission path," that it constitutes "a ***form of*** 'loop transmission facility'" under checklist item 4. This argument makes no sense. To make it, the CLECs must ignore the portion of the definition of HFPL that

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[144] Fogle Direct at 5. The resolution of this issue should resolve the question left unanswered in Docket No. 040601-TP.
[145] 47 U.S.C. § 271(d)(2)(B)(iv).
[146] *E.g., TRO* at ¶ 255 (explaining the end user in a line sharing arrangement is receiving both voice and DSL service over the same facility).
[147] 47 C.F.R. § 51.319(a).
[148] CLECs have previously cited to FCC 271 orders for the proposition that line sharing is a Section 271 obligation, yet offer no explanation for the fact that neither New York nor Texas were required to offer line sharing to obtain Section 271 approval. If line sharing actually had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted Verizon and SBC Section 271 authority. *See In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, 15 FCC Rcd 3953 (Dec. 22, 1999); *In the Matter of Application by SBC Communications, Inc., et al.; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, 15 FCC Rec'd 18354 (June 30, 2000).

defines HFPL as a "complete transmission path ***on the frequency range above the one used to carry analog circuit switched voice transmissions*** ...." In other words, the HFPL is only part of the facility – not the entire "transmission path" required by checklist item 4.[149]

Notwithstanding federal law, CLECs' refusal to include the FCC's transition plan in Section 252 interconnection agreements necessitates a resolution of this issue. Notably, no CLEC filed testimony that explained their view. Instead, CompSouth's witness submitted contract language on this issue, but readily acknowledged he did not sponsor any testimony (aside from the flawed CLEC Section 271 line sharing theory) to support that proposed language.[150]

Beyond the obvious fact that line sharing cannot credibly consist of a form of loop transmission, the CLEC argument is that, notwithstanding the clear language of the *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.[151] This position is deeply illogical and inconsistent with both the statutory scheme and the FCC's binding decisions.

First, 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, state commissions have no authority to require an ILEC to include Section 271 elements in a Section 252 interconnection agreement.

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[149] 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.

[150] Gillan Deposition, Hearing Exhibit 7 at 77.

[151] While many CLECs have interconnection agreements that contain line sharing language that needs to be amended, only nine CLECs have active line sharing arrangements in place in BellSouth's region. Fogle Direct at 5.

Second, the CLECs' theory that line sharing is still available as a Section 271 element would render irrelevant the FCC's carefully-calibrated transition plan to wean CLECs away from line-sharing and to other means of accessing 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 be separately unbundled ***creates better competitive incentives.***"[152] Because of the inherent difficulties in pricing access to just the HFPL (difficulties that exist regardless whether access is required under Section 251 or, as CompSouth claims, under Section 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."[153]

Indeed, the FCC expressly found continued unlimited access to line-sharing to be ***anticompetitive*** and contrary to the core goals of the 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.*** [154]

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, in lieu of line sharing, a whole loop or

[152] *TRO* at ¶ 260. (emphasis added).
[153] *Id.*
[154] *Id.* ¶ 261 (emphasis added).

engage in line-splitting. Thus, in its *BellSouth Declaratory Ruling Order,*[155] the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop."[156] Far from suggesting an open-ended Section 271 obligation to allow line-sharing, this recent FCC decision reiterates that line sharing was required "***only*** under an express three-year phase out plan."[157] 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. Instead, checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."[158] 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.[159] 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.

But even if (hypothetically) Section 271 did require line-sharing, the FCC's forbearance decision would have removed any such obligation.[160] BellSouth realizes Covad disputes 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 Chairman (then Commissioner) Martin:

> 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

[155] *See Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251 (Mar. 25, 2005) ("BellSouth Declaratory Order").
[156] (¶ 35).
[157] *Id.* ¶ 5 n. 10 (emphasis added).
[158] 47 U.S.C. § 271(d)(2)(B)(iv).
[159] 47 C.F.R. § 51.319(a).
[160] *Memorandum Opinion and Order*, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order*").

> *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 obligation 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. [161]

As stated by Chairman Martin, the Bell Operating Companies, as well as 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,"[162] 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:

> [T]o 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).

In its forbearance order, the FCC stated that,

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[161] Statement of Commissioner Kevin J. Martin, *Broadband 271 Forbearance Order. Id.;* BellSouth acknowledges that the separate statement of former FCC Chairman Powell – which statement was amended *after* the FCC issued a press release concerning the adoption of the *Broadband 271 Forbearance Order* – conflicts with Chairman Martin's statement. Mr. Powell's amended statement, 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 de-listed 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 indicated that 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. In contrast, Chairman Martin's statement was supported by applicable law.

[162] *Broadband 271 Forbearance Order*, at ¶ 9.

> [a]lthough 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).[163]

In this regard, the FCC cited to a March 26, 2004 *ex parte* letter filed by Verizon. Verizon's March 26, 2004 letter included a white paper that specifically referred to line sharing. Indeed, referring to *USTA II,* Verizon stated:

> [t]he 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.'[164]

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 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."[165] It used the same rationale to eliminate the HFPL broadband element.[166] As stated by the D.C. Circuit Court of Appeals in affirming these portions of the *TRO:*

> [t]he Commission . . . 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 unbundled the

[163] *Broadband 271 Forbearance Order, at ¶ 2, n. 9.*
[164] Verizon's March 26, 2004 filing, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48.
[165] *Broadband 271 Forbearance Order* at ¶ 7, *citing TRO* at ¶¶ 242 – 44.
[166] *TRO* at ¶¶ 258 – 63.

high frequency portion of copper loops, a practice known as "line sharing," id. ¶¶ 255-63.[167]

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."[168] And the D.C. Circuit Court's opinion clearly contemplates that "the broadband elements at issue" included line sharing.[169] There is simply no rational basis for excluding one broadband element – line sharing – from the broadband relief the FCC granted.

There is, however, every reason to conclude that the FCC did 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.[170]

This holding mirrors the FCC's conclusion about the effect of removing line sharing from the UNE list in the *TRO*.[171] The FCC also explained "[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."[172] Just as forbearance from 271 obligations for

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[167] 359 F.3d 554, at 226.
[168] *Broadband 271 Forbearance Order*, n. 73, *citing USTA II*, 359 F.3d at 578 – 85.
[169] 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.
[170] *Broadband 271 Forbearance Order* at ¶ 34.
[171] *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").
[172] *Broadband 271 Forbearance Order* at ¶ 22. The FCC concluded at ¶ 29 that "Broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using

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.[173] Thus, as explained by Chairman (then Commissioner) 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.

Neither Covad nor any other CLEC can identify any 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.[174]

Finally, commission decisions in Tennessee, Massachusetts, Michigan, Rhode Island and Illinois support BellSouth's position. The TRA determined that the FCC's transition rules alone apply.[175] In Rhode Island, 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,

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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."

[173] 47 U.S.C. § 160(c) ("[a]ny such petition shall be deemed granted if the Commission does not deny the petition ....").

[174] CompSouth's response to this is to characterize Chairman Martin's view as "manifestly incorrect." *See SJ Response* at 38.

[175] Docket No. 04-00186, Order dated July 20, 2005. Covad has requested rehearing of this order. BellSouth acknowledges that other state commissions have reached different conclusions; however, to the extent that continued line sharing was required based upon state tariffs that preexisted the *TRO* any such decisions are distinguishable.

claiming Verizon had a Section 271 line sharing obligation. The Rhode Island Commission rejected Covad's arguments and approved Verizon's tariff modifications.[176]

Also, the Illinois Commission has rejected CLEC arguments that line sharing is a Section 271 obligation. 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 ... [p]atently, no reference to Section 271 obligations belongs in the ICA.[177]

The Massachusetts Commission directed the parties "to include the [FCC's] line sharing rules verbatim in" interconnection agreement amendments.[178] In Michigan, that commission dismissed a CLEC's complaint seeking to force SBC to include new line sharing; the CLEC claimed SBC had a Section 271 obligation.[179] This Commission should make clear that no new line sharing arrangements can be ordered under the federal rules.[180]

F. **Issue 17: Line Sharing – Transition:** *If the answer to Issue 17 is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?*

*** **Summary of BellSouth's Position:** The FCC's line sharing transition language is appropriate. For any line sharing arrangements that were placed in service after October 1, 2004, the CLEC should be required to pay the full stand-alone loop rate for such arrangements. ***

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[176] *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).

[177] *In re: XO Illinois*, 2004 WL 3050537 (Ill. C.C. Oct. 28, 2004).

[178] *Massachusetts Arbitration Order,* p. 185.

[179] *In re: Application of ACD Telecom, Inc. against SBC Michigan for its Unilateral Revocation of Line Sharing Service in Violation of the Parties' Interconnection Agreement and Tariff Obligations and For Emergency Relief,* 2005 Mich. PSC LEXIS 109, Order Dismissing Complaint * 12-13 (Mar. 29, 2005).

[180] In a recent Georgia filing, CompSouth referred to decisions in Maine, Pennsylvania, and Louisiana to support its view. Any reliance on a preliminary Louisiana decision is misplaced – BellSouth has requested the Commission review its January 2005 decision, which it has agreed to do. The Maine decision is on appeal, and the Pennsylvania Commission explicitly relied on Verizon's tariff filing as the basis for its decision, recognizing "there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA's tariff under the present state of FCC orders." Docket No. R-00038871C0001 (July 8, 2004) at 20. Indeed, the Pennsylvania Commission explicitly recognized "the state commission's role in . . . regard to [Section 271] is consultative and the ultimate adjudicative authority lies with the FCC." Id. at 17.

The FCC articulated, as clearly as it could, the transitional plan for line sharing 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 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.

CompSouth's proposed contract language – unsupported by testimony– completely disregards the FCC's plan and binding federal rules.[181]

BellSouth has no obligation to add new line sharing arrangements after October 2004. Thus, to properly transition existing line sharing arrangements, those CLECs with line sharing customers must amend their interconnection agreements to incorporate the line sharing transition plan from the federal rules and should pay the stand-alone loop rate for arrangements added after October 1, 2004.[182]

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

*** **<u>Summary of BellSouth's Position:</u>** BellSouth's proposed language is appropriate and recognizes that unbundled access to call-related databases is tied to BellSouth's limited obligation to provide unbundled access to local switching.

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[181] *See* Fogle Rebuttal at 7.
[182] *Id.*

> After March 10, 2006, CLECs may purchase access to call related databases pursuant to BellSouth's tariffs or a separate commercially negotiated agreement. ***

BellSouth's proposed contract language concerning call-related databases ties its obligation to provide unbundled access to call related databases to BellSouth's limited obligation to provide switching or UNE-P.[183] Pursuant to the *TRO*, ILECs are not obligated to unbundle call-related databases for CLECs who deploy their own switches.[184] 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.[185] This decision applies on a nationwide basis, both to enterprise and mass-market switching.[186] Consequently, interconnection agreements should not contain any language regarding the provision of unbundled access to call-related databases other than 911 and E911.

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.[187] The Court rejected this argument and held that "[a]s 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."[188] 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. BellSouth's legal obligation is expressly limited to providing databases only in connection with switching provided under the FCC's transition

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[183] *See* PAT-1 Section 7.1; Tipton Direct at 62-64.
[184] *TRO* at ¶ 551 ("[w]e 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").
[185] 47 C.F.R. 51.319(d)(4)(i).
[186] *TRO* at ¶ 551.
[187] *USTA II* at 50.
[188] *Id.*

plan. To circumvent the binding federal rules, the CLECs rely again on Section 271; claiming BellSouth must include language concerning Section 271 access to call-related databases in its interconnection agreements.[189] Because the Commission has no Section 271 authority, and because it is patently unreasonable to assume that the FCC and D.C. Circuit eliminated unbundling requirements for databases only to have such obligations resurrected through Section 271, CompSouth's proposed language must be rejected.

II. Transition Issues (1, 2, 3, 4, 8, 9, 10, 31)

A. 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?*

*** **Summary of BellSouth's Position:** CLECs should submit orders promptly to convert/disconnect delisted UNEs. Otherwise, BellSouth will convert delisted UNEs to their resale/tariff equivalent or disconnect these arrangements at the definitive end of the transition period. Transitional rates apply when the CLEC is leasing the delisted UNE and are retroactive to March 11, 2005. ***

1. Summary of Argument

The transition disputes between the parties include establishing contract language that effectuates an orderly transition, that is completed by the end date of the transition period, and that makes clear CLECs cannot pay UNE rates after they have migrated from Section 251 UNEs to other serving arrangements.[190] The CLECs also improperly seek to include contract language that would allow them to transition from Section 251 UNEs to Section 271 checklist items, which language must be rejected as explained in connection with Issue 7.

The *TRRO* is clear that CLECs should not be allowed to wait until the eleventh hour to work cooperatively with BellSouth to establish an orderly transition. Instead, the FCC stated that

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[189] Revised Exhibit JPG-1 at 50.

[190] In addition to these disputes, BellSouth and the CLECs may dispute which wire centers in Florida are not impaired pursuant to the FCC's impairment tests. BellSouth addresses which wire centers satisfy the test in its discussion of Issue 4, not Issue 1. BellSouth also discusses CompSouth's erroneous fiber-based collocation definition in its discussion of Issue 3.

its timeframes provide: (1) adequate time to perform "the ***tasks*** necessary to an orderly transition";[191] and (2) "the time necessary to ***migrate*** to alternative fiber arrangements".[192] There can be no realistic debate that the FCC provided a transition period for exactly that purpose, to have an orderly transition.[193]

Once CLECs have migrated from UNEs to alternative serving arrangements, the rates, terms, and conditions of such alternatives apply.[194] The TRRO specifically states that these rates will apply only while the CLEC is leasing the de-listed element from the ILEC during the relevant transition period.[195] The transition rates will thus apply until the earlier of March 10, 2006 (or September 10, 2006 for dark fiber), or the date the de-listed UNEs are converted to the alternative arrangements ordered by the CLEC.

There is no legal basis for including contract language that would allow CLECs to transition from UNEs to state regulated Section 271 services. The Commission has no authority to dictate the rates, terms, and conditions of BellSouth's Section 271 obligations, and should reject CLECs' attempts to encourage it to issue an illegal order. Indeed, in the transition paragraphs of the *TRRO,* the FCC made no mention of transitioning to state regulated Section 271 elements.[196]

2. **Local Switching and UNE-P**

In establishing transitional language, the Commission should require CLECs to identify their embedded base via spreadsheets and submit orders as soon as possible to convert or

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[191] (*TRRO* at ¶ 143 (DS1/3 transport); ¶ 196 (DS1/3 loops); ¶ 227 (local switching))
[192] (*TRRO* at ¶ 144 (dark fiber transport); ¶ 198 (dark fiber loops)). Tipton Direct at 6.
[193] *Id.*
[194] Tipton Rebuttal at 13.
[195] *See TRRO* at ¶¶ 145, 198 and 228.
[196] *See TRRO* at ¶¶ 142, 195, and 227.

disconnect their embedded base of UNE-P or standalone local switching.[197] This will give BellSouth time to work with each CLEC to ensure all embedded base elements are identified, negotiate project timelines, issue and process service orders, update billing records, and perform all necessary cutovers.[198] If a CLEC fails to submit orders to convert UNE-P lines to alternative arrangements in a timeframe that allows the orders to be completed by March 10, 2006, BellSouth will convert remaining UNE-P lines to the resale equivalent no later than March 11, 2006.[199] For any remaining stand-alone switch ports, BellSouth will disconnect these arrangements no later than 3/11/06, as there is no other tariff or wholesale alternative for stand-alone switch ports.[200]

The Commission must also include the transitional rates contained in the FCC's rules.[201] In doing so, the rules require transitional switching rates based on the higher of the rate ***the CLEC paid*** for that element or combinations of elements on June 15, 2004, or the rate the state commission ordered for that element or combination of elements between June 16, 2004 and the effective date of the *TRRO*.[202] In most instances, the transitional rate will be the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the transitional additive ($1 for UNE-P/Local Switching). For UNE-P, this includes those circuits priced at market rates for the FCC's four or more line carve-out established in the *UNE Remand Order* and affirmed in the *TRO,* n. 1376. To the extent that contracts include a market based price for switching for "enterprise" customers served by DS0 level switching that met the FCC's four or more line

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[197] Tipton Direct at 7 – 10. BellSouth initially proposed that such orders be issued by October 1, 2005 and December 9. Tipton Direct at 7, 10, 12. BellSouth's alternative dates are December 1, 2005 and January 15, 2006. Hearing Exhibit 4 at 147. It is crucial that the Commission order CLECs to submit orders as soon as possible.

[198] Tipton Direct at 7-10.

[199] *Id.*

[200] *Id.*

[201] *See* 47 C.F.R. 51.319(d)(2)(iii).

[202] Tipton Rebuttal at 8-9.

carve-out, these terms and rates were included in the interconnection agreements and were in effect on June 15, 2004.[203]

The Commission must reject CompSouth's suggestion that TELRIC rates plus $1 apply to "enterprise" customers, as the FCC was very clear that for the embedded base of UNE-Ps, the CLECs would pay either the higher of the rates that were in their contracts as of June 15, 2004, or the rates that the state commissions had established between June 16, 2004 and the effective date of the TRRO, plus $1.[204]

3. DS1 and DS3 High Capacity Loops and Dedicated Transport

For unimpaired wire centers where the FCC's competitive thresholds are met[205] or impaired wire centers where the FCC's caps apply, the Commission should require CLECs to submit spreadsheets as soon as possible identifying the embedded base and excess DS1 and DS3 loops and transport circuits to be disconnected or converted to other BellSouth services.[206] If a CLEC does not provide notice in a timely manner to accomplish orderly conversions by March 10, 2006, BellSouth will convert any remaining embedded or excess high capacity loops and interoffice transport to the corresponding tariff service offerings.[207]

4. Dark Fiber Loops and Dedicated Transport

Transitional language ordered by the Commission should require CLECs to submit spreadsheets to identify their embedded base dark fiber to be either disconnected or converted to other services by June 10, 2006.[208] If CLECs do not submit orders in a timely manner so that

[203] Although BellSouth has the legal right to the transitional additive in addition to the rate in existing interconnection agreements (Tipton Rebuttal at 7-8; 47 C.F.R. § 51.319(d)(2)(iii)), BellSouth has elected not to apply the additional $1 to previously established market rates for switching.
[204] Tipton Rebuttal at 10.
[205] BellSouth identifies and discusses the wire centers that satisfy the FCC's competitive thresholds in its discussion of Issue 3.
[206] Tipton Direct at 10-11.
[207] *Id.* Again, BellSouth is committed to avoiding disruption to end users.
[208] Tipton Direct at 13.

conversions can be completed by September 11, 2006, BellSouth will convert any remaining dark fiber loops or embedded base dark fiber transport to corresponding tariff service offerings.[209]

5. Transition Rates, Terms, and Conditions

Along with contractual language that requires CLECs to identify their embedded base of customers and that requires timely and orderly steps to effectuate the transition from UNEs to alternative services, the Commission should also require a number of additional steps. This Commission has ruled the transition period does not permit CLECs to add new UNE arrangements.[210] To the extent that a CLEC has added such services after March 11, 2005, they must be trued up to the appropriate rate as of March 11, 2005 following the execution of an amended interconnection agreement. Also, the transition process must begin and end within the transition period and may not be extended.[211]

As explained above, the transition rate is the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the FCC's prescribed transitional additive for that particular element.[212] For UNE switching, the additive is $1.00.[213] For UNE high capacity loops and transport, the additive is 15% of the rate paid (*i.e.,* a rate equal to 115% of the rate paid as of June 15, 2004).[214] Transition period pricing applies for each de-listed UNE retroactively to March 11, 2005.[215] Facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon amendment of the interconnection agreements as

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[209] *Id.* BellSouth is committed to avoiding disruption to end users. Dark fiber by its nature is not being used to serve end users.
[210] *Embedded Base Order.*
[211] Tipton Rebuttal at 14.
[212] Tipton Rebuttal at 8-10.
[213] *Id.*
[214] *Id.*
[215] *Id.* at 11.

part of the applicable change of law process.[216] The transition rates will not go into effect without a contract amendment but once the agreement is amended, the transition rate must be trued-up to the March 11, 2005 transition period start date.[217] The transition rates apply only while the CLEC is leasing the de-listed element from BellSouth during the transition period.[218] Once the de-listed UNE is converted to an alternative service, the CLEC will be billed the applicable rates for that alternative service going forward.[219]

BellSouth acknowledges that in Docket No. 040156-TP this Commission determined the transitional rates apply until the end of the transition period. However, BellSouth's position that once a de-listed UNE is converted to an alternative service transition rates no longer apply was adopted by the Illinois Commerce Commission, which found:

> The Commission disagrees with CLECs that the transition rate should remain in effect for the entire transition period, even if transition is completed before the deadline. The terms of an agreement go into effect at the time the agreement say it does . . . Once the transition has been completed, the agreement takes over with all of its rate, terms, and conditions. The transition rates default only to those UNEs that have not transitioned to an alternate service arrangement.
>
> The Commission does not see how the imposition of agreement rates prior to the expiration of the deadline would somehow adversely affect an otherwise orderly transition. CLECs' argument, that SBC would have the incentive to overstate and exaggerate implementation challenges so as to convert as many UNEs as early as possible, defies logic.[220]

BellSouth respectfully requests that transitional rates end after delisted UNEs are converted.

B. <u>Issue 2: Modification and Implementation of Interconnection Agreement Language:</u> *(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*

[216] *TRRO* n. 408, 524, 630.
[217] *Id.*
[218] Tipton Rebuttal at 13.
[219] *Id.*
[220] Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision,* November 2, 2005, p. 78.

obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

*** **Summary of BellSouth's Position:** Delisted UNEs must be removed from existing interconnection agreements, subject to transition language, and should not be included in new agreements. The appropriate contract language, whether amendments or new agreements, should be promptly executed following the conclusion of this proceeding so that transitions are completed by March 10, 2006. ***

In the *TRRO* the FCC directed carriers to "implement changes to their interconnection agreements consistent with [the FCC's] conclusions [in the TRRO]."[221] Carriers must, accordingly, execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. Over 130 CLECs in Florida have amended or entered into new interconnection agreements to implement the changes in law that are the subject of this proceeding.[222] The Commission must require the remaining CLECs to execute an amendment with Commission-approved contract language promptly following issuance of the Commission's order in this docket; indeed, this Commission has already ruled that all certificated CLECs operating in BellSouth's Florida territory will be bound by the ultimate findings in this proceeding.[223] Thus, this Commission's findings will apply to interconnection agreements that are currently the subject of arbitrations, and agreements that are being negotiated, but for which no arbitration has yet been filed.

In other states (but not in testimony in this docket), NuVox and Xspedius contended that as a result of their "abeyance agreement" with BellSouth, they, and only they, should not be required to amend their current interconnection agreements with BellSouth to incorporate the *TRRO*. This should be a moot issue in Florida as a result of Order No. PSC-05-0639-PCO-TP

[221] *TRRO* at ¶ 233.
[222] Tr. at 244.
[223] *See* Order No. PSC-05-0639-PCO-TP.

and the *Joint Arbitration Order* which addressed specific arbitration issues between NuVox and Xspedius and BellSouth.

C. **Issue 3: High Capacity Loops and Dedicated Transport:** *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?*

*** **Summary of BellSouth's Position:** No unbundling obligations exist when the FCC's rules are met. Terms should be defined by the federal rules, except building should be defined using a reasonable person standard. Business lines include all UNE loops and business UNE-P connected to a wire center. Digital access lines are counted at full capacity. ***

To implement BellSouth's Section 251 unbundling obligations, BellSouth's contract language properly cites to the relevant federal rules, and incorporates the FCC's impairment thresholds.[224] BellSouth recognizes its Section 251 obligation to provide unbundled DS1 loops and transport, and unbundled DS3 loops and transport, available except in the instances in which the FCC's impairment tests are satisfied.[225] BellSouth has no obligation to provide unbundled access to entrance facilities, and the CLECs do not contend otherwise.[226] BellSouth has also proposed language that captures the federal requirements concerning dark fiber loops and dark fiber transport.[227] No party disputes the federal rules provide the applicable definition of a route. To the extent a CLEC orders transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers, and ***connects*** these links together in another Tier 3 wire center, the CLEC has created a route between unimpaired wire centers which should be disallowed as gaming.[228]

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[224] Tipton Direct at 15-27. The parties do not dispute that route is defined in the federal rules.
[225] Tipton Direct at 21-26.
[226] Tipton Direct at 26.
[227] *Id.* at 23, 25-26.
[228] *TRRO* at ¶ 106.

Finally, with respect to EELs, the FCC's impairment tests must be applied to the individual elements comprising an EEL.[229]

The essence of the parties' dispute concerning high capacity loops and transport effectuating the FCC's impairment tests in a manner that is faithful to the *TRRO*. In terms of the actual definitions that should be included in interconnection agreements, the federal rules should be incorporated.[230] To the extent a term is not defined, such as "building", a definition is not required. Alternatively, if the Commission adopts any definition of building, it should elect to use the definition contained in Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.[231]

The parties' key dispute in resolving definitional disputes centers on CompSouth's proposed fiber-based collocator language, which is inconsistent with the federal rule, 47 C.F.R. § 51.5. CompSouth's proposed language adds certain language to the federal definition,[232] which seeks to force BellSouth to count AT&T and SBC as one fiber-based collocator, rather than as separate fiber-based collocators. BellSouth's treatment of AT&T and SBC is appropriate -- CompSouth cannot dispute that the *TRRO* has a precise effective date. The FCC set forth its tests to measure the amount of competition present in a given wire center ***at a given time***, and as of the March 10, 2005 effective date of the *TRRO*, AT&T and SBC were ***not*** affiliated

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[229] Tipton Direct at 26-27.

[230] *See* Tipton Direct at 15-27.

[231] PAT-5, p. 19.

[232] CompSouth adds the following:

For purposes of this definition: (i) carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same, will be treated as affiliates and therefore as one collocator; provided, however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement shall ***not*** be counted as a Fiber-Based Collocator, (ii) a Comparable transmission Facility means, at a minimum, the provision of transmission capacity equivalent to fiber-optic cable with a minimum point-to-point symmetrical data capacity exceeding 12 DS3s; (iii) the network of a Fiber-Based Collocator may only be counted once in making a determination of the number of Fiber-Based Collocators, notwithstanding that such single Fiber-Based Collocator leases its facilities to other collocators in a single wire center; provided, however, that a collocating carrier's dark fiber leased from an unaffiliated carrier may only be counted as a separate fiber-optic cable from the unaffiliated carrier's fiber if the collocating carrier obtains this dark fiber on an IRU basis.

companies.[233] Indeed, state commissions that have been faced with this issue have previously declined to count Verizon and MCI, or and SBC and AT&T, as one entity.[234]

The Commission should also reject CompSouth's proposed language about counting the network of fiber-based collocators separately. Although this is not a live dispute between the parties, it makes perfect sense that a CLEC purchasing fiber from another CLEC can qualify under the federal definition. If one CLEC purchases fiber from another, has terminating fiber equipment, and can use the fiber it purchases to transport traffic in and out of a wire center, it qualifies. CompSouth's proposed definition ignores this reality, and has the potential to lead to gaming. For example, under CompSouth's proposed language, CLECs with spare fiber capacity terminating in a wire center can lease this spare capacity to existing or new collocators in that wire center and avoid current and future unbundling relief. This arrangement has been referred to as "daisy chaining". Alternatively, a CLEC or other party could agree to purchase all of the collocation arrangements in a given wire center for some nominal sum, then lease this space back to the previous owners for a paltry amount in exchange for a percentage of the savings the former owners will accrue by paying cost-based UNE rates instead of special access rates. The Commission must reject these attempts to game the FCC's rules.

CompSouth's additional language addressing fiber-based collocation must be rejected as inconsistent with the federal rules and vulnerable to gaming. BellSouth's proposed contract language is fully consistent with the federal rules and should be approved.

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[233] The impact of the parties' dispute concerning the treatment of AT&T and SBC is reflected on Hearing Exhibits 4 (pp. 33-34) and 6 (listing the specific wire centers that are appropriate designated as Tier 1 transport offices because AT&T and SBC should be counted separately). This dispute is also apparent by review Hearing Exhibit 27, which lists particular offices in which BellSouth and CompSouth disagree as to the number of fiber-based collocators based on the treatment of AT&T and SBC.

[234] *See Rhode Island Order* at 12 – 13; *see also* Order, p. 11, Case No. U-14447, Michigan Public Service Commission, Sept. 20, 2005 ("[i]n the Commission's view, the federal rules do not support the Joint CLECs' position. Contrary to their arguments, the Commission is not free to rewrite the FCC's rules, to improve upon them, or ignore them when arbitrating interconnection agreement terms.") ("Michigan Order").

D. **Issue 4: Unimpaired Wire Centers:** *(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)?*

*** **Summary of BellSouth's Position:** This Commission should confirm the wire centers identified by BellSouth satisfy the FCC's tests, after which CLECs cannot self-certify to obtain UNEs in such wire centers. Future wire center identification will occur via postings to BellSouth's website with shorter timeframes for transitioning services. ***

1. State Commission Authority

Pursuant to *USTA II,* the FCC may not delegate impairment decisions to state commission.[235] State commissions, however, are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO.*[236] As a practical matter, therefore, the Commission must resolve the parties' disputes concerning the wire centers that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition UNEs to alternative arrangements.[237]

2. Florida Wire Centers that Currently Satisfy the FCC's Impairment Tests

There are a total of 46 wire centers in Florida that currently satisfy the FCC's impairment tests.[238] Of these offices, 29 qualify as Tier 1 transport offices, 17 qualify as Tier 2 transport offices, 10 qualify for DS3 loop relief and 2 qualify for DS1 loop relief.[239] BellSouth requests

[235] *USTA II* at 574.
[236] *TRRO* at ¶ 234.
[237] Tipton Direct at 29.
[238] Hearing Exhibit 20 (Revised PAT-4). CompSouth does not dispute that the majority of the offices BellSouth has identified qualify for relief. *See* Hearing Exhibit 27, Revised Exhibit No. JPG-5 (submitted October 31, 2005). Indeed, CompSouth's flawed business line analysis purportedly impacts the impairment status of only 4 transport offices and one loop office.
[239] *Id.*

that the Commission order CLECs to transition existing Section 251 loops and transport in the wire centers listed in Hearing Exhibit 20 to alternative serving arrangements. BellSouth further requests that the Commission make clear that CLECs have no basis to "self-certify" to obtain Section 251 loops and transport in the future in the wire centers above (as applicable). In confirming that the wire centers identified above satisfy the FCC's impairment test, the primary dispute concerns the application of the FCC's federal rule defining business lines.[240]

As a preliminary matter, the Commission should reject CompSouth's unfounded claims that the FCC expected a different number of wire centers to satisfy the impairment thresholds it established in the *TRRO*.[241] Notably, the FCC ***specifically asked BellSouth to provide it with updated wire center designations following the issuance of the TRRO.***[242] The FCC's request demonstrates clearly that the FCC knew precisely what it was doing when it established its business line rule. Any attempt by CompSouth to compare the data BellSouth provided ***before*** the *TRRO* was issued to data it provided ***after the TRRO was issued, at the FCC's express request***, and claim that the results are different than what the FCC expects is flatly wrong.[243]

Concerning business lines, there are two primary areas of disagreement. The first relates to how BellSouth counted UNE loops, the second concerns how BellSouth addressed the capacity available in UNE loops and in BellSouth's own retail/resold switched loops. In both areas, BellSouth properly implemented the applicable federal rule.

With respect to including UNE loops, the text of the *TRRO* clearly requires BellSouth to include business UNE-P.[244] BellSouth did so, and the CLECs have not suggested BellSouth

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[240] *See* 47 C.F.R. § 51.5. And, the parties also dispute how to count collocation arrangements of AT&T and SBC.
[241] *See* Gillan Rebuttal at 20.
[242] *See* Hearing Exhibit 6 at 209.
[243] Moreover, the CLECs have raised their concerns with the FCC. The FCC, and not this Commission, should clarify its rule if it deems such a clarification to be necessary.
[244] *TRRO* at ¶ 105.

should have included residential UNE-P. The CLECs take issue with BellSouth including all other UNE loops. The federal rule requires the

> number of business lines in a wire center [t]o 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.[245]

The FCC intentionally required all UNE loops (excluding only residential UNE-P) to be included as business lines, because it gauges "the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs."[246] The CLECs, however, have previously contended that because BellSouth included ***all*** UNE loops, that it has wrongly included some UNE loops that serve residential customers. This contention is flatly contradicted by Mr. Gillan's deposition testimony and is contrary to the FCC's goal of simplified approach that made ease of administration and enforceability a consideration; namely, *TRRO* ¶ 99, "We are acutely aware of the need to base any test we adopt here ***on the most objective criteria*** possible in order to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis. .... ***Unlike our approach here, the data required to administer our previous transport test was complex and allowed significant latitude*** to decipher exactly what type of data counted toward the application of a trigger." Likewise, the FCC made clear it sought ***a simplified ability*** to obtain the necessary information.

Moreover, BellSouth questioned Mr. Gillan about DSO loops, which would be the loop type used to serve residential customers. Mr. Gillan conceded that he did not think it was worth "correcting" BellSouth's business line count to exclude residential DSO loops because "it's such a small number ... trying to go into do it correctly wouldn't be worth it. 'Cause you just – you

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[245] 47 C.F.R. § 51.5

[246] *TRO* at ¶ 105.

don't know whether or not those lines are used to provide switched business service."[247] Thus, the CLECs have no basis to disagree with BellSouth's inclusion of all UNE loops – they conceded, even if they have a philosophical disagreement, it is not worth "correcting" the business line data to exclude these lines and acknowledged Bellsouth doesn't know if such lines are business lines. More importantly, if the Commission disregarded some portion, estimate, or percentage of UNE loops, it would ignore the "opportunity" present in a particular wire center. The FCC's language is clear and logical given its intent to evaluate the opportunity in a wire center.

The Commission should also reject the CLECs' attempts to improperly lower the business line count that BellSouth has provided. Mr. Gillan's suggestion that the Commission must undertake some calculation or estimate to capture "switched" UNE loops is nonsense. Mr. Gillan concedes there is no source that would provide data concerning which UNE loops are switched as compared to loops that are not switched.[248] Indeed, Mr. Gillan conceded that even his CLEC clients could not provide such data.[249]

CompSouth's position also contradicts the FCC's intent to capture, with its business line test, an accurate measurement of the revenue ***opportunity*** in a wire center.[250] Indeed, considering the FCC was very clear that it wished to avoid a "complex" test, or a test that would be subject to "significant latitude,"[251] it is difficult to imagine any useful purpose – other than obtaining UNEs when no impairment exists – served by Mr. Gillan's complex proposed estimates and assumptions.

[247] Gillan Deposition, Hearing Exhibit 7, at 43.
[248] Gillan Deposition, Hearing Exhibit 7, at 44.
[249] *See* Hearing Exhibit 4 at 30-32.
[250] *TRRO* at ¶ 104.
[251] *TRRO,* ¶ 99

To limit the number of lines as Mr. Gillan suggests is not only contrary to the FCC's intent to capture ***opportunity,*** it flies squarely against the revised impairment standard of the *TRRO* which considers, in part, whether requesting carriers can compete without access to particular network elements.[252] Likewise, the revised impairment standard requires consideration of ***all*** the revenue opportunity that a competitor can reasonably expect to gain over facilities it uses, from all possible sources.[253] Thus, the business line test is designed as a "proxy" for gauging the competitive opportunities, and if the Commission consciously excludes some portion of UNE loops under the misguided notion that because they are not "switched" they should not qualify, it ignores completely the competitive opportunity and potential present in the UNE loops. A CLEC has the choice to provide all voice (or switched) services over a loop, or it can opt to provide a mixture of voice and data services. That does not mean that a CLEC needs continued access to UNEs simply because it serves customers using a bundled offering. Instead, excluding an estimated number of UNEs because some unknown number of CLECs provide data would only serve to improperly evaluate impairment with reference to a particular CLEC's business strategy, which would be unlawful.[254]

The Illinois Commerce Commission issued a decision on this issue on November 2, 2005, and used line count data in the manner BellSouth presented. It ruled that

> [t]he data the FCC relied upon is based on ARMIS 43-08 business lines, business UNE-P, plus UNE . . . loops. Altering those business counts after the thresholds have been established renders the impairment determinations inconsistent with the FCC's findings. The FCC's definition of business lines specifically includes 'the sum of all incumbent LEC business switched access line, plus *the sum of all UNE loops* connected to that wire center, including UNE loops provisioned in combination with other

[252] *TRRO* at ¶ 22.
[253] *Id.* at 24.
[254] *TRRO*, ¶ 25.

> unbundled elements . . . . ***The phrase 'all UNE loops' encompasses residential customers and non-switched services.***[255]

In doing so, it expressly rejected the adjustments that CompSouth advocates here. Likewise, in rejecting other proposed adjustments, the Michigan Public Service Commission ruled

> the *TRRO* requires that the line count include each Centrex line as one line, without a factor to reduce the number to one ninth. There is no provision in those rules or the *TRRO* that would permit the reduction by the Centrex equivalency factor as proposed by the CLECs. If the parties believe that such an equivalency factor is appropriate for use in the impairment analysis, they must prevail on that argument before the FCC.[256]

The federal rule also very clearly requires ISDN and other digital access lines, whether BellSouth's lines or CLEC UNE lines, to be counted at their full system capacity; that is, each 64 kbps-equivalent is to be counted as one line.[257] The FCC rule plainly states that "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'"[258] The FCC has made clear its "test requires ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one."[259] Mr. Gillan, however, would improperly limit business lines by discarding the potential customers CLECs can serve. CompSouth's position contravenes the FCC's intent to evaluate and capture potential. Indeed, in Florida, this Commission requires CLECs to self-report lines. Based on CLEC reporting, the number of CLEC lines reported for the state of Florida ***exceeds*** the number of UNE lines BellSouth calculated.[260] Thus, if this Commission wanted to refer to another data point this self-

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[255] Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision,* November 2, 2005, p. 30 (citations omitted) (first emphasis in original) (second emphasis added).

[256] *In re: Commission's own Motion to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon,* 2005 Mich. PSC LEXIS 310, Order at * 13.

[257] 47 C.F.R. § 51.5.

[258] *Id.*

[259] *See* Hearing Exhibit 36.

[260] *See* Hearing Exhibits 44 and 43 (BellSouth reported total UNE lines in Florida of 824,297; CLECs in Florida self-reported 953,616 lines in Florida); *also* Tr. at 508.

reported CLEC data demonstrates that BellSouth's business line count, not CompSouth's, is appropriate.

In contrast to Mr. Gillan, BellSouth's witness Ms. Tipton provided a clear explanation of BellSouth's careful application of the FCC's instruction on how to count business lines.[261] For their part, the CLECs' witness Mr. Gillan urged that the counting process laid out by the FCC and followed by BellSouth was not good enough and that the Commission should instead engage in a process of estimating based on certain assumptions rather than simply counting the items outlined in the FCC's rule. This Commission should reject CompSouth's attempt to make it "estimate" business lines.

CompSouth has also claimed that BellSouth's business line results are inconsistent with BellSouth's financial reporting, which claims must also be rejected. BellSouth's financial reporting and line count data are consistent.[262] CompSouth simply prefers to disregard reality, and attempt to obtain unbundling in circumstances in which it is not entitled to UNEs. Similarly, any attempt to inject uncertainty concerning BellSouth's Form 477 reporting made to the FCC cannot pass muster. EELs are not explicitly required to be reported in the FCC Form 477 data and BellSouth had not historically included EELs in its Form 477 reporting, although it has refiled its reports to eliminate any concerns. BellSouth's business line data fully comports with the FCC's directives and with other reports filed with the FCC.

3. Identifying Wire Centers in the Future that Satisfy the FCC's Impairment Tests

To the extent wire centers are later found to meet the FCC's no impairment criteria, BellSouth will notify CLECs of these new wire centers via a Carrier Notification Letter

[261] Tipton Direct t 16-17; 32-37.
[262] Hearing Exhibit 29.

("CNL").[263] The non-impairment designation will become effective ten business days after posting the CNL. Beginning on the effective date, BellSouth would no longer be obligated to offer high capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the self-certification process.[264] This means that if a CLEC self certifies, BellSouth will process the order, subject to its right to invoke the dispute resolution process if BellSouth believes the self certification is invalid. High capacity loop and transport UNEs that were in service when the subsequent wire center determination was made will remain available as UNEs for 90 days after the effective date of the non-impairment designation.[265] This 90 day period is referred to as the "subsequent transition period." No later than 40 days from effective date of the non-impairment designation, affected CLECs must submit spreadsheets identifying their embedded base UNEs to be converted to alternative BellSouth services or to be disconnected. From that date, BellSouth will negotiate a project conversion timeline that will ensure completion of the transition activities by the end of the 90-day subsequent transition period. BellSouth's future wire center identification process has been agreed to with a number of CLECs, and the Commission should adopt it here.[266]

CompSouth has proposed a different means for identifying future wire centers.[267] BellSouth has no conceptual objection to the Commission resolving future disputes, as shown on BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5; however, BellSouth is unwilling to agree to a process that limits its right to designate future wire centers on an annual basis. Nothing in the federal rules supports this limitation. Moreover, CompSouth's proposed language contains faulty data qualifications that would impose CompSouth's erroneous views on

[263] Tipton Rebuttal at 37.
[264] *Id.*
[265] *Id.*
[266] *See* Tr. at 244 (over 130 CLECs have TRO/TRRO language in place).
[267] Gillan Direct at 31 - 32.

the business line definition into the process. If the Commission establishes any future process, it must reject CompSouth's annual filing and data limitations, as reflected on BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

E. **Issue 8: Conditions Applicable to the Embedded Base** *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?*

*** **Summary of BellSouth's Position:** UNE arrangements, not customers, constitute the embedded base. CLECs cannot add new UNE arrangements that have been delisted. BellSouth will provision orders for new high-capacity loops and dedicated transport based on "self-certification." CLECs cannot self-certify for new services relating to wire centers that satisfy the FCC's non-impairment tests. ***

This Commission recently addressed this specific issue in its *Embedded Base Order*, finding "the *TRRO* prohibits CLECs from adding new local switching UNE arrangements, not merely for new UNE customers . . . ." This ruling resolves this issue, and CompSouth has not contended otherwise.[268]

Changes to existing service do not require a new service order. BellSouth will, accordingly, process orders to modify an existing customer's service by, for example, adding or removing vertical features, during the transition period.[269]

In order to submit an order for a high-capacity loop or transport UNE, a CLEC must self-certify, based on a reasonably diligent inquiry, that it is entitled to unbundled access to the requested element.[270] BellSouth must process the request.[271] It may only subsequently challenge the validity of such order(s) pursuant to the dispute resolution provision in the parties' interconnection agreement.[272]

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[268] Hearing Exhibit 2 at 67.
[269] Blake Direct at 9.
[270] *TRRO* at ¶ 234.
[271] *Id.*
[272] *Id.*

In accordance with the *TRRO*, BellSouth has been accepting and processing CLEC orders for new high-capacity loops and dedicated transport even in those wire centers and for those routes that BellSouth has identified as areas where CLECs are not impaired pursuant to the competitive thresholds the FCC set forth in the TRRO.[273] At the conclusion of this proceeding, however, the Commission should confirm the Florida wire centers identified in Hearing Exhibt 20 satisfy the FCC's impairment tests. Once this confirmation is made, CLECs cannot "self-certify" orders for high capacity loops and dedicated transport in these wire centers. If BellSouth is to follow the FCC directives, and it will, the Commission must eliminate future disputes by requiring CLECs to abide by its wire center confirmation.

F. **<u>Issue 9: Transition of De-listed Network Elements To Which No Specified Transition Period Applies:</u>** *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?*

*** **<u>Summary of BellSouth's Position:</u>** This issue concerns UNEs delisted by the *TRO* that have no transition periods. BellSouth should be authorized to disconnect/convert such arrangements, subject to nonrecurring charges, upon 30 days written notice absent a CLEC order to disconnect/convert. BellSouth will, however, provide a transition period to March 10, 2006 for entrance facilities. ***

BellSouth has addressed the rates, terms and conditions for elements de-listed by the *TRRO* and which have a designated transition period, including those identified in subpart (b) above, in connection with its discussion of Issue 2. In addition to taking steps to transition away

[273] Tipton Direct at 30.

from elements de-listed by the *TRRO,* the FCC removed significant unbundling obligations in the *TRO.*[274]

Because the FCC eliminated the ILECs' obligation to provide unbundled access to these elements in the *TRO*, CLECs that still have the rates, terms and conditions for these elements in interconnection agreements have reaped the benefits of unlawful unbundling of these elements far too long.[275] As such, with the exception of entrance facilities, which BellSouth will agree to allow CLECs to transition with their embedded base and excess dedicated transport, BellSouth should be authorized in the terms of the interconnection agreement, to disconnect or convert such arrangements upon 30 days written notice absent a CLEC order to disconnect or convert such arrangements.[276] BellSouth should also be permitted to impose applicable nonrecurring charges.[277] To do otherwise will incent these CLECs to simply refuse to act in order to further delay implementation of the *TRO.* BellSouth's proposed contract language should be approved.

G. 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?*

*** **Summary of BellSouth's Position:** CLECs must transition delisted UNEs by the end of the applicable timeframes. CLECs should promptly notify BellSouth of their plans and timely submit orders to disconnect/convert delisted UNEs. The Commission should allow BellSouth to identify/convert/disconnect delisted arrangements subject to nonrecurring charges if CLECs fail to timely submit orders. ***

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[274] Tipton Direct at 43-44. The delisted elements in the *TRO* include, entrance facilities, enterprise or DS1 level switching, OCN loops and transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching.

[275] *Id.*

[276] *Id.*

[277] *Id.*

The *TRRO* makes clear that CLECs must transition their entire embedded base of switching and high capacity loops and transport by March 10, 2006, and not after that date.[278] To accomplish this, and to minimize disruption to end users, BellSouth needs CLECs to timely provide it with information concerning their plans for these services.

BellSouth is asking CLECs to identify their embedded base UNE-Ps as soon as possible and to submit orders to disconnect or convert the embedded base in a timely manner so as to complete the transition process by March 10, 2006.[279] If CLECs fail to submit orders in a timely manner, BellSouth should be permitted to identify all such remaining embedded base UNE-P lines and convert them to the equivalent resold services no later than March 10, 2006, subject to applicable disconnect charges and the full nonrecurring charges in BellSouth's tariffs.[280] Absent a commercial agreement for switching, the Commission should allow BellSouth to disconnect any stand alone switching ports which remain in place on March 11, 2006.[281]

For high capacity loops and dedicated transport, BellSouth is requesting CLECs submit spreadsheets by December 9, 2005 or as soon as possible to identify and designate transition plans for their embedded base of these de-listed UNEs.[282] If CLECs fail to submit such spreadsheets, BellSouth should be permitted to identify such elements and transition such circuits to corresponding BellSouth tariffed services no later than March 10, 2006, subject to applicable disconnect charges and full nonrecurring charges in BellSouth's tariffs.[283]

For dark fiber, BellSouth is requesting that CLECs submit spreadsheets to identify and designate plans for their embedded base dark fiber loops and de-listed dark fiber transport to

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[278] Tipton Direct at 45.
[279] *Id.* at 46-47.
[280] *Id.*
[281] *Id.*
[282] *Id.* at 47.
[283] *Id.* at 47-48.

transition to other BellSouth services by June 10, 2006.[284] If a CLEC fails to submit such spreadsheets, BellSouth should be allowed to identify all such remaining embedded dark fiber loops and/or de-listed dark fiber dedicated transport and transition such circuits to the corresponding BellSouth tariffed services no later than September 10, 2006, subject to applicable disconnect charges and full nonrecurring charges set forth in BellSouth's tariffs.[285] BellSouth's proposals are reasonable. The CLECs should not be permitted to wait until the "eleventh hour" to implement the FCC ordered transition mechanisms.

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

> *** **Summary of BellSouth's Position:** This Commission should approve contract language resolving each disputed issue that can be promptly executed so that the FCC's transitional deadlines are met and not extended. This Commission should also approve contract language to apply as a default for CLECs that fail to respond to an Order in this docket. ***

It is important that, in its order, the Commission approves specific contractual language that resolves each disputed issue and that can be promptly executed by the parties, unless otherwise mutually agreed to, so that the FCC's transitional deadlines are met. BellSouth requests that in order to ensure that a smooth transition, the Commission order that promptly following its written order approving contract language parties must execute compliant amendments (*i.e.,* those that track the Commission language, unless otherwise mutually agreed to) to their interconnection agreements. The Commission should make clear that if an amendment is not executed within the allotted timeframe, the Commission's approved language will go into effect for all CLECs in the state of Florida, regardless of whether an amendment is signed.

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[284] *Id.*
[285] *Id.*

III. Service-Specific Issues (12, 14, 15, 28, 30)

A. Issue 12: Performance Plan: *Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?*

*** **Summary of BellSouth's Position:** Delisted elements should not be subject to a performance plan, which ensures nondiscriminatory access to 251(c)(3) UNEs. CLECs can self-provide delisted UNEs or CLECs can purchase similar services from other providers, none of whom are required to perform under a performance plan. ***

Elements that are no longer required to be unbundled pursuant to Section 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan. The SQM/PMAP/SEEM plan was established to ensure that BellSouth would continue to provide nondiscriminatory access to elements required to be unbundled under section 251(c)(3) after BellSouth gained permission to provide in-region interLATA service. If BellSouth fails to meet measurements set forth in the plan, it must pay a monetary penalty to a CLEC and/or to the State. Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLECs to provide service and without access to the ILEC's network, the CLEC would be impaired in its ability to do so.

When making the determination that an element is no longer "necessary" and that CLECs are not "impaired" without access to an ILEC's UNE, the FCC found that CLECs were able to purchase similar services from other providers. These other providers are not required to perform under a SQM/PMAP/SEEM plan. To continue to impose upon BellSouth a performance measurement, and possible penalty, on competitive, commercial offerings is discriminatory and anticompetitive. For commercial offerings, the marketplace, not a SQM/PMAP/SEEM plan, becomes BellSouth's penalty plan. If BellSouth fails to meet a CLEC's provisioning needs, such CLEC can avail itself of other providers of the service and BellSouth is penalized because it losses a customer and associated revenues.[286]

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[286] Blake Direct at 11.

More than 150 CLECs have entered into commercial agreements to purchase BellSouth's DS0 wholesale platform. Those agreements make available to CLECs a service similar to the UNE-P, but at commercial rates, not rates imposed by a regulator. Those CLECs, which include members of CompSouth, are satisfied with the penalties and remedies in the commercial agreement and were willing to forgo any SQM/PMAP/SEEM penalty payments should BellSouth fail to perform in accordance with the parties' agreement.[287]

The Georgia Commission recently entered an *Order Adopting Hearing Officer's Recommended Order*, dated June 23, 2005, in Docket No. 7892-U, in which it approved a Stipulation Agreement reached between BellSouth and several CLEC parties which included the following provisions:

> 1. All DS0 wholesale platform circuits provided by BellSouth to a CLEC pursuant to a commercial agreement are to be removed from the SQM Reports; Tier 1 payments; and Tier 2 payments starting with May 2005 data.
>
> 2. The removal of DS0 wholesale platform circuits as specified above will occur ***region-wide***.
>
> 3. All parties to this docket [the Performance Measurements' docket] reserve the right to make any arguments regarding the removal of any items other than the DS0 wholesale platform circuits from SQM/SEEMs in Docket No. 19341-U [the Generic Change of Law docket] to the extent specified in the approved issues list.[288]

This regional Stipulation was endorsed by a number of CLECs, including AT&T, Covad, MCI and DeltaCom, all of whom are CompSouth members. There is no legitimate reason that de-listed UNEs should be a part of a UNE performance measurements and penalty plan. To not remove such de-listed UNEs from the plan is anticompetitive and unfair to BellSouth.

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[287] *Id.*. at 11-12.
[288] Blake Direct at 12-13.

B. **<u>Issue 14: Conversion of Special Access Circuits to UNEs:</u>** *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?*

*** **<u>Summary of BellSouth's Position:</u>** BellSouth will convert special access services to UNE pricing following the execution of appropriate contract language. Special access to UNE conversions terminate volume and term tariffed discount plans or grandfathered arrangements. BellSouth's proposed rates are appropriate. Conversions do not include physical changes to the circuit – such changes trigger nonrecurring charges. ***

BellSouth will convert special access services to UNE pricing, subject to the FCC's service eligibility requirements and limitations on high-cap EELs, once these terms are incorporated into contracts.[289] BellSouth will also convert UNE circuits to special access services. Special access to UNE conversions should be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangements.[290] The evidence before the Commission included the following proposed rates. For the first single DS1 or lower capacity loop conversion on an LSR should be $24.97 and $3.52 per loop for additional conversions on that LSR.[291] For a project consisting of 15 or more loops submitted on a single spreadsheet, the rate should be $26.46 for the first loop and $5.01 for each additional loop on the same LSR.[292] For DS3 and higher capacity loops and for interoffice transport conversions, the rate should be $36.82 for the first single conversion on an LSR and $16.12 per loop for additional single conversions on that LSR.[293] For a project consisting of 15 or more such elements in a state submitted on a single spreadsheet, BellSouth is proposing $38.31 for the first

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[289] Tipton Direct at 57.
[290] *Id.* at 57-58.
[291] *Id.* at 58.
[292] *Id.*
[293] Hearing Exhibit 46.

loop and $17.61 for each additional loop conversion on the same spreadsheet.[294] The Commission-ordered rate of $8.98 should apply for EEL conversions, until new rates are issued.[295] If physical changes to the circuit are required, the activity should not be considered a conversion and the full nonrecurring and installation charges should apply.[296]

Mr. Gillan did not file any direct or rebuttal testimony addressing Issue 15.[297] Moreover, CompSouth has known since the first generic change of law hearing in Georgia that BellSouth was proposing single element conversion rates based on a recent TELRIC cost study. Ms. Tipton's Georgia testimony was filed on July 19, 2005, and pursuant to Order No. PSC-05-0736-PCO-TP, CompSouth could have pursued discovery concerning BellSouth's proposed rates. CompSouth elected not to do so, and cannot legitimately object to BellSouth's cost studies given its lack of diligence. The Commission should adopt BellSouth's proposed language and BellSouth's proposed rates.[298]

C. **Issue 15: Pending Conversion Requests:** *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?*

*** **Summary of BellSouth's Position:** The language contained in a CLEC's contract at the time the *TRO* became effective governs the rates, terms, conditions and effective dates for conversion requests pending on the *TRO's* effective date. Conversion rights, rates, terms and conditions are not retroactive and become effective only after an interconnection agreement is amended. ***

The contract language contained in a CLEC's interconnection agreement at the time the *TRO* became effective governs the appropriate rates, terms, conditions and effective dates for conversion requests that were pending on the effective date of the *TRO*.[299] ***Conversion rights,***

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[294] *Id.*
[295] Tipton Direct at 58.
[296] *Id.* at 57.
[297] Gillan Deposition, Hearing Exhibit 7 at 77.
[298] Tipton Rebuttal at 43.
[299] Tipton Direct at 58.

rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended.[300]

Mr. Gillan did not file any direct testimony addressing Issue 16.[301] In his rebuttal testimony, Mr. Gillan claimed that conversion language and rights must be retroactive to March 11, 2005, the effective date of the *TRRO.*[302] This testimony is incorrect, and plainly inconsistent with the *TRO* and the *TRRO.*

CompSouth attempts to portray this issue as "vital" to CLECs.[303] This portrayal cannot stand and is belied by the actions of the very CLECs that are complaining. BellSouth attempted to implement changes in law, including contract language that would have allowed CLECs to convert from special access services to UNEs following the *TRO,* yet many CLECs have not agreed to contract language that includes such provisions. It is not surprising that these CLECs elected to wait, given that the *TRO* as a whole eliminated access to UNEs including entrance facilities, enterprise or DS1 level switching, OCN loops and transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching. CLECs that did not execute *TRO* amendments have presumably decided that it was to their benefit to retain these de-listed UNEs in lieu of obtaining conversion rights.[304] In any event, the retroactive true-up that BellSouth seeks as a result of the de-listed elements in the *TRRO* is explicitly contained in that Order and the federal rules.[305] Retroactive conversion rights were not contemplated in the *TRO,* instead, the FCC made clear that "carriers [were] to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts."[306] This is precisely

[300] *See* Tipton Direct at 59-61; Tipton Rebuttal at 43.
[301] Gillan Deposition, Hearing Exhibit 7 at 77.
[302] Gillan Rebuttal at 37.
[303] *Id.* at 38.
[304] *See* Hearing Exhibit 4 at 144.
[305] *TRRO,* notes 408, 524, 630 *and* 47 C.F.R. 51.319(a)(4)(iii), 51.319(d)(2)(iii), 51.319(e)(2)(ii)(C).
[306] *TRO* at ¶ 588.

the conclusion the Massachusetts and Rhode Island commissions reached when confronted with this issue.[307]

D. **Issue 28: Enhanced Extended Link ("EEL") Audits:** *What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?*

> *** **Summary of BellSouth's Position:** BellSouth's proposed language is appropriate and prevents unnecessary delay and expense. BellSouth should not be required to show cause prior to the commencement of an audit, incorporate a list of acceptable auditors in its contracts, or be subject to language that requires the parties to agree on the auditor. ***

BellSouth's proposed language allows it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria, and requires BellSouth to obtain and pay for an independent auditor who will conduct the audit pursuant to American Institute for Certified Public Accountants ("AICPA") standards.[308] The auditor determines material compliance or non-compliance.[309] If the auditor determines that CLECs are not in compliance, the CLECs are required to true-up any difference in payments, convert noncompliant circuits and make correct payments on a going-forward basis.[310] Also, CLECs determined by the auditor to have failed to comply with the service eligibility requirements must reimburse the ILEC for the cost of the auditor.[311] BellSouth should not be required to agree to any terms that would add delay and expense to audits.[312] Finally, to the extent that an auditor determines that a CLEC's

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[307] *See Massachusetts Arbitration Order,* p. 135; *see also Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 30 ("Paragraph 589 [of the *TRO*] does not contain any clear FCC mandate that pricing for conversions begin on the effective date of the *TRO,* which was October 2, 2003. Accordingly, the pricing for these conversions does not take effect until the ICA amendment goes into effect").

[308] Tipton Direct at 64-65.

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *Id.*

noncompliance is material in one area, the CLEC would be responsible for the cost of the audit even if each of the other criteria has been met to the auditor's satisfaction.[313]

In contrast to BellSouth's proposed language, CompSouth's contract language goes well beyond both the FCC's requirements[314] and the Commission's prior rulings on this subject. CompSouth claims that BellSouth must show cause to the CLEC before it can begin an audit.[315] That same contention has been rejected by this Commission.[316] The trouble that can be created by the notion of such a "cause" requirement is apparent from BellSouth's ongoing EELs dispute regarding NuVox. In his deposition, Mr. Gillan blithely claimed that BellSouth and CLECs could mutually agree on an auditor before an audit takes place. Mr. Gillan's claim is not credible, particularly because he was not aware of any specifics of BellSouth's dispute with CompSouth's member company Nuvox.[317] Those who are familiar with the specifics know that litigation over such a "cause" showing can grind any effort to audit to a complete halt.

BellSouth does not audit without cause.[318] Since BellSouth must pay for the audit, inserting "for cause" contractual language is unnecessary. By attempting to require BellSouth to demonstrate cause before auditing, CLECs can delay the actual audit from ever taking place, all the while reaping unlawful UNE rates. Because CLECs can self-certify to obtain access to EELs, BellSouth should be permitted to audit consistent with the FCC's rulings and without additional hurdles. The CLECs attempt to curtail BellSouth's audit language is simply an effort to frustrate BellSouth's legitimate audit rights, and the Commission can and should resolve consistent with its ruling in Docket No. 040156-TP.

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313 *Id.* at 66.
314 Tipton Rebuttal at 45.
315 Gillan Deposition, Hearing Exhibit 7 at 84.
316 *See Staff Recommendation,* Docket No. 040156-TP at 175.
317 Gillan Deposition, Hearing Exhibit 7, at 85.
318 Hearing Exhibit 4 at 4.

E. **Issue 30:** ***Core Forbearance Order:*** *What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?*

*** **Summary of BellSouth's Position:** This issued should be resolved on a carrier by carrier basis depending on the specific facts that apply to a particular carrier. ***

The Commission should order that BellSouth resolve this issue on a carrier by carrier basis depending on the specific facts. To be clear, BellSouth is not attempting to avoid implementing the *Core Order* when it is appropriate to do so. BellSouth's specific concern with generic language on this issue is based on the choices available in the *Core Order,* which allow CLECs to elect different rate structures.[319] Due to these choices, a one-size-fits-all approach is inappropriate.[320] In addition, BellSouth has entered into specific carrier settlements implementing the *Core Order.*[321]

Notably, CompSouth is not proposing specific language either.[322] Thus, the only language before the Commission is the language proposed by ITC^DeltaCom, which suggests that BellSouth's template agreement should include language implementing the *Core Order.* However, as Ms. Tipton explained, parties still must identify their desired rate structure and including standard language would not address all scenarios encountered in the implementation of the *Core Order.*[323]

IV. Network Issues (5, 18, 22, 23, 25, 26, 27)

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

*** **Summary of BellSouth's Position:** For wire centers in which BellSouth is not required to provide UNE DS1 loops, BellSouth is also relieved of any

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[319] Tipton Direct at 71-73.
[320] *Id.*
[321] *Id.*
[322] *See* Exhibit JPG-1 at 63.
[323] Tipton Rebuttal at 49.

obligation to provide CLECs with a UNE HDSL loop. Also, UNE HDSL loops can and should be counted as 24 business lines for the purpose of evaluating impairment. ***

This issue presents two questions for resolution, both of which relate specifically to BellSouth's UNE HDSL loop product, rather than to HDSL compatible loops generally. First, in the two offices in Florida for which BellSouth qualifies for DS1 loop relief, the Commission should find that BellSouth has no obligation to provide CLECs with its UNE HDSL loop product. Second, the Commission should confirm that BellSouth can and should count each deployed UNE HDSL loop as 24 voice grade equivalent lines as directed by the FCC.

Concerning unbundling relief, BellSouth's position that CLECs are not entitled to order UNE HDSL loops in wire centers that satisfy the FCC's thresholds for DS1 loop relief is explicitly supported by the FCC's definition of a DS1 loop. The FCC defined a DS1 loop as including "2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, ***such as 2-wire and 4-wire HDSL Compatible Loops.***"[324] The federal rule is incorporated into BellSouth's proposed interconnection agreement language, which is as follows:

> For purposes of this Agreement, including the transition of DS1 and DS3 Loops described in Section 2.1.4 above, DS1 Loops include 2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, such as 2-wire and 4-wire HDSL Compatible Loops.

BellSouth's language appropriately implements the applicable federal rules, which, by their terms, extend unbundling relief to UNE HDSL loops in the same wire centers in which BellSouth obtains DS1 loop relief.

In attempting to circumvent the application of the federal rules, CLECs ignore the FCC's definition of a DS1 loop, and cite to FCC language addressing HDSL capable loops generally,

[324] 47 C.F.R. § 51, 319(a)(4); Fogle Rebuttal at 4 (emphasis supplied).

rather than to the clear and unambiguous language contained in the rules.[325] The CLECs' reliance is misplaced, because, by defining DS1 loops as including a 2-wire and 4-wire HDSL loops, the FCC expressly removed any obligation to provide these loops in unimpaired wire centers. More importantly, however, the CLECs cannot refute the reality that there has been very little CLEC interest in BellSouth's UNE HDSL product, as only 883 UNE HDSL loops were in service to *all* CLECs in Florida as of July 2005.[326]

The second dispute posed by this issue relates to how UNE HDSL loops should be calculated in determinations of subsequent wire centers that satisfy the FCC's impairment thresholds. UNE HDSL loops can and should be counted as 24 business lines. In the *TRO* the FCC explained:

> We note throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. ***Carriers frequently use a form of DSL service, i.e., High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers.*** We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps.[327]

The FCC has also made clear that, for the purposes of calculating business lines, "a DS1 line corresponds to 24 kbps-equivalents, and therefore to 24 'business lines.'"[328] Since the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity, and since the FCC declared that UNE HDSL loops are used to deliver T1 services, it is obvious that BellSouth's UNE HDSL loops must be counted, for the purpose of determining business lines in an office, as

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[325] Gillan Direct at 27.
[326] Fogle Rebuttal at 8. Sprint, with whom BellSouth has reached agreement on all issues except this one issue, had no UNE HDSL loops as of July 2005. *Id.* Thus, its objection to BellSouth's position on this issue is simply not credible.
[327] *TRO*, n. 634 (emphasis supplied).
[328] 47 C.F.R. § 51.5.

24 business lines.[329] BellSouth's proposed contract language is consistent with the FCC's decisions and should be approved.

B. **<u>Issue 18: Line Splitting:</u>** *What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?*

*** **<u>Summary of BellSouth's Position:</u>** BellSouth's proposed language is appropriate. BellSouth's language involves a CLEC purchasing a stand-alone loop (the whole loop), providing its own splitter in its central office leased collocation space, and then sharing the high frequency portion of the loop with a second CLEC. ***

No CLEC witness provided any testimony concerning line splitting, which occurs when one CLEC provides narrowband voice service over the low frequency portion of a loop and a second CLEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter.[330] Thus, although Mr. Gillan sponsored contract language concerning line splitting, the Commission should disregard such terms as lacking evidentiary support.

In contrast, BellSouth's witness on this issue, Mr. Fogle, demonstrated the need for BellSouth's contract language, which involves a CLEC purchasing a stand-alone loop (the whole loop) and providing its own splitter in its central office leased collocation space, and then sharing the portion of the loop frequency not in use with a second CLEC.[331]

If the Commission chooses to compare the different contract language, any such comparison should result in the adoption of BellSouth's proposed language. CompSouth includes language that would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271; however, as explained above the Commission should not support the reincarnation of UNE-P and should exclude Section 271 obligations from Section 251/252 interconnection agreements. Moreover,

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[329] Fogle Rebuttal at 4.
[330] *TRO* at ¶ 251; *Line Sharing Reconsideration Order* at ¶ 33; Gillan Deposition, Hearing Exhibit 7 at 77 – 78.
[331] Fogle Direct at 9-10.

the loop described by CompSouth does not exist, is not required by the FCC, and, therefore, should not be included in the section of the ICA that addresses line splitting.[332]

CompSouth also proposes that BellSouth be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L; however, as Mr. Fogle made clear, splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter built into all Asynchronous Digital Subscriber Line ("ADSL") platforms.[333] The CLECs offered no contrary evidence. BellSouth should not be obligated to provide the CLECs with splitters when they are utilizing UNE-L and can readily provide this function for themselves.[334]

The final area of competing contract language concerns CompSouth's proposed OSS language. The dispute between the parties is not over the language contained in the federal rules – clearly, the federal rules require BellSouth to make modifications to its OSS necessary for line splitting. The dispute between the parties revolves around the modifications that are actually "necessary." Mr. Fogle has explained that CLECs do not need anything from BellSouth to facilitate line splitting.[335] Consequently, BellSouth cannot agree to the open-ended contract language that CompSouth has proposed. That language would create, rather than solve, issues between BellSouth and its CLEC customers. Since CompSouth has failed to explain in any detail the basis for its proposed language, the Commission should reject it and adopt BellSouth's language in resolution of this issue.

C. <u>Fiber and Broadband Unbundling:</u>

1. <u>Greenfield and Fiber To The Home</u>

i. **<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*

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[332] Fogle Rebuttal at 9.
[333] *Id.*
[334] *Id.*
[335] Fogle Deposition, Hearing Exhibit 7, at 91, 94.

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?

*** **Summary of BellSouth's Position:** BellSouth has no obligation to provide CLECs with unbundled access to newly-deployed or "Greenfield" fiber loops. ***

ii. **Issue 27: 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?*

*** **Summary of BellSouth's Position:** BellSouth's proposed language is appropriate and recognizes that BellSouth has no obligation to provide unbundled access to FTTH and FTTC loops. ***

The parties have two substantive disputes relating to these issues. The first area of disagreement is that CompSouth has deleted BellSouth's Section 2.1.2.3, which states:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval

CompSouth did not offer any explanation for its deletion of BellSouth's proposed Section 2.1.2.3 and its deletion should be rejected by the Commission.[336]

The second difference and the major disagreement between the parties centers on the extent of fiber unbundling. The core dispute relates to the language that CompSouth substituted for BellSouth's proposed Section 2.1.2.3, which follows:

[336] *See* Fogle Rebuttal at 15.

> Notwithstanding the above, nothing in this Section shall limit BellSouth's obligation to offer CLECs an unbundled DS1 loop (or loop/transport combination) in any wire center where BellSouth is required to provide access to DS1 loop facilities.[337]

CompSouth claims that its limitation is supported by the FCC's use of the terms "mass market" at various places in its orders; however, the language CompSouth has proposed does not appear in the binding federal rules, and should be rejected.[338]

In resolving this issue, the Commission needs to understand the FCC's various orders concerning fiber relief. The first order addressing fiber was the *TRO,* and the FCC stated at ¶ 273:

> Requesting carriers are not impaired without access to FTTH loops, although we find that the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop. With a limited exception for narrowband services, our conclusion applies to FTTH loops deployed by incumbent LECs in both new construction and overbuild situations. ***Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loops must be unbundled for narrowband services only. Incumbent LECs do not have to offer unbundled access to newly deployed or "greenfield" fiber loops.***

Although the FCC used the terms "mass market" at various other places in the *TRO,* it did not use those words in explaining the scope of its fiber relief, and the FCC was very clear that its "unbundling obligations and limitations for such loops do not vary based on the customer to be

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[337] The Commission should not accept CompSouth's proposed language, as explained more fully below. If, however, the Commission sought to include some alternative language, it should adopt the language that BellSouth and Sprint agreed upon to resolve this issue. *See* Fogle Rebuttal at 13 and Tr. at 382. Moreover, if the Commission entertained any aspect of CompSouth's language (it should not) and required BellSouth to provide access to its FTTH/FTTC loops, it should make clear that BellSouth would have no obligation to provide a DS1 loop or DS1 EEL provided over a FTTH or FTTC loop to a *residential customer.* Mr. Gillan conceded as much in his deposition:

> Q: Would you agree that if, for some reason, a residential customer ordered a DS1 loop, that – and it's a Greenfield loop, that we would have no obligation to provide a DS1 loop in that circumstance?
> A: I'm going to give you a conditional yes, subject to checking the order in more detail. But I do believe that every time that the FCC referred to the enterprise market, it used the business enterprise market as part of the definition. So I think that that's an accurate statement.

Gillan Deposition, Hearing Exhibit 7 at 81.

[338] *See* 47 C.F.R. § 51.319(a)(3).

served."[339] Rather, the FCC previously concluded that "[a]lthough we require unbundling of legacy technology used over hybrid loops, ***we decline to attach unbundling requirements to the next-generation network capabilities of fiber-based local loops,*** i.e., those loops that make use of fiber optic cables . . ."[340] Indeed, contrary to the CLEC position, the FCC emphasized that it was drawing this distinction based on technology – in this case fiber - instead of on the speed of service, the identity of the customer of some other factor.[341] Keeping fiber and other next generation technologies free from forced unbundling is the best way to ensure the FCC's goals for increased deployment of next generation broadband are met. Morever, the FCC recognized that CLECs "are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation."[342]

The FCC extended its fiber relief in subsequent orders. In its *MDU Reconsideration Order*,[343] the FCC made clear that BellSouth is not obligated to unbundle fiber loops serving predominantly residential multiple dwelling units ("MDUs").[344] The FCC explained the existence of businesses in MDUs does not exempt such buildings from the FTTH unbundling framework established in the *TRO*. For instance, the FCC stated "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."[345] The FCC acknowledged its rule "will deny unbundling to competitive carriers seeking to serve customers

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[339] *TRO* at ¶ 210.
[340] *TRO* at ¶ 272.
[341] *Id.* at 293 ("we conclude that such a line is best based on ***technological boundaries rather than transmissions speeds, bandwidth, or some other factor"***) (emphasis supplied).
[342] *TRO* at ¶ 275.
[343] CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) ("*MDU Reconsideration Order*").
[344] *MDU Reconsideration Order* at ¶ 7.
[345] *Id.*

in predominantly residential MDUs" but found that "such unbundling relief was necessary to remove disincentives for incumbent LECs to deploy fiber to these buildings."[346]

Following its *MDU Reconsideration Order,* the FCC addressed fiber loops in its *FTTC Reconsideration Order.*[347] After defining a FTTC loop as a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises,"[348] the FCC granted further unbundling relief, concluding that "requesting carriers are not impaired in greenfield areas and face only limited impairment without access to FTTC loops where FTTC loops replace pre-existing loops."[349] Significantly, the FCC reiterated that CLECs have increased revenue opportunities available with FTTC loops and that the entry barriers for CLECs and ILECs were "largely the same."[350] The FCC again concluded that its rule modification "will relieve the providers of such broadband loops from unbundling obligations under section 251 of the Act."[351]

Despite these orders, CompSouth's proposed contract language would require BellSouth to provide access to its FTTH or FTTC DS1 loops or to DS1 EELs. The Commission must reject this language as flatly contradictory to the FCC's broadband policies, its fiber orders, and the binding federal rule. CompSouth's primary argument is that the FCC's impairment tests provide the only source of DS1 or DS3 loop relief.[352] This argument conveniently ignores the FCC's explanation that it used its "at a minimum" Section 251(d)(2) authority to incent swift, ubiquitous broadband relief and that it granted fiber relief based on ***technology*** rather than on

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[346] *Id.* at 23.
[347] *Order on Reconsideration,* CC Docket No. 01-338, FCC 04-248 at ¶¶ 1, 9 (Oct. 18, 2004).
[348] *FTTC Reconsideration Order* at ¶ 10.
[349] *Id.* at 11.
[350] *Id.* at 12.
[351] *Id.* at 32.
[352] *See* Hearing Exhibit 4 at 149.

transmission speed.[353] CompSouth's argument also utterly disregards the clear and unambiguous federal rule, which contains no such limiting language.

BellSouth is aware of three state commission decisions that have addressed this issue in a manner consistent with BellSouth's position.[354] The Michigan Commission found as follows:

> The Commission finds that the Joint CLECs' proposal to include a limitation for the definition of FTTH, FTTC, and hybrid loops should be rejected. First, the Commission notes that there is no language within the FCC rule defining these loops that would so limit the definitions. Further, the Commission notes that in the *TRO,* the FCC stated that although it was adopting rules specific to each loop type, its determination concerning unbundling obligations and limitations for such loops do not vary based on the customer to be served. Therefore, the Commission is persuaded that the FCC did not create an ambiguity in its rules by not including the "mass market customer" limitation proposed by the Joint CLECs.[355]

The Massachusetts Department of Telecommunications and Energy reached a similar conclusion:

> CLECs argue that the FCC's intent to limit the unbundling relief to loops used to serve mass market customers can be found in the context of the relevant orders .... Although [CLECs are] correct that the FCC included its discussion of FTTH lops under the heading "Mass Market Loops," the FCC emphasized elsewhere in the *[TRO]* that while the FCC adopts loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served. Therefore, the Department determines that the FCC did not intend to limit FTTP, FTTC, or FTTH unbundling relief only to those loops being used to provide service to residential customers.[356]

Finally, the Rhode Island Commission explained:

> To be even clearer, the definition of FTTH refers to 'customer premises' without any limitation as to the type of customer. In fact, in subsequent errata and reconsideration orders the FCC substituted previous references to 'residential' as relates to FTTH with more generic phraseology such as 'customer premises." This demonstrated that FTTH is not limited to residential customers, but encompasses business customers as well. In

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[353] *FTTC Reconsideration Order* ¶ 5; *see also TRO* ¶ 293.

[354] BellSouth believes that this Commission addressed this issue in Docket No. 040156-TP. *See* Staff Recommendation, p. 93 ("in no event is Verizon obligated to offer unbundled access to FTTP loops (or any segment or functionality thereof) which terminate at an end user's customer premises that previously has not been served by any Verizon loop facility"). BellSouth acknowledges other states have reached different conclusions.

[355] *Michigan Order,* p. 6 – 7.

[356] *Massachusetts Arbitration Order,* p. 177.

fact, the FCC had originally indicated in the TRO that its 'loop unbundling rules do not vary based on the customer to be served.[357]

In a final effort to flout the federal rules, CompSouth has claimed Hearing Exhibit 37 – a brief the FCC filed ***after*** the *TRO* but ***before*** the issuance of its *MDU Reconsideration Order* and its *FTTC Reconsideration Order* – supports its position. CompSouth is wrong.

The FCC stated, on appeal to the D.C. Circuit, that

> [t]here is no hard-and-fast definition of whether a particular customer is a 'mass market' or an 'enterprise' customer; those categories are based on general characteristics of the types of communications services customers typically demand and were used as descriptive tools to guide the analysis.[358]

Consequently, CompSouth has no legitimate basis to insert a limitation to the FCC's fiber relief. Likewise, the FCC confirmed that in the *TRO* it "found that CLECs would suffer no impairment without access to ILEC FTTH loops" because "ILECs face roughly the same costs in deploying fiber loops as CLECs, and therefore are not at a cost disadvantage"; "FTTH loops are still in the very beginning stages of deployment, so there is not a large embedded base of ILEC FTTH loops that gives ILECs a significant head start advantage"; and "CLECs are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation.[359] BellSouth's proposed contract language is fully consistent with applicable FCC rules and should be approved.

2. **<u>Issue 23: Hybrid Loops:</u>** *What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?*

*** **<u>Summary of BellSouth's Position:</u>** BellSouth's sole obligation to provide access to hybrid loops is limited to a requirement to provide access

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[357] *Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 18.

[358] Hearing Exhibit 37 at 6.

[359] *TRO* at ¶ 275.

to the time division multiplexing features of a hybrid loop, where continued access to existing copper is required by the FCC. ***

Hybrid loops are defined in the federal rules, and BellSouth and CompSouth do not appear to contest that it is appropriate to include the language contained in such rules in interconnection agreements.[360] What is not acceptable is CompSouth's proposal to require BellSouth to provide access to hybrid loops as a Section 271 obligation.[361] The Commission should not include any Section 271 language in Section 252 interconnection agreements; thus CompSouth's proposed language should be rejected.

D. Routine Network Modification Issues

1. **Issue 25:** *What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?*

*** **Summary of BellSouth's Position:** BellSouth's proposed language is appropriate and recognizes that "routine network modifications ("RNMs")" must be performed at parity. ***

2. **Issue 26:** *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?*

*** **Summary of BellSouth's Position:** RNMs should be based on TELRIC. If CLECs ask BellSouth to perform an activity that is not routine (such as removal of load coils on loops longer than 18,000 feet or removal of bridged taps), then the applicable rate should be based on special construction/special assembly tariffs as appropriate. ***

BellSouth's proposed contract language refers to the applicable federal rules concerning routine network modifications ("RNM") to unbundled loop facilities.[362] The parties' dispute centers on the relationship between RNM and line conditioning.[363] In addition, CompSouth improperly attempts to limit BellSouth's cost recovery to TELRIC rates, even if BellSouth

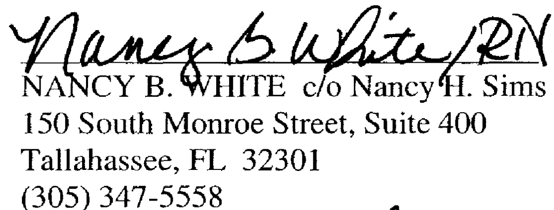
[360] *See* PAT-1 and PAT-2.
[361] Fogle Rebuttal at 17-18.
[362] Fogle Direct at 23-27.
[363] *Id.* at 24.

performs work that it would not typically perform for its retail customers.[364] This Commission thoroughly addressed this issue in its *Joint Arbitration Order* holding BellSouth's RNM and line conditioning obligations were to be performed at parity.[365] Under this ruling, BellSouth is not obligated, to remove at TELRIC rates, load coils on loops greater than 18,000 feet.[366] Likewise, this held that BellSouth's obligation to remove bridged taps was to provide parity access.[367] This Commission's well-reasoned and comprehensive analysis should be extended to all CLECs in Florida.

CONCLUSION

This docket requires the Commission to make the decisions that will implement, not undermine, the decisions of the FCC. The FCC clearly did not intend to have its critical changes in telecommunications regulation ignored and to have business continue largely as before but merely under a different statute. Instead it is clear that the FCC intends these decisions to get out of hearing rooms and to be made instead at the companies' negotiating tables.

BELLSOUTH TELECOMMUNICATIONS, INC.



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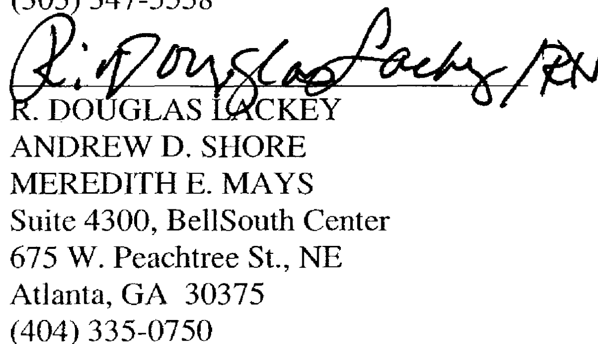

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[364] Gillan Direct at 58; Fogle Rebuttal at 19-20.
[365] *See* Order No. PSC-05-0975-FOF-TP at 24 – 26.
[366] *Id.* at 36 – 37.
[367] *Id.* at 41.