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February 24, 2006

VIA HAND DELIVERY

Ms. Blanca Bayo, Director
Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: *Docket No. 041269-TP: Petition to Establish a Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law by BellSouth Telecommunications, Inc.*

Dear Ms. Bayo:

NuVox Communications, Inc. and Xspedius Communications, Inc., on behalf of itself and its Florida operating subsidiaries, Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville LLC (together, the "Joint CLECs"), through counsel, hereby request that the Florida Public Service Commission (the "Commission") take notice of new authority by the Federal Communications Commission ("FCC") and other state commissions impacting the Commission's rulings on the commingling issue (Issue 13) in the above-referenced proceeding. Specifically, as set forth in recent arbitration orders, the state commissions of Georgia[1] and North Carolina[2] ruled that BellSouth must commingle Section

1 *See Generic Proceeding to Examine Issue Related to BellSouth's Obligation to Provide Unbundled Network Elements*, Georgia Public Service Commission Docket No. 19341-U, Commissioner Motion for the Resolution of the Remaining Issues in Docket No. 19341-U (Feb. 7, 2006) (Issue 14) at 4 and 34 (relevant portions attached as *Exhibit A*).

2 *In the Matter of Joint Petition of NewSouth Communications Corp. et al for Arbitration with BellSouth Telecommunications, Inc.*, North Carolina Utilities Commission Docket Nos. P-772, Sub. 8; P-913, Sub. 5; P-989, Sub. 3; P-824, Sub. 6, P-1202, Sub. 4, Order Ruling on Objections and Requiring the Filing of the Composite Interconnection Agreement (Feb. 8, 2006); Recommended Arbitration Order (Jul. 26, 2005) (Issue 36, 37, 38) (relevant portions attached as *Exhibit B*).

251(c)(3) unbundled network elements ("UNEs") with network elements that BellSouth is obligated to provide under Section 271 of the Act, 47 U.S.C. § 271. Moreover, the FCC recently confirmed that network elements provided by BellSouth under Section 271 of the Act, 47 U.S.C. § 271, including unbundled switching, loops and dedicated transport facilities, are "wholesale" services.[3] The FCC's unbundling rules, at 47 C.F.R. §§ 51.309(e), (f) and (g), require commingling of such wholesale services with unbundled network elements provided by BellSouth under Section 251(c)(3) of the Act, 47 U.S.C. § 251(c)(3). Accordingly, the Joint CLECs respectfully request that Commission take notice of and consider such new authority in the above-referenced proceeding.

Respectfully submitted,

Brett Heather Freedson

Brett Heather Freedson

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3 *See In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (Dec. 2, 2005) at ¶ 100 ("...checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide **wholesale access** to loops, transport and switching, irrespective of any impairment analysis under section 251 to provide unbundled access to such elements.") (emphasis added) (relevant portions attached as *Exhibit C*).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery (*) and U. S. Mail this 24th day of February, 2006.

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Commissioner Motion for the resolution of the remaining issues in Docket No. 19341-U.

SUMMARY

Issue 2: 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?

(1) BellSouth has argued that state commissions do not have the authority to require it to offer de-listed UNEs at rates terms and conditions found just and reasonable under Section 271. The Commission has already concluded that it does have such authority.

(2) CLECs have until March 11, 2006 to order conversions from BellSouth. To the extent that it takes BellSouth beyond March 11 to process these orders, BellSouth is entitled to a true-up of the difference between the TELRIC rate and the rate BellSouth may charge after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

(3) Parties are required to negotiate appropriate transition mechanisms through the Section 252 process for high-capacity loops for which the FCC found impairment in the *TRRO,* but which may meet the thresholds for non-impairment in the future.

Issue 3: Modification and Implementation of Interconnection Agreement Language – (a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

(1) Parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

(2) The Commission adopts CompSouth's position to limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO.*

(3) The Commission adopts BellSouth's position and finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise.

(4) The Commission adopts BellSouth's position and concludes that the Abeyance Agreement does not excuse Cbeyond from implementing the *TRRO* until the parties have a new interconnection agreement.

BellSouth argued that self-effectuating enforcement mechanisms provided assurance of continued Section 271 compliance. (Tr. 117, Supplemental Brief, p. 7). In its order granting BellSouth Section 271 authority in Georgia, the FCC stated that the performance plans were designed to create a financial incentive for post-entry compliance with Section 271. (Tr. 117-18, FCC's Section 271 Order for Georgia, pp. 9, 13). There is no indication that this purpose was limited to those Section 271 obligations that overlapped what was required by Section 251. The reasonable conclusion is that it was the intent for the performance plan to apply even if BellSouth's Section 251 obligations were to change.

Issue 14 – 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)?

Positions of the Parties

BellSouth

A.

BellSouth argues that CompSouth's proposed language would improperly assert state commission authority over Section 271 obligations and would resurrect UNE-P. (BellSouth Brief, p. 37). Only the FCC has the authority to regulate the terms of Section 271 compliance; therefore Section 271 services cannot be commingled with other UNEs. *Id.* at 38.

B.

BellSouth also argues that even if the Commission had Section 271 authority, it wouldn't matter because BellSouth is not obligated to commingle Section 251 services with Section 271 services. (BellSouth Brief, p. 38). The FCC only requires commingling of loops or loop transport combinations with tariffed special access services – not with UNE-P. BellSouth relies on the *SOC's* reference to commingling at ¶28 in which it only mentions tariffed services. *Id.* BellSouth then cites to paragraph 579 of the *TRO* to support its position that the *TRO* is consistent with the *SOC*.

Paragraph 579 states, in relevant part, as follows:

> By commingling, we mean 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 combining of a UNE or UNE combination with one or more such wholesale services.

While this paragraph on its own would indicate ILECs have the obligation to commingle Section 271 and Section 251 elements, the *TRO Errata* deleted the italicized language from paragraph 584 below:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including *any network elements unbundled pursuant to section 271 and* any services offered for resale pursuant to section 251(c)(4) of the Act.

BellSouth argues that this deletion indicates that the commingling requirement does not pertain to Section 271. (BellSouth Brief, p. 40).

At this same time, the FCC also deleted the following sentence from fn 1989 (1990 pre-errata): "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to checklist items." BellSouth argues that the two deletions read together make the *TRO* consistent with the *SOC*. (BellSouth Brief, p. 40). Had the FCC intended to clear up any conflict, as the CLECs argue, then it only would have deleted the footnote. *Id.*

C.

BellSouth next describes how wholesale services are repeatedly referred to as tariffed access services. BellSouth points to the TRO's references to wholesale services always being followed by the parenthetical "(e.g., switched and special access services offered pursuant to tariff)." (BellSouth Brief, p. 41). Along with the deletion of the language from ¶584, BellSouth says the FCC's clear intent was not to require commingling for 271 unbundling obligations. *Id.*

D.

In the *TRRO*, when describing the conversion from wholesale services to UNEs and UNE combinations, the FCC limited its discussion to the conversion of tariffed services to UNEs. ¶229. BellSouth construes this paragraph as further evidence that the FCC is only referring to tariffed services when it discusses commingling. (BellSouth Brief, p. 42). Any other interpretation would undermine the decision in the *TRRO* to eliminate the unbundling of UNE-P. *Id.*

E.

BellSouth also cites to a number of other state commissions that it asserts have agreed with its position on commingling. BellSouth states that both the New York Public Service Commission and the Mississippi Federal District Court indicated an interpretation of the FCC's orders consistent with BellSouth's position. (BellSouth Brief, p. 42). The North Carolina Utilities Commission Panel concluded that the FCC did not intend for ILECs to commingle Section 271 elements with 251 elements. (NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order, p. 24).*

The Florida Public Service Commission was swayed that the removal of language from ¶ 584 indicates FCC intent not to require 271 commingling. FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005). The Kansas Commission also found that commingling Section 271 elements was not a part of interconnection agreements. Kansas Order at ¶¶ 13-14.

BellSouth acknowledged that a number of other states reached a different conclusion, among them Kentucky, Washington and Massachusetts. (BellSouth Brief, fn 81).

CompSouth

CompSouth's presentation of its position on commingling includes (A) a background explanation on the origin and nature of commingling, (B) an analysis of the *TRO*, including the errata and (C) a discussion of the impact of the issue on CLECs.

A.

The FCC authorized commingling in 2003. The *TRO* required that ILECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services. *TRO* ¶584. The difference between commingling and combinations is that while combinations involve both Section 251 elements, commingling involves 251 elements with any other wholesale service.

B.

The legal basis for the FCC's commingling rules is the nondiscrimination requirements set forth in Section 202 of Federal Act.

> Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3).

(*TRO*, ¶ 581).

CompSouth addresses the impact of the errata that amended paragraph 584 of the *TRO*. As stated in the discussion of BellSouth's position, the errata removes the language "any network elements pursuant to Section 271" from a sentence that outlined an ILEC's commingling obligations. CompSouth pointed out that even after the phrase in question is deleted from paragraph 584, BellSouth's unbundling obligations are not limited to exclude Section 271 elements. (CompSouth Brief, p. 75). Wholesale facilities and services include those required by 271. *Id.* The FCC merely removed a redundant clause. *Id.* at 76.

In further support of its position, CompSouth states that the *TRO Errata* also removed the last sentence of footnote 1990. In its entirety footnote 1990 reads as follows (with emphasis added to the last sentence):

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). *We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.*

CompSouth contends that the deletion of this sentence indicates that the FCC did not mean to exclude Section 271 elements from commingling. (CompSouth Brief, p. 76).

In response to BellSouth's argument that the FCC always refers to tariffed interstate special access services, CompSouth emphasizes that the *TRO* always says "for example" before identifying these services. *Id.* at 77.

C.

CompSouth argues that the practical effect of restricting commingling would be dire for CLECs. BellSouth's proposed language would lead to potential disruption to customers. *Id.*

Discussion

Prior to determining whether the FCC has required BellSouth to commingle 251 and 271 elements, the Commission must decide whether the FCC intended state commissions to enforce any such obligation. The *TRO* provides that restricting commingling would be inconsistent with the nondiscrimination requirement in Section 251(c)(3). ¶ 581. State commissions enforce Section 251(c)(3). The *TRO* also states that incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are connected, combined or otherwise attached to wholesale services. State commissions have jurisdiction to consider the unlawful denial of UNEs.

Regardless of any determination of state commission authority under Section 271, it appears that the FCC did intend for the states to require ILECs to permit commingling between UNEs and wholesale services. The question then is whether the FCC intended to include Section 271 requirements within wholesale services. The *TRO* requires ILECs "to perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act." ¶ 579. Section 271 elements obtained at wholesale would fit within this description.

The ambiguity exists over whether the FCC intended for the wholesale facilities or services in question to include Section 271 elements. In describing the types of services for which commingling with Section 251 elements is required, the *TRO* offers by way of example "switched and special access services offered pursuant to tariff." *TRO* ¶ 579. This language differs meaningfully from the FCC's treatment of commingling in the *Supplemental Order Clarification* (rel. June 2, 2000). In its *SOC*, the FCC modified the term "commingling" with the following parenthetical "(i.e. combining loops or loop-transport combinations with tariffed special access services)." SOC, ¶ 28. In the *TRO*, issued three years later, the FCC eliminated the restrictions it placed on commingling in the *SOC*, and apparently adjusted its definition of commingling. Tariffed special access services went from being the only services at issue to an example of the services that could be at issue in commingling.

BellSouth maintains, however, that the clear intent of the FCC was not to include Section 271 elements within the commingling requirement. It cites as evidence of this intent the TRO

Errata which deleted the phrase "including any network elements unbundled pursuant to section 271" from paragraph 584 of the *TRO*. CompSouth points out that even without this phrase, the sentence, which requires commingling for wholesale facilities and services, would still apply to Section 271 elements. CompSouth also states that BellSouth should not ignore the other step that the FCC took in the *TRO Errata*, which was to delete a sentence from a footnote that expressly declined to apply the commingling rule to Section 271 checklist items.

In sum, the *TRO* included two statements that shed light on whether Section 271 elements were to be included as part of commingling, and these two statements were directly contradictory to each other. Deletion of either one of the statements would have eliminated any doubt from the requirement. The FCC deleted both statements.

While the focus of the unbundling rules appears to be on special access services, the plain language of the *TRO* would include Section 271 elements provided they were obtained at wholesale. It is unlikely that this result was oversight by the FCC given that the two previously discussed statements expressly mention Section 271, and then were both deleted. BellSouth did not offer any plausible explanation for why the FCC would have deleted the sentence from footnote 1990 that expressly excluded Section 271 elements from the commingling requirement if that was precisely what the FCC wished to do. Granted, it would have been clearer had the FCC not also deleted the phrase from paragraph 584 that specifically included Section 271 elements within the commingling requirement. However, while the specific inclusion was deleted, the general inclusion remains. That is, the sentence as modified still applies the commingling obligation to Section 271 elements obtained at wholesale. The *TRO Errata* removed a redundancy in paragraph 584, but it does not alter the plain meaning of the sentence. In contrast, the meaning of footnote 1990 does change as a result of the *TRO Errata*.

BellSouth also relies on paragraph 229 of the *TRRO*, which states in relevant part that the FCC "determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LECs seeking to convert such services satisfies any applicable eligibility criteria." (*TRRO*, ¶ 229). This language purports neither to modify the plain meaning of the *TRO*, nor to clarify that the commingling obligation in the *TRO* applied exclusively to tariffed services. It cannot be disputed that the *TRO* requires ILECs to commingle Section 251 elements with other wholesale facilities and services. It is also the case that while the FCC used special access services as an example of a wholesale facility or service in the *TRO* it did not exclude other wholesale facilities or services. Finally, it is not disputed that Section 271 elements may be obtained at wholesale. So in the *TRO*, Section 271 elements were included as part of the commingling obligation. Had the FCC in the *TRRO* wished to exclude Section 271 elements from commingling or to clarify that the *TRO* excluded Section 271 elements from the commingling obligation, then it is reasonable to assume it would have stated that it was doing so. It did not make any such statement. Rather, it stated only that the *TRO* allowed CLECs to convert tariffed services to UNEs and UNE combinations, and that this decision was upheld on appeal. (*TRRO*, ¶ 229). Given that the plain language of the *TRO* applies to any facilities or services obtained at wholesale, and that the *TRRO* neither modifies nor clarifies the *TRO* on this issue, BellSouth's reliance on this paragraph is unavailing.

The Commission's interpretation of the *TRO* comports with the 47 C.F.R. § 51.5, which defines commingling as "the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services."

In conclusion, the Commission finds that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. This action should not be construed as recreating UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that the Commission has concluded that it is prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P.

Issue 15 – TRO Conversions: Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?

Positions of the Parties

BellSouth

A.

BellSouth will make the necessary conversions once the language is incorporated into the interconnection agreements. (BellSouth Brief, pp. 82-83).

B.

The applicable rates for single element conversions in Georgia should be $25.06 for single element conversions and $26.55 for projects consisting of 15 or more loops submitted on a spreadsheet. *Id.* at 83. The Commission-ordered rate of $5.70 should apply for EEL conversions, until new rates are issued. *Id.* 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. *Id.*

C.

CompSouth did not file any testimony on this issue; therefore BellSouth's position should be adopted. *Id.*

CompSouth

A.

The *TRO* requires that ILECs provide procedures to convert various wholesale services, including special access service, to the equivalent UNE or combination of network elements.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 8
DOCKET NO. P-913, SUB 5
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.	))))))	ORDER RULING ON OBJECTIONS AND REQUIRING THE FILING OF THE COMPOSITE AGREEMENT

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Robert V. Owens, Jr., and Lorinzo L. Joyner

BY THE COMMISSION: On July 26, 2005, the Commission issued its *Recommended Arbitration Order* (*RAO*) in this docket. The Commission made the following:

FINDINGS OF FACT

1. The term "End User" should be defined as "the customer of a party."

2. The industry standard limitation of liability limiting the liability of the provisioning party to a credit for the actual cost of services or functions not performed or improperly performed should apply.

3. If a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from its decision not to include the limitation of liability.

4. The rights of end users should be defined pursuant to state contract law.

5. The Agreement should state that incidental, indirect, and consequential damages should be defined pursuant to state law.

6. The proposal of the Joint Petitioners (including NewSouth Communications Corp. (NewSouth), NuVox Communications, Inc. (NuVox), and Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC (Xspedius)) found in Section 10.5 of their Appendix A should be approved.

FINDING OF FACT NO. 9 (ISSUE NO. 9 – MATRIX ITEM NO. 26): Should BellSouth be required to commingle a UNE or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth shall permit a requesting carrier to commingle a UNE or UNE combination obtained pursuant to Section 251 with one or more facilities or services that the requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act. However, this does not include services, network elements, or other offerings made available only under Section 271 of the Act.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 9, arguing that the Commission has tentatively rejected the Joint Petitioners' language for Matrix Item No. 26 based on two incorrect findings: first, that the FCC held that its commingling rule does not apply to Section 271 elements; second, that BellSouth is correct in asserting that only tariffed elements are eligible for commingling. The Joint Petitioners contended that neither of these findings is supported by the *TRO,* and that their Brief demonstrated that the FCC made clear that it never intended to exclude Section 271 elements from commingling. Accordingly, the Joint Petitioners claimed that the Commission's tentative decision is not in keeping with federal law.

The Joint Petitioners argued that FCC Rules 51.309(e) and (f) give the Joint Petitioners the right to connect Section 251 UNEs with any element or service obtained at wholesale. The Joint Petitioners claimed that Rule 51.309 has no limitation and does not exclude any type of element or wholesale offering. The text of the *TRO* also does not contain the exception claimed by BellSouth and embraced in the *RAO*. The Joint Petitioners argued that their Brief further demonstrated that BellSouth's argument in attempting to exclude Section 271 elements from commingling was unsupported, was contrary to established telecommunications law and practice, and did not hold up to cross-examination.

The Joint Petitioners asserted that this is an issue of paramount importance for facilities-based competitors such as the Joint Petitioners, as application of the FCC's new impairment tests may result in the need to replace Section 251 UNEs, particularly dedicated transport, with network elements unbundled pursuant to Section 271. Notably, these elements will be the same, only under Section 271, a just and reasonable pricing standard applies instead of TELRIC. These Section 271 elements will be necessary to connect to UNEs, such as UNE loops, that are still available pursuant to Section 251 and that were previously used in combination with Section 251 transport (i.e. EELs). In this regard, the Joint Petitioners noted that they do not agree that tariffed special access satisfies the Section 271 checklist requirements, as such

offerings (which were available at the time the Act was enacted and, if indeed satisfactory, would have made the Section 271 checklist unnecessary) are not made pursuant to Section 252 interconnection agreements.

The Joint Petitioners maintained that the FCC did not hold that Section 271 elements are ineligible for commingling. The *RAO* quotes a passage from the *TRO* as grounds to reject the Joint Petitioners' language: "[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." This passage appears in Footnote 1990 of the *TRO*. The Joint Petitioners contended that they do not support BellSouth's argument for two reasons. First, to combine is not the same mandate as to commingle. These terms of art refer respectively to the connecting of likes (combining of Section 251 elements with Section 251 elements, which is required, and combining of Section 271 elements with Section 271 elements, which is not required) and dislikes (commingling of Section 251 elements with any other wholesale offering, including those mandated by Section 271, which, pursuant to Section 251 and Section 201 is required). The rule requiring commingling of elements was promulgated under Section 251, as well as Sections 201 and 202, which prohibit unjust and unreasonable practices.[1] It was codified in a wholly separate rule - 47 C.F.R. § 51.309. The combinations rule is contained in 47 C.F.R. § 51.315. Thus, the Joint Petitioners asserted, the FCC's conclusion that ILECs need not combine Section 271 elements with Section 251 UNEs should not be read to mean something that the FCC did not say, in Footnote 1990 or anywhere else, that ILECs need not commingle these items with UNEs offered pursuant to Section 251 of the Act.

Further, the Joint Petitioners argued, though the *TRO* may "refer [] to tariffed access services" in the context of commingling, such references cannot be deemed to contravene the plain language of FCC Rule 51.309 that contains no such tariffing limitation. Indeed, the tariff references in the *TRO* are mere suggestions rather than commands. The Joint Petitioners stated that Paragraph 579 of the *TRO* states that ILECs must commingle Section 251 UNEs with "services (e.g., switched and special access services offered pursuant to tariff)." The Joint Petitioners contended that tariffed services were only one example, not an exhaustive list, of items to be commingled with Section 251 UNEs. Similarly, Paragraph 581 of the *TRO* states that ILECs must commingle UNEs with services "including interstate access services." The Joint Petitioners asserted that access services are tariffed and must be commingled, but this provision establishes a clear requirement and in no way purports to limit services that must be commingled. In summary, nothing in the *TRO* states that elements obtained at wholesale are exclusively those provided pursuant to a tariff.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners' arguments in support of their objections are two-fold: (1) BellSouth has an obligation to commingle Section 251 and Section 271 services because commingling and combining are two different things; and

[1] *TRO*, at ¶ 581.

(2) the phrase "wholesale services" includes Section 271 services. BellSouth asserted that both of these arguments are incorrect and should be rejected.

First, BellSouth argued that the Commission correctly determined that BellSouth has no obligation to commingle Section 251 and Section 271 services. Contrary to the Joint Petitioners' attempt to distinguish commingling from combining, the FCC defined commingling in the *TRO* as the combining of a Section 251 element with a wholesale service obtained from an ILEC by any method other than unbundling under Section 251(c)(3) of the Act. BellSouth pointed out that the Joint Petitioners agreed at the hearing that commingling is the same as combining. BellSouth noted that, specifically, KMC witness Johnson testified that commingling means combining elements that are different in terms of their regulatory nature.

BellSouth maintained that it has no Section 271 obligation to combine Section 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act.[2] Further, with the *TRO Errata Order,* the FCC deleted the only reference in the *TRO* that would have required ILECs to combine Section 251 and Section 271 services.[3] BellSouth stated, based on the above, that the Commission correctly determined that "the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements." The Florida PSC also recently reached this same conclusion in its recent arbitration proceeding involving the Joint Petitioners and BellSouth:

> . . . In Paragraph 584 of the *TRO*, the FCC said 'as a final matter we require the incumbent LECs to 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.' The FCC's errata to the *TRO* struck the portion of Paragraph 584 referring to '... any network elements unbundled pursuant to Section 271....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also required to be unbundled under Section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to Section 271. . .[4]

Thus, BellSouth maintained that the Commission correctly excluded Section 271 services from BellSouth's commingling obligations.

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[2] *See TRO* at ¶ 655, Footnote 1990. ("We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251."); *United States Telecom Ass'n v. FCC*, 359 F.3d at 589 (D.C. Cir. 2004) *(USTA II)*.

[3] *See TRO Errata Order* at ¶ 27.

[4] FPSC Order No. PSC-05-0975-FOF-TP at 19.

Second, BellSouth argued that the Commission cannot adopt the Joint Petitioners' proposed language, because the Commission has no jurisdiction to determine or enforce the terms and conditions under which BellSouth must provide elements pursuant to Section 271. On the contrary, Congress gave the FCC the exclusive right to enforce compliance with Section 271. 47 U.S.C. § 271(d)(6)(A). As the FCC explained, the Act grants "sole authority to the [FCC] to administer... Section 271."[5] BellSouth maintained that the only role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271 approval process.[6]

BellSouth asserted that a state commission's authority to arbitrate and approve interconnection agreements entered into pursuant to Section 251 is specifically limited by the Act to implementing Section 251 obligations, not Section 271 obligations.[7] Accordingly, BellSouth argued that Congress did not authorize a state commission to enforce Section 271 obligations, to establish any Section 271 obligations, to establish rates for any Section 271 obligation, or to otherwise regulate Section 271 obligations.[8]

BellSouth noted that the United States District Court for the Eastern District of Kentucky confirmed this bedrock jurisdictional prohibition in finding that "[t]he enforcement authority for Section 271 unbundling duties lies with the FCC and must be challenged there first."[9] Likewise, the United States District Court for the Southern District of Mississippi held that, "even if Section 271 imposed an obligation to provide unbundled switching independent of Section 251 with which BellSouth had failed to comply, Section 271 explicitly places enforcement authority with the FCC...." *BellSouth Telecommunications, Inc. v. Mississippi Public Ser. Comm 'n, 368 F.* Supp. 2d 557 (S.D. Miss. 2005). This court concluded by stating that "[t]hus, 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." *Id* at 566 (emphasis added).

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[5] *InterLATA Boundary Order*, 14 FCC Rcd at 14400-01, ¶¶ 17-18; *see also*, *TRO* at ¶¶ 664, 665. ("Whether a particular checklist element's rate satisfies the just and reasonable standard of Section 201 and 202 is a fact-specific inquiry that the Commission will under take...."; "... Section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271. BellSouth stated, in particular, this section provides the Commission with enforcement authority where a BOC 'has ceased to meet any of the conditions required for such approval.'").

[6] 47 U.S.C. § 271(d)(2)(B); *see also Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) (state commission cannot "parley its limited role" in consulting with the FCC on a BOC's application for long-distance relief to impose substantive requirements under the guise of Section 271 after that application has been granted).

[7] *See* 47 U.S.C. § 252(c), (d); *see also Coserv Ltd. Liab. Co. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487-88 (5th Cir. 2003) (ILEC has no duty to negotiate items not covered by Section 251); *MCI Telecomms. Corp, v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (same).

[8] *See UNE Remand Order* at ¶ 470; *TRO* at ¶¶ 656, 664; *USTA II*, 359 F.3d at 237-38.

[9] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co. ET AL.*, Civil Action No. 3:05-CV-16-JMH at 12 (Apr. 22, 2005).

BellSouth stated that to adopt the Joint Petitioners' arguments regarding commingling would be to determine or enforce the terms and conditions under which BellSouth must provide services pursuant to Section 271. As made clear above, BellSouth asserted that the Commission has no authority to do that. BellSouth noted that the Kansas Corporation Commission (Kansas Commission) made this expressly clear in a recent arbitration proceeding:

> The FTA's (the Act's) 271 provisions explicitly provide that a BOC, desirous of entering the interLATA marketplace, may apply to the FCC for authorization to do so (§ 271(d)(1)); the FCC determines the BOC's qualification for interLATA authority (§ 271(d)(3)); and, it is the FCC that possesses the sole authority to determine if the BOC continues to abide by the 271 requirements (§ 271(d)(6)). The only state participation in the 271 qualification inquiry is consultation with the FCC to verify BOC compliance with 271 requirements. The clear implication here is that there is no place for independent state action. The Commission concludes for the foregoing reasons, and those expressed by the Arbitrator, that the FCC has preemptive jurisdiction over 271 matters.[10]

Third, BellSouth maintained that the Commission should reject the Joint Petitioners' arguments because it results in effectively recreating UNE-P with Section 271 services in contravention of federal law. BellSouth argued that the FCC made clear in the *TRRO*, that there is "no Section 251 unbundling requirement for mass market local circuit switching nationwide."[11] BellSouth pointed out that this Commission has already determined that it "does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P."[12] Likewise, BellSouth noted that the New York PSC, as well as the Mississippi Federal District Court, have indicated that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to Section 271-based UNE-P arrangements.'"[13] Accordingly, BellSouth asserted that the regulatory landscape is now clear - UNE-P is abolished and state commissions cannot recreate it with Section 271 elements.

BellSouth further noted that the Florida PSC, in a sound analysis, used the elimination of UNE-P in the *TRRO* to adopt BellSouth's position on commingling in the Florida Joint Petitioner arbitration proceeding, as follows: "Further, we find that connecting a

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[10] *In the Matter of Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB, *et al.* at ¶¶ 13-14 (July 18, 2005) (emphasis added).

[11] *TRRO* at Paragraph 199.

[12] *In re: Complaints Against BellSouth Telecommunications, Inc., Regarding Implementation of the TRRO*, Docket No. P-55, Sub 1550 at 13 (April 25th 2005).

[13] *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 PSC's findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (March 16, 2005)).

Section 271 switching element to a Section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential recreation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition."[14] BellSouth contended that this additional reason further supports the Commission's decision.

In any event, BellSouth noted that, as made clear by their objections, the Joint Petitioners want to commingle Section 251 loops with Section 271 transport. BellSouth provides Section 271 transport via its access tariff, and there is nothing in the Commission's decision that would prohibit the Joint Petitioners from commingling Section 251 loops with tariffed access services. Indeed, they could commingle those services today (if they were subject to a *TRO* and *TRRO* compliant agreement). Thus, BellSouth commented that it appears that the Joint Petitioners' objection with the Commission's decision is simply a rate issue, because they do not want to pay tariffed rates for transport. Such an objection does not support a reversal of the correct and well-reasoned decision of the Commission. This is especially true because only the FCC has jurisdiction to determine whether a rate under Section 201 is "just and reasonable." And, only the FCC or a federal court can address violations of Section 201.[15] Thus, BellSouth argued that the Joint Petitioners are not harmed by the Commission's decision, and any challenge to BellSouth's Section 271 transport rates must be made at the FCC and not before this Commission.

Fourth, BellSouth argued that the Joint Petitioners' reliance on the *TRO Errata Order* to Footnote 1990 of the *TRO* is misplaced. Specifically, the Joint Petitioners focus on the FCC's deletion of the last sentence of Footnote 1990 in the *TRO Errata Order*, which provided that ILECs have no obligation to commingle Section 251 with Section 271 elements. The FCC deleted this sentence because it held immediately prior that ILECs have no obligation to combine Section 271 services with services no longer required to be unbundled pursuant to Section 251 (Footnote 1990) and because of the FCC's deletion to the reference of Section 271 services in Paragraph 584 (*TRO Errata Order* ¶27). Thus, BellSouth maintained that there is nothing monumental about the FCC's *TRO Errata Order* regarding Footnote 1990. It was simply an attempt to remove redundant, unnecessary language.

Fifth, BellSouth further asserted that, contrary to the Joint Petitioners' arguments and as found by the Commission, Section 271 services are excluded from the definition of wholesale services as it relates to commingling. BellSouth stated that this conclusion is supported by the express wording of the *Supplemental Order Clarification (SOC)* released on June 2, 2000, the *TRO*, the *TRO Errata Order*, and the *TRRO*. Specifically, Paragraph 579 of the *TRO* states that the commingling obligations addressed in the

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[14] FPSC Order No. PSC-05-0975-FOF-TP at 19.

[15] *See* 47 U.S.C. §§ 201, 207; *Citibank v. Graphic Scanning Corp.*, 618 F.2d 222, 225 (6th Cir. 1980) ("This is so notwithstanding that the Act vests exclusive jurisdiction over claims for damages for statutory violations of the Act in federal courts or the FCC.") (Citations omitted).

TRO arose from the *SOC*.[16] The *SOC*, in turn, defined commingling as "i.e. combining loops or loop-transport with tariffed special access services...."[17] Thus, what the FCC changed in the *TRO* was the commingling obligation set forth in the *SOC*—the obligation to combine loops with tariffed special access circuits.

Moreover, BellSouth argued that, in the *TRO Errata Order*, the FCC deleted the only reference to Section 271 services in the entire commingling section of the *TRO*. The Joint Petitioners do not dispute this fact or the fact that the *TRO Errata Order* is in force and effect. In fact, contrary to the Joint Petitioners' interpretation of this issue, throughout the entire commingling section in the *TRO* the FCC limits its description of the wholesale services that are subject to commingling to tariffed access services.[18] BellSouth argued that these passages, in conjunction with the *TRO Errata Order*, make it clear that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 elements.

Furthermore, BellSouth contended that the FCC confirmed that the phrase "wholesale services" does not include Section 271 services in the *TRRO*. Particularly, in addressing conversion rights, the FCC in the *TRO* used the same wholesale services phrase that it used in describing ILECs' commingling obligations.[19] In the *TRRO*, the FCC described its holding in the *TRO* regarding conversions to be limited 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 ...." *TRRO* at ¶ 229. Thus, BellSouth asserted, the FCC has subsequently construed the phrase wholesale services to be limited to tariffed services, which is consistent with BellSouth's position.

Accordingly, BellSouth stated that to adopt the Joint Petitioners' argument would mean that the FCC meant for wholesale services to have two different meanings in the same order. BellSouth argued that such a finding is illogical and also in violation of basic statutory construction principles. BellSouth asserted that the only logical conclusion based upon the express wording of the *TRO*, as well as the *TRO Errata Order* (and the *TRRO)*, is that BellSouth has no obligation to commingle Section 271 elements with Section 251 elements.

Sixth, and finally, BellSouth argued that the Commission should not be persuaded by the Joint Petitioners' argument that the manner in which BellSouth complies with its Section 271 obligations somehow undermines its commingling arguments. Specifically, the fact that BellSouth complies with its Section 271 obligations to provide loops and transport via its access tariff and its Section 271 switching obligation via a commercial agreement is of no consequence. The loop and transport access services in BellSouth's

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[16] *See TRO* at ¶ 529.

[17] (*SOC* at ¶ 28).

[18] *See TRO* at Paragraphs 579, 580, 581, 583.

[19] *See TRO* at Paragraph 585 ("We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations....").

tariffs were available well before the Act was implemented, and are generally available to BellSouth customers. The fact that these same services also happen to satisfy BellSouth's obligation to make available loops and transport elements under Section 271 neither eliminates BellSouth's obligation to commingle Section 251 elements with these access services, nor creates an obligation for BellSouth to commingle Section 251 elements with Section 271 elements that are not otherwise available from BellSouth. BellSouth argued that, regardless of how BellSouth complies with its Section 271 obligations, BellSouth has no obligation to commingle Section 251 elements with services provided only pursuant to Section 271.

For all of these reasons, BellSouth urged the Commission to confirm the Commission's decision that BellSouth has no obligation to commingle Section 251 services with services that BellSouth makes available only pursuant to Section 271.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff stated that the Joint Petitioners objected to the Commission's conclusions that the commingling rule does not apply to Section 271 elements and that only tariffed elements are eligible for commingling. The Public Staff noted that the Joint Petitioners discussed in their brief that FCC Rules 51.309(e) and (f) give them the right to connect Section 251 UNEs with any element or service obtained at wholesale. These rules are without limitation and do not exclude any type of element or wholesale offering. The Public Staff stated that it agrees with the Joint Petitioners; the rules are unambiguous, and their legality is unchallenged by any party.[20]

The Public Staff stated that it also believes that the *RAO* mistakenly equates the terms commingle and combine. The Public Staff opined that "combining" is the joining of like elements, such as two or more Section 251 UNEs. The Public Staff opined that "commingling" is the joining of two or more unlike elements, such as Section 251 UNEs and special access service, or, in the case at hand, Section 251 UNEs and Section 271 elements. Paragraph 579 of the *TRO* specifically defines 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 other 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.

The Public Staff opined that the FCC made a clear distinction between combining and commingling in Paragraph 572 of the *TRO* when it stated that it would address its "rules for UNE combinations, specific issues pertaining to EELs, the ability of requesting

[20] *See MCIMetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 881 (4th Cir. 2003) (construing 47 C.F.R. § 51.703(b) and finding that a state commission is bound by an FCC rule that is unambiguous and unchallenged).

carriers to commingle UNEs and UNE combinations with other wholesale services, [and] issues surrounding conversions of access services to UNEs."

In addition, the Public Staff stated that it believes that the Commission's conclusions fail to account for the FCC's intent regarding commingling of Section 271 elements. The Public Staff argued that this intent is demonstrated in the *TRO Errata Order* where the FCC removed the sentence, "We also decline to apply our commingling rule... to services that must be offered pursuant to these checklist items."[21] The Public Staff asserted that the removal of this language strongly supports the conclusion that the FCC did not intend to exempt Section 271 elements from the commingling requirement. The Public Staff argued that, had the FCC intended for Section 271 elements to be exempt from the commingling requirements, it would not have needed to remove this language.

The Public Staff further stated that the FCC also evinced this intent in Footnote 1787 of the *TRO*, where it stated that, "[i]n light of the determinations we make herein, we grant WorldCom's request to clarify that requesting carriers may commingle UNEs with other types of services." WorldCom had requested that the FCC clarify "that requesting carriers are entitled to access to UNEs in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, for the efficient provision of telecommunications services."[22] The Public Staff averred that, although WorldCom did not specifically request commingling of Section 271 elements in its clarification motion, the FCC's grant of WorldCom's request for clarification indicated it contemplates more services to be commingled with Section 251 UNEs than just the LECs' tariffed access services.

The Public Staff commented that BellSouth's argument that the FCC means only tariffed services when it refers to wholesale services is somewhat misleading. At the time the *TRO* was issued, ILECs offered no alternatives to the loop, transport, and switching Section 251 UNEs other than their tariffed offerings. Thus, the only real examples that the FCC could use for wholesale services were the ILECs' tariffed services.

Further, the Public Staff asserted that, by specifying that tariffed services are merely examples of wholesale services in Paragraph 579 of the *TRO,* the FCC does not limit the term wholesale service to tariffed offerings. The Public Staff opined that, by spelling out that the commingling requirement is applicable generally to wholesale services, the FCC automatically included any future wholesale service, such as Section 271 elements, in this requirement without the constant revision of its rules.

The Public Staff recommended that the Commission reconsider its conclusions with regard to this issue and instead find that BellSouth should permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or

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[21] Footnote 1990 of the *TRO*.

[22] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Petition of MCI WorldCom, Inc. for Clarification, pp. 21-23, February 17, 2000.

more facilities or services that the requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners contended that the lack of an obligation to combine Section 271 elements with other Section 271 elements cannot lawfully be transformed into an exception to the FCC's unqualified requirement that ILECs provide for commingling of Section 251 elements with any other service provided on a wholesale basis. The Joint Petitioners opined that this obligation includes those made available only under Section 271.

The Joint Petitioners argued that, despite their clear explanation of the conceptual difference between commingling and combining elements, BellSouth continues to obfuscate. BellSouth's attempt to show that the Joint Petitioners made some fatal concession is misguided. First, BellSouth ignored the fact that witness Johnson stated that commingling involves the "combining [o]f elements that are different in terms of their regulatory nature". Thus, the Joint Petitioners opined that witness Johnson's testimony supports their assertion that the combining of Section 271 elements with other Section 271 elements (elements of the same regulatory nature) is different from commingling.

Second, the Joint Petitioners stated that BellSouth failed to disclose that witness Johnson precisely explained the differences between combining and commingling ("as defined in the *TRO* specifically, the FCC lifted its prohibition on combining wholesale services with UNEs in order to allow CLPs to commingle tariff services or wholesale services with Section 251 UNEs."). The Joint Petitioners opined that witness Johnson confirmed that Section 271 elements are wholesale services. Thus, the Joint Petitioners maintained that commingling of Section 251 elements with Section 271 elements and combining Section 271 elements with other Section 271 elements are different concepts. The Joint Petitioners argued that commingling Section 251 elements with other wholesale offerings, including those mandated by Section 271, is required by Section 251, as interpreted and implemented by the FCC.[23] The Joint Petitioners argued that the FCC's revision to Footnote 1990 of the *TRO* clarified that Section 271 elements are not subject to a Section 271 combinations rule, but are subject to the FCC's Section 251 commingling rule.

The Joint Petitioners asserted that BellSouth also mistakenly claimed that, by adopting the Joint Petitioners' language, the Commission will recreate UNE-P. The Joint Petitioners stated that UNE-P includes local switching elements and the local loop, all priced at TELRIC pursuant to Section 251. The Joint Petitioners argued that, on the other hand, a commingled arrangement replacing UNE-P would not include all elements

[23] *See* 47 C.F.R. §§ 51.309, 51.315.

priced at TELRIC. Thus, the Joint Petitioners argued, the two scenarios result in different pricing and therefore commingling does not result in the "all Section 251 UNE" combination commonly referred to as UNE-P.

Finally, the Joint Petitioners noted that BellSouth relied on the holding of the Florida PSC to support its claim that BellSouth is under no obligation to commingle Section 271 elements with Section 251 elements. The Joint Petitioners contended that the Florida PSC's decision creates an implied exception that cannot be squared with the second part of the FCC's *TRO Errata Order*, which deleted the FCC's Footnote 1990 sentence that had said "[w]e decline to apply our commingling rule... to services that must be offered pursuant to these checklist items." The Joint Petitioners opined that the Florida PSC made no attempt to read the *TRRO* as a whole and, as a result, reached an erroneous conclusion.

PUBLIC STAFF: The Public Staff recommended that the Commission reconsider its conclusions in the *RAO* such that Finding of Fact No. 9 should read as follows:

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Telecommunications Act of 1996 (the Act), including those obtained as Section 271 elements.

The Public Staff disagreed with the Commission's conclusion that Section 271 services are excluded from the definition of "wholesale services" as it relates to commingling.

The Public Staff stated that the resolution of the commingling issue depends on whether Section 271 elements, local switching in particular, are wholesale services. The Public Staff opined that BellSouth provides Section 271 elements as wholesale services pursuant to the common definition of "wholesale" found in Black's law dictionary. The Public Staff maintained that, in the *RAO*, the Commission noted that, in Paragraph 579 of the *TRO* the FCC "repeatedly references 'switched and special access services offered pursuant to tariff' when using the term wholesale services. In describing wholesale services that are subject to commingling, the FCC refers to tariffed access services."

However, the Public Staff maintained that, on September 16, 2005, the FCC granted in part a petition for forbearance filed by Qwest Corporation (Qwest) seeking relief from statutory and regulatory obligations that apply to it as an incumbent telephone company. The Public Staff stated that, in the press release announcing the decision, the FCC stated the following:

> The Commission leaves in place other section 251(c) requirements such as interconnection and interconnection-related collocation obligations as well as *section 271 obligations to provide wholesale access to local loops,*

local transport, and local switching at just and reasonable prices." [emphasis added]

The Public Staff maintained that BellSouth acknowledged at the hearing that it provides certain Section 271 elements, such as transport elements, as wholesale services through its special access tariff. However, the Public Staff argued that Rule 51.5 does not qualify "wholesale" to mean only those wholesale services offered by an ILEC through its tariffs, and the FCC has used the term "wholesale" recently when referring to Section 271 obligations to provide access to local switching, local loops, and local transport, without limiting its meaning to "switched and special access services offered pursuant to tariff." Thus, the Public Staff asserted, the Commission may reconsider its Finding of Fact No. 9 in this docket based on the plain language of the rule and the evidence at the hearing.

DISCUSSION

After careful consideration, the Commission concludes that it should reconsider its decision in the *RAO* finding that services, network elements, or other offerings made available only under Section 271 of the Act should not be subject to commingling with Section 251 elements or combinations thereof. Instead, the Commission now believes that such commingling should be allowed for both legal and public policy reasons.

This has been an extraordinarily difficult issue to grapple with. All the parties have presented strong and cogent arguments, and reasonable persons can disagree about which arguments are better and more convincing. The task of decision has been complicated by the relative opaqueness of the FCC's pronouncements on the subject. This lack of clear FCC guidance has been a serious handicap for both the parties and the Commission. It is thus not surprising that, construing the same language, different State commissions have reached different conclusions on this issue and that no consensus appears evident. For its part, the Commission must examine this matter according to what it believes constitutes the better legal and public policy considerations.

In brief, the Commission has come to believe on reconsideration that Section 271 services, elements, or offerings constitute "wholesale services" within the meaning of the commingling rule and therefore that they should be made available on a commingled basis with Section 251 UNEs. The Commission has also come to believe that this is the sounder public policy choice, largely because it ensures the availability of Section 271 services, elements, and offerings in a more predictable and practically usable form to competitors. The Commission believes that this is consistent with the FCC's general stress on the continued *availability* of certain Section 271 services, elements, and offerings by RBOCs in a delisted Section 251 UNE environment, with due recognition that those Section 271 services, elements, and offerings, among other things, are subject to a different rate standard from their Section 251 counterparts.

Concerning the legal arguments, the Joint Petitioners filed a Motion for Reconsideration on this issue requesting that the Commission reconsider Finding of Fact No. 9 since, they argued, it was based on two incorrect findings: first, that the FCC held that its commingling rule does not apply to Section 271 elements; and second, that BellSouth is correct in asserting that only tariffed elements are eligible for commingling. The Joint Petitioners contended that neither of these findings is supported by the *TRO,* and that their Brief demonstrated that the FCC made clear that it never intended to exclude Section 271 from commingling. Accordingly, the Joint Petitioners claimed that the Commission's tentative decision is not in keeping with federal law.

The Public Staff filed initial comments and reply comments agreeing with the Joint Petitioners that the Commission's decision on Finding of Fact No. 9 should be reconsidered. The Public Staff stated that it agreed with the Joint Petitioners that the FCC's rules are unambiguous, and their legality is unchallenged by any party.

The Commission notes that FCC Rule 51.309(e) states:

> Except as provided in § 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

The Rule clearly states that commingling of UNEs or combinations of UNEs with wholesale services obtained from an ILEC shall be permitted, while not, in any way, limiting the type of wholesale service. In fact, as noted on Page 22 of the *RAO,* BellSouth acknowledged in this docket that it does occasionally provide some Section 271 elements as wholesale services. In particular, BellSouth stated that it agreed to commingle UNEs with tariffed services or resold services and that it would commingle a Section 271 transport element. However, BellSouth maintained, it will not commingle switching because it does not provide switching as a wholesale service. The Commission does not believe that FCC Rule 51.309(e) allows BellSouth to determine which Section 271 elements are indeed wholesale services and which Section 271 elements are not wholesale services.

The Commission further notes that in Paragraph 579 of the *TRO,* the FCC specifically stated that commingling involves 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 ILEC pursuant to **any** method other than unbundling under Section 251(c)(3) of the Act. Specifically, Paragraph 579 of the *TRO* states, in its entirety:

> We eliminate the commingling restriction that the Commission adopted as part of the temporary constraints in the Supplemental Order Clarification and applied to stand-alone loops and EELs. 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), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request. By commingling, we mean 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 a UNE combination with one or more such wholesale services. Thus, an incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier **has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act**. In addition, upon request, an incumbent LEC shall perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier **has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act**. As a result, 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), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services. [Emphasis added.]

The Commission believes that Section 271 elements qualify as wholesale services that a requesting carrier can obtain from an ILEC under a method other than Section 251 unbundling.

The Commission also notes that Paragraph 579 of the *TRO* removes the commingling restriction that the FCC adopted as part of its temporary constraints in its *SOC*. However, further in Part VII.A(2)(c) of the *TRO*, specifically at Paragraph 584, the FCC states, as modified by the *TRO Errata Order*, that, "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251(c)(4) of the Act." Therefore, the FCC's discussion on commingling in the *TRO* was **not** limited to the previous commingling restriction from the *SOC*; if it was, Paragraph 584 would not have been included in the *TRO*.

Further, the Commission believes that the FCC's *TRO Errata Order*, which eliminated the phrase "any network elements unbundled pursuant to section 271 and" from Paragraph 584, must be read in context and within the framework of the *TRO*. After the altered sentence, the remaining portion of Paragraph 584 discusses commingling and services offered pursuant to resale. Furthermore, the FCC dedicated a separate section of the *TRO* to Section 271 issues, specifically, Section VIII.A. It is within that section that the FCC states that a BOC's obligations under Section 271 are not

necessarily relieved based on any determination the FCC made under the Section 251 unbundling analysis (See Paragraph 655 of the *TRO*). Therefore, the Commission believes that the logical interpretation of the FCC's changes in the *TRO Errata Order* to Paragraph 584 was that the FCC would discuss Section 271 elements and commingling under its separate Section 271 part of the *TRO* (namely, Section VIII.A).

Turning to Section VIII.A of the *TRO* concerning Section 271 issues, the Commission notes that the FCC's *TRO Errata Order* also altered Footnote 1990 to delete the following sentence: "We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items." Footnote 1990 was attached to the following sentence in Paragraph 655 of the *TRO*: "As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis." The Commission believes that the fact of the matter is that if the FCC had intended to relieve BOCs of their obligation to commingle Section 251 elements with Section 271, wholesale elements, it would not have deleted the last sentence in Footnote 1990. Without the *TRO Errata Order*, the FCC would have declined to require BOCs to commingle Section 251 elements with Section 271 elements; with the removal of this language, the FCC clearly intended not to decline, or rather to continue to enforce, its requirement for BOCs to commingle Section 251 elements with Section 271 elements.

As the Public Staff noted, the ultimate question is whether Section 271 UNEs are wholesale services which must be commingled pursuant to FCC Rule 51.309(e). The Commission agrees with the Joint Petitioners and the Public Staff and believes that all Section 271 elements are wholesale services. In reaching this conclusion, the Commission is convinced by several references made by the FCC in its December 2, 2005[24] *Memorandum Opinion and Order* addressing a Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area (FCC 05-170; WC Docket No. 04-223; adopted on September 16, 2005), as follows:

> . . . Indeed, Qwest's section 251(c)(4) and **section 271(c) wholesale obligations** remain in place. . . [Paragraph 67 – Emphasis added.]
>
> . . . We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that **relies on Qwest's wholesale inputs** – which must be priced at just, reasonable and nondiscriminatory rates and is subject to Qwest's **continuing obligations under section 251(c)(4) and section 271(c)** – supports our conclusion that . . . [Paragraph 68 with footnotes omitted and emphasis added.]

[24] The Commission notes that the FCC's *Qwest Order* was released after the *RAO*, Motions for Reconsideration, initial comments, and reply comments were filed in this docket.

We deny Qwest's Petition for forbearance to the extent Qwest seeks relief from its section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA (i.e., checklist items 4-6). In contrast to checklist items 1 through 3 and 14, which incorporate by reference other provisions of the Act, checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide **wholesale access to loops, transport and switching**[25], irrespective of any impairment analysis under section 251 to provide unbundled access to such elements. . . [Paragraph 100 with footnotes omitted and emphasis added.]

. . . The Commission also has explained that it is reasonable to conclude that section 251 and section 271 establish independent obligations because the entities to which these provisions apply are different – namely, section 251(c) applies to all incumbent LECs, while section 271 imposes obligations only on BOCs. . . [Footnote 246.]

We conclude that Qwest has not demonstrated that sufficient facilities-based competition exists in the Omaha MSA to justify forbearance from **Qwest's wholesale access obligations under sections 271(c)(2)(B)(iv)-(vi)**. . . [Paragraph 103 – Emphasis added.]

. . . Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of **Qwest's wholesale obligation to provide these network elements under sections 271(c)(2)(B)(iv) and (v)**. . . [Paragraph 105 – Emphasis added.]

The Commission believes that if the FCC had intended to limit commingling to only switched and special access services offered pursuant to a tariff, the FCC would have, specifically and definitively stated that instead of continuously referencing services obtained at wholesale by a (or any) method other than unbundling under Section 251(c)(3) of the Act.

Finally, the Commission believes that, in addition to the legal analysis above, requiring commingling of Section 251 elements with Section 271 elements is better public policy. As previously noted, the Commission believes that reconsideration on this issue is appropriate to ensure the availability of Section 271 services, elements, and offerings in a more predictable and practically usable form to competitors. The entire reason for making Section 271 elements available is to allow a competitor to serve end-user customers. Placing limits on the manner in which a competitor can utilize Section 271 elements as advocated by BellSouth runs counter to this policy goal. The

[25] The Commission notes that the FCC references wholesale access to Section 271(c)(2)(B) (the competitive checklist) and specifically to switching, which is checklist item 6. Therefore, BellSouth's position that it will not commingle switching because it does not provide switching as a wholesale service is unpersuasive and inconsistent with the FCC's recent *Qwest Order*.

Commission believes that its decision herein is in harmony with the FCC's general emphasis on the continued access by competitors to certain Section 271 services, elements, and offerings by RBOCs regardless of any de-listing due to a nonimpairment analysis under Section 251.

Based upon the foregoing, the Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration on Finding of Fact No. 9 and to alter Finding of Fact No. 9 to state, as follows:

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

CONCLUSIONS

The Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration and, thus, alter Finding of Fact No. 9, as outlined hereinabove. The Commission notes that its decision herein does not address the issue of the appropriateness of including Section 271 elements in interconnection agreements. Nor does the decision herein address the issue of the appropriate rates for Section 271 elements. These issues, in addition to the specific commingling issue decided herein, will be addressed by the Full Commission by order in the change of law docket (Docket No. P-55, Sub 1549).

FINDING OF FACT NO. 10 (ISSUE NO. 10 – MATRIX ITEM NO. 36): How should line conditioning be defined in the Agreement; and what should BellSouth's obligations be with respect to line conditioning?

FINDING OF FACT NO. 11 (ISSUE NO. 11 – MATRIX ITEM NO. 37):

Joint Petitioners' Issue Statement: Should the Agreement contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less?

BellSouth's Issue Statement: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

FINDING OF FACT NO. 12 (ISSUE NO. 12 – MATRIX ITEM NO. 38): Under what rates, terms, and conditions should BellSouth be required to perform line conditioning to remove bridged taps?

INITIAL COMMISSION DECISION

In Findings of Fact Nos. 10, 11, and 12, the Commission concluded as follows:

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

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the Omaha	)	
Metropolitan Statistical Area	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2005 **Released: December 2, 2005**

By the Commission: Chairman Martin issuing a separate statement; Commissioners Copps and Adelstein concurring and issuing a joint statement.

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Exhibit "C"

c. Checklist Items 4-6 (Loops, Transport and Switching)

100. We deny Qwest's Petition for forbearance to the extent Qwest seeks relief from its section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA (*i.e.*, checklist items 4-6).[245] In contrast to checklist items 1 through 3 and 14, which incorporate by reference other provisions of the Act, checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide wholesale access to loops, transport and switching, irrespective of any impairment analysis under section 251 to provide unbundled access to such elements.[246] We conclude that Qwest has not shown that checklist items 4 through 6 are unnecessary to ensure that Qwest's charges and practices are just and reasonable and not unreasonably discriminatory, nor unnecessary to ensure that consumers' interests are protected.[247] We instead conclude that granting Qwest's Petition would not be in the public interest and would likely harm competition in the provision of telecommunications services in the Omaha MSA.[248]

101. As an initial matter, we clarify that the scope of our inquiry in this section is limited. The analysis below pertains only to loop, transport and switching elements that need not be unbundled pursuant to section 251(c)(3) and for which we have not already forborne from section 271 access obligations. *First*, we deny Qwest's forbearance Petition to the extent it seeks relief from obligations to provide access to loops, transport and switching under section 271 when Qwest also has an obligation to provide the same network elements – for example, loops in those wire centers where we have neither forborne from section 251(c)(3) in this Order nor found non-impairment in the *Triennial Review Remand Order* – pursuant to section 251(c). For this class of network elements, even if we were to forbear from sections 271(c)(2)(B)(iv)-(vi), which require just and reasonable pricing under sections 201 and 202, Qwest would still be obligated to provide access to these network elements pursuant to section 251(c)(3) at more specific TELRIC prices.[249] To the extent that section 271(c)(2)(B) imposes an obligation no greater than section 251(c)(3), and where that section 251(c)(3) obligation still applies, we deny Qwest's

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[245] Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." 47 U.S.C. § 271(c)(2)(B)(iv). Section 271(c)(2)(B)(v) requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C. § 271(c)(2)(B)(v). Section 271(c)(2)(B)(vi) requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services." 47 U.S.C. § 271(c)(2)(B)(vi); *see also Verizon Pennsylvania Section 271 Order*, 16 FCC Rcd at 17532-536, paras. 48-56.

[246] *See Triennial Review Order*, 18 FCC Rcd at 17384, para. 653; *see also Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3905, para. 471 (1999) (*UNE Remand Order*). As the Commission previously has explained, this interpretation of the Act best comports with the plain meaning of the statute and avoids other problems of statutory construction. The Commission also has explained that it is reasonable to conclude that section 251 and section 271 establish independent obligations because the entities to which these provisions apply are different – namely, section 251(c) applies to all incumbent LECs, while section 271 imposes obligations only on BOCs. *See Triennial Review Order*, 18 FCC Rcd at 17385, para. 655.

[247] 47 U.S.C. § 160(a)(1)-(2).

[248] *Id.* at § 160(a)(3).

[249] *See Triennial Review Order*, 18 FCC Rcd 17386, para. 656.