BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:	)	
Petition to Establish Generic Docket to Consider	)	Docket No. 041269-TP
Amendments to Interconnection	)	Filed: March 7, 2006
Agreements Resulting from Changes of Law	)	
	)	

REQUEST FOR OFFICIAL RECOGNITION (REVISED)

DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), through its undersigned counsel, pursuant to rule 90.202, Florida Rules of Evidence, and section 120.569(2)(i), Florida Statutes, requests Official Recognition of the *Order Concerning Changes of Law,* issued by the North Carolina Utilities Commission in Docket No. P-55, SUB 1549, In the Matter of Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications and Competing Local Providers Due to Changes of Law, on March 1, 2006. The Commission's attention is particularly directed to the North Carolina's decision not to rule on line sharing issues at page 10. In addition, Covad requests Official Recognition of *Order on Remaining Issues*, issued by the Georgia Public Service Commission in Docket No. 19341-U, In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc.'s Obligations to Provide Unbundled Network Elements, released on March 2, 2006. This filing reflects the hand delivery of the materials to the Clerk.

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CERTIFICATE OF SERVICE
Docket No. 041269-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing Request for Official Recognition (Revised) was served via Electronic Mail the 7th day of March, 2006, to the following:

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1549

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law	))))))	ORDER CONCERNING CHANGES OF LAW

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, September 19 and 20, 2005

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Sam J. Ervin, IV, Lorinzo L. Joyner, Robert K. Koger, and Howard N. Lee

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BY THE COMMISSION: On November 4, 2004 BellSouth Telecommunications, Inc. (BellSouth) filed a petition requesting the Commission to establish a generic docket to determine what changes were needed in its interconnection agreements (ICAs or Section 252 agreements) with competing local providers (CLPs) in North Carolina as a

result of the *Triennial Review Order*[1] (*TRO*) and other recent decisions of the Federal Communications Commission (FCC) and federal courts. BellSouth asserted that a single generic docket would be preferable to having a separate change-of-law proceeding for each of its North Carolina ICAs. In an order of November 10, 2004, the Commission established this docket, designating it as Docket No. P-100, Sub 133u, and directed BellSouth to provide supplementary information identifying the ICAs it had in effect and the CLPs who were parties to those ICAs. BellSouth filed the requested information on December 6, 2004.

In an Order issued on January 4, 2005, the Commission made all CLPs identified in BellSouth's supplementary information parties to this proceeding; directed BellSouth to confer with the state's principal CLPs and the Public Staff concerning discovery procedures and the schedule to be followed in this docket; and instructed the parties to file a joint report by February 4, 2005. The parties were unable to agree on a joint report, and on February 4, 2005 BellSouth and several CLPs filed separate reports on scheduling issues.

On February 22, 2005 the Public Staff filed a report stating that it had met with BellSouth and all interested CLPs by conference call, and the parties had succeeded in reaching agreement on a proposed schedule, which was set out in the Public Staff's report. The Public Staff also filed a motion requesting that the docket be assigned a new docket number to reflect the fact that it is not a truly generic docket, but instead is limited to BellSouth and the CLPs that have ICAs with BellSouth, and further requesting that issues raised by the FCC's *Triennial Review Remand Order*[2] (*TRRO*) be recognized as within the scope of the proceeding. On February 24, 2005 the Commission issued an order adopting the parties' agreed-upon schedule, redesignating the docket as Docket No. P-55, Sub 1549, and authorizing the consideration of *TRRO*-related issues.

On March 24, 2005 the Commission ordered BellSouth to file a complete list of CLPs to whom it had sent correspondence concerning changes of law. BellSouth filed the requested list on April 7, 2005. By Order issued on April 12, 2005, the Commission designated all CLPs on the list as parties to this docket and directed them to indicate whether they wished to participate actively in the proceeding. The following parties declared themselves to be active participants: Image Access, Inc. d/b/a NewPhone; Balsam West FiberNet, LLC; Xspedius Communications LLC (Xspedius); US LEC of North Carolina Inc. (US LEC); DIECA Communications, Inc., d/b/a Covad Communications Company (Covad); ITC^DeltaCom Communications, Inc. (ITC^DeltaCom); JCM Networking Inc. d/b/a Southern LEC; CTC Exchange Services, Inc.; @ Communications, Inc.; MCImetro Access Transmission Services, Inc. (MCI);

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[1] 18 FCC Rcd. 16978, 17145, *corrected by Errata,* 18 FCC Rcd. 19020, *vacated and remanded in prat, aff'd in part,* United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir.), *cert. denied,* 125 S. Ct. 313 (2004).

[2] *Unbundled Access to Network Elements, Review of the* Section *251 Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, CC Docket 01-338, Order on Remand, FCC 04-290 (released Feb. 4, 2005).

Global Connection Inc. of America; Momentum Business Solutions, Inc. (Momentum); AT&T Communications of the Southern States, LLC (AT&T); TCG of the Carolinas, Inc.; NuVox Communications (NuVox); Sprint Communications Company, L.P. (Sprint); Town of Pineville, d/b/a PTC Communications; and LecStar Telecom, Inc. (LecStar). The Competitive Carriers of the South, Inc. (CompSouth) did not declare itself to be an active participant, but did participate actively in the proceeding without objection from any party. CompSouth is an organization whose members include AT&T, Covad, ITC^DeltaCom, LecStar, Momentum, NuVox, Xspedius, and a number of CLPs that did not designate themselves as active participants.

On April 4, 2005, the Commission issued an Order transferring certain specified issues from pending arbitration dockets to this case.

In a motion filed on June 4, 2005, BellSouth requested summary judgment on a number of contested issues and declaratory judgment in its favor on several other issues. The Commission held a conference call on June 14, 2005, to receive input from all interested parties on how to address this motion. Following the conference call, in an Order of June 17, 2005, the Commission established deadlines for parties to file responses to BellSouth's motion, as well as motions for cross-summary judgment, and for BellSouth to respond to any motions for cross-summary judgment.

On June 30, 2005, a report was jointly filed by all parties actively participating in the proceeding. The report included a protective agreement and proposed discovery guidelines, both of which had been agreed upon by all parties. It also included a joint matrix of contested issues. The matrix listed 32 issues, some of which were broken down into sub-issues. The parties filed an amended joint report on July 7, 2005, modifying the discovery guidelines. In an Order dated July 8, 2005, the Commission approved the protective agreement, the discovery guidelines, and the issues matrix.

CompSouth, US LEC, and Sprint filed responses on July 15, 2005, to BellSouth's motions for summary judgment and declaratory judgment, and CompSouth also moved for cross-summary judgment. BellSouth filed its response to CompSouth's motion on July 25, 2005. On August 15, 2005 the Commission issued an Order denying all of the motions for summary judgment and declaratory judgment. In that Order, the Commission noted that there was no controversy among the parties over Issues 7, 14(b), or 21. (The Commission referred to the question of "DSL over UNE-P," as addressed in BellSouth's discussion of Issue 14, as Issue 14(b).)

On August 1, 2005, BellSouth filed the testimony and exhibits of Kathy K. Blake, Eric Fogle, Pamela A. Tipton, and David Wallis; CompSouth filed the testimony and exhibits of Joseph Gillan; US LEC filed the testimony of Wanda G. Montano; and Sprint filed the testimony and exhibits of James M. Maples.

On August 18, 2005, the Commission issued an Order transferring 28 issues from Docket No. P-500, Sub 18 (BellSouth/ITC^DeltaCom arbitration proceeding) to this proceeding, resulting in a total of 60 issues in the issues matrix. The Commission

established deadlines for the parties to file supplemental direct and rebuttal testimony relating to the transferred issues.

On August 29, 2005, BellSouth filed the rebuttal testimony of witnesses Blake and Fogle and the rebuttal testimony and exhibits of witness Tipton; CompSouth filed the rebuttal testimony and exhibits of witness Gillan and the rebuttal testimony of Edward J. Cadieux; US LEC filed the rebuttal testimony of witness Montano; Sprint filed the rebuttal testimony of witness Maples; and ITC^DeltaCom filed the rebuttal testimony and exhibit of Jerry Watts.

On September 6, 2005 BellSouth filed the supplemental direct testimony of witnesses Blake, Fogle, and Tipton, and ITC^DeltaCom filed the supplemental direct testimony of Mary Conquest, Steve Brownworth, and witness Watts. On September 13, 2005, BellSouth filed the supplemental rebuttal testimony of witnesses Blake, Fogle, and Tipton, and ITC^DeltaCom filed the supplemental rebuttal testimony of witnesses Watts, Conquest, and Brownworth.

The matter came on for hearing as scheduled. At the hearing BellSouth and ITC^DeltaCom announced that they had resolved all of the issues transferred to this docket in the Commission's Order of August 18, 2005; that they would withdraw their supplemental direct and rebuttal testimony; and that the rebuttal testimony of ITC^DeltaCom witness Watts would be withdrawn, but he would be permitted to refile, after the hearing, a redacted version of his rebuttal testimony, limited exclusively to Issue 31, as listed in the joint matrix, an issue that remained in dispute between BellSouth and ITC^DeltaCom. The parties agreed to waive cross-examination of witness Watts on his refiled and redacted testimony. The parties further agreed to waive cross-examination of the following witnesses and stipulate to admission of their testimony: BellSouth witness Wallis, CompSouth witness Cadieux, US LEC witness Montano, and Sprint witness Maples. They stipulated that the depositions of BellSouth witnesses Blake, Fogle, and Tipton, CompSouth witnesses Gillan and Cadieux, and US LEC witness Montano would be received in evidence. It was announced that the parties had resolved Issues 12, 20(a), 25, and 30, and that they had also resolved the issue relating to a Digital Signal 1 (DS1) transport cap, which was viewed by some parties as part of Issue 2 and by others as part of Issue 4. BellSouth presented the testimony of witnesses Blake, Fogle, and Tipton, and CompSouth presented the testimony of witness Gillan.

In a letter of September 28, 2005, BellSouth confirmed that certain issues had been settled, specifically Matrix Item Nos. 7, 12, 20(a), 25, and 30.

ITC^DeltaCom, pursuant to its agreement with BellSouth, filed the redacted rebuttal testimony of witness Watts on September 29, 2005.

On October 24, 2005, BellSouth filed a confidential exhibit setting out the results of the discovery it had conducted concerning the presence of CLPs with fiber-based collocation in North Carolina. On the same day US LEC filed a motion in which it

Also, on January 13, 2006, Sprint filed a letter advising the Commission that Sprint and BellSouth had reached agreement in principle on the issues in dispute in this docket with the exception of Matrix Item No. 6 – Availability of high-bit-rate digital subscriber line (HDSL)-Capable Loops.

On January 24, 2006, CompSouth filed a copy of a January 20, 2006 *Order Initiating Hearings to Set a Just and Reasonable Rate Under* Section *271* released by the Georgia Public Service Commission.

On January 27, 2006, BellSouth filed a letter in response to CompSouth's January 24, 2006 filing. BellSouth noted that, to the extent the Commission chooses to take official notice of the Georgia decision, BellSouth requested that the Commission also take notice of the Complaint for Declaratory and Injunctive Relief filed on January 24, 2006 by BellSouth in the United States District Court, Northern District of Georgia. BellSouth noted that the Complaint seeks declaratory relief and BellSouth believes that it demonstrates that the Georgia decision is unlawful, contrary to, and preempted by federal law.

On February 10, 2006, BellSouth filed a copy of the Florida Public Service Commission's vote sheet on all issues pending in Florida's change of law docket.

On February 22, 2006, CompSouth filed responses to recent BellSouth filings regarding change of law proceedings in Georgia and Florida.

Appendix A provides a list of the acronyms used in this Order.

WHEREUPON, based upon a careful consideration of the entire record in this proceeding, the Commission now makes the following

FINDINGS OF FACT

1. Language implementing the *TRRO* transition should require the identification and physical reconfiguration of affected unbundled network elements (UNEs) as soon as practicable, impose transition rates throughout the applicable transition periods, require notification of end users where applicable, identify wire centers in accordance with Finding of Fact No. 5, require that CLPs be notified of affected wire centers, and provide for the self-certification and protest process that is currently in place.

2. BellSouth and the CLPs should be required to execute amendments to their ICAs deleting the provisions requiring BellSouth to offer the UNEs that the FCC has found are no longer required to be offered under Section 251(c)(3) of the Telecommunications Act of 1996 (the Act or TA96). Unless the parties mutually agree on different language, the language of the amendments must be as set forth in this Order; or, if no specific language is set forth in this Order, it must be consistent with the Commission's conclusions. The decisions reached in this Order will be controlling in all pending arbitration proceedings involving BellSouth, and, unless the parties agree on

different language, the language approved in this Order should be included in any ICA currently under negotiation.

3. The definitions contained in FCC Rule 51.5 for business line and fiber-based collocator are appropriate for inclusion in interconnection agreements. The definition of building as modified and proposed by CompSouth witness Gillan is appropriate. The definition of route in FCC Rule 51.319(e) should be adopted with a clarification regarding wire centers and reverse collocation facilities, as proposed by Sprint witness Maples. The parties may adopt a verbatim recitation of the FCC's threshold rules or simply reference them in the ICA, in order to incorporate BellSouth's obligation to offer unbundled access to high-capacity loops and dedicated transport in ICAs.

4. The Commission has the authority, in this situation wherein there is a dispute, to determine whether or not BellSouth's application of the FCC's Section 251 nonimpairment criteria for high-capacity loops and transport is appropriate.

5. In determining the number of business lines, it is inappropriate for BellSouth to expand its count of its switched access business lines to count full system capacity. The number of switched business access lines reported in Automated Reporting Measurement Information System (ARMIS) should be used. In addition, it is inappropriate for BellSouth to include residential unbundled network element – loop (UNE-L) lines in the count of business lines. Further, it is inappropriate for BellSouth to expand its count of high-capacity UNE-L to count full-system capacity. Instead, BellSouth should use the same utilization factor for CLP high-capacity UNE-L as exists for BellSouth's high-capacity lines. Finally, it is appropriate for BellSouth to count the number of lines provided via HDSL, asymmetrical digital subscriber line (ADSL), unbundled copper loop – short (UCL-S), and integrated services digital network (ISDN) digital subscriber line (IDSL) loops on a one-for-one basis.

6. The parties should negotiate appropriate language to include in the interconnection agreements which reflects the procedures outlined by the Commission in Finding of Fact No. 5 concerning the calculation of business lines. After the non-impairment wire center list is established, CLPs should not be able to self-certify that they are entitled to obtain high-capacity loops and transport on an unbundled basis in a wire center where they are not impaired. Further, it is appropriate for BellSouth to only include the initial non-impaired wire center list in its interconnection agreements and simply to make a reference in the interconnection agreements to BellSouth's Carrier Notification Letters as posted on its website for the latest wire center list. BellSouth's proposed process for developing future non-impaired wire center lists by posting a Carrier Notification Letter is appropriate, however, BellSouth should not be required to unbundle new high-capacity loops or transport 30 business days after posting a Carrier Notification Letter. Finally, high-capacity loops and transport UNEs that are in service when a subsequent wire center determination is made should remain available as UNEs for one-half of the original transition period, with the clock starting to tick the day BellSouth posts the Carrier Notification Letter.

7. HDSL-capable loops are not equivalent to DS1 loops for the purpose of evaluating impairment.

8. The Commission does not have the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252, nor does the Commission have the authority to set rates for such elements.

9. No conditions should be imposed on moving, adding, or changing orders to a CLP's respective embedded base of switching except those described in 47 C.F.R. § 51.319(d)(2). However, Rule 51.319(d)(2)(iii) requires BellSouth to provide unbundled switching to a CLP's embedded base of end-user customers until March 11, 2006. No conditions should be imposed on moving, adding, or changing orders to a CLP's high-capacity loops except those described in 47 C.F.R § 51.319(a). No conditions should be imposed on moving, adding, or changing orders to a CLP's dedicated transport except those described in 47 C.F.R. § 51.319(e).

10. Any service arrangements de-listed by the FCC in the *TRO* should be removed from ICAs as Section 251 UNE offerings effective with the *TRO* amendment. BellSouth should not impose disconnection or nonrecurring charges when transitioning the de-listed Section 251 UNEs to alternate services. The issue of future de-listing is addressed in Finding of Fact 6.

11. In instances where BellSouth has tariffed alternatives to a de-listed UNE, and the CLP does not submit conversion orders or spreadsheets to BellSouth prior to the end of the transition period, such UNEs should be converted to the appropriate tariffed rate effective on the day following the end of the FCC-specified transition period. No disconnection charges should apply, and in cases where no physical rearrangements are necessary for conversion, no tariffed nonrecurring charges should apply. For services for which no tariffed offering exists, BellSouth must provide each CLP a spreadsheet or order as soon as possible prior to the end of the transition period listing the services for which no order has been placed, together with a notice that the services will be disconnected on the day after the end of the transition period.

12. With the Commission's approval of the new, stipulated Service Quality Measurement (SQM) / Self-Effectuating Enforcement Mechanism (SEEM) plan in Docket No. P-100, Sub 133k, effective November 15, 2005, the issue in this docket of removing de-listed UNEs from the SQM/Performance Measurements and Analysis Platform (PMAP)/SEEM plan is moot.

13. Section 271 offerings can be commingled with Section 251 UNE offerings. The cost of multiplexing equipment should be based on the cost of the higher speed element associated with the multiplexing equipment. Rates for commingling should remain at total element long-run incremental cost (TELRIC) prices for Section 251 UNEs and just and reasonable market prices for Section 271 elements.

14. BellSouth is required to provide conversion of special access circuits to UNE pricing. The contract language concerning the "Conversion of Wholesale Services to Network Elements or Network Elements to Wholesale Services", as proposed by CompSouth witness Gillan, in his First Revised Exhibit JPG-1, should be adopted. The conversions should be made pursuant to the terms of the ICA. The switch-as-is conversion rates proposed by BellSouth, in its December 5, 2005 filing, are the appropriate rates.

15. The rates, terms, and conditions for conversions should be retroactive back to the *TRO* effective date, except that requests for conversions that were pending as of the effective date of the *TRO* should be processed under the conditions that existed prior to the *TRO*.

16. The Commission concludes that, since it has decided in Finding of Fact No. 8 that it does not have the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252, nor have the authority to set rates for such elements, it will not rule on whether BellSouth is obligated pursuant to the Act and FCC Orders to provide line sharing to new customers after October 1, 2004 under its Section 271 obligations.

17. ICAs should only contain language for line sharing transitioning from CLPs' existing Section 251 line sharing arrangements.

18. In accordance with the Commission's decision on Matrix Item No. 14 (Finding of Fact No. 13), line splitting should be allowed on a commingled arrangement of a Section 251 loop and unbundled local switching pursuant to Section 271. BellSouth and CompSouth should negotiate acceptable language to address whether a CLP should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLP involved in the line splitting arrangement. It is appropriate to adopt Section 3.8.15 from CompSouth's First Revised Exhibit JPG-1 concerning access to operations support systems (OSS). Finally, BellSouth is not obligated to provide CLPs with access to BellSouth-owned splitters, however, CompSouth's proposed language in Section 3.6.13 of CompSouth's First Revised Exhibit JPG-1 is acceptable.

19. Consistent with its ruling in Finding of Fact No. 8, the Commission concludes that it does not have the authority to require BellSouth to include call-related databases provided pursuant to Section 271 in ICAs entered into pursuant to Section 252.

20. The following Sections should be incorporated into the *TRRO* amendments:

> 2.1.2 Fiber to the Home (FTTH) loops are local loops consisting entirely of fiber optic cable, whether dark or lit, serving an End User's premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the MDU minimum point of entry (MPOE). Fiber to the Curb loops are local

loops consisting of fiber optic cable connecting to a copper distribution plant that is not more than five hundred (500) feet from the End User's premises or, in the case of predominantly residential MDUs, not more than five hundred (500) feet from the MDU's MPOE. The fiber optic cable in a FTTC loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than five hundred (500) feet from the respective End User's premises. BellSouth shall offer CLECs unbundled access to FTTH/FTTC loops serving enterprise customers and predominantly business MDUs.

2.1.2.1 In new build (Greenfield) areas, where BellSouth has only deployed FTTH/FTTC facilities, BellSouth is under no obligation to provide such FTTH and FTTC Loops. FTTH facilities include fiber loops deployed to the MPOE of a MDU that is predominantly residential regardless of the ownership of the inside wiring from the MPOE to each End User in the MDU.

2.1.2.3 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 unbundled access to DS1 loops and loop/transport combinations.

21. The following language should be adopted for the *TRRO* amendments to address BellSouth's hybrid loop unbundling obligations:

2.1.3 A hybrid loop is a local loop, composed of both fiber optic cable usually in the feeder plant and cooper twisted wire or cable usually in the distribution plant. BellSouth shall provide unbundled access to hybrid loops pursuant to the requirements of 47 C.F.R. 51.319(a)(2).

22. The language proposed by Sprint witness Maples, in his rebuttal testimony, for Section 1.10 of the *TRRO* amendments should be adopted to implement BellSouth's obligation to provide routine network modifications (RNMs).

23. Sprint witness Maples' amended version of Section 1.10 of the *TRRO* amendments, previously adopted in Finding of Fact 22, adequately addresses the appropriate charges for RNMs. Such language will provide BellSouth with the flexibility to price network modifications on an individual case basis in the event that existing rates do not cover a particular situation.

24. The following language should be adopted for Section 2.1.2.2 of the *TRRO* amendments to address issues relating to fiber to the home and fiber to the curb:

2.1.2.2 In FTTH/FTTC overbuild situations where BellSouth also has copper Loops, BellSouth will make those copper Loops available to

<<customer_short_name>> on an unbundled basis pursuant to the requirements of 47 C.F.R. § 51.319(a)(3)(iii). BellSouth's retirements of copper loops or copper subloops must comply with the requirements of 47 C.F.R. § 51.319(a)(3)(iv).

25. Thirty to forty-five days' advance notice of an audit provides a CLP with an adequate time to prepare. In its Notice of Audit, BellSouth shall state its concern that the requesting CLP has not met the qualification criteria and set out a concise statement of the reasons therefore. BellSouth may select the independent auditor without the prior approval of the CLP or the Commission. Challenges to the independence of the auditor may be filed with the Commission only after the audit has been concluded. BellSouth is not required to provide documentation, as distinct from a statement of concern, to support its basis for an audit, or seek the concurrence of the requesting carrier before selecting the location of the audit.

26. The *Core Order* removed the "growth caps" and "new markets" reciprocal compensation restrictions and should be implemented in ICAs. The language set forth in Exhibit JW-1 should be used as a guide by parties to remove the "growth caps" and "new markets" restrictions wherever such restrictions are included in ICAs. Such language need not be used where the parties adopt negotiated language to implement the *Core Order*, or where the right to amend an ICA to implement the *Core Order* has been waived through a party's failure to make a request by a deadline specified in the ICA. Amendments to ICAs to implement the *Core Order* should be included with the *TRO/TRRO* amendments.

27. BellSouth and all CLPs with whom it has ICAs currently in effect should execute and file amendments to the ICAs that are consistent with the provisions of this Order, or are mutually agreeable to the parties to the ICA, by March 10, 2006.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

ISSUE NO. 1 – MATRIX ITEM NO. 2: *TRRO* / FINAL RULES – What is the appropriate language to implement the FCC's transition plan for: (1) switching; (2) high-capacity loops; and (3) dedicated transport as detailed in the FCC's *TRRO*, issued February 4, 2005?

POSITIONS OF PARTIES

COMPSOUTH: The interconnection agreement must indicate when higher transitional prices begin, when they end, and what other changes are necessary to assure an orderly change to new arrangements. CLPs are entitled to transition rates for any UNEs that are "de-listed" until March 10, 2006. BellSouth's contract proposals would force CLPs off the transition pricing plan well before the end of the FCC-mandated transition period (and before meaningful Section 271 alternatives are made available). CompSouth is willing to work cooperatively with BellSouth to ensure that circuits subject to the transition of Section 251(c)(3) UNEs are processed efficiently. In no

circumstances should CLP cooperation with BellSouth to ensure an orderly transition. result in CLPs being forced to pay higher rates than the FCC authorized during the transition period.

BELLSOUTH: The language should indicate that the transition applies only to the embedded base of elements that are no longer required to be offered under Section 251. It should indicate the length of the transition period and specify that the transition should begin prior to the end of the period. For the embedded base of local switching, CLPs should submit orders as soon as possible to convert or disconnect their embedded base of unbundled network element – platform (UNE-P) or standalone local switching. This will give BellSouth time to work with each CLP to ensure all embedded base elements are identified, negotiate project timelines, issue and process service orders, update billing records, and perform all necessary cutovers. For unimpaired wire centers where the FCC's competitive thresholds are met or impaired wire centers where the FCC's caps apply, CLPs should submit spreadsheets by December 9, 2005, or 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. BellSouth and other active parties have agreed that the DS1 transport cap applies to routes for which there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport. The wire centers that satisfy the FCC's impairment tests are identified in witness Tipton's testimony and listed in BellSouth's Post-Hearing Brief, and the Commission should require CLPs to convert their de-listed high-capacity loops and transport facilities in these wire centers to alternative serving arrangements. CLPs should submit spreadsheets to identify their embedded base dark fiber to be either disconnected or converted to other services by June 10, 2006. The transition rates apply only while the CLP is leasing the de-listed element from BellSouth during the transition period. Once the de-listed UNE is converted to an alternative service, the CLP will be billed the applicable rates for that alternative service going forward.

PUBLIC STAFF: Language implementing the *TRRO* transition should require the identification and physical reconfiguration of affected UNEs as soon as practicable, impose the transition rates during the entire transition periods, require notification of end users where applicable, identify wire centers in accordance with Finding of Fact No. 5, require that CLPs be notified of affected wire centers, and provide for the self-certification/protest process that is currently in place.

DISCUSSION

BellSouth witness Tipton testified that in the *TRRO* the FCC eliminated BellSouth's obligation to unbundle DS0 level switching as a Section 251 UNE. Previously, in the *TRO*, the FCC eliminated the requirement that BellSouth unbundle DS1 and above enterprise switching. The result of the two orders, collectively, is that BellSouth is no longer required to provide local switching pursuant to Section 251.

Witness Tipton stated that, in the *TRRO*, the FCC implemented a 12-month transition period for CLPs to move away from Section 251 UNEs for local switching and

for certain high-capacity loops and transport. Section 251 UNEs for certain dark fiber loops and transport are to be transitioned over an 18-month period. However, witness Tipton maintained that CLPs cannot wait until the end of the transition period to begin transitioning their embedded base of Section 251 UNEs. Witness Tipton asserted that the FCC clearly did not intend this course of action. The *TRRO* states that the transition provides adequate time to perform the tasks necessary to an orderly transition and the time necessary to migrate to alternative fiber arrangements.

According to witness Tipton, from an implementation perspective, BellSouth cannot be expected to process conversion orders from over 260 CLPs in one day. Nor could the CLPs handle the volume of orders necessary to convert the Section 251 UNEs to alternative serving arrangements so quickly. As a result, the transition period must reflect an ongoing move from Section 251 UNEs to alternative arrangements. Witness Tipton stated that BellSouth is committed to working with CLPs to make the transition as seamless as possible for CLP end users, but the CLPs must communicate with BellSouth and work cooperatively to complete the tasks before the transition period expires.

Witness Tipton further stated that BellSouth proposes a process that requires CLPs to submit orders to convert or disconnect their embedded base of local switching as soon as practicable. In the event an order has not been placed by the CLP, BellSouth proposes to convert UNE-P lines to the resale equivalent and to disconnect any stand-alone switch port effective March 11, 2006.

For high-capacity loops, BellSouth proposes that CLPs submit spreadsheets identifying their embedded base of high-capacity loops to enable BellSouth to establish a project schedule to convert the loops to alternative arrangements. For arrangements that have not been converted by March 11, 2006, BellSouth will convert those services to the corresponding tariff service. Dedicated transport should be processed in the same manner as BellSouth's proposal for high-capacity loops. Again, should any dedicated transport facilities not be converted by March 11, 2006, BellSouth proposes to convert them to the appropriate tariff service.

Dark fiber loops and dark fiber transport have an 18-month transition period. However, witness Tipton recommended a process for these UNEs similar to the process for high-capacity loops and transport elements. The difference would be that BellSouth's conversion to one of its tariff offerings would not take place until September 11, 2006.

Witness Tipton stated that BellSouth proposes that for new CLPs signing ICAs after March 11, 2005, the agreements not include rates, terms, and conditions for switching, UNE-P, or dark fiber loops, since the FCC concluded that CLPs are not impaired without access to these elements. Witness Tipton contended that agreements with existing CLPs should have language that incorporates a transition to alternative service offerings. In addition, BellSouth proposes a standard agreement with existing

CLPs that has different language concerning high-capacity loops and transport than that proposed for new CLPs.

CompSouth witness Gillan testified that transitional prices should become effective only when the ICA modifications addressing these prices become effective. According to witness Gillan, the FCC was clear that changes called for in the *TRRO* were to take effect through contract changes, not through unilateral action. He further testified that the rates should not be retroactive.

Witness Gillan recommended that CLPs need only to place an order with BellSouth in order to qualify for transitional rates, as most unimpaired elements will not be moved to different network arrangements but will be moved to a new pricing schedule. He stated that, in many cases, because of the uncertainty as to whether particular wire centers are impaired, CLPs do not know where they must analyze alternative arrangements. Until a final list of unimpaired wire centers is established, CLPs will not be certain as to which high-capacity loops and transport facilities must be transitioned to other services.

With regard to pricing during the transition, witness Gillan argued that the *TRRO* makes clear that the CLPs are entitled to pay TELRIC rates (plus $1) for all analog customers, including any customers that were previously considered to be enterprise customers. Finally, he noted that the *TRO* and *TRRO* have numerous requirements that need to be implemented coincident with the removal of the de-listed Section 251 elements.

Sprint witness Maples testified that ICAs should contain explicit language consistent with the transition plan established by the FCC in the *TRRO*. Terms used in the agreement should accurately reflect those found in FCC Rule 51.319. In addition, ICAs should contain provisions that permit CLPs to challenge BellSouth's claim that a wire center meets the FCC's non-impairment criteria.

Witness Maples proposed a transition plan that generally provides for CLPs to submit orders to BellSouth for disconnection or conversion of the affected UNEs in increments of one-third, stating that it makes sense for a plan to be established where a certain percentage of orders are placed by certain dates.

The Commission believes that the *TRRO* is clear that local switching and dark fiber loops are no longer required to be unbundled by BellSouth under Section 251. Further, it is clear that once a wire center meets the non-impairment criteria set forth by the FCC, BellSouth is no longer required to unbundle high-capacity loops and transport or dark fiber loops and dark fiber transport for CLPs. The Commission believes there is no dispute between the parties concerning these matters.

The disputes among the parties appear to concern the transition of wire centers from impaired status to unimpaired status. For example, when does the transition period begin and end? How much should CLPs pay for the elements that are being

transitioned? How should impaired services be moved to unimpaired services? In addition, there is disagreement among the parties on the procedure for determining whether a wire center is impaired or unimpaired.

In the *TRRO*, the FCC implemented a 12-month transition period for CLPs to move away from Section 251 UNEs for local switching and for certain high-capacity loops and transport. Section 251 UNEs for certain dark fiber loops and transport are to be transitioned over an 18-month period ending September 10, 2006. Thus, the FCC clearly envisioned that the transition process must take place over an extended period of time. The complicated transactions involved in this transition cannot be accomplished overnight without causing massive customer confusion and disruption to service. For that reason, the Commission strongly believes that the transition process should proceed in a manner such that customers are unaffected to the maximum extent possible. This will require the transition process to be as seamless as possible. Hopefully, adherence to the FCC's two transition periods will provide ample time to minimize customer disruptions and adverse impacts.

One of BellSouth's primary concerns is the need for sufficient time to process the changes necessary to move the de-listed UNEs to alternative services or facilities. The Commission shares this concern. However, the CLPs are concerned that they will be faced with paying rates that exceed the transition rates, despite the FCC's pronouncement that the transition rates apply through the two transition periods ending March 10, 2006, and September 10, 2006. Again, the Commission believes the CLPs' concerns are valid.

Accordingly, the Commission concludes that the most reasonable manner in which to accommodate these somewhat conflicting positions is to (1) require CLPs and BellSouth, as soon as practicable, to identify and process the changes necessary to effect the transition from unimpaired UNEs to alternative services or facilities and (2) impose transition rates throughout the applicable transition periods. This will require CLPs to identify and provide information to BellSouth, on a timely basis, detailing the loops and transport routes that need to be transitioned to other facilities. Furthermore, consistent with the FCC's two transition periods, the new rates for the alternative service or facilities will become effective on either March 11, 2006, or September 11, 2006, depending upon the particular UNE and which transition period is applicable. Thus, the transition rates will apply to service from March 11, 2005, through either March 10, 2006, or September 10, 2006, regardless of whether the affected UNE has been transitioned to a new facility or service offering. This compromise allows BellSouth to implement the necessary network changes as soon as possible and the CLPs to fully benefit from the transition rates consistent with the *TRRO*.

To the extent that a CLP no longer desires to provide a particular service, it must notify BellSouth of its intent to discontinue and the two parties must coordinate the disconnect to take place prior to the conclusion of the applicable transition period. Importantly, the CLP must also adhere to Commission Rule R17-2(q) regarding the

discontinuance of service to customers, as notification to customers is critical to minimizing the impact of this transition on end users.

The issue of how to define the embedded base has previously been addressed by the Commission in Docket No. P-55, Sub 1550. In its April 25, 2005 Order, the Commission concluded that the embedded base consists of the customers using the UNEs impacted by the *TRRO*. CLPs are permitted to order and process changes for these embedded customers that add or modify the impacted UNEs during the transition period. The evidence in this docket does not support a departure from that conclusion.

With regard to the identification of wire centers that meet the FCC's non-impairment criteria, the Commission addresses this issue in the discussion of the Evidence and Conclusions for Finding of Fact No. 5, hereinafter. Therefore, there should be no disagreement over which wire centers meet the criteria and which do not. However, it would be beneficial for the wire centers that do meet the FCC's non-impairment criteria to be identified and for the CLPs to be notified in a manner similar to BellSouth's Carrier Notification Letters.

To the extent there are disputes over a wire center's classification, dispute resolution provisions in ICAs should be modified to address these matters. Our discussion of the Evidence and Conclusions for Finding of Fact No. 6 addresses the procedure to be followed when subsequent wire centers are found to meet the FCC's non-impairment criteria.

In Docket No. P-55, Sub 1550, BellSouth indicated that it would continue to follow the self-certification and protest process set forth in the *TRRO*, and the Commission expects BellSouth to do so. Thus, CLPs will be able to self-certify for the provision of high-capacity loops and transport. To the extent BellSouth prevails in a protest, CLPs will be liable to BellSouth for the difference in rates between an alternative arrangement and the self-certified UNE, as well as interest on the difference, and language to this effect should be incorporated into ICAs. The Commission believes these provisions will prevent any gaming of the self-certification process and allow CLPs to avoid delaying service implementation.

CONCLUSIONS

The Commission concludes that language implementing the *TRRO* transition should require the identification and physical reconfiguration of affected UNEs as soon as practicable, impose transition rates throughout the applicable transition periods, require notification of end users where applicable, identify wire centers in accordance with Finding of Fact No. 5, require that CLPs be notified of affected wire centers, and provide for the self-certification and protest process that is currently in place.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

ISSUE NO. 2 – MATRIX ITEM NOS. 3(a) & 3(b): *TRRO*/FINAL RULES - (a) How should existing ICAs be modified to address BellSouth's obligations 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?

POSITIONS OF PARTIES

COMPSOUTH: With respect to Matrix Item No. 3(a), CompSouth stated that the Commission's decisions in this proceeding should form the basis for ICA amendments implementing changes in BellSouth's unbundling obligations. Except to the extent the parties agree otherwise, ICA amendments should be completed in a timely manner after the conclusion of this proceeding. Existing ICAs should only be modified, however, regarding disputed issues that are within the scope of this proceeding. If an issue is covered by an existing ICA and is not in dispute in this proceeding (or was not even affected by the FCC's *TRO* or *TRRO* rulings), then the current contract language addressing that issue should not be affected by the decisions in this proceeding. CompSouth, furthermore, expressed concern about the ICA Attachment 2 which BellSouth filed along with its testimony. Attachment 2 addresses issues related to the *TRO* and *TRRO* that are not disputed in this proceeding, such as EEL eligibility criteria. Attachment 2 also includes contract language on many issues that were not affected in any way by the recent changes in law arising from the *TRO* and *TRRO*, such as white page directory listings and intercarrier compensation. The Commission should not adopt any part of BellSouth's proposed Attachment 2 and should reject entirely from consideration matters unrelated to the disputed issues in this case. BellSouth should specifically identify those portions of its Attachment 2 that apply directly to the issues in this proceeding and, to the extent the Commission agrees with BellSouth's positions, only the specified contract language should be included in the ICA agreements.

With respect to Matrix Item No. 3(b), CompSouth argued that the appropriate way to implement in new agreements, pending in arbitrations, modifications arising from this proceeding depends on how the parties to the arbitration have treated those issues. If the issue resolved in this case is an unresolved issue in a pending arbitration, the Commission's ruling in this docket should govern the resolution of the arbitration. If the issue resolved in this case is not an unresolved disputed issue in a pending arbitration, and the parties have agreed that they will abide by their negotiated resolutions notwithstanding the results in this case, those resolutions should be honored. On the other hand, absent a specific agreement, either party to the arbitration should be able to invoke the change of law provisions of the ICA once the agreement is approved by the Commission. That approach would enable the parties to adopt the new rulings by this Commission in an orderly manner consistent with any specific agreement they may have concerning how those rulings should be addressed.

BELLSOUTH: With respect to Matrix Item Nos. 3(a) and 3(b), BellSouth maintained that network elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act must be removed from existing interconnection agreements, subject to the appropriate transition language and should not be included in new agreements. The appropriate contract language, whether in amendments to existing ICAs or new agreements that reflect the results of this docket, should be promptly executed following the conclusion of this proceeding so that transitions are completed by March 10, 2006.

PUBLIC STAFF: With respect to Matrix Item Nos. 3(a) and 3(b), the Public Staff stated that BellSouth and the CLPs should be required to execute amendments to their ICAs deleting the provisions requiring BellSouth to offer the UNEs that the FCC has found are no longer required to be offered under Section 251(c) of the Act. Unless the parties mutually agree to different language, the language of the amendments should be as set forth in the Commission's Order; or, if no specific language has been set forth, it should be consistent with the Commission's conclusions. The decisions reached in this Order should be controlling in all pending arbitration proceedings involving BellSouth, and, unless the parties agree on different language, the language approved in this Order would be included in any ICA currently under negotiation.

DISCUSSION

The questions posed by these issues are implementation issues regarding how Section 251 UNEs should be dealt with in ICAs. Substantively, the answer is largely dictated by the Commission's conclusions in Finding of Fact No. 8. CompSouth and BellSouth have widened their focus to bring up more tangential and generic issues related to implementation which have application outside of the Section 251 UNE context. To their credit, they appear to recognize, for example, that, if the Commission prescribes language, that is the language that should be incorporated in the ICA. Of course, they disagree as to various particulars. The principal disputes that have arisen are CompSouth's argument as to the over-inclusiveness of BellSouth's Attachment 2, which it says addresses issues not even before the Commission in this proceeding, such as white page directory listing and intercarrier compensation, and BellSouth's argument that NuVox and Xspedius believe that, as a result of their "abeyance agreement" with BellSouth, they and they alone should not be required to amend their current interconnection agreements with BellSouth to incorporate the *TRRO*. Significantly, however, BellSouth does not mention Attachment 2 in its Brief concerning Matrix Item Nos. 3(a) and 3(b), and it admits that the NuVox/Xspedius argument regarding the abeyance agreement has been made in other states but not here. In any event, CompSouth's Brief makes no reference to the abeyance agreement.

The Commission is agreeable to widening the implementation focus somewhat, but it does not believe it needs to address the above issues in detail, except to note that it has addressed the abeyance agreement in its *Order Concerning New Adds* in Docket No. P-55, Sub 1550, issued on April 25, 2005, and that it is not the Commission's intent to give blanket approval to BellSouth's proposed Attachment 2 or to address issues

outside the Joint Issues Matrix. Indeed, blanket approval would be impossible to the extent that the Commission decided certain issues favorable to CLPs.

The Commission believes that the Public Staff has struck a reasonable balance between the Section 251 UNE question and more generic implementation issues. The Commission further believes that the recommendations proposed by the Public Staff are the most reasonable—viz., that BellSouth and the CLPs should be required to execute amendments to their ICAs deleting provisions requiring BellSouth to offer the UNEs that the FCC has found are no longer required to be offered pursuant to Section 251; that, unless the parties mutually agree to different language, the language of the amendments should be as set forth in the Commission's Order, or, if no specific language has been set forth, it should be consistent with the Commission's conclusions; that decisions reached in this Order should be controlling in all pending arbitration proceedings involving BellSouth; and that, unless the parties agree on different language, the language approved in this Order should be included in any ICA currently under negotiation.

CONCLUSIONS

The Commission concludes that BellSouth and the CLPs should be required to execute amendments to their ICAs deleting the provisions requiring BellSouth to offer the UNEs that the FCC has found are no longer required to be offered under Section 251(c) of the Act; that, unless the parties mutually agree to different language, the language of the amendments should be as set forth in the Commission's Order; or that, if no specific language has been set forth, it should be consistent with the Commission's conclusions; that the decisions reached in this Order should be controlling in all pending arbitration proceedings involving BellSouth; and, that, unless the parties agree on different language, the language approved in this Order should be included in any ICA currently under negotiation.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

ISSUE NO. 3 - MATRIX ITEM NO. 4: *TRRO* / FINAL RULES – What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high-capacity loops and dedicated transport and how should the following terms be defined? (i) Business Line; (ii) Fiber-Based Collocator; (iii) Building; and (iv) Route.

POSITIONS OF PARTIES

COMPSOUTH: In regard to the two terms: (i) business line and (ii) fiber-based collocator, CompSouth argued that it has proposed contract language that faithfully implements the FCC's decisions regarding availability of high-capacity loops and dedicated transport UNEs. CompSouth contended that its differences with BellSouth are not focused so much on the appropriate definitions of the terms used in the *TRRO*, but on how those definitions are applied. CompSouth recommended that the FCC's definitions be read and applied in their entirety and that potentially contradictory parts of

such definitions be applied in a way that would harmonize the various provisions that comprise the definition. In contrast, CompSouth asserted that BellSouth's approach pulls out and highlights particular provisions of certain definitions in a way that distorts the overall meaning of the FCC's definition and consistently leads to more non-impairment in more locations than is justified by the plain terms of the *TRRO*. For example, CompSouth explained that when BellSouth applies the appropriate test to determine whether DS1 access must be offered as a UNE under Section 251(c)(3) — i.e., when it classifies its wire centers according to the number of business lines and fiber-based collocators — it improperly inflates the business line count by including lines used to provide data services and to serve residential customers. Similarly, CompSouth observed that BellSouth's original estimate of the number of fiber-based collocators has been revised downward after review of information from CLPs demonstrating that they do not qualify as fiber-based collocators in certain central offices.

For term (iii) building, CompSouth stated that the FCC did not define what it meant by building when it limited the availability of loops to particular numbers of buildings. CompSouth asserted that it had proposed a reasonable definition that would recognize how telecommunications services are provided to various types of structures. For example, CompSouth commented that its definition notes the differences between buildings where a single versus multiple minimum point of entry (MPOE) have been established by the building owners. CompSouth explained that these distinctions have an impact on the way telecommunications services are provided in office complexes, strip malls, and other settings often served by CLPs targeting the small business market.

For term (iv) route, CompSouth observed that there is no dispute among the parties that a route is defined by the FCC in 47 C.F.R. Section 51.319(e). However, CompSouth asserted that it is important that the Commission's ruling in this docket make it clear that a route is defined in relation to the two wire centers between which the CLP is requesting transport, not wire centers beyond or subtending either of those two wire centers. In other words, CompSouth believes that whether an impaired route being requested lies, due to the configuration of the BellSouth network, within a larger, non-impaired route should have no impact on the classification of the smaller route. CompSouth argued that a route is defined by its end-points, not by whatever decision BellSouth employs as to how it will ultimately provide transport between those points.

BELLSOUTH: BellSouth observed that it has a continuing obligation to offer Section 251 access to high-capacity loops and transport except as follows:

Loops

- BellSouth is not obligated to provide Section 251 unbundled access to DS1 loops to buildings that are served out of wire centers containing at least 60,000 business lines and 4 or more fiber-based collocators.

- BellSouth is not obligated to provide Section 251 unbundled access to DS3 loops to buildings that are served out of wire centers containing at least 38,000 business lines and 4 or more fiber-based collocators.
- In the wire centers in which BellSouth has a Section 251 unbundling obligation, CLPs may only obtain unbundled access to 10 DS1 loops to any one building and 1 DS3 loop to any one building.
- BellSouth is not obligated to provide Section 251 unbundled access to dark fiber loops.

Transport

- BellSouth is not obligated to provide Section 251 unbundled access to DS3 or dark fiber transport on routes containing at least 24,000 business lines or 3 fiber-based collocators. For routes between all other wire centers (and not those contemplated in the preceding sentence) a CLP may only obtain unbundled access to 12 DS3 dedicated transport circuits on such routes. On routes for which there is no unbundling obligation of DS3 transport, but for which impairment exists for DS1 transport, CLPs may only obtain unbundled access to 10 DS1 dedicated transport circuits on such routes.
- BellSouth is not obligated to provide Section 251 unbundled access to DS1 transport on routes between wire centers with at least 38,000 business lines or 4 fiber-based collocators.

Definitions

For purposes of implementing the FCC's non-impairment thresholds, BellSouth maintained that the following definitions should apply:

"Business Line" is defined by the FCC in 47 C.F.R. §51.5.

"Building" should be defined from the perspective of a reasonable person – if a reasonable person believes a structure is a building, then it is a building. For example, a multi-tenant building is one building regardless of the number of tenants that work or live in that building.

"Fiber-Based Collocator" is defined by the FCC in 47 C.F.R. §51.5.

"Route" is defined by the FCC in 47 C.F.R. §51.319(e).

Further, BellSouth stated that business lines include BellSouth retail and resold business switched access lines, as reported in BellSouth's year-end 2004 ARMIS 43-08 report, all UNE loops connected to a wire center, including UNE loops provisioned in combination with other unbundled elements, and business UNE-P lines. BellSouth believes that all ISDN and other digital access lines, whether BellSouth's lines or UNE lines, should be counted with their full system capacity; that is, each 64 kbps-equivalent should be counted as one line. BellSouth argued that the

Commission should reject any CLP arguments that would improperly narrow the business line definition or result in a factually-intensive inquiry. BellSouth asserted that the FCC made clear that the FCC's "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"[3] and CLPs have conceded such by seeking reconsideration of the business line definition. BellSouth noted that likewise, the FCC has made clear that its test includes all UNE loops.[4]

Furthermore, BellSouth observed that if there is no impairment for dedicated transport at the wire centers comprising the end points of the transport portion of an enhanced extended loop (EEL), BellSouth does not have to provision that portion of the EEL on an unbundled basis. According to BellSouth, if the threshold for the wire center serving the loop location is met, then, BellSouth does not have to provision that portion of the EEL on an unbundled basis. BellSouth stated that where the competitive thresholds have been met for both the loop and transport portions of the EEL, the service is not available on an unbundled basis.

Lastly, BellSouth observed that it is no longer obligated to provide unbundled access to entrance facilities.

PUBLIC STAFF: The Public Staff stated that the definitions contained in FCC Rule 51.5 for "business line" and "fiber-based collocator" are appropriate for inclusion in the ICAs.

The Public Staff believes that the definition of "route" in FCC Rule 51.5 is appropriate with a clarification regarding wire centers and reverse collocation facilities. [Commission Note: The Commission notes that the Public Staff inadvertently referenced FCC Rule 51.5, when it should have referenced FCC Rule 51.319(e), which is where route is defined.]

The Public Staff maintained that the definition of "building", as modified and proposed by witness Gillan, is appropriate, and the ICAs may adopt a verbatim recitation of the FCC's threshold rules or simply reference them in the ICA in order to incorporate BellSouth's obligation to offer unbundled access to high-capacity loops and dedicated transport.

DISCUSSION

•Business Line

In its Brief, CompSouth observed that the FCC's rules adopted in the *TRRO* to determine non-impairment for high-capacity loops and transport require a wire-center by

[3] See September 9, 2005 Brief for FCC Respondents, United States Court of Appeals, D.C. Cir., No. 05-1095.

[4] See *TRRO* Paragraph 105.

wire-center analysis. CompSouth explained that the key variables in such analysis are two factors: (1) the number of "business lines" in each wire center, and (2) the number of "fiber-based collocators." CompSouth stated that there is little dispute concerning the appropriate definition of these two terms. Instead, CompSouth opined that the dispute primarily involves the appropriate interpretation of definitions provided by the FCC, particularly as to how the number of business lines should be counted.

In regard to the term "business line", CompSouth witness Gillan stated, in rebuttal testimony, that "the contract definition of a 'business line' is revised to parallel the definition in the *TRRO*. It is clear that the dispute with BellSouth involves an *interpretation* of how the definition should be read and not the definition itself." CompSouth witness Gillan testified that the term, business line, as defined in FCC Rule 51.5 states:

> Business line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

However, in its Brief, CompSouth observed that despite agreement on the wording of the foregoing definition, BellSouth has adopted a reading of this definition which causes each directive in the definition to conflict with another. In particular, CompSouth asserted that BellSouth includes with the business line count: (a) residential lines served by CLPs using UNE loops; (b) capacity on its own high-speed digital access lines that are either empty or used for data services; and (c) capacity on the high-speed digital access lines leased to CLPs that are similarly empty or used for data services, which inflates the number of business lines counted by BellSouth and directly conflicts with the FCC's definition.

BellSouth witness Tipton testified that the FCC's definition for business line or a reference to this definition should be included in the ICAs. Witness Tipton explained that a business line, as used in her testimony, is the same as defined in FCC Rule 51.5. However, witness Tipton testified that there is a disagreement between BellSouth and some of the CLPs as to what constitutes a business line. In particular, in her direct testimony, witness Tipton observed that some of the CLPs question the manner in which BellSouth counted UNE loops, claiming, for example, that certain types of UNE loops that are used to provide DSL services are not "switched" by BellSouth. Witness

Tipton argued that the FCC's definition of business lines clearly requires that BellSouth include the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements and, accordingly, BellSouth counted all UNE loops, including those that CLPs may contend are not "switched" by BellSouth. Further, in rebuttal testimony, in regard to her testimony on Matrix Item No. 5(b), witness Tipton further discussed why she disagreed with some of CompSouth witness Gillan's testimony as to how BellSouth should have counted business lines.

Sprint witness Maples testified that the term business line should be as defined by FCC Rule 51.5.

The Public Staff recommended that the definition contained in FCC Rule 51.5 for business line should be included in the ICAs.

Based upon the foregoing, it appears to the Commission that the dispute on this issue is not on how to define a business line, but how to interpret the FCC's definition. Accordingly, the Commission concludes that the actual term, business line, as defined in FCC Rule 51.5 Terms and Definitions, is the appropriate definition to be included in the ICAs. However, in regard to the disagreement as to how the actual calculation of the number of business lines should be performed, the Commission will address that matter, hereinafter, under our discussion concerning Matrix Item No. 5(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? Therefore, the term, business line, should be interpreted consistent with our rulings regarding Matrix Item No. 5(b) (Finding of Fact No. 5).

•Fiber-Based Collocator

Unlike the dispute over the calculation of the number of business lines, there now appears to be agreement on how to count the number of fiber-based collocators. In particular, on December 12, 2005, in this docket, BellSouth filed a letter stating that, at this time, the parties do not have an active dispute concerning the number of fiber-based collocators in any wire centers in North Carolina. Said filing also included a BellSouth and CompSouth jointly submitted exhibit summarizing the results of the parties' agreed-upon process for confirming the identity of fiber-based collocators, as that term is defined in the *TRRO* and FCC rules. The letter stated that the joint exhibit reflects the results of the parties' process in those wire centers in which BellSouth has identified fiber-based collocators for the purpose of satisfying the impairment tests in the *TRRO*.

As to the definition of the term, fiber-based collocator, there no longer appears to be any disagreement between BellSouth and CompSouth. Thus, the Commission believes that all the parties agree that fiber-based collocator should be defined as set forth in FCC Rule 51.5, which states as follows:

Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

Accordingly, the Commission concludes that the actual term, fiber-based collocator, as defined in FCC Rule 51.5 Terms and Definitions, is the appropriate definition to be included in the ICAs.

•Building

The Commission notes that in FCC Rule 51.319(a)(4)(ii), the FCC places a cap on unbundled DS1 loop circuits such that "A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops." And under FCC Rule 51.319(a)(5)(ii), the FCC places a cap on unbundled DS3 loop circuits such that "A requesting telecommunications carrier may obtain a maximum of a single unbundled DS3 loop to any single building in which DS3 loops are available as unbundled loops." However, as the parties have pointed out in their Briefs or Proposed Order, the FCC did not explicitly set forth its definition of a "building"; and the parties have not reached agreement on the proper definition of the term in the context of the *TRRO*.

BellSouth witness Tipton testified in her direct testimony that BellSouth was not proposing a definition for building in its contract because, as a practical matter, common sense dictates that the word, building, means just what it says. However, witness Tipton stated that if a dispute materializes, then a building should be defined using a "reasonable person" standard, i.e., if a reasonable person believes something is a building, then it is a building. In her rebuttal testimony (filed August 29, 2005), witness Tipton testified that she objected to CompSouth's proposed definition of a building as set forth in Section 10.1 of Exhibit JPG-1 (filed August 1, 2005). Witness Tipton argued that by attempting to define individual tenant space in a multi-tenant building as its own "building", a CLP would have virtually unlimited access to UNE DS1 loops and DS3 loops to the one building housing all of these tenants in clear violation of the caps imposed by the FCC for these elements. Witness Tipton again testified that the term, building, should be defined based on a "reasonable person" standard; and as such, a single structure building, like Wachovia Center, is one building regardless of whether there is one tenant or multiple tenants operating or residing in it.

Witness Tipton provided Exhibit PAT-5 with the filing of her rebuttal testimony; Exhibit PAT-5 presents "BellSouth's Redlines to Direct Testimony Exhibit JPG-1 of Joseph P. Gillan". Witness Tipton stated that BellSouth has attempted to redline CompSouth's proposed interconnection agreement language in an attempt to bring CompSouth's proposed language into compliance with the *TRO* and *TRRO*. However, witness Tipton testified that because CompSouth did not propose a comprehensive set of terms and conditions, BellSouth cannot advocate adopting even BellSouth's redlined version of the CompSouth proposal because it would be incomplete. With that caveat, the Commission believes it is insightful to note that in Exhibit PAT-5, with BellSouth's modifications to witness Gillan's initial definition of building, BellSouth's version would read as follows:

> For purposes of this Attachment 2, a 'Building' is a permanent physical structure including, but not limited to, a structure in which people reside, conduct business or work and which has a unique street address assigned to it excluding suites, floors, room numbers or other identifying information (Unique Street Address). Multi-tenant property with a single street address shall constitute one 'building' for purposes of this Attachment. As an example only, a high rise office building with a general telecommunications equipment room through which all telecommunications services to that building's tenants must pass would be a single 'building' for purposes of this Attachment 2. Two or more physical structures that share a connecting wall or are in close physical proximity shall not be considered a single building solely because of a connecting tunnel or covered walkway, or a shared parking garage or parking area so long as each such structures has a Unique Street Address. Multiple permanent physical structures held under common ownership on a contiguous property will each be considered a single building for purposes of this Attachment 2.

CompSouth argued that the Commission should adopt its proposed definition for a building. CompSouth witness Gillan filed his First Revised Exhibit JPG-1 on August 29, 2005, along with the filing of his rebuttal testimony. Witness Gillan testified that he had revised his proposed building definition, taking as a starting point, BellSouth's concept of a reasonable person. Witness Gillan explained that the main difference is that the recommended building definition in First Revised Exhibit JPG-1 is based on the concept of a "reasonable *telecom* person," to ensure that the deciding factor in defining a "building" is that the area is served by a single point of entry for telecom services. Thus, witness Gillan explained that a high-rise building with a general telecommunications equipment room would be considered a single building, while a strip mall with separate telecom-service points for each individual business in the mall would not. Witness Gillan contended that such circumstances should be treated, for loop-aggregation purposes, as individual premises, even though they may share common walls. In its Brief, CompSouth maintained that witness Gillan's revised definition reflects how a "building" would be seen for network engineering purposes,

which is the relevant standard in an interconnection agreement. As provided in First Revised Exhibit JPG-1, CompSouth's proposed definition for building reads as follows:

> For purposes of this Attachment 2, a 'Building' is a permanent physical structure including, but not limited to, a structure in which people reside, or conduct business or work on a daily basis and through which there is one centralized point of entry in the structure through which all telecommunications services must transit. As an example only, a high rise office building with a general telecommunications equipment room through which all telecommunications services to that building's tenants must pass would be a single 'building' for purposes of this Attachment 2. Two or more physical areas served by a individual points of entry through which telecommunications services must transit will be considered separate buildings. For instance, a strip mall with individual businesses obtaining telecommunications services from different access points on the building(s) will be considered individual buildings, even though they might share common walls.

The Public Staff agreed with CompSouth's building definition proposal stating that it was a reasonable compromise.

Based upon the foregoing, the Commission believes there is merit and benefit to defining a building in ICAs, rather than accepting BellSouth's approach such that the term would be undefined in a contract just because BellSouth believes that common sense dictates that the word, building, means just what it says. The Commission believes that witness Gillan's proposal, as provided in his First Revised Exhibit JPG-1 and set forth above is a reasonable definition which recognizes that a high-rise building with a general telecommunications equipment room would be considered a single building, while a strip mall with separate telecom-service points for each individual business in the mall would not, even though they might share common walls. Thus, the Commission concludes that witness Gillan's definition, as modified in First Revised Exhibit JPG-1, is appropriate for inclusion in ICAs.

•Route

Based upon the positions of the parties, the Commission understands that there is no dispute that a route is defined in FCC Rule 51.319(e). In direct testimony, BellSouth witness Tipton testified that the term "route" is defined in FCC Rule 51.319(e) as the following:

> • a transmission path between one of an ILEC's wire centers or switches and another of the ILEC's wire centers or switches;
>
> • a route between two points that may pass through one or more intermediate wire centers or switches; and

• transmission paths between identical endpoints are the same "route" irrespective of whether they pass through the same intermediate wire centers or switches, if any.

Sprint witness Maples stated that the FCC defined the meaning of the term, route, within its definition of the dedicated transport UNE found in FCC Rule 51.319(e), which is stated as follows:

> 51.319(e) Dedicated transport. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with Section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this Section. A 'route' is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch 'A' and wire center or switch 'Z') may pass through one or more intermediate wire centers or switches (e.g., wire center or switch 'X'). Transmission paths between identical end points (e.g., wire center or switch 'A' and wire center or switch 'Z') are the same 'route,' irrespective of whether they pass through the same intermediate wire centers or switches, if any.

Further, witness Maples stated that there are no exceptions to one end of the route having to be an ILEC wire center or switch, however, he noted that the FCC includes non-ILEC locations where an ILEC has collocated switching equipment in its definition of what constitutes a wire center, which is called "reverse collocation". Witness Maples provided excerpts from the *TRRO*, which defined reverse collocation at Paragraph 87, as follows:

> 87. As noted above, the D.C. Circuit criticized the Commission's *Triennial Review Order* framework for dedicated transport for failing to provide a meaningful method to identify which routes were similar to other routes, and thus failing to make inferences where possible. We find that the best way to respond to this concern is by categorizing similar end-points, and then making determinations of impairment or non-impairment for the resulting combinations (*i.e.*, routes) connecting different classes of end-points. Specifically, we utilize evidence of actual deployment to define the general characteristics of incumbent LEC wire centers[251] where we believe there is a lack of impairment – that is, where reasonably efficient competitive LECs-are capable of duplicating the incumbent LEC's network. Thus, the proxies we use for this purpose identify where revenue opportunities are or could be sufficient to justify competitive LEC deployment. The tests that we adopt below therefore evaluate impairment through a focus on wire centers, the end-points of routes, in a manner that accounts for both actual and potential competition. (Footnotes 250 and 252 omitted.)

[251] By 'wire center,' we mean any incumbent LEC switching office that terminates and aggregates loop facilities. Thus, line counts derived on a wire center basis include all loops that terminate in that location, even if they terminate on separate switches. To the extent that an incumbent LEC switching office exists that has no line-side function, such as an access tandem located in a building apart from line-side switching facilities, we provide for such offices in our analysis, below. **This definition also includes any incumbent LEC switches with line-side functionality that terminate loops that are 'reverse collocated' in non-incumbent LEC collocation hotels.** (Emphasis added.)

Witness Maples asserted that the definition of route should follow the FCC definition included in the FCC rules and should incorporate a reference to reverse collocation.

Witness Maples testified, in rebuttal testimony, that the definition proposed by BellSouth is consistent with FCC Rule 51.319(e), however, it does not clearly include sites where BellSouth is reverse collocated as a wire center. Witness Maples proposed that the definition in the agreement should be modified so that all parties understand that non-BellSouth locations where BellSouth has collocated switching equipment are to be considered BellSouth wire centers for the determinations of routes. Witness Maples recommended that the definition for route, as proposed by BellSouth, be expanded to add in the following sentence at the end of BellSouth's language:

> For the purposes of determining routes wire centers include non-BellSouth locations where BellSouth has reverse collocated switches with line side functionality that terminate loops.

Accordingly, witness Maples provided the following proposed language with the last sentence being underlined to show his proposed additional sentence:

> <<customer_short_name>> may obtain a maximum of ten (10) unbundled DS1 Dedicated Transport circuits or twelve (12) unbundled DS3 Dedicated Transport circuits, or their equivalent, on each route where the respective Dedicated Transport is available as a Network Element. A route is defined as a transmission path between one of BellSouth's wire centers or switches and another of BellSouth's wire centers or switches. A route between two (2) points may pass through one or more intermediate wire centers or switches. Transmission paths between identical end points are the same 'route', irrespective of whether they pass through the same intermediate wire centers or switches, if any. <u>For the purposes of determining routes wire centers include non-BellSouth locations where BellSouth has reverse collocated switches with line side functionality that terminate loops.</u>

The Public Staff agreed that the definition of "route" should follow the language of the FCC's rules, however, as noted by witness Maples, the definition of "route" should also recognize the FCC's position that a wire center includes "reverse collocation" facilities to the extent that BellSouth collocates there.

Based upon the foregoing, the Commission believes that Sprint witness Maples' proposed language for the definition of a route is appropriate, as it tracks the FCC definition and makes it clear that a wire center includes "reverse collocation" facilities, to the extent that BellSouth collocates there, consistent with the FCC's ruling, as expressed in the *TRRO*, in Paragraph 87, as cited above.

•BellSouth's obligation to provide Section 251 unbundled access to high-capacity loops and dedicated transport

BellSouth witness Tipton stated that the FCC has established specific criteria in the *TRRO* regarding BellSouth's obligation to provide unbundled access to high-capacity loops and dedicated transport. These rules, established for each type of high capacity loop and dedicated transport, specify varying thresholds that must not be exceeded for BellSouth to remain obligated to provide these types of UNEs.

In its Brief, BellSouth stated that 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. BellSouth stated that it recognizes its Section 251 obligation to provide unbundled DS1 loops and transport, and unbundled DS3 loops and transport, except in the instances in which the FCC's impairment tests are satisfied. BellSouth commented that it has no obligation to provide unbundled access to entrance facilities, and that the CLPs do not contend otherwise. BellSouth observed that it has also proposed language that captures the federal requirements concerning dark fiber loops and dark fiber transport. With respect to EELs, BellSouth observed that the FCC's impairment tests must be applied to the individual elements comprising an EEL. Finally, BellSouth remarked that the essence of the parties' dispute concerning high-capacity loops and transport is not the implementing of BellSouth's Section 251 obligations.

In its Matrix Item No. 4, BellSouth observed that it has a continuing obligation to offer Section 251 access to high-capacity loops and transport except as follows:

Loops

- BellSouth is not obligated to provide Section 251 unbundled access to DS1 loops to buildings that are served out of wire centers containing at least 60,000 business lines and 4 or more fiber-based collocators.
- BellSouth is not obligated to provide Section 251 unbundled access to DS3 loops to buildings that are served out of wire centers containing at least 38,000 business lines and 4 or more fiber-based collocators.
- In the wire centers in which BellSouth has a Section 251 unbundling obligation, CLPs may only obtain unbundled access to 10 DS1 loops to any one building and 1 DS3 loop to any one building.
- BellSouth is not obligated to provide Section 251 unbundled access to dark fiber loops.

Transport

- BellSouth is not obligated to provide Section 251 unbundled access to DS3 or dark fiber transport on routes containing at least 24,000 business lines or 3 fiber-based collocators. For routes between all other wire centers (and not those contemplated in the preceding sentence) a CLP may only obtain unbundled access to 12 DS3 dedicated transport circuits on such routes. On routes for which there is no unbundling obligation of DS3 transport, but for which impairment exists for DS1 transport, CLPs may only obtain unbundled access to 10 DS1 dedicated transport circuits on such routes.
- BellSouth is not obligated to provide Section 251 unbundled access to DS1 transport on routes between wire centers with at least 38,000 business lines or 4 fiber-based collocators.

Aside from the issues concerning the proper definitions for - business line, fiber-based collocator, building, and route - and how these definitions should be interpreted, in its Brief under its discussion of Matrix Item No. 4, CompSouth did not address any outstanding issues in regard to BellSouth's general obligations to provide unbundled access to high-capacity loops and dedicated transport. Furthermore, the Commission notes that at the beginning of the hearing in this proceeding, Counsel for BellSouth presented information to the Commission on additional issues between the parties that the Commission would not need to take up. Counsel stated that "One of the issues is really a separate issue, but a sub-issue and it has to do with the DS1 cap. I believe the CompSouth witness addresses it under Issue 2. I think BellSouth may address it under Issue 4. But the issue of the DS1 cap has been resolved between the parties."

In its Proposed Order, the Public Staff observed that there was essentially no testimony as to the appropriate language to include in ICAs to implement BellSouth's obligation to provide unbundled access to high-capacity loops and dedicated transport. The Public Staff believes that the FCC has clearly spelled out BellSouth's requirements in the *TRRO* and its accompanying rule revisions. As a result, the Public Staff believes that the parties may adopt a verbatim recitation of the FCC's threshold rules or simply reference them in the ICA in order to incorporate BellSouth's obligation to unbundle access to high-capacity loops and dedicated transport in ICAs.

Based upon the foregoing, the Commission does not find any issues which need to be resolved in this regard. The *TRRO* and its accompanying rule revisions set forth, in detail, BellSouth's overall obligations to offer unbundled access to high-capacity loops and dedicated transport. The Commission agrees with the Public Staff's recommendation that the parties may adopt a verbatim recitation of the FCC's threshold rules or simply reference them in the ICA, in order to incorporate BellSouth's obligation to offer unbundled access to high-capacity loops and dedicated transport in ICAs.

CONCLUSIONS

The Commission concludes that the term, business line, as defined in FCC Rule 51.5 Terms and Definitions, is the appropriate definition to be included in the ICAs; and, in regard to the disagreement as to how the actual calculation of the number of business lines should be performed, the Commission addresses that matter, hereinafter, under our discussion concerning Matrix Item No. 5(b). Further, the Commission finds that the term, business line, should be interpreted consistent with our rulings regarding Matrix Item No. 5(b).

The Commission concludes that the term, fiber-based collocator, as defined in FCC Rule 51.5 Terms and Definitions, is the appropriate definition to be included in the ICAs. Further, based upon BellSouth's December 12, 2005 letter, there is no active dispute concerning the number of fiber-based collocators in any wire center in North Carolina.

The Commission concludes that witness Gillan's definition for the term, building, as modified in First Revised Exhibit JPG-1, is appropriate for inclusion in ICAs, as it recognizes that a high-rise building with a general telecommunications equipment room would be considered a single building, while a strip mall with separate telecom-service points for each individual business in the mall would not, even though they might share common walls.

The Commission concludes that Sprint witness Maples' proposed language for the definition of a route is appropriate, as it tracks the FCC definition in FCC Rule 51.319(e) and makes it clear that a wire center includes "reverse collocation" facilities, to the extent that BellSouth collocates there.

The Commission concludes that the parties may adopt a verbatim recitation of the FCC's threshold rules or simply reference them in the ICA, in order to incorporate BellSouth's obligation to offer unbundled access to high-capacity loops and dedicated transport in ICAs.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

ISSUE NO. 4 - MATRIX ITEM NO. 5(a): *TRRO*/FINAL RULES – Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 nonimpairment criteria for high-capacity loops and transport is appropriate?

POSITIONS OF PARTIES

COMPSOUTH: Yes. CompSouth argued that the Commission does have the authority to determine whether BellSouth's application of the FCC's Section 251 nonimpairment criteria for high-capacity loops and transport is appropriate. Moreover, CompSouth maintained that the Commission has authority to approve ICA amendments and, where

appropriate in the alternative, new ICAs reflecting the appropriate terms for implementing the FCC's criteria.

BELLSOUTH: No. BellSouth maintained that the FCC is the appropriate agency to determine whether BellSouth has properly applied its criteria, but because the Commission must approve contract language that governs the transition for de-listed UNEs and the parties do not agree on the wire centers that satisfy the FCC's impairment criteria, the Commission should confirm that the wire centers identified by BellSouth satisfy the FCC's impairment thresholds.

PUBLIC STAFF: Yes. The Public Staff stated that the Commission has the authority to determine whether BellSouth has appropriately categorized its wire centers using the FCC's rules regarding nonimpairment with regard to high-capacity loops and transport.

DISCUSSION

BellSouth witness Tipton stated in direct testimony that the FCC established the impairment criteria for high-capacity loops and transport in the *TRRO*. Witness Tipton asserted that, therefore, the FCC is the appropriate agency to determine whether BellSouth has properly applied its criteria.

BellSouth witness Tipton stated that, as a practical matter, the Commission is being asked to approve contract language that governs the transition away from UNEs. Witness Tipton maintained that if the CLPs and BellSouth are unable to reach agreement on the wire centers that satisfy the FCC's impairment criteria, then the Commission will find itself in the position of deciding which wire centers satisfy the FCC's rules. Witness Tipton asserted that, indeed, consistent with the dispute resolution language in the *TRRO* and in current interconnection agreements, disagreements between BellSouth and the CLPs over CLP orders in wire centers that satisfy the FCC's impairment criteria will have to be resolved by the Commission.

CompSouth witness Gillan stated in direct testimony that the principal reason that Commission review of the categorization of wire centers is critical is that only BellSouth has access to the information used to categorize wire centers, and yet, it is BellSouth that would gain by incorrectly assigning wire centers so as to curtail its unbundling obligations under Section 251. Witness Gillan maintained that, as a result, the Commission must review BellSouth's claims to ensure that the interconnection agreements properly reflect those wire centers where a reduced level of unbundling is required. Witness Gillan footnoted that the FCC recognized in Footnote 659 of the *TRRO* that CLPs would not have the information needed absent proceedings such as this to validate BellSouth's claims.

Sprint witness Maples stated in direct testimony that an agreement should include terms that allow CLPs to challenge an ILEC's claim as to whether or not a specific wire center meets the FCC criteria. Witness Maples stated that in Paragraph 234 of the *TRRO*, the FCC discusses the dispute process. Witness Maples

stated that an ILEC can raise the issue through the dispute resolution terms contained in the interconnection agreement, which ultimately gets the issue before a regulatory body, such as the Commission. Witness Maples provided specific recommendations on the appropriate language, but as Sprint noted in its Post-Hearing Brief, the only issue remaining in contention between BellSouth and Sprint is Matrix Item No. 6.

BellSouth witness Tipton stated in rebuttal testimony that it is BellSouth's legal position that the FCC is the only regulatory body that has jurisdiction over whether BellSouth properly applied the FCC's criteria. However, witness Tipton asserted that BellSouth has tried to exercise every precaution to ensure that it properly applied the FCC's criteria to determine which of its wire centers exceed the nonimpairment thresholds. Witness Tipton maintained that BellSouth did not alter the findings to serve its own interests.

BellSouth stated in its Post-Hearing Brief that the relevant Contract Provisions for this issue include Exhibit PAT-1, Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8; and Exhibit PAT-2, Sections 2.1.4.2.1, 2.1.4.2.2, 2.1.4.4, 2.1.4.5, 5.2.2.1, 5.2.2.2, 5.2.2.4, 5.2.2.5.

BellSouth argued that, pursuant to *USTA II,* the FCC may not delegate impairment decisions to state commissions. BellSouth maintained that state commissions, however, are charged in Paragraph 234 of the *TRRO* with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO.* BellSouth asserted that, 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 CLPs must transition UNEs to alternative arrangements.

CompSouth asserted in its Post-Hearing Brief that there is no question that the Commission has the jurisdiction to determine whether or not BellSouth's application of the FCC's Section 251 nonimpairment criteria for high-capacity loops and transport is appropriate. CompSouth stated that both BellSouth and CompSouth recognize that challenges concerning wire center classifications are to be resolved in the context of Section 252 interconnection agreements. CompSouth asserted that this point is made explicitly by the FCC in Paragraph 100 of the *TRRO.* CompSouth maintained that BellSouth's witnesses do not contest that state commissions have the authority to determine if BellSouth has correctly followed the FCC's mandates for how to designate non-impaired wire centers. CompSouth argued that this indicates that state commissions, as arbiters of Section 252 agreements, have the flexibility, in adopting conforming language for such interconnection agreements, to adopt the most efficient process to resolve disputes. CompSouth stated that it believes it is more efficient to settle these disputes at the "front end" through review by the Commission, than at the "back end" of a dispute.

The Public Staff stated in its Proposed Order that it appears that this issue centers primarily on when the Commission will need to review the criteria used by BellSouth in classifying its wire centers as being non-impaired. The Public Staff maintained that while BellSouth contended that it is the FCC's responsibility to determine whether the impairment criteria have been properly applied, witness Tipton acknowledged that the Commission will become involved when disputes arise over a wire center's classification. On the other hand, the Public Staff asserted, witness Gillan appeared to ask that the Commission review BellSouth's wire center impairment classifications without regard to whether a wire center's classification is in dispute.

Thus, the Public Staff opined, it appears that BellSouth and CompSouth both agree that the Commission has some authority to determine whether or not BellSouth's application of the FCC's Section 251 nonimpairment criteria for high-capacity loops and transport is appropriate. The Public Staff maintained that the issue is essentially when the Commission can exert this authority.

The Public Staff recommended that the Commission conclude that it does have authority to determine whether BellSouth has appropriately categorized its wire centers using the FCC's rules regarding nonimpairment with regard to high-capacity loops and transport.

The Commission notes that all of the parties appear to agree that if there is a dispute on the classification of wire centers as impaired or non-impaired, as is the case in this proceeding, the Commission has the authority to resolve the dispute. Therefore, the Commission finds that it does have the authority, in this situation wherein there is a dispute, to determine whether or not BellSouth's application of the FCC's Section 251 nonimpairment criteria for high-capacity loops and transport is appropriate.

CONCLUSIONS

The Commission concludes that it does have the authority, in this situation wherein there is a dispute, to determine whether or not BellSouth's application of the FCC's Section 251 nonimpairment criteria for high-capacity loops and transport is appropriate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

ISSUE NO. 5 - MATRIX ITEM NO. 5(b): *TRRO*/FINAL RULES – What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 nonimpairment criteria for high-capacity loops and transport?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth argued that, in this proceeding, it is challenging BellSouth's identification of wire centers allegedly meeting the FCC's Section 251 nonimpairment criteria. CompSouth stated that its challenge is based primarily on:

(1) BellSouth's systematic over-counting of "business lines" based on a flawed view of the FCC's definition of that term; and (2) the question of whether the nearly-completed merger of SBC and AT&T should result in those two companies being treated as affiliates where both are fiber-based collocators in a single central office.

CompSouth asserted that the mixed factual, policy, and legal questions that have arisen regarding BellSouth's identification of non-impaired wire centers should be resolved in this proceeding. CompSouth maintained that the Commission's resolution of the disputed issues in this proceeding will have a significant impact on how BellSouth goes about identifying non-impaired wire centers in the future.

BELLSOUTH: BellSouth maintained that the Commission should confirm that BellSouth has applied the appropriate procedures to identify the wire centers that currently satisfy the FCC's impairment thresholds, including the procedures identified in the parties' stipulated process regarding the identification of fiber-based collocators.

PUBLIC STAFF: The Public Staff stated that the business line count as defined by FCC Rule 51.5 should reflect the business lines in BellSouth's ARMIS report, with UNE-P lines and UNE-L lines added. The Public Staff believes that high capacity UNE-L lines should reflect the same utilization as BellSouth's end users with HDSL, ADSL, UCL-S, and IDSL loops counted on a one-to-one basis. Further, the Public Staff maintained that the number of fiber-based collocators should also be determined pursuant to FCC Rule 51.5.

DISCUSSION

On December 12, 2005, BellSouth and CompSouth filed a joint exhibit which summarizes the results of the parties' agreed process for confirming the identity of fiber-based collocators as that term is defined in the *TRRO* and FCC rules. The letter noted that, as a result of discovery that BellSouth received following the time that it filed its Post-Hearing Brief, BellSouth identified wire center BURLNCDA as a Tier 3 transport office, and was withdrawing its claim for unbundling relief as to that wire center.

The parties noted in the December 12, 2005 letter that, at this time, they do not have an active dispute concerning the number of fiber-based collocators in any wire center in North Carolina. They maintained that they continue to disagree as to the number of business lines in the listed wire centers, which disagreement has been addressed in each party's respective Post-Hearing Brief.

The Commission notes that since there is no active dispute between the parties in this docket on the number of fiber-based collocators, the Commission will not discuss or make any findings or conclusions on the issue at this time.

BellSouth witness Tipton stated in direct testimony that the FCC has provided adequate guidance to allow ILECs, including BellSouth, to identify those wire centers where there is no impairment, without the need for intervention by the Commission.

Witness Tipton stated that the information needed, namely business line counts and the presence of fiber-based collocation arrangements in BellSouth wire centers, is readily available to BellSouth, and BellSouth has determined the wire centers that meet the nonimpairment test.

Witness Tipton explained her understanding of the FCC's impairment test, as follows:

> **Dedicated Interoffice Transport:**
> A CLP is not impaired without access to DS1 transport on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators or at least 38,000 business lines. For DS3 transport and dark fiber transport, a CLP is not impaired without access on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines.
>
> **High-Capacity Loops:**
> A CLP is not impaired without access to DS3 loops to any building within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. CLPs are not impaired without access to DS1 loops to any building in a wire center serving area containing 60,000 or more business lines and four or more fiber-based collocators.

Witness Tipton stated that, in keeping with the FCC's request for wire center access line count data in early December 2004, the starting point was the Automated Reporting Measurement Information System (ARMIS) reports, filed annually by all ILECs. Witness Tipton stated that at the time of the FCC's initial request, the latest available filed ARMIS reports reflected line counts as of December 2003. Witness Tipton noted that following the release of the *TRRO* in February 2005, BellSouth updated the line count information that it had filed with the FCC in December 2004 to include the UNE loop and UNE-P data not captured in ARMIS, as directed by the FCC's definition of a business line. Witness Tipton maintained that this data, which was almost a year old at the time, was used to provide a consistent view of line counts and to meet the FCC's intent to use line counts that were publicly available, at least at a summary level.

Witness Tipton noted that, recently, BellSouth has updated its wire center results to include December 2004 ARMIS data and the December 2004 UNE loop and UNE-P data so that the most current information is used to establish the wire centers that satisfy the FCC's tests.

Witness Tipton maintained that the ARMIS reports do not count all of the lines that the FCC included in its definition of business lines. Witness Tipton noted that unbundled loops, whether provisioned on a stand-alone basis or in combination with other network elements, are not included in BellSouth's switched access line counts in ARMIS. Witness Tipton stated that, as a result, to comply with the FCC's definition of a

business line, all UNE loops provisioned in combination with other unbundled elements; as well as all UNE-P arrangements for which a business class of service Universal Service Ordering Code (USOC) had been assigned, had to be added to the data reflected in the ARMIS reports. Witness Tipton stated that, initially, BellSouth used in-service quantities for December 2003 for UNE-P and UNE-L line counts to be consistent with the time period of the December 2003 ARMIS 43-08 data. Witness Tipton noted that BellSouth's recent update used December 2004 line counts.

Witness Tipton stated that ARMIS data is reported in summary fashion and is not reported by wire center. She noted that BellSouth used the underlying source data for retail and resold lines so that the ARMIS reported data could be provided at the wire center level. Witness Tipton also maintained that the ARMIS reports do not report high capacity business lines in the same manner that the FCC required in the *TRRO*. Witness Tipton stated that BellSouth had to identify the business high capacity digital switched access lines in each wire center and expand the count to full system capacity. She noted that ARMIS 43-08 line counts only include provisioned or "activated" 64 kbps channels that ride high capacity digital switched access lines. Witness Tipton stated that, for example, if a switched DS1 Carrier System had 18, 64 kbps channels provisioned as business lines for a customer, the ARMIS 43-08 would count only 18 business lines. Witness Tipton commented that the *TRRO* definition of business lines requires that the full system capacity be counted as business lines, so for *TRRO* purposes, the business line count for that DS1 Carrier System would be the full system capacity, or 24 business lines.

Witness Tipton also noted that high capacity UNE-L lines were counted at full system capacity. She noted that, for example, a DS1 UNE Loop in a wire center was counted as having 24 business lines; likewise, BellSouth counted DS1 and DS3 EELs on a voice-grade equivalency. Witness Tipton stated that BellSouth counted each EEL at the end user wire center, not at the interoffice transport terminating wire center. However, witness Tipton maintained that BellSouth did not count HDSL loops at a full system capacity. Witness Tipton further stated that for certain other UNE loops, such as ADSL compatible loops, UCL-S and IDSL loops, BellSouth counted these lines on a one-for-one basis, without converting them to voice-grade equivalents.

Witness Tipton noted that BellSouth retained an independent third-party, Deloitte & Touche (Deloitte), to: (1) confirm that BellSouth performed the analysis as stated; (2) confirm the conclusions that BellSouth reached in implementing the nonimpairment thresholds set forth in the *TRRO*; and (3) confirm the conclusions that BellSouth reached in identifying the specific wire centers where those thresholds have been met. BellSouth included a copy of the results of Deloitte's review with the direct testimony of witness Wallis. Witness Tipton noted that BellSouth did not ask Deloitte to independently define "business line" nor make any interpretation of the application of the FCC's rules. Witness Tipton commented that she was responsible for the decisions that were made regarding what constituted a business line, how high-capacity loops were going to be measured, as so forth; Deloitte was retained to determine whether BellSouth did what it said it was going to do, and whether it did it correctly.

Witness Tipton explained that the collocation information for each wire center was merged with the count of business lines using December 2003 data in each of the wire centers. She noted that this information was consolidated into a single list that reflects the proper Tier for the wire center, as well as the Common Language Location Identifier (CLLI) code for the wire center, and the number of business lines. Witness Tipton noted that BellSouth provided in Carrier Notification Letter SN91085088, dated April 15, 2005, those wire centers that qualified under the FCC's business line and/or fiber-based collocator criteria, using December 2003 line counts. Witness Tipton maintained that Exhibit PAT-4 provides the North Carolina information updated with December 2004 line counts.

Witness Tipton commented that the FCC defines "Tiers" in 47 CFR §51.319(e)(3), as follows:

> **Tier 1** wire centers are those ILEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.
>
> **Tier 2** wire centers are those ILEC wire centers that are not Tier 1 wire centers, but contain at least three fiber-based collocators, at least 24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.
>
> **Tier 3** wire centers are those ILEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

Witness Tipton stated that, as shown in BellSouth's April 15, 2005 Carrier Notification Letter, BellSouth determined that North Carolina had 14 Tier 1 wire centers and 4 Tier 2 wire centers (the remaining 122 wire centers were Tier 3). Witness Tipton noted that as shown on Exhibit PAT-4, using the updated December 2004 data, BellSouth has 13 Tier 1 wire centers and 5 Tier 2 wire centers (with the remaining 122 wire centers as Tier 3) in North Carolina. Witness Tipton commented that, looking at December 2003 data, there were four wire centers in which CLPs are not impaired without unbundled access to DS3 high-capacity loops, and 2 wire centers where CLPs are not impaired without unbundled access to DS1 high-capacity loops; using the December 2004 data results in no change to these wire centers.

Witness Tipton maintained that BellSouth initially shared the information based on the December 2003 data with CLPs on February 18, 2005, via BellSouth's Carrier Notification Process. She noted that BellSouth subsequently released Carrier Notification Letters that provided further details and published all of the letters on BellSouth's website at http://interconnection.bellsouth.com/notifications.carrier/carrier_lett_05.html. Witness Tipton stated that copies of these Carrier Notification Letters were attached to her testimony as Exhibit PAT-3. She noted that because BellSouth just received the

validated 2004 data report from Deloitte, the updated wire center list based on December 2004 data had not yet been posted to BellSouth's interconnection website.

CompSouth witness Gillan stated in direct testimony that arriving at the number of business lines in a particular wire center requires the summation of three values:

(1) The number of BellSouth's business switched access lines;

(2) The number of UNE loops (including, where appropriate, loops used with transport); and

(3) The number of business UNE-P.

Witness Gillan further stated that the definition for a business line includes the following additional directions:

(1) Shall include only those access lines connecting end-user customers with ILEC end-offices for switched services;

(2) Shall not include non-switched special access lines; and

(3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24, 64 kbps-equivalents, and therefore to 24 business lines.

Witness Gillan asserted that, importantly, these requirements are not choose one of three – for a line to be counted, the line must be for switched services before it becomes relevant as to how multi-channel switched lines should be counted. Witness Gillan also maintained that these additional requirements are only relevant for determining how to count UNE lines, for the FCC provides specific direction as to what source should be used to account for BellSouth's switched business lines – ARMIS 43-08 – whose instructions effectively ensure that these additional requirements are satisfied.

Witness Gillan stated that there is no question, based on Paragraph 105 of the *TRRO*, that the *TRRO* methodology is grounded in the ARMIS 43-08 data. He noted that the ARMIS 43-08 data already conforms to the specific requirements included by the FCC in the *TRRO*. Witness Gillan maintained that the additional direction provided by the FCC in the definition of "business lines" boils down to two requirements. Witness Gillan maintained that the first is that only switched lines are to be counted, while the second directs that multi-channel digital lines be converted to a voice-grade equivalent. Witness Gillan stated that, with respect to the Business Switched Access Lines, the FCC's directive that ARMIS 43-08 Business Switched Access Lines be used already conform to these requirements. Witness Gillan argued that there is no justification for BellSouth modifying, in any way, the number of Business Switched Access Lines filed under ARMIS 43-08. Witness Gillan maintained that to this value it would add UNE-L

and business UNE-P lines to arrive at the total Business Line count used to categorize wire centers as required by the *TRRO.*

Further, witness Gillan stated that, although the FCC rules are explicit that only lines used for switched services are to be counted, the FCC provided no guidance as to how that determination should be made for UNE-L lines. Witness Gillan maintained that the requirement that ARMIS 43-08 data be used resolves any issue with respect to BellSouth's Business Switched Lines and, by definition, UNE-P is a switched service. Witness Gillan also maintained that BellSouth routinely counts the number of UNE-P lines used to serve business customers. Witness Gillan asserted that what BellSouth cannot measure directly is the number of UNE-L voice equivalent lines used to provide switched services.

Witness Gillan recommended, as a starting point, that BellSouth be permitted to propose wire center classifications that simply convert each digital UNE-L facility to its voice-grade equivalent assuming each circuit is used to provide switched services to a business customer. Witness Gillan also recommended that BellSouth should file the necessary workpapers to determine whether this assumption results in the reclassification of any particular wire center. Witness Gillan maintained that, in this way, the focus of any further analysis can be limited to only those particular circumstances where the assumption determines the outcome.

Second, witness Gillan asserted that, in those wire centers where the assumptions do affect the classification of a wire center, BellSouth should be required to provide, under an appropriate protective order, the names of each carrier and the amount of digital capacity that BellSouth assumes is being used to provide switched services to business customers. Witness Gillan maintained that this data can then be used by the Commission and affected parties to identify and, where appropriate, challenge the validity of BellSouth's assumptions.

Witness Gillan stated that it is his understanding that BellSouth claims that HDSL-capable loops should be counted as though they are DS1 loops, and then converted to 24 business lines. Witness Gillan argued that there is nothing in the *TRRO* that justifies this adjustment. Witness Gillan further footnoted that based on a review of BellSouth's testimony in Georgia, the BellSouth position is slightly more subtle. Witness Gillan maintained that in BellSouth's Georgia testimony, BellSouth states that it has not counted HDSL loops as 24 business lines, but that it would be appropriate to do so. Witness Gillan stated that because BellSouth apparently reserves the right to do so in the future, the Commission must resolve the issue here, even though it may not affect wire centers in this proceeding.

Witness Gillan stated that, first, the *TRRO* is specific that the only lines that are to be converted to voice-grade equivalent services are digital access lines, noting the

business line count:

> . . . shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines'. (47 CFR § 51.5)

Witness Gillan maintained that a HDSL-capable loop is exactly that – a dry copper line that is not a digital facility without the addition of CLP equipment.

Second, witness Gillan noted that the FCC was clear that its business line tally is not intended to identify CLP loops. Witness Gillan asserted that the FCC specifically rejected suggestions that it should expand the analysis to include CLP loops in Paragraph 105 of the *TRRO* wherein the FCC stated:

> Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify.

Witness Gillan argued that the additional capacity of a HDSL-capable loop – to the extent it is activated at all – are essentially CLP-created loops. Witness Gillan maintained that not only did the FCC not indicate that HDSL-capable loops should be included in the business line count, to include any additional capacity created on those loops by the CLP would be the equivalent of counting CLP capacity – an approach the FCC explicitly rejected.

Witness Gillan asserted that he does not believe that the *TRRO* can be legitimately read to suggest that HDSL-capable loops should be assumed equal to 24 switched business lines. Witness Gillan stated that it is true that the FCC recognized that HDSL technology may be one of the means used to provide a DS1 loop by BellSouth. Witness Gillan noted that, in defining BellSouth's unbundling obligations, the FCC stated in FCC Rule 51.319(a)(4):

> A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

Witness Gillan stated that, taken-out of context, the second sentence of the above cite may be misread in isolation as implying that BellSouth's unbundling obligations for HDSL-capable loops were equivalent to its unbundling obligations for DS1 loops. Witness Gillan contended that even this reading nowhere suggests that HDSL-capable loops are to be counted as though they are 24 switched business lines for purposes of categorizing wire centers. Witness Gillan maintained that when both sentences are read together, however, it is clear that the FCC was defining a DS1 loop as a facility that

is a 1.544 mbps channel, not anything that could someday become one, with the second sentence merely recognizing that a variety of facilities could be used to actually support the service.

Witness Gillan maintained that the *TRRO* contains language that indicates that the FCC intended that BellSouth's obligation to provide HDSL-capable loops would continue, even where it was not required to unbundle a DS1 loop. Witness Gillan stated that, as part of its rationale that CLPs would be able to serve customers even where DS1 loops would no longer be unbundled, the FCC reasoned that CLPs would be able to use HDSL-capable loops (See Footnote 454 to Paragraph 163 of the *TRRO*).

Witness Tipton noted in rebuttal testimony that BellSouth had additional corrections to make to its wire center list for North Carolina. She stated that BellSouth recently discovered a typographical error in the number of fiber-based collocators in the CHRLNCUN wire center. Witness Tipton maintained that Exhibit PAT-4 reflected that this wire center had five fiber-based collocators, but this number should have been four. She noted that this change does not affect the unimpaired wire centers in North Carolina. She stated that a revised Exhibit PAT-4 would be filed after further confirmation had occurred.

Witness Tipton stated that she disagrees with certain arguments of witness Gillan concerning business line counts. Witness Tipton maintained that witness Gillan's assertion that BellSouth must first determine which UNE-L lines are used to provide switched services before they can be included in the business line count was not a requirement imposed by the FCC. She noted that FCC Rule 51.5 states that:

> The number of business lines in a wire center shall equal the sum of all incumbent LEC 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.

Witness Tipton argued that this definition makes sense since the objective is to determine where the CLPs are not impaired without access to BellSouth's facilities as UNEs. Witness Tipton stated that the FCC has determined that business lines is a good indicator of that, but of course the fact that the CLPs have already purchased UNE loops in a wire center, irrespective of what services the CLP provides over the UNE loops, is equally good proof that CLPs are not impaired in that wire center. Witness Tipton asserted that, furthermore, the FCC no doubt recognized that the ILECs would have no way of knowing what the UNE loops are being used for; hence the requirement that all UNE loops be included in the business line count.

Witness Tipton maintained that BellSouth did not count HDSL loops as it did DS1 loops, counting each 64 kbps-equivalent as one line as witness Gillan assumed in his direct testimony. She stated that BellSouth counted HDSL loops conservatively, on a one-for-one basis, although it would have been appropriate to convert these loops to their voice-grade equivalents. Witness Tipton asserted that although BellSouth has

defined DS1 loops to include 2-wire and 4-wire HDSL Compatible Loops, BellSouth included only in service DS1 loops, converted to voice-grade equivalents, and in service UNE HDSL loops, which were not converted.

Witness Tipton also asserted that, contrary to witness Gillan's suggestion, BellSouth did not count UNE-P residential lines in its business line count data.

In rebuttal testimony, witness Gillan stated that BellSouth witness Wallis's testimony concerning the Deloitte report is not relevant to any wire center issue in dispute. Witness Gillan maintained that Deloitte merely confirmed that BellSouth's spreadsheets were free of mathematical error. He asserted that the testimony and analysis avoid the issues in question and, as such, do nothing to legitimize BellSouth's claims in this proceeding other than its arithmetic.

Witness Gillan stated that, based on his review of BellSouth's wire center analysis, there appears to be two significant issues. Witness Gillan noted that the first issue concerns an assumption used by BellSouth in how it converts UNE-L to switched business lines. Witness Gillan maintained that, in effect, BellSouth assumes that the maximum potential capacity of each UNE-L circuit is used to provide switched business line service when, in fact, that is not the case. Witness Gillan stated that the second key issue concerns fiber-based collocators and BellSouth's claim that several end offices are served by multiple competitive fiber networks.

Witness Gillan asserted that 47 CFR § 51.5 defines business line, in part, as:

> . . . an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements.

Witness Gillan maintained that, importantly, as BellSouth interprets this rule, it reads the second sentence in the rule as granting a waiver of the first sentence. Witness Gillan argued that even though the FCC rule clearly defines a business line as "an incumbent LEC-owned switched access line used to serve a business customer", BellSouth believes that it is entitled to count the maximum potential capacity of every UNE-L circuit as a switched access line serving a business customer no matter how the circuit is actually configured and to what use it is put.

Witness Gillan argued that the FCC did not sanction BellSouth's assumption, as the remainder of the business line definition makes clear, as follows:

> . . . Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC

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

Witness Gillan maintained that the FCC went on to make clear that among these requirements, i.e., what should be counted, including UNE-L, the business line tallies "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services." Thus, witness Gillan asserted, while BellSouth claims that the FCC rule does not exclude any particular type of unbundled loop, the rule most plainly does. Witness Gillan argued that the rule specifically requires that only those access lines connecting end-user customers with ILEC end-offices for switched services shall be counted; it could not be clearer.

Witness Gillan asserted that the directive that digital access lines should count each 64 kbps-equivalent as one line does not override every other requirement in the rule. Witness Gillan maintained that there is nothing in the rule that suggests the final instruction overrides the entire rest of the rule. Witness Gillan argued that the rule should be read in its entirety and a circuit must satisfy all of the requirements in the rule in order to be counted; it must be a switched line, it must be ILEC-owned, it must be used to serve a business customer and, for digital circuits that satisfy these requirements, each 64 kbps channel used to provide switched service to a business customer should be counted as a line.

Witness Gillan maintained that CLPs routinely offer non-switched services using UNE-L; the staple of the CLP product offering is the integrated service that combines voice and data on the same access facility (typically a DS1). He also asserted that CLPs offer data-only services and sometimes only partially fill DS1s, even where only switched service is provided. Witness Gillan argued that it is patently unreasonable to assume that the maximum potential capacity of each UNE-L is used to provide business customers with switched services, which is the assumption that BellSouth makes.

Witness Gillan argued that BellSouth's assumption in this regard is very significant. Witness Gillan maintained that Confidential Exhibit JPG-2 identifies how many of BellSouth's claimed business lines are associated with the total maximum potential capacity of the UNE-L that is counted.[5] Witness Gillan stated that overall, 27% of the total claimed business lines depend upon BellSouth's assumption that the total maximum potential capacity of every UNE-L is used to provide switched access line service to business customers.

Witness Gillan further asserted that there is a dramatic difference between the number of business lines at each wire center that BellSouth provided the FCC and which the FCC used to establish impairment thresholds and the number that BellSouth

[5] Exhibit JPG-2 is no longer classified as confidential.

claims in this proceeding. Witness Gillan provided the following table comparing, on a regionwide basis, the number of wire centers that BellSouth told the FCC would fall in each category to its claims now:

Criterion: WC Lines	Use of Criteria Under *TRRO*	Told FCC	Claims Now	Change
60,000	Restricts Access to DS1 Loops	3	11	267%
38,000	Restricts Access to DS3 Loops and DS1/DS3 Transport	15	34	127%
24,000	Restricts Access to DS3 Transport	54	100	85%

Witness Gillan noted that, as shown on Confidential Exhibit JPG-3[6], a primary driver for the changes illustrated in Table 1 is the number of business lines that BellSouth claims exist at its wire centers. He noted that Exhibit JGP-3 compares the number of business lines BellSouth informed the FCC it had in wire centers in North Carolina to the number of business lines BellSouth now claims exist. Witness Gillan stated that, on average, BellSouth now claims that its relevant wire centers have nearly 35% more business lines than they did when they filed data with the FCC. Witness Gillan asserted that the evidentiary basis to the FCC's decision rested upon data quite different than that which BellSouth presents in this docket.

Witness Gillan also maintained that BellSouth manipulated its own switched business line counts to impose the same assumption that it applied to UNE-L. Witness Gillan asserted that BellSouth began its analysis with correct information – that is, ARMIS 43-08 only counts lines that are actually used to provide switched access line service to business customers – and then expanded the count so that it would assume that the maximum potential capacity of each circuit was being used.

Witness Gillan recognized that the FCC did not provide specific guidance as to the best way to ensure that UNE-L counts appropriately include only those access lines used to provide switched services to business customers. Witness Gillan maintained that BellSouth's approach, to simply assume that the maximum potential capacity of each UNE-L is entirely used to provide switched services, is clearly unreasonable and dramatically overstates the number of business lines at each wire center. Witness Gillan asserted that the fact that BellSouth then expands its own business line count to mirror the assumption, rather than to use its actual business line count, underscores the unreasonableness of the approach.

Witness Gillan stated that BellSouth's data can be used to correct both errors. First, witness Gillan noted, BellSouth's workpapers permit him to directly correct for the phantom business lines. Witness Gillan maintained that, second, this same data provides a reasonable estimate of the percentage of digital capacity that is used to provide switched access line service to business customers. Witness Gillan asserted that all that the Commission needs to do is to accept the simple and straightforward

[6] Exhibit JPG-3 is no longer classified as confidential.

assumption that the average utilization for the CLPs is equal to the average utilization for BellSouth.

Witness Gillan maintained that Exhibit JPG-4 provides a corrected business line count by removing BellSouth's phantom business lines and applying to the CLPs' digital UNE-L capacity the same percentage of used-to-potential capacity that BellSouth experiences. Witness Gillan argued that it is plainly more reasonable to assume that CLPs use approximately the same percentage of their potential digital capacity to provide switched access line services to business customers as BellSouth, than it is to assume that CLPs use all of their maximum potential capacity in this manner.

Witness Gillan finally noted that he was not prepared at the time of his rebuttal testimony to provide a fully correct alternative to BellSouth's claimed list of wire centers. However, he stated that, to the extent that a classification is based on the number of switched business lines, a partially corrected list of wire centers for North Carolina is provided in Exhibit JPG-5.

BellSouth provided the following table in its Post-Hearing Brief which outlines the wire centers in North Carolina that BellSouth believes currently satisfy the FCC's impairment tests:

		Transport		High-Capacity Loops	
Wire Center	**Total Business Lines**	**Tier 1**	**Tier 2**	**No Impairment for DS3**	**No Impairment for DS1**
BURLNCDA	18,608		X[7]		
CARYNCCE	27,888	X			
CHRLNCBO	24,980	X			
CHRLNCCA	85,131	X		X	X
CHRLNCDE	17,354		X		
CHRLNCLP	9,811	X			
CHRLNCRE	11,507	X			
CHRLNCSH	13,484	X			
CHRLNCUN	14,570	X			

[7] BellSouth noted in its December 12, 2005 letter that BellSouth had identified the BURLNCDA wire center as a Tier 3 transport office and, therefore, was withdrawing its claim for unbundling relief as to that wire center.

		Transport		High-Capacity Loops	
Wire Center	Total Business Lines	Tier 1	Tier 2	No Impairment for DS3	No Impairment for DS1
CPHLNCRO	41,802	X		X	
GNBONCAS	34,302	X			
GNBONCEU	48,789	X		X	
RLGHNCGL	26,809	X			
RLGHNCHO	29,561	X			
RLGHNCMO	75,174	X		X	X
SLBRNCMA	11,462		X		
WLMGNCWI	24,794		X		
WNSLNCFI	33,021		X		

***COMMISSION NOTE:** Exhibit PAT-4 lists the WLMGNCFO wire center as having 21,712 business lines, 5 fiber-based collocators, and a Tier 1 wire center for Interoffice Transport, however, it was not included in the above table presented in BellSouth's Brief.

BellSouth stated that it seeks relief in only 18[8] wire centers. BellSouth requested that the Commission order CLPs to transition existing Section 251 loops and transport (as applicable) in the wire centers listed above to alternative serving arrangements. BellSouth further requested that the Commission make clear that CLPs have no basis to "self-certify" to obtain Section 251 loops and transport in the future in the wire centers above (as applicable). BellSouth stated that, in confirming that the wire centers identified above satisfy the FCC's impairment test, the dispute with CompSouth concerns the application of the FCC's federal rule defining business lines.

BellSouth asserted that, as a preliminary matter, the Commission should reject out of hand CompSouth's unfounded claims that the FCC expected a different number of wire centers to satisfy the impairment thresholds it established in the *TRRO*. BellSouth stated that it has provided in other proceedings all of its correspondence to the FCC, which is also available as a matter of public record. Notably, BellSouth commented, the FCC specifically asked BellSouth to provide it with updated wire center designations following the issuance of the *TRRO*. BellSouth asserted that the FCC's request demonstrates clearly that the FCC knew precisely what it was doing when it established its business line rule. BellSouth opined that any attempt by CompSouth to compare the data BellSouth provided before the *TRRO* was issued to data it provided

[8] After BellSouth's December 12, 2005 letter, the number of wire centers has been revised to 17.

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.[9]

BellSouth noted that, concerning business lines, there are two primary areas of dispute. BellSouth stated that the first is BellSouth's treatment of UNE loops; the second concerns BellSouth's treatment of high-capacity loops. BellSouth asserted that, in both areas, BellSouth properly implemented the applicable federal rule.

BellSouth maintained that with respect to including UNE loops, Paragraph 105 of the *TRRO* clearly requires BellSouth to include business UNE-P. BellSouth stated that it did so, and the CLPs have not suggested BellSouth should have included residential UNE-P. BellSouth noted that the CLPs take issue with BellSouth including all other UNE loops. BellSouth noted that 47 C.F.R. § 51.5 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.

BellSouth argued that the FCC intentionally required all UNE loops (excepting residential UNE-P) to be included, because it gauges "the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs."[10] BellSouth asserted that the CLPs, however, may imply that because BellSouth included all UNE loops, that it has wrongly included some UNE loops that serve residential customers. BellSouth maintained that any such implication is flatly contradicted by witness Gillan's deposition testimony. Specifically, BellSouth noted that it questioned witness Gillan about his views of DS0 loops, which would be the single loop type used to serve residential customers. BellSouth stated that witness Gillan conceded that he did not think it was worth "correcting" BellSouth's business line count to exclude residential DS0 loops because "it's such a small number ... trying to go into do it correctly wouldn't be worth it. 'Cause you just – you don't know whether or not those lines are used to provide switched business service."[11] Thus, BellSouth argued, the CLPs cannot legitimately express some disagreement to the Commission 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 count to exclude these lines and that BellSouth does not know if such lines are business lines in any event. BellSouth stated that, more importantly, if the Commission were to disregard completely some portion, estimate, or percentage of UNE loops, it would ignore the "opportunity" present in a particular wire center. BellSouth maintained that

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[9] Moreover, the CLPs have raised their concerns with the FCC. The FCC, and not the Commission, should clarify its rule if it deems such a clarification to be necessary.

[10] *TRRO* at Paragraph 105.

[11] Gillan Deposition at Page 43.

the FCC's language is clear and it is logical given the FCC's purpose in evaluating the opportunity in a wire center.

BellSouth asserted that the Commission should also reject the CLPs' attempts to improperly lower the business line count that BellSouth has provided. BellSouth noted that witness Gillan's suggestion that the Commission must undertake some calculation or estimate to capture "switched" UNE loops is nonsense. BellSouth maintained that witness Gillan conceded there is no source that would provide data concerning which UNE loops are switched as compared to loops that are not switched.[12]

Indeed, BellSouth stated, witness Gillan conceded at a similar docket in Tennessee under questioning from a Commissioner that even his CLP clients could not provide such data:

> DIRECTOR TATE Q. Okay. And so the difference in the actual and the potential capacity you spoke about a few minutes ago, like maybe you just wouldn't know that someone was utilizing all of the capacity?
>
> MR. GILLAN A. Yes, for the CLEC. Here's – if BellSouth is serving the customer, it gives them this pipe and then it knows how many lines the customer is actually purchasing on the pipe. If for that same customer the CLEC wins the customer and then the CLEC buys the pipe, well, now BellSouth has given the pipe to the CLEC and so BellSouth's billing records don't tell it how many lines the CLEC is selling the customer. Now, I don't think it makes any sense that the business line count changes based on whether the incumbent serves the customer or the CLEC serves the customer. What changes is how easy it is for BellSouth to calculate the number.
>
> * * * *
>
> DIRECTOR TATE Q. And it's just impossible, impracticable for you-all to be able to provide an exact number or for the CLECs?
>
> MR. GILLAN A. It becomes – it becomes impractical. We're trying to do it with just the CompSouth members and then partially it was all of their billing systems look different. Some of them don't collect the information at all in this form. Even if I had gotten the information – I never would have gotten the information from all of them. I would have gotten it from one or two of them, and then I would have been accused of whether those were representative. So I just don't think it's – at first that's how I thought – my thinking was going down the line you were thinking.
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> * * * *

[12] Gillan Deposition, Joint Hearing Exhibit 4 at Page 44.

DIRECTOR TATE Q. But you-all would – the CLECs would know that exact[ly] because how they're billing their customers is based on those lines?

MR. GILLAN A. Not always. See, here's the problem. If I'm – some CLECs might be selling the customer service that is just six business lines and all data and they may call that Advantage, you know, whatever. And they bill the customer for Advantage, and then they don't have in their billings system how that product was split between voice and data. That was the problem I was running into. Unless the CLEC product and the CLEC billing systems were designed to track business lines, which they weren't, there was no way to collect the data from many of them, and then it was almost impossible to collect data from CLEC A that you knew was comparable to what you were getting from CLEC B, etc.[13]

BellSouth stated that, moreover, witness Gillan's testimony flatly contradicts the FCC's intent to capture, with its business line test, an accurate measurement of the revenue opportunity in a wire center.[14] BellSouth maintained that, 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,"[15] it is difficult to imagine any useful purpose – other than obtaining UNEs when no impairment exists – served by witness Gillan's complex proposed estimates and assumptions.

BellSouth argued that to limit the number of business lines as witness 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.[16] BellSouth stated that, 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.[17] BellSouth maintained that 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. BellSouth asserted that a CLP 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. BellSouth

[13] TRA Docket No. 04-00381, Transcript of proceedings, Wednesday, September 14, 2005, Vol. IV, pp. 124-129.

[14] *TRRO* at Paragraph 104.

[15] *TRRO* at Paragraph 99.

[16] *TRRO* at Paragraph 22.

[17] *TRRO* at Paragraph 24.

stated that it does not mean that a CLP needs continued access to UNEs simply because it serves customers using a bundled offering. BellSouth maintained that, instead, excluding an estimated number of UNEs because some unknown number of CLPs provide data would only serve to improperly evaluate impairment with reference to a particular CLP's business strategy, which would be unlawful.[18]

BellSouth noted that the Illinois Commerce Commission released a decision on this issue on November 2, 2005, and used line count data in the manner BellSouth presented. The Illinois Commerce Commission 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 unbundled elements . . . . ***The phrase 'all UNE loops' encompasses residential customers and non-switched services.***[19]

BellSouth stated that, in doing so, the Illinois Commerce Commission expressly rejected the adjustments that CompSouth advocates here. Likewise, BellSouth commented, 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 CLPs. 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.[20]

BellSouth asserted that Rule 51.5 also very clearly requires ISDN and other digital access lines, whether BellSouth's lines or CLP UNE lines, to be counted at their full system capacity; that is, each 64 kbps-equivalent is to be counted as one line. BellSouth maintained that FCC Rule 51.5 plainly states that "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'" BellSouth stated that the

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[18] *TRRO* at Paragraph 25.

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

[20] *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.

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."[21]

BellSouth stated that, in contrast to witness Gillan, BellSouth witness Tipton provided a clear explanation of BellSouth's careful application of the FCC's instruction on how to count business lines. BellSouth asserted that witness 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.

BellSouth argued that, to the extent CompSouth may imply in its post-hearing filings that BellSouth's business line results are inconsistent with BellSouth's financial reporting, such claims must be rejected. BellSouth stated that it has provided CompSouth with data that shows clearly that its financial reporting and line count data are consistent. BellSouth argued that CompSouth simply prefers to disregard reality, and focus on its misguided attempts to obtain unbundling in circumstances in which it is not entitled to UNEs. BellSouth maintained that, likewise, any post-hearing attempt to inject some uncertainty concerning BellSouth's Form 477 reporting made to the FCC cannot pass muster. BellSouth stated that it has recently provided the FCC updated Form 477 data to eliminate any prior confusion on CompSouth's part concerning its reporting of EELs. BellSouth noted that 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 noted that its business line data fully comports with the FCC's directives and with other reports filed with the FCC.

CompSouth did not specifically address this issue under Matrix Item No. 5 in its Post-Hearing Brief. However, CompSouth did address this issue under Matrix Item No. 4 in its Brief. As discussed under Matrix Item No. 4 hereinabove, the discussion of the appropriate procedures to apply the definition of business lines will be addressed here under Matrix Item No. 5(b).

CompSouth stated in its Brief that the FCC rules adopted in the *TRRO* to determine non-impairment for high-capacity loops and transport require a wire-center by wire-center analysis. CompSouth noted that the key variables in the analysis are two factors: (i) the number of business lines in each wire center, and (ii) the number of fiber-based collocators. CompSouth asserted that there is little dispute concerning the appropriate definition of these terms. Rather, the dispute primarily involves the appropriate interpretation of definitions provided by the FCC, particularly as to how the number of business lines should be counted.

CompSouth argued that the Commission should adopt CompSouth's calculation of business lines as the only internally consistent reading of the FCC's rules.

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[21] *See* Sept. 9, 2005, Br. for the FCC Respondents, United States Court of Appeals, D.C. Cir. No. 05-1095.

CompSouth asserted that the FCC's business line definition consists of four sentences that must be read together. CompSouth alleged that the purpose of BellSouth's interpretation is to dramatically inflate the number of business lines claimed at each wire center so as to claim non-impairment in wire centers where such relief is not justified by the FCC's findings in the *TRRO*.

CompSouth maintained that, although BellSouth argues that the FCC instructed BellSouth to calculate business lines in the manner that it did, BellSouth's business line count here is far beyond the level BellSouth provided the FCC, and which the FCC relied upon when determining its impairment thresholds. CompSouth stated that the number of business lines that BellSouth claims in this proceeding not only significantly exceed the number of business lines it provided the FCC in the *TRRO* proceeding but also dramatically exceed the number of business lines BellSouth reports to investors and to the FCC in comparable numbers routinely filed for that agency's local competition reports.

CompSouth stated that there is no dispute as to the content of the FCC's Business Line definition. "Business Line," as defined in 47 C.F.R. Section 51.5 states:

> Business line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'

CompSouth maintained that, despite agreeing to the wording of the definition, BellSouth has adopted a reading of the above that causes each directive in the definition to conflict with another. Specifically, CompSouth asserted that BellSouth includes with the business line count: (a) residential lines served by CLPs using UNE loops; (b) capacity on its own high-speed digital access lines that are either empty or used for data services; and (c) capacity on the high-speed digital access lines leased to CLPs that are similarly empty or used for data services. CompSouth argued that each of these actions inflates the number of business lines counted by BellSouth and directly conflicts with the FCC's definition.

CompSouth noted that, oddly, BellSouth begins its reading of the above definition in the middle, with the second sentence:

> The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements.

CompSouth stated that BellSouth claims that the FCC directed that it count all UNE loops, including loops that are used to serve residential customers. CompSouth asserted that, by conveniently downplaying the first sentence of the definition, BellSouth takes the position that business lines should include residential lines. CompSouth disagreed. CompSouth argued that this first sentence of the definition was not included as meaningless introduction, but represents the core requirement that only business lines be counted when "business lines" are counted. CompSouth maintained that the second sentence of the definition provides elaboration, not contradiction – it simply identifies that the *categories* of LEC-owned switched access lines that serve business customers are: (a) the ILEC's business switched access lines; and (b) lines leased to the CLP as UNEs. CompSouth argued that the fact that most UNEs are used to serve business customers does not mean that UNEs not used to provide switched access line service to business customers are to be counted. CompSouth asserted that the FCC had no reason to conclude that it would be necessary to repeat each line of its business line definition as the last clause of every subsequent sentence in order for its instructions to be followed. CompSouth argued that a reasonable person would read the entire definition with an eye towards maintaining internal consistency, not read individual sentences in isolation so as to conflict with one another.

CompSouth noted that BellSouth does not even follow its own reading of the definition consistently, for its "explanation" for counting residential UNE-L is that the definition directs it to count all UNE loops, which would also include "UNE loops provisioned in combination with other unbundled elements." CompSouth argued that, strictly read (as BellSouth claims it is doing), that direction would also include UNE-P (which are UNE loops provisioned in combination with unbundled local switching). Nevertheless, CompSouth noted, BellSouth does not count residential UNE-P despite what its interpretation of the business line definition would suggest.

CompSouth noted that it is not suggesting that residential UNE-P should be counted – it should not. CompSouth maintained that BellSouth's exclusion, however, demonstrates that its own reading of the definition runs afoul of other FCC discussion, including the FCC's discussion in Paragraph 105 of the *TRRO* that refers solely to business UNE-P. CompSouth asserted that under its reading of the FCC's definition, there is no need to fall-back on the discussion in Paragraph 105 and adopt a supra-definitional direction (as BellSouth must), because under the CompSouth reading it is already clear from the definition that only lines used to serve business customers may be counted.

In addition, CompSouth noted that BellSouth claims that the FCC's definition directs it to count all high-speed digital facilities at their maximum potential capacity – that is, by the maximum number of voice-grade lines the facility could support – without

regard to whether the lines are being used to provide switched business line service to end users. CompSouth maintained that it is this error that causes the greatest increase in BellSouth's business line count, for BellSouth inflates both the number of its retail lines *and* the high-speed digital loops that it leases to CLPs.[22]

CompSouth argued that a full reading of the FCC's definition makes clear that the FCC did not sanction BellSouth's adjustments to either its retail lines, or direct it to count UNE-L in the manner it chose. CompSouth asserted that the FCC was unambiguously clear that when counting either BellSouth's business switched access lines, or when counting UNE-L, a set of additional requirements must be satisfied (emphasis added):

> The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies
>
> (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
>
> (2) shall not include non-switched special access lines,
>
> (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."[23]

CompSouth argued that these additional requirements obligate BellSouth to provide the best analysis that it can -- for both its retail lines and for the UNE-L it leases -- to assure that only access lines used for switched services are counted. CompSouth maintained that BellSouth is *expressly* prohibited from counting empty channels or data circuits (which are not a switched service) as business lines. CompSouth alleged that BellSouth violates these additional requirements by including in its calculation the maximum potential capacity of its digital access lines, irrespective to how that capacity is used.

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[22] CompSouth stated that BellSouth's workpapers demonstrate that virtually all UNE loop based competition (other than that provided by UNE-P) relies on high-speed DS1 loops to serve customers. *See* BellSouth Response To CompSouth Data Request No. 1 (this data request was served in the Georgia Change of Law proceeding). BellSouth's workpapers for its calculation of business lines for all nine states in its service territory. A comparison of the number of lines served by various categories of UNE-L demonstrates that DS1 loop-based UNE-L accounts for the lion's share of UNE-L lines in service.

[23] 47 CFR § 51.5.

CompSouth asserted that the basis for BellSouth's calculation is an isolated reading -- in this instance, the last clause, of the last sentence. CompSouth maintained that BellSouth reads this last sentence to sanction its counting circuits that do not provide switched access line service – indeed, they may not be providing any service at all – as business lines. CompSouth stated that there is no indication in the text of the *TRRO*, or in its definition, that the FCC intended for its third criteria to reverse the prior two. CompSouth argued that, indeed, upon closer examination, it is clear that item #3 in the above list does not direct BellSouth to count each channel in a high capacity circuit as a "business line" at all. CompSouth maintained that the critical sentence in item #3 in the above list is that BellSouth "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line." CompSouth argued that this requirement, however, does nothing more than it plainly states: It merely directs that each 64 kbps-equivalent should be considered "one line;" it does not direct that each line then be declared a business line without regard to the remaining criteria.

CompSouth stated that the fact that the definition provides an example of how the analysis might count a DS1 is not the same as defining all DS1s as 24 business lines. CompSouth argued that had the FCC wanted to declare all high capacity services business lines, it could have easily simplified the definition to say so; but the FCC did not. CompSouth noted that it directed that each 64-kbps equivalent be considered one line, and then directed that other criteria – most specifically, that the line be used to provide switched access line service to a business customer -- determine whether each "line" should be considered a business line.

CompSouth asserted that perhaps the most telling example of how far BellSouth's interpretation forces it to depart from reality is the way BellSouth treats its own "business switched access lines." CompSouth noted that the term "business switched access lines" is a defined term in ARMIS 43-08,[24] which is the report that the FCC directed be used to measure BellSouth's retail lines.[25] CompSouth argued that, significantly, the ARMIS reporting instructions *already* require that BellSouth report its lines in voice-equivalents,[26] but limit the voice-equivalent line count to only those circuits actually activated to provide business switched access line service. CompSouth argued that even though the FCC directed that BellSouth rely on a defined measure already

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[24] *See TRRO*, Paragraph 105, n.303, specifically referencing a document from the FCC website: http://www.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf (see page 21 for definition of Business Switched Access Lines).

[25] As the FCC explained (*TRRO*, Paragraph 105 Footnotes omitted): "The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops.... by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information."

[26] *See* http://www.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf (page 21) defining ARMIS 43-08 Business Switched Access Lines as "total voice-grade equivalent analog or digital switched access lines to business customers." (Emphasis added).

converted to voice-grade equivalents – and thus a measure that would require no further adjustment to comply with the business line definition – BellSouth nevertheless increased its switched business line count to include any capacity not used to provide switched business line service.

CompSouth argued that one measure of the reasonableness of BellSouth's business line analysis is to compare its results to other measures produced by BellSouth, including the data that BellSouth provided to the FCC in the *TRRO* proceeding. CompSouth maintained that the *TRRO* data is particularly relevant because it was this "version" of BellSouth's business lines that the FCC relied upon in establishing the thresholds for impairment. CompSouth asserted that, although BellSouth claims that the FCC changed the business line definition after considering numerous proposals regarding what "an appropriate competitive threshold" should be, there is no data source that produces the levels of business lines claimed by BellSouth in this proceeding. CompSouth argued that, to the contrary, the number of business lines BellSouth claims here are also at odds with data BellSouth provides investors, and the data BellSouth routinely filed with the FCC to be used in the FCC's biennial Local Competition Report.

CompSouth asserted that the FCC clearly relied upon business line count information provided by BellSouth when adopting the thresholds used for impairment.[27] CompSouth stated that, nevertheless, the number of business lines BellSouth claims exist in the affected North Carolina wire centers is 35% higher than the number it provided the FCC in the *TRRO* proceeding.[28] CompSouth stated that the effects of BellSouth's business line counts produce non-impairment findings in its region very different from what the FCC expected when it adopted these thresholds (See chart provided in witness Gillan's rebuttal testimony, which was previously provided hereinbefore).

CompSouth noted that BellSouth attempts to explain this discrepancy by claiming that the FCC changed the definition of business lines to produce these very different consequences. CompSouth stated that, however, BellSouth cannot explain the basis for the FCC's changes, since none of BellSouth's calculations here were provided to the FCC during its deliberations. CompSouth asserted that there is nothing in the *TRRO* that BellSouth can point to explaining why the FCC would adopt a test that produces

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[27] *TRRO*, Paragraph 105, n.304.

[28] CompSouth Exhibit JPG-3. CompSouth noted that BellSouth claims that it is inappropriate to compare the business line numbers that BellSouth provided the FCC in the *TRRO* proceeding to the number it claims now because, according to BellSouth, the FCC dramatically changed its business line definition between these filings. While CompSouth conceded that the FCC did provide more detail in the definition it adopted, the fact remains that the numbers BellSouth provided the FCC – and which the FCC based its findings on – are dramatically lower than the number of business lines BellSouth claims now. CompSouth argued that there is nothing misleading about CompSouth's comparison – it is a factual comparison between the data BellSouth provided the FCC and which the FCC used to adopt its thresholds, and the data that BellSouth is now using.

such radically different results from the business line counts the FCC favorably cited in the *TRRO*. CompSouth further maintained that none of BellSouth's other available data – such as its public filings with investors, the Securities Exchange Commission, or even the FCC's own Local Competition Survey – is consistent with these claims now.

CompSouth noted that BellSouth routinely reports the number of business lines, unbundled loops, and business UNE-P to investors as part of its quarterly earnings report available on BellSouth's website. CompSouth stated that, although not available on a state-specific basis, this report can be used to compare the unit volumes used in this proceeding on a region-wide basis to the levels reported to Wall Street for the same period (December 2004).

Comparing BellSouth Claims to Financial Reports

Measure	Lines Claimed by BellSouth in	
	4Q2004 Earnings Report	Impairment Analysis
Business Retail + Resale	5,303,000	6,258,000
Business UNE-P	750,000	811,000
Unbundled Loops[29]	273,000	381,648

CompSouth noted that, in a post-hearing data request, the Tennessee Regulatory Authority asked BellSouth to explain the first of these discrepancies, *i.e.*, the difference between BellSouth's financial report and the numbers of business lines used in these proceedings.[30] CompSouth maintained that BellSouth's explanation is that the business lines reported in its quarterly earnings information does not include ISDN lines (these lines are reported separately), and that once such ISDN lines are included in the financial report (and official lines removed), the difference between the two data sources are effectively reconciled. CompSouth stated that leaving aside whether BellSouth's explanation is complete – for instance, it would not explain the wide variation in the claimed number of business UNE-P and does not address the unbundled loop discrepancy at all – the larger point is that this public data would not have forewarned the FCC of the consequence of the changes in the business line definition that BellSouth's claims the FCC adopted. CompSouth asserted that not only would there have been no record basis in the *TRRO* for the FCC to so drastically change its business line definition (after establishing impairment thresholds on business line

[29] Comparison of unbundled loops converts BellSouth's measure of unbundled loops in the state impairment proceedings that are presented on a voice-equivalent basis to a basic unit count (i.e., a DS1 is counted as a single loop) in order to *minimize* the discrepancy with its financial reports.

[30] BellSouth Response to Tennessee Regulatory Authority Data Request, Docket 04-00381, September 23, 2005, Item No. 7. BellSouth's response was filed on October 14, 2005. BellSouth's Response to the Tennessee Regulatory Authority was attached to CompSouth's Brief as Attachment A.

counts provided by BellSouth), there was not even any public data that could have guided the FCC's analysis.

CompSouth asserted that even more troubling is the discrepancy in the number of UNE loop arrangements that BellSouth claims here and the number of UNE loop arrangements that it routinely filed with FCC so that the FCC could prepare its biennial Local Competition Report. CompSouth noted that FCC Form 477 is used by the FCC to collect statistics on local competition. CompSouth stated that, as part of this report, BellSouth is required to provide, for each state, the number of UNE loop arrangements where switching is not provided.[31] CompSouth maintained that, in accordance with the instructions for its Form 477 Local Competition Report, BellSouth should be reporting, for each state, all UNE-L that is not part of UNE-P, which would include all UNE loop arrangements that connect to UNE transport (otherwise known as an EEL).

CompSouth noted that the FCC routinely posts selected data from the Form 477 Local Competition Reports filed by the BOCs, including the UNE-L unit data reported on Line C.II-4. [32] CompSouth maintained that BellSouth reported to the FCC that it had 43,081 UNE-L (loops without switching) in North Carolina in December 2004.[33] CompSouth stated that the work papers underlying BellSouth's business line count for North Carolina in this proceeding, however, indicate 47,490 UNE-L arrangements.[34] CompSouth maintained that BellSouth identified the discrepancy in this data as being explained by the number of EELs (DS0, DS1, and DS3), which BellSouth asserts it had not, in the past, included in its Form 477 Reports.[35] CompSouth asserted that because this error involved the highest capacity facilities, the effect on the number of business lines is substantial. CompSouth noted that, specifically, the 4,409 additional UNE-L EEL units that BellSouth claims it has failed to file with the FCC translate to 108,550 additional "business lines" using BellSouth's method of counting here.

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[31] *See* FCC Form 477 Instructions: http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/2000/d001669a.doc. In particular, note Instruction for Line C.II-4 at the top of Page 7 of Form 477 Instruction.

[32] This data can be found on the FCC's website at: http://www.fcc.gov/wcb/iatd/comp.html where it lists "Miscellaneous data from FCC Form 477" – "Selected RBOC Local Competition Data." The data specific to December 2004 can be found at: http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/RBOC_Local_Telephone_Dec_2004.xls.

[33] Although BellSouth presents its UNE-L data in this docket in "voice grade equivalent" form, the number of UNE-L voice-grade equivalents can be converted back to basic unit volumes so that it may be compared with the unit volumes reported to the FCC on the Form 477.

[34] See BellSouth Response to CompSouth Data Request No. 1.

[35] BellSouth recently filed supplemental discovery in Florida (and with the Georgia Commission) that confirms that the discrepancy between its Form 477 data and the data that it has filed in this proceeding is caused by its failure to include EELs in its Form 477 filing. CompSouth provided a copy of the supplemental discovery as Attachment B to its Brief.

CompSouth maintained that BellSouth has recently refiled its Form 477 Local Competition data to address the inconsistency.[36] CompSouth stated that its point here, however, is unchanged: there is not a single datum that the FCC could have used to establish its impairment thresholds, while at the same time changing the methodology to count business lines in the manner claimed by BellSouth. CompSouth maintained that whether the FCC looked only at the data it cited in the *TRRO* – which, as explained above, showed business line counts dramatically lower than BellSouth now claims – or whether it supplemented its analysis by considering other public data, including BellSouth's own local competition filings with the FCC[37], none of the available data sources would have warned the FCC of the levels of business lines that would result from the dramatic changes in the business line definition that BellSouth claims the FCC adopted.

CompSouth argued that witness Gillan's testimony applies a straight-forward reading of the FCC's definition to determine the number of "business lines" at each wire center, making sure that the count is not inflated by including data and spare capacity. CompSouth asserted that to do so requires two corrections to BellSouth's data, each intended to ensure that the business line count:

(1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, and

(2) shall not include non-switched special access lines.[38]

CompSouth maintained that these requirements apply equally to BellSouth's retail lines, as well as UNE-P and UNE-L arrangements used by CLPs. CompSouth asserted that to correct the errors in BellSouth's analysis requires that (a) BellSouth's inclusion of non-switched lines in its retail count be removed, and (b) that a reasonable method be applied to similarly remove non-switched capacity from the count of CLP high-speed UNE loop arrangements.

CompSouth noted that these corrections were detailed in Exhibit JPG-4. CompSouth stated that correcting BellSouth's retail line count so that it conforms to ARMIS 43-08 requires only that BellSouth's adjustment be reversed. CompSouth

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[36] BellSouth's refilling of Form 477 Reports was provided as a supplemental discovery response in Florida, and CompSouth provided a copy as Attachment C to its Brief.

[37] Indeed, there is reason to believe that the FCC *expected* UNE volumes comparable to its 477 filings, for it explained (*TRRO* Paragraph 105, emphasis supplied) that: "[b]y basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information." The FCC's Form 477 Local is the only federal regulatory filing (of which CompSouth is aware) where ILECs report UNE figures.

[38] 47 CFR § 51.5.

further stated that correcting CLP capacity requires the application of a reasonable estimation. CompSouth argued that its methodology is simple and straightforward – it merely assumed that the average utilization of CLP high-capacity lines equals the average utilization of BellSouth itself. CompSouth asserted that because BellSouth and the CLPs effectively compete for the same customer base, there is no reason to expect differences in relative capacity use. CompSouth argued that what is clear is that the FCC's definition requires a good-faith estimate in order to ensure, as closely as possible, that only lines used to provide switched access line service to business customers should be included in the count. CompSouth maintained that it has provided a reasonable methodology and its business line count should be adopted for purposes of wire center calculation. CompSouth maintained that Attachment D to its Brief, comparing the wire center classifications proposed by BellSouth to those of CompSouth, demonstrates the importance of correctly calculating the number of business lines at each wire center in determining the appropriate tier assignment.

The Public Staff maintained in its Proposed Order that, based on the testimony of witness Tipton and a review of Tipton Exhibit PAT-4, it appears to the Public Staff that most of BellSouth's wire centers do not meet the FCC's nonimpairment criteria for high-capacity loops and transport. Thus, the Public Staff opined, for the majority of wire centers, there should be no dispute between the parties since BellSouth has determined that CLPs are still impaired based on the FCC's rules. The Public Staff asserted that Exhibit PAT-4 shows that of its 140 wire centers, BellSouth has determined that only nineteen[39] should be classified as Tier 1 or 2, and therefore should have no impairment for DS3 or DS1 high-capacity loops.

The Public Staff stated that, to the extent that parties agree on whether a particular wire center meets or does not meet the FCC's nonimpairment criteria, the Public Staff does not believe it is necessary for the Commission to adopt a procedure or make a specific finding regarding that wire center at this time. The Public Staff asserted that, as conceded by BellSouth, the Commission will need to determine whether a wire center meets the nonimpairment criteria when the parties cannot agree.

The Public Staff noted that, at this time, it is unsure which of BellSouth's wire centers CompSouth will dispute as having met the FCC's nonimpairment criteria. The Public Staff opined that, although there appears to be considerable dispute regarding the manner in which BellSouth calculated the number of business lines, based on Exhibit JPG-4, witness Gillan would classify only six wire centers differently than BellSouth based solely on business line counts. The Public Staff maintained that, because witness Gillan was unable to state whether CompSouth disagrees with the number of fiber-based collocators BellSouth claims for each wire center, the Public Staff is unable to determine the total number of wire centers that witness Gillan would classify differently from BellSouth. As a result, at this time, the Public Staff declined to make a specific proposed finding for each disputed wire center.

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[39] BellSouth stated in its Post-Hearing Brief that there are 18 wire centers, and by letter dated December 12, 2005 revised that number to 17.

However, the Public Staff asserted that the Commission should provide the parties with guidance as to how it interprets the FCC's rules regarding the appropriate method to use in calculating business lines and fiber-based collocators. The Public Staff opined that, with this guidance, the parties should be able to come to agreement on how business access lines and fiber-based collocators are to be counted.

The Public Staff noted that FCC Rule 51.5 specifies that a business line is "an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC." The rule further states that:

> . . . the number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'

The Public Staff argued that evidence of the FCC's intent in defining business lines in this manner can be found in Paragraph 105 of the *TRRO*. The Public Staff asserted that it does not appear that the FCC meant the determination of the number of business lines in a wire center to be a complicated or cumbersome process. The Public Staff noted that the FCC stated that business line counts, as it defines them, are an "objective set of data that incumbent LECs already have created for other regulatory purposes." The Public Staff maintained that, continuing, the FCC notes that the BOC wire center data is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops. Finally, the Public Staff noted, the FCC points out that by basing the definition of business lines in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, the FCC can be confident in the accuracy of the thresholds, and can obtain the necessary information in a simplified manner.

The Public Staff noted that the rule specifically includes "only those access lines connecting end-user customers with incumbent LEC end-offices for switched services" and excludes "non-switched special access lines." The Public Staff argued that this seems to indicate that only used and useful lines are to be included in the line count. The Public Staff asserted that, contrary to BellSouth's belief that the maximum potential use of a high capacity line should be calculated, the Public Staff believes the intent of the FCC was to use only the activated portions of high capacity lines. The Public Staff asserted that this intent is shown in Paragraph 105 of the *TRRO*, where the FCC explains its adoption of the business line definition, stating: "We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through

the use of UNEs." Thus, the Public Staff argued, the business opportunities in a wire center represent the actual use of the lines, not necessarily the maximum potential use of the lines.

The Public Staff maintained that, as a result, BellSouth should not have adjusted the high capacity business lines in its ARMIS report to reflect the maximum potential use. Instead, the Public Staff argued that the actual use of these lines is the critical factor; simply because a DS1 line has the potential to provide 24 voice-grade lines, that does not mean the DS1 is actually providing 24 voice-grade lines. The Public Staff asserted that nor should the business line calculation reflect the potential number of business lines. The Public Staff opined that it should reflect the actual business lines in service.

The Public Staff noted that there seems to be no dispute over the calculation of UNE-P lines used for business. However, the Public Staff noted that BellSouth and CompSouth disagree over the proper method of calculating the number of UNE-L lines. Again, the Public Staff argued, the principal issue is whether the maximum capacity of high capacity lines should be used, or simply the activated portions of high capacity lines. As in the case of BellSouth's high capacity business lines, the Public Staff believes the calculation of UNE-L lines should reflect only the actual used capacity. As for the argument that BellSouth cannot determine the actual capacity of a CLP's UNE-L, the Public Staff believes that a surrogate can be used that will adequately approximate the CLP's activated portion on these types of lines. The Public Staff noted that witness Gillan proposed that BellSouth use the same utilization factor for CLPs as exists for its high capacity lines. The Public Staff believes that it is reasonable to assume that a CLP's end users would have approximately the same utilization factor as BellSouth's end users. Therefore, the Public Staff noted that if BellSouth's high capacity line customers use 75% of the maximum capacity of their lines, the calculation by BellSouth of UNE-L high capacity lines should reflect the same utilization.

The Public Staff stated that one last matter of concern to witness Gillan was the manner in which BellSouth would determine the number of lines provided via HDSL, ADSL, UCL-S, and IDSL loops. The Public Staff noted that, while witness Gillan expressed the fear that BellSouth would attempt to convert these types of loops to DS1 equivalents, BellSouth witness Tipton testified that BellSouth counted them on a one-to-one basis. The Public Staff maintained that this issue is addressed more fully in its discussion of Finding of Fact No. 7. However, as detailed in that finding, the Public Staff agrees with BellSouth's calculation and believes that this is the proper manner in which to determine the number of lines via these types of loops.

The Public Staff recommended that the Commission conclude that the business line count as defined by FCC Rule 51.5 should reflect the business lines in BellSouth's ARMIS report, with UNE-P lines and UNE-L lines added. The Public Staff recommended that high-capacity UNE-L lines should reflect the same utilization as BellSouth's end users with HDSL, ADSL, UCL-S, and IDSL loops counted on a one-to-one basis.

The Commission notes that there is no active dispute between the parties in this docket on the number of fiber-based collocators. Therefore, the Commission will not make any findings or conclusions on the issue of fiber-based collocators.

The only active issue that is in dispute is the number of business lines used by BellSouth in its impairment analysis under the *TRRO*. The Commission has identified the following issues in dispute concerning the business line count:

(a) whether it is appropriate for BellSouth to expand its count of its switched access business lines to count full system capacity;

(b) whether it is appropriate for BellSouth to include residential UNE-L lines in the count of business lines;

(c) whether it is appropriate for BellSouth to expand its count of high-capacity UNE-L to count full system capacity; and

(d) whether the number of lines provided via HDSL, ADSL, UCL-S, and IDSL loops should be counted on a one-to-one basis.

Based on a review of BellSouth's Brief and Attachment D to CompSouth's Brief, in addition to BellSouth's December 12, 2005 letter and joint exhibit, it appears that BellSouth and CompSouth only have disagreement on the impairment analysis in this proceeding as follows:

Wire Center	Transport Tier BellSouth	Transport Tier CompSouth	Loop Unbundling BellSouth	Loop Unbundling CompSouth
CPHLNCRO			No DS3 impairment	DS3 impairment
WLMGNCWI	2	3		
WLMGNCFO[40]	1	3		
CHRLNCCA			No DS1 impairment	DS1 impairment

BellSouth and CompSouth disagree on the Tier placement of two wire centers for the transport impairment analysis and on the impairment of high-capacity loops in two wire centers. BellSouth and CompSouth are in agreement on the impairment analysis for 14 wire centers. Therefore, of the 18 wire centers BellSouth identified in its Brief that it was seeking unbundling relief in this proceeding, CompSouth is only disagreeing with the impairment analysis in 4 wire centers.

Foremost, the Commission believes that its analysis of this issue should focus on the FCC's directives in calculating business lines found in the *TRRO* and Rule 51.5, and not on BellSouth's data presented to the FCC or the data represented on BellSouth's

[40] The December 12, 2005 joint exhibit on fiber-based collocators does not list the WLMGNCFO wire center; Attachment D to CompSouth's Brief does list the WLMGNCFO wire center; and BellSouth's Brief does not list the WLMGNCFO wire center.

earnings reports. Although the referenced data may be of general interest, the Commission instead will focus on determining how the business lines should be counted in this proceeding using the directives of the FCC in the *TRRO* and Rule 51.5.

The Commission notes that the FCC's complete definition of business line in Rule 51.5 states:

> Business line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'

Further, the FCC stated in Paragraph 105 of the *TRRO* during its discussion of how the FCC defines business lines, as follows:

> Moreover, as we define them, business line counts are an objective set of data that incumbent LECs already have created for other regulatory purposes. The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-L. We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs. Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify. Conversely, by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information. [Footnotes omitted.]

The Commission believes after reading and analyzing the FCC's directives in both the *TRRO* and Rule 51.5 that the FCC did not intend for the ILECs' ARMIS business line count to be altered in any way. Therefore, the Commission agrees with CompSouth and the Public Staff that BellSouth has inappropriately adjusted the high capacity business lines represented in the ARMIS report to reflect the maximum potential use. The Commission is further convinced by the first sentence of the

business line rule, Rule 51.5, which specifically states that a business line is an incumbent LEC-owned switched access line **used to serve a business customer**. The Commission agrees with CompSouth witness Gillan that this first sentence is the core of the FCC's definition of business line.

Therefore, the Commission concludes that it is inappropriate for BellSouth to expand its count of its switched access business lines to count full system capacity.

The second issue in contention concerns whether it is appropriate for BellSouth to include all UNE-L lines, including residential lines, in the count of business lines. BellSouth argued that the definition in Rule 51.5 states that the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements, should be included in the business line count. CompSouth argued that the first sentence of Rule 51.5 is the core of the definition and states that a business line is an ILEC-owned switched access line used to serve a business customer. The Commission does acknowledge that the FCC stated in its Rule that business lines should include all UNE loops. However, the Commission finds it troublesome that a business line count would include residential lines. In addition, the Commission agrees that the first sentence in Rule 51.5 is a core requirement for a line to be counted and that sentence says that it must be a switched access line used to serve business customers in order to be counted.

Therefore, the Commission concludes that it is inappropriate for BellSouth to include residential UNE-L lines in the count of business lines.

The third area of disagreement concerns whether it is appropriate for BellSouth to expand its count of high-capacity UNE-L to count full system capacity. The Commission agrees with CompSouth and the Public Staff that UNE-L lines added should only reflect the actual used capacity to serve a business customer as specified in the first sentence of Rule 51.5 (i.e., only lines used to serve business customers should be counted). The Commission agrees with the Public Staff that the business opportunities in a wire center represent the actual use of the lines, not necessarily the maximum potential use of the lines. Stated another way, the actual use of lines by actual customers is the business opportunity available in a wire center, not simply the maximum capacity available to serve additional customers if additional customers are not seeking to be served.

The Commission acknowledges that BellSouth cannot determine the actual used capacity of the CLPs' UNE-L lines. The Commission believes that the proposal by CompSouth, supported by the Public Staff, to assume that CLP end users would have the same utilization factor as BellSouth's end users is appropriate. As explained by the Public Staff, if BellSouth's high capacity line customers use 75% of the maximum capacity of their lines, it is reasonable to believe that CLP customers would use 75% of the maximum capacity of their lines.

Therefore, the Commission concludes that it is inappropriate for BellSouth to expand its count of high-capacity UNE-L to count full system capacity. Instead, BellSouth should use the same utilization factor for CLP high-capacity UNE-L as exists for BellSouth's high-capacity lines.

The final issue in contention concerns whether the number of lines provided via HDSL, ADSL, UCL-S, and IDSL loops should be counted on a one-to-one basis. CompSouth did not address this issue in either Matrix Item No. 4 or No. 5 in its Brief. The Commission agrees with the Public Staff that BellSouth's methodology of counting the number of lines provided via HDSL, ADSL, UCL-S, and IDSL loops on a one-for-one basis is appropriate.

CONCLUSIONS

The Commission concludes that:

(a) it is inappropriate for BellSouth to expand its count of its switched access business lines to count full system capacity. The number of switched business access lines reported in ARMIS should be used;

(b) it is inappropriate for BellSouth to include residential UNE-L lines in the count of business lines;

(c) it is inappropriate for BellSouth to expand its count of high-capacity UNE-L to count full system capacity. Instead, BellSouth should use the same utilization factor for CLP high-capacity UNE-L as exists for BellSouth's high-capacity lines; and

(d) it is appropriate for BellSouth to count the number of lines provided via HDSL, ADSL, UCL-S, and IDSL loops on a one-for-one basis.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

ISSUE NO. 6 - MATRIX ITEM NO. 5(c): *TRRO*/FINAL RULES – What language should be included in agreements to reflect the procedures identified in Matrix Item No. 5(b)?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth argued that its proposed contract language memorializing the process described in witness Gillan's testimony is included in Exhibit JPG-1 to witness Gillan's testimony.

CompSouth maintained that future designations by BellSouth should also be subject to review by the Commission and interested parties. CompSouth noted that witness Gillan's direct testimony describes a process BellSouth should be required to follow each year when it seeks to "de-list" additional wire centers for Section 251 impairment

purposes. CompSouth argued that the process described in witness Gillan's testimony gives BellSouth ample opportunity to assert its view that Section 251 unbundling is not required in additional central offices, while requiring that BellSouth provide the Commission and interested parties the underlying data needed to validate BellSouth's claims regarding nonimpairment in particular wire centers.

BELLSOUTH: BellSouth maintained that after the Commission confirms that BellSouth has identified the wire centers that satisfy the FCC's competitive threshold tests, CLPs may no longer self-certify that they are entitled to obtain high-capacity loops and transport on an unbundled basis in those wire centers.

BellSouth stated that, to the extent wire centers are later found to meet the FCC's no impairment criteria using the process identified in this proceeding, BellSouth will notify CLPs of these new wire centers via a Carrier Notification Letter. BellSouth asserted that the nonimpairment designation will become effective 10 business days after posting the Carrier Notification Letter. BellSouth stated that, beginning on the effective date (i.e., 10 days after posting the Carrier Notification Letter), BellSouth would no longer be obligated to offer new high-capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the self-certification process. BellSouth opined that high-capacity loops 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 nonimpairment designation. BellSouth noted that this 90-day period is referred to as the "subsequent transition period". BellSouth maintained that no later than 40 days from the effective date of the nonimpairment designation, affected CLPs must submit spreadsheets identifying their embedded base UNEs to be converted to alternative BellSouth services or to be disconnected. BellSouth asserted that 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.

PUBLIC STAFF: The Public Staff believes that ICA language that addresses the identification of additional wire centers in the future that meet the FCC's nonimpairment criteria should ensure that future transitions are transparent to end users if possible, that future transition periods should be one-half of the initial transition period, and that BellSouth should not be limited to one annual filing. The Public Staff recommended that the Commission find that if BellSouth notifies affected CLPs directly of new wire centers meeting the FCC's non-impairment criteria, the embedded customer base should be established after 14 days. The Public Staff further proposed that the Commission find that if BellSouth indirectly notifies CLPs via its website, there should be a 30-day time frame for establishing the embedded base.

DISCUSSION

BellSouth witness Tipton stated in direct testimony that once the "no impairment" wire center list is established, CLPs may no longer self-certify that they are entitled to obtain high-capacity loops and transport on an unbundled basis in wire centers where they are not impaired.

Witness Tipton asserted that the language the Commission should approve to address this issue should be, as follows:

DS1 Loops
For CLPs that had an interconnection agreement with BellSouth as of March 11, 2005, BellSouth is proposing the language in Section 2.1.4.9 of Exhibit PAT-1. For CLPs that did not have an interconnection agreement with BellSouth prior to March 11, 2005, the proposed language is set forth in Section 2.1.4.4 of Exhibit PAT-2.

DS3 Loops
For CLPs that had an interconnection agreement with BellSouth as of March 11, 2005, BellSouth is proposing the language in Section 2.1.4.10 of Exhibit PAT-1. For CLPs that did not have an interconnection agreement with BellSouth prior to March 11, 2005, the proposed language is set forth in Section 2.1.4.5 of Exhibit PAT-2.

DS1 Dedicated Transport
For CLPs that had an interconnection agreement with BellSouth as of March 11, 2005, BellSouth is proposing the language in Section 6.2.6.7 of Exhibit PAT-1. For CLPs that did not have an interconnection agreement with BellSouth prior to March 11, 2005, the proposed language is set forth in Section 5.2.2.4 of Exhibit PAT-2.

DS3 Dedicated Transport
For CLPs that had an interconnection agreement with BellSouth as of March 11, 2005, BellSouth is proposing the language in Section 6.2.6.8 of Exhibit PAT-1. For CLPs that did not have an interconnection agreement with BellSouth prior to March 11, 2005, the proposed language is set forth in Section 5.2.2.5 of Exhibit PAT-2.

CompSouth witness Gillan stated in direct testimony that the Commission should establish a formal process to review proposed changes to the wire center list. Witness Gillan proposed that an annual filing procedure be established that is keyed to BellSouth's annual filing of ARMIS business line data. Witness Gillan outlined the following proposed process:

(1) BellSouth would file a proposed list of any new wire centers on April 1 of each year (coincident with its filing of ARMIS 43-08 with the FCC), reflecting the number

of business lines and fiber-based collocators in each wire center as of December 31st of the year just ending;

(2) Included with the April filing, BellSouth would file all supporting documentation that each new wire center meets *TRRO* criteria, including the following information. Such documentation would be available to CLPs under terms of a standing proprietary agreement.

(a) The CLLI of the wire center.

(b) The number of switched business lines served by RBOC in that wire center as reported in ARMIS 43-08 for the year just ending.

(c) The number of UNE-P lines used to serve business customers.

(d) The number of analog UNE-L lines in service.

(e) The number of DS-1 UNE-L lines in service.

(f) The number of DS-3 UNE-L lines in service.

(g) A completed worksheet that shows, in detail, any conversion of access lines to voice-grade equivalents.

(h) The names of claimed independent fiber-optic networks (or comparable transmission facilities) terminating in a collocation arrangement in that wire center.

(3) CLPs would have until May 1st to file a challenge to any new wire center named by BellSouth.

(4) The Commission should have a standing hearing date reserved (by June 1st) to take evidence on any disputed wire center, and issue a decision by June 15th.

(5) Any changes to the wire center list would become effective on July 1 of that year.

Witness Gillan noted that under his proposed schedule, any dispute concerning the appropriate wire center designation would be resolved within 90 days of BellSouth's initial filing with a revised wire center list becoming effective July 1st.

Witness Tipton stated in rebuttal testimony that BellSouth is not opposed to the initial wire center list being incorporated into the interconnection agreements. However, witness Tipton maintained that BellSouth is opposed to any requirement to have subsequent wire center lists incorporated into interconnection agreements, as that

would require unnecessary administrative work when the same result can be achieved more efficiently. Witness Tipton argued that it makes more sense to make a reference in the interconnection agreements to BellSouth's website for the latest wire center list, as is the case with CLP guides, collocation space exhaust lists, and other instructional guides that impact the availability, ordering, and provisioning of services offered pursuant to the interconnection agreement.

Witness Tipton asserted that BellSouth proposes that Commission approval for subsequent wire center determinations be undertaken in an orderly, more expedited basis. Witness Tipton noted that BellSouth is also considering the proposal made by CompSouth in Exhibit JPG-1. She noted that BellSouth anticipates having an opportunity to discuss BellSouth's counterproposal with CompSouth and any other interested CLPs prior to the hearing to determine whether there is some mutually agreeable resolution of this issue.

Witness Tipton noted that BellSouth is proposing, through its language in Exhibits PAT-1 and PAT-2, to the extent additional wire centers are found to meet the FCC's no impairment criteria, BellSouth will notify CLPs of these new wire centers via a Carrier Notification Letter. She noted that BellSouth's standard contract language states that 10 business days after posting the Carrier Notification Letter, BellSouth would no longer be obligated to offer new high-capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the self-certification process. Witness Tipton stated that high capacity loop and transport UNEs that were in service when the subsequent wire center determination was made would remain available as UNEs for 90 days after the 10th business day following posting of the Carrier Notification Letter. However, witness Tipton noted that affected CLPs would be obligated to submit spreadsheets identifying these embedded base UNEs to be converted to alternative BellSouth services or disconnected no later than 40 days from the date of BellSouth's Carrier Notification Letter. Witness Tipton noted that BellSouth is willing to consider other commercially reasonable terms that could eliminate disputes over this process. However, witness Tipton maintained that absent a mutually agreeable compromise, BellSouth's standard terms should apply.

Sprint witness Maples stated in rebuttal testimony that Sprint could agree that once the Commission has resolved a dispute regarding the status of a wire center and has made a finding of no impairment, CLPs can no longer self-certify to gain access to high-capacity loops and transport for that particular wire center. Witness Maples said that, in addition, a CLP could waive its right to self-certify in a forward looking transition process by not self-certifying within a specific time frame. However, witness Maples stated that Sprint would not agree if BellSouth's proposal meant that BellSouth only had to publish the wire center list on its website. Witness Maples argued that this is contrary to the process provided for by the FCC in the *TRRO* that allows CLPs to self-certify and dispute the status of an ILEC wire center. Witness Maples noted that neither would Sprint agree if it somehow superseded the transition process established by the FCC in the *TRRO*.

Witness Maples maintained that the terms proposed by BellSouth in connection with this issue are somewhat confusing. Witness Maples noted that the terms state that once a wire center meets a threshold no future unbundling is required, yet when a wire center meets a threshold ILECs have an obligation to continue unbundling the embedded base and excess UNEs during the transition period. Witness Maples stated that Sprint assumes that BellSouth means that no future additional or new unbundling is required, yet as stated above, it is not clear. Witness Maples stated that the terms recommended in his direct testimony address this ambiguity.

BellSouth stated in its Post-Hearing Brief that, to the extent wire centers are later found to meet the FCC's no impairment criteria, BellSouth will notify CLPs of these new wire centers via a Carrier Notification Letter. BellSouth maintained that the nonimpairment designation will become effective 10 business days after posting the Carrier Notification Letter. BellSouth noted that, beginning on the effective date, BellSouth would no longer be obligated to offer new high-capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the self-certification process. BellSouth asserted that this means that, if a CLP 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. BellSouth stated that 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 nonimpairment designation. BellSouth stated that this 90-day period is referred to as the "subsequent transition period." BellSouth maintained that no later than 40 days from the effective date of the nonimpairment designation, affected CLPs must submit spreadsheets identifying their embedded base UNEs to be converted to alternative BellSouth services or to be disconnected. BellSouth stated that, 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 stated that its future wire center identification process has been agreed to by a number of CLPs, and the Commission should adopt it here.

BellSouth maintained that CompSouth has proposed a different means for identifying future wire centers that would resolve any disputes relating to BellSouth's subsequent wire center identification within 90 days after BellSouth's initial filing. BellSouth stated that it has no conceptual objection to the Commission resolving future disputes, as shown on Exhibit PAT-5; BellSouth, however, stated that it is unwilling to agree to a process that limits its right to designate future wire centers on an annual basis. BellSouth argued that nothing in the federal rules supports this limitation. BellSouth stated that, moreover, CompSouth's proposed process improperly inserts a number of qualifications to the data that it seeks from BellSouth, which impose CompSouth's erroneous views on the business line definition into the process. BellSouth stated that it bears repeating that BellSouth has been successful at resolving this on a commercial basis, an option the Commission could elect here. BellSouth asserted that, if the Commission establishes any future process, it must reject CompSouth's annual filing and data limitations, as reflected on Exhibit PAT-5.

CompSouth stated in its Post-Hearing Brief that an orderly process should be established to determine future changes in the wire center list. CompSouth stated that it proposed a simple, annual procedure, tied to filing of updated ARMIS 43-08 business line data, which is one-half of the qualifying criteria. CompSouth noted that, while the FCC does not specifically limit how frequently such disputes should be addressed, CompSouth believes that its process is administratively reasonable. CompSouth maintained that if BellSouth sought to reclassify a wire center in mid-year, the CLPs would be entitled to mid-year business line data, requiring BellSouth to provide ARMIS 43-08 calculations more frequently than once a year. CompSouth asserted that, rather than complicate the disputes in this manner by requiring BellSouth to update its access line information more frequently than annually, CompSouth believes the process should be synchronized with the routine filing of ARMIS 43-08.

CompSouth stated that, significantly, BellSouth has never explained its objection to the process recommended in witness Gillan's testimony, nor has BellSouth proposed an alternative. CompSouth argued that its proposal is not only a reasonable process to update the wire center list in an orderly manner, it is the *only* process being recommended in this proceeding; the Commission should adopt the CompSouth process.

The Public Staff noted in its Proposed Order that this issue concerns the inclusion of procedures in ICAs for how the transition from impaired to unimpaired should proceed, from the initial transition that ends March 10, 2006, to subsequent determinations of additional wire centers that meet the FCC's nonimpairment criteria. The Public Staff noted that it addressed the issue of language to effect the initial transition in its discussion of Matrix Item No. 2.

The Public Staff maintained that the transition process for wire centers found to meet the FCC's nonimpairment criteria subsequent to the initial transition should proceed in such a manner that customers are unaffected to the extent possible. The Public Staff opined that, although the FCC specified the procedures for the initial transition period, it did not specify similar transition procedures for wire centers that become unimpaired subsequent to the initial transition period.

The Public Staff noted that, with respect to the process of handling transitions resulting from subsequent wire centers meeting the FCC's nonimpairment criteria, the Public Staff believes that the original transition time frames as proposed by Sprint are too long and inappropriate. Once the transitioning process is in place, the Public Staff believes that all parties should proceed in a more efficient manner, because the amount of loops or transport routes that will require transitioning should be considerably smaller than during the initial period.

The Public Staff argued that, however, the short time frame proposed by BellSouth (i.e., 90 days after the 10th business day following the posting of the Carrier Notification Letter) does not seem to allow adequate time for CLPs to verify BellSouth's claim of nonimpairment or to effect a transition to another service. The Public Staff

stated that it is of the opinion that one-half the original transition period is an adequate compromise; it reflects that subsequent transitions will have a lower number of arrangements, as well as BellSouth's need to complete the transition away from unbundled UNEs.

The Public Staff also noted that CompSouth proposed that BellSouth be required to make annual filings to reflect new wire centers that meet the FCC's nonimpairment criteria. The Public Staff stated that it can find no basis for limiting BellSouth's filings in this manner. The Public Staff opined that this process is dynamic, and while ARMIS reports are filed but once a year, new fiber-based collocators in a wire center can occur at any time. The Public Staff argued that it would be unfair to BellSouth if a wire center met the impairment criteria based on fiber collocations just after the deadline for the annual filing and BellSouth had to wait a full year to add the wire center to the nonimpairment list.

The Public Staff noted that the last aspect of this issue concerns the notice that BellSouth is required to give to the CLPs concerning new wire centers meeting the FCC's nonimpairment criteria. The Public Staff stated that BellSouth proposed a Carrier Notification Letter to be published on its web site. The Public Staff noted that Sprint has proposed that BellSouth be required to notify the affected CLPs directly. The Public Staff believes that the notification can be adequately handled by either method. However, the Public Staff opined, the time period in which CLPs can still initiate UNE orders prior to the transition period should not be the same for either method. The Public Staff opined that a much shorter cutoff period should apply if BellSouth directly notifies the affected CLPs.

The Public Staff stated that it does not believe that 10 days provides adequate time for a CLP to receive the notice and then validate BellSouth's claim that a wire center is no longer impaired. The Public Staff believes that a 30-day time frame, as proposed by Sprint, should apply if BellSouth wishes to implement the notice via its website. The Public Staff maintained that should BellSouth wish to inform CLPs via a direct notification, then a 14-day time frame would be appropriate. The Public Staff believes that CLPs should be able to order affected services during the notice period.

The Public Staff recommended that the Commission conclude that language to reflect identification of additional wire centers in the future that meet the FCC's nonimpairment criteria should ensure that future transitions are transparent to end users if possible, that future transition periods should be one-half the initial transition period, and that BellSouth should not be limited to one annual filing. The Public Staff proposed that should BellSouth notify affected CLPs directly of new wire centers meeting the FCC's nonimpairment criteria, the embedded customer base should be established after 14 days and that if BellSouth indirectly notifies CLPs via its website, there should be a 30-day time frame for establishing the embedded base.

First, the Commission believes that the parties should negotiate appropriate language to include in the interconnection agreements which reflects the procedures

outlined by the Commission in Matrix Item No. 5(b) (discussed in the Evidence and Conclusions for Finding of Fact No. 5) above concerning the calculation of business lines.

In addition, the Commission notes that the parties address four separate subissues within Matrix Item No. 5(c), as follows:

(a) After the non-impairment wire center list is established, should CLPs be able to self-certify that they are entitled to obtain high-capacity loops and transport on an unbundled basis in wire center where they are not impaired?;

(b) Is it appropriate for BellSouth to only include the initial non-impaired wire center list in its interconnection agreements and to post all subsequent wire center lists to its website in a Carrier Notification Letter?;

(c) What is the appropriate process for developing future non-impaired wire center lists after the initial wire center list?; and

(d) What is the appropriate procedure for transitioning in wire centers that are subsequently found to be non-impaired wire centers?

The Commission notes that for the first issue, it agrees with BellSouth that once the non-impairment wire center list is established, a CLP may no longer self-certify that they are entitled to obtain high-capacity loops and transport on an unbundled basis in wire centers where they are not impaired. The Commission notes that FCC Rule 51.319(e)(3) states that once a wire center is determined to be a Tier 1 or Tier 2 wire center for transport, that wire center is not subject to later reclassification, except reclassifying a Tier 2 wire center to a Tier 1 wire center. Therefore, the Commission agrees with BellSouth that after the non-impairment wire center list is established, CLPs should not be able to self-certify that they are entitled to obtain high-capacity loops and transport on an unbundled basis in wire center where they are not impaired.

The second issue concerns whether it is acceptable that BellSouth only include the initial non-impaired wire center list in its interconnection agreements and simply make a reference in the interconnection agreements to BellSouth's website for the latest wire center list. The Commission notes that CompSouth does not appear to disagree with this procedure as outlined on Page 19 of Exhibit JPG-1. The Commission believes that it is appropriate for BellSouth to only include the initial non-impaired wire center list in its interconnection agreements and simply to make a reference in the interconnection agreements to BellSouth's Carrier Notification Letters as posted on its website for the latest wire center list.

The next issue concerns the appropriate process for developing future non-impaired wire center lists after the initial wire center list has been developed. CompSouth proposed an annual filing procedure as outlined on Pages 18 and 19 of

Exhibit JPG-1. The Commission agrees with BellSouth and the Public Staff that it is inappropriate to limit BellSouth's right to designate future wire centers only on an annual basis. As the Public Staff noted, new fiber-based collocators in a wire center can occur at any time and it would be unfair to BellSouth if a wire center met the nonimpairment criteria based on fiber-based collocators just after the deadline for the annual filing and had to wait a full year to add the wire center to the non-impaired list. Therefore, the Commission finds that the procedure outlined in BellSouth's Exhibit PAT-5 of posting a Carrier Notification Letter to designate future wire centers as non-impaired is appropriate. However, the Commission does agree with the Public Staff that BellSouth's proposal to not be required to unbundle new high-capacity loops or transport 10 business days after posting a Carrier Notification Letter is not enough time for a CLP to receive the notice and validate BellSouth's claim that a wire center is no longer impaired. The Commission agrees with the Public Staff that 30 business days is a more appropriate time frame in this regard.

The final issue concerns transitioning the embedded base of customers off of a UNE in a particular wire center subsequently found to be non-impaired. The Commission notes that BellSouth has proposed that high capacity loop and transport UNEs that were in service when a subsequent wire center determination is made would remain available as UNEs for 90 days after the 10th business day following posting of the Carrier Notification Letter. The Commission agrees with the Public Staff that this time period is too short and, in the spirit of compromise, a time period of one-half the original transition period is appropriate in this regard.

Therefore, the Commission finds that high-capacity loops and transport UNEs that are in service when a subsequent wire center determination is made should remain available as UNEs for one-half of the original transition period, with the clock starting to tick the day BellSouth posts the Carrier Notification Letter.

CONCLUSIONS

The Commission concludes:

(a) that the parties should negotiate appropriate language to include in the interconnection agreements which reflects the procedures outlined by the Commission in Matrix Item No. 5(b) (Finding of Fact No. 5) above concerning the calculation of business lines;

(b) that after the non-impairment wire center list is established, CLPs should not be able to self-certify that they are entitled to obtain high-capacity loops and transport on an unbundled basis in wire center where they are not impaired;

(c) that it is appropriate for BellSouth to only include the initial non-impaired wire center list in its interconnection agreements and simply to make a

reference in the interconnection agreements to BellSouth's Carrier Notification Letters as posted on its website for the latest wire center list;

(d) that BellSouth's proposed process for developing future non-impaired wire center lists by posting a Carrier Notification Letter is appropriate however that BellSouth should not be required to unbundle new high-capacity loops or transport 30 business days after posting a Carrier Notification Letter; and

(e) that high-capacity loops and transport UNEs that are in service when a subsequent wire center determination is made should remain available as UNEs for one-half of the original transition period, with the clock starting to tick the day BellSouth posts the Carrier Notification Letter.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

ISSUE NO. 7 - MATRIX ITEM NO. 6: *TRRO* / FINAL RULES – Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

POSITIONS OF PARTIES

SPRINT: HDSL-capable copper loops are not the equivalent of DS1 loops for the purpose of evaluating impairment. BellSouth should continue to be required to unbundle HDSL-compatible loops in DS1 non-impaired wire centers. HDSL-compatible loops should also be counted as 1 or 2 voice grade equivalents (1 for 2-wire and 2 for 4-wire) just as any other copper loop, when evaluating the number of business lines, and not as 24 voice grade equivalents.

COMPSOUTH: HDSL-capable copper loops are not DS1 loops. The *TRRO* contains no language to justify this type of treatment for HDSL-capable copper loops. Indeed, the *TRRO* contains language that assumes that HDSL-capable copper loops can be used as a substitute for DS1 loops should they no longer be available as Section 251 elements.

BELLSOUTH: The FCC clearly contemplated that every currently deployed HDSL loop would be counted as a 24-line equivalent. However, BellSouth has counted HDSL loops on a one-for-one basis and did not convert them to voice grade equivalents. An HDSL loop is equivalent to a DS1 loop, and in most cases, HDSL is the technology used to provision DS1 service to the customer.

PUBLIC STAFF: HDSL-capable loops are not equivalent to DS1 loops for the purpose of evaluating impairment.

DISCUSSION

BellSouth witness Fogle testified that BellSouth opted to undercount business lines in various central offices by not counting HDSL loops as equivalent to 24 voice grade lines. According to witness Fogle, HDSL is the preferred technology used to provision a symmetrical 1.544 mega-bits per second (Mbps) T1 on a normal, shielded, and bridged (but not loaded) twisted pair. BellSouth provisions multiple versions of HDSL technology. One is a standard two-wire configuration and another is a standard four-wire configuration. Witness Fogle noted that the FCC said in the *TRO* that carriers frequently use a form of DSL service as a means of delivering T1 services to customers, because the symmetrical bit rate for HDSL is established at 1.544 Mbps regardless of the type of HDSL technology used.

Sprint witness Maples countered that HDSL-capable copper loops are not the equivalent of DS1 loops for the purpose of evaluating impairment. BellSouth's HDSL-compatible loop product is nothing more than a conditioned copper loop to which the CLP may attach its own HDSL electronics. The difference between a DS1 and an HDSL-capable loop is that for DS1 loops, BellSouth provides all the electronics and standard DS1 interfaces, while HDSL-capable loops are simply conditioned copper loops with no electronics provided.

Witness Maples testified that the FCC has made no finding of non-impairment for copper loops. Nor has the FCC established use restrictions that prevent CLPs from accessing all the features and capabilities of those UNEs. Witness Maples also noted that BellSouth has an obligation to provide access to unbundled copper loops. Finally, witness Maples argued that the definition of DS1 should be modified to add language specifying that it includes 2-wire and 4-wire copper loops capable of providing HDSL services only when the associated electronics on these loops are provided by BellSouth.

CompSouth witness Gillan testified that an HDSL-capable loop is nothing but a dry copper loop. It is not a digital facility without the addition of CLP equipment. Further, the FCC, in Paragraph 105 of the *TRRO*, was clear that its business line tally was not intended to identify CLP loops. Whenever additional capacity of an HDSL-capable loop is created by activating its electronics, this is done by the CLP. Therefore, if the Commission were to include any additional capacity created on these loops, it would be adding CLP loops, something the FCC rejected.

Witness Gillan also testified that the FCC intended for BellSouth's obligation to provide HDSL-capable loops to continue even where BellSouth was not required to unbundle a DS1 loop. As part of its rationale that CLPs would be able to serve their customers without a DS1 loop unbundling obligation, the FCC reasoned that CLPs would be able to use HDSL-capable loops to provide DS1 service to customers.

It is clear from the testimony that HDSL-capable loops can be used in certain circumstances to provide DS1 services. However, as the CLP witnesses pointed out,

this capability exists only because of additional electronics that are provided by the CLPs. Thus, the HDSL-capable facility provided by BellSouth cannot, by itself, provide a DS1 service. In fact, in the *TRRO*, the FCC suggested that HDSL-capable lines were an alternative available to CLPs should unbundled DS1 loops become unavailable to CLPs. Unless modified by the CLP, it is only capable of providing a single voice grade line. Therefore, the Commission concludes that a HDSL-capable loop without attached electronics should not be treated as the equivalent of a DS1 loop for purposes of evaluating impairment.

CONCLUSIONS

The Commission concludes that HDSL-capable loops are not equivalent to DS1 loops for the purpose of evaluating impairment.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

ISSUE NO. 8 – MATRIX ITEM NO. 8: *TRRO*/FINAL RULES - (a) Does the Commission have the authority to require BellSouth to include in its ICAs entered into pursuant to Section 252, network elements either under state law or pursuant to Section 271 or any other federal law other than Section 251? (b) If the answer to part (a) is affirmative in any respect, does the Commission have the authority to establish rates for such elements? (c) If the answer to part (a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements, and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions of such elements?

POSITIONS OF PARTIES

COMPSOUTH: With respect to Matrix Item No. 8(a), CompSouth argued that the Commission has the authority to require BellSouth to include in its Section 252 ICAs the availability and price of network elements under Section 271. CompSouth also argued that the Commission has the authority under state law to include Section 271 network elements in the ICAs, but it is not requesting the Commission to exercise such power in this proceeding. Rather, CompSouth requested the Commission to approve its proposed contract language that includes rates, terms, and conditions for Section 271 as well as Section 251 network elements. The basis of CompSouth's argument is that both Section 251 and Section 271 point to the Section 252 state commission negotiation and arbitration process for establishing contract terms for ILEC unbundling obligations. This process is unquestioned with respect to Section 251 elements. Under Section 271, Bell Operating Companies (BOCs) such as BellSouth that want to establish and maintain the right to provide interLATA long distance services must provide access to UNEs listed on the Section 271 checklist at just and reasonable rates. Section 271 in turn contemplates that BOC compliance with the competitive checklist requires that the checklist items be included in the ICAs pursuant to the Section 252 state commission approval process. The FCC has emphasized that Section 271 unbundling obligations are independent of and in addition to Section 251 unbundling obligations. The

appropriate forum for establishing the rates, terms, and conditions of BellSouth's independent Section 271 unbundling obligations is the state commission arbitration and approval process.

With respect to Matrix Item No. 8(b), CompSouth maintained that the Commission has the authority to set rates for Section 271 network elements. As noted above, the Act requires that Section 271 network elements be reflected in the ICAs approved pursuant to Section 252, which provides for state commission review and approval of ICAs. Just as states arbitrate and approve TELRIC rates for Section 251 network elements, so state commissions have the authority to arbitrate just and reasonable rates for Section 271 checklist elements. State commissions, however, do not have the authority to revoke BellSouth's Section 271 authority for failure to continue meeting the competitive checklist. While that role is reserved for the FCC, state commissions do have a role in ensuring the nondiscriminatory availability of UNEs required under Section 271.

With respect to Matrix Item No. 8(c), CompSouth stated that the rates, terms, and conditions for Section 271 checklist UNEs should be included in BellSouth's ICAs along with the rates, terms and conditions for Section 251 UNEs. The Section 271 elements must meet a "just and reasonable" pricing standard rather than a TELRIC pricing standard. The terms and conditions for both Section 251 and 271 unbundling must provide for meaningful access to network elements (e.g., ICA terms must prohibit unreasonable restrictions on the way network elements are made available) and must provide that both Section 251 and 271 network elements be available on a nondiscriminatory basis. Thus, with the exception of the pricing standard, the terms and conditions for Section 251 and Section 271 elements should be substantially similar. CompSouth has proposed interim rates for Section 271 network elements that should be included in ICAs until the Commission establishes permanent rates for Section 271 elements under the "just and reasonable" standard. These rates are above TELRIC and track the transition rates for loops, transport, and switching network elements approved by the FCC in the *TRRO*.

BELLSOUTH: BellSouth denied that State commissions have the authority to require BellSouth to include in Section 252 ICAs any element not required by Section 252. There is no provision in Section 252 authorizing state commissions to establish rates, terms and conditions for Section 271 network elements. Thus, the 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 Section 252 ICAs.

PUBLIC STAFF: The Public Staff stated that it does not believe that the Commission has the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252. However, the Commission is not foreclosed from exercising its authority to provide for the reasonable interconnection of facilities between providers of telecommunications services outside of Section 252 ICAs so long as the Commission's actions do not "substantially prevent" implementation of the Act.

DISCUSSION

Because Matrix Item Nos. 8(a), 8(b) and 8(c) are closely related, the Commission will address them collectively. The arguments pertaining to these issues are not unfamiliar to the Commission because they have been made in various forms in other dockets for quite some time. Most prominently, this issue was addressed in the *Recommended Arbitration Order* in Docket No. P-500, Sub 18, *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* issued on March 4, 2004, in which the Commission considered many of the same arguments made here and noted that "overseeing and enforcing Section 271 in its essence remains an FCC responsibility, with State Commission responsibilities being largely consultative." The Commission held that persons aggrieved by market pricing should seek redress from the FCC pursuant to Section 271(d)(6) of the Act, although the Commission at that time was careful to make no statements in derogation of its own jurisdiction generally. However, this is the first case before the Commission where the question is put squarely before us as to whether Section 271 UNEs[41] need to be included in ICAs considered and approved by the Commission.

These issues are both highly significant and highly controversial. Nevertheless, there are some areas of agreement. All the parties agree as to the existence of Section 271 UNEs—that is, continuing obligations by BOCs to provide certain elements, formerly Section 251 UNEs, that have now been de-listed because the FCC has found that competitors are not impaired without them. All the parties agree that the pricing standard for Section 271 UNEs is not TELRIC but is rather that rates be "just and reasonable rates" under Sections 201 and 202 of the Act, although one can detect yearnings in CompSouth's filings for a conclusion that "just and reasonable" rates should at least approximate TELRIC rates. All the parties agree that State commissions do not have the authority to revoke BellSouth's Section 271 authority for failure to continue to meet the competitive checklist set out in Section 271(c)(2)(B). The enforcement role is entrusted to the FCC.

The core disagreement between the parties is whether the State commissions have the legal authority to require BOCs such as BellSouth to include Section 271 UNEs in ICAs and, by extension, to arbitrate disagreements about rates, terms, and conditions relating to such UNEs. This core disagreement implies different visions by the parties. CompSouth envisions the use of a generic rate setting docket and an arbitration process with respect to Section 271 UNEs—i.e., a process mirroring the Sections 251/252 status quo, but with ultimate enforcement authority residing with the

[41] The term "Section 271 UNE" is used in this discussion as a shorthand term for what might be more accurately described as wholesale service obligations arising under Section 271. The FCC has used this term "wholesale service obligation" in its December 2, 2005, *Memorandum Opinion and Order* addressing the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. 160(c), Paragraph 105. The term "unbundled network element" or "UNE" does not appear in Section 271 but does appear as such in Section 251 (c)(3) ("An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.")

FCC and the parties required to use a non-TELRIC pricing standard. BellSouth envisions a process wherein parties agree to "market rates" in commercial agreements outside of ICAs and, if a party is aggrieved and does not believe these rates to be "just and reasonable," it has recourse to the FCC. It is therefore not a question of whether the elements must and will be offered but the process by which they are memorialized and the rates defined.

The underlying basis for CompSouth's argument that Section 271 UNEs should be subject to inclusion in ICAs under Section 252 and to the State commission review and approval process provided for by that statutory provision is language in Section 271(c)(1)(A) [Track A] and 271(c)(2)(A) [Specific interconnection requirements]. The former states that "[a] Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under Section 252...", while the latter states that "[a] Bell operating company meets the requirements of this paragraph if...such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A)...and such access and interconnection meets the requirement of subparagraph (B) [Competitive Checklist] of this part." In addition, Sections 251 and 252 are mentioned in Section 271(c)(2)(B)(i) [interconnection], (ii) [nondiscriminatory access to network elements], (xii) [dialing parity], (xiii) [reciprocal compensation], and (xiv) [resale]. Thus, CompSouth maintains that, by such references in Section 271(c)(2)(A) and (B), the Act has linked compliance with the competitive checklist to the review process in Section 252. CompSouth cited a number of decisions, both state and federal, in support of its position. CompSouth also noted that, while it believes that the Commission may include Section 271 UNEs in ICAs pursuant to state authority, it is not requesting the Commission to exercise such authority at the present time.

Needless to say, BellSouth strongly disagreed with CompSouth's analysis. It argued that the importation of Section 271 UNEs into a Section 251 process creates an insupportable logical anomaly and that the FCC has decisional authority under Section 271, with the states having principally an advisory role. BellSouth pointed out that, while Section 271 may at points reference Section 252, Section 252 never refers to Section 271, while containing numerous express references to Section 251. (For that matter, Section 251 does not reference Section 271 either). Most importantly, the Section 251 references in Section 252 explicitly limit the rate-setting and arbitration powers of State commissions to Section 251 elements. For example, Section 252(a)(1), regarding voluntary negotiations, links the ILECs' duties in that process to having received "a request for interconnection, services, or network elements pursuant to Section 251." Similarly, in Section 252(c)(1), regarding standards for arbitration, the State commission is to "ensure that such resolution and conditions meet the requirements of Section 251, including regulations prescribed by the Commission pursuant to Section 251." Moreover, under Section 252(d)(1), concerning pricing standards, State commissions are to determine "the just and reasonable rate for the interconnection of facilities and equipment for the purposes of subsection (c)(2) of Section 251...." BellSouth further noted that in Paragraph 665 of the *TRO*, the FCC 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 [S]ection 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6)." Like CompSouth, BellSouth cited a number of state and federal decisions which it argued supported its position.

BellSouth further maintained that a Section 271 arbitration and rate-setting process mirroring the Section 251 process would run athwart of the FCC's general movement toward market-based rate-setting for Section 271 UNEs. This is exemplified by the FCC's statement in the *UNE Remand Order,* Paragraph 473, that where a checklist network item is no longer unbundled because the competitor is not impaired without access, "the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market." According to BellSouth, "market-based" rates and "commission-set" rates are fundamentally at odds. BellSouth satisfies the federal standard of just and reasonable rates when it offers Section 271 UNEs at market rates. This, among other reasons, is why any attempt to base inclusion of Section 271 UNEs in interconnection agreements upon state authority should be preempted as running counter to federal policy.

The Public Staff generally agreed with BellSouth's position regarding the inclusion of Section 271 UNEs, while noting that both parties had made "thoughtful and cogent arguments." Specifically, after citing its position in Docket No. P-500, Sub 18, the Public Staff concluded that it did not believe that the Commission has the authority to compel BellSouth to include Section 271 UNEs in ICAs entered into pursuant to Section 252. However, the Public Staff did not believe that the Commission was foreclosed from acting pursuant to state law under G.S. 62-110(f1) "to provide for the reasonable interconnection of facilities between all providers of telecommunications services," so long as the Commission's actions did not "substantially prevent" implementation of Section 251. In other words, the Public Staff maintained, the Commission may act outside the confines of an ICA made pursuant to Section 252 to ensure the goals of G.S. 62-110(f1). The Public Staff noted that the Commission has previously exercised state authority in Docket No. P-19, Sub 454, by order issued September 22, 2003, where it required Verizon to perform a transit function outside of its Section 251 interconnection obligations. The Commission's ability to exercise this authority in the future is not constrained should the circumstances require it.

The Commission agrees with the Public Staff that the parties have made thoughtful and cogent arguments and that the proper resolution of these issues is not free from doubt. It is also true that different courts and different State commissions, looking at the same language in statute and orders, have come to different conclusions on these matters. All are interesting, some more or less persuasive, but none is dispositive. The FCC has not yet spoken definitively on these matters, so the Commission must examine fragments and trends. Therefore, the Commission must decide what has been brought before it according to the law and sound public policy interpreted according to our best lights. CompSouth's arguments, while colorable and thought-provoking, are not ultimately persuasive.

The Commission after careful consideration concludes that the Commission lacks the authority to compel BellSouth to include Section 271 UNEs in its Section 251/252 ICAs, nor does the Commission believe it has the authority to establish rates for such elements, for the reasons as generally set forth by BellSouth and the Public Staff.

First, the Commission believes that there now exists a logical disjuncture between Section 271 and Sections 251 and 252 with respect to Section 271 UNEs. Section 251 sets out the duties of "local exchange carriers," including UNEs, while Section 252 sets out the negotiation and arbitration process by which those duties are implemented, including the pricing standards that have evolved into TELRIC and are applicable to Section 251 UNEs. Section 271 UNEs are in an entirely different category from Section 251 UNEs because, by definition, there is no impairment associated with Section 271 UNEs, they are subject to a different pricing standard, and the obligation to provide does not arise out of Section 251. Section 271 UNEs exist simply because the corresponding Section 251 UNEs were de-listed, and the FCC quite reasonably recognized from its reading of Section 271 that there needed to be a continuing requirement that BOCs provide UNEs that did not fit into the Section 251 category or process so that the BOCs would be in continuing compliance with Section 271. Now, it is true that Section 271 does make reference to Sections 251 and 252 and incorporation of certain provisions in ICAs, most notably in Section 271(c)(1)(A) and Section 271(c)(2)(B)(i) and (ii). This worked smoothly and logically *as long as all UNEs were* Section *251 UNEs,* but this is no longer the case with the advent of Section 271 UNEs. Section 271 UNEs do not fit neatly into the categories established by Section 251 and 252; they are like ill-fitting gloves. It would be illogical for a new category of UNEs arising out of Section 271 instead of Section 251 to have been created and then to conclude that they are subject to a Section 252 process worded explicitly for Section 251 purposes.[42] Quite simply, such a construction would lead to an "unreasonable or absurd result," something disfavored under canons of statutory interpretation. *See, AmJur2d,* "Statutes," Sec. 172.

Second, the Commission concurs in the view that administration and enforcement of Section 271 is largely the responsibility of the FCC, with the role of the State commissions being essentially advisory in nature, most notably and explicitly when a BOC applies for interLATA long distance authority. This is evident from the structure of Section 271. *See*, e.g., Section 271(d)(2)(B) (FCC to consult with State

[42] One possible explanation for the oddity that there are references to Section 251 and 252 in Sections 271's Track A and parts of the competitive checklist but no corresponding references in Section 251 or 252 to Section 271 is that neither the delisting of Section 251 UNEs nor the corresponding rise of the new category of Section 271 UNEs was explicitly foreseen. As noted above, until recently, the Section 251/252 references in Section 271 presented no logical conundrums because *all UNEs listed in* Section *271 were* Section *251 UNEs.* It is notable that BOCs in all the 48 contiguous states, plus the District of Columbia, have now received Section 271 authority, the last being SBC's authorization to provide such service in Arizona on December 3, 2003—before delisting had taken place. When the FCC de-listed certain elements and recognized corresponding Section 271 elements as vital to continuing compliance with Section 271, it could have specified that it believed that those Section 271 elements would be subject to the Section 252 process, but it did not choose to do so.

commissions when application is submitted). While BOCs are expected to remain in continuing compliance with Section 271, the FCC is entrusted with specific enforcement authority to ensure that they do so. *See*, Section 271(d)(6). All the parties recognize that enforcement authority resides with the FCC, but CompSouth argues that the Commission should undertake an arbitration and ratemaking process under Section 252 for Section 271 UNEs which it has no authority to enforce. The Commission concludes that it makes little practical sense for it to arbitrate Section 271 rates, terms, and conditions that it is powerless to enforce.

Third, the Commission concurs with the view that requiring Section 271 UNEs to be part of a Section 251/252 process is inconsistent with the FCC's enunciated desire to move to a more market-driven process for rate-setting. Plainly, CompSouth's proposal leads in the opposite direction. It bears repeating that Section 271 UNEs exist at all because it was found that competitors were not impaired without the corresponding Section 251 UNEs. The non-impairment finding for Section 251 UNEs implies that there are other sources from which competitors may obtain same or similar services—i.e, that there is a competitive market to some significant degree. That is why the FCC stated that the pricing standard should be "just and reasonable" rates under Sections 201 and 202, instead of TELRIC rates. Of course, no one knows ahead of time precisely what a "just and reasonable" rate will be, but the process that the FCC appears to envision is one in which "the market price should prevail." Then, if a party is aggrieved and does not believe that such rate is "just and reasonable," the FCC has indicated it will "undertake a fact-specific inquiry" in the context of its Section 271 enforcement authority. See, *TRO,* Paragraph 665. That is the remedy the FCC will use to ensure that market rates charged for Section 271 UNEs are in fact "just and reasonable," rather than relying on the Section 252 state commission arbitration process.

Lastly, there is the question of the extent to which state law authorizes a Commission decision to require the inclusion of Section 271 UNEs in ICAs. CompSouth indicated that it believed that the Commission has such authority, but did not choose to argue extensively in favor of that position at this time. BellSouth thought that the assertion of such state authority would be inconsistent with the regulatory framework that the FCC has in place and thus inappropriate. The Public Staff said that the Commission may act outside the confines of an ICA made pursuant to Section 252 to "ensure the goals of G.S. 62-110(f1)," but it identified no circumstances in this case which might justify such action. Indeed, the Public Staff agreed with BellSouth's position regarding the non-inclusion of Section 271 UNEs in ICAs. The Commission does not believe it is necessary to rule on the question of state authority in this context at this time. The Commission simply observes that Section 251(d)(3) purports not to preclude state access regulations that do "not substantially prevent implementation of the requirements of this section and the purposes of this part."

Finally, the Commission notes that elsewhere in this Order we have construed the relevant FCC rules and have found that Section 271 elements qualify as "wholesale services" in the context of the commingling rules and, therefore, there is an obligation to provide Section 271 elements on a commingled basis with Section 251 elements. This

is, needless to say, a completely separate question from whether Section 271 elements must be incorporated into ICAs with "just and reasonable" rates set by State commissions under a Section 252 process—questions that the Commission has herein answered in the negative.

CONCLUSIONS

The Commission concludes that it does not have the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252, nor does the Commission have the authority to set rates for such elements.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

ISSUE NO. 9 – MATRIX ITEM NO. 9: *TRRO*/FINAL RULES – What conditions, if, any, should be imposed on moving, adding, or changing orders to a CLP's respective embedded bases of switching, high-capacity loops, and dedicated transport, and what is the appropriate language to implement such conditions, if any?

POSITIONS OF PARTIES

COMPSOUTH: The *TRRO* included detailed provisions for identifying CLP's embedded base of Section 251 unbundled switching, high-capacity loops and dedicated transport that is subject to the *TRRO*'s transition provisions. The ICA language implementing the *TRRO* on this issue should carefully track the FCC's requirements, taking into account the prior interpretation of those requirements by this Commission.

BELLSOUTH: CLPs should not be allowed to add new UNE arrangements that have been de-listed, whether new arrangements would result from an order to add services, to move services (which would require a new arrangement at a different location), or change services (which would require a new arrangement at a different location). BellSouth will provision CLPs orders for new high-capacity loops and dedicated transport based upon a CLP's performance of a reasonably diligent inquiry and "self-certification"; however, CLPs have no legitimate basis to self-certify orders for new services relating to wire centers that BellSouth has identified as satisfying the FCC's impairment tests.

PUBLIC STAFF: No conditions should be imposed on moving, adding, or changing orders to a CLP's respective embedded bases of switching except those described in 47 C.F.R. § 51.319(d)(2). However, Rule 51.319(d)(2)(iii) requires BellSouth to provide unbundled switching to a CLP's embedded base of end-user customers until March 11, 2006. No conditions should be imposed on moving, adding, or changing orders to a CLP's high-capacity loops except those described in 47 C.F.R § 51.319(a). No conditions should be imposed on moving, adding, or changing orders to a CLP's dedicated transport except those described in 47 C.F.R. § 51.319(e).

DISCUSSION

CompSouth stated that the provisions of the revised ICAs should clarify that the definition of "embedded base"[43] (whether loop, dedicated transport, or unbundled switching) permits adds,[44] moves,[45] or changes[46] to be made by a CLP at the request of a customer that was served the CLP's network on or before March 11, 2005. CompSouth maintained that the *TRRO* provides that CLPs be able to serve their existing customers as of March 11, 2005 by providing adds, moves, or changes to the existing customers during the transition period.

CompSouth argued that BellSouth's proposed language defining "embedded base" for DS1 and DS3 Loops and DS1, DS3, and Dark Fiber Dedicated Transport in non-impaired wire centers and for Unbundled Local Switching each contain the following condition: "Subsequent disconnects or loss of End Users shall be removed from the Embedded Base."[47] CompSouth asserted that BellSouth's language appears to agree with the CompSouth position that the CLP may continue to serve the existing end user and is able to make adds, moves, or changes during the transition period. CompSouth noted that BellSouth's stated position in the Joint Issue Matrix, however, reflects that BellSouth does not interpret its proposed language in this manner and believes that a CLP is not entitled to make any adds, moves, or changes on behalf of a customer that was taking service from the CLP prior to March 11, 2005.

With regard to high-capacity loops and dedicated transport, CompSouth stated that it does not argue that "adds" of de-listed UNE loops and dedicated transport are permissible during the transition period, once a wire center has been found by the Commission to be non-impaired, even if the underlying customer was taking service from the CLP as of March 11, 2005. According to CompSouth, the issue is whether a "move" of a "de-listed" UNE loop or dedicated transport on behalf of a customer that was served by the CLP as of March 11, 2005, should be permitted.

CompSouth noted that the FCC stated, "[t]hese transition plans shall apply only to the embedded customer base," rather than to embedded lines or circuits.[48]

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[43] This argument presumes that the Commission has determined that specific wire centers are considered non-impaired as of March 11, 2005.

[44] "Add" means when the existing CLP customer seeks to add an additional line to his/her service.

[45] "Move" means when the existing CLP customer moves to a new address.

[46] "Change" means when the existing CLP customer seeks to add or a delete a feature, such as call waiting. A "change," therefore, is applicable to unbundled local switching and not to loops or transport.

[47] *See* Exhibit PAT-1, Attachment 2, Sections 2.1.4.2, 4.2.2, and 6.2.2.

[48] *TRRO* Paragraphs 142 and 195.

CompSouth argued that, thus, during the transition period, modifications or changes to the customer's service should be processed during the transition period. CompSouth maintained that as long as the "embedded customer" is moving to a location within the same non-impaired serving wire center, and no "disconnect" order or "new install order" is issued, then no "add" has been accomplished. Accordingly, CompSouth argued that moves completed in this manner should be permitted.

CompSouth also maintained that BellSouth should be obligated to continue to process adds, changes, and moves for CLPs at the request of customers that were served through UNE-P arrangements as of March 11, 2005. CompSouth believes that the transition period adopted by the FCC applies to the CLP's "embedded customer base" not to the embedded circuits or lines.[49] Thus, CompSouth argued that the intent of the FCC was to enable the CLP to continue to serve the needs of the existing customer base, which would include permitting the customer's to make adds, moves, and changes to their existing services.

BellSouth stated that on April 5, 2005, the United States District Court for the Northern District of Georgia ruled that

> [u]nder the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 months and at higher rates than they were paying previously. The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ed]' to place new orders.[50]

BellSouth argued that the Court's decision applies equally to the situation when a CLP seeks to move a customer's service to a different location, because doing so requires disconnection of the service and the placement of a "new" order for de-listed service. BellSouth noted that the CLPs argue that a "move" of a de-listed UNE is not a new order. BellSouth disagreed.

BellSouth maintained that changes to an existing service do not require a new service order. BellSouth stated that it will, accordingly, process orders to modify an existing customer's service by, for example, adding or removing vertical features, during the transition period.[51]

BellSouth argued that, in order to submit an order for a high-capacity loop or transport UNE, a CLP must self-certify, based on a reasonably diligent inquiry, that it is entitled to unbundled access to the requested element.[52] BellSouth stated that it must

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[49] "The transition period shall apply only to the embedded customer base..." *TRRO* Paragraph 227.

[50] *BellSouth v. MCImetro*, Case No. 1:05-CV-0674-CC, at 4.

[51] *Id.*

[52] *TRRO* at Paragraph 234.

process the request.[53] BellSouth further stated that it may only subsequently challenge the validity of such order(s) pursuant to the dispute resolution provision in the parties' interconnection agreement.[54]

BellSouth stated that, in accordance with the *TRRO*, it has been accepting and processing CLP 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 CLPs are not impaired pursuant to the competitive thresholds the FCC set forth in the *TRRO*.[55] BellSouth asserted that, at the conclusion of this proceeding, however, the Commission should confirm the North Carolina wire centers that satisfy the FCC's impairment tests. BellSouth maintained that once the North Carolina wire centers are confirmed, CLPs have no basis whatsoever to self-certify orders for high-capacity loops and dedicated transport in the confirmed wire centers. BellSouth commented that, if BellSouth is to follow the FCC directives, and it will, the Commission must eliminate future disputes by requiring CLPs to abide by its wire center confirmation.

The Public Staff commented that the *TRRO* limits the unbundling requirements for BellSouth. The Public Staff noted that Appendix B of the *TRRO* revised some Sections of 47 C.F.R. § 51.319, which describes the new requirements for this issue. The Public Staff maintained that, in order to ease the change to the *TRRO*, the FCC allowed a transition period from March 11, 2005, through March 10, 2006, that covers switching, loops for DS1 and DS3, and transport for DS1 and DS3. The Public Staff noted that the transition period for dark fiber loops and dark fiber transport also began on March 11, 2005, but lasts through September 10, 2006.

In his direct testimony, CompSouth witness Gillan acknowledged that the *TRRO* removed some of BellSouth's unbundling obligations. However, he also stated that the Section 251 UNEs withdrawn by the *TRRO* must be replaced by parallel offerings under Section 271.

The Public Staff noted that BellSouth witness Blake testified that CLPs should not be allowed to add new UNE arrangements removed by the *TRRO*, nor should they be allowed to move an existing customer's service to another location without considering it to be a new service. The Public Staff stated that witness Blake testified that the FCC intended to direct CLPs away from the UNE platform and toward other alternatives.

The Public Staff noted that witness Blake also testified that CLPs may modify an existing customer's service, i.e., change features, add features, or suspend and restore during the transition period.

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[53] *Id.*

[54] *Id.*

[55] *Id.*

The Public Staff noted that on April 25, 2005, the Commission issued an *Order Concerning New Adds* in Docket No. P-55, Sub 1550, in which it declined to declare that BellSouth must provide new additions of UNE-P, DS1, and DS3 UNEs outside of the embedded customer base after March 11, 2005. The Public Staff stated that, however, the Order concluded that BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process. The Public Staff stated that it disagrees with witness Gillan's assertion that all Section 251 UNEs withdrawn by the *TRRO* must be replaced by parallel offerings under Section 271, since there are some Section 251 offerings that have no Section 271 parallels.

The Public Staff commented that the *TRRO* modified the requirements for provision of mass market (DS0) switching in the new 47 C.F.R. § 51.319(d)(2). The Public Staff noted that BellSouth is no longer required to unbundle mass market switching. The Public Staff opined that CLPs must migrate their embedded customer base from unbundled local circuit switching to other arrangements by March 11, 2006. The Public Staff stated that it disagrees with witness Blake's assertion that CLPs cannot move an existing customer's service to another location without considering it to be a new service. The Public Staff maintained that, according to 47 C.F.R. § 51.319(d)(2)(iii), an ILEC must provide access to local circuit switching on an unbundled basis for a CLP to serve its embedded base of end-user customers until March 11, 2006. Furthermore, the Public Staff stated that it also agrees that new customers may not be added.

The Public Staff asserted that the *TRRO* did not modify the rules regarding switching for circuits with DS1 capacity and higher. The Public Staff opined that ILECs are still not required to provide unbundled local circuit switching to CLPs for DS1 and higher.

The Public Staff commented that the *TRRO* modified the unbundling requirements for high-capacity loops in 47 C.F.R. § 51.319(a)(4), (5), and (6), which sets the conditions for moving, adding, or changing orders.

The Public Staff noted that witness Blake stated that for high-capacity loops and dedicated transport, CLPs who disagree with an incumbent LEC's classification of Tier 1 or Tier 2 qualifying wire centers may perform due diligence and submit self-certifying orders, which the incumbent LEC must provision. The Public Staff commented that witness Blake believes that incumbent LECs are entitled to challenge the validity of self-certifying orders pursuant to the dispute resolution provision in the ICA.

The Public Staff pointed out that the amended 47 C.F.R. § 51.319(e) sets conditions for moving, adding, or changing orders for dedicated transport.

The Public Staff stated that it disagreed with CompSouth's assertion that all Section 251 UNEs withdrawn by the *TRRO* must be replaced by parallel offerings under Section 271. The Public Staff maintained that Section 271 requires BellSouth to provide

many types of offerings; however, these offerings do not necessarily replace or parallel all Section 251 offerings that were withdrawn by the *TRRO*.

Lastly, the Public Staff stated that it agrees with witness Blake's assertion regarding self-certification by CLPs of Tier 1 and Tier 2 qualifying wire centers and that ILECs can dispute a self-certifying order pursuant to the dispute resolution provision in the ICA.

The Commission believes that a CLP may move, add, or change an order with BellSouth with respect to its embedded bases of mass market (DS0) switching until March 11, 2006. However, by that date, a CLP must have moved this switching to alternative arrangements as described in 47 C.F.R. § 51.319(d)(2).

A CLP may move, add, or change an order with BellSouth with respect to its high-capacity loops according to 47 C.F.R. § 51.319(a). No other conditions will apply. However, within 30 days of the date of this Order, BellSouth must file a list of all wire centers that meet the unbundling criteria for DS1 and DS3 loops that are described in 47 C.F.R. §§ 51.319(a)(4) and (5).

A CLP may move, add, or change an order with BellSouth with respect to dedicated transport according to 47 C.F.R. § 51.319(e). No other conditions will apply.

Further, the Commission believes that if BellSouth disagrees with a CLP's self-certification of an element, it must first request that the CLP cease using that element and provide proof that the element is not impaired according to Sections IV, V, and VI of the *TRRO*. If the two parties still cannot agree, either party may petition this Commission for dispute resolution. BellSouth may not disconnect the element in dispute unless the CLP agrees or this Commission grants authority to do so.

CONCLUSIONS

The Commission concludes that no conditions should be imposed on moving, adding, or changing orders to a CLP's respective embedded bases of switching except those described in 47 C.F.R. § 51.319(d)(2). However, Rule 51.319(d)(2)(iii) requires BellSouth to provide unbundled switching to a CLP's embedded base of end-user customers until March 11, 2006. No conditions should be imposed on moving, adding, or changing orders to a CLP's high-capacity loops except those described in 47 C.F.R § 51.319(a). No conditions should be imposed on moving, adding, or changing orders to a CLP's dedicated transport except those described in 47 C.F.R. § 51.319(e).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

ISSUE NO. 10 – MATRIX ITEM NO. 10: *TRRO*/FINAL RULES – What rates, terms and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and

what are the appropriate rates, terms and conditions during such transition period, for unbundled high-capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

POSITIONS OF PARTIES

COMPSOUTH: (a) There are certain UNEs that were de-listed by the *TRO* and for which the FCC provided no specific transition plan for after the initial transition plan, and which would not be necessarily governed by the transition plan discussed in Issue No 2. For those existing network elements that BellSouth is no longer required to provide as Section 251 elements, and that are not covered by the FCC's *TRRO* transition rules (or an agreement to subject them to those transition rules), BellSouth should be obligated to identify the specific service agreements or services that it insists be converted to non-Section 251 network elements or other services by circuit identification numbers. CLPs should have 30 days from receipt of that notice to submit orders to convert or disconnect such circuits or to dispute the identification of circuits identified on BellSouth's list. BellSouth should not be able to disconnect any of the service arrangements or services identified on its notice if the CLP has notified BellSouth of a dispute regarding BellSouth's identification of a specific service arrangement or service that BellSouth claims it is not required to provide as a Section 251 element. For those service arrangements or services that BellSouth is not required to provide as Section 251 elements, there should be no service order, labor, disconnection, project management or other nonrecurring charges associated with a conversion and the conversion should take place in a seamless manner without any customer disruptions or adverse affects to service quality. If a CLP chooses to convert DS1 or DS3 loops to special access circuits, BellSouth should be required to include such DS1 and DS3 loops once converted within the CLP's total special access circuits and apply discounts for which CLP is eligible.

(b) The arguments set forth in the Issue Nos. 2, 4, and 5 are incorporated by reference as a response to this issue for the arguments related to the determination of whether subsequent wire centers meet the FCC's non-impairment standards once wire centers are identified by BellSouth.

BELLSOUTH: BellSouth's position is that this issue addresses de-listed network elements for which there is no transition period for which the transition period has already ended; including, entrance facilities, enterprise or DS-1 level switching, OCN loops and transport, fiber-to-the-curb, fiber sub-loop feeder, and packet switching. Generally, these elements were addressed in the *TRO*. 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, are addressed by BellSouth under Issue 1.

PUBLIC STAFF: Any service arrangements de-listed by the FCC in the *TRO* should be removed from ICAs as Section 251 UNE offerings effective with the *TRO* amendment.

BellSouth should not impose disconnection or nonrecurring charges when transitioning the de-listed Section 251 UNEs to alternate services and must provide written notice to the affected CLP 90 days prior to the discontinuation of those services.

DISCUSSION

CompSouth stated that the FCC recognized that UNEs for which impairment existed as of March 11, 2005, may subsequently meet the non-impairment standards. Nevertheless, the FCC did not adopt a default transition process for UNEs that are subsequently determined to meet the non-impaired standard. A process by which the identification of a non-impaired wire center is confirmed must be determined prior to any requirement that a CLP commence voluntary conversions of "de-listed" UNEs. The Commission's resolution of Issue Nos. 4 and 5 should provide the process for this confirmation, which leaves the issue of how long a subsequent transition period should be and what the rates should be for the "subsequent embedded base" from the date the non-impairment status of a wire center becomes effective to the date the "subsequent embedded base" is either disconnected or converted to alternative services. CompSouth proposed a maximum of 12-months for "Subsequent Transition Periods" with a minimum of no less than 180 days. Since the FCC did not impose the transitional rates to subsequent transition periods, CompSouth submitted that, until the conversion of the UNE is completed, the existing UNE rate applies.

CompSouth stated that when BellSouth designates wire centers as "de-listed" in the future, it seeks to post the notice of such determination on its website without providing actual written notice to the CLPs point of contacts contained in the notice provision of the interconnection agreement. Because of the potential impact on the rights and obligations of the parties when such a notice is issued, CompSouth urged that BellSouth be required to comply with the notice provision of the parties' interconnection agreement to ensure that the CLPs are aware of the potential loss of UNEs in a wire center. CompSouth stated that constructive notice of a posting on the website is insufficient and is contrary to the general terms and conditions of the interconnection agreement.

BellSouth commented that because the FCC eliminated the ILECs' obligation to provide unbundled access to these elements two years ago in the *TRO*, CLPs that still have the rates, terms, and conditions for these elements in interconnections agreements have reaped the benefits of unlawful unbundling of these elements for far too long. As such, with the exception of entrance facilities (which BellSouth is allowing CLPs 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 CLP order to disconnect or convert such arrangements. BellSouth opined that it should also be permitted to impose applicable nonrecurring charges. BellSouth stated that its proposed contract language is fully consistent with the *TRO* and should be approved.

The Public Staff commented that BellSouth witness Tipton interpreted this issue to pertain to network elements de-listed by the *TRO* for which there is no transition period or for which the transition period has already ended. The Public Staff noted that witness Tipton stated the Commission should not allow the Parties time to transition off these elements, and that any CLP that still has rates, terms, and conditions for these elements in its ICA has utilized these elements for far too long.

The Public Staff maintained that witness Tipton reasoned that the rates, terms, and conditions for de-listed elements should be removed from any agreements in which they appear, and that any arrangements in place after the effective date of the new agreement should be disconnected or converted by BellSouth after 30 days written notice. Further, if the CLP failed to disconnect or convert such arrangements within the 30-day period, BellSouth would transition such circuits to equivalent BellSouth tariffed services. Also, all applicable disconnect charges for the services, as well as the full tariffed nonrecurring and recurring charges would apply on and after the effective date of the agreement. The Public Staff noted that neither Sprint witness Maples nor CompSouth witness Gillan commented on BellSouth witness Tipton's discussion of services that were de-listed in the *TRO* or proposed alternate agreement language to witness Tipton's Section 1.7.

The Public Staff commented that regarding part (b) of the issue, witness Tipton explained that to the extent that additional wire centers are found to meet the FCC's no impairment criteria, BellSouth will notify CLPs of these new wire centers via a Carrier Notification Letter. The proposed language states that 10 business days after posting the Carrier Notification Letter, BellSouth will 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. 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 10th business day following posting of the Carrier Notification Letter. However, affected CLPs will be obligated to submit spreadsheets identifying these embedded base UNEs to be converted to alternative BellSouth services or disconnected no later than 40 days from the date of BellSouth's Carrier Notification Letter, and the conversion timeline will be negotiated after that point.

The Public Staff noted that Sprint witness Maples focused on part (b) of the issue, which addresses services that may become unavailable in the future as business lines and the number of fiber collocators change. Witness Maples stated in his direct testimony that the Commission should adopt a finding that requires the transition process for future declassification events to mirror the process adopted by the FCC in the *TRRO* for the embedded base of UNEs. The Public Staff noted that witness Maples stated that BellSouth should notify each individual CLP directly, rather than simply via a carrier notification letter as provided for in BellSouth's proposed Section 2.1.4.12.1. The Public Staff commented that witness Maples stated that Sprint should have a minimum of 30 days from the date it receives notification from BellSouth regarding the status of a wire center in which to determine if it will self-certify and if not, to modify its process to eliminate the use of the impacted UNE, rather than the 10 business days provided for in

BellSouth's proposed Section 2.1.4.12.2. The Public Staff noted that witness Maples also stated that Sprint should be allowed to continue ordering the affected UNE during that 30-day period, and he took issue with other aspects of BellSouth's proposed provisions on future declassification events.

The Public Staff commented that CompSouth witness Gillan testified that the Commission should establish a formal process to review proposed changes to the wire center list. The Public Staff noted that witness Gillan pointed out that, as with the initial wire center list, BellSouth has exclusive access to the requisite information while having an incentive to distort the analysis. The Public Staff commented that witness Gillan recommended that the Commission adopt an annual filing procedure keyed to BellSouth's annual filing of ARMIS business line data. The Public Staff maintained that witness Gillan recommended that BellSouth's requested changes, if any, be proposed simultaneously with its ARMIS filing. Furthermore, the Public Staff stated that witness Gillan proposed that any dispute concerning the appropriate wire center designation would be resolved within 90 days of BellSouth's initial filing.

The Public Staff stated that it agrees that any service arrangements de-listed by the FCC in the *TRO* should be removed as Section 251 element offerings from ICAs effective with the *TRRO* amendment. However, the Public Staff stated that it believes that the 30-day period of discontinuation of any such arrangements after written notice is inadequate for the CLPs to transition the network elements de-listed by the *TRO* into other services, and that at least 90 days should be allowed. The Public Staff recommended that the Commission require that BellSouth allow those services to continue for a period of 90 days after the written notice to the affected CLP is provided.

In addition, the Public Staff stated that it has grave concerns regarding disconnect and nonrecurring installation charges that BellSouth proposes to impose upon CLPs. The Public Staff commented that it is unreasonable for BellSouth to impose a disconnect charge for a service that BellSouth itself is discontinuing. Nor should BellSouth be permitted to charge nonrecurring installation charges when transitioning the de-listed Section 251 UNEs to its tariffed or other services. The Public Staff believes that the conversion of Section 251 UNEs to their tariffed or other equivalent does not require installation. Instead, the Public Staff opined that it simply represents a billing change. With regard to any argument that this policy amounts to discrimination, the Public Staff noted that the question is really whether it constitutes unreasonable discrimination. The Public Staff stated that the Commission should find that the de-listing of Section 251 UNEs and transitioning them to other services provides ample basis for disparate treatment from normal customers; therefore, the failure to charge the normal nonrecurring charges does not constitute unreasonable discrimination.

The Public Staff recommended to the Commission that the language to be incorporated into the amendment for these services should be as BellSouth proposed in Section 1.7, modified as necessary to accommodate these conclusions.

Lastly, the Public Staff stated that the issue of future changes in the list of wire centers that meet the FCC's non-impairment standards was addressed in this matter in the Public Staff's discussion of Finding of Fact No. 6. The Public Staff stated that it is cognizant of the fact that BellSouth is the only entity that will have information on the characteristics of the wire centers, but it prefers to allow the parties to attempt to work through any change in the non-impaired wire center list in the hope of avoiding more formal proceedings. The Public Staff stated that the Commission should be prepared, if necessary, to settle any disputes on any change if the parties are unable to come to an agreement.

The Commission believes that any service arrangements de-listed by the FCC in the *TRO* should be removed from ICAs as Section 251 UNE offerings effective with the *TRRO* amendment. Further, as changes in service arrangements are made in response to delisting of service elements by the FCC, changes or revisions to service arrangements would appear to be of a billing adjustment nature only, since the service itself provided by the CLP to its customer would remain the same. Therefore, BellSouth's intent to charge disconnect and nonrecurring installation charges for tariff services which result from changes made in service arrangements brought on by de-listed service elements would not be appropriate. Furthermore, the Commission agrees with the Public Staff that de-listing of Section 251 UNEs and transitioning them to other services provides ample basis for disparate treatment from normal customers; therefore, the failure to charge the normal nonrecurring charges does not constitute unreasonable discrimination. However, should the CLPs fail to transition future de-listed Section 251 offerings during the transition period, service changes and modifications made after the transition period would be subject to disconnect and nonrecurring installation charges for tariff services.

CONCLUSIONS

The Commission concludes that any service arrangements de-listed by the FCC in the *TRO* should be removed from ICAs as Section 251 UNE offerings effective with the *TRRO* amendment. BellSouth shall not impose disconnection or nonrecurring charges when transitioning the de-listed Section 251 UNEs to alternate services. The issue of future de-listing is addressed in Finding of Fact No. 6.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

ISSUE NO. 11 - MATRIX ITEM NO. 11: *TRRO* / FINAL RULES – What rates, terms, and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth's position as reflected in witness Gillan's revised Exhibit JPG-1 is that BellSouth must give the CLPs notice of the de-listed services to which the CLPs subscribe prior to the end of the transition period. The notice is to be provided one month prior to the end of the transition period for all services whose transition period ends on March 10, 2006, and three months prior to the end of the transition period for services whose transition period ends on September 10, 2006. If the CLPs do not submit a spreadsheet prior to the end of the transition period, BellSouth may transition such services to the equivalent BellSouth Section 271 service or tariffed service. No nonrecurring charges will apply for the transitions.

BELLSOUTH: BellSouth's position is that none of the de-listed network elements for which the FCC established a transition period may remain in place after March 10, 2006 (or September 10, 2006, in the case of dark fiber elements). The Commission should make it clear that all conversions must occur prior to March 11, 2006 or, in the case of dark fiber, September 11, 2006. For all elements other than stand-alone switching (for which BellSouth does not offer an alternative other than in its commercial agreement), BellSouth has provided alternatives to which unconverted elements can be changed.

PUBLIC STAFF: In instances where BellSouth has tariffed alternatives to a de-listed UNE, and the CLP does not submit conversion orders or spreadsheets to BellSouth prior to the end of the transition period, such UNEs should be converted to the appropriate tariffed rate effective on the day following the end of the FCC-specified transition period. No disconnection charges should apply, and in cases where no physical rearrangements are necessary for conversion, no tariffed nonrecurring charges should apply. For services for which no tariffed offering exists, BellSouth must provide each CLP a spreadsheet or order 45 days prior to the end of the transition period listing the services for which no order has been placed, together with a notice that the services will be disconnected on the day after the end of the transition period.

DISCUSSION

BellSouth witness Tipton testified that CLPs must transition their entire base of DS0 level switching and UNE-P lines to alternative arrangements by March 11, 2006, not on or after that date. In the case of stand-alone switching ports, BellSouth has requested that CLPs submit, no later than October 1, 2005, orders to disconnect or convert their embedded base local switching ports to other BellSouth services. Since BellSouth offers no tariff equivalent for DS0 level switching, BellSouth contended that it may disconnect any stand-alone switching ports that remain in place on March 11, 2006. For UNE-P, BellSouth requested that each CLP submit orders or spreadsheets to convert its entire embedded base to alternative arrangements by October 1, 2005. BellSouth plans to convert any remaining embedded base UNE-P services to resold services no later than March 10, 2006, and to charge any applicable disconnect charges and the full tariffed nonrecurring charges for those services.

For high-capacity loops, witness Tipton testified that the CLPs must transition their embedded base and excess DS1 and DS3 loops to alternative arrangements by March 11, 2006, and that BellSouth is asking the CLPs to submit spreadsheets by December 9, 2005 to disconnect or convert their embedded base and excess DS1 and DS3 loops to other BellSouth services. If a CLP fails to submit such spreadsheets by December 9, 2005, BellSouth should be permitted to identify all such remaining embedded base and excess DS1 and DS3 loops, transition such circuits to corresponding BellSouth tariffed services no later than March 10, 2006, and apply disconnect charges and full tariffed nonrecurring charges.

For dark fiber loops, witness Tipton testified that BellSouth is asking CLPs to submit spreadsheets to disconnect or convert their embedded base dark fiber loops to other BellSouth services by June 10, 2006. If a CLP fails to submit such spreadsheets by June 10, 2006, BellSouth's position is that it may identify all such remaining embedded base dark fiber loops and transition such circuits to the corresponding BellSouth tariffed service no later than September 10, 2006, and subject them to applicable disconnect charges and full tariffed nonrecurring charges.

For DS1 and DS3 dedicated transport, witness Tipton testified that BellSouth is asking the CLPs to submit spreadsheets by December 9, 2005, identifying all embedded base and excess DS1 and DS3 dedicated transport and DS1 and DS3 entrance facilities to be disconnected or converted to other BellSouth services. If a CLP fails to submit such spreadsheets by December 9, 2005, BellSouth should be permitted to identify any remaining embedded base and excess DS1 and DS3 dedicated transport as well as DS1 and DS3 entrance facilities and convert such circuits to corresponding BellSouth tariff services no later than March 10, 2006, and subject those services to all applicable disconnect charges and full tariffed nonrecurring charges.

Witness Tipton testified that BellSouth is asking CLPs to submit spreadsheets by June 10, 2006, identifying all embedded base dark fiber transport to be disconnected or converted to other BellSouth services. If a CLP fails to submit such spreadsheets by June 10, 2006, BellSouth's position is that it may identify all remaining embedded base dark fiber transport circuits and convert such circuits to the corresponding BellSouth tariff service by September 11, 2006 and charge the CLP for the applicable disconnect charges and full tariff nonrecurring charges.

CompSouth witness Gillan testified that there is no provision in the *TRRO* permitting BellSouth to establish arbitrary cutoff dates in advance of March 10, 2006, by which CLP orders must be placed. He stated that once a CLP submits an order, it has satisfied its obligation, and the "ball is in BellSouth's court" to implement that order. Witness Gillan proposed, as reflected in his revised Exhibit JPG-1, that BellSouth be required to give the CLPs notice of the de-listed services to which the CLPs subscribe prior to the end of the transition period. The notice should be provided one month prior to the end of the transition period for all services whose transition period ends on March 10, 2006, and three months prior to the end of the transition period for services whose transition period ends on September 10, 2006. If the CLPs do not submit a spreadsheet

prior to the end of the transition period, BellSouth may transition such services to the equivalent BellSouth Section 271 service or tariffed service. No nonrecurring charges should apply for the transitions.

Generally, where an order or a spreadsheet has been provided by the CLP for the conversion of a UNE by the UNE order conversion deadline, and the order has simply not been worked or is in a clarification stage, the Commission believes that the UNE should not be disconnected, but that BellSouth should be able to apply the rate associated with the analogous service, rather than the UNE rate, effective on the first day after the end of the transition period for that service. Contrary to BellSouth's arguments that it should be able to control the effective date of the conversions requested by the CLPs, the Commission believes that since the FCC did not dictate any specific directives on the effective date of CLP requests, the CLPs should be able to specify the effective date of their orders as they usually do, subject to normal intervals.

If BellSouth is not physically able to work all of the orders because many of the scheduled dates are on or near the day after the end of the transition period, the orders should be delayed until they can be worked. However, BellSouth should be able to apply the billing for the alternate service to which the arrangements were scheduled to be converted as of March 11, 2006, for UNEs other than dark fiber loops and transport, or September 11, 2006, for dark fiber loops and transport even in cases where the conversion order has not yet been completed. The Commission also concludes that, contrary to the BellSouth transition plan, no disconnection charges should apply, and in cases where no physical rearrangements are necessary, as indicated in the discussion of Finding of Fact No. 10, no tariffed nonrecurring charges should apply.

The Commission believes that no CLP customer should be disconnected because of a failure of the CLP and BellSouth to adequately communicate or negotiate an alternative, even if the customer is served by a UNE that is being taken out of service effective March 11, 2006. That potential exists for those stand-alone port services and other services that would, under BellSouth's transition plan, be disconnected immediately after the transition period ends if no transition order was received from the CLP. For those services, the Commission believes that whenever a CLP is utilizing stand-alone ports or other services that do not have a tariffed replacement, and the CLP has not submitted a spreadsheet or order to BellSouth as soon as possible prior to the end of the transition period, BellSouth should provide the CLP a list of the ports or other services for which no order has been placed and a notice that the services will be disconnected on the day after the end of the transition period. If BellSouth provides the required notice and the CLP does not request an alternative prior to the end of the transition period, the ports and other services should be disconnected on March 11, 2006. The CLP is obligated to provide adequate notice to its subscribers prior to any disconnection. The Commission believes that this is necessary as an adequate safeguard for those services that would otherwise be disconnected.

CONCLUSIONS

The Commission concludes that in instances where BellSouth has tariffed alternatives to a de-listed UNE, and a CLP does not submit conversion orders or spreadsheets to BellSouth prior to the end of the transition period, such UNEs should be converted to the appropriate tariffed rate effective on the day following the end of the FCC-specified transition period. No disconnection charges should apply, and in cases where no physical rearrangements are necessary for conversion, no tariffed nonrecurring charges should apply. For stand-alone ports and other services for which no tariffed offering exists, the Commission concludes BellSouth must provide each CLP that is utilizing such services that are not covered by a spreadsheet or order as soon as possible prior to the end of the transition period a list of the ports or other services for which no order has been placed, together with a notice that the services will be disconnected on the day after the end of the transition period.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

ISSUE NO. 12 - MATRIX ITEM NO. 13: *TRRO*/FINAL RULES – Should network elements de-listed under Section 251(c)(3) be removed from the Service Quality Measurement (SQM) / Performance Measurement and Analysis Platform (PMAP) / Self-Effectuating Enforcement Mechanism (SEEM)?

POSITIONS OF PARTIES

COMPSOUTH: No. CompSouth argued that network elements de-listed under Section 251(c)(3) should not be removed from the SQM/PMAP/SEEM plan to the extent such network elements are still required pursuant to Section 271. CompSouth maintained that the SQM/PMAP/SEEM performance measurements were instituted to confirm BellSouth's compliance with its Section 271 obligations. CompSouth stated that when switching, loop, and transport network elements are no longer available under Section 251, BellSouth still must provide meaningful, nondiscriminatory access to such network elements pursuant to the Section 271 competitive checklist. CompSouth asserted that it is not compliance with Section 251 obligations that SQM/PMAP/SEEM are designed to measure; it is compliance with Section 271 obligations – including the provision of unbundled elements required even after a finding of no impairment under Section 251. CompSouth maintained that the justification for performance measurement plans in Section 271 proceedings was to ensure there was no "backsliding" by BOCs on their promises to maintain open local telecommunications markets. CompSouth argued that the need for preventing backsliding does not change simply because the Section of the federal Act under which unbundling occurs changes. CompSouth maintained that the Section 271 checklist items that must be unbundled should remain subject to SQM/PMAP/SEEM.

BELLSOUTH: Yes. BellSouth maintained that elements that are no longer required to be unbundled pursuant to Section 251(c)(3) (de-listed elements) should not be subject to the measurements of a SQM/PMAP/SEEM plan. BellSouth asserted that the

purpose of establishing and maintaining a SQM/PMAP/SEEM plan is to ensure that BellSouth provides nondiscriminatory access to elements required to be unbundled under Section 251(c)(3), and if BellSouth fails to meet such measurements, it must pay the CLP and/or the state a monetary penalty. BellSouth argued that Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLPs to provide local service and without access to the ILEC's network on an unbundled basis, the CLP would be impaired in its ability to do so. BellSouth maintained that with a no impairment designation, the FCC found that CLPs were able to economically self-provision or purchase similar services from other providers. BellSouth stated that these other providers are not required to perform under a SQM/PMAP/SEEM plan. BellSouth argued that to continue to impose upon BellSouth a performance measurement, and/or performance penalty, on competitive, commercial offerings is discriminatory and anticompetitive. BellSouth maintained that when elements are de-listed, the ILEC will most likely provide a wholesale service similar to such element pursuant to a commercially negotiated agreement or tariffed service with specific terms and conditions relating to the provision of such service. BellSouth opined that there is no parity obligation for Section 271 elements. Consequently, BellSouth argued, it is neither necessary nor appropriate to compare BellSouth's performance for such elements provided to CLPs to BellSouth's retail performance, and it certainly is not appropriate for BellSouth to be subject to any SQM/SEEM penalties for Section 271 elements.

PUBLIC STAFF: The Public Staff maintained that further consideration of Matrix Item No. 13 should be held in abeyance pending action in Docket No. P-100, Sub 133k. The Public Staff asserted that, in the event that no party raises objections to the Commission's *October 24, 2005 Order* in Docket No. P-100, Sub 133k by November 14, 2005, the new SQM and SEEM plans presented by BellSouth and the CLP Coalition in that docket should be deemed approved, rendering Matrix Item No. 13 moot.

DISCUSSION

BellSouth witness Blake stated in direct testimony that the purpose of establishing and maintaining a SQM/PMAP/SEEM plan is to ensure that BellSouth provides nondiscriminatory access to elements required to be unbundled under Section 251(c)(3), and if BellSouth fails to meet such requirements, it must pay the CLP and/or the state a monetary penalty. Witness Blake maintained that Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLPs to provide service and without access to the ILEC's network, the CLP would be impaired in its ability to do so. Witness Blake contended that when making the determination that an element is no longer necessary and that CLPs are not impaired without access to an ILEC's UNE, the FCC found that CLPs were able to purchase similar services from other providers; these other providers are not required to perform under a SQM/PMAP/SEEM plan. Witness Blake argued that to continue to impose upon BellSouth a performance measurement, and possible penalty, on competitive, commercial offerings is discriminatory and anticompetitive. Witness Blake asserted that

the market, not regulation, is the appropriate dictator of the implications should BellSouth, or any provider, fail to meet its customers' needs.

Witness Blake noted that in May 2005, BellSouth and several CLPs entered into a Stipulated Agreement relating to issues analogous to the issue presented here and filed such agreement with the Georgia Public Service Commission in response to a Commission proceeding relating to whether BellSouth had the right to discontinue reporting and making payments under Tier 2 for performance deficiencies relative to the industry as a whole. Witness Blake maintained that by Order dated June 23, 2005, the Georgia Public Service Commission approved the Stipulation Agreement and included the following provisions:

(1) All DS0 wholesale platform circuits provided by BellSouth to a CLP pursuant to a commercial agreement 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 reserve the right to make any arguments regarding the removal of any items other than the DS0 wholesale platform circuits from SQM/SEEMs in the generic change of law docket to the extent specified in the approved issues list.

Witness Blake stated that the parties reserved the right to address this issue for any service other than the DS0 wholesale platform in each state generic change of law docket, and thus, the CLPs are free to do so.

CompSouth witness Gillan stated in his direct testimony that the performance penalty plans were an important part of BellSouth's commitment to maintain open markets after it had obtained approval to offer long distance services. Witness Gillan noted that the FCC stated in its *September 18, 2002 Order* approving BellSouth's application to provide interLATA long distance service in North Carolina:

> . . . we find that the existing SEEM plans currently in place for these states [including North Carolina] provide assurance that these local markets will remain open after BellSouth receives Section 271 authorization. . . We therefore approve of these plans and accord them the same probative value as we did the Georgia plan. (Paragraph 293 with footnotes omitted)

Witness Gillan further noted that the "probative value" ascribed to SEEM plans by the FCC during its review of BellSouth's Georgia application was as follows:

> Although it is not a requirement for Section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission

> previously has found that the existence of a satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its Section 271 obligations after a grant of such authority.

Witness Gillan asserted that these plans were used as probative evidence that BellSouth would continue to meet its Section 271 obligations after a grant of interLATA authority. As such, witness Gillan maintained that the mere fact that an element has moved from being a Section 251/271 obligation to solely a Section 271 obligation hardly justifies eliminating provisions adopted to ensure compliance with Section 271. Witness Gillan argued that as these plans were adopted to ensure continuing compliance with Section 271, they should continue to apply to those offerings made available to comply with Section 271.

BellSouth witness Blake stated in her rebuttal testimony that she disagreed with witness Gillan and asserted that the requirement to provide nondiscriminatory access to BellSouth's network is a Section 251(c)(3) obligation. Witness Blake noted that the FCC, in granting BellSouth authority to provide long distance services in North Carolina, stated that because the North Carolina performance plan was similar to the Georgia plan, it accorded the plan the same probative value as the Georgia plan and believed that the North Carolina plan provided sufficient incentives to foster post-entry compliance. Witness Blake maintained that the FCC also stated in Paragraph 294 of the *5-State* Section *271 Approval Order* that:

> . . . as we stated in the BellSouth Georgia/Louisiana Order, the performance plans adopted by each state commission do not represent the only means of ensuring that BellSouth continues to provide nondiscriminatory service to competing carriers. In addition to the financial penalties imposed by these plans, BellSouth faces other consequences if it fails to sustain a high level of service to competing carriers, including federal enforcement action pursuant to Section 271(d)(6), liquidated damages under dozens of interconnection agreements, and remedies associated with antitrust and other legal actions.

Thus, witness Blake maintained that it is clear that the FCC did not reply solely on the presence of a performance measurements plan when granting long-distance approval to BellSouth.

Witness Blake further argued that the structure of the SQM/SEEM plan demonstrates that it should not include Section 271 elements. Witness Blake commented that the SQM/SEEM plan establishes a retail analogue or benchmark for each Section 251 element BellSouth provides. Witness Blake stated that this mechanism allows the Commission to compare BellSouth's performance for its retail customers to BellSouth's performance for CLPs and to determine if BellSouth is providing service at parity.

Witness Blake asserted that there is no parity obligation for Section 271 elements. Witness Blake argued that, consequently, it is neither necessary nor appropriate to compare BellSouth's performance for such elements provided to CLPs to BellSouth's retail performance, and it certainly is not appropriate for BellSouth to be subject to any SQM/SEEM penalties for Section 271 elements.

Witness Gillan argued in his rebuttal testimony that the SQM/PMAP/SEEM plans were developed in order to ensure continuing compliance with Section 271, which includes but is not limited to BellSouth's obligation under Section 251(c)(3). Witness Gillan asserted that the FCC's impairment findings with respect to loops, transport, switching, and signaling do not eliminate BellSouth's obligations under Section 271 to continue to offer these elements. Witness Gillan maintained that the purpose of establishing and maintaining a SQM/PMAP/SEEM plan is not to comply with Section 251, but to ensure that BellSouth will continue to meet its Section 271 obligations. Witness Gillan recommended that the Commission continue to apply these plans to any offering required under Section 271.

BellSouth asserted in its Post-Hearing Brief that 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. BellSouth stated that 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. BellSouth stated that if it fails to meet measurements set forth in the plan, it must pay a monetary penalty to a CLP and/or to the State. BellSouth maintained that Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLPs to provide service and without access to the ILEC's network, the CLP would be impaired in its ability to do so.

BellSouth opined that, when making the determination that an element is no longer "necessary" and that CLPs are not "impaired" without access to an ILEC's UNE, the FCC found that CLPs were able to purchase similar services from other providers. BellSouth argued that these other providers are not required to perform under a SQM/PMAP/SEEM plan. BellSouth maintained that to continue to impose upon BellSouth a performance measurement, and possible penalty, on competitive, commercial offerings is discriminatory and anticompetitive. BellSouth noted that, for commercial offerings, the marketplace, not a SQM/PMAP/SEEM plan, becomes BellSouth's penalty plan. BellSouth asserted that if it fails to meet a CLP's provisioning needs, such CLP can avail itself of other providers of the service and BellSouth is penalized because it loses a customer and the associated revenues.

BellSouth maintained that more than 150 CLPs have entered into commercial agreements to purchase BellSouth's DS0 wholesale platform. BellSouth noted that those agreements make available to CLPs a service similar to the UNE-P, but at commercial rates, not rates imposed by a regulator. BellSouth stated that those CLPs, 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.

BellSouth noted that the regional Stipulation approved by the Georgia Public Service Commission on June 23, 2005 was endorsed by a number of CLPs, including AT&T, Covad, MCI, and DeltaCom, all of whom are CompSouth members. BellSouth maintained that there is no legitimate reason that de-listed UNEs should be a part of a UNE performance measurements and penalty plan. BellSouth opined that to not remove such de-listed UNEs from the plan is anticompetitive and unfair to BellSouth.

CompSouth stated in its Post-Hearing Brief that network elements de-listed under Section 251(c)(3) should not be removed from the SQM/PMAP/SEEM, to the extent such network elements are still required pursuant to Section 271. CompSouth argued that the SQM/PMAP/SEEM performance measurements were instituted to confirm BellSouth's compliance with its Section 271 obligations. CompSouth maintained that when switching, loop, and transport network elements are no longer available under Section 251, BellSouth still must provide meaningful, nondiscriminatory access to such network elements pursuant to the Section 271 competitive checklist. CompSouth asserted that it is not compliance with Section 251 obligations that SQM/PMAP/SEEM are designed to measure; it is compliance with Section 271 obligations – including the provision of unbundled elements required even after a finding of no impairment under Section 251.

CompSouth argued that the justification for the institution of performance measurement plans in Section 271 proceedings was to ensure there was no "backsliding" by BOCs on their promises to maintain open local telecommunications markets. CompSouth stated that BellSouth's Briefs in the Section 271 proceedings make this exact point: Section 271 performance measurement plans are in place to ensure compliance with the Section 271 competitive checklist.[56] CompSouth maintained that the need for preventing backsliding does not change simply because the Section of the federal Act under which unbundling occurs changes; the Section 271 checklist items that must be unbundled should remain subject to SQM/PMAP/SEEM.

CompSouth noted that, although BellSouth argued in its Section 271 proceeding that performance measurement plans would ensure ongoing compliance with Section 271 checklist requirements, BellSouth now argues that the performance measurement plans are in place to ensure compliance only with Section 251 obligations. CompSouth asserted that this argument should be rejected for two reasons. First, BellSouth's witness supporting this position could not point to a single pleading, brief, or other document in the Section 271 proceedings before the Commission or the FCC where BellSouth informed regulators that its performance measurement plans were in place to ensure compliance with Section 251 rather than Section 271. CompSouth stated that the BellSouth Brief from the Section 271

[56] *See* CompSouth Cross-Examination Exhibit 3 (Excerpt from BellSouth Brief in Support of Application by BellSouth for Provision of In-Region InterLATA Services in Florida and Tennessee).

proceedings presented at hearing made clear that BellSouth repeatedly referenced compliance with Section 271 as the justification for the existence of the performance measurement plans.[57] CompSouth argued that it is simply incredible to contend that after explicitly stating to the FCC and this Commission that performance measures are to ensure compliance with Section 271 obligations, BellSouth can now – several years after being granted long distance authority – reverse its prior representations and adopt an entirely new (and much more limited) theory explaining its performance measurement obligations.

CompSouth stated that, second, it would make no sense for performance measurements designed to ensure there is no backsliding on Section 271 obligations be limited to Section 251 obligations. CompSouth maintained that, as it discussed thoroughly in the argument on Matrix Item No. 8, BellSouth's Section 271 obligations are independent of and in addition to its Section 251 obligations. CompSouth argued that the competitive checklist requires that BOCs comply with Section 251 requirements (that is checklist item number 1). CompSouth asserted that the checklist goes on to require that BOCs continue to provide unbundled loops, transport, and switching even if those elements are no longer required pursuant to Section 251. CompSouth noted that BellSouth admitted that it must provide nondiscriminatory access to Section 271 checklist elements, just as it must for Section 251 elements. Thus, CompSouth stated, to ensure there is no backsliding on BellSouth's Section 271 obligations for those items "de-listed" under Section 251, the performance measurement plans must continue to apply to those elements as they are provided under Section 271.

The Public Staff noted in its Proposed Order that, on September 30, 2005, BellSouth and AT&T, Covad, ITC^DeltaCom, MCImetro, LLC, MCI, KMC Telecom, Inc., Z-Tel Communications, Inc., and IDS Telecom, LLC (collectively, the CLP Coalition) filed a Joint Motion asking the Commission to approve new SQM and SEEM plans for BellSouth in North Carolina. The Public Staff commented that, on October 24, 2005, the Commission issued an Order granting the Joint Motion and approving the proposed SQM and SEEM plans, unless objections to the plans were filed by November 7, 2005. The Public Staff noted that this deadline was subsequently extended to November 14, 2005.

The Public Staff recommended that the Commission conclude that further consideration of Matrix Item No. 13 should be held in abeyance pending action in Docket No. P-100, Sub 133k. The Public Staff opined that, in the event no party raises objections to the Commission's October 24, 2005 Order in Docket No. P-100, Sub 133k by November 14, 2005, the new SQM and SEEM plans presented by BellSouth and the CLP Coalition in that docket will be deemed approved, rendering Matrix Item No. 13 moot.

The Commission notes that on September 30, 2005, the CLP Coalition, which includes AT&T, Covad, ITC^DeltaCom, MCI, KMC, Z-Tel, and IDS, filed a Joint Motion

[57] *See*, CompSouth Cross-Examination Exhibit 3.

in Docket No. P-100, Sub 133k requesting that the Commission approve a new, stipulated SQM/SEEM plan for BellSouth in North Carolina. The Commission issued an Order which granted the Joint Motion unless objections were received by November 7, 2005. The date for objections was subsequently extended based on a Motion from the Public Staff until November 14, 2005. No objections were filed by any party and the new, stipulated SQM/SEEM plan was approved by the Commission effective November 15, 2005.

The Commission further notes that direct and rebuttal testimony were filed in the instant docket in August 2005 and the evidentiary hearing was held on September 19 and 20, 2005. The hearing was held only days before the Joint Motion to approve the new, stipulated SQM/SEEM plan was filed in Docket No. P-100, Sub 133k. Further, the Proposed Order and Briefs submitted in the instant docket were filed on November 8, 2005, well after the Joint Motion to approve the new, stipulated SQM/SEEM plan was filed. Several member companies of CompSouth participating in this docket are members of the CLP Coalition that entered into the new, stipulated SQM/SEEM plan with BellSouth including Covad, ITC^DeltaCom, MCI, and IDS. The other members of CompSouth participating in this docket that are not part of the CLP Coalition had the opportunity to object to the new, stipulated SQM/SEEM plan in Docket No. P-100, Sub 133k and did not file any objections with the Commission.

Based upon the foregoing, the Commission agrees with the Public Staff that, with the Commission's approval of the new, stipulated SQM/SEEM plan in Docket No. P-100, Sub 133k, effective November 15, 2005, the issue in this docket is moot.

CONCLUSIONS

The Commission concludes that, with the Commission's approval of the new, stipulated SQM/SEEM plan in Docket No. P-100, Sub 133k effective November 15, 2005, the issue in this docket is moot.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

ISSUE NO. 13 - MATRIX ITEM NO. 14: *TRO* / COMMINGLING – What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)?

POSITIONS OF PARTIES

COMPSOUTH: BellSouth is required to allow the CLPs to commingle Section 271 elements with other elements allowed under the commingling rules.

BELLSOUTH: BellSouth is not required to allow the CLPs to commingle Section 271 elements with other elements allowed under the commingling rules. BellSouth is also not required to commingle its services with the services of a CLP or third party.

PUBLIC STAFF: Section 271 offerings can be commingled with Section 251 UNE offerings. The cost of multiplexing equipment should be based on the cost of the higher speed element associated with the multiplexing equipment. Rates for commingling should remain at TELRIC prices for Section 251 UNEs and just and reasonable market prices for Section 271 elements.

DISCUSSION

CompSouth and BellSouth hold opposite views as to whether Section 271 elements should be commingled with Section 251 elements. CompSouth argued "yes," while BellSouth argued "no." The Public Staff concurred with CompSouth. The Commission has exhaustively examined this issue previously in Docket No. P-772, Sub 8, *et al.* In our *Order on Reconsideration* in these dockets we held that commingling of such elements is required. Our analysis here is consistent with the analysis we have set out in these dockets.

In support of commingling, CompSouth witness Gillan referred in his testimony to *TRO* Paragraph 597, under which, he claims, UNEs can be commingled with ILEC wholesale offerings pursuant to any method other than unbundling under Section 251. ILEC wholesale offerings include Section 271 offerings. Witness Gillan explained that BellSouth is required to offer UNE combinations and commingled arrangements. He further explained that the rules regarding combinations are based on the nondiscrimination requirement found in Section 251. "Commingled" arrangements, however, include both Section 251 network elements and network elements and functions offered through a mechanism other than Section 251. Witness Gillan concluded by recommending that the Commission require BellSouth to offer Section 271 elements under the same terms and conditions as apply (or in the case of switching, applied) to the parallel Section 251 offering, except as to price.

BellSouth witness Tipton, on the other hand, disagreed that the FCC had defined wholesale services to include Section 271 elements. Instead, she testified that the FCC has limited wholesale services in Paragraph 579 of the *TRO* to "switched and special access services offered pursuant to tariff." Moreover, by specifically removing the portion of *TRO* Paragraph 584 that includes Section 271 elements in commingling, the FCC made clear, according to witness Tipton, in its *TRO Errata Order* that ILECs are not obligated to combine UNEs and UNE combinations with Section 271 elements. Witness Tipton discounted the CLPs' argument that the FCC's removal of the sentence "We also decline to apply our commingling rule, as set forth in Part VII A, above to services that must be offered pursuant to these checklist items" from Footnote 1990 of the *TRO* showed that the FCC intended that Section 271 elements be subject to commingling. She maintained that the FCC has removed that sentence solely to clarify its change in the body of the *TRO*.

Witness Tipton also argued that the Commission lacked jurisdiction to resolve whether the FCC intended for ILECs to commingle UNEs and UNE combinations with Section 271 elements. Thus, according to BellSouth, "CLPs are permitted to commingle,

or connect, attach, or otherwise link, a UNE or UNE combination with one or more of BellSouth's tariffed access services.

The Commission's review starts with Paragraph 579 of the *TRO*, which provides in pertinent part:

> [A]n 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 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.

The Commission does not believe that "commingling" is the same thing as combining. The Commission agrees with CompSouth witness Gillan's testimony that the FCC has limited the term "combining" to refer to circumstances where both elements being requested by a CLP are required by Section 251 of the Act. If the FCC had wanted to use the term "combine" to refer to connecting 251 UNEs to elements obtained at wholesale, it would have had no need to specifically define "commingling" as above.

Ultimately, the resolution of this issue depends on whether Section 271 elements are wholesale services.[58] As an initial matter, Section 271 elements are wholesale pursuant to the common definition of wholesale *See Black's Law Dictionary*: ("Selling to retailers or jobbers rather than to consumers.")[59] Second, the Commission notes that the FCC considers Section 271 elements to be wholesale as well. In remarks made by FCC Commissioner Abernathy in 2003, she stated: "Bell operating companies still must make the facilities available to competitors on a wholesale basis, because Section 271 requires them to provide competitive access to their loops."[60] Moreover, recently the FCC granted in part a petition for forbearance filed by Qwest Corporation, seeking relief

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[58] *See Covad Communications Co.*, Docket No. UT-043045; 2005 Wash. UTC LEXIS 54, *51 (Wash UTC Feb. 9, 2005) (*Covad Order*) (discussing commingling obligations).

[59] Black's Law Dictionary 823 (5th ed. 1983).

[60] Kathleen Q. Abernathy, Supporting Universal Access to Telecommunications Services: Lessons and Challenges, Remarks at the 7th Annual Florida Communications Policy Seminar (April 3, 2003) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-233045A1.doc).

from statutory and regulatory obligations that apply to it as an ILEC. In the press release announcing the decision, the FCC stated that it

> [l]eaves 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.*[61]

The Commission believes that the FCC and not BellSouth determines what is wholesale and what is not. In Docket No. P-772, Sub 8, BellSouth witness Blake testified with regarding to commingling: "Switching is a Section 271 obligation solely. It's not a wholesale service nor is it a retail service." She continued: "It's not offered on a stand-alone basis as a wholesale service offering." Yet, in this docket, witness Blake contradicted that testimony when she stated that "BellSouth developed and began offering CLPs a commercial *wholesale service which included stand-alone switching and DS0 loop/switching combinations* (including what was known as UNE-P) at commercially reasonable and competitive rates". (emphasis added) The Commission does not believe that BellSouth should be allowed to evade its commingling obligations by classifying Section 271 elements as retail or "neither wholesale nor retail" to suit its purposes. In sum, Section 271 elements are wholesale according to the FCC and this Commission.

The next question to be resolved is whether the FCC has excluded Section 271 elements as a whole from commingling obligations. We find that it has not. First, the FCC removed language from Footnote 1990 of the *TRO* that would have supported BellSouth's view that commingling of Section 271 elements is prohibited. Second, the Commission rejects BellSouth's argument that the phrase "any network elements unbundled pursuant to Section 271" was removed from Paragraph 584 of the *TRO* to evince the FCC's intent to imply that Section 271 elements are not wholesale services. Rather, we interpret removal of that phrase as reflecting the FCC's intent to address commingling of resale services in particular, not to remove Section 271 elements from commingling obligations. Thus, it does not appear that the FCC intended to limit wholesale services to merely tariffed access services. While the FCC certainly refers to tariffed access services in the *TRO* as examples of wholesale services, it has, as discussed above, referred to Section 271 elements recently as wholesale. FCC Rule 51.5 does not qualify "wholesale" to mean only those wholesale services offered by an ILEC through its tariffs. In sum, the FCC has not limited the definition of wholesale in the context of commingling.

Finally, the Commission notes that in Finding of Fact No. 8 it decided that it does not have authority to require BellSouth to include Section 271 elements in ICAs. The Commission's authority to require commingling of Section 251(c)(3) UNEs with

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[61] *FCC Grants Qwest Forbearance Relief in Omaha MSA; Commission Relies on Substantial Evidence of Intermodal Competition,* News, FCC 05-170, 2005 FCC LEXIS 5122 (released. September 16, 2005) (emphasis added).

Section 271 elements is found not under Section 271, however, but is derivative from Section 252(c)(1), which requires state commissions to ensure that ICAs meet the requirements of Section 251.[62] Therefore, ICAs must meet the requirements of the FCC's rules addressing commingling and allow commingling of Section 251 elements with Section 271 elements.

As for rates, rates for Section 251 UNEs should be TELRIC rates and those for Section 271 elements should be "just and reasonable".

CONCLUSIONS

The Commission concludes that Section 271 offerings can be commingled with Section 251 UNE offerings. Rates for commingling will remain at TELRIC prices for Section 251 UNEs and just and reasonable market prices for Section 271 elements. The *TRRO* amendments should reflect the Commission's conclusions on this issue.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

ISSUE NO. 14 - MATRIX ITEM NO. 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 PARTIES

COMPSOUTH: CompSouth stated that BellSouth is required to provide conversion of special access circuits to UNE pricing. CompSouth observed that, in the *TRO*, the FCC required that ILECs provide straightforward procedures for conversion of various wholesale services (including tariffed special access service) to the equivalent UNE or combination of network elements. CompSouth's proposed contract language provides that BellSouth will charge the applicable Commission-approved, TELRIC-compliant, nonrecurring switch-as-is rates for conversions. CompSouth explained that any rate change resulting from the conversion would be effective as of the next billing cycle following BellSouth's receipt of a conversion request from a CLP. CompSouth represented that its proposal provides that a conversion shall be considered termination for purposes of any volume and/or term commitments and/or grandfathered status between a CLP and BellSouth, and that any change from a wholesale service to a network element that requires a physical rearrangement will not be considered to be a conversion for purposes of the ICA.

Further, CompSouth asserted that the Commission should reject the new conversion rates proposed by BellSouth witness Tipton. CompSouth argued that the proposed

[62] See *Covad Order* at *53 (explaining how Washington Commission found it did not have authority over Section 271 elements in interconnection agreements, but did have the authority to require commingling).

rates are not supported by a cost study filed in this docket, and should not be approved without further review and consideration of BellSouth's supporting cost data.

BELLSOUTH: BellSouth maintained that it will convert special access services to UNE pricing, subject to the FCC's service eligibility requirements and limitations on high-cap EELs, once a CLP has these terms incorporated in its contract. BellSouth noted that it will also convert UNE circuits to special access services. BellSouth explained that special access to UNE conversions should be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangements. BellSouth stated that the applicable rate for single DS1 loop conversions in North Carolina is $25.05 and $26.55 for a project consisting of 15 or more loops submitted on a single spreadsheet. In addition, BellSouth noted that the Commission ordered a rate of $11.28, which applies for EEL conversions and, until new rates are issued, BellSouth proposes $11.28 for EEL conversions and interoffice transport facility conversions [Commission Note: This rate of $11.28 is reflected in BellSouth's revised North Carolina UNE Price List filed on May 3, 2005, in Docket No. P-100, Sub 133d]. BellSouth contended that 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.

PUBLIC STAFF: The Public Staff stated that BellSouth should be required to provide conversion of special access circuits to UNE pricing. The Public Staff asserted that the conversions should be made pursuant to the terms of the ICA; and the rates should be those proposed by BellSouth.

DISCUSSION

In the *TRO*, at Paragraphs 585-589, the FCC addressed conversions concluding that carriers may convert UNEs and UNE combinations to wholesale services (or vice versa), and in the *TRRO*, at Paragraphs 229-232, the FCC observed that the BOCs urged the FCC to prohibit conversions, but the FCC concluded that a bar on conversions would be inappropriate and the FCC upheld its *TRO* position. As background information, the Commission provides that in the *TRO*, at Paragraphs 585-589 the FCC states as follows:

> 585. We decline the suggestions of several parties to adopt rules establishing specific procedures and processes that incumbent LECs and competitive LECs must follow to convert wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale services. Because both the incumbent LEC and requesting carriers have an incentive to ensure correct payment for services rendered, and because both parties are bound by duties to negotiate in good faith, we conclude that these carriers can establish any necessary procedures to perform conversions with minimal guidance on our part. [Footnotes omitted.]

586. We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable. To the extent a competitive LEC fails to meet the eligibility criteria for serving a particular customer, the serving incumbent LEC may convert the UNE or UNE combination to the equivalent wholesale service in accordance with the procedures established between the parties. Likewise, to the extent a competitive LEC meets the eligibility requirements and a particular network element is available as a UNE pursuant to our impairment analysis, it may convert the wholesale service used to serve a customer to UNEs or UNE combinations in accordance with the relevant procedures. Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality. We recognize that conversions may increase the risk of service disruptions to competitive LEC customers because they often require a competitive LEC to groom interexchange traffic off circuits and equipment that are already in use in order to comply with the eligibility criteria. Thus, requesting carriers should establish and abide by any necessary operational procedures to ensure customer service quality is not affected by conversions. [Footnotes omitted.]

587. We decline to require incumbent LECs provide requesting carriers an opportunity to supersede or dissolve existing contractual arrangements through a conversion request. Thus, to the extent a competitive LEC enters into a long-term contract to receive discounted special access services, such competitive LEC cannot dissolve the long-term contract based on a future decision to convert the relevant circuits to UNE combinations based on changes in customer usage. We recognize, however, that once a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time. We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service. Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions. Moreover, we conclude that such charges are inconsistent with Section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage. [Footnotes omitted.]

588. We conclude that conversions should be performed in an expeditious manner in order to minimize the risk of incorrect payments. We expect carriers to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts. We decline to adopt ALTS's suggestion to require the completion of all necessary billing changes within ten days of a request to perform a conversion because such timeframes are better established through negotiations between incumbent LECs and requesting carriers. We recognize, however, that converting between wholesale services and UNEs (or UNE combinations) is largely a billing function. We therefore expect carriers to establish appropriate mechanisms to remit the correct payment after the conversion request, such as providing that any pricing changes start the next billing cycle following the conversion request. [Footnotes omitted.]

589. As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

BellSouth witness Tipton testified that BellSouth is required to convert special access services to UNE pricing, subject to the FCC's limitations on high-capacity EELs, and to convert UNE circuits to special access services, provided that the requesting CLP has these terms incorporated into its contract. Witness Tipton stated that BellSouth believes the same conversion rate should apply regardless of the conversion and has offered that the conversion be effective as of the next billing cycle following receipt of a complete and accurate request for such a conversion. However, witness Tipton maintained that conversions should be limited to switch-as-is arrangements. Witness Tipton explained that if physical changes to the circuit are required, it should not be considered a conversion, and the full nonrecurring disconnect and installation charges should apply. In addition, witness Tipton observed that conversions should be considered termination for purposes of any applicable volume and term discount plan or grandfathered arrangements. Witness Tipton noted that the Commission previously ordered a rate of $11.28 for EEL conversions in Docket No. P-100, Sub 133d. Witness Tipton proposed the following rates in North Carolina for switch-as-is conversions:

$25.05 – first single DS1 or lower capacity loop conversion on an LSR (Local Service Request) and $3.53 for additional loop conversions on that same LSR; and
$26.55 – first loop conversion on a project consisting of 15 or more such loops in a state submitted on a single spreadsheet and $5.03 for additional loops on that same spreadsheet.

$40.25 – for DS3 and higher capacity loops and for interoffice transport. conversions, for the first single conversion on an LSR and $13.51 for additional single conversions on that same LSR; and
$64.04 – for the first element on a project consisting of 15 or more such elements in a state submitted on a single spreadsheet and $25.62 for additional conversions on that same spreadsheet.

Witness Tipton provided Exhibit PAT-5 with the filing of her rebuttal testimony; Exhibit PAT-5 presents "BellSouth's Redlines to Direct Testimony Exhibit JPG-1 of Joseph P. Gillan". Witness Tipton specifically stated for Matrix Item No. 15 of Exhibit PAT-5 that "BellSouth can agree to the language below as modified." (Modifications indicated with shading of underlined words.)

> Conversion of Wholesale Services to Network Elements or Network Elements to Wholesale Services. Upon request, BellSouth shall convert a wholesale service, or group of wholesale services, to the equivalent Network Element or Combination that is available to CLEC pursuant to Section 251 of the Act and under this Agreement, or convert a Network Element or Combination that is available to CLEC pursuant to Section 251 of the Act and under this Agreement to an equivalent wholesale service or group of wholesale services offered by BellSouth (collectively "Conversion"). BellSouth shall charge the applicable nonrecurring switch-as-is rates for Conversions to specific Network Elements or Combinations found in Exhibit A. BellSouth shall also charge the same nonrecurring switch-as-is rates when converting from Network Elements or Combinations. Any rate change resulting from the Conversion will be effective as of the next billing cycle following BellSouth's receipt of a complete and accurate Conversion request from CLEC. A Conversion shall be considered termination for purposes of any volume and/or term commitments and/or grandfathered status between CLEC and BellSouth. Any change from a wholesale service/group of wholesale services to a Network Element/Combination, or from a Network Element/Combination to a wholesale service/group of wholesale services that requires a physical rearrangement will not be considered to be a Conversion for purposes of this Agreement. BellSouth will not require physical rearrangements if the Conversion can be completed through record changes only. Orders for Conversions will be handled in accordance with the guidelines set forth in the Ordering Guidelines and Processes and CLEC Information Packages as referenced in Sections 1.13.1 and 1.13.2 below.

In addition, witness Tipton provided in her Exhibits PAT-1 and PAT-2, the following:

> 1.13.1 For information regarding Ordering Guidelines and Processes for various Network Elements, Combinations and Other Services,

<<customer_short_name>> should refer to the 'Guides' Section of the BellSouth Interconnection Web site.

1.13.2 Additional information may also be found in the individual CLEC Information Packages located at the 'CLEC UNE Products' on BellSouth's Interconnection Web site at: www.interconnection.bellsouth.com/guides/html/unes.html.

[Commission Note: The Commission notes that there is no dispute over the language in Section 1.13.1 and Section 1.13.2.]

CompSouth witness Gillan did not file any direct or rebuttal testimony addressing Matrix Item No. 15, except that in his Exhibit JPG-1 and his First Revised Exhibit JPG-1, witness Gillan provided his proposed language for Matrix Item No. 15. As indicated above, BellSouth agreed with witness Gillan's proposed language except for the modifications which have been included and indicated above by the shading of underlined words which reference Section 251 of the Act.

In its Brief, CompSouth observed that BellSouth is required to provide conversion of special access circuits to UNE pricing. CompSouth explained that its proposed contract language provides that BellSouth will charge the applicable nonrecurring "switch-as-is" rates for conversions; any rate change resulting from the conversion would be effective as of the next billing cycle following BellSouth's receipt of a conversion request from a CLP, as required by the *TRO*; a conversion should be considered termination for purposes of any volume and/or term commitments and/or grandfathered status between a CLP and BellSouth; and any change from a wholesale service to a network element that requires a physical rearrangement will not be considered to be a conversion for purposes of the ICA.

CompSouth stated that it agrees with BellSouth that, to avoid the "wasteful and unnecessary charges" prohibited by the FCC, conversions should be priced based on a "switch-as-is" basis. CompSouth stated that the Commission has previously approved a conversion charge for EELs (that involves conversion of both loop and transport elements) of $5.59. [Commission Note: CompSouth indicated, by footnote, that the $5.59 charge was reflected in witness Tipton's direct testimony; the Commission believes that this number should be $11.28, as that is what witness Tipton testified to and it was not changed by her errata sheet.] Next, CompSouth asserted that witness Tipton's direct testimony includes proposed conversion rates that would result in a fivefold increase in the rates CLPs pay for conversions. CompSouth stated that BellSouth proposes a rate of $24.89 for the first single DS1 or lower capacity loop conversion submitted on a LSR ordering form, and $3.51 for additional conversions on that LSR. For larger projects, CompSouth represented that the first conversion would cost $26.37 for the first loop and $4.99 for each additional loop on the same LSR. CompSouth stated that BellSouth's proposed conversion rates for DS3 loops would be (depending on the size of the project) between $10.28 and $64.09 for the first conversion and $13.52 to $25.63 for additional loop conversions. [Commission Note:

Again, the Commission notes that CompSouth indicated, by footnote, that these numbers were from witness Tipton's direct testimony; the Commission believes that these numbers, although close, are incorrect, as that is not what is provided in witness Tipton's direct testimony.]

CompSouth asserted that BellSouth's proposed rates are not supported by a cost study, nor did BellSouth submit any form of supporting documentation in this proceeding justifying the proposed rates. Thus, CompSouth opined that there is no record evidence to justify adoption of the conversion rates presented in witness Tipton's testimony and for that reason alone the BellSouth proposal should be rejected. Further, CompSouth stated that the Commission should not give final approval to any increased conversion rate until the parties have had an opportunity to review and question the BellSouth cost studies and present their arguments regarding those studies to the Commission.

In its Proposed Order, the Public Staff commented that even though the parties' ICA proposals are nearly identical, the current negotiations have not led to an agreement as of this date. The Public Staff observed that the language proposed by CompSouth witness Gillan in his First Revised Exhibit JPG-1, at Page 35, states that BellSouth must convert wholesale service to UNE service (or vice versa) pursuant to the ICA; and that BellSouth witness Tipton suggested ICA language for conversion in Exhibit PAT-5, at Page 40, where she proposes identical language except that her proposal makes the conversion pursuant to the ICA and Section 251 of the Act.

The Public Staff observed that neither party stated why the reference to Section 251 should or should not be part of the ICA. The Public Staff opined that it was unable to determine why BellSouth seeks to reference one Section of the Act – Section 251 – and no other Sections. The Public Staff maintained that other Sections will continue to apply after the conversion is complete. The Public Staff recommended that the Commission should conclude that the new ICA language for this issue as proposed by witness Gillan in his First Revised Exhibit JPG-1 should be adopted.

Further, the Public Staff stated that both parties are in agreement on all other terms, conditions, and timeframes for conversions, except that BellSouth has proposed rates that were not addressed by CompSouth. The Public Staff stated that the Commission should find that the rates proposed by witness Tipton are fair and reasonable and should be approved as BellSouth's rates for conversions.

Based upon the foregoing, the Commission understands that BellSouth is required to provide conversion of special access circuits to UNE pricing and that there are only two questions that need to addressed to resolve this issue – should BellSouth's language referencing Section 251 be required to be included in the contract language and what are the appropriate rates for conversions.

With respect to the contract language, the only difference is in the first sentence in the proposed language. That sentence is stated as follows with underlined text

indicating the difference - BellSouth wants to include the Section 251 references as underlined, whereas CompSouth and the Public Staff proposed that it be excluded:

> Upon request, BellSouth shall convert a wholesale service, or group of wholesale services, to the equivalent Network Element or Combination that is available to CLEC pursuant to Section 251 of the Act and under this Agreement, or convert a Network Element or Combination that is available to CLEC pursuant to Section 251 of the Act and under this Agreement to an equivalent wholesale service or group of wholesale services offered by BellSouth (collectively "Conversion").

The Commission has reviewed the *TRO* language regarding conversions, as cited above in regard to *TRO* Paragraphs 585-589, and has found nothing that compels it to believe that BellSouth's proposed Section 251 reference should be required. The Commission simply is not convinced by the very limited evidence that BellSouth's reference to only Section 251 of the Act is necessarily appropriate. Accordingly, the Commission believes that the language proposed by CompSouth witness Gillan and agreed to by the Public Staff should be adopted.

In regard to the appropriate rates for conversions, the Commission notes that on December 5, 2005, BellSouth filed a letter, in this docket, stating that since the hearing it has updated the rates that it will offer its wholesale customers in its standard interconnection agreement. The Commission understands that BellSouth's proposed switch-as-is conversion rates would be nonrecurring charges. BellSouth provided updated rates as follows:

> $25.03 ~~$25.05~~ – first single DS1 or lower capacity loop conversion on an LSR and $3.53 – additional loop conversions on that same LSR; and
> $26.52 ~~$26.55~~ – first loop conversion on a project consisting of 15 or more such loops submitted on a single spreadsheet and $5.02 ~~$5.03~~ for additional loops on that same spreadsheet. [The rates shown with strikethrough indicate the rates BellSouth witness Tipton had previously proposed.]
>
> $36.90 ~~$40.25~~ – for DS3 and higher capacity loops and for interoffice transport conversions, for the first single conversion per circuit on an order and $16.15 per circuit ~~$13.51~~ for additional single conversions on that same order; and
> $38.39 ~~$64.04~~ – for the first circuit on a project consisting of 15 or more such elements submitted on a single spreadsheet and $17.64 ~~$25.62~~ for each additional circuit conversion on that same spreadsheet. [The rates shown with strikethrough indicate the rates BellSouth witness Tipton had previously proposed.]

The Commission is inclined to accept these revised rates for switch-as-is conversions, as proposed by BellSouth. The Commission notes that for the above rates that have been changed by BellSouth, they are all lower than originally proposed, except for one - the new $16.15 rate represents about a 20% increase, but on the other

side it is noteworthy that the $38.39 rate represents about a 40% decrease and the $17.64 rate represents about a 31% decrease. The Commission understands that CompSouth witness Gillan did not provide any direct or rebuttal testimony on the switch-as-is conversion rates which were first presented in the direct testimony of witness Tipton. Further, during our hearing, there were no cross-examination questions by CompSouth of witness Tipton regarding these specific conversion rate proposals. And CompSouth did not file any comments or objection to BellSouth's December 5, 2005 letter, wherein BellSouth provided revised rates. In addition, in its Proposed Order, the Public Staff concluded that BellSouth's proposed rates, as presented in witness Tipton's prefiled testimony, were fair and reasonable. Based upon the foregoing, the Commission believes it is reasonable to adopt BellSouth's revised rates for switch-as-is conversions, as provided in BellSouth's December 5, 2005 letter.

CONCLUSIONS

The Commission concludes that the contract language concerning the conversions issue, as proposed by CompSouth witness Gillan, in his First Revised Exhibit JPG-1 should be adopted. That language is worded as follows:

> Conversion of Wholesale Services to Network Elements or Network Elements to Wholesale Services. Upon request, BellSouth shall convert a wholesale service, or group of wholesale services, to the equivalent Network Element or Combination that is available to CLEC pursuant to this Agreement, or convert a Network Element or Combination that is available to CLEC under this Agreement to an equivalent wholesale service or group of wholesale services offered by BellSouth (collectively "Conversion"). BellSouth shall charge the applicable nonrecurring switch-as-is rates for Conversions to specific Network Elements or Combinations found in Exhibit A. BellSouth shall also charge the same nonrecurring switch-as-is rates when converting from Network Elements or Combinations. Any rate change resulting from the Conversion will be effective as of the next billing cycle following BellSouth's receipt of a complete and accurate Conversion request from CLEC. A Conversion shall be considered termination for purposes of any volume and/or term commitments and/or grandfathered status between CLEC and BellSouth. Any change from a wholesale service/group of wholesale services to a Network Element/Combination, or from a Network Element/Combination to a wholesale service/group of wholesale services that requires a physical rearrangement will not be considered to be a Conversion for purposes of this Agreement. BellSouth will not require physical rearrangements if the Conversion can be completed through record changes only. Orders for Conversions will be handled in accordance with the guidelines set forth in the Ordering Guidelines and Processes and CLEC Information Packages as referenced in Sections 1.13.1 and 1.13.2 below.

Accordingly, conversions should be made pursuant to the terms of the ICA. The

Commission notes that there is no dispute over BellSouth's proposed language for Section 1.13.1 and Section 1.13.2. Further, the Commission concludes that the switch-as-is conversion rates, as set forth hereinabove, as proposed by BellSouth in its December 5, 2005 filing should be accepted as the appropriate rates.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

ISSUE NO. 15 - MATRIX ITEM NO. 16: *TRO* / CONVERSIONS – What are the appropriate rates, terms, and conditions, and effective dates, if any, for conversion requests that were pending on the effective date of the *TRO*?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth observed that the FCC provided rules for conversions in the *TRO* in 2003. CompSouth stated that conversions pending on the effective date of the *TRO* should be handled using conversion provisions set forth in the amended ICAs. CompSouth contended that its approach gives CLPs the benefit of conversion policies adopted by the FCC long ago, but not implemented by BellSouth until the newly amended ICAs are effective.

BELLSOUTH: BellSouth asserted that the contract language contained in a CLP'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*. BellSouth stated that conversion rights, rates, terms, and conditions are not retroactive and become effective once an interconnection agreement is amended.

PUBLIC STAFF: The Public Staff stated that the rates, terms, and conditions for conversions should be retroactive to the *TRO* effective date, except that requests for conversions that were pending as of the effective date of the *TRO* should be processed under the conditions that existed prior to the *TRO*.

DISCUSSION

In its Brief, BellSouth noted that neither BellSouth nor CompSouth proposed specific language on this issue. BellSouth explained that the parties' dispute concerns the CLPs' unfounded claims for retroactive conversion rights.

BellSouth witness Tipton testified that BellSouth's position on this issue is that the terms of the interconnection agreements in effect on the effective date of the *TRO* are the appropriate rates, terms, conditions, and effective dates for EEL conversion requests that were pending on that date. In her direct testimony, witness Tipton stated that "some carriers may try to claim that the *TRO* somehow held a retroactive requirement for ILECs to honor 'pending CLP requests' for conversion of individual elements, rather than combinations, to UNEs in spite of the fact that no rates, terms, or conditions for such conversions existed in interconnection agreements and ILECs had

had no obligation to perform such conversions up to that point." Witness Tipton argued that there is no basis for such a claim. Witness Tipton stated that in the *TRO*, the FCC held, for the first time, that ILECs had an obligation to convert special access circuits to stand-alone UNEs at TELRIC rates.

In rebuttal testimony, witness Tipton testified that any conversions pending on the effective date of the *TRO* should be guided by whether the CLP had the appropriate conversion language in its interconnection agreement at the time the *TRO* became effective. Witness Tipton stated that to the extent this is what CompSouth is proposing then BellSouth is in agreement. Further, witness Tipton asserted that there is nothing in the FCC's rules to indicate that these conversion provisions should be applied retroactively. Accordingly, BellSouth stated that conversion rights, rates, terms, and conditions are not retroactive and become effective once an interconnection agreement is amended.

In addition, BellSouth observed that it had attempted to implement changes in law, including contract language, that would have allowed CLPs to convert from special access services to UNEs following the *TRO,* yet many CLPs have not agreed to contract language that includes such provisions. However, BellSouth opined that it is not surprising that these CLPs 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. BellSouth stated that CLPs that did not execute *TRO* amendments presumably decided that it was to their benefit to retain these de-listed UNEs in lieu of obtaining conversion rights. In any event, BellSouth pointed out that 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. However, BellSouth observed that 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."[63]

CompSouth witness Gillan did not file any direct or rebuttal testimony addressing Matrix Item No. 16, except that in his Exhibit JPG-1 and his First Revised Exhibit JPG-1, witness Gillan stated for Matrix Item No. 16 that "Conversions pending on the effective date of the *TRO* should be handled using conversion provisions set forth in the amended ICAs."

In its Brief, CompSouth asserted that the rates, terms, and conditions for conversions pending on the effective date of the *TRO* should be those that reflect the FCC's decisions in the *TRO*. CompSouth explained that once conversion language reflecting the *TRO* is included in an ICA, the parties should treat conversions pending as of the 2003 effective date of the *TRO* based on the FCC's forward-looking conversion procedures that were established in the *TRO*.

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[63] *TRO* at Paragraph 588.

CompSouth observed that the FCC explicitly addressed the question of how to handle pending conversion requests when it issued the *TRO*. Specifically, in Paragraph 589, the FCC stated:

> As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

CompSouth opined that the FCC tied pricing provisions regarding conversions to the effective date of the *TRO*. CompSouth observed that CLPs have been waiting for over two years for BellSouth to implement the portions of the *TRO* that improved pricing, terms, and conditions for conversions. CompSouth maintained that its position simply provides that the explicit language in the *TRO* regarding pending conversions will, at last, be implemented in BellSouth ICAs.

In its Proposed Order, the Public Staff observed that the position of CompSouth is that the rates, terms, conditions, and effective dates for conversions pending on the *TRO* effective date should be those in the amended ICA, (i.e., conversion requests that were pending on the effective date of the *TRO* should be handled using the conversion procedures set forth in the amended ICAs) whereas, BellSouth believes that the rates, terms, conditions, and effective dates for conversions pending on the *TRO* effective date should be those that were in effect on that date.

The Public Staff observed that in the *TRO*, at Paragraph 585, the FCC specifically declined to set specific procedures and processes for conversions and, at Paragraph 587, the FCC specifically declined to require that ILECs give CLPs an opportunity to supersede or dissolve contractual arrangements. The Public Staff stated that when deciding differences between parties in arbitration decisions, the Commission has generally adopted the concept of true-ups, i.e., the rates or terms and conditions for a particular situation become effective when the regulatory body, either the Commission or the FCC, approves the change.

The Public Staff opined that the logic of this concept is simple. However, the Public Staff explained that effecting changes to the terms and conditions of ICAs is not a simple process - it normally takes a considerable amount of time for the parties to come to agreement on the changes necessary to implement various orders of the Commission and FCC. Therefore, the Public Staff maintained that it would be unfair to allow a time delay to deny a party the benefit of the changes required by an order.

The Public Staff believes that the rates, terms, conditions, and effective dates for conversions in the amended ICA should be retroactive back to the *TRO* effective date. However, the Public Staff explained that requests for conversions that were pending as of the effective date of the *TRO* should be processed under the conditions that existed

prior to the *TRO*, as CLPs could not have expected to convert arrangements under conditions other than those in the laws and agreements that were in effect at the time.

Based upon the foregoing, the Commission is convinced to agree with the Public Staff that the rates, terms, conditions, and effective dates for conversions in the amended ICA should be retroactive back to the *TRO* effective date, which the Commission understands to be October 2, 2003, which is the date the *TRO* was published in the Federal Register. Furthermore, the Commission believes that it is reasonable to conclude that requests for conversions that were pending as of the effective date of the *TRO* should be processed under the conditions that existed prior to the *TRO*, as CLPs could not have expected to convert arrangements under conditions other than those in the laws and agreements that were in effect at that time.

CONCLUSIONS

The Commission concludes that the rates, terms, and conditions for conversions should be retroactive back to the *TRO* effective date, except that requests for conversions that were pending as of the effective date of the *TRO* should be processed under the conditions that existed prior to the *TRO*.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

ISSUE NO. 16 - MATRIX ITEM NO. 17: *TRO*/LINE SHARING – Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new customers after October 1, 2004?

POSITIONS OF PARTIES

COMPSOUTH: Yes. CompSouth argued that BellSouth is obligated to provide line sharing to new customers after October 1, 2004. CompSouth maintained that line sharing is the process by which a CLP provides digital subscriber line (xDSL) service over the same copper loop that BellSouth uses to provide retail voice service, with BellSouth using the low frequency portion of the loop and a CLP using the high frequency spectrum of the loop. CompSouth asserted that BellSouth is required to provide line sharing pursuant to Section 271 of the Act. CompSouth stated that line sharing is a loop transmission facility that must be provided by BellSouth pursuant to checklist item 4 of the Section 271 competitive checklist. CompSouth noted that BellSouth acknowledged that if line sharing constitutes a Section 271 checklist loop facility, then BellSouth has an obligation to provide line sharing under Section 271 even if it has no further obligation to provide it under Section 251. CompSouth stated that BellSouth disputes, however, thaf line sharing is required by the Section 271 checklist. CompSouth argued that this assertion by BellSouth lacks credibility; when it was seeking long distance authority under Section 271, BellSouth asserted that the availability of line sharing provided important evidence that BellSouth was meeting its checklist item 4 obligations. CompSouth noted that, moreover, in every FCC Order granting Section 271 authority, line sharing was treated as a checklist item 4 element.

CompSouth argued that now that BellSouth wants to be rid of line sharing obligations, it reverses course and attempts to delete line sharing from the competitive checklist.

BELLSOUTH: No. BellSouth maintained that it is not obligated to provide new line sharing arrangements after October 1, 2004 (See *TRO*, Paragraphs 199, 260-262, and 264-265). BellSouth asserted that in the absence of ILEC-provided line sharing, CLPs have numerous options available for serving the broadband needs of their respective end-user customers that create better competitive incentives. BellSouth stated that, for example, CLPs can: (1) utilize line splitting; (2) purchase the entire loop facility; (3) provision the end-user customer with Integrated Services Digital Network (ISDN) Digital Subscriber Line (IDSL) service; (4) partner with a cable broadband provider to provide cable modem broadband service; (5) purchase BellSouth's tariff wholesale DSL offering; (6) provision the end-user with a dedicated or shared T1; (7) deploy a fixed wireless broadband technology; (8) partner with a satellite broadband provider; and finally (9) build their own loop facilities or lease loop facilities from a third party. BellSouth asserted that there is no Section 271 line sharing obligation, and, even if such an obligation existed (and it does not), the FCC has forborne from applying it to BellSouth.

PUBLIC STAFF: The Public Staff stated that the Commission should find that the parties should work together to create language that incorporates the Commission's findings on terms and conditions for line sharing arrangements that are grandfathered, fall under the FCC's transition plan, and will be transitioned to a Section 271 element.

DISCUSSION

BellSouth witness Fogle stated in his direct testimony that the FCC has made clear in Paragraphs 199, 260, 261, 262, 264, and 265 of the *TRO* that BellSouth is not obligated to provide new line sharing arrangements after October 1, 2004. Witness Fogle noted that BellSouth has approximately 300 interconnection agreements that contain line sharing, however, only nine CLPs have active line sharing arrangements being used to serve end-user customers. Witness Fogle maintained that eight of the nine CLPs have placed new orders for new line sharing arrangements after October 1, 2004, and are continuing to pay line sharing rates that are significantly lower than paying for unbundled access to the entire loop, even though the FCC has stated in Paragraph 260 of the *TRO*:

> . . . we find that allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives.

Witness Fogle asserted that these CLPs should be ordered to pay the stand-alone loop rate for all line sharing arrangements ordered since October 2004 consistent with the rules set forth by the FCC.

Witness Fogle argued that line sharing is not a necessary component for CLPs to have to be able to continue to offer broadband service. Witness Fogle stated that CLPs have numerous options available for serving the broadband needs of their respective end-user customers, when line sharing is not available, that create better competitive incentives.

Witness Fogle also asserted that since the FCC's Order eliminating line sharing, one of the most active line sharing CLPs, Covad, has issued a series of press releases demonstrating its ability to compete without line sharing. Witness Fogle maintained that Covad has actively been signing line splitting agreements, utilizing the entire loop to offer both broadband and voice, and is even deploying fixed wireless broadband technology, all since the FCC rules eliminating line sharing were issued. Witness Fogle also noted that Covad is aggressively pursuing the deployment of a fixed wireless broadband solution. Witness Fogle stated that in the October 1, 2004 issue of America's Network magazine, Covad clearly articulated its plan to provide broadband capability via WiMax technology in 2005.

Witness Fogle asserted that CLPs, especially Covad, are not impaired without access to line sharing.

In his rebuttal testimony, witness Fogle stated that even though the FCC has made it clear that BellSouth is not obligated to provide new line sharing arrangements after October 1, 2004, the CLPs propose interconnection agreement language that would obligate BellSouth to continue to provide access to line sharing as an unbundled network element. Witness Fogle argued that the CLPs have not provided any explanation for their line sharing contract language. Witness Fogle maintained that although CompSouth witness Gillan included contract language, he failed to include any discussion in his testimony supporting that language, which is likely because this issue is more of a legal dispute, which both parties have briefed. Witness Fogle stated that for more information on this issue, he refers the Commission to BellSouth's summary judgment briefs.

BellSouth noted in its Post-Hearing Brief that this issue concerns Contract Provisions outlined in Exhibit EF-1, Section 3.1.2.

BellSouth argued that the FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004. BellSouth asked the Commission to implement this aspect of the *TRO* and require CLPs to either eliminate line sharing from their interconnection agreements entirely if a CLP has no line sharing arrangements in place, or to include language that implements the *TRO's* binding transition mechanism for access to the high frequency portion of the loop if a CLP has active line sharing arrangements. BellSouth asserted that its request is both reasonable and appropriate, particularly given that only nine CLPs region-wide have active line sharing arrangements in place.

BellSouth maintained that, in an effort to avoid implementing the *TRO* and the federal rules concerning line sharing, however, the CLPs (primarily Covad) claim that line sharing is a Section 271 obligation. BellSouth asserted that this argument fails. BellSouth maintained that the language of Section 271 does not require line sharing. BellSouth noted that checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services." BellSouth stated that 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. BellSouth thus stated that it meets its checklist item 4 obligations by offering access to unbundled loops and the "transmission" capability on those facilities. BellSouth noted that the CLPs argued 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. BellSouth maintained that this argument makes no sense. To make it, BellSouth argued, the CLPs must ignore the portion of the definition of the HFPL that defines the 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.

BellSouth noted that 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. BellSouth stated that certainly the buyer would not consider the icing alone a "form" of birthday cake. On the contrary, BellSouth argued, 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.

BellSouth maintained that, notwithstanding federal law, Covad and other CLPs flatly refuse to include the FCC's transition plan in Section 252 interconnection agreements, thus necessitating a resolution of this issue. BellSouth stated that, notably, neither Covad nor any other CLP witness filed testimony that explained their view. Instead, BellSouth noted, CompSouth's witness filed contract language addressing the issue, but readily acknowledged he did not sponsor any testimony (aside from his support of Covad's Section 271 line sharing theory) to support his proposed contract language.

BellSouth asserted that, beyond the obvious fact that line sharing cannot credibly consist of a form of loop transmission, the CLP argument is that, notwithstanding the clear language of the FCC in its *TRO*, CLPs 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. BellSouth argued that this position is deeply illogical and inconsistent with both the statutory scheme and the FCC's binding decisions.

First, BellSouth opined that, even if line sharing could be construed to be a Section 271 network element, the state commissions have no authority to require an ILEC to include Section 271 elements in a Section 252 interconnection agreement.

Second, BellSouth argued, if that is not sufficient, the CLPs' theory that line sharing is still available as a Section 271 element is illogical because it would render irrelevant the FCC's carefully-calibrated transition plan to wean CLPs away from the use of line sharing and to transition them to other means of accessing the facilities, such as access to whole loops and line splitting, that do not have the same anticompetitive effects that the FCC concluded are created by line sharing. BellSouth stated that, 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." BellSouth argued that, because of the inherent difficulties in pricing access to just the HFPL (difficulties that exist regardless of whether access is required under Section 251 or, as Covad 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 CLPs "in a more fair competitive position."

Indeed, BellSouth asserted, the FCC expressly found continued unlimited access to line sharing to be anticompetitive and contrary to the core goals of the Act. BellSouth noted that the FCC stated in Paragraph 261 of the *TRO* that 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.*** [Emphasis added.]

BellSouth argued that there is no basis to conclude that the FCC, having eliminated these anticompetitive consequences under Section 251, has allowed these same untoward effects to go on unchecked under Section 271. BellSouth asserted that, on the contrary, subsequent FCC Orders confirm that the federal agency continues to believe that it has required CLPs to obtain, in lieu of line sharing, a whole loop or engage in line splitting. Thus, in its very recent *BellSouth Declaratory Ruling Order,*[64] the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop."[65] BellSouth stated that, moreover, far from suggesting an open-ended Section 271 obligation to allow line sharing, this very recent FCC decision reiterates that line sharing was required "***only*** under an express three-year phase out plan."[66] BellSouth argued that the FCC's statement cannot be squared with the notion that line sharing is also required indefinitely under Section 271.

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[64] *See Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251 (March 25, 2005) (*BellSouth Declaratory Order*).

[65] *BellSouth Declaratory Order* at Paragraph 35.

[66] *BellSouth Declaratory Order* at Paragraph 5, n. 10 (emphasis added).

BellSouth asserted that there is not a single mention of line sharing in Section 271. BellSouth maintained that it bears repeating that, by its plain text, Section 271 does not require line sharing when such access is no longer mandated as a separate UNE (and thus required under Section 271 checklist item 2). Instead, BellSouth argued, checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services." BellSouth opined that the FCC has authoritatively defined the "local loop" in 47 C.F.R. § 51.319(a) as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises. BellSouth stated that it 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.

BellSouth stated that, even if (hypothetically) Section 271 did require line sharing, the FCC's recent forbearance decision would have removed any such obligation.[67] BellSouth stated that it understands that Covad disputes the fact that line sharing is included in the relief granted in the *Broadband 271 Forbearance Order.* BellSouth maintained that a review of the record in that case, however, demonstrates that the relief granted extended to all broadband elements, including the HFPL. BellSouth noted that Chairman (then Commissioner) Martin stated:

> . . . While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of Section 271 with respect to line sharing [citing *Verizon Petition for Forbearance*]. Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any Section 271 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. [68]

BellSouth acknowledged 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. BellSouth noted that 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, BellSouth maintained that 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, BellSouth argued that the lack of any additional language

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[67] *Memorandum Opinion and Order*, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 (*Broadband 271 Forbearance Order*).

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

that explicitly addresses line sharing means that the FCC must forbear from enforcing any Section 271 obligations that may exist with respect to line sharing, as recognized by Chairman Martin. Also, BellSouth opined that, 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, BellSouth maintained that Chairman Martin's statement was supported by applicable law.

BellSouth concluded that, as stated by Chairman Martin, the BOCs, including BellSouth, included line sharing in their Petitions for Forbearance filed with the FCC, and the relief granted therefore also included line sharing. BellSouth stated that its Petition in particular "[sought] forbearance from the same broadband elements as sought by Verizon,"[69] and was patterned after an earlier Petition filed by Verizon. BellSouth maintained that Verizon's Petition, in turn, asked the FCC to forbear from imposing any Section 271 obligation on the broadband elements that the FCC had eliminated in the *TRO*. BellSouth stated that its 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[70]. (emphasis added).

BellSouth noted that, in its *Broadband 271 Forbearance Order*, the FCC stated in Footnote 9 of Paragraph 2[71] that,

> [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

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[69] *Broadband 271 Forbearance Order*, at Paragraph 10.

[70] The Commission notes that the October 1, 2003 reference in BellSouth's Brief was in error. BellSouth's March 1, 2004 Petition states on Page 1 that Verizon's Petition for Forbearance was filed on October 24, 2003.

[71] The Commission notes that the reference in BellSouth's Brief is in error. The quote is from Footnote 6 of Paragraph 2.

broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under Section 251(c). . .

BellSouth noted that, in this regard, the FCC cited to a March 26, 2004 *ex parte* letter filed by Verizon. BellSouth stated that, in relevant part, Verizon's March 26, 2004 letter included a white paper that specifically referred to line sharing. BellSouth maintained that 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 CLPs 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.' [72]

BellSouth maintained that its request for relief, which relied on the Verizon filing, thus included line sharing.

Indeed, BellSouth argued, 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.* BellSouth asserted that 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. BellSouth stated that the FCC 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."[73] BellSouth maintained that the FCC used the same rationale to eliminate the HFPL broadband element.[74] BellSouth commented that the D.C. Circuit Court of Appeals stated, in affirming these portions of the *TRO*, as follows:

> [t]he Commission declined to require ILECs to provide unbundled access to most of the broadband capabilities of mass market loops. In particular, it decided . . . not to require unbundling of the broadband capabilities of hybrid copper-fiber loops, Order ¶¶ 288-89, or fiber-to-the-home ('FTTH') loops, id. ¶ 273-77, and it also decided not to require ILECs to unbundle the high frequency portion of copper loops, a practice known as 'line sharing,' id. ¶¶ 255-63.[75]

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[72] Verizon's March 26, 2004 filing, Page 8, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48.

[73] *Broadband 271 Forbearance Order* at Paragraph 6, *citing TRO* at Paragraphs 242 – 244.

[74] *TRO* at Paragraphs 258 – 263.

[75] 359 F.3d 554, at 226.

BellSouth stated that, 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 unbundling on a national basis "for the broadband elements at issue."[76] BellSouth noted that the D.C. Circuit Court's opinion also clearly contemplates that "the broadband elements at issue" included line sharing.[77] BellSouth argued that there is simply no rational basis for excluding one broadband element – line sharing – from the broadband relief the FCC granted.

Likewise, BellSouth maintained, there is every reason to conclude that the FCC did, in fact, forbear from imposing any Section 271 obligations on each of these broadband elements. BellSouth argued that the benefits to broadband competition of forbearing from imposing Section 271 obligations on the fiber loop elements apply equally to forbearance of line sharing arrangements. For example, BellSouth noted, the FCC held in Paragraph 34 of the *Broadband 271 Forbearance Order* 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.

BellSouth asserted that this holding mirrors the FCC's conclusion about the effect of removing line sharing from the UNE list in the *TRO*.[78] BellSouth noted that 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."[79]

Finally, BellSouth commented that the FCC concluded in Paragraph 29 of the *Broadband 271 Forbearance Order* that:

> . . . broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from Section 271 unbundling will encourage the BOCs to become full

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[76] *Broadband 271 Forbearance Order*, n. 73, *citing USTA II*, 359 F.3d at 578 – 85.

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

[78] *TRO* at Paragraph 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").

[79] *Broadband 271 Forbearance Order* at Paragraph 22, quoting Paragraph 246 of the *TRO*.

> 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.

BellSouth argued that just as forbearance from Section 271 obligations for fiber-to-the-home and fiber-to-the-curb loops is good for broadband competition, so is forbearance from any line sharing obligations.

BellSouth asserted that even if the FCC's *Broadband 271 Forbearance Order* did not expressly address line sharing, any petition for forbearance not denied within the statutory time period is deemed granted.[80] Thus, BellSouth noted, 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.

BellSouth maintained that neither Covad nor any other CLP can identify any place where the FCC denied the forbearance petition as to line sharing. Thus, as a matter of law, BellSouth argued, the petition was granted as to that functionality.[81]

BellSouth concluded by noting that commission decisions in Tennessee, Massachusetts, Michigan, Rhode Island, and Illinois support BellSouth's position.

BellSouth commented that in Tennessee, in addressing a dispute between BellSouth and Covad, the Commission determined that the FCC's transition plan constitutes the only obligation BellSouth has regarding line sharing.[82] Likewise, BellSouth noted, in Rhode Island, Verizon had previously filed tariffs setting forth certain wholesale obligations. BellSouth stated that, following the *TRO,* Verizon filed tariff revisions, including a revision that eliminated line sharing from the classification as a UNE. BellSouth stated that Covad objected to Verizon's revision, claiming, as it did in this docket, that Verizon had a Section 271 line sharing obligation. BellSouth noted that

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[80] 47 U.S.C. § 160(c) ("[a]ny such petition shall be deemed granted if the Commission does not deny the petition ....").

[81] CompSouth seeks to persuade the Commission that Chairman Martin's view is "manifestly incorrect." *See* CompSouth's Response to BellSouth's Motion for Summary Judgment, Page 42.

[82] 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.

the Rhode Island Commission rejected Covad's arguments and approved Verizon's tariff modifications.[83]

BellSouth also noted that the Illinois Commission has rejected CLP arguments that line sharing is a Section 271 obligation. BellSouth stated that, in relevant part, in an arbitration decision addressing SBC's obligations under the *TRO,* the Illinois Commission held,

> . . . as for XO's contention that the ICA should reflect line-sharing obligations under Section 271 and state law, the Commission notes that the HFPL is not a [Section] 271 checklist item ... [p]atently, no reference to Section 271 obligations belongs in the ICA.[84]

BellSouth maintained that the Massachusetts Commission directed the parties "to include the [FCC's] line sharing rules verbatim in" interconnection agreement amendments.[85] BellSouth also noted that, in Michigan, the Commission dismissed a CLP's complaint seeking to force SBC to include new line sharing; the CLP claimed SBC had a Section 271 obligation.[86] BellSouth asserted that the Commission should endorse the FCC's transition plan and make clear that no new line sharing arrangements can be ordered under the federal rules.

BellSouth argued that in a recent Georgia filing, CompSouth referred to decisions in Maine, Pennsylvania, and Louisiana to support its view. BellSouth argued that 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. BellSouth noted that 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, BellSouth asserted that 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.

CompSouth argued in its Post-Hearing Brief that BellSouth is obligated pursuant to the Act and FCC Orders to provide line sharing to new CLP customers after

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[83] *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).

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

[85] *Massachusetts Arbitration Order,* Page 185.

[86] *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 (March 29, 2005).

October 1, 2004. CompSouth maintained that BellSouth's obligation to provide access to line sharing pursuant to Section 271 is grounded in two irrefutable legal facts: (1) line sharing is a Section 271 checklist item 4 loop transmission facility; and (2) BOCs who, like BellSouth, offer long distance services pursuant to Section 271 authority have an obligation to provide checklist item 4 loop transmission facilities irrespective of unbundling determinations under Section 251. CompSouth stated that, to date, BellSouth has never disputed the second of these facts – that if line sharing falls under checklist item 4, then BellSouth has the obligation to provide it irrespective of Section 251 determinations. CompSouth maintained that nothing BellSouth says can change the fact that every FCC statement on the subject and every Section 271 Brief by BellSouth considered line sharing a checklist item 4 loop transmission facility.

CompSouth noted that three state commissions who have addressed the question presented here, Maine, Pennsylvania and Louisiana, have agreed that line sharing falls under checklist item 4, and that BOCs, like BellSouth, subject to Section 271 must provide access to it.[87]

CompSouth stated that, in summary, the FCC's *Line Sharing Order* created a new UNE by defining the high frequency portion of the loop as a separate UNE, available under both Section 251 and Section 271. CompSouth maintained that the FCC subsequently determined that CLPs were not impaired without access to the high frequency portion of the loop and therefore it was no longer available under Section 251. CompSouth asserted that, in making that decision, the FCC did not change its decision that the high frequency portion of the loop constituted a separate UNE and that separate UNE remains available under Section 271.

CompSouth argued that line sharing is a Section 271 checklist item 4 loop transmission facility. CompSouth noted that because checklist items 4, 5, 6, and 10 are independent of Section 251 determinations, those Section 251 determinations may not remove elements from checklist items 4, 5, 6 or 10. CompSouth stated that the simple historical question is: was line sharing in checklist item 4? If it was, then it remains in checklist item 4.

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[87] In Maine: Order, Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Maine Public Utilities Commission, Docket No. 2002-682, issued September 13, 2005 (holding that "Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of Section 271"). In Pennsylvania: Opinion and Order, *Covad Communications Company v. Verizon Pennsylvania Inc.*, Pennsylvania Public Utility Commission Docket No. R-00038871C0001, issued July 8, 2004, Pages 19-20 (finding that "it is a reasonable interpretation of Checklist item #4 to also include the HFPL of the local loop. . . . line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing Section 271 obligations") (hereinafter, "PA Opinion and Order"). In Louisiana: Order No. U-28027, Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Louisiana Public Service Commission, Docket No. U-28027, January 13, 2005.

CompSouth stated that the answer to that question is simple: in numerous FCC Orders, the FCC expressly stated that line sharing is a checklist item 4 element. CompSouth noted that a few examples include:

> **The *Massachusetts* Section *271 Order*:**
> On December 9, 1999, the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to Section 251c(3) of the Act and, thus, checklist items 2 and 4 of Section 271.[88]
>
> **The *Florida and* Tennessee Section 271 *Order*:**
> BellSouth's provisioning of the line shared loops satisfies checklist item 4.[89]
>
> **The *Georgia and Louisiana* Section *271 Order*:**
> We find that, given BellSouth's generally acceptable performance for all other categories of line-shared loops, BellSouth's performance is in compliance with checklist item 4.[90]

CompSouth also asserted that, before it was in its interest to do otherwise, BellSouth itself placed line sharing in every one of its own Section 271 Briefs to the states and to the FCC under checklist item 4.[91] CompSouth argued that if BellSouth

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[88] *In the Matter of: Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at Paragraph 164 (emphasis added). In reply to BellSouth's point that the FCC did not require BOCs to provide line sharing in a December 1999 and June 2000 set of Section 271 approvals, it should be noted that line sharing was not ordered until after those applications were pending and that the FCC specifically addressed the provision of line sharing in those orders.

[89] *In the Matter of:* Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331, Released December 19, 2002 at Paragraph 144 (emphasis added).

[90] *In the Matter of:* Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Memorandum Opinion and Order, WC Docket No. 02-35, FCC 02-147, Released May 15, 2002, Paragraph 239.

[91] *In the Matter of:* Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee, Brief in Support of Application by BellSouth for Provision of In-Region, Interlata Services in Florida and Tennessee, WC 02-307, filed September 20, 2002 at Pages 96-99; *In the Matter of:* Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in *Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Brief in Support of Application by BellSouth for Provision of In-Region, Interlata Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC 02-150, filed June 20, 2002 at Pages 114-116; *In the Matter of:* Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Brief in Support of Application by BellSouth for Provision of In-Region, Interlata Services in Georgia and Louisiana, CC 01-277, filed October 2, 2001 at Pages 112-114.

had a single quotation from the FCC saying that line sharing was not a checklist item 4 element or that line sharing was not a Section 271 obligation, BellSouth would have provided it; yet they have not. CompSouth argued that the quotations provided above make no sense unless line sharing fell under Section 271 checklist item 4.

CompSouth maintained that, in the world BellSouth attempts to construct, line sharing never was a checklist item 4 element. However, CompSouth asserted, that position renders numerous quotations from the FCC nonsensical. CompSouth opined that if the FCC did not mean what it said in the above quotations, what did it mean? CompSouth asked, "How does a BOC 'satisfy' or 'comply' with a checklist item by providing an element which never was subject to the checklist?" CompSouth stated that BellSouth's position simply does not match-up with numerous statements from the FCC. CompSouth maintained that BellSouth's effort to remove line sharing from the checklist by arguing that it never really had to offer line sharing because offering the whole loop was sufficient to fulfill its obligations under the checklist is laughable to any party to the Section 271 proceedings. CompSouth alleged that BellSouth had to offer both line sharing and whole loops in order to fulfill its obligations under checklist item 4 and those obligations did not change with the Section 251(c)(3) determinations contained in the *TRO*.

CompSouth maintained that, importantly, the FCC's statement in the *Massachusetts* Section *271 Order* was not an anomaly: In every FCC Section 271 Order granting BellSouth long distance authority[92] – indeed, in every FCC Order granting any BOC such authority – the FCC placed line sharing in checklist item 4. Manifestly then, CompSouth asserted, line sharing is a Section 271(c)(2)(B)(iv) (checklist item 4) network element.

CompSouth stated that there appears to be no question that if line sharing is a local loop transmission facility under Section 271(c)(2)(B)(iv), then BellSouth is obligated to provide access to it irrespective of any Section 251 unbundling

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[92] *In the Matter of:* Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331, Released December 19, 2002 at Paragraph 144; *In the Matter of:* Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in *Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, WC Docket No. 02-150, FCC 02-260, Released September 18, 2002, Paragraph 248; *In the Matter of:* Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Memorandum Opinion and Order, WC Docket No. 02-35, FCC 02-147, Released May 15, 2002, Paragraph 238.

determinations by the FCC. [93] CompSouth noted that, in apparent recognition that it has an obligation to provide access to checklist item 4 elements, BellSouth does not take issue with that obligation, but, rather, devotes its legal arguments to challenging the historical placement of line sharing in checklist item 4. CompSouth argued that, despite its effort to rewrite history, there can be no legitimate dispute that BellSouth does indeed have an obligation to provide nondiscriminatory access to all checklist item 4 elements, including line sharing "regardless of any unbundling analysis under Section 251."[94] CompSouth maintained that, so long as BellSouth continues to sell long distance service under its Section 271 authority, it must continue to provide nondiscriminatory access to all network elements under checklist items 4, 5, 6 and 10, irrespective of whether they are "de-listed under 251"[95] – including line sharing under checklist item 4.[96]

CompSouth also noted that when the FCC released the *Broadband 271 Forbearance Order*, two of the Commissioners released statements that leave different impressions of what action the FCC took regarding forbearance for line sharing under Section 271. CompSouth asserted that the dueling views of then-Commissioner Martin and then-Chairman Powell, however, make one thing clear: Line sharing is a Section 271 obligation. CompSouth noted that Chairman Powell's statement says the FCC did not remove Section 271 obligations for line sharing. CompSouth further noted that Commissioner Martin's statement on line sharing, although stating a different viewpoint, is based upon the clear premise that line sharing is a Section 271 obligation of ongoing force unless and until the FCC grants a petition for forbearance. CompSouth asserted that, if, as BellSouth asserts, line sharing never was a Section 271 element, there would be no Section 271 obligation to forbear from nor any need to clarify that the FCC was not "removing 271 unbundling obligations" for line sharing.

CompSouth argued that, far from supporting BellSouth's position in this docket, the statements of Chairman Powell and Commissioner Martin demonstrate that BellSouth's position is—and has always been—wrong: there is indeed a continuing BOC obligation to provide CLPs with line sharing in accordance with Section 271 of the Act.

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[93] *TRO* at Paragraph 653 (providing that "the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling [checklist items 4, 5, 6, and 10] regardless of any unbundling analysis under Section 251"); *see also TRO* at Paragraph 659 (providing that "Section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under Section 251 . . .").

[94] *TRO* at Paragraph 653; 47 U.S.C. § 271(c)(2)(B)(iv).

[95] With the exception of checklist item numbers 1 and 2, as these items are directly tied to Section 251 and Section 252.

[96] This obligation can only be removed by the FCC in response to a petition for forbearance pursuant to 47 U.S.C. §160.

CompSouth noted that BellSouth relies on then-Commissioner Martin's statement in support of its argument that the FCC granted forbearance from line sharing. CompSouth stated that, at the same time, BellSouth still argues that line sharing is not a Section 271 obligation (from which there would be no need to forbear); BellSouth's arguments are completely inconsistent. CompSouth maintained that either line sharing is a Section 271 obligation, and the FCC may grant forbearance from that obligation, or, alternately, line sharing is not a Section 271 obligation, and there is no need for the FCC to forbear. CompSouth asserted that both cannot be true.

CompSouth argued that the FCC did not grant – by implication or otherwise – forbearance from line sharing because forbearance from line sharing was never requested. CompSouth noted that BellSouth represents that it included line sharing in its Petition for Forbearance filed with the FCC, and the relief granted also included line sharing. CompSouth asserted that both representations are false. CompSouth maintained that the FCC's *Broadband 271 Forbearance Order* repeatedly provides a list of the elements from which the FCC is forbearing and line sharing is not on the list:

> In this Order, we forbear from enforcing the requirements of Section 271, for all four petitioners (the Bell Operating Companies (BOCs)), with regard to the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent reconsideration orders (collectively, the '*Triennial Review* proceeding'). These elements are fiber–to-the-home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops), the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements). (Paragraph 1)
>
> * * *
>
> For the reasons described below, we grant all BOCs forbearance from Section 271's independent access obligations with regard to the broadband elements the Commission, on a national basis, relieved from unbundling under Section 251: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching. (Paragraph 12)
>
> * * *
>
> As discussed below, we find that the BOCs have demonstrated that they satisfy the criteria set forth in Section 10 with respect to the broadband elements for which the Commission provided unbundling relief on a national basis in the *Triennial Review* proceeding: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching. (Paragraph 19)
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> * * *

> Moreover, we find that Section 10(a)'s three-pronged test for forbearance has been met with respect to Section 271(c)(1)(B)'s independent access obligation for FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching for all of the affected BOCs to the extent such broadband elements were relieved of unbundling on a national basis under Section 251(c). (Paragraph 37)

CompSouth stated that, moreover, the FCC repeatedly explains – as it is statutorily obliged to do – that it is granting forbearance to encourage the BOCs to build next-generation fiber facilities.[97] CompSouth maintained that there is no mention in the Order of any considerations related to legacy copper networks carrying line sharing which hence lead to then-Chairman Powell's Statement: "By removing 271 unbundling obligations for fiber-based technologies – and not copper based technologies such as line sharing . . . ". CompSouth stated that, additionally, on November 5, 2004 – more than one week after then-Commissioner Martin expressed his view that the FCC granted forbearance from line sharing – the FCC released an Order again stating that "[o]n October 27, 2004, the Commission released an order granting SBC's petition to the extent that it requested forbearance with respect to broadband network elements, specifically fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, and packet switching."[98] CompSouth stated that, once again, line sharing is not on the list of "broadband elements" for which the FCC granted forbearance. CompSouth asserted that, accordingly, the express language of the Order, the substance of the Order, and a follow-on Order, all make it clear that the *Broadband 271 Forbearance Order* only addresses fiber based technologies – and not line sharing.

CompSouth asserted that if BellSouth believed the FCC granted forbearance from its Section 271 obligation to provide line sharing – despite the clear language of the Order and the Chairman's statement to the contrary – then BellSouth should have filed a Motion for Clarification at the FCC.

CompSouth stated that, in summary, BellSouth is obligated pursuant to Section 271 to provide access to line sharing at just and reasonable rates after October 1, 2004 and the proposed language from CompSouth First Revised Exhibit JPG-1, Issue 17, should be adopted as reflecting the appropriate access language. CompSouth maintained that, if BellSouth considers the current rates inconsistent with a just and reasonable rate, then it is free to challenge the rate in an appropriate case.

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[97] *Broadband 271 Forbearance Order*, Paragraphs 6, 12, 20, 21, 24, 25, 27, 31 and 34.

[98] Order, In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c) from Application of Section 271, WC Docket No. 03-235, DA 04-3532, Released November 5, 2004, Paragraph 2.

The Public Staff noted in its Proposed Order that 47 C.F.R. § 51.319(a)(1)(i) includes both a grandfathering provision and a transition plan for line sharing arrangements ordered under Section 251. The Public Staff stated that the grandfathering provision permits all line sharing arrangements existing as of October 1, 2003 to remain available at the rates in effect prior to October 1, 2003 so long as the CLP or its successor continues to provide xDSL service to the end user. The Public Staff stated that the transition plan includes line sharing arrangements placed in service between October 2, 2003 and October 1, 2004. The Public Staff noted that the plan specifies that the rate will be 25% of the stand-alone copper loop rate during the first year, 50% of the stand-alone copper loop rate during the second year, and 75% of the stand-alone copper loop rate for the third year. The Public Staff noted that after the third year, BellSouth is no longer required to provide line sharing for the arrangements covered by the transition plan as a Section 251 network element. The Public Staff asserted that BellSouth is not required to provide the Section 251 line sharing element to new customers after October 1, 2004.

The Public Staff disagreed with BellSouth's argument that it only has to provide access to the whole loop to meet its obligations under checklist item 4 of Section 271. The Public Staff noted that in the *Kansas/Oklahoma* Section *271 Order*[99] granting interLATA in-region authority for SBC Communications, Inc. in Kansas and Oklahoma, the FCC concluded in Paragraph 178:

> In order to establish that it is 'providing' unbundled local loops in compliance with checklist item 4, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops. *Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.* In order to provide the requested loop functionality, such as the ability to deliver xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities. The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor. (Emphasis added.)

The Public Staff believes that the *Kansas/Oklahoma Order* clearly indicates that checklist item 4 requires BellSouth to do more than simply provide a whole loop to a CLP. The Public Staff noted that the *Kansas/Oklahoma* Section *271 Order* goes so far as to require the BOC to perform line conditioning if necessary. Indeed, the Public Staff commented that the Commission noted the FCC's requirements as spelled out in the

[99] *SBC Communications, Inc.*, CC Docket No. 00-217, FCC 01-29 (released January 22, 2001).

Kansas/Oklahoma Section *271 Order* in its Advisory Opinion with regard to BellSouth's request for Section 271 authority in North Carolina.

The Public Staff argued that BellSouth's contention that line sharing is not part of checklist item 4 is inconsistent with its filings before the Commission and the FCC. The Public Staff opined that, even though BellSouth now claims that line sharing is not a requirement of checklist item 4, its Brief and Proposed Order filed in Docket No. P-55, Sub 1022 (BellSouth's Section 271 docket) addressed line sharing in connection with its compliance obligations under checklist item 4. In addition, the Public Staff maintained, BellSouth addressed line sharing under checklist item 4 in its Brief filed with the FCC in support of its Five-State Application for Section 271 authority.

The Public Staff argued that, if providing line sharing was not required for ascertaining compliance with checklist item 4, BellSouth presumably would not have included an analysis of its line sharing capability. Further, the Public Staff opined, the FCC would not have included sections dealing with line sharing when discussing checklist item 4 compliance in its numerous Section 271 Orders, including the Order that authorized BellSouth to provide in-region, interLATA long distance service in North Carolina. For these reasons, the Public Staff recommended that the Commission find that BellSouth has a Section 271 obligation to provide line sharing to new customers after October 1, 2004.

The Public Staff also disagreed with BellSouth that the FCC's *Broadband 271 Forbearance Order* granted relief from this Section 271 line sharing obligation. The Public Staff noted that, in this Order, the FCC granted forbearance from Section 271 obligations for four broadband elements: fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, and packet switching. The Public Staff stated that, not only does the FCC specifically list these four elements, but, throughout the Order, the FCC limits its discussion to fiber-based and next generation facilities. The Public Staff asserted that the Order does not discuss the legacy copper loop facilities used to provision line sharing.

The Public Staff maintained that the forbearance petition filed by Verizon asked the FCC to grant relief from the same fiber-based elements that the FCC addressed in the *TRO*. The Public Staff asserted that BellSouth asks the Commission to assume that the Petition was altered to include line sharing by a reference in a white paper filed as supplemental information. The Public Staff noted that the white paper does mention line sharing; however, Verizon makes the paper's focus clear in the first paragraph of Section I.A. by listing the following elements: "fiber-to-the-premises ('FTTP') loops, packet switching and the packetized functionality of hybrid loops." The Public Staff asserted that the conflicting separate statements of Chairman Powell and Commissioner Martin add more confusion to BellSouth's argument. The Public Staff opined that Chairman Powell clearly thought the Petitions only covered fiber-based facilities when he said that the Order did not remove copper-based technologies such as line sharing from the Section 271 unbundling obligations. The Public Staff noted that Commissioner Martin, on the other hand, evidently read more into the Petition and

considered line sharing to be included. The Public Staff asserted that, despite these statements, the actual Order makes it clear that the FCC considered the Petitions to only cover fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, and packet switching.

The Public Staff believes that BellSouth should request clarification of the *Broadband 271 Forbearance Order*'s scope if BellSouth believes that the FCC would come to a different conclusion. The Public Staff argued that until such time as the FCC grants BellSouth forbearance from its line sharing obligation under checklist item 4 or confirms BellSouth's contention that the *Broadband 271 Forbearance Order* granted such relief, BellSouth should continue offering line sharing as a Section 271 checklist item 4 network element.

The Public Staff does not agree, however, with CompSouth's assertion that the transition plan adopted by the FCC in Paragraph 265 of the *TRO* does not apply to BOCs. The Public Staff asserted that it is unlikely that the FCC would create the transition plan for only non-BOC ILECs, as this would affect only a small portion of the line sharing arrangements in existence. The Public Staff believes that the transition plan should be included in the line sharing language.

Therefore, the Public Staff recommended that the Commission find that the parties should negotiate language that incorporates the Commission's findings and covers each type of line sharing arrangement for inclusion in the line sharing section of the *TRRO* amendments. The Public Staff asserted that this includes grandfathered arrangements in place on or before October 1, 2003, line sharing arrangements placed in service between October 2, 2003 and October 1, 2004, and the arrangements ordered after October 1, 2004 that will be transitioned to a Section 271 element.

The Public Staff recommended that the Commission conclude that the parties should work together to create language that incorporates the Commission's findings on terms and conditions for line sharing arrangements that are grandfathered, fall under the FCC's transition plan and will be transitioned to a Section 271 network element.

The Commission notes that in Paragraph 248 of the *TRO*, the FCC found that, subject to the grandfather provision and transition period established, ILECs do not have to unbundle the HFPL (under Section 251(c)(3)) for requesting telecommunications carriers. The FCC described line sharing in Paragraph 255 of the *TRO* as ". . . when a competing carrier provides xDSL service over the same line that the incumbent LEC uses to provide voice service to a particular end user, with the incumbent LEC using the low frequency portion of the loop and the competing carrier using the HFPL. . ."

Further in the *TRO*, the FCC recognized that a number of CLPs have relied on the existence of line sharing to provide broadband service to end users, and, therefore, adopted a three-year transition period for new line sharing arrangements of requesting

carriers. In Paragraph 265 of the *TRO*, the FCC outlined the transition period, as follows:

> **First Year (October 2, 2003 – October 1, 2004)**
> CLPs may continue to obtain new line sharing customers through the use of the HFPL at 25% 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.
>
> **Second Year (October 2, 2004 – October 1, 2005)**
> The recurring charge for such access for those customers will increase to 50% of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for stand-alone copper loops for that particular location.
>
> **Third Year (October 2, 2005 – October 1, 2006)**
> The recurring charge for such access for those customers obtained during the first year after release of the *TRO* will increase to 75% of the state-approved recurring rate or the agreed-upon recurring rate for stand-alone copper loops for that particular location.

The FCC continued in Paragraph 265 to state that after the transition period, any new customer (i.e., customer obtained during the three-year transition period or after the three-year transition period but excluding customers who have been grandfathered) must be served through a line splitting arrangement, through use of the stand-alone copper loops, or through an arrangement that a CLP has negotiated with the ILEC to replace line sharing.

The main question before the Commission in this docket is if line sharing is available to CLPs after October 1, 2004 under the requirements of Section 271(c)(2)(B)(iv) – local loop transmission from the central office to the customer's premises, unbundled from local switching or other services. BellSouth asserted that it is not obligated under Section 271 to provide new line sharing and that CLPs have numerous options available for serving the broadband needs of their end-users. BellSouth further argued that if a Section 271 obligation did exist, the FCC has forborne BellSouth from the requirement in the FCC's *Broadband 271 Forbearance Order*. CompSouth asserted that BellSouth is obligated under checklist item 4 of Section 271 to provide line sharing to new customers after October 1, 2004. CompSouth maintained that in every FCC Order granting Section 271 authority, line sharing was treated as a checklist item 4 element. The Public Staff agreed with CompSouth and believes that line sharing is required under Section 271.

The Commission further notes that this exact issue has been addressed by the Commission before. On October 29, 2004[100], the Commission issued its *Order*

[100] The Commission notes that its Order in the Covad/BellSouth arbitration docket was issued two days after the release data of the FCC's *Broadband 271 Forbearance Order*.

Concerning Line Sharing in an arbitration docket between Covad and BellSouth (Docket No. P-775, Sub 8). The Commission stated in its Order:

> . . . that at this time it should decline to decide whether BellSouth is obligated to provide Covad access to line sharing after October 2004.
>
> The legal status of line sharing is highly confused at this time. . . Based on at least two reports in the trade press this week it appears that significant confusion exists concerning whether the FCC has, or will soon, decide this issue. Given this state of affairs, we resist the invitation to join the confusion by rendering a substantive decision and instead call upon our colleagues at the federal level to provide much needed clarity to the situation, and to do so sooner rather than later. . .

Unfortunately, 16 months later, the FCC still has not provided a definitive answer on this issue.

In Finding of Fact No. 8 of this Order, the Commission has concluded that it does not have the authority to require BellSouth to include Section 271 elements in ICAs pursuant to Section 252, nor does the Commission have the authority to set rates for such elements. The Commission concludes that, since it does not have this authority, it will not rule on whether BellSouth is obligated pursuant to the Act and FCC Orders to provide line sharing to new customers after October 1, 2004 under its Section 271 obligations. However, the Commission does believe that if line sharing is subsequently determined to be a Section 271 element, it should be subject to commingling as decided herein under Finding of Fact No. 13.

Based upon the above discussion, the Commission concludes that it will not rule on the issue of whether line sharing is a Section 271 element.

CONCLUSIONS

The Commission concludes that, since it has decided in Finding of Fact No. 8 that it does not have the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252, nor have the authority to set rates for such elements, it will not rule on whether BellSouth is obligated pursuant to the Act and FCC Orders to provide line sharing to new customers after October 1, 2004 under its Section 271 obligations.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

ISSUE NO. 17 - MATRIX ITEM NO. 18: *TRO*/LINE SHARING TRANSITION – If the answer to the foregoing is negative, what is the appropriate language for transitioning off a CLP's existing line sharing arrangements?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth argued that if BellSouth is not obligated to provide line sharing arrangements to new CLP customers after October 1, 2004 (i.e., if line sharing is not required under checklist item 4 of the Section 271 competitive checklist), the amended ICA should include provisions for transitioning customers off Section 251 line sharing arrangements as contemplated by the *TRO.* CompSouth stated that its proposed contract language provides that line sharing arrangements in service as of October 1, 2003, under prior ICAs between BellSouth and CLPs, will be grandfathered until the earlier of the date the end user customer discontinues or moves xDSL service with a CLP. CompSouth maintained that any line sharing arrangements placed in service between October 2, 2003 and October 1, 2004, and not otherwise terminated, would terminate on October 2, 2006 under CompSouth's proposed contract language.

BELLSOUTH: BellSouth maintained that the FCC's line sharing transition language is appropriate. BellSouth stated that per the *TRO*, as of October 1, 2004, BellSouth was no longer obligated to provide new line sharing arrangements, although CLPs have continued to request such arrangements, and BellSouth has provided such arrangements pursuant to the existing interconnection agreement language that has not yet been appropriately amended. BellSouth argued that for any line sharing arrangements that were placed in service after October 1, 2004, the CLP should be required to pay the full stand-alone loop rate for such arrangements. BellSouth noted that, per the FCC's line sharing transition plan, for all new line sharing arrangements provided to CLPs between October 2, 2003 (the effective date of the *TRO*) and October 1, 2004, the recurring charge should increase to 50 percent of the recurring rate for the zone-specific stand-alone copper loop until October 1, 2005; and, effective October 1, 2005, the recurring charge should increase to 75 percent of the recurring rate for the zone-specific stand-alone loop until October 1, 2006. BellSouth noted that, at the end of the transition period – October 1, 2006, BellSouth is not obligated to continue providing the line sharing arrangements put in place between October 2, 2003 and October 1, 2004, nor is BellSouth obligated to provide any new line sharing arrangements; however, CLPs can purchase stand-alone loops at the rates in their interconnection agreements.

PUBLIC STAFF: The Public Staff recommended that the Commission find that ICAs should only contain language for line sharing transitioning from CLPs' existing line sharing arrangements to Section 271 elements.

DISCUSSION

BellSouth witness Fogle stated in his direct testimony that Exhibit EF-1 contains BellSouth's proposed transition language for line sharing arrangements placed in service between October 2, 2003 and October 1, 2004. Witness Fogle maintained that there is no transition period for line sharing arrangements placed in service after October 1, 2004; rather, the Commission should order CLPs to pay the stand-alone loop rate for such arrangements, and add no new line sharing arrangements going forward.

Witness Fogle asserted that CLPs can serve new customers through a line splitting arrangement or through the use of the stand-alone copper loop, or any other method mentioned in his discussion of Finding of Fact No. 16.

Witness Fogle stated that since only nine CLPs currently have active line sharing circuits, BellSouth's proposed transition language is not included in BellSouth's standard interconnection agreement. Witness Fogle noted that this language is consistent with the FCC's transition plan established in Paragraph 265 of the *TRO* and in 47 C.F.R. § 51.319(a)(1)(i)(B), which details a three-year transition period for line sharing arrangements placed in service between October 2, 2003 through October 1, 2004.

In his rebuttal testimony, witness Fogle stated that the CLPs' proposed contract language on this issue does not include the FCC's transition plan. Witness Fogle maintained that the CLPs' omission is clear when the language in Exhibit EF-1 at 3.1.2 is compared with witness Gillan's proposed contract language at Exhibit JPG-1, Section 3.1.3. Witness Fogle argued that the Commission should simply reject the CompSouth language and adopt BellSouth's transition language which includes the FCC's transition plan. Witness Fogle noted that BellSouth's proposed language also requires CLPs that have ordered line sharing arrangements after October 1, 2004 to pay the full loop rate for those arrangements; CompSouth's proposed language omits such a requirement.

BellSouth witness Fogle stated in his summary that the FCC has ruled that BellSouth is not obligated to provide new line sharing arrangements, and no CLP has pointed to any authority to the contrary, nor provided testimony supporting their alternative contract language. Witness Fogle noted that BellSouth has agreed to abide by the FCC's rules establishing a transition plan for line sharing.

BellSouth noted in its Post-Hearing Brief that this issue concerns Contract Provisions outlined in Exhibit EF-1 and Exhibit EF-2. BellSouth argued that the FCC articulated, as clearly as it could, the transitional plan for line sharing at Paragraph 265 of the *TRO*, as follows:

> 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.

BellSouth asserted that CompSouth's proposed contract language completely disregards the FCC's plan and binding federal rules.

BellSouth stated that, as shown in connection with Matrix Item No. 17, BellSouth has no obligation to add new line sharing arrangements after October 2004. Accordingly, BellSouth maintained, in order to properly transition existing line sharing arrangements, those CLPs with line sharing customers must amend their interconnection agreements to incorporate both the line sharing transition plan contained in the federal rules and language that requires CLPs to pay the stand-alone loop rate for arrangements added after October 1, 2004.

CompSouth stated in its Post-Hearing Brief that in the event that the Commission determines that BellSouth does not have an obligation under Section 271 to provide continued access to line sharing, then the language offered by either CompSouth or BellSouth appropriately reflects the remaining legal obligations of BellSouth. CompSouth asserted that Matrix Item Nos. 17 and 18 are essentially one issue: What is the legal obligation of BellSouth with regard to line sharing? CompSouth stated that if BellSouth has an obligation under Section 271, then the CompSouth proposed language from Matrix Item No. 17 should be used, and if BellSouth does not have an obligation to provide line sharing under Section 271, then the language from Matrix Item No. 18 should be used. CompSouth asserted that, for the reasons set forth in the record and its Brief regarding Matrix Item No. 17, the Commission should adopt CompSouth's proposed language from Matrix Item No. 17 for the resolution of these two issues.

The Public Staff stated in its Proposed Order that, as it discussed in the Evidence and Conclusions for Matrix Item No. 17, the Commission should find that BellSouth is still obligated to provide CLPs access to line sharing through a Section 271 arrangement. Therefore, the Public Staff believes that language for transitioning off existing line sharing arrangements should apply only to transitioning elements from Section 251 to Section 271.

The Public Staff recommended that the Commission conclude that ICAs should only contain language for line sharing transitioning from CLPs' existing Section 251 line sharing arrangements to Section 271 elements.

The Commission concluded in Finding of Fact No. 16 (Matrix Item No. 17) above. that, since it has decided in Finding of Fact No. 8 that it does not have the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252, nor have the authority to set rates for such elements, it will not rule on whether BellSouth is obligated pursuant to the Act and FCC Orders to provide line sharing to new customers after October 1, 2004 under its Section 271 obligations. Therefore, the Commission believes that it is appropriate to conclude that ICAs should only contain language for line sharing transitioning from CLPs' existing Section 251 line sharing arrangements.

CONCLUSIONS

The Commission concludes that ICAs should only contain language for line sharing transitioning from CLPs' existing Section 251 line sharing arrangements.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

ISSUE NO. 18 - MATRIX ITEM NO. 19: *TRO*/LINE SPLITTING – What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth asserted that there are three issues in dispute in the competing contract language on line splitting: (1) the availability of line splitting to the UNE-P "embedded base"; (2) BellSouth's obligations when BellSouth chooses to control the splitter; and (3) BellSouth's obligations to "make all necessary network modifications" to its OSS to facilitate line splitting. CompSouth maintained that BellSouth requests that the Commission find that BellSouth's line splitting obligations are limited to when a CLP purchases a stand-alone loop and provides its own splitter and that BellSouth has no obligation to provide line splitting under any other service arrangement. CompSouth argued that BellSouth's position is inconsistent with its legal obligations under the FCC's *TRO* and *TRRO*, which are reflected in the FCC's rules. CompSouth asserted that BellSouth's legal obligations include the provision of line splitting to the UNE-P "embedded base"; compatible splitter functionality (when BellSouth retains control of a splitter); and an obligation to make OSS modifications to facilitate line splitting.

BELLSOUTH: BellSouth maintained that its line splitting obligations are limited to when a CLP purchases a stand-alone loop from BellSouth and the CLP provides its own splitter. BellSouth stated that its contract language provides for line splitting over an UNE-L, and for a limited time, with UNE-P arrangements. BellSouth noted that its language involves a CLP 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 CLP.

PUBLIC STAFF: The Public Staff asserted that the Commission should find that the line-splitting language proposed by CompSouth in Section 3 of witness Gillan's First Revised Exhibit JPG-1 should be adopted. The Public Staff maintained that the language of BellSouth's proposed modification to Section 3.8.14 of the *TRRO* amendments, concerning limited liability, should be further briefed or negotiated by the parties.

DISCUSSION

BellSouth witness Fogle stated in his direct testimony that BellSouth's legal position, that its line splitting obligations are limited to when a CLP purchases a stand-alone loop and the CLP provides its own splitter, is detailed in BellSouth's Motion for Summary Judgment.

Witness Fogle stated that BellSouth's contract language (Section 3 in Attachment 2) provides for line splitting over an UNE-L, and for a limited time, with UNE-P arrangements.

Witness Fogle maintained that with respect to line splitting with UNE-L, BellSouth offers the following language:

> 3.1 Line Splitting – UNE-L. In the event <<customer_short_name>> provides its own switching or obtains switching from a third party, <<customer_short_name>> may engage in line splitting arrangements with another CLP using a splitter, provided by <<customer_short_name>>, in a Collocation Space at the central office where the loop terminates into a distribution frame or its equivalent.

Witness Fogle contended that BellSouth's language involves a CLP 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 CLP.

Witness Fogle argued that CLPs are not impaired without access to BellSouth's splitters. Witness Fogle maintained that splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter built into all Asymmetrical Digital Subscriber Line (ADSL) platforms.

Witness Fogle also asserted that BellSouth is not obligated to provide the splitter for the CLP. Witness Fogle stated that a CLP can provide the splitter in its leased collocation space in BellSouth's central office. Witness Fogle maintained that a CLP, using its own splitter, is free to offer voice service on the low frequency portion of the loop and have another CLP provide broadband service, such as DSL, over the high frequency portion of the loop (or vice versa).

In rebuttal testimony, witness Fogle stated that based on the interconnection agreement language proposed by CompSouth witness Gillan (Exhibit JPG-1, Section 3), the parties' disagreement centers on the types of loops that should be included with line splitting, and who should provide the splitter. Witness Fogle maintained that the additional loop type introduced by CompSouth does not require line splitting. Witness Fogle stated that BellSouth's contract language (Section 3 in Attachment 2) provides for line splitting over UNE-L, and, for a limited time, with UNE-P arrangements. Witness Fogle asserted that the proposed CompSouth language attempts to require line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271. Witness Fogle argued that 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 interconnection agreement that addresses line splitting.

Finally, witness Fogle stated that it appears that the CLPs propose that BellSouth be obligated to provide splitters between the data and voice CLPs that are splitting a UNE-L. Witness Fogle maintained that splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter built into all ADSL platforms. Witness Fogle argued that BellSouth should not be obligated to provide the CLPs with splitters when they are utilizing UNE-L and can readily provide this function for themselves.

BellSouth stated in its Post-Hearing Brief that this issue concerns Contract Provisions in Exhibit PAT-1, Section 3 and Exhibit PAT-2, Section 3.

BellSouth asserted that no CLP witness provided any testimony concerning line splitting, which occurs when one CLP provides narrowband voice service over the low frequency portion of a loop and a second CLP provides xDSL service over the high frequency portion of that same loop and provides its own splitter.[101] BellSouth stated that, therefore, although witness Gillan sponsored contract language concerning line splitting, the Commission can and should disregard such terms as lacking any evidentiary support.

BellSouth maintained that, in contrast, BellSouth's witness on this issue, witness Fogle, demonstrated the need for BellSouth's contract language, which involves a CLP 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 CLP.

BellSouth argued that if the Commission chooses to compare the contract language despite CompSouth's lack of any evidentiary support, any such comparison should result in the adoption of BellSouth's proposed language. BellSouth maintained that 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

[101] *TRO* at Paragraph 251; *Line Sharing Reconsideration Order* at Paragraph 33; Gillan Deposition, Joint Hearing Exhibit 4 at 77 – 78.

reincarnation of UNE-P and should not include any references to Section 271 in Section 251/252 interconnection agreements. Moreover, BellSouth asserted, 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.

BellSouth noted that CompSouth also proposed that BellSouth be obligated to provide splitters between the data and voice CLPs that are splitting a UNE-L; however, as witness 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 ADSL platforms. BellSouth asserted that the CLPs offered no contrary evidence. BellSouth argued that it should not be obligated to provide the CLPs with splitters when they are utilizing UNE-L and can readily provide this function for themselves.

BellSouth noted that the final area of competing contract language concerns CompSouth's proposed OSS language. BellSouth maintained that 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. BellSouth opined that the dispute between the parties revolves around the modifications that are actually "necessary." BellSouth stated that, as witness Fogle has explained, CLPs do not need anything from BellSouth to facilitate line splitting. Again, BellSouth noted, the CLPs offered no contrary evidence.

Consequently, BellSouth stated that it cannot agree to the open-ended contract language that CompSouth has proposed. BellSouth asserted that the language would create, rather than solve, issues between BellSouth and its CLP customers. BellSouth asserted that 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, which is clear and reasonable, in resolution of this issue.

CompSouth stated in its Post-Hearing Brief that there are three areas of disagreement reflected in the competing language proposed by the parties regarding line splitting:

1. Whether line splitting can involve the commingling of Section 251 and Section 271 elements;

2. Whether a CLP should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLP involved in the line splitting arrangement; and

3. Whether BellSouth must upgrade its OSS to facilitate line splitting.

CompSouth stated that the first issue - Whether line splitting can involve the commingling of Section 251 and Section 271 elements – is resolved by the resolution of Matrix Item No. 14 regarding commingling. CompSouth noted that the second issue -- Whether a CLP should indemnify BellSouth for "claims" or "claims and actions" arising

out of actions by the other CLP involved in the line splitting arrangement -- is largely. semantic. CompSouth stated that it agrees that the CLP should indemnify and defend BellSouth against claims made against BellSouth. CompSouth stated that it is concerned that the inclusion of the words "actions, causes of action" and "suits" might give rise to an obligation for CLPs to defend and indemnify BellSouth against entire "actions" or "suits", rather than the specific claims made against BellSouth (which do not involve accusations of willful misconduct or gross negligence).

The Public Staff noted in its Proposed Order that it agrees with BellSouth that BellSouth is not obligated to provide CLPs with access to BellSouth-owned line splitters. The Public Staff opined that, while FCC Rule 51.319(a)(1)(v) requires certain functionality for splitters under an ILEC's control, it does not state that the ILEC is required to make such splitters available. The Public Staff maintained that FCC Rule 51.319(a)(1)(ii) only obligates BellSouth to provide CLPs ". . . with the ability to engage in line splitting arrangements with another [CLP] using a splitter collocated at the central office. . ." Although the Public Staff believes that this obligation can be met without providing access to BellSouth-owned splitters, it also believes that the CLP should be allowed to use any available splitter, owned by itself or another CLP. As BellSouth witness Fogle suggested, the splitting functionality could come from any collocated stand-alone splitter or from the ADSL equipment itself.

The Public Staff noted that, in Section 3.8.14 relating to limited liability, BellSouth proposed to replace "damages and costs" with "actions, causes of action, suits, damages, injury, and costs including reasonable attorney's fees." The Public Staff stated that the parties did not discuss this section of the language in their testimony, and therefore the nature of the dispute is unclear. The Public Staff believes the parties should prepare a brief of their positions or negotiate mutually acceptable language.

The Public Staff maintained that Section 3.8.15 of CompSouth's proposed language requires BellSouth to make all necessary network modifications to facilitate line splitting. The Public Staff opined that this section restates the requirement that appears in 47 C.F.R. § 51.319(a)(1)(ii)(B). The Public Staff believes that BellSouth is obligated by this rule and that CompSouth's proposed language in this regard should be included in the ICA.

For these reasons, the Public Staff recommended that the Commission adopt the line splitting language proposed by CompSouth in witness Gillan's First Revised Exhibit JPG-1. With respect to the language proposed by BellSouth revising CompSouth's Section 3.8.14, which concerns limiting liability, the parties should clarify the dispute or attempt to negotiate mutually acceptable language.

After a review of the record of evidence on this issue, the Commission believes that there are four distinct areas of disagreement concerning line splitting, as follows:

(a) Whether line splitting can involve the commingling of Section 251 and Section 271 elements;

(b) Whether a CLP should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLP involved in the line splitting arrangement;

(c) Whether BellSouth must upgrade its OSS to support line splitting; and

(d) Whether BellSouth is obligated to provide CLPs access to BellSouth's splitters.

The Commission notes that the dispute over line splitting on a commingled arrangement of a Section 251 loop and unbundled local switching pursuant to Section 271 is resolved by the Commission's decision for Matrix Item No. 14. There, the Commission concluded that BellSouth should be required to commingle Section 251 UNEs with elements obtained pursuant to Section 271.

The second issue concerns the question of whether a CLP should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLP involved in the line splitting arrangement. The Commission notes that the Public Staff stated in its Proposed Order that the parties did not discuss this language dispute in their testimony, and therefore the nature of the dispute is unclear. The Public Staff recommended that the Commission require the parties to prepare a brief of their positions or negotiate mutually acceptable language. However, CompSouth clarified in its Post-Hearing Brief that it is concerned that the inclusion of the words "actions, causes of action" and "suits" might give rise to an obligation for CLPs to defend and indemnify BellSouth against entire "actions" or "suits", rather than the specific claims made against BellSouth (which do not involve accusations of willful misconduct or gross negligence). The Commission believes that CompSouth's concerns appear reasonable and that it should be possible for BellSouth and CompSouth to further negotiate this issue to include appropriate language in the interconnection agreement.

The third issue concerns whether BellSouth must upgrade its OSS to support line splitting. The Commission notes that FCC Rule 51.319((a)(1)(ii)(B) states, as follows:

> An incumbent LEC must make all necessary network modifications, including providing nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.

The Commission further notes that Section 3.8.15 of CompSouth's First Revised Exhibit JPG-1 includes this exact same language as reflected in Rule 51.319(a)(1)(ii)(B). BellSouth stated that the dispute between the parties revolves around the OSS modifications that are actually "necessary." BellSouth stated that CLPs do not need anything from BellSouth to facilitate line splitting. The Commission cannot

find comparable language concerning OSS in either BellSouth Exhibit PAT-1 or Exhibit PAT-2.

Although BellSouth asserts that the CLPs do not need anything from BellSouth to facilitate line splitting, the Commission does believe that it is appropriate to reflect the language of FCC Rule 51.319(a)(1)(ii)(B) in the interconnection agreement. Therefore, the Commission finds it appropriate to adopt Section 3.8.15 from CompSouth's First Revised Exhibit JPG-1 concerning access to OSS.

The final issue concerns whether BellSouth is obligated to provide CLPs access to BellSouth's splitters. The Commission notes that Section 3.6.13 of CompSouth's First Revised Exhibit JPG-1 states that "The Data LEC, Voice CLEC, a third party or BellSouth may provide the splitter." Further, the Commission notes that Section 3.4.1 of BellSouth's Exhibit PAT-1, concerning line splitting and UNE-P, states that "The Data LEC, Voice CLEC or BellSouth may provide the splitter" and that Section 3.5.1 of Exhibit PAT-1 and Section 3.3.1 of Exhibit PAT-2 states that "The Voice CLEC provides the splitter when providing Line Splitting with UNE-L".

The Commission further notes that FCC Rule 51.319(a)(1)(v) states:

> *Control of the loop and splitter functionality.* In situations where a requesting telecommunications carrier is obtaining access to the high frequency portion of a copper loop either through a line sharing or line splitting arrangement, the incumbent LEC may maintain control over the loop and splitter equipment and functions, and shall provide to the requesting telecommunications carrier loop and splitter functionality that is compatible with any transmission technology that the requesting telecommunications carrier seeks to deploy using the high frequency portion of the loop. . . "

Further, FCC Rule 51.319(a)(1)(ii) states:

> *Line splitting.* An incumbent LEC shall provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent.

The Commission agrees with BellSouth and the Public Staff that BellSouth is not obligated to provide CLPs with access to BellSouth-owned splitters. However, the Commission does not believe that CompSouth's proposed language requires BellSouth to provide a splitter; it simply states, for UNE-P, that BellSouth may provide the splitter, which implies that it is at BellSouth's discretion whether a BellSouth-owned splitter is available. Therefore, the Commission believes it is appropriate to conclude that BellSouth is not obligated to provide CLPs with access to BellSouth-owned splitter,

however, that CompSouth's proposed language in Section 3.6.13 of CompSouth's First Revised Exhibit JPG-1 is acceptable.

CONCLUSIONS

Based upon the foregoing and a review of the entire record of evidence in this proceeding, the Commission concludes that:

(a) In accordance with the Commission's decision on Matrix Item No. 14, line splitting should be allowed on a commingled arrangement of a Section 251 loop and unbundled local switching pursuant to Section 271;

(b) BellSouth and CompSouth should negotiate acceptable language to address whether a CLP should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLP involved in the line splitting arrangement;

(c) It is appropriate to adopt Section 3.8.15 from CompSouth's First Revised Exhibit JPG-1 concerning access to OSS; and

(d) BellSouth is not obligated to provide CLPs with access to BellSouth-owned splitters, however, that CompSouth's proposed language in Section 3.6.13 of CompSouth's First Revised Exhibit JPG-1 is acceptable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 19

ISSUE NO. 19 – MATRIX ITEM NO. 22: *TRRO*/FINAL RULES – What is the appropriate ICA language, if any, to address access to call related databases?

POSITIONS OF PARTIES

COMPSOUTH: BellSouth rests its contention that call-related databases should be excluded from ICAs on its general position that Section 271 checklist items should not be included in ICAs. BellSouth contended that because CLPs no longer have access to unbundled switching under Section 251, CLPs have no unbundled access to call-related databases. BellSouth is wrong on both counts: both unbundled switching and call-related databases must continue to be provided to CLPs at just and reasonable rates, terms, and conditions as part of BellSouth's compliance with the Section 271 competitive checklist. CompSouth's proposed contract language provides for call-related databases to be provided as part of the *TRRO* transition, and then be made available after the transition period in conjunction with Section 271 unbundled switching offerings.

BELLSOUTH: BellSouth's proposed language recognizes that its obligation to provide access to call-related databases is limited to the time in which it is obligated to provide unbundled access to local switching. Call related databases will no longer be available on an unbundled, Total Element Long Run Incremental Cost (TELRIC) priced basis

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

PUBLIC STAFF: The language proposed by CompSouth in Section 4.4.3.1 of witness Gillan's First Revised Exhibit JPG-1 should be adopted. The Commission should decline to consider the additional language proposed by CompSouth member MCI regarding directory assistance at this time.

DISCUSSION

CompSouth stated that ICAs should include language that makes call-related databases accessible pursuant to the Section 271 competitive checklist. CompSouth commented that any decision on access to call-related databases (e.g., loops, transport, and switching) is included in the Section 271 competitive checklist. CompSouth suggested that BellSouth's wholesale omission of ICA language on call-related databases is thus inappropriate, and CompSouth's proposed language should be incorporated in BellSouth ICAs.

BellSouth stated that its proposed contract language concerning call-related databases ties BellSouth's obligation to provide unbundled access to call related databases to BellSouth's limited obligation to provide switching or UNE-P.[102] Pursuant to the *TRO*, ILECs are not obligated to unbundle call-related databases for CLPs who deploy their own switches.[103] BellSouth contended that interconnection agreements should not contain any language regarding the provision of unbundled access to call-related databases other than 911 and E911.

BellSouth maintained that the D.C. Circuit affirmed the FCC's decision on call-related databases. If subsequent developments alter this situation, affected parties may petition the [FCC] to amend its rule."[104] BellSouth stated that to date no party has filed such a petition.

BellSouth argued that, because CLPs no longer have access to unbundled switching, CLPs 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 plan. BellSouth argued that 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.

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[102] *See* PAT-1 Section 7.1; Tipton Direct at Pages 60-62.

[103] *TRO* at Paragraph 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").

[104] *Id.*

The Public Staff stated that, with the exception of the MCI language, it appears that the only issue remaining is whether access to call-related databases pursuant to Section 271 should be included in the *TRRO* amendments. The Public Staff stated that it agrees with CompSouth that checklist item 10 requires BellSouth to continue providing nondiscriminatory access to databases and associated signaling necessary for call routing and completion after the transition period for access to Section 251 switching ends. The Public Staff maintained that, as the FCC made clear in Paragraphs 649 through 667 of the *TRO*, BellSouth has an independent obligation to provide access to elements under Section 271 checklist items 4, 5, 6, and 10 that have been removed from Section 251. The Public Staff recommended that the Commission should adopt the language proposed by CompSouth in Section 4.4.3.1 of witness Gillan's First Revised Exhibit JPG-1.

The Public Staff noted that the language proposed by MCI is included as Issue No. 31 in the upcoming arbitration proceeding in Docket No. P-474, Sub 14. The Public Staff opined that the parties did not provide sufficient information in this proceeding to enable the Commission to rule on this issue. Therefore, the Public Staff believes that the Commission should decline to consider the MCI language at this time.

The Commission believes that it appears that the only issue remaining is whether access to call-related databases pursuant to Section 271 should be included in the *TRRO* amendments. The Commission further adopts the reasoning of the Public Staff in which it agrees with CompSouth that checklist item 10 requires BellSouth to continue providing nondiscriminatory access to databases and associated signaling necessary for call routing and completion after the transition period for access to Section 251 switching ends. As the FCC made clear in Paragraphs 649 through 667 of the *TRO*, BellSouth has an independent obligation to provide access to elements under Section 271 checklist items 4, 5, 6, and 10 that have been removed from Section 251. However, the Commission believes that it does not have the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252 although fully cognizant that BellSouth does have an on-going obligation to provide nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

CONCLUSIONS

Consistent with its ruling in Finding of Fact No. 8, the Commission concludes that it does not have the authority to require BellSouth to include call-related databases provided pursuant to Section 271 in ICAs entered into pursuant to Section 252.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 20

ISSUE NO. 20 – MATRIX ITEM NO. 23(b): *TRO* – GREENFIELD AREAS - What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or "greenfield" fiber loops, including fiber loops deployed to the minimum point of entry (MPOE) of a multiple dwelling unit that is predominantly

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

POSITIONS OF THE PARTIES

COMPSOUTH: CompSouth contended that BellSouth's FTTH/FTTC loop unbundling exemptions applied only to loops serving mass market customers, not to loops serving enterprise customers. CompSouth also proposed making a slight clarification to BellSouth's Section 2.1.2.1, and adding new Section 2.1.2.3 to address BellSouth's obligation to offer unbundled DS1 loop facilities.

BELLSOUTH: BellSouth proposed to define FTTH and FTTC loops in Attachment 2, Section 2.1.2 of its standard ICA, and to implement the FCC's decisions concerning FTTH/FTTC loop unbundling obligations in greenfield areas in Attachment 2, Section 2.1.2.1. Greenfield fiber loops are part of newly-constructed fiber optic cable facilities to residential or business areas (areas that have never had existing copper facilities). BellSouth has no obligation to provide CLPs with unbundled access to newly-deployed greenfield fiber loops.

PUBLIC STAFF: The language in the Public Staff's proposed Finding of Fact 21 for Sections 2.1.2, 2.1.2.1 and 2.1.2.3 of the *TRRO* amendments should be adopted.

DISCUSSION

The FCC established the current requirements for unbundling FTTH loops in Paragraphs 197-342 of the *TRO*. In a separate order released on October 18, 2004 (*FTTC Order)*, the FCC defined FTTC loops and extended its FTTH loop unbundling requirements to FTTC loops.[105] These decisions were incorporated into the FCC's Rules in 47 C.F.R. § 51.319(a)(3), which defines the characteristics of FTTH/FTTC loops and sets forth the unbundling requirements that apply to them. Pursuant to 47 C.F.R. § 51.319(a)(3), an incumbent LEC must allow requesting telecommunications carriers, including CLPs, to access its FTTH and FTTC loops under limited circumstances for the provision of telecommunications services.

BellSouth proposed adding Paragraphs 2.1.2 and 2.1.2.1 to its standard ICA to address its FTTH/FTTC loop unbundling obligations in new build (greenfield) areas. Section 2.1.2 defines FTTH and FTTC loops as follows.

> 2.1.2 Fiber to the Home (FTTH) loops are local loops consisting entirely of fiber optic cable, whether dark or lit, serving an End User's premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the

[105] *Review of* Section *251 Unbundling Obligations of Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98, and 98-147, Order on Reconsideration (released Oct. 18, 2004).

MDU minimum point of entry (MPOE). Fiber to the Curb loops are local loops consisting of fiber optic cable connecting to a copper distribution plant that is not more than five hundred (500) feet from the End User's premises or, in the case of predominantly residential MDUs, not more than five hundred (500) feet from the MDU's MPOE. The fiber optic cable in a FTTC loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than five hundred (500) feet from the respective End User's premises.

Section 2.1.2.1 addresses BellSouth's fiber loop unbundling obligations in greenfield areas:

2.1.2.1 In new build (Greenfield) areas, where BellSouth has only deployed FTTH/FTTC facilities, BellSouth is under no obligation to provide Loops. FTTH facilities include fiber loops deployed to the MPOE of a MDU that is predominantly residential regardless of the ownership of the inside wiring from the MPOE to each End User in the MDU.

Sprint witness Maples stated that, in the *TRO*, the FCC eliminated an ILEC's obligation to unbundle FTTH loops in areas that had never been previously served by a loop facility (FCC Rule 51.319(a)(3)(i).) However, witness Maples explained that such exclusion does not apply to enterprise customers or predominantly business MDUs. Consequently, witness Maples suggested appending the following sentence to the end of BellSouth's Section 2.1.2, in order to explicitly exclude fiber loops serving enterprise customers and predominantly business MDUs from any *TRO* FTTH/FTTC unbundling exemptions: "FTTH/FTTC loops do not include local loops to enterprise customers or predominantly business MDUs."

Witness Maples observed that the *TRO* had defined FTTH loops in connection with its discussion of mass market loops (Paragraphs 214-220, and 273-285), and had specifically referred to them as mass market loops in Paragraph 274. In addition, witness Maples noted that in its discussion of an ILEC's obligation to provide access to DS1 loops, in Footnote 956 of the *TRO*, in its discussion pertaining to enterprise market loops, the FCC clearly included fiber optic facilities. Said Footnote 956 states the following:

DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, *e.g.*, two-wire and four-wire HDSL or SHDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve unless otherwise specifically indicated. *See supra* Part VI.A.4.a.(v) (discussing FTTH). The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers. *See supra* Part VI.A.4.a.(v)(b)(i).

Further, witness Maples observed that the initial definition incorporated in the FCC rules restricted the FTTH loops to residential units, but was subsequently changed to "end user's customer premises" in the *TRO Errata Order*, released September 17, 2003. In particular, FCC Rules 51.319(a)(3) and 51.319(a)(3)(i) were changed as follows - with strikethrough indicating deletions and shading indicating additions:

> (3) Fiber-to-the-home loops. A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving a ~~residential~~ end user's customer premises.
>
> (i) New builds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to a ~~residential unit~~ end user's customer premises that previously has not been served by any loop facility.

Furthermore, witness Maples commented that the FCC required access to dark fiber loops at the same time it provided for the FTTH exclusion and FTTH loops are defined as being either dark or lit. Witness Maples testified that the FTTH exemption was not intended to eliminate CLP access to every fiber loop; however, the FTTH loop unbundling restrictions do apply to certain small business customers, but not enterprise customers. He contended that these actions by the FCC indicated that it had not intended to extend any FTTH loop unbundling exemptions to loops serving enterprise customers. The FCC subsequently issued orders establishing FTTH unbundling rules for loops serving multiple dwelling units (*MDU Order*)[106] and extending its FTTH loop unbundling requirements to FTTC loops. Witness Maples quoted Paragraph 8 of the *MDU Order* to support his further contention that the FCC had intended to tailor FTTH/FTTC loop unbundling exemptions exclusively to predominantly residential MDUs, but not to predominantly business MDUs. Paragraph 8 of the MDU Order states that:

> Second, we conclude that tailoring FTTH relief to predominantly residential MDUs is more appropriate than a single, categorical rule covering all types of multiunit premises. A categorical rule either would retain disincentives to deploying broadband to millions of consumers contrary to the goals of section 706 or would eliminate unbundling for enterprise customers where the record shows additional investment incentives are not needed. As discussed above, we find that extending relief to predominately residential MDUs best tailors the unbundling relief to those situations where the analysis of impairment and investment incentives indicates that such relief is appropriate. We thus reject

[106] *Review of the* Section *251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, and 98-147, *Order on Reconsideration* (released August 9, 2004).

commenters' categorical assertions that the FTTH rules should never apply in the case of any multiunit premises, or that the unbundling relief should extend to all multiunit premises. Because we can draw an administratively workable distinction between predominately residential MDUs and other multiunit premises, we find that we can more carefully target the unbundling relief warranted by the consideration of section 706's goals. (Emphasis added and footnotes omitted.)

In rebuttal testimony, CompSouth witness Gillan argued that the FCC had not granted BellSouth a blanket exclusion from unbundling obligations for all fiber and hybrid loops. Instead, the FCC had specifically limited this exclusion to instances in which loops were being used to serve mass market customers. Witness Gillan quoted nine separate passages in the *TRO* and *FTTC Order* that he said limited any exemption from FTTH/FTTC loop unbundling requirements to loops serving mass market customers. He argued that BellSouth was obligated to provide access to CLPs serving enterprise customers, even in cases where the CLP could not gain access to the loop facility to serve mass market customers.

Witness Gillan also cited Paragraph 209 of the *TRO*, in which the FCC stated that it was addressing the provision of high-capacity loops, such as DS1, DS3, and OCn loops, as part of its enterprise market analysis. Witness Gillan interpreted this to mean that, whenever a CLP requested a DS1 loop to serve a customer, the request automatically meant the customer was, or was becoming, an enterprise market customer, and that BellSouth should apply the enterprise market loop unbundling obligations to such a request. Witness Gillan contended that BellSouth was inappropriately trying to exempt itself from the FCC's DS1 loop unbundling requirements, which should apply regardless of the type of loop architecture in place or the number of fiber-based collocators or switched business lines in the serving end office.

To address its concerns about the provision of DS1 loops, CompSouth proposed to add the following new Paragraph 2.1.2.3 to the standard agreement:

2.1.2.3 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.

BellSouth witness Fogle testified that BellSouth was willing to add a provision to the agreement stating that "FTTH/FTTC loops do not include local loops to predominantly business MDUs," even though BellSouth interpreted the *TRO* as applying the same FTTH/FTTC loop unbundling rules to all types of customers. While witness Fogle acknowledged that certain FCC orders suggested that loops serving predominantly business MDUs were not exempt from fiber loop unbundling requirements, he noted that the FCC's Rules did not make such a distinction. He suggested that BellSouth's ICAs could be amended later, if the FCC subsequently

addresses pending motions for reconsideration in a manner that clarifies the extent of BellSouth's FTTH/FTTC unbundling obligations. In rebuttal testimony, witness Fogle stated that the best reading of the *TRO*, the rules, and the FCC's goals of increasing broadband deployment is that FTTH/FTTC relief extends to all such deployments. As an example, witness Fogle observed that the FCC stated in the *TRO*, at Paragraph 210, that while it adopted "loop unbundling rules specific to each loop type, our obligations and limitations for such loops do not vary based on the customer to be served." *TRO* Paragraph 210 states that:

> In considering the different customer markets to inform our understanding of competitive carrier loop deployment, we note that our market classifications allow us to conduct our impairment analyses for the various loop types at a more granular level but are not intended to prohibit the use of UNE loops by customers not typically associated with the respective customer market class. For example, business customers typically associated with the enterprise market may require DS0 lines, particularly if they have remote business locations staffed by only a few employees where high-capacity loop facilities are not required. Because a competitive carrier faces the same economic characteristics to serve these customers at their remote locations with a DS0 loop that it faces to serve residential customers served by the same loop type, our customer class distinctions are not intended to preclude a competitive LEC from obtaining an unbundled DS0 loop to serve these business customers. Similarly, a competitive LEC faces the same economic considerations in provisioning a DS1 loop to a large business customer typically associated with the enterprise market that it faces in provisioning that same loop type to a very small business or residential customer typically associated with the mass market. Thus, while we adopt 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. (Footnote omitted.)

Further, witness Fogle commented that In the *TRO Errata* (issued September 2003), the FCC deleted the word "residential" from its rules defining FTTH loops, so that a FTTH loop is a local loop serving an end user's customer premises (*TRO Errata*, Paragraph 37). Also, witness Fogle noted that in the *TRO Errata*, the FCC replaced the word "residential unit" with "end user's customers premises" in the rules defining new builds, so that an ILEC is not required to provide FTTH loop to an end user's customer premises. (*TRO Errata*, Paragraph 38). Witness Fogle also stated that in the *Errata* to the October 18, 2004 *Order on Reconsideration*, the FCC replaced the words "a residential unit" in its rules addressing new builds, so that an ILEC is not required to provide a FTTH or FTTC loop on an unbundled basis when the ILEC deploys such a loop to an end user's customers premises that has not been served by any loop facility. Thus, witness Fogle observed that while some of the FCC's orders contain language suggesting that fiber relief does not extend to predominantly business MDUs, the rules contain no such limitation.

The Commission has carefully examined the *TRO*, the *FTTC* and *MDU* Orders, and the FCC's Rules, and agrees that the FCC's language concerning incumbent LECs' obligations to provide unbundled access to FTTH/FTTC loops serving predominantly business MDUs and enterprise customers could be clearer. However, the Commission's best interpretation of the FCC's decisions supports the conclusions and recommendations of Sprint, CompSouth, and the Public Staff; i.e., that BellSouth's FTTH/FTTC loop unbundling obligations should extend to loops serving predominantly business MDUs and enterprise customers. BellSouth witness Fogle effectively conceded the point in connection with predominantly business MDUs, and the language of the *MDU Order* leads the Commission to conclude that BellSouth should be required to offer unbundled access to FTTH/FTTC loops serving these locations. However, Sprint, CompSouth, and the Public Staff also argued persuasively and, the Commission believes, correctly, that the FCC intended for FTTH and FTTC loops serving enterprise customers to be subject to loop unbundling obligations. Accordingly, the Commission concludes that BellSouth's proposed Section 2.1.2 should be modified by adding the following sentence at the end: "BellSouth shall offer CLECs unbundled access to FTTH/FTTC loops serving enterprise customers and predominantly business MDUs."

With respect to BellSouth's proposed Section 2.1.2.1, CompSouth proposed to insert the phrase "such FTTH and FTTC" into the first sentence, so that it reads: "In new build (Greenfield) areas, where BellSouth has only deployed FTTH/FTTC facilities, BellSouth is under no obligation to provide such FTTH and FTTC Loops." No party opposed this change, and the Commission believes the additional phrase proposed by CompSouth helps to clarify the nature of BellSouth's greenfield FTTH/FTTC loop unbundling exemption without changing the intent of the paragraph.

BellSouth witness Fogle agreed with CompSouth's proposed language for access to FTTH and FTTC (Gillan Exhibit JPG-1, Paragraphs 2.1.2, 2.1.2.1, and 2.1.2.2). However, in rebuttal testimony, witness Fogle testified that in other states CompSouth has modified its contract language in an attempt to require BellSouth to provide unbundled DS1 FTTH/FTTC loops in unimpaired wire centers and "[i]f CompSouth refiles its exhibit, then BellSouth is unwilling to agree to any such language."

The Public Staff proposed to include CompSouth's Section 2.1.2.3 in the ICA subject to the following modifications:

> 2.1.2.3 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 unbundled access to DS1 loops and loop/transport combinations~~loop facilities~~.

Accordingly, the Commission concludes that Section 2.1.2.3 as modified above should be incorporated into the standard agreement.

The final question raised in Matrix Item No. 23(b) was whether the ownership of the inside wiring from the MPOE to each end user has any impact on BellSouth's obligation to offer unbundled access to greenfield fiber loops. The second sentence of BellSouth's proposed Section 2.1.2.1 includes language stating that "FTTH facilities include fiber loops deployed to the MPOE of a MDU that is predominantly residential regardless of the ownership of the inside wiring from the MPOE to each End User in the MDU." Inclusion of this sentence in the agreement was not opposed by any party. The language in question, which appears to mirror the FCC's decision in Paragraph 10 of the MDU Order, is appropriate for inclusion in Section 2.1.2.1.

CONCLUSIONS

The Commission concludes that the following Sections should be incorporated into the *TRRO* amendments to resolve Matrix Item No. 23(b):

> 2.1.2 Fiber to the Home (FTTH) loops are local loops consisting entirely of fiber optic cable, whether dark or lit, serving an End User's premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the MDU minimum point of entry (MPOE). Fiber to the Curb loops are local loops consisting of fiber optic cable connecting to a copper distribution plant that is not more than five hundred (500) feet from the End User's premises or, in the case of predominantly residential MDUs, not more than five hundred (500) feet from the MDU's MPOE. The fiber optic cable in a FTTC loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than five hundred (500) feet from the respective End User's premises. BellSouth shall offer CLECs unbundled access to FTTH/FTTC loops serving enterprise customers and predominantly business MDUs.
>
> 2.1.2.1 In new build (Greenfield) areas, where BellSouth has only deployed FTTH/FTTC facilities, BellSouth is under no obligation to provide such FTTH and FTTC Loops. FTTH facilities include fiber loops deployed to the MPOE of a MDU that is predominantly residential regardless of the ownership of the inside wiring from the MPOE to each End User in the MDU.
>
> 2.1.2.3 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 unbundled access to DS1 loops and loop/transport combinations.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 21

ISSUE NO. 21 – MATRIX ITEM NO. 24: *TRRO*/FINAL RULES – What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

POSITIONS OF PARTIES

COMPSOUTH: The only "limitation" on BellSouth's unbundling obligations with respect to fiber/cooper hybrid loops is that BellSouth need not provide access to the packet-based capability in the loop. This limitation, however, should not affect CLPs' ability to obtain access to DS1 (and DS3) loops. The FCC made clear that BellSouth must still provide DS1 and DS3 loops on such facilities. In the hybrid loop unbundling portion of the *TRO*, the FCC emphasized that the unbundling limitations on hybrid loops do "not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers." (*TRO* Paragraph 294) In addition, the FCC's policies are premised on the understanding that, to the extent that an ILEC deploys a packet-based architecture, the packet-architecture parallels its TDM-network, and would not isolate customers from access to CLP DS1-based services. As with the "greenfield" provisions discussed regarding Issue 22, the limitations on unbundling of hybrid loops should not be used to deny CLPs access to the DS1 facilities necessary to serve small business customers.

BELLSOUTH: BellSouth's sole obligation to provide access to hybrid loops is limited to a requirement to provide access to the time division multiplexing features of a hybrid loop, where continued access to existing cooper is required by the FCC.

PUBLIC STAFF: The following language should be adopted for the *TRRO* amendments to address BellSouth's hybrid loop unbundling obligations: "A hybrid loop is a local loop, composed of both fiber optic cable usually in the feeder plant and cooper twisted wire or cable usually in the distribution plant. BellSouth shall provide unbundled access to hybrid loops pursuant to the requirements of 47 C.F.R. 51.319(a)(2)."

DISCUSSION

CompSouth stated that this issue is critical for CLPs serving the small and medium-size business market. CompSouth asserted that BellSouth's position is that it can deny access to Section 251 UNE DS1 loops, even in areas that the FCC has found remain "impaired" for purposes of Section 251. CompSouth argued that BellSouth's position is that anywhere it extends new fiber or replaces existing copper with fiber, it may refuse to provision Section 251 DS1 loops.

Further, CompSouth stated that the predicate to BellSouth's reduced unbundling obligations for these network architectures is that the loops are used to serve mass market customers. CompSouth noted that BellSouth was not granted a total exception to its loop unbundling obligations for all fiber and hybrid loops; rather, the FCC's

broadband exclusions were specifically limited to circumstances where these loops are used to serve the mass market.

CompSouth commented that, with regard to fiber/copper hybrid loops, the only "limitation" on BellSouth's unbundling obligations is that BellSouth need not provide access to the packet-based capability in the loop.[107] CompSouth argued that this limitation, however, should not affect CLPs' ability to obtain access to DS1 (and DS3) loops in any meaningful way.

CompSouth maintained that, first, the FCC made clear that BellSouth must still provide DS1 and DS3 loops on such facilities:

> We stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers. These TDM-based services – which are generally provided to enterprise customers rather than mass market customers – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs.... Incumbent LECs remain obligated to comply with the nondiscrimination requirements of Section 251(c)(3) in their provision of loops to requesting carriers, including stand-alone spare copper loops, copper subloops, and the features, functions, and capabilities for TDM-based services over their hybrid loops.[108]
>
> Although packetized fiber capabilities will not be available as UNEs, incumbent LECs remain obligated, however, to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information. Thus, as discussed more specifically in the Enterprise Loops Section, consistent with the proposals of HTBC, SBC, and others, incumbent LECs must provide unbundled access to a complete transmission path over their TDM networks to address the impairment we find that requesting carriers currently face. This requirement ensures that competitive LECs have additional means with which to provide broadband capabilities to end users because competitive LECs can obtain DS1 and DS3 loops, including channelized DS1 or DS3 loops and multiple DS1 or DS3 loops for each customer.[109]

Second, CompSouth noted that the FCC's policies are premised on the understanding that, to the extent that an ILEC does deploy a packet-based architecture, the packet-architecture parallels its TDM-network, and would not isolate customers from access to CLP DS1-based services.

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[107] *TRO* Paragraph 288.

[108] *TRO* Paragraph 294. Footnotes omitted.

[109] *TRO* Paragraph 289. Footnote omitted.

> In their submissions in this proceeding, incumbent LECs demonstrate that they typically segregate transmissions over hybrid loops onto two paths, *i.e.*, a circuit-switched path using TDM technology and a packet-switched path (usually over an ATM network). *See, e.g.*, SBC Jan. 15, 2003 *Ex Parte* Letter at 4 (providing diagram to illustrate that its network architecture consists of a TDM-based portion and a packet-switched portion).[110]

CompSouth opined that the exception to BellSouth's general obligation to unbundle DS1 (and DS3) services in the hybrid loop context is a narrow one. To the extent that BellSouth is no longer required to provide access to DS1 (and DS3) loops, those circumstances are defined by the wire-center-by-wire-center analysis related to establishing the number of switched business lines and unaffiliated fiber-based collocators, and not by the loop architecture deployed by the incumbent.

BellSouth stated that 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, whether that language is a shortened version of the rules, as BellSouth proposes, or the federal definition in its entirety.[111] Either alternative is acceptable. BellSouth argued that what is not acceptable is CompSouth's proposed language to require BellSouth to provide access to hybrid loops as a Section 271 obligation.[112] BellSouth explained that the Commission should not include any Section 271 language in Section 252 interconnection agreements; thus CompSouth's proposed language should be rejected.

The Public Staff stated that FCC set forth the current requirements for hybrid loop unbundling in Paragraphs 285 through 297 of the *TRO* and codified these requirements in FCC Rule 51.319(a)(2), which defines a "hybrid loop" as "a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant." The Public Staff opined that, pursuant to this rule, an incumbent LEC must allow requesting telecommunications carriers, including CLPs, to access its hybrid loops for the provision of broadband and narrowband services. The Public Staff maintained that, however, an ILEC is not required to provide unbundled access to the packet switched features, functions, and capabilities of its hybrid loops.

The Public Staff noted that BellSouth witness Fogle addressed the issue of hybrid loop unbundling in his direct and rebuttal testimony. The Public Staff commented that witness Fogle cited Paragraph 288 of the *TRO* to support his argument that requiring ILECs to unbundle hybrid loops would discourage their deployment of advanced telecommunications infrastructure and deter competitive LECs from investing in their own facilities. The Public Staff stated that, however, he acknowledged that, in

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[110] *TRO* Paragraph 294, footnote 846.

[111] *See* Exhibits PAT-1 and PAT-2.

[112] Fogle Rebuttal at 12.

overbuild situations, ILECs were still required to provide access to the time division multiplexing features of hybrid loops. The Public Staff pointed out that BellSouth proposed to include the following language in Section 2.1.3 of its standard ICA:

> 2.1.3 A hybrid loop is a local Loop, composed of both fiber optic cable, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant. BellSouth shall provide <<customer_short_name>> with nondiscriminatory access to the time division multiplexing features, functions and capabilities of such hybrid Loop, on an unbundled basis to establish a complete transmission path between BellSouth's central office and an End User's premises. (Exhibit PAT-1 - Attachment 2, Pages 8-9.)

The Public Staff noted that CompSouth witness Gillan disputed witness Fogle's arguments, contending that the FCC had only exempted BellSouth from offering unbundled access to fiber and hybrid loops serving mass market customers, not all customers. The Public Staff maintained that witness Gillan identified nine passages from the *TRO* and the subsequent *FTTC Order* to support his position. The Public Staff noted that witness Gillan claimed that the only hybrid loop exemption actually granted to BellSouth was an exemption from the requirement to provide access to the packet-based capability of hybrid loops. The Public Staff stated that he also cited *TRO* provisions suggesting that BellSouth was still required to offer CLPs access to hybrid DS1 and DS3 loops. The Public Staff maintained that CompSouth proposed the following changes to BellSouth's Section 2.1.3:

> 2.1.3 A hybrid loop is a local Loop, composed of both fiber optic cable, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant. BellSouth shall provide ~~<<customer_short_name>>~~CLEC with nondiscriminatory access to the time division multiplexing features, functions and capabilities of such hybrid Loop, including DS1 and DS3 capacity under Section 251 where impairment exists, on an unbundled basis to establish a complete transmission path between BellSouth's central office and an End User's premises. Where impairment does not exist, BellSouth shall provide such hybrid loop at just and reasonable rates pursuant to Section 271 at the rates set forth in Exhibit B. This access shall include access to all features, functions, and capabilities of the hybrid loop that are not used to transmit packetized information. (First Revised Exhibit JPG-1, Page 53.)

The Public Staff noted that Sprint witness Maples testified that, pursuant to 47 C.F.R. §§ 51.319(a)(2)(iii)(A)-(B), ILECs are required to provide unbundled access to hybrid loops for broadband (DS1/DS3) and narrowband (DS0) loops. The Public Staff commented that he disagreed with witness Fogle's contention that hybrid loops should not be unbundled since they are part of the next-generation network, citing *TRO* Paragraph 288 to show that the FCC was actually characterizing the packet-switched functionality of hybrid loops as "next-generation" technology, rather than the loops

themselves. The Public Staff maintained that witness Maples proposed that the underlined language below be added to BellSouth's Section 2.1.3:

> 2.1.3 A hybrid loop is a local Loop, composed of both fiber optic cable, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant. BellSouth shall provide <<customer_short_name>> with nondiscriminatory access to the time division multiplexing features, functions and capabilities of such hybrid Loop, on an unbundled basis to establish a complete transmission path between BellSouth's central office and an End User's premises for the provision of broadband services. For Narrowband services BellSouth shall provide <<customer short name>> with nondiscriminatory access to an entire hybrid loop capable of voice grade service using the time division multiplexing features, functions and capabilities or (sic) hybrid loop or access to a spare home-run copper loop.

The Public Staff stated that Sprint's language includes a paraphrased version of 47 C.F.R. §§ 51.319(a)(2)(iii)(A)-(B), which addresses the use of hybrid loops in the provision of broadband and narrowband services.

The Commission believes that BellSouth, CompSouth, and Sprint have all raised valid points concerning Matrix Item No. 24. The Commission agrees with the Public Staff that BellSouth has crafted a version of Section 2.1.3 that tracks specific language in the Rule precisely, except that BellSouth substitutes the phrase "such hybrid loop" for the FCC's phrase "that hybrid loop," and substitutes "End User's premises" for the FCC's "end user's customer premises." BellSouth's language omits most of the detail contained in the FCC's Rules addressing hybrid loops, apparently in order to avoid unnecessarily complicating the agreement.

As the Public Staff pointed out in its analysis, the versions of Section 2.1.3 proposed by CompSouth and Sprint also selectively cite language from the FCC's Rules on hybrid loops, focusing on certain requirements and ignoring others. CompSouth adds a further provision requiring BellSouth to provide hybrid loops "at just and reasonable rates pursuant to Section 271" wherever impairment does not exist, yet it fails to justify or explain the need for this provision in its testimony. Therefore, the Commission rejects this additional language.

After examining the current text of FCC Rule 51.319(a)(2) ("Hybrid loops") and comparing it to the versions of Section 2.1.3 offered by BellSouth, CompSouth, and Sprint, the Commission believes that there is no dispute among the parties concerning the applicability and appropriateness of the rules adopted by the FCC to govern hybrid loops. The Commission concludes that the best approach to Matrix Item No. 24 is to set forth BellSouth's hybrid loop unbundling obligations in the agreement by defining hybrid loops in Section 2.1.3 and then adding a sentence to explicitly require that access to hybrid loops be provided consistent with the requirements of the FCC's Rules.

CONCLUSIONS

The Commission concludes that the following language should be adopted for the *TRRO* amendments to address BellSouth's hybrid loop unbundling obligations:

> 2.1.3 A hybrid loop is a local loop, composed of both fiber optic cable usually in the feeder plant and cooper twisted wire or cable usually in the distribution plant. BellSouth shall provide unbundled access to hybrid loops pursuant to the requirements of 47 C.F.R. 51.319(a)(2).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

ISSUE NO. 22 - MATRIX ITEM NO. 26: *TRO* / ROUTINE NETWORK MODIFICATION (RNM) – What is the appropriate ICA language to implement BellSouth's obligation to provide RNMs?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth remarked that the FCC defined RNMs as follows: "A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers."[113] CompSouth asserted that under the FCC rules, BellSouth is obligated to make RNMs for CLPs where the UNE loop or transport routes have already been constructed. CompSouth observed that BellSouth had acknowledged its obligation to provide RNMs, but BellSouth opposed the language offered by CompSouth that would ensure that the new ICA would be completely consistent with the FCC's orders and rules on RNMs. For example, CompSouth explained that in BellSouth's mark-up of CompSouth's contract language proposal (filed as Exhibit PAT-5 to witness Tipton's rebuttal testimony), BellSouth objected to language ensuring that RNMs are conducted in a nondiscriminatory fashion. CompSouth argued that its proposed contract language more faithfully tracks the FCC's RNM rulings, and provides the better alternative on this issue.

In addition, CompSouth remarked that there is an issue regarding whether line conditioning, which is subject to a separate set of FCC rules, should nevertheless be treated as an RNM. CompSouth asserted that its contract language recognizes that line conditioning requirements subject BellSouth to different obligations than RNM requirements. CompSouth explained that the line conditioning rules were in effect before the RNM rules and were specifically re-adopted by the FCC in the *TRO*. CompSouth maintained that BellSouth has stretched two sentences in the *TRO* well beyond their context in order to limit line conditioning in ways not contemplated by the FCC. CompSouth believes that its proposed contract language properly treats RNMs as RNMs, and does not attempt to inappropriately subject line conditioning to RNM rules. CompSouth contended that BellSouth should continue to make line conditioning available at the TELRIC rates already approved by the Commission.

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[113] See 47 C.F.R. Section 51.319(a)(8)(ii)(local loops) and Section 51.319(e)(5)(ii)(dedicated transport).

BELLSOUTH: BellSouth maintained that BellSouth's RNM obligation is limited to performing those tasks that BellSouth regularly undertakes for its own customers (including xDSL customers).

PUBLIC STAFF: The Public Staff stated that the version of Section 1.10 of the *TRRO* amendments offered by Sprint witness Maples should be adopted to implement BellSouth's obligation to provide RNMs.

DISCUSSION

BellSouth proposed specific language for Attachment 2, Section 1.10 of the standard ICA to address the rates, terms, and conditions for providing RNMs to CLPs. BellSouth witness Fogle testified that BellSouth's language was consistent with the FCC's decisions in the *TRO*. According to witness Fogle, RNMs are industry-recognized standard changes to outside plant infrastructure in order to provide standard services. As an example of what he considered a RNM, witness Fogle explained that in order for BellSouth or a CLP to offer DS1 service to a customer over 20,000 feet from a central office, the industry standard calls for signal repeaters to be installed. Alternatively, witness Fogle testified that nonstandard changes to loops are not RNMs. And as an example of what he considered a non-RNM, witness Fogle stated that industry standards require load coils to be placed on copper loops over 18,000 feet long to provide sufficient quality voice service in the low frequency portion of the loop. Further, witness Fogle explained that since load coil removal on a loop over 18,000 feet long is a nonstandard request, and rare, it is not routinely performed.

Further, witness Fogle testified that line conditioning is a RNM and as a result BellSouth included the following language in Section 2.5.1 which states, in part, that "Line Conditioning is defined as routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers." Witness Fogle testified that the types of line conditioning CLPs have historically requested that BellSouth does not consider to be RNMs are where BellSouth has removed load coils on loops greater than 18,000 feet long and removed bridged taps at the request of CLPs. Witness Fogle maintained that since BellSouth does not perform either type of line conditioning while provisioning xDSL service to its own customers, and they are not routine, BellSouth is not obligated to perform this function for CLPs. Witness Fogle testified that line conditioning is a subset of RNMs and, in support of his position, he cited *TRO* Paragraph 250, which states that line conditioning constitutes a form of RNM and Paragraph 643, which states that line conditioning is properly seen as a RNM. In summary, witness Fogle stated that the issue here concerns the relationship between RNMs and line conditioning and this same issue has been raised in the Joint Petitioners/BellSouth Arbitration; and the real dispute here is that the CLPs do not agree with the FCC's decision that BellSouth should not be required to perform work for CLPs that it does not perform for itself in the course of providing service to its own customers.

In its Brief, BellSouth stated that the FCC in *TRO* Paragraph 632 has defined RNMs as "those activities that incumbent LECs regularly undertake for their own customers." Further, BellSouth argued that the FCC, in the *TRO*, at Paragraph 630, citing the United States Supreme Court, recognizes that BellSouth does not have an obligation to "alter substantially [its] network[] in order to provide superior quality interconnection and unbundled access." Thus, BellSouth claimed that an ILEC has to make the same RNMs to their existing loop facilities for CLPs that they make for their own customers. BellSouth also noted that the FCC in *TRO* Paragraph 634 stated

> . . . By way of illustration, we find that loop modification functions that the incumbent LECs routinely perform for their own customers, and therefore must perform for competitors, include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer. (Footnotes omitted.)

BellSouth noted that the FCC described these and other activities that would constitute RNMs as the "'routine, day-to-day work of managing an [incumbent LEC's] network.'"[114]

In addition, BellSouth opined that the D.C. Circuit Court's analysis in *USTA II* is entirely consistent with BellSouth's position on this issue. BellSouth provided the following excerpt as support:

> The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. ***The FCC has established a clear and reasonable limiting principle: the distinction between a 'routine network modification' and a 'superior quality' alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for its own customers.*** While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLPs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be 'nondiscriminatory'.[115] (Emphasis added.)

Further, BellSouth argued that in its discussion of RNMs, the FCC expressly equated its RNM rules to its line conditioning rules in the *TRO* when it stated that "In fact, the routine modifications we require today are substantially similar activities to

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[114] *TRO* at Paragraph 637.

[115] *USTA II*, 359 F.3d at 578. (Emphasis added.)

those that the incumbent LECs currently undertake under our line conditioning rules."[116] Furthermore, BellSouth stated that the FCC echoed these sentiments in Paragraph 250 of the *TRO*:

> As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service.

In its Brief, CompSouth stated that its disagreement with BellSouth regarding RNMs is twofold: (1) CompSouth disagreed with BellSouth's attempt to submerge the FCC's pre-existing rules on line conditioning into the rules adopted in the *TRO* regarding RNMs, and (2) CompSouth opposed BellSouth's proposed contract language on the issue, since it fails to include certain modifications that are required of BellSouth in the *TRO*.

CompSouth witness Gillan testified that the FCC adopted specific rules requiring BellSouth to condition loop plant to support advanced data services. Witness Gillan noted that under FCC Rule 51.319(a)(1)(iii) BellSouth is expressly required to perform line conditioning. Witness Gillan testified that line conditioning is not the same obligation as RNMs. Witness Gillan maintained that the FCC's line conditioning rule makes it clear that BellSouth is obligated to condition facilities "whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop." Accordingly, witness Gillan noted that BellSouth need not routinely condition loop facilities for its own services for it to be obligated to condition facilities for other CLPs. Witness Gillan asserted that the obligation to conduct RNMs, by contrast, is a separate and distinct obligation from BellSouth's additional obligation to perform line conditioning for CLPs. Witness Gillan pointed out that these two obligations are governed by distinct rules: RNMs are mandated by FCC Rule 51.319(a)(8), while line conditioning is mandated by FCC Rule 51.319(a)(1)(iii); and thus, the structure of FCC Rule 51.319 in itself demonstrates that line conditioning is not the same obligation as a RNM.

Witness Gillan presented the following example to illustrate the difference between line conditioning and a RNM:

> To a large extent, BellSouth's DSL offerings are housed in remote terminals, located closer to customers. CLECs, on the other hand, collocate their equipment at the central office and, therefore, must frequently use longer loops.
>
> To the extent that BellSouth limits its own line conditioning to shorter loops because of its network architecture, it could claim that it does not need to perform line conditioning for a CLEC because it was not a 'routine network modification'. However, because the FCC has specifically established

[116] *TRO* at Paragraph 635.

Line Conditioning as an obligation that BellSouth must honor *whether or not it would do so for its own customers*, BellSouth must still condition facilities at the request of the CLEC at the TELRIC-compliant rates already approved by this Commission.

CompSouth stated that in its 1996 *Local Competition Order*[117], the FCC established that ILECs must modify their facilities to accommodate CLP access to UNEs. CompSouth explained that certain aspects of the FCC's initial rules were overturned, but the current law provides (as the FCC stated in the *TRO*) that ILECs "can be required to modify their facilities 'to the extent necessary to accommodate interconnection or access to network elements,' but cannot be required 'to alter substantially their networks in order to provide superior quality interconnection and unbundled access.'"[118]

Next, CompSouth explained that as part of the 1999 *UNE Remand Order*, the FCC exercised this authority to adopt rules regarding "line conditioning." The line conditioning rules require ILECs to condition copper loops and subloops "to ensure that the copper loop or subloop is suitable for providing digital subscriber line services ... whether or not the [ILEC] offers advanced services to the end-user customer on that copper loop or subloop."[119] The line conditioning rules were re-adopted by the FCC in the *TRO*.[120]

Further, CompSouth observed that it was not until the *TRO* that the FCC identified the concept of "routine network modifications" as another set of network changes ILECs are obligated to make to accommodate UNE access. In the *TRO*, at Paragraph 632, the FCC stated: "By 'routine network modifications' we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers . . . to provide competitive carriers with greater certainty as to the availability of unbundled high-capacity loops and other facilities throughout the country." CompSouth stated that in the RNM discussion in the *TRO*, the FCC explicitly limited RNMs to activities ILECs "undertake[s] for their own customers," a limitation that has never been placed on the line conditioning rules.

CompSouth noted that the line conditioning and RNM rules are outlined in different, wholly contained subsections of the loop unbundling rules[121] and they cover

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[117] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd at 15608, Paragraph 209 (1996) ("*Local Competition Order*").

[118] *TRO*, at Paragraph 630, *quoting*, *Iowa Utilities Board v. FCC*, 120 F.3d at 813 (8th Cir. 1997).

[119] 47 C.F.R. § 51.319(a)(1)(iii).

[120] *TRO*, at Paragraph 642.

[121] Rule 51.319 is the general rule setting forth unbundling requirements for all Section 251 UNEs. The line conditioning rules are found at 51.319(a)(1)(iii); the RNM rules are found at 51.319(a)(8).

different topics and set forth unique requirements for the ILEC. They were discussed and approved (or re-approved, in the case of line conditioning) by the FCC in two different Sections of the *TRO*.[122] CompSouth stated that, nevertheless, BellSouth contends that these independent rules are not independent at all; rather, when the FCC adopted the line conditioning rules in 1999, it really meant that line conditioning is a "subset" of the routine network modification rules that were not adopted until 2003.

Furthermore, CompSouth asserted that BellSouth's contention that the line conditioning rules should be read as part of the RNM rules is based on a few sentences in the *TRO*, rather than on a comprehensive review of the rules and ordering paragraphs. CompSouth explained that, primarily, BellSouth relies on a sentence in the line conditioning discussion where the FCC was rebutting arguments that line conditioning violates the prohibition against forcing ILECs to provide access to a "superior network." In countering the ILECs' arguments, in the *TRO*, at Paragraph 643, the FCC stated:

> Line conditioning does not constitute the creation of a superior network, as some incumbent LECs argue. Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers.

With respect to that FCC discussion, CompSouth contended that the FCC was comparing the nature of the activities that ILECs must perform under RNM and line conditioning requirements. CompSouth opined that by comparing the two when describing what activities are included in each, the FCC said nothing that negates the actual terms in its rules. CompSouth believes that the FCC simply did not, as BellSouth claims, change its long-standing line conditioning rules to make line conditioning, as a legal matter, a subset of RNM. CompSouth asserted that when read in context, the *TRO* (and the *UNE Remand Order* before it) clearly treat line conditioning and RNM as separate requirements subject to separate rules. In other words, just because the FCC acknowledged that line conditioning is a modification that ILECs routinely make to their networks, the FCC did not require CLP access to line conditioning on the basis that it is a RNM, but, rather, the FCC established clear rules for CLP access to line conditioning long prior to the *TRRO*. CompSouth maintained that nothing in the *TRRO* vacated or changed those rules, or placed line conditioning under the RNM rules.

As the evidence at hearing demonstrated, CompSouth commented that the issue is an important one as broadband services continue to evolve. Currently, according to BellSouth witness Fogle, BellSouth does not condition copper loops over 18,000 feet in length for its own DSL services. CompSouth observed that there are emerging DSL technologies, however, that would allow DSL to be provided by CLPs on loops longer than 18,000 feet. CompSouth believes that if a CLP chose to use such a technology and needed line conditioning, a straightforward reading of the FCC's Orders indicates that line conditioning would be available at TELRIC rates. However, as CompSouth

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[122] Compare *TRO* Paragraphs 632-641 and Paragraphs 642-648.

observed if BellSouth's reading of the rules is accepted, BellSouth could decline to perform line conditioning as requested by the CLP, or demand exorbitant rates to undertake the necessary line conditioning work.

Furthermore, CompSouth opined that DSL standards are subject to change and are regularly debated in industry forums. Thus, CompSouth commented that even if line conditioning different from what BellSouth does for itself is not needed regularly today, an emerging DSL technology could change that quickly. CompSouth noted that if BellSouth sought to slow a CLP's deployment of such a technology, it could decline to perform line conditioning, claiming that it only has to perform RNM/line conditioning the same as it does it for its own customers. CompSouth argued that if BellSouth is not yet serving customers using the new technology, however, that could explain why BellSouth is not conducting the requested line conditioning and it could be refusing to perform the requested line conditioning as a way to keep CLPs from beating BellSouth to market with an innovative new technology.

CompSouth opined that as technology emerges, the best hope CLPs have for expanding broadband competition is to get to market quickly with innovative offerings. CompSouth maintained that the line conditioning rules affecting DSL-based and other advanced services were written to facilitate such rapid market entry by competitors. CompSouth noted that, in fact, when the FCC re-adopted the line conditioning rules, the FCC explicitly stated in the *TRO*, at Paragraph 644 that:

> As a final matter, we determine that requiring incumbent LECs to perform line conditioning advances our Section 706 goals. Specifically, line conditioning speeds the deployment of advanced services by ensuring that competitive LECs are able to obtain, as a practical matter, a local loop UNE with the features, functions, and capabilities necessary to provide broadband services to the mass market.

CompSouth contended that BellSouth's attempt to submerge the FCC's pre-existing rules on line conditioning into the rules adopted in the *TRO* regarding RNMs would impose a roadblock that was not contemplated by the FCC's rules. CompSouth stated that BellSouth's creative reading of the *TRO* should be rejected and the FCC's Orders should be applied as they are written. In Gillan Exhibit JPG-1, CompSouth witness Gillan provided his proposed line conditioning language under his reference to Generic Issue No. 33*, which was stated as follows: "(a) How should Line Conditioning be defined in the Agreement? (b) Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less? (c) Under what rates, terms, and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?"

In regard to its second objection to the BellSouth RNM position, CompSouth explained that it involves the specific terms in the proposed ICA language concerning BellSouth's proposed language on RNMs. Witness Gillan testified that the RNM language should closely track the FCC's specific discussion and he provided proposed

language in Gillan Exhibit JPG-1, for Matrix Item No. 26. CompSouth noted that when BellSouth "redlined" CompSouth's contract language proposal, which was provided in Exhibit JPG-1, BellSouth filed its redline version of CompSouth's proposal, as Exhibit PAT-5 to witness Tipton's rebuttal testimony. CompSouth asserted that BellSouth inexplicably excluded portions of the CompSouth contract proposal that were taken directly from the FCC's RNM rule. CompSouth urged the Commission to accept CompSouth's proposed contract language (Gillan First Revised Exhibit JPG-1, Page 55), which would define RNMs in greater detail, state that RNMs would be provided in a nondiscriminatory fashion, and quote specific language and details used by the FCC in the *TRO*, including examples of RNMs that the FCC cited in Paragraphs 634-637 of the *TRO*.

With respect to Matrix Item No. 26, Sprint witness Maples testified that BellSouth's proposed language for Section 1.10, concerning RNMs, should be amended to remove certain provisions, which could enable BellSouth to inappropriately categorize certain network modifications as nonroutine because they are not recognized as being "anticipated" by BellSouth.

Witness Maples objected to three separate phrases in BellSouth's proposed Section 1.10, which would allow network modifications to be treated as nonroutine in cases where BellSouth had not "anticipated the request" from a CLP. Witness Maples testified that this language is vague and has no basis in the FCC rules or orders. Witness Maples testified that he could find no mention of "anticipation" with respect to RNMs. Furthermore, witness Maples, in pondering how the phrase "anticipated the request" could and perhaps would be interpreted, suggested the following: "Does it mean that a modification isn't routine if BellSouth does not anticipate what UNE the CLP orders, or that a modification is not routine if BellSouth does not anticipate when the CLP orders the UNEs, or that a modification is not routine if BellSouth does not anticipate the number of UNEs contained on a specific order, or that a modification is not routine if BellSouth does not anticipate where the UNE ordered by the CLP is provisioned?" Witness Maples opined that BellSouth could use any of these excuses to justify rejecting a UNE order or demanding additional charges. Witness Maples stated that the FCC's rules and orders offered no basis for this anticipated requirement. In order to prevent the possibility of such exclusions, as noted above, witness Maples recommended that BellSouth's version of Section 1.10 be revised to eliminate all three references to the anticipated requirement.

In its Proposed Order, the Public Staff observed that the only significant difference between the provisions of CompSouth's language and Sprint's language is that CompSouth's language incorporates verbatim most of FCC Rule 51.319(a)(7), which defines in full detail what a RNM is, provides examples of what constitutes a RNM and what does not, and requires that RNMs to unbundled loops be provided in a nondiscriminatory fashion. The Public Staff believes that all of CompSouth's additional verbiage is completely unnecessary, because the first sentence of Section 1.10 explicitly states that "BellSouth will perform Routine Network Modifications (RNM) in accordance with FCC 47 C.F.R. § 51.319 (a)(7) and (e)(4) for Loops and Dedicated

Transport provided under this Attachment." For this reason, the Public Staff recommended that the Commission should not adopt CompSouth's proposed language concerning RNMs.

The Public Staff stated that the Commission should adopt the language proposed by Sprint witness Maples, which eliminates BellSouth's three references to "anticipated" RNMs. The Public Staff agreed with Sprint that BellSouth's proposed language allows BellSouth to place a vague constraint on RNMs that could expose CLPs seeking network modifications to potential abuses by BellSouth, and there appears to be no support in the *TRO* for BellSouth's concept of classifying certain RNMs as "anticipated."

There are three separate drafts of language addressing RNMs for the Commission to consider: BellSouth's original set forth in Section 1.10, Sprint's amended version of Section 1.10, and CompSouth's comprehensively revised version, which it labels as Sections 1.9.1 and 1.9.2.

With respect to the matter of line conditioning, as addressed by BellSouth and CompSouth, as discussed hereinabove, the Commission finds that this matter has already been adequately decided by the Commission and ruled upon in a recent arbitration proceeding. In fact, during the change of law hearing, Commissioner Kerr, the Presiding Commissioner, inquired of the parties if the Commission had not already dealt with the line conditioning matter in a prior arbitration. Counsel for BellSouth responded that BellSouth witness Fogle had referenced that this was the issue in the Joint CLPs/BellSouth arbitration where the parties had made filings after the *Recommended Arbitration Order* (*RAO*) had been issued and that a final decision had not been issued.

The Commission notes that in Docket Nos. P-772, Sub 8, P-913, Sub 5, and P-1202, Sub 4 (arbitration between BellSouth and NewSouth et al.), the Commission issued its *RAO* on July 26, 2005, and issued its *Order Ruling on Objections and Requiring the Filing of the Composite Agreement* on February 8, 2006. In that *RAO*, in regard to line conditioning[123], the Commission addressed Issue No. 10 - How should line conditioning be defined in the Agreement; and what should BellSouth's obligations be with respect to line conditioning?; Issue No. 11 - Should the Agreement contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less?; and Issue No. 12 - Under what rates, terms, and conditions should BellSouth be required to perform line conditioning to remove bridged taps? In the *RAO*, in Findings of Fact Nos. 10, 11, and 12, the Commission concluded as follows:

> 10. The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.3219(a)(1)(iii)(A). BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii).

[123] These issues concerning line conditioning are discussed on Pages 24-48 of the *RAO*.

11. The line conditioning activity of load coil removal on copper loops should not be limited to copper loops with only a length of 18,000 feet or less.

12. Any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission.

On September 1, 2005, BellSouth filed objections to the *RAO* and requested that the Commission reconsider its Findings of Fact Nos. 10, 11, and 12, among other findings. In its recent *Order Ruling on Objections*, issued February 8, 2006, the Commission denied BellSouth's request for reconsideration with respect to its line conditioning findings[124] and, thereby, upheld and affirmed its original findings of fact regarding line conditioning as set forth above. Accordingly, the Commission finds there is no need to revisit these issues, as the Commission has already firmly ruled upon and provided guidance on the line conditioning issues in the *RAO* and in its most recent *Order Ruling on Objections*. Further, the Commission notes that in the proceeding at hand in the Joint Matrix Issues List provided on June 30, 2005, the matrix indicated that the line conditioning issue, which was indicated with an asterisk (*) and which was shown after Issue No. 32, was being addressed in BellSouth change of law dockets only in the states of Mississippi and South Carolina as those Commissions had moved certain issues from an existing arbitration proceeding between BellSouth and Nuvox and Xpedius to their BellSouth generic change of law dockets. This was not the situation in North Carolina, i.e. these line conditioning issues remained and were addressed by the Commission in the Joint Petitioners' arbitration with BellSouth. Furthermore, the Commission notes that, in the Issue Matrices provided, as required by the Commission, with the parties' Briefs or Proposed Order filed in this current proceeding, none of the parties identified the line conditioning issue, per se, as an issue to be ruled upon in this proceeding.

Based upon the foregoing and our review of the parties proposed language, the Commission finds, in regard to the appropriate language concerning RNMs, that Sprint's proposal is the most appropriate. In rebuttal testimony, witness Maples provided the following proposed language [with underlining indicating what Sprint would add and strikethrough indicating what Sprint would remove from BellSouth's proposal]:

> BellSouth will perform Routine Network Modifications (RNM) in accordance with FCC 47 C.F.R. § 51.319(a)(7) and (e)(4) for Loops and Dedicated Transport provided under this Attachment. If BellSouth performs ~~has anticipated~~ such RNM ~~and performs them~~ during normal operations and has recovered the costs for performing such modifications

[124] These issues concerning line conditioning are discussed on Pages 31-42 of the *Order Ruling on Objections*.

through the rates set forth in Exhibit A, then BellSouth shall perform such RNM at no additional charge. RNM shall be performed within the intervals established for the Network Element and subject to the performance measurements and associated remedies set forth in Attachment 9 of this Agreement ~~to the extent such RNM were anticipated in the setting of such intervals~~. If BellSouth ~~has not anticipated a requested network modification as being a RNM and~~ has not recovered the costs of such RNM in the rates set forth in Exhibit A, then such request will be handled as a project on an individual case basis. BellSouth will provide a price quote for the request and, upon receipt of payment from <<customer_short_name>>, BellSouth shall perform the RNM.

The Commission believes it is entirely reasonable to adopt Sprint's proposed language, as BellSouth's proposal is vague; we find nothing in the *TRO* that would support the need for including such language; and without the removal of such language, as shown above, BellSouth would have the capability to inappropriately categorize certain network modifications as nonroutine because they are not recognized as being "anticipated" by BellSouth. Furthermore, the Commission finds that CompSouth's proposed language is unnecessary, in particular, the first sentence of both BellSouth's and Sprint's proposed language provide that BellSouth will perform RNMs in accordance with FCC Rule 51.319(a)(7) and (e)(4) for Loops and Dedicated Transport provided under this Attachment; and, thus, the Commission sees no need to require that the contract reiterate the details in those rules, as proposed by CompSouth.

CONCLUSIONS

In Docket Nos. P-772, Sub 8, P-913, Sub 5, and P-1202, Sub 4, in its *RAO*, issued on July 26, 2005, and in its *Order Ruling on Objections and Requiring the Filing of the Composite Agreement*, issued on February 8, 2006, the Commission firmly ruled upon and provided guidance on the line conditioning issues raised here and the Commission finds no logical reason, in this proceeding, to revisit its decision on these matters, as nothing has changed.

The Commission concludes that the language proposed by Sprint witness Maples for Attachment 2, Section 1.10, as provided hereinabove, is adequate to fully address and balance the interests of BellSouth and the CLPs with respect to RNMs. Accordingly, the Commission adopts, for the purpose of *TRRO* amendments, the version of Section 1.10 offered by witness Maples on Pages 26-27 of his rebuttal testimony.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 23

ISSUE NO. 23 - MATRIX ITEM NO. 27: *TRO* / ROUTINE NETWORK MODIFICATION – What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or nonrecurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth noted that the *TRO* requires BellSouth to perform RNMs as part of the provisioning of unbundled high-capacity loops and dedicated transport. CompSouth argued that BellSouth does not get to add a charge for a modification that is, by definition, "routine" and accounted for in the rates BellSouth charges for unbundled loops and transport. Further, CompSouth explained that if BellSouth can show that the RNM is not one for which BellSouth is compensated for through its UNE rates, BellSouth may assess a Commission-approved charge for such RNM. CompSouth stated that its proposed contract language provides that RNMs will be performed as contemplated by the FCC (i.e., for no charge above the UNE rates), but if BellSouth can demonstrate that its costs are not being recovered, it may ask the Commission to institute a rate for such activity. CompSouth argued that BellSouth's proposal goes in the opposite direction — it gives BellSouth the discretion to assert that it did not "anticipate" the requested RNM, and allows BellSouth to slow the process for completing RNMs while pricing controversies are addressed. Moreover, CompSouth asserted that BellSouth's proposal deletes provisions proposed by CompSouth that would prohibit double-recovery of RNM costs by BellSouth. CompSouth maintained that its proposed language is more faithful to the letter and intent of the FCC's RNM rulings and, thus, it should be adopted.

BELLSOUTH: BellSouth asserted that if it is obligated to perform a RNM, then the rate for that activity should be based on TELRIC. BellSouth stated that if it is not obligated to perform a particular function, or an activity 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.

PUBLIC STAFF: The Public Staff stated that the version of Section 1.10 of the *TRRO* amendments offered by Sprint witness Maples adequately addresses the appropriate charges for RNMs.

DISCUSSION

In the prior discussion of the Evidence and Conclusions for Finding of Fact No. 22, the Commission decided that provisions of BellSouth's proposed Section 1.10 which categorized certain RNMs as "anticipated" were not supported by the *TRO*, so BellSouth's language was rejected. Instead, the Commission adopted, for the purpose of *TRRO* amendments, the version of Section 1.10 offered by Sprint witness Maples.

The Commission, similarly, finds that BellSouth's version of Section 1.10 fails to properly address network modification charges, because these charges would be dependent upon whether or not a RNM was "anticipated."

BellSouth witness Fogle testified, in his rebuttal testimony, that for RNMs that have established TELRIC rates approved by this Commission, that the Commission-approved rates would be used. Witness Fogle stated that for RNMs that have not been included in Commission-approved TELRIC rates, BellSouth proposes that each situation be handled on an individual case basis (ICB), until such time as the Commission approves a rate for the previously unspecified RNMs. BellSouth contended that its proposed contract language is fully consistent with applicable FCC rules and should be approved.

CompSouth witness Gillan presented CompSouth's position in his First Revised Exhibit JPG-1, wherein, he provided language concerning RNM charges in his proposed Section 1.9.2, as follows:

> BellSouth shall perform routine network modifications pursuant to the existing non-recurring charges and recurring rates ordered by the state commission for the loop and transport facilities set forth in Exhibit A and not at an additional charge. RNM shall be performed within the intervals established for the Network Element and subject to the performance measurements and associated remedies set forth in Attachment 9 of this Agreement except to the extent BellSouth demonstrates that such RNM were not anticipated in the setting of such intervals. If BellSouth believes that it has not anticipated a requested network modification as being a RNM and has not recovered the costs of such RNM in the rates set forth in Exhibit A, BellSouth can seek resolution from the state commission. However, in the interim, BellSouth will perform the RNM at the existing recurring and non-recurring rates associated with the provision of the loop or transport facility. There may not be any double recovery or retroactive recovery of these costs.

Aside from this proposed language, witness Gillan provided no further testimony that was specific to this issue.

In its Brief, CompSouth objected to any proposal that would allow BellSouth to impose ICB pricing for RNMs. CompSouth stated that the FCC has defined these modifications as routine because they are performed in the usual and normal course of provisioning service to customers. CompSouth asserted that BellSouth in most instances can be expected to have priced these modifications into its recurring and nonrecurring charges. CompSouth stated that to the extent it has not, it is incumbent upon BellSouth to demonstrate its costs and establish a cost-based rate for these modifications, but not to insert open-ended ICB pricing into the parties' agreement that creates uncertainty for CLPs. CompSouth explained that it is concerned that BellSouth's proposals would countenance both double recovery of costs and refusal to

conduct RNMs while pricing disputes are resolved. CompSouth maintained that its proposed contract language should be approved.

Sprint witness Maples, as previously discussed in the Evidence and Conclusions for Finding of Fact No. 22, recommended that BellSouth's provisions regarding "anticipated" should be rejected. In regard to rates for RNMs, witness Maples testified that ILECs cannot require additional charges for RNMs unless they prove that the costs they represent are not already included in the UNE recurring and/or nonrecurring rates. Witness Maples observed that the FCC warned against double recovering these costs in Paragraph 640 of the *TRO*. Therefore, witness Maples stated that any separate charge proposed by BellSouth should be reviewed to determine which costs are included in the existing rates and which ones are not. Witness Maples' proposed language for Section 1.10, [with underlining indicating what Sprint would add and strikethrough indicating what Sprint would remove from BellSouth's proposal] is worded as follows:

> BellSouth will perform Routine Network Modifications (RNM) in accordance with FCC 47 C.F.R. § 51.319(a)(7) and (e)(4) for Loops and Dedicated Transport provided under this Attachment. If BellSouth performs ~~has anticipated~~ such RNM ~~and performs them~~ during normal operations and has recovered the costs for performing such modifications through the rates set forth in Exhibit A, then BellSouth shall perform such RNM at no additional charge. RNM shall be performed within the intervals established for the Network Element and subject to the performance measurements and associated remedies set forth in Attachment 9 of this Agreement ~~to the extent such RNM were anticipated in the setting of such intervals~~. If BellSouth ~~has not anticipated a requested network modification as being a RNM and~~ has not recovered the costs of such RNM in the rates set forth in Exhibit A, then such request will be handled as a project on an individual case basis. BellSouth will provide a price quote for the request and, upon receipt of payment from <<customer_short_name>>, BellSouth shall perform the RNM.

Witness Maples recommended that BellSouth should be required to delete all of the provisions in its proposed Section 1.10 that contemplate rates for RNMs being subject to the RNMs being "anticipated".

The Public Staff believes that the version of Section 1.10 of the *TRRO* amendments offered by witness Maples adequately addresses the appropriate charges for RNMs. The Public Staff believes that Sprint's proposal will be the most effective and streamlined approach for dealing with nonstandard network modifications that are not adequately or specifically addressed under existing rate schedules.

The Commission notes that CompSouth's proposed language, as provided, hereinabove, reflects BellSouth's concept of "anticipated" RNMs, which the Commission has previously rejected, as discussed in the Evidence and Conclusions for Finding of

Fact No. 22. The Commission understands that CompSouth's proposed language would also require BellSouth to seek resolution from the Commission if BellSouth felt that existing recurring and nonrecurring charges would not enable it to adequately recover the costs of a network modification.

The Commission recognizes that Sprint's proposed language for Section 1.10 avoids the problem of "anticipated" RNMs, and it also gives BellSouth the flexibility to price network modifications on an ICB in the event that existing rates do not cover a particular situation. The Commission agrees with the Public Staff that this should be an effective and streamlined approach for dealing with nonstandard network modifications that are not adequately or specifically addressed under existing rate schedules. The Commission also recognizes that in the event that a CLP considers BellSouth's ICB pricing to be excessive, it may seek review from the Commission at that point.

CONCLUSIONS

The Commission concludes that witness Maples' amended version of Section 1.10, previously adopted in Finding of Fact No. 22, adequately addresses the appropriate charges for RNMs. Such language will provide BellSouth with the flexibility to price network modifications on an ICB in the event that existing rates do not cover a particular situation. However, the Commission reminds the parties that in the event that a CLP considers BellSouth's ICB pricing to be excessive, it may seek review from the Commission at that point.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 24

ISSUE NO. 24 - MATRIX ITEM NO. 28: *TRO* / FIBER TO THE HOME – What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth would reword BellSouth's Section 2.1.2.2 slightly and add the sentence "BellSouth's retirement of copper Loops must comply with Applicable Law." CompSouth would also revise BellSouth's Section 2.1.2.3 to address BellSouth's obligation to offer DS1 loops and loop/transport combinations.

BELLSOUTH: BellSouth proposes adding Sections 2.1.2.2 and 2.1.2.3 to Attachment 2 of the standard ICA to address Matrix Item No. 28.

PUBLIC STAFF: The following language should be adopted for Section 2.1.2.2 of the *TRRO* amendments to address issues relating to fiber to the home and fiber to the curb:

> 2.1.2.2 In FTTH/FTTC overbuild situations where BellSouth also has copper Loops, BellSouth will make those copper Loops available to <<customer_short_name>> on an unbundled basis pursuant to the

requirements of 47 C.F.R. § 51.319(a)(3)(iii). BellSouth's retirements of copper loops or copper subloops must comply with the requirements of 47 C.F.R. § 51.319(a)(3)(iv).

DISCUSSION

BellSouth proposed adding the following language to Sections 2.1.2.2 and 2.1.2.3 of the standard agreement to address loop unbundling in FTTH/FTTC overbuild situations. This language is taken from 47 C.F.R. §§ 51.319(a)(3)(iii)-(iv).

> 2.1.2.2 In FTTH/FTTC overbuild situations where BellSouth also has copper Loops, BellSouth will make those copper Loops available to <<customer_short_name>> on an unbundled basis, until such time as BellSouth chooses to retire those copper Loops using the FCC's network disclosure requirements. In these cases, BellSouth will offer a sixty-four (64) kilobits per second (kbps) voice grade channel over its FTTH/FTTC facilities.
>
> 2.1.2.3 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.

BellSouth witness Fogle commented briefly on BellSouth's proposed language and on its views concerning loop access in FTTH/FTTC overbuild situations. Sprint witness Maples testified that the modifications he recommended to BellSouth's proposed Section 2.1.2 should also adequately address FTTH/FTTC overbuild situations.

CompSouth recommended the following language as a substitute for BellSouth's version of Section 2.1.2.2.

> 2.1.2.2 In FTTH/FTTC overbuild situations where BellSouth also has copper Loops, BellSouth will make those copper Loops available to ~~<<customer_short_name>>~~CLEC on an unbundled basis, until such time as BellSouth chooses to retire those copper Loops using the FCC's network disclosure requirements. In these cases, BellSouth will offer a ~~sixty-four (64) kilobits per seconds (kbps)~~ 64 kbps second voice grade channel over its FTTH/FTTC facilities. BellSouth's retirement of copper Loops must comply with Applicable Law.

The only significant change recommended above by CompSouth is the additional statement that "BellSouth's retirement of copper Loops must comply with Applicable Law." CompSouth also proposed to delete BellSouth's proposed Section 2.1.2.3 in its entirety and to replace it with language addressing the unbundling of DS1 loop facilities. The Commission has already considered CompSouth's proposed language for Section 2.1.2.3 and approved it with minor changes, in its discussion of Finding of Fact No. 20.

The Commission believes that the most sensible approach to this issue would be to take the language BellSouth proposed for Section 2.1.2.2 and modify it, so that it addresses CompSouth's concerns about compliance with applicable law and references the FCC's overbuild requirements with specificity. BellSouth's language ignores important safeguards established in the FCC's Rules, most notably the requirement in 47 C.F.R. § 51.319(a)(3)(iv)(B) that retirements of copper loops and subloops must satisfy state requirements. In order to avoid the omissions and subtle changes in BellSouth's overbuild language, the Commission makes the following modifications to Section 2.1.2.2.

> 2.1.2.2 In FTTH/FTTC overbuild situations where BellSouth also has copper Loops, BellSouth will make those copper Loops available to <<customer_short_name>> on an unbundled basis~~, until such time as BellSouth chooses to retire those copper Loops using the FCC's network disclosure requirements. In these cases, BellSouth will offer a sixty-four (64) kilobits per seconds (kbps) voice grade channel over its FTTH/FTTC facilities~~ pursuant to the requirements of 47 C.F.R. §51.319(a)(3)(iii). BellSouth's retirements of copper loops or copper subloops must comply with the requirements of 47 C.F.R. §51.319(a)(3)(iv).

CONCLUSIONS

The Commission adopts the following language for Section 2.1.2.2 to address Matrix Item No. 28:

> 2.1.2.2 In FTTH/FTTC overbuild situations where BellSouth also has copper Loops, BellSouth will make those copper Loops available to <<customer_short_name>> on an unbundled basis pursuant to the requirements of 47 C.F.R. § 51.319(a)(3)(iii). BellSouth's retirements of copper loops or copper subloops must comply with the requirements of 47 C.F.R. § 51.319(a)(3)(iv).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 25

ISSUE NO. 25 – MATRIX ITEM NO. 29: *TRO*/EEL AUDITS - What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the *TRO*?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth stated that the FCC had granted BellSouth a "limited right to audit" CLP compliance with EEL eligibility criteria. This "limited right" is not an open invitation, since the *TRO* at Paragraph 622 indicated it was the FCC's intention to grant CLPs "unimpeded access based upon self-certification, subject to later verification based upon cause." Thus, before it can initiate any audit under the FCC guidelines, BellSouth must have some legitimate and demonstrable cause to question whether particular circuits are in compliance. CompSouth's proposed language reflects this scope-limiting "for-cause" auditing standard, as well as the FCC's other ruling on how EEL audits are to be conducted. Undocumented cause is no cause at all. Documented cause, on the other hand, will allow relevant documentation to be made available early and quickly. Although the *TRO* does not include a specific notice requirement, the Commission may include such a requirement. CompSouth also proposed requiring mutual consent to a specific auditor to ensure that conflicts are vetted.

BELLSOUTH: BellSouth's proposed language allows it to audit CLPs on an annual basis to determine compliance with the qualifying service eligibility criteria, and it requires BellSouth to obtain and pay an independent auditor pursuant to the American Institute of Certified Public Accountants (AICPA) standards. The auditor determines material compliance or noncompliance. If the auditor determines noncompliance, the CLP is required to true-up any difference in payments, convert noncompliant circuits, and make correct payments on a going-forward basis. Also, if the CLP is determined by the auditor to have failed to comply with the service eligibility requirements, it must reimburse the ILEC for the cost of the audit. BellSouth should not be required to agree to terms that would add delay and expense to audits, such as a requirement to show cause prior to the commencement of the audit, incorporation of a list of acceptable auditors in ICAs, or a requirement that the parties must agree on an auditor. If a CLP's noncompliance is material in one area, the CLP should be responsible for the cost of the audit, even if each of the other criteria has been met to the auditor's satisfaction.

PUBLIC STAFF: Thirty to forty-five days' advance notice of an audit provides a CLP with adequate time to prepare. In its Notice of Audit, BellSouth should state its concern that the requesting CLP has not met the qualification criteria and set out a concise statement of its reasons therefore. BellSouth should be permitted to select the independent auditor without the prior approval of the CLP or the Commission. Parties should be permitted to file challenges to the independence of the auditor with the Commission only after the audit has been concluded. BellSouth should not be required to provide documentation, as distinct from a statement of concern, to support its basis for an audit, or seek the concurrence of the requesting carrier before selecting the audit's location.

DISCUSSION

This issue is in essence a replay of the same issues that were addressed in both Docket No. P-772, Sub 7 (*BellSouth v. NewSouth*) and Docket No. P-772, Sub 8 (*Joint*

Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth). In the latter docket, issued as a *Recommended Arbitration Order* (*RAO*) on July 26, 2005, the Commission concluded that the *TRO* sufficiently outlines the requirements for an audit and that thirty to forty-five days notice of the audit will provide the CLP with adequate time to prepare. The Commission also found that in its Notice of Audit, BellSouth should state its concern that the requesting CLP has not met the qualification criteria and include a concise statement of its reasons. The Commission stated that BellSouth could select the independent auditor without the prior approval of the CLP or the Commission, but the CLP may challenge the independence of the auditor by filing a complaint with the Commission *only after* the audit has been concluded. Finally, BellSouth was not required to provide documentation, as distinct from a statement of concern, to support is basis for the audit or seek the concurrence of the requesting carrier before selecting the location of the audit.

The Commission finds no basis in this docket for changing this conclusion.

CONCLUSIONS

The Commission concludes that thirty to forty-five days advance notice of an audit provides a CLP with an adequate time to prepare. In its Notice of Audit BellSouth shall state its concern that the requesting CLP has not met the qualification criteria and set out a concise statement of the reasons therefore. BellSouth may select the independent auditor without the prior approval of the CLP or the Commission. Challenges to the independence of the auditor may be filed with the Commission only after the audit has been concluded. BellSouth is not required to provide documentation, as distinct from a statement of concern, to support its basis for an audit, or seek the concurrence of the requesting carrier before selecting the location of the audit.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 26

ISSUE NO. 26 – MATRIX ITEM NO. 31: *ISP REMAND CORE FORBEARANCE ORDER* – What language should be used to incorporate the FCC's *ISP Remand Core Forbearance Order* into interconnection agreements?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth stated that the FCC removed certain restrictions on CLPs' rights to receive reciprocal compensation in its 2004 *ISP Remand Core Forbearance Order (Core Order)*. The FCC granted forbearance regarding the "new markets" and "growth cap" restrictions imposed by the FCC's 2001 *ISP Remand Order*. The contractual changes to implement the *Core Order* may differ slightly among various CLPs' ICAs, but the guiding principle is a simple one: all references to the "new markets" and "growth cap" restrictions should be deleted. Those restrictions may no longer be used to limit CLPs' reciprocal compensation rights, as those rights are provided for under the Act and the portions of the *ISP Remand Order* that remain in effect.

BELLSOUTH: BellSouth stated that the Commission should order BellSouth to resolve this issue on a carrier-by-carrier basis depending on the specific facts that apply to a particular carrier. Specifically, for some CLPs, it may be as simple as removing the growth caps and new markets standard. However, other CLPs have adopted the mirroring rule, in which case alternative terms must be negotiated. Additionally, there may be other CLPs that are not entitled to implement the *Core Order* based upon the particular language negotiated between the parties in that CLP's interconnection agreement.

PUBLIC STAFF: The Public Staff recommended that the language set forth in Watts Exhibit JW-1 should be included in the *TRRO* amendments. This language need not be adopted in agreements where the parties adopt their own negotiated language implementing the *Core Order*, or where the right to add such language to an agreement has been waived through a party's failure to make a request by a deadline specified in the agreement.

DISCUSSION

BellSouth witness Tipton agreed that the FCC's *Core Order* should be incorporated in ICAs. However, she testified that it was not possible to implement the *Core Order* by inserting one set of new language in every ICA for three reasons. First, witness Tipton explained that the "mirroring" rule of the *ISP Remand Order*, which remains in effect, allows interconnecting parties to choose between different rate structures or compensation regimes for the exchange of ISP-bound traffic and local traffic. The existing language and terms of BellSouth's ICAs with CLPs vary depending upon which option was chosen by the parties. Second, witness Tipton testified that BellSouth has entered into carrier-specific settlements that address the compensation for ISP-bound traffic as well as other issues and, thus, a change in the compensation structure for traffic exchange only would be inconsistent with the entire settlement agreement. Third, she stated that some ICAs require that a party must provide written notification within a specified number of days after a change in law takes effect in order to amend the ICA in accordance with the change in law. If a CLP did not provide BellSouth with a request to amend the ICA within the specified deadline following the effective date of the *Core Order*, then the CLP would not be entitled to amend the ICA to incorporate the *Core Order*. For these reasons, witness Tipton testified there is no one set of specific language that could be used to implement the *Core Order* in every ICA. Therefore, she recommended that implementation of the *Core Order* should be handled on a case-by-case basis.

In its Brief, BellSouth recommended that the Commission should order BellSouth to resolve this issue on a carrier-by-carrier basis depending on the specific facts. BellSouth represents that it is not attempting to avoid implementing the *Core Order* when it is appropriate to do so. BellSouth states that its specific concern with any use of generic language to resolve this issue is based on the compensation choices available in the *Core Order*. BellSouth also states that it has entered into specific carrier settlements implementing the *Core Order*. In addition, BellSouth argues that

CompSouth is not proposing specific language and the language proposed by ITC^DeltaCom would not address all scenarios encountered in various ICAs with respect to implementation of the *Core Order*.

In CompSouth's Brief, it recommends that all references to the "new markets" and "growth caps" restrictions should be deleted from the reciprocal compensation provisions of BellSouth's ICAs in order to implement the *Core Order*. Page 59 of CompSouth witness Gillen's Exhibit JPG-1 contains a statement consistent with this recommendation. While CompSouth acknowledges that the contractual changes necessary to implement the *Core Order* may differ slightly among various ICAs, the guiding principle is a simple one: all references to the "new markets" and "growth caps" restrictions should be deleted. CompSouth argued that the provisions of the *Core Order* impact only those CLPs who have chosen reciprocal compensation plans that include provisions regarding the "new markets" and "growth caps" restrictions. CompSouth believes that the Commission can overcome all of BellSouth's concerns, and fairly implement the *Core Order*, by ordering that all ICAs which include the restrictions overturned by the *Core Order* be amended on the same timeline and processes that apply to the Commission's orders on amendments related to changes in the *TRO/TRRO*.

In his late-filed rebuttal testimony, ITC^DeltaCom witness Watts stated that BellSouth takes the position that the template language in the interconnection agreement should not incorporate the *Core Order* because BellSouth had reached individual settlements with certain carriers. Witness Watts testified that each such specific settlement should be between that carrier and BellSouth but that on a generic basis and certainly in a template agreement, the language offered in the template should be compliant with the most recent orders. Witness Watts recommended the language in his Exhibit JW-1 for the template agreement to implement the *Core Order*. Exhibit JW-1 contains language addressing interconnection compensation for ISP-bound traffic, including the definition of such traffic, as well as the following language which specifically addresses new markets and growth caps:

> 6.3.1 The Parties shall charge the rate of $.0007 per minute of use for ISP-bound Traffic **regardless of whether CLEC is entering into a new market**.
>
> 6.3.2 Notwithstanding anything to the contrary in this Agreement, the volume of ISP-bound Traffic for which one Party may bill the other shall no longer be subject to a growth **cap pursuant to WC Docket No. 03-171**.

In its Proposed Order, the Public Staff stated that it cannot agree with BellSouth that the *Core Order* should be implemented on a case-by-case basis. The Public Staff believes it is undoubtedly true that BellSouth has negotiated provisions in a number of its ICAs addressing the *Core Order*. Further, the Public Staff believes it may also be true that some agreements contain language under which the CLP has, through

inaction, waived its right to benefit from the *Core Order*. However, the Public Staff stated that there are a number of other ICAs that do not contain such provisions and it is appropriate for the Commission to adopt standard contractual language implementing the *Core Order*. As to the standard contractual language which should be used, the Public Staff noted that the language proposed by ITC^DeltaCom witness Watts is more detailed and precise than CompSouth witness Gillian's suggestion that the parties simply delete all references to growth caps and new markets. Therefore, the Public Staff would adopt witness Watt's proposal.

More specifically, the Public Staff recommends that the language set forth in Watts Exhibit JW-1 should be included in the *TRRO* amendments. However, the Public Staff also recommends that this language need not be adopted in ICAs where the parties adopt their own negotiated language implementing the *Core Order*, or where the right to add such language to an ICA has been waived through a party's failure to make a request by a deadline specified in the ICA.

The issue before the Commission is to determine what language should be used to incorporate the *Core Order* into ICAs. BellSouth recommends that this issue should be resolved on a carrier-by-carrier basis depending on the specific facts for the reasons described above. CompSouth simply wants all references to the "new markets" and "growth caps" restrictions deleted from ICAs but acknowledges that the contractual changes to implement the *Core Order* may differ slightly among various ICAs. ITC^DeltaCom proposes generic language for a template agreement such that the capped rate for ISP-bound traffic will be charged by parties "regardless of whether CLEC is entering into a new market" and the volume of ISP-bound traffic for which one party may bill the other "shall no longer be subject to a growth cap pursuant to WC Docket No. 03-171." However, ITC^DeltaCom also recognizes that BellSouth has reached individual settlements with certain carriers. Finally, the Public Staff endorses the language proposed by ITC^DeltaCom, except where parties adopt their own negotiated language implementing the *Core Order* or where the right to incorporate the proposed language has been waived through a party's failure to request an amendment by a deadline specified in a change of law provision in the agreement.

At the outset in its consideration of this issue, the Commission notes that no party proposed language which could be inserted into ICAs for the purpose of implementing the *Core Order* without acknowledging such language may need to differ in certain ICAs or may not be applicable in other ICAs. After carefully examining the record and the reasons given by BellSouth as to why this issue should be dealt with on a carrier-to-carrier basis, the Commission concludes that it would not be appropriate to require that certain specific language be shoe-horned into every ICA.

Nonetheless, the *Core Order* removed the growth caps and new markets reciprocal compensation restrictions and should be implemented in ICAs. Therefore, the Commission concludes that the language set forth in Exhibit JW-1 should be used as a guide by parties to remove the growth caps and new markets restrictions wherever such restrictions are included in ICAs. Such language need not be used where the

parties adopt negotiated language to implement the *Core Order*, or where the right to amend an ICA to implement the *Core Order* has been waived through a party's failure to make a request by a deadline specified in the ICA. Amendments to ICAs to implement the *Core Order* should be included with the *TRO/TRRO* amendments.

CONCLUSIONS

The Commission concludes that the *Core Order* removed the "growth caps" and "new markets" reciprocal compensation restrictions and should be implemented in ICAs. The language set forth in Exhibit JW-1 should be used as a guide by parties to remove the "growth caps" and "new markets" restrictions wherever such restrictions are included in ICAs. Such language need not be used where the parties adopt negotiated language to implement the *Core Order*, or where the right to amend an ICA to implement the *Core Order* has been waived through a party's failure to make a request by a deadline specified in the ICA. Amendments to ICAs to implement the *Core Order* should be included with the *TRO/TRRO* amendments.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 27

ISSUE NO. 27 – MATRIX ITEM NO. 32: GENERAL ISSUE – How should the determinations made in this proceeding be incorporated into existing Section 252 interconnection agreements?

POSITIONS OF PARTIES

COMPSOUTH: CompSouth stated that, unless parties have specifically agreed otherwise, determinations made in this proceeding should be incorporated into amendments to BellSouth-CLP ICAs. Such amendments should be completed and approved by the Commission on a timely basis, subject to any specific agreements or pending proceedings between BellSouth and a particular CLP.

BELLSOUTH: BellSouth recommended that, at the end of this proceeding, this Commission should approve specific contractual language that resolves each disputed issue and which can be promptly executed by the parties, unless mutually agreed to otherwise, so that the FCC's transitional deadlines are met. The FCC's transitional periods for UNE switching and high-capacity loops and dedicated transport cannot be extended beyond March 10, 2006. This Commission should also allow BellSouth to incorporate the results of its decision into BellSouth's standard offering, or should approve BellSouth's Exhibits PAT-1 and PAT-2 as a default for those CLPs that fail to respond to an order requiring the execution of *TRO/TRRO* ICA language.

PUBLIC STAFF: The Public Staff recommended that BellSouth and all CLPs with whom it has ICAs currently in effect should, within 45 days from the effective date of the Order, execute and file amendments to the ICAs that are consistent with the provisions of the Order, or are mutually acceptable to the parties to the ICA. Within one week after the expiration of the 45-day deadline, BellSouth should file a list of all CLPs that have

ICAs in effect with BellSouth but have not executed an amendment to the ICA as required by the Order.

DISCUSSION

As noted above, BellSouth takes the position that the Commission should approve specific contractual language that resolves each disputed issue which can promptly be executed by the parties, unless mutually agreed to otherwise, so that the FCC's transitional guidelines are met. BellSouth noted and the Commission recognizes that the transitional periods for UNE switching and high-capacity loops and dedicated transport cannot be extended beyond March 10, 2006.

In order to facilitate a smooth transition, BellSouth also requested in its Brief that the Commission require the parties to execute compliant amendments (i.e., amendments that track the Commission's language, unless otherwise mutually agreed upon) promptly following, but in no event less than 45 days after, the release of its written order. BellSouth believes the Commission should make it clear that if an amendment is not executed within the allotted timeframe, the Commission's approved language will go into effect for all CLPs in North Carolina, regardless of whether an amendment is signed.

CompSouth recommended that determinations made in this proceeding should be incorporated into amendments to BellSouth and CLP ICAs, unless parties have specifically agreed otherwise. Such amendments should be completed and approved on a timely basis, subject to any specific agreements or pending proceedings between BellSouth and a particular CLP.

CompSouth's Brief stated that it takes no position as to whether the Commission's orders in this docket can or should bind non-parties. CompSouth emphasized that the Commission should take no action to upend existing ICAs that address how such changes of law should be incorporated into existing and new Section 252 ICAs and make it clear that any action undertaken by the Commission does not upend such agreements.

CompSouth contended that Exhibits PAT-1 and PAT-2, submitted by BellSouth and attached to witness Tipton's testimony, include proposed contract language on dozens of issues that are not in dispute in this proceeding. CompSouth believed that the cross-examination of BellSouth witness Blake established that the Commission should not approve such contract language on issues unrelated to this proceeding, and further, BellSouth was not seeking approval of such language. CompSouth noted that many CLPs have negotiated or arbitrated ICAs that address the issues in Exhibits PAT-1 and PAT-2 that are not in dispute in this case. CompSouth submitted that CLPs should not be forced to accept new language because the Commission has "approved" it in a case that has nothing to do with the subject matter of the contract language. In summary, CompSouth stated that this issue, while a technical one, is extremely

important and urged that the Commission make clear that it is only approving contract language on the jointly submitted Issues List.

In its Proposed Order, the Public Staff noted that BellSouth witness Blake testified that all CLPs which have entered into ICAs with BellSouth have received notice of this proceeding and were informed that they will be bound by the Commission's rulings. Therefore, the Public Staff recommended that the Commission should state in its final order that its decisions are binding on all CLPs that have ICAs in place with BellSouth. The Public Staff also recommended that the Commission should approve specific contractual language that can be executed by the parties, and the Commission should take steps to ensure that this language is in fact incorporated into all of BellSouth's ICAs. One way to accomplish this, according to the Public Staff, would be to require all parties to execute contract amendments complying with the order within 45 days of the date that the Commission's order takes effect, and to specify that for parties who fail to execute such an amendment, the approved language will automatically go into effect on the deadline date and will be binding on them. The Public Staff stated that the order needs to be implemented quickly so that the transition required by the *TRRO* can be completed by the March 10, 2006 deadline date. Finally, the Public Staff asserted that no witness testified in opposition to the procedure outlined by witness Blake.

CONCLUSIONS

The Commission concludes that BellSouth and all CLPs with whom it has ICAs currently in effect should execute and file amendments to the ICAs that are consistent with the provisions of this Order, or are mutually agreeable to the parties to the ICA, by March 10, 2006.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth and every CLP that is a party to this proceeding, whether it be an active or an inactive participant, shall execute and file with the Commission, by no later than Friday, March 10, 2006, an amendment to each ICA affected by this proceeding (or, as appropriate, a revised Composite Agreement); and

2. That each such amendment or revised Composite Agreement shall **only** incorporate the language approved in this Order, and, with respect to issues as to which no specific language is set forth in this Order, shall be consistent with this Order's

conclusions; provided, that the parties may mutually agree on language that departs from the provisions of this Order.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of March, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner Robert K. Koger resigned from the Commission effective December 5, 2005 and did not participate in this decision.

bp030106.01

Glossary of Acronyms
Docket No. P-55, Sub 1549

Act	Telecommunications Act of 1996
ADSL	Asymmetrical Digital Subscriber Line
Agreement	Interconnection Agreement
AICPA	American Institute of Certified Public Accountants
ARMIS	Automated Reporting Measurement Information System
AT&T	AT&T Communications of the Southern States, LLC
BellSouth	BellSouth Telecommunications, Inc.
BOCs	Bell Operating Companies
CLEC	Competitive Local Exchange Company
CLLI	Common Language Location Identifier
CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
CompSouth	The Competitive Carriers of the South
Covad	DIECA Communications, Inc., d/b/a Covad Communications Company
Deloitte	Deloitte & Touche
DS1	Digital Signal 1
DS3	Digital Signal 3
DSL	Digital Subscriber Line
EEL	Enhanced Extended Link (Loop)
FCC	Federal Communications Commission
FTTC	Fiber-to-the-curb
FTTH	Fiber-to-the-home
FTTP	Fiber-to-the-premises
HDSL	High-bit-rate Digital Subscriber Line
HFPL	High Frequency Portion of the Loop
ICA	Interconnection Agreement
ICB	Individual Case Basis
IDSL	ISDN Digital Subscriber Line
ILEC	Incumbent Local Exchange Company (Carrier)
ISDN	Integrated Services Digital Network

ITC or ITC^DeltaCom	ITC^DeltaCom Communications, Inc.
Joint Petitioners	NewSouth, NuVox, and Xspedius
Kbps	Kilobits Per Second
LEC	Local Exchange Company
LecStar	LecStar Telecom, Inc.
LSR	Local Service Request
Mbps	Megabits Per Second
MCI	MCImetro Access Transmission Services, Inc.
MDU	Multiple Dwelling Unit
Momentum	Momentum Business Solutions, Inc.
MPOE	Minimum Point of Entry
NewSouth	NewSouth Communications Corp.
NuVox	NuVox Communications, Inc.
OSS	Operations Support Systems
PMAP	Performance Measurements and Analysis Platform
Public Staff	Public Staff – North Carolina Utilities Commission
RAO	Recommended Arbitration Order
RBOC	Regional Bell Operating Company
RNMs	Routine Network Modifications
SEEM	Self-Effectuating Enforcement Mechanism
SOC	Supplemental Order Clarification
Sprint	Sprint Communications Company, L.P.
SQM	Service Quality Measurement
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order
TRRO	Triennial Review Remand Order
UCL-S	Unbundled Copper Loop – Short
UNE	Unbundled Network Element
UNE-L	Unbundled Network Element – Loop
UNE-P	Unbundled Network Element – Platform
US LEC	US LEC of North Carolina, Inc.
USOC	Universal Service Ordering Code

Verizon	Verizon Virginia, Inc.
WCB	Wireline Competition Bureau (of the FCC)
WorldCom	WorldCom, Inc.
xDSL	Digital Subscriber Line
Xspedius	Xspedius Communications, LLC

Docket No. 19341-U

In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc's. Obligations to Provide Unbundled Network Elements

ORDER ON REMAINING ISSUES

I. Statement of Proceedings

A. Jurisdiction

This proceeding was initiated by the Georgia Public Service Commission ("Commission") to amend parties' interconnection agreements consistent with the Federal Communications Commission's ("FCC") *Triennial Review Order*[1] and *Triennial Review Remand Order*[2]. Under the Federal Telecommunications Act of 1996 (Federal Act), state commissions are also authorized to set terms and conditions for interconnection and access to unbundled elements pursuant to Sections 251 and 252 of the Federal Act. Section 271 compliance is necessary for a regional Bell Operating Company ("BOC") to establish or maintain the right to provide interLATA long distance services. In order to comply with the requirements of Section 271, a BOC must provide access and interconnection pursuant to at least one Section 252 interconnection agreement or be offering access and interconnection pursuant to a Statement of Generally Accepted Terms. 47 U.S.C. § 271(c)(2)(A)(i). In addition, Section 271 requires that the BOC provide access to unbundled network elements ("UNEs") on the competitive checklist set forth within the statute at just and reasonable rates. 47 U.S.C. § 271(c)(2)(B)(i). The Section 271 competitive checklist items (i) and (ii) make explicit reference to compliance with provisions in Sections 251 and 252. Therefore, the Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271. As such, it is logical to

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[1] 18 FCC Rcd 16978, 17145, *corrected by Errata,* 18 FCC Rcd 19020, *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"), cert. denied,* 125 S. Ct. 313 (2004) (*"TRO").*

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

conclude that obligations under Section 271 must be included in a Section 252 interconnection. agreement.

In addition to its jurisdiction of this matter pursuant to the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

B. Proceedings

The Commission initiated this docket on August 24, 2004. In its June 30, 2005 Procedural and Scheduling Order, the Commission directed the parties to submit a Joint Issues List. The Commission approved the Joint Issues List submitted by BellSouth Telecommunications, Inc. ("BellSouth") and Competitive Carriers of the South ("CompSouth")[3] along with the issues added by Digital Agent, LLC. (Order on Motion to Move Issues into Generic Proceeding, p. 2).

On July 19, 2005, in accordance with the Procedural and Scheduling Order, direct testimony was pre-filed with the Commission by BellSouth, CompSouth, US LEC of Georgia, Inc., Cbeyond Communications, LLC ("Cbeyond") and Sprint Communications Company LP ("Sprint"). BellSouth, CompSouth, Sprint, Cbeyond, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and XO Communications Services filed rebuttal testimony with the Commission on August 9, 2005. Hearings were held before the Commission on August 30 through September 1, 2005. BellSouth, CompSouth, Sprint and Cbeyond filed briefs with the Commission on October 21, 2005.

In its January 20, 2006 Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271, the Commission concluded that it had jurisdiction to set just and reasonable rates for delisted unbundled network elements under Section 271 of the Federal Telecommunications Act of 1996. However, the Commission held the remaining unresolved issues to be resolved at a subsequent Administrative Session.

The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS AND CONCLUSIONS

A. Summary

The Commission sets forth the following summary of its findings and conclusions on the remaining issues. The analysis for these conclusions, along with the positions advanced by the parties, is detailed in a subsequent section of this order. Given the nature of a summary, it may

[3] CompSouth is an association of Competitive Local Exchange Carriers.

not address each finding and conclusion included in the more detailed discussion. This does not indicate that the finding or conclusion in question is not a determination by this Commission and binding on the parties subject to this Order.

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) Competitive Local Exchange Carriers ("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[4] 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.

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[4] Total Element Long Run Incremental Cost

Issue 4: 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; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

(1) Business Line Count: For the counting of business lines, the Commission agrees with BellSouth that the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops. The Commission counts DS1 lines as 24 business lines, provided that those DS1 lines in which all 24 channels are empty shall not be counted at all towards the business line count.

(2) Fiber-Based Collocators: The Commission does not accept CompSouth's proposed language to include planned mergers in the definition of fiber-based collocators. The date certain for counting fiber-based collocators will be the effective date of this Commission's order addressing this issue, and not, as BellSouth proposes, the date the FCC rule became effective.

(3) Building: The Commission adopts CompSouth's "reasonable telecom person" standard for the term "building."

(4) Routes: The Commission adopts BellSouth's definition of route.

Issue 5: TRRO/FINAL RULES:
a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?
b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?
c) What language should be included in agreements to reflect the procedures identified in (b)?

The Commission will allow BellSouth to designate future wire centers on an annual basis. The Commission will monitor how this process works and make necessary and appropriate changes moving forward.

Issue 6: HDSL Capable Copper Loops: -- Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

The Commission adopts BellSouth's position and determines that HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment.

Issue 9 – 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?

Based on the District Court Order granting BellSouth's preliminary injunction, the Commission adopts BellSouth's position and concludes that a CLEC may not use facilities that have already been provided to serve existing customers who move to a new location and that the transition period does not apply to moving, adding or changing orders.

Issue 10 – Transition of Delisted Network Elements To Which No Specified Transition Period Applies – 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?

(1) To the extent that resolution of this issue involves other issues in this proceeding, the Commission acts consistently with its positions on those other issues.

(2) The Commission adopts a transition period of 30 days for CLECs to submit orders to convert UNE-Platform ("UNE-P") prior to BellSouth being permitted to disconnect or convert circuits and 60 days for everything else.

(3) The Commission adopts a Subsequent Transition Plan, which applies to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards, of 120 days, which is a compromise between the parties' positions on this issue.

(4) Finally, the Commission adopts CompSouth's position and obligates BellSouth to provide actual written notice to the point of contact in the parties' interconnection agreements. If a party does not have a point of contact identified in the agreement, then posting constructive notice on the website should be deemed acceptable.

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

(1) In the context of Issue 2, the Commission found that CLECs have until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that are not completed until after March 11, 2006. For conversions that are completed prior to March 10, 2006, the Commission orders BellSouth to true-up the difference.

(2) The Commission has decided to set rates based on the just and reasonable standard in Section 271. Those will be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to convert CLECs' UNE-P arrangements to the resale rate beginning March 11, 2006, unless parties agree to alternative arrangements or are otherwise ordered by the Commission.

(3) The Commission concludes that BellSouth should not take any action with regard to wire centers in dispute until such dispute is resolved by the Commission.

Issue 13 – Performance Plan: -- Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

No. The Commission adopts CompSouth's position and finds that performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251 as opposed to covering only the overlap between Section 271 and Section 251.

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)?

The Commission finds, consistent with CompSouth's position, 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. The FCC has not been clear on this issue. To reach the position advocated by BellSouth appears to require changing the meaning of the plain language of an FCC order; whereas the position advocated by the CLECs does not involve the same obstacle. That is, the FCC has stated that the commingling obligation applies to facilities or services obtained at wholesale. It has not stated that Section 271 facilities or services obtained at wholesale are excluded from this obligation.

This action should not be construed as the recreation of 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 this Commission has concluded that it would be 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?

The Commission will remand this issue to a Hearing Officer, or to itself, for evidence on the issue of the appropriate conversion rate. In the interim, the Commission adopts a rate of TELRIC plus fifteen percent based on the Commission's determination of TELRIC.

Issue 16 – 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?

The Commission finds consistent with CompSouth's position that CLECs that submitted legitimate requests to convert wholesale services to UNEs or UNE combinations prior to the effective date of the *TRO* are entitled to UNE pricing as of the date the *TRO* became effective.

Issue 17- Line Sharing: Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

(1) The issue of whether BellSouth is obligated under Section 271 to provide line sharing breaks down to (1) whether line sharing falls under checklist item 4 and (2) whether, if so, the FCC's Forbearance Order relieved BellSouth of this obligation. As to the first issue, the Commission adopts CompSouth's position and concludes that line sharing is a checklist item 4 item. As to the second, individual FCC commissioners issued conflicting statements as to whether its Forbearance Order addressed line sharing. There is more support for the position that it did not address line sharing, but obviously the conflicting statements create ambiguity. Given the Commission's assertion of Section 271 authority, the Commission maintains the status quo by requiring BellSouth to provide line sharing, until the FCC clarifies that it does not have this responsibility.

(2) The Commission's assertion of Section 271 jurisdiction impacts this issue because it means that the Commission finding that line sharing is a checklist item 4 obligation requires BellSouth to provide line sharing as opposed to the determination being purely consultative.

Issue 18: TRO – Line Sharing – Transition: If the answer to the foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Given the Commission's position on Issue 17, this issue is not applicable.

Issue 19 – Line Splitting: -- What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

(1) For the reasons set forth in the Commission's decision on Issue 14, the Commission finds that line splitting can involve the commingling of Section 251 and Section 271 elements.

(2) Consistent with CompSouth's proposal, the Commission concludes that CLECs should indemnify and defend BellSouth against claims made against BellSouth, but that the indemnification language should relate to specific claims.

(3) The Commission will remand this issue for evidence as to the extent of BellSouth's line splitting obligations.

Issue 22 – Call Related Databases: What is the appropriate ICA language, if any, to address access to call related databases?

The Commission asserted Section 271 jurisdiction to set just and reasonable rates. Therefore, the Commission orders that BellSouth is obligated to offer call related databases at just and reasonable rates.

Issue 23 – Greenfield Areas: a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?

a) Pursuant to the FCC's definition, the MPOE is "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. 68.105(b).

b) Based on the *Broadband Forbearance Order,* and consistent with BellSouth's position, the Commission concludes that BellSouth is under no obligation to provide access to greenfield Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops.

Issue 24: TRO – Hybrid Loops – What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

The Commission adopts BellSouth's proposed language because it tracks the following FCC rule:

When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (*where impairment has been found to exist*) on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop. 47 C.F.R. 51.319(a)(2)(ii) *(emphasis added).*

Issue 26: -- What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

(1) The Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

(2) The Commission should order BellSouth to permit inclusion of the CompSouth proposed language on routine network modifications ("RNMs") that mirrors the FCC rule.

Issue 27 – 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?

(1) Because the Commission has found that BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

(2) The Commission finds that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

Issue 28 – 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?

a) The Commission adopts BellSouth's proposed language as modified below:

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~~.

b) Because the FCC rules on fiber to the home/fiber to the curb do not include an exclusion based on impairment analysis, the Commission finds that the FCC's fiber to the home/fiber to the curb rules apply to all central offices. This conclusion rejects CompSouth's apparent position that the fiber to the home/fiber to the curb rules do not apply where impairment was found without access to DS1s or DS3s.

Issue 29 – Enhanced Extended Link ("EEL") Audits: -- What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

(1) The Commission adopts CompSouth's position and finds that it is consistent with the *TRO* to include a requirement that BellSouth have some cause prior to initiating an audit.

(2) The Commission adopts BellSouth's position and does not require BellSouth to obtain the agreement of a CLEC with regard to the auditor.

(3) The Commission adopts BellSouth's position and finds that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. The reimbursement should not be limited to only those circuits for which non-compliance is found.

Issue 31 – Core Forbearance Order: -- What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?

The Commission orders that agreements be amended to remove "new market" and "growth cap" restrictions in BellSouth's ICA reciprocal compensation provisions. BellSouth has not explained how the distinctions between carrier contracts would render such direction problematic.

Issue 32 – Binding Nature of Commission Order: How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?

(1) Consistent with BellSouth's position, the Commission clarifies that its order applies to all certified competitive local exchange carriers.

(2) In the event that parties entered into separate agreements with BellSouth that may impact the implementation of changes of law, the Commission concludes that the parties be bound by those agreements. This issue is also addressed as part of Issue 3.

B. Discussion

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?

Positions of the Parties

BellSouth

The *TRRO* requires CLECs to work cooperatively for an orderly transition. This is evidenced by the requirement that adequate time be allowed to perform "the tasks necessary to an orderly transition." (*TRRO*, ¶¶ 143, 196, 227). Also, BellSouth argues that it is entitled to time in advance of March 10, 2006 so that it may migrate to alternative fiber arrangements. (BellSouth Brief, p. 58). BellSouth adds that there is no basis for transitioning from UNEs to state regulated Section 271 services. *Id.*

With regards to local switching and UNE-P, BellSouth argues that CLECs should be ordered to identify their embedded base via spreadsheets and submit orders as soon as possible or convert or disconnect their embedded base of UNE-P or standalone local switching. (BellSouth Brief, p. 59). BellSouth will then have adequate time to work with CLECs to ensure base elements are identified. If BellSouth is not given adequate time to convert, BellSouth will convert remaining UNE-P lines to the resale equivalent no later than March 11, 2006. *Id.* Remaining stand-alone switch ports will be disconnected. *Id.*

BellSouth states that the Commission is bound by the FCC's rules on transitional rates. (BellSouth Brief, p. 59). 47 CFR 51.319(d)(2)(iii) requires transitional rates of the higher of the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the *TRRO* for that combination of network elements, plus one dollar. TELRIC rates do not apply. *Id.* at 60.

BellSouth urges the Commission to clarify that CLECs may not add new arrangements after March 11, 2005. (BellSouth Brief, p. 61). Any service added after that date must be subject to the appropriate true up. *Id.*

CompSouth

CLECs should be able to transition to Section 271 checklist elements. (CompSouth Brief, p. 6). In support of this position, CompSouth states that all of the major Section 251 UNEs that were de-listed by the *TRRO* must remain available to CLECs under Section 271. *Id.* CompSouth contends that CLECs are entitled to submit conversion orders through March 11, 2005. (CompSouth Brief, p. 7). If it takes BellSouth longer to fulfill those orders, CLECs have no control over that part of the process. *Id.*

Interconnection agreements must include transition provisions for high capacity loops and transport that BellSouth is currently required to provide under Section 251, but may not have

to provide under this statute in the future as a result of growth in either business line counts or fiber-based collocators. (CompSouth Brief, p. 9). The *TRRO* states that when a high capacity loop for which there is currently impairment meets the standards for non-impairment, the FCC "expect[s] ILECs and CLECs to negotiate appropriate transition mechanisms through the section 252 process." *TRRO* ¶ 196, fn. 519.

CompSouth requests that the Commission declare that "BellSouth is obligated to provide for transition of high capacity loops and transport when in the future it is relieved of the obligation to provide them in and between particular wire centers pursuant to Section 251." (CompSouth Brief, p. 10).

Discussion

The first question within this issue pertains to what terms and conditions CLECs may transition to when they must transition away from UNEs. CompSouth argues that the transition should be to Section 271 checklist elements. The Commission has asserted jurisdiction under Section 271 to set just and reasonable rates for de-listed UNEs. The transition plan set forth in the *TRRO* for switching, high capacity loops and dedicated transport should apply during the transition period. After the transition period, the rates ordered by the Commission shall apply subject to the response of the FCC to the Commission's petition.

The second question within this issue pertains to whether there is some point prior to the end of the transition period beyond which CLECs may no longer order conversions. BellSouth states that conversions must be ordered far enough in advance of March 11, 2006, to enable it to process all orders by that date. CompSouth argues that CLECs are allowed to order conversions for the entire year.

The clearest indication of the FCC's intent is in paragraph 227 of the *TRRO* discussing the transition plan for mass market local switching. The FCC states that "We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of the Order." Given that the FCC set an express deadline for the submission of orders, it is not prudent for this Commission to imply an earlier deadline from the FCC's expressed wish for an orderly transition. The FCC could have specified that CLECs must submit their orders by some earlier date to ensure that all customers would be converted as of March 10, 2006. The FCC declined to take such action. Instead, the FCC stated that CLECs have one year from the effective date to submit the necessary orders. In the context of high capacity loops, the FCC states that "At the end of the twelve-month period, requesting carriers must transition all of their affected high-capacity loops to alternative facilities or arrangements." (*TRRO*, ¶196). Because the above quotation references the obligation of the requesting carriers, it must be assumed that the FCC is referencing any actions that the requesting carriers must take, such as ordering a conversion. The CLEC does not control when an incumbent LEC ("ILEC") would act on its order; therefore, this passage cannot be reasonably construed to obligate the CLECs to submit orders prior to the one year anniversary in anticipation of the time necessary for the ILEC to process the order. The language in paragraph 143 of the *TRRO*, with respect to the transition period for dedicated interoffice transport is the same as that for high-capacity loops.

The three factors that need to be reconciled are (1) that CLECs have until twelve months after the effective date of the *TRRO* to order conversions, (2) that ILECs only have to provide unbundled local switching and dedicated loop and transport for twelve months from the effective date of the *TRRO* (see, 47 C.F.R.§ 51.319(d)(iii) and (3) processing the conversions takes time. During the cross-examination of BellSouth witness, Pamela Tipton, by counsel for Cbeyond Communications Company, John Heitman, the concept of a true up was explored.

> Q. (Mr. Heitman) Well, let me ask this, if a CLEC agreed or the Commission ordered that if a conversion wasn't completed by March 10, 2006, that once it was completed after that date, that BellSouth could true up to the rate for that alternative service back to March 11, 2006, would that be acceptable to BellSouth?
>
> A (Ms. Tipton) I mean certainly the Commission has the -- the right to do that.

(Tr. 773). The Commission orders that 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.

An additional question within this issue concerns high-capacity loops for which the FCC found impairment in the *TRRO*, but may in the future meet the thresholds for non-impairment. Consistent with footnote 519 of the *TRRO*, the Commission requires the parties to negotiate appropriate transition mechanisms through the Section 252 process.

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?

Positions of the Parties

BellSouth

BellSouth's arguments on Issue 3 address generally how change-of-law issues should be addressed in interconnection agreements and specifically the impact of abeyance agreements on this process. *TRRO* ¶233 obligates carriers to execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. Therefore, CLECs should be ordered to implement promptly the changes of law that are the subject of this proceeding. (BellSouth Brief, p. 63). For issues that are currently the subject of arbitrations, BellSouth urged the

Commission to address change-of-law issues in this proceeding and apply its conclusions in those arbitrations. This process is more efficient. *Id.*

The Abeyance Agreement between BellSouth and Cbeyond does not excuse Cbeyond from implementing the *TRRO* until the parties have a new arbitration agreement. *Id.* at 64. The parties agreed to hold the arbitration of their new interconnection agreement in abeyance for 90 days in light of the uncertainty of the FCC's unbundling rules. *Id.* The Abeyance Agreement states that the parties "agreed to avoid a separate/second arbitration process of negotiating/arbitrating change-of-law amendments to the current interconnection agreement to address USTA II and its progeny." Tr. 1073; Hyde Direct testimony, at 4.

The Abeyance Agreement does not mention the *TRRO*, and was limited to changes from *USTA II*. Neither the *TRO* nor the *TRRO* are "progeny" of *USTA II*. "Progeny" means "a line of opinions that succeed a leading case." *Black's Law Dictionary*. The *TRO* was issued prior to *USTA II*; therefore, it is not a progeny. (BellSouth Brief, p. 65). The *TRRO* is not a legal opinion, and it does not reaffirm the Circuit court's opinion so it is not a progeny. *Id.*

South Carolina rejected Cbeyond's argument on this point, stating that it was an unreasonable result for BellSouth to have given up its right to implement the new rules, even before it knew what the rules would contain. *Id.* at 65-66.

CompSouth

CompSouth agrees that parties should act in reasonable time frame to implement changes. (CompSouth Brief, p. 10). However, CompSouth charges that BellSouth's proposed language exceeds scope of the docket. *Id.* at 11. As to the forum for the Commission to decide issues, CompSouth proposes a series of processes depending on the stage of the unresolved dispute. If an unresolved disputed issue is in a pending arbitration, then the Commission ruling in this case should govern. *Id.* If it is not an unresolved disputed issue in an arbitration, and the parties to the arbitration have agreed that they will abide by their negotiated resolutions notwithstanding the results in this case, those resolutions should be honored. *Id.* at 11-12. If there is no such agreement, either party to the arbitration should be able to invoke the change of law provisions of the interconnection agreement once the agreement is approved by the Commission. *Id.* at 12.

Cbeyond

Cbeyond entered into a voluntary Abeyance Agreement filed with the Commission in Docket No. 18995-U. The Abeyance Agreement obligates the parties to implement the *TRO* and the *TRRO* through the replacement interconnection agreement negotiated and arbitrated between Cbeyond and BellSouth.

Discussion

The first component of this issue that parties addressed in briefs pertained to the obligation under the *TRRO* to implement through good faith negotiations changes to interconnection agreements to account for certain elements no longer being Section 251(c)(3) obligations. There does not appear to be any substantive difference in the parties' positions. Instead, it appears they have chosen different wording to characterize the FCC's holding. The Commission orders that the parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

CompSouth has also charged that BellSouth proposed language that exceeds the scope of the docket because it pertains to changes unrelated to the *TRO* and the *TRRO*. The Commission initiated this docket in response to two separate petitions for declaratory rulings. In Docket No. 18943-U, XO Georgia, Inc. and Allegiance Telecom of Georgia, Inc. filed a Joint Petition for Declaratory Ruling requesting that the Commission order BellSouth to continue to honor the terms of its interconnection agreements. In Docket No. 19003-U, CompSouth filed a similar petition. The impetus for these petitions was actions taken by BellSouth in the wake of the *USTA II* decision that vacated and remanded portions of the *TRO* in which the FCC established unbundling requirements for local switching, transport and other UNEs. Based on BellSouth's representations that it would not unilaterally violate the terms of its interconnection agreements, the Commission dismissed the petitions and initiated this generic docket. The purpose of this docket was to examine "(a) whether the vacatur represents a "change in law", (b) whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996, and (c) whether BellSouth is obligated to provide UNEs under Georgia State Law." (Order Initiating Docket, p. 1; *quoting* CompSouth Petition, p. 4). The Commission then directed the parties to develop an Issues List for the Commission's consideration. In doing so, the Commission noted that in light of the *TRRO* the issues that the parties wish to place in front of the Commission may have changed. The Commission adopted the proposed Issues List as part of its Procedural and Scheduling Order in this docket.

Issue 3(a) asks how existing ICAs should be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations. The purpose of this docket was clearly to respond to the *TRO* and the *TRRO*, and not to every change in law that may be the subject of negotiations pursuant to the relevant provisions of the interconnection agreements. The Commission will limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO*. The implementation of other changes of law is not usually the subject of a generic proceeding. This conclusion does not inhibit parties from acting pursuant to the change of law provisions in their interconnection agreements to implement changes in law unrelated to the *TRO* or *TRRO*.

The Commission also finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise. Parties are free to negotiate interconnection agreements that provide for alternative arrangements. In connection with the three scenarios set forth in CompSouth's brief, the Commission agrees with CompSouth on the first two. However, the Commission does not agree with the process set forth by CompSouth for its third scenario. If there is a pending arbitration, and no agreement among the parties to resolve an issue outside of this generic proceeding, then

the parties should incorporate the result of this docket into the interconnection agreement they submit for approval.

Finally, the Commission concludes that Cbeyond is not excused from implementing the *TRRO* until the parties have a new interconnection agreement. The July 23, 2004 Abeyance Agreement included the following language: "Within this framework, Cbeyond and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current Interconnection Agreement to address *USTA II* and its progeny." (Joint Motion, p. 2) (emphasis added). The framework in question appears to include that the abeyance requested by the parties was set to last for ninety (90) days. The parties waived the resolution of the arbitration only through June 2005. It exceeds the scope of the Abeyance Agreement to delay further the implementation of the *TRRO* now that the deadline provided for in the Abeyance Agreement has passed. While individual statements in the Abeyance Agreement state that the parties will continue to operate pursuant to their existing agreement until the new agreement is finalized, such statements were made within the framework of the abeyance being for ninety (90) days.

Issue 4: 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; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?

Positions of the Parties

BellSouth

A.
Business Line

BellSouth cites to two areas of disagreement on the definition of "business line." The first disagreement is over BellSouth's inclusion of all UNE loops. The second disagreement concerns BellSouth's counting of high capacity loops.

BellSouth includes all UNE loops, rather than a subset of them and cites to the *TRRO* for support. The *TRRO* states that "Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify." (¶ 105). The FCC also states that "The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." *Id.* (footnotes omitted). BellSouth argues that the *TRRO* included all UNE loops because it gauges business opportunities in a wire center. (BellSouth Brief, p. 72).

The second point of disagreement concerns the counting of high capacity loops. BellSouth again argues that the FCC intended to capture opportunity. *Id.* at 73. BellSouth also asserts that limiting the number of lines runs counter to the FCC's revised impairment standard, which considers whether CLECs can compete without access to particular network elements and considers all the revenue opportunity that a competitor can expect to gain over the facilities it uses. *Id.* Excluding lines because they are not "switched" would ignore the competitive opportunity in the UNE loops. *Id.* It would also violate the direction included in *TRRO ¶ 25* not to evaluate impairment with reference to a particular CLEC's business strategy. *Id. at 74.* The Michigan PSC found that the TRRO requires that the line count include each Centrex line as one line, without a factor to reduce the number to one-ninth. *Id.*

A DS1 line is to be counted as 24 business lines for determining the number of business lines, regardless of how many of the 24 channels are activated. *Id.* Contrary to CompSouth's allegations, BellSouth's reporting is not inconsistent with its financial reporting. *Id.* at 75. Beyond that point, CompSouth's information is not in evidence in Georgia. *Id.*

Finally, BellSouth argues that there is nothing in the federal law that would support limiting its right to designate future wire centers on an annual basis. *Id.* at 76.

B.
Fiber-based collocator

BellSouth argues that the Commission should strike CompSouth's proposed addition to the FCC's definition of "fiber-based collocator" that would result in counting carriers that have not finalized mergers as one collocator.[5] (BellSouth Brief, pp. 66-69). The practical impact of CompSouth's proposal is that it would result in counting AT&T and SBC as one fiber-based collocator. BellSouth's states that its position has been adopted by the Rhode Island and Michigan commissions. *Id.* at 69.

BellSouth also urges the Commission to reject CompSouth's proposed language about counting the network of fiber-based collocators separately. BellSouth discusses gaming of the routes as a CLEC connecting links from a Tier 1 or Tier 2 wire center in a Tier 3 wire center. *Id.*

C.
Building

BellSouth does not believe the term "building" needs to be defined, but instead, the Commission should just follow a "reasonable person" standard. *Id.* at 67.

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[5] CompSouth proposes that the term "fiber-based collocator" apply to "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."

CompSouth

A.
Counting of Business Lines

CompSouth states that BellSouth has improperly read the first sentence of FCC Rule 51.5 out of the definition. The first sentence reads as follows:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC.

This first sentence eliminates any residential lines so there was no need for the FCC to restate throughout the definition that residential lines were not included. (CompSouth Brief, p. 15). BellSouth's reading is internally inconsistent because it does not include UNE-P, while it does include all UNE loops. *Id.* CompSouth argues there is no basis for this distinction. *Id.*

CompSouth disagrees with BellSouth's argument that the maximum number of voice grade lines the facility could support should be counted. The final three sentences of the definition of "business lines" states:

> The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

Empty channels are not switched services so do not meet the definition of business lines. (CompSouth Brief, p. 17).

Also, BellSouth treats its own business switched access lines differently than it is proposing the Commission count business lines for purposes of impairment. ARMIS requires that BellSouth report its lines in voice-equivalents, but limit the voice-equivalent line count to only those circuits actually activated to provide business switched access line service. *Id.* at 18. BellSouth has inflated the number of business lines so that they are misaligned with the thresholds relied upon by the FCC. *Id.* at 19-24.

B.
Fiber-Based Collocation

CompSouth argues that state commissions are not bound to looking only at March 10, 2005. CompSouth emphasizes that BellSouth has not cited to any authority for why the Commission must count fiber-based collocators as of March 10, 2005. (CompSouth Brief, p. 27). Moreover, looking backwards to March 10, 2005 is inconsistent with the FCC's direction to count as one fiber collocator multiple collocations at a single wire center by the same or affiliated carriers. *Id.*

C.
Building

CompSouth's definition of "building" incorporates the concept of BellSouth's "reasonable person" standard, but it adapts it to include a "reasonable telecom person." The purpose of this amendment is "to ensure that the deciding factor in defining a 'building' is that the area is served by a single point of entry for telecom services." *Id.* at 29.

D.
Route

CompSouth states that there is no further dispute on the definition of the term "route."

Discussion

FCC Rule 51.5 defines "business line" as follows:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

For the counting of business lines, the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops. It is not necessary to read the first sentence out of the definition in order to reach this conclusion. The first sentence includes in the definition of "business line" that it serve a "business customer." However, the next sentence of the line instructs on the manner in which such lines shall be calculated. In setting forth what shall be included in the calculation, the rule modifies the sum of all incumbent LEC switched access lines with the word "business." There is no confusion that this part of the addition is limited to business lines. Yet, in the same sentence, when discussing the sum of all UNE loops connected to that wire center, the rule does not similarly use the modifier "business."

If, because of the prior sentence, it would have been duplicative to state that these were business UNE loops, as CompSouth suggests, then the switched access lines need not have been identified as business in the first part of the sentence. That the switched access lines were expressly limited to business lines, and the UNE loops were not so limited, indicates that the limitation does not apply to the UNE loops. In the discussion of business line counts in the *TRRO,* the FCC again refers to "business UNE-P, plus UNE-loops." (¶ 105). This conclusion is consistent with the policy goals expressed by the FCC. That the FCC states it intended to measure business "opportunities" in a wire center provides support for why its method to calculate business lines would potentially include non-business lines. *Id.*

The Commission also concludes that it is appropriate to count DS1 lines as 24 business lines, provided that those DS1 lines in which all 24 channels are empty shall not be counted at all towards the business line count. It is consistent with Commission practice to consider a DS1 line to be an access line. If a DS1 line includes channels that are not empty, then it is an access line that connects end-user customers with incumbent LEC end-offices for switched services. Consistent with 47 C.F.R. § 51.5, such a DS1 line must count as 24 lines. However, if a DS1 line does not connect end-users for switched services, then it does not meet the first requirement set forth in the federal rule, and therefore must be excluded from the tally of business lines.

The issue in defining the term "fiber-based collocator" hinges on the date that the impairment test must be applied. BellSouth cites to language that CompSouth has proposed that would expand the definition of "fiber-based collocator" to address planned mergers. In doing so, CompSouth essentially is seeking to apply the impairment test at a later date because it is accounting for situations in which the number of fiber-based collocators in existence as of the date of the analysis is more than will be available a short while after the analysis is completed. Because the parties agree that a decision to de-list a particular wire center is irrevocable (Tr. 666), the changes to the competitive landscape could not be reflected in the assessment of the wire centers. As the Michigan Public Service Commission observed, however, state commissions are not free to rewrite federal rules with what we may view to be improvements. Therefore, the Commission does not accept CompSouth's proposed language because there is no basis for it in the federal law.

More directly on point is whether the March 11, 2005 effective date of the *TRRO* requires that the Commission consider the number of fiber-based collocators in a wire center as of that date. BellSouth argues that it does so require, but does not cite to any authority for why it could not be some other date. CompSouth emphasizes this shortcoming in BellSouth's position, and argues that the Commission should look at circumstances as they exist, rather than how they existed on March 11, 2005. The Commission agrees with CompSouth. That the FCC rules became effective March 11, 2005 does not mean that the application of the rules must ignore changes that occurred between the effective date of the rule and its application.. Rather, it means that as of March 11, 2005 any application must comply with the new rule. State commissions often must apply federal rules in reaching its decisions. When state commissions do so they typically apply the federal rules to the evidence with which it has been presented. State commissions do not typically ask the parties to go back and present evidence that reflects the effective date of the FCC rule to be applied. The only policy reason that BellSouth offers for its

position is the need for a certain date. The Commission finds that the date of this Commission order is the date certain for the analysis.

It appears contrary to the intent of the *TRRO* essentially to miscount the number of fiber-based collocators currently in existence because the number was different as of the time that the FCC order took effect. For these reasons, the Commission will apply the definition of "fiber-based collocators" set forth in the *TRRO* and federal rules to the circumstances as they exist currently.

The Commission adopts CompSouth's "reasonable telecom person" standard for the term "building." The only difference between CompSouth and BellSouth on this definition is the inclusion of the word "telecom." This difference would allow buildings to be defined by how they are seen for network engineering purposes.

CompSouth represented in its brief that there was no further dispute on routes; therefore, the Commission adopts BellSouth's definition of route.

Issue 5: TRRO/FINAL RULES:
a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?
b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?
c) What language should be included in agreements to reflect the procedures identified in (b)?

Positions of the Parties

BellSouth

BellSouth states that state commissions are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO*. (*TRRO* ¶ 234). The Commission must resolve the parties' disputes concerning the wire centers in Georgia 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. (BellSouth Brief, p. 70). BellSouth urges the Commission to conclude that CLECs cannot self-certify to obtain Section 251 loops and transport in the future.

CompSouth

State commissions have authority to determine whether BellSouth has followed FCC mandates on how to designate non-impaired wire centers. (*TRRO* ¶100). CompSouth believes that it is most efficient for the Commission to settle disputes on the front end. (CompSouth

Brief, p. 30) An orderly process should be established to determine future changes in the wire center list. The process of reclassifying a wire center would be synchronized with the routine filing of ARMIS 43-08. BellSouth has not offered an alternative. *Id.* at 31.

Discussion

The *TRRO* provides that CLECs will "be able to challenge the incumbent's estimates in the context of section 252 interconnection agreement disputes." (¶100). State commissions have the authority to resolve disputes arising under Section 252 agreements. Therefore, state commissions have the authority to determine whether an ILEC's estimates are accurate. CompSouth's proposed method of having BellSouth file its ARMIS data and allowing time for the CLECs to review it, with a scheduled date for a Commission decision seems reasonable. The Commission will begin by allowing BellSouth to designate future wire centers on an annual basis. The Commission will monitor how this process works and make necessary and appropriate changes moving forward.

BellSouth requests that the Commission confirm that it has applied the appropriate procedures to identify the wire centers. As discussed in Issue 4, the Commission agrees with BellSouth, except on the issue of the effective date of the *TRRO* and the counting of a DS1 that has only empty channels.

Issue 6: HDSL Capable Copper Loops: -- Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

Positions of the Parties

BellSouth

For those wire centers that meet the FCC's impairment thresholds for DS1 loops, BellSouth does not have any obligation to provide CLECs with its UNE HDSL loop product. (BellSouth Brief, p. 87). The FCC defined 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." 47 C.F.R. §51.319(a)(4). The FCC has therefore removed any obligation to provide these loops in unimpaired wire centers. In addition, there has been very little CLEC interest in BellSouth's UNE HDSL product. (BellSouth Brief, p. 88).

The second position BellSouth takes with respect to Issue 6 is that it can and should count each deployed UNE HDSL loop as 24 voice grade equivalent lines. The *TRO* states as follows:

> 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 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. (n. 634).

For calculating business lines, a DS1 corresponds to 24 kbps-equivalents, and therefore to 24 business lines. 47 C.F.R. § 51.5.

BellSouth's argument is that (1) a DS1 is the equivalent of 24 business lines, (2) a DS1 loop and a T1 are equal in speed and capacity, and (3) UNE HDSL loops are used to deliver T1 services; therefore BellSouth's UNE HDSL loops must be counted as 24 business lines.

CompSouth

A.

HDSL-capable copper loops are not the equivalent of DS1 loops for purposes of evaluating impairment. (CompSouth Brief, p. 31). They are just copper loops that are less than 12,000 feet long and are clear of equipment that could block provision of high-bit rate DSL services. *Id.* They do not include the electronics on both ends of the loop that provide the means for the loop to be used to provide DS1-level services. *Id.* In sum, CompSouth's position is that an HDSL-capable copper loop doesn't have everything that a DS1 loop has.

BellSouth has read the first sentence out of the FCC's definition. 47 C.F.R. § 51.319(a)(4)(i) states:

> A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

A DS1 loop must be capable of sending signals at a speed of 1.544 mbps. (CompSouth Brief, p. 32). If a certain type of copper loop is capable of doing so, then it qualifies as a DS1 loop, but the rule does not state that copper loops that are not capable of doing so become DS1 loops. *Id.* BellSouth does not contend that an HDSL-capable copper loop cannot provide a 1.544 mbps service if it doesn't have the associated electronics. *Id.*

The outcome of adopting BellSouth's reading is inconsistent with the apparent intent of the FCC. Adoption of BellSouth's position would prevent CLECs from creating their own DS1 loops. (CompSouth Brief, p. 33). In the *TRRO*, the FCC stated that "[t]he record also suggests that in some cases, competitive LECs might be able to serve customers' needs by combining other elements that remain available as UNEs." (¶ 163, n.454). The FCC went on to state that in place of DS1 UNE loops that were declassified as UNEs, CLECs could us HDSL-capable loops. *Id.* If DS1 and HDSL-capable loops were the same things for impairment purposes, then the FCC would not have considered HDSL-capable loops to be substitutes for DS1.

BellSouth's contention that HDSL-capable copper loops should be counted as DS1 lines for purposes of counting business lines would inflate the business line count. (CompSouth Brief, p. 34). This method would allow BellSouth to convert a lot of residential lines to business lines. *Id.* It is also inconsistent with how HDSL-capable copper loops were counted by another one of BellSouth's witnesses in this case. *Id.* at 34-35.

Sprint

A DS1 loop is not the same as an HDSL-compatible loop because a DS1 loop is provisioned with all the required electronics; whereas an HDSL-compatible loop is a conditioned copper loop without any electronics. (Sprint Brief, p. 3). The FCC's conclusion that requesting carriers are impaired without access to copper loops remains in effect. *Id.* at 3-4. The intent behind the FCC rule upon which BellSouth relies is "to ensure that ILECs could not refuse to provide DS1 loops if ILECs used other technologies such as HDSL in combination with DS1 loops." *Id.* at 5.

Discussion

This issue turns on whether an HDSL copper loop is a DS1 loop by itself, or whether it is only a DS1 loop if provided with the associated electronics necessary for it to provide DS1 services. More specifically, the first issue turns on whether the word "capable" in the context of 47 C.F.R.§ 51.319(a)(4) means capable on its own. After reviewing the pertinent FCC rules and orders on this issue, the Commission finds that the FCC intended for HDSL copper loops to be considered a DS1 loop for purposes of counting lines to determine impairment.

Because there are not any copper loops capable of providing DS1 service without the addition of associated electronics, it is unlikely that by "capable," the FCC meant capable on its own. It would not serve any purpose for the FCC to include within the definition of DS1 loops a type of copper loop that does not exist. It is also of note that there are copper loops that cannot provide DS1 service regardless of the electronics added. This fact supports a reading of the word "capable" to include those loops that are capable if provided the associated electronics. The criterion distinguishes between those loops that are capable of providing DS1 service with the provision of associated electronics and those loops that are not.

In its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* ("*Third Report and Order*"), the FCC states that an "xDSL-capable" loop describes "copper loops from which bridge taps, low-pass filters, range extenders, and similar devices have been removed." (¶ 172). Separately in that order, the FCC explains that that "'xDSL' refers to the various kinds of Digital Subscriber Line service, such as ADSL . . . and HDSL" *Id.* at fn 299. Therefore, the FCC description of an xDSL capable loop would apply to an HDSL-capable loop. The above description of these loops does not include any electronics, but rather refers to simply the copper loop. Construing the rule consistent with the FCC's *Third Report and Order,* DS1 loops would include two and four wire HDSL copper loops without the associated electronics. To reach a different conclusion would necessitate finding that the FCC described HDSL copper loops inconsistently between its rule and its order. The Commission concludes that HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment.

Issue 6 explicitly addresses the narrow question of whether HDSL-capable copper loops are the equivalent of DS1 loops for the purpose of evaluating impairment. By phrasing the issue in such a manner, it is apparent that the parties intended for the Commission to address only the question of whether HDSL-capable copper loops should be counted the same as DS1 loops for assessing whether the 60,000 business line threshold set forth in the *TRRO* has been met. The Commission will not address questions that exceed the scope of Issue 6 as agreed upon by the parties and adopted by the Commission.

Issue 9 – 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?

Positions of the Parties

BellSouth

BellSouth relies on the District Court's opinion in the appeal of the Commission's order in this docket. The order states "The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ted]' to place new orders." *BellSouth v. MCIMetro,* Case No. 1:05-CV-0674-CC, (April 5, 2005 Order, p. 4). BellSouth argues that moving a customer's service to a different location would require the placement of a new order for service, and that therefore the transition period would not apply. (BellSouth Brief, p. 77).

BellSouth states that changes to existing orders do not require a new service order. BellSouth will accordingly process orders to modify an existing customer's service by adding or removing vertical features during the transition period. *Id.* Pursuant to the *TRRO,* CLECs may self-certify that they are entitled to unbundled access to a requested element, and BellSouth must process this request. BellSouth may only challenge the order after the fact. BellSouth asserts that at the conclusion of this generic proceeding the Commission should confirm the Georgia wire centers that satisfy the FCC's impairment tests. (BellSouth Brief, p. 77). Doing so would eliminate the situation in which a CLEC would self-certify.

CompSouth

With regard to high capacity loops and dedicated transport, CompSouth identifies the only issue as being whether moves of de-listed UNE loops or dedicated transport on behalf of a customer that was served by the CLEC as of March 11, 2005 should be permitted. (CompSouth Brief, p. 62). The *TRRO* stated that the transition plans shall apply only to the embedded customer base. (¶ ¶ 0142, 195) It did not state embedded lines or circuits.

With regard to UNE-P, CompSouth argues that BellSouth should be obligated to continue to process adds, changes, and moves for CLECs at the request of customers that were served

through UNE-P arrangements as of March 11, 2005. (CompSouth Brief, p. 63). Again, the transition period applied to the customer base, not to the circuits or lines. (*TRRO*, 227).

Discussion

The Commission concludes that a CLEC may not use facilities that have already been provided to serve existing customers who move to a new location and that the transition period does not apply to moving, adding or changing orders. To do so would require a new order, and the District Court has interpreted the *TRRO* not to allow such action. The Commission is bound by the District Court's interpretation.

Issue 10 – Transition of Delisted Network Elements To Which No Specified Transition Period Applies – 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?

Positions of the Parties

BellSouth

BellSouth incorporates its arguments from Issue 2 into its position for rates, terms and conditions for elements de-listed by the *TRRO* and which have a designated transition period. (BellSouth Brief, p. 78). CLECs have had two years notice of the *TRO* decision that certain elements no longer needed to be unbundled. Therefore, with the exception of entrance facilities, BellSouth should be authorized to disconnect or convert such arrangements upon 30 days written notice absent a CLEC order to disconnect or convert such arrangements. (BellSouth Brief, p. 78).

CompSouth

CompSouth incorporates into its position on Issue 10 its positions on both Issues 2 and 8. (CompSouth Brief, pp. 63-64). The FCC did not provide a specific transition plan for every type of UNE. Such UNEs are not covered by the transition plan covered in Issue 2. *Id.* at 64. For example, DS1 "enterprise" unbundled switching and OCN loops and transport are UNEs that BellSouth is no longer obligated to provide pursuant to Section 251(c)(3) of the Federal Act. *Id.* BellSouth has proposed a 30 day period for the submission of orders to convert UNEs or BellSouth may disconnect or convert.

CompSouth argues that although CLECs have known since the *TRO* that certain UNEs were de-listed, no agreement has been reached as to how the transitions or conversions would be

completed. (CompSouth Brief, p. 64). The CLECs argue for at least a 60 day time period. *Id.* at. 64-65.

CompSouth incorporates its arguments on Issues 2, 4 and 5 into Issue 10(b). *Id.* at 65. The FCC did not adopt a default transition process for UNEs that are found to meet the non-impairment standard after March 11, 2005. Therefore, the parties have to agree on a transition period. *Id.* The 90 day Subsequent Transition Period proposed by BellSouth is not adequate. *Id.* In order to complete the work necessary to identify and create a spreadsheet to convert the de-listed circuits to alternative circuits, CompSouth proposes a maximum of 12 months and minimum of 180 days for the Subsequent transition period. *Id.*

CompSouth argues that BellSouth should be obligated to provide written notice to the CLECs' point of contacts contained in the notice provision of the interconnection agreement. *Id.*at 66-67. Merely posting the notice on the website is not acceptable. *Id.* at 67.

Discussion

To the extent that resolution of this issue involves other issues in this proceeding, the Commission adopts the conclusions it reached on those other issues. The Commission adopts a 30 day transition period for UNE-P and a 60 day transition period for everything else. While it is true that CLECs have been on notice for two years, there has been no agreement on how the parties would move forward. A 60-day period is reasonable going forward.

The Subsequent Transition Plan applies to wire centers that were impaired as of March 11, 2005, but which subsequently met the non-impairment standards. The Commission will allow a 120 day Subsequent Transition Period, which is a compromise between the parties' positions on this issue.

Finally, the Commission finds it prudent to obligate BellSouth to provide actual written notice to the point of contact in the parties' interconnection agreements. If a party does not have a point of contact identified in the agreement, then posting constructive notice on the website shall be deemed acceptable.

Issue 11 - 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?

Positions of the Parties

BellSouth

BellSouth argues that CLECs must transition their entire embedded base by March 10, 2006. (BellSouth Brief, p. 79). BellSouth needs CLECs to provide it with timely information in order to accomplish this transition. BellSouth requests that CLECs be obligated to provide this information by October 1, 2005 or as soon as possible. *Id.* If CLECs do not submit timely

orders, then BellSouth should be able to convert or disconnect the remaining embedded base-lines by March 10, 2006. *Id.*

For high capacity loops, BellSouth is asking that the Commission direct CLECs to 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. *Id.*

CompSouth

CompSouth argues that CLECs have a right to pay no more than the FCC's transition rates for Section 251 network elements subject to non-impairment findings. (CompSouth Brief, p. 67). The process for transitioning should not result in CLECs being denied transition pricing during the FCC's transition period. *Id.*

If a CLEC has not converted a circuit "de-listed" under Section 251 by the end of the transition period, the Section 271 checklist element rate should apply because (1) all *TRRO* de-listed UNEs must be provided by BellSouth pursuant to Section 271, and (2) Section 271 terms and conditions will similar to those of the de-listed UNEs. *Id.*

The ongoing disputes between the parties regarding the proper designation of wire centers where the FCC has authorized non-impairment findings has complicated the transition. CLECs should not be forced off Section 251 UNE arrangements where there is a dispute over the wire center until the Commission decides this case. The Commission should reject BellSouth's contract proposals that would penalize CLECs for not following its transition schedule. (CompSouth Brief, p. 69).

Discussion

This issue is resolved for the most part by other issues the Commission will address in this docket. The Commission has already concluded that the CLECs have until March 10, 2006 to submit orders for the transition, subject to a true-up mechanism for conversions that are not completed until after the March 11, 2006. For conversions that are completed prior to March 10, 2006, the Commission orders BellSouth to true-up the difference. The Commission decided to set rates based on the just and reasonable standard in Section 271; therefore those shall be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to convert CLECs' UNE-P arrangements to the resale rate beginning March 11, 2006, unless parties agree to alternative arrangements or are otherwise ordered by the Commission.

Finally, the Commission finds that BellSouth shall not take any action with regard to wire centers in dispute until such dispute is resolved by the Commission.

Issue 13 – Performance Plan: -- Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

Positions of the Parties

BellSouth

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. (BellSouth Brief, p. 81). The purpose of the plan was to ensure nondiscriminatory access to elements as required by Section 251(c)(3), after BellSouth gained permission to provide in-region interLATA service. *Id.* In de-listing a UNE, the FCC found CLECs were able to purchase similar services from other providers. *Id.* It is discriminatory to subject BellSouth to penalties and not these other providers. *Id.*

BellSouth has entered into commercial agreements with more than 150 CLECs. *Id.* These CLECs were willing to forgo the plan's penalties for those included within the commercial agreement. *Id.* at 81-82. The Commission adopted the Hearing Officer's recommendation to approve a stipulation to remove certain DS0 wholesale platform circuits from the plan. *Id.* at 82.

CompSouth

CompSouth argues that the plan should still apply to the extent such network elements are still required pursuant to Section 271. (CompSouth Brief, p. 69). CompSouth argues that BellSouth still must provide meaningful, non-discriminatory access to such network elements pursuant to the Section 271 competitive checklist. *Id.*

BellSouth's position is inconsistent with the position it took when it applied for Section 271 approval. BellSouth stated that the performance measurement plans were in place to ensure compliance only with Section 271 obligations. *Id.* at 70. Moreover, it would make no sense for performance measurements designed to ensure there is no Section 271 backsliding to be limited to Section 251. *Id.*

Discussion

The issue is whether the performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251. The record of BellSouth's Section 271 application indicates that the performance plans were intended to ensure Section 271 compliance. BellSouth's position that the Section 271 compliance the parties were referencing was intended only to cover the overlap between Section 271 and Section 251 is not reflected.

The performance plan was adopted as a condition of the approval of BellSouth's Section 271 application. Therefore, regardless of BellSouth's position that state commissions lack jurisdiction under Section 271, BellSouth subjected itself to this degree of state commission involvement in its Section 271 obligations as part of achieving Section 271 approval. The record reflects that the purpose of the performance plan was to ensure that BellSouth continued to meet its Section 271 obligations. (Tr. 112-19).[6] In its Brief in Support of Application for Provision of

[6] The Commission took administrative notice of BellSouth's Brief in Support of Application for Provision of In-Region Inter-Lata Services in Louisiana and Georgia, BellSouth's Supplemental Brief filed with the FCC for 271 authority in Georgia, and the FCC order granting BellSouth authority to sell long distance in Georgia. (Tr. 115-16).

In-Region Inter-Lata Services, BellSouth quoted the FCC's Kansas/Oklahoma Order on SBC's Section 271 application. Quoting the FCC, BellSouth stated that the performance plans constitute probative evidence of continued Section 271 compliance. (Tr. 116-17, BellSouth Brief in Support of Application, p. 5). BellSouth also stated in its brief that a performance plan is designed to prevent against Section 271 backsliding. (Tr. 117, BellSouth Brief in Support of Application, p. 5). In its Supplemental Brief filed with the FCC for 271 authority in Georgia, 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

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.

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 reference in the *Supplemental Order Clarification*[7] to commingling at paragraph 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

[7] FCC 00-183, CC Docket No. 96-98 (rel. June 2, 2000) (*"SOC"*)

> 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 footnote 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.*

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 paragraph 584, BellSouth says the FCC's clear intent was not to require commingling for Section 271 unbundling obligations. *Id.*

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.*

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 paragraph 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.

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.

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.

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 Section 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.* 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. That the FCC deleted both statements resolves the conflict but not the ambiguity.

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

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

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

CompSouth

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. (CompSouth Brief, p. 78). The FCC said that "wasteful and unnecessary" ILEC charges would deter economically efficient conversions. *Id.* at 79, quoting *TRO* ¶ 587. The FCC found that "termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time" may not applied to conversions. (*TRO* ¶ 587). Such charges would violate Section 202 of the Communications Act. *Id.*

The Commission has approved a TELRIC rate of $5.70 for switch-as-is conversions of the loop-transport combination known as an EEL. (CompSouth Brief, p. 80). This rate compensates BellSouth for its costs. *Id.* BellSouth proposes new rates for conversions but did not adequately explain the dramatic increase over TELRIC. *Id.* BellSouth did not file the purported cost study that would justify the increase in this proceeding for review by the Commission. *Id.* The increased rate is BellSouth's attempt to circumvent the FCC's requirements to "switch-as-is." *Id.* at 81.

Discussion

The parties do not appear to differ that ILECs must allow CLECs that meet the eligibility requirements to convert the wholesale service used to serve a customer to UNEs or UNE combinations. This requirement is set forth in paragraph 586 of the *TRO*. The FCC declined to establish procedures and stated that parties are bound by good faith.

On the issue of cost, BellSouth proposes a dramatic increase to the Commission's approved TELRIC rate for EEL conversions. According to the testimony of Ms. Tipton, this increase results from a cost study it recently performed. (Tr. 719). This cost study was not provided as part of this proceeding. The Commission finds, therefore, that it shall not afford it any weight. The rate also appears to include a penalty to CLECs that do not work with BellSouth on the schedule preferred by BellSouth. This penalty would involve BellSouth recovering for costs that it does not actually incur. In fact, BellSouth's witness testified that "It isn't a matter, in our minds, of cost recovery at that point." (Tr. 721).

The Commission will remand this issue to a Hearing Officer or to itself for evidence on the issue of the appropriate conversion rate. In the interim, the Commission orders a rate of the TELRIC rate plus fifteen percent based on the Commission's determination of TELRIC.

Issue 16 – 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?

Positions of the Parties

BellSouth

There is no retroactivity for conversion requests; the effective date is the date the agreements were amended. (BellSouth Brief, p. 83). The *TRO* does not contemplate retroactivity. (*TRO* ¶ 588). Moreover, that CLECs have not agreed to amended contract language shows that the issue is not vital to them. The Massachusetts Commission found that the rights were not retroactive.

CompSouth

Once conversion language reflecting the *TRO* is included in an interconnection agreement, parties should treat conversions pending as of the effective date of the *TRO*.

(CompSouth Brief, p. 81). The FCC stated that it declined to require retroactive billing to any time before its effective date. The FCC went on to state that "To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order." (*TRO*, ¶ 589).

Discussion

Paragraph 589 of the *TRO* provides as follows:

> As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

In the above paragraph, the FCC distinguishes between the time prior to the effective date of the *TRO* and the time after the effective date of the *TRO*. The FCC is clear that it will not require retroactive billing prior to the effective date of the *TRO*, but that "up to the effective date" ILECs would be required to offer the appropriate pricing for orders that were pending at the time of the *TRO*. So a CLEC that submitted an order for conversion prior to the effective date of the *TRO*, which was still pending as of that date, was entitled to "the appropriate pricing."

In the preceding paragraphs of the section on conversions, the FCC breaks down the situations in which an ILEC may convert UNE or UNE combinations to the equivalent wholesale service and a CLEC may do the reverse. (*TRO* ¶ 586). In addition, the FCC concludes that it is not fair to permit CLECs to supersede existing contracts through a conversion request; however, ILECs should not be entitled to assess on legitimate conversion requests wasteful and unnecessary fees associated with establishing initial service. *Id.* at 587. The "appropriate pricing" referenced in paragraph 589 appears to reference this discussion. That is, if a CLEC submitted a legitimate request to convert a wholesale service to a UNE or UNE combination and that request was pending as of the effective date of the *TRO*, paragraph 589 indicates that the CLEC is entitled to the UNE or UNE combination rate as of the *TRO*'s effective date. However, any request that sought to supersede an existing contractual arrangement would not be a legitimate request.

Issue 17- Line Sharing: Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

Positions of the Parties

BellSouth

BellSouth has three main points to its position on Issue 17. First, BellSouth argues that state commissions do not have authority over Section 271 unbundling obligations. (BellSouth Brief, p. 47). Second, BellSouth argues that line sharing is not a Section 271 obligation. *Id.* at 45. Third, BellSouth asserts that the FCC has granted it forbearance from any Section 271 line sharing obligation that it may have. *Id.* at 50.

BellSouth cites to paragraphs 199 and 260-62 of the *TRO* for the proposition that it does not have any obligation to provide new line sharing arrangements after October 1, 2004. (BellSouth Brief, p. 45). BellSouth argues that Section 271 does not require, and in fact, does not even mention line sharing. (BellSouth Brief, p. 49). Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services." BellSouth's position is that the high frequency portion of the line ("HFPL") is only part of the loop, and that BellSouth is only obligated to provide the entire loop. (BellSouth Brief, p. 46). 47 CFR 51.319(a) defines the local loop network element as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises. *Id.* at 45. BellSouth argues that it meets its checklist item 4 obligation by offering access to complete loops. *Id.* at 49. CompSouth did not provide testimony in support of its proposed contract language on this issue. *Id.* at 47.

BellSouth charges that CompSouth's position would render the FCC's transitional scheme irrelevant because it would allow CLECs to receive line sharing indefinitely under Section 271 and at rates other than the ones the FCC established as part of the transition plan. *Id.* It would also undermine the *TRO's* plan for CLECs to access facilities that do not have the same anti-competitive effects as line-sharing. *Id.* at 47-48.

BellSouth next discusses the FCC's order in response to its forbearance petition.[8] BellSouth asserted that its petition requested forbearance from any stand-alone unbundling obligations on broadband elements. *Id.* at 50. This requested relief would encompass line sharing. *Id.* at 51. Paragraph 34 of the FCC's *Broadband 271 Forbearance Order* includes the following passage:

> 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.

Because its forbearance petition was granted, BellSouth argues that it is not required to provide line sharing even if otherwise required by Section 271.

BellSouth cites to state commission decisions in Tennessee, Massachusetts, Michigan, Rhode Island and Illinois that support its position. *Id.* at 54. BellSouth also references state

[8] *Memorandum Opinion and Order,* WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order*").

commissions that have reached different conclusions, but argues that to the extent those other decisions were based on state tariffs, they are distinguishable. *Id.* at fn 105.

CompSouth

CompSouth refers to decisions of the Maine, Pennsylvania and Louisiana commissions that have held that line sharing falls under checklist item 4, and that BOCs that are subject to Section 271 must provide access to it. (CompSouth Brief, p. 83). In addition, numerous FCC Orders granting Section 271 access to BOCs discuss line sharing as a component of checklist item 4. *Id.* at 84. Even BellSouth included line sharing as a checklist item 4 element at one point. *Id.* If it was necessary to provide an element in order to satisfy the checklist item, then the element must be included in the checklist item. *Id.* at 85.

CompSouth next addresses the conflicting comments of the FCC commissioners after the issuance of the *Broadband 271 Forbearance Order.* Regardless of their disagreement over the scope of the *Broadband 271 Forbearance Order*, it is clear that each commissioner viewed line sharing to be included as part of checklist item 4. (CompSouth Brief, p. 87). Addressing the scope of the *Broadband 271 Forbearance Order,* CompSouth asserts that it did not apply to line sharing because BellSouth did not request forbearance from line sharing. *Id* The FCC order identifies FTTH loops, FTTC loops, the packetized functionality of hybrid loops and packet switching as the broadband elements for which it is granting forbearance. *Id.* at 88. An FCC order issued subsequent to then-Chairman Powell's statement that line sharing was not addressed again listed the same items mentioned above. Therefore, the FCC excluded line sharing from the list of broadband elements. The FCC issued a subsequent order that similarly did not address forbearance for line sharing.[9]

Discussion

The Commission asserted jurisdiction to set just and reasonable rates under Section 271. The issue of whether line sharing is a Section 271 element is ultimately an issue to be adjudicated by the FCC. As pointed out by CompSouth, both the FCC and BellSouth have in the past referred to line sharing as part of checklist item 4 compliance. The FCC has not taken any action to remove this component from checklist item 4.

With regards to BellSouth's Petition for Forbearance, it is ambiguous as to whether the FCC construed BellSouth's Petition to include line sharing. Individual FCC commissioners have issued separate conflicting statements on this question, although the statement of the Chairman at the time supports the position that the FCC did not grant BellSouth forbearance with respect to line sharing. On November 5, 2004, subsequent to the conflicting statements of FCC Commissioners, the FCC issued its *SBC Order* in which it granted forbearance with respect to broadband network elements "specifically fiber-to-the-home loops, fiber-to the-curb loops, the

[9] See, *In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Section 271;* WC Docket No. 03-235, Order, (Rel. November 5, 2004) ("*SBC Order*").

packetized functionality of hybrid loops, and packet switching." The FCC then stated that "SBC's petition remains pending to the extent that it requests forbearance from the requirements of section 271(c)(2)(B) with respect to other network elements." By not listing line sharing in the order and by stating that it would address other network elements separately, it can be argued that the FCC did not intend to include line sharing among the obligations from which it was granting forbearance. At the very least, this subsequent order did not support the position that BellSouth is excused from its obligation to provide line sharing under Section 271.

Given the ambiguity, the Commission will maintain the status quo by requiring BellSouth to provide line sharing until the FCC clarifies that it does not have this responsibility.

Issue 18: TRO – Line Sharing – Transition: If the answer to the foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Positions of the Parties

BellSouth

Those CLECs with line sharing customers must amend their interconnection agreements in accordance with the transition plan set out in paragraph 265 of the *TRO*. (BellSouth Brief, pp. 55-56).

CompSouth

CompSouth agrees with the transitional language should the Commission determine that BellSouth does not have a line sharing obligation. (CompSouth Brief, p. 90).

Discussion

Given the Commission action on Issue 17, this issue is not applicable.

Issue 19 – Line Splitting: -- What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

Positions of the Parties

BellSouth

Line splitting 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. BellSouth argues that no CLEC provided testimony on line splitting so CompSouth's proposal should not be adopted.

The Commission should not adopt CompSouth's proposal because it would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271. (BellSouth Brief, p. 89). This issue is covered in the context of Issue 14.

BellSouth should not be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L because splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by using the integrated splitter built into all ADSL platforms. *Id* at 90.

The parties dispute what OSS modifications are necessary. BellSouth sponsored expert testimony that CLECs do not need anything from BellSouth to facilitate line splitting. (Joint Exhibit 2, at 94).

CompSouth

The first question under this issue is whether line splitting can involve the commingling of Section 251 and Section 271 elements. This issue is the same as was addressed in Issue 14. The second issue is whether a CLEC should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLEC involved in the line splitting arrangement. CompSouth agrees that a CLEC should indemnify and defend BellSouth against claims against BellSouth. (CompSouth Brief, p. 91). However, CompSouth argues that the language to be included in the interconnection agreement should refer to specific claims, and not entire actions. *Id.*

The third issue is whether BellSouth must upgrade its OSS to facilitate line splitting. BellSouth has electronic ordering for its Fast Access plan. (Tr. 376). The only electronic ordering scenarios available to CLECs right now involve adding line splitting or data to an existing UNE-P account. (Tr. 377). Because UNE-P is going away as of March 11, 2006, these scenarios will not be of use to CLECs after that point. (Tr. 377-78). The difference in manual orders and electronic orders is about $19 ("in excess of $22 vs. $3.50"). (Tr. 382).

If BellSouth has deployed ADSL 2-plus, and was conditioning loops over 18,000 feet for itself, then it should be obligated to provide this service to CLECs at TELRIC rates. (Tr. 379). If BellSouth has not deployed ADSL 2-plus, then CLECs would pay the special construction rate for this service. (Tr. 379). So a CLEC that is innovative enough to deploy its own ADSL 2-plus has to pay the higher special construction rate for line conditioning. (Tr. 380-81).

Discussion

For the reasons set forth in the Commission's discussion of Issue 14, the Commission finds that line splitting can involve the commingling of Section 251 and Section 271 elements.

BellSouth did not brief the issue of whether the indemnification language should cover the entire action or be limited to specific claims. CompSouth's position appears reasonable. The

Commission concludes that CLECs should indemnify and defend BellSouth against claims made against BellSouth, but that the indemnification language should relate to specific claims.

The Commission remands this issue for a hearing as to the extent of BellSouth's line splitting obligations. In Docket No. 11900-U, the parties dispute how many line splitting scenarios BellSouth must make available. At the time the Commission initially addressed line splitting, the record was not complete on the number of line splitting scenarios. A hearing to determine a fair and reasonable number of line splitting scenarios for BellSouth to provide would be beneficial to the parties, especially in light of the imminent end of the transition period.

Issue 22 – Call Related Databases: What is the appropriate ICA language, if any, to address access to call related databases?

Positions of the Parties

The parties do not dispute that the obligation of BellSouth to provide nondiscriminatory access to call-related databases arises out of Section 271, and not Section 251. The dispute, as it has been on a number of issues discussed in detail above, has to do with whether the Section 271 obligation must be included in a Section 251 interconnection agreement and whether state commissions have the authority to require ILECs to meet this obligation.

Discussion

The Commission asserted Section 271 jurisdiction to set just and reasonable rates. Therefore, the Commission orders that BellSouth is obligated to offer call related databases at just and reasonable rates.

Issue 23 – Greenfield Areas: a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?

Issue 24: TRO – Hybrid Loops – What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

Issue 28 – 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?

Positions of Parties

BellSouth

As an initial matter, BellSouth points out that Covad and some other CLECs have moved for reconsideration of the FCC decision to eliminate certain unbundling requirements concerning

certain types of fiber loops. (BellSouth Brief, p. 91 fn 124). BellSouth then identifies a minor difference between the parties relating to the deletion by CompSouth of BellSouth's proposed language that states that it is not obligated to ensure that non-retired copper loops in FTTH/FTTC overbuild areas are capable of transmitting signals prior to receiving a request for access to such loops by a CLEC. (BellSouth Brief, p. 91).

The major difference between the parties relates to the extent of fiber unbundling. CompSouth erroneously claims its limitation is supported by the FCC's use of terms "mass market." (BellSouth Brief, p. 92). With regard to fiber, the FCC provided that there was no impairment on FTTH, except in overbuild situations where the ILEC elects to retire existing copper loops. (*TRO*, ¶273). In that situation, the unbundling requirement only applies for narrowband. *Id.*

The FCC did not use the term "mass market" in explaining the scope of its fiber relief. The FCC stated that the obligations and limitations for such loops do not vary based on the customer to be served. *Id.* at ¶ 210. In its *MDU Reconsideration Order*[10], the FCC determined that fiber loops that serve MDUs that are predominantly residential are governed by the FTTH rules. (¶ 7).

In its *FTTC Reconsideration Order*,[11] the FCC found that the FTTC Loop is a transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises. (¶ 10). The FCC also stated 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." *Id.* at 11. CompSouth would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. (BellSouth Brief, p. 94).

BellSouth also cites to other state commissions, including Michigan and Massachusetts, that have found in the ILEC's favor on this issue and rejected limitations for the definition of FTTH, FTTC and hybrid loops. *Id.* at 94-95.

With respect to hybrid loops, BellSouth should not be required to provide access to hybrid loops as a Section 271 obligation. *Id.* at 96.

CompSouth

The FCC distinguishes between "mass market" and "enterprise" loops. For instance, paragraph 209 of the *TRO* states as follows:

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[10] *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) (*MDU Reconsideration Order"*)

[11] *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-248 (*"FTTC Reconsideration Order"*)

> Loops, such as analog loops, DS0 loops or loops using xDSL based technologies are generally provided to small business customers and will be addressed as part of mass market analysis. While high capacity loops (DS1, DS3, OCn capacity) are generally provisioned to larger customers and will be addressed as part of enterprise market analysis.

The FCC did not limit what the customer could order, but rather was conducting the analysis for purposes of impairment. (CompSouth Brief, p. 91).

CompSouth supported its position with numerous references in the *TRO* and *FTTC Order* in which the FCC did not require unbundling for mass market customers. 47 CFR § 51.319(a)(4) also distinguishes between enterprise and mass market loops.

With regard to fiber/copper hybrid loops, the only limitation on BellSouth's unbundling obligation is that BellSouth need not provide access to the packet-based capability in the loop. (*TRO*, ¶ 288). CompSouth argues that this limitation should not affect CLECs' ability to obtain access to DS1 and DS3 loops because the FCC made clear that BellSouth must provide DS1 and DS3 loops on such facilities:

> We stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers. These TDM-based services - which are generally provided to enterprise customers rather than mass market customer – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs. (*TRO*, ¶294).

CompSouth next criticizes BellSouth for relying on the summaries of orders, instead of the text of the orders. (CompSouth Brief, p. 101). That the summaries did not include the distinction between market and enterprise is a result of it being a summary and should not override the text of the orders. *Id.* In the *Broadband Forbearance Order*, the FCC summarized its *TRO* loop impairment findings and stated that "For enterprise customer loops, the Commission required incumbent LECs to offer unbundled access to dark fiber, DS3 and DS1 loops subject to more granular reviews by the state commissions. ¶5, n. 23. The FCC's pleading in the D.C. Circuit Court of Appeals also explained that the *TRO* and the rules coming out of them "make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices." CompSouth Ex. 1. When a CLEC requests a DS1 loop, by definition it is seeking to serve an enterprise customer.

Discussion

Issue 23:

a) The appropriate definition of MPOE is the FCC's definition. The MPOE is "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. 68.105(b).

b) Based on the following language from the *Broadband Forbearance Order,* the Commission concludes that BellSouth is under no obligation to provide access to greenfield Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops.

> [In the TRO] The [FCC] distinguished new fiber networks used to provide broadband services for the purposes of its unbundling analysis. Specifically, the [FCC] determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including FTTH loops in greenfield situations.... (*Broadband Forbearance Order*, ¶ 6).
>
> In the subsequent Triennial Review FTTC Reconsideration Order, the Commission found that the FTTH analysis applied to FTTC loops, as well, and granted the same unbundling relief to FTTC as applied to FTTH. *Id* (footnote omitted).

Issue 24

> The FCC's rules are clear on this issue:
>
> When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (*where impairment has been found to exist*) on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop. 47 C.F.R. 51.319(a)(2)(ii) *(emphasis added)*

BellSouth's language tracks the FCC's rules and should be adopted.

Issue 28

The parties debated the meaning of paragraph 210 of the *TRO.* The Commission construes this paragraph to mean that while the FCC considered the customers served by a particular loop type for purposes of its impairment analysis, its conclusions on impairment track the loop and not the customer served.

Fiber to the Home ("FTTH") is, by definition, fiber facilities extending to a residence. Because FTTH is an extension of Fiber to the Curb ("FTTC"), it follows that FTTC must also describe facilities to a residence. The FCC's rules on FTTH and FTTC provide for one exception to the foregoing definition. That exception is that primarily residential multiple dwelling units ("MDUs") should be treated consistent with traditional residences. Therefore,

FTTH/ FTTC could in fact describe fiber facilities to a business, but only if that business is located in a primarily residential MDU.

In overbuild deployments, the requirement that incumbent LECs provide capacity to competitive LECs, regardless of whether the copper facilities have been retired, applies only to narrowband facilities. *See* 47 C.F.R. 51.319(a)(3)(iii) BellSouth proposes the following language:

> 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.

The Commission finds that BellSouth's proposal is consistent with the federal rule for the most part and adopts BellSouth's language with one modification. Because the third sentence of BellSouth's language would exclude orders for legacy copper from the SQM/ SEEM plan, the Commission modifies that sentence to require these orders to remain in the SQM/ SEEM plan until the Commission determines the appropriate interval for provisioning such an order. BellSouth may petition the Commission to modify the interval. Therefore, the Commission orders the following language:

> 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 apply.

Finally, CompSouth appears to argue that the FTTH/ FTTC rules do not apply in central offices in which the FCC found that competitive LECs were impaired without access to DS1s and DS3s. However, the FCC rules on FTTC/ FTTH make no mention of any exclusion based on impairment analysis. Presumably, the FCC did not anticipate that competitive LECs would seek to provide high-capacity services to residential customers. The Commission finds that the FCC's FTTH/ FTTC rules apply to all central offices.

Issue 26: -- What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

Positions of the Parties

BellSouth

Routine Network Modifications (RNMs) are "those activities that incumbent LECs regularly undertake for their own customers." (*TRO*, ¶ 632). ILECs are not obligated to alter substantially their networks to provide superior quality interconnection. (*TRO*, at ¶ 630 quoting Iowa Util. Bd. 120 F.3d. 753 (1997)).

Line conditioning is an RNM. (*TRO*, ¶ 643). Therefore, BellSouth's only obligation is to provide line conditioning at parity. *Id.* Paragraph 250 of the *TRO* states that "line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service."

The Florida Public Service Commission did not obligate BellSouth to remove at TELRIC rates load coils on loops greater than 18,000 feet. (BellSouth Brief, pp. 98-99). The Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access. *Id.* at 99.

CompSouth

BellSouth is wrong to "submerge the FCC's pre-existing rules on line conditioning into the rules adopted in the TRO regarding routine network modifications." (CompSouth Brief, p. 106). In its *Local Competition Order,*[12] the FCC established ILECs must modify their facilities to accommodate CLEC access to UNEs. (¶ 209). In the *UNE Remand Order*, the FCC adopted line conditioning rules, which stated that ILECs are required to condition copper loops and subloops "to ensure that the copper loop or subloop is suitable for providing digital subscriber line services . . . whether or not the [ILEC] offers advanced services to the end-user customer on that copper loop or subloop." 51.319(a)(1)(iii).

In the *TRO,* the FCC (1) re-adopted the line conditioning rules, (2) identified the concept of "routine network modification" for the first time, (3) treated line conditioning and RNMs in different sections and (4) included language that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (¶ 643). This dispute has important policy implications because there are emerging DSL technologies, and CLECs need to be able to respond with innovative offers. BellSouth's position is a roadblock. (CompSouth Brief, pp. 109-10).

CompSouth also complains that BellSouth struck language from its proposal that was taken directly from the FCC's rule on RNMs. *Id.* at 110-11).

Discussion

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[12] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, *First Report and Order,* 11 FCC Rcd at 15608 (1996) ("*Local Competition Order*").

The Commission finds that BellSouth is obligated to perform line conditioning in instances in which BellSouth is not providing advanced services to the customers in question. The FCC notes that in the context of the *UNE Remand Order*[13] it concluded that the Eighth Circuit holding stating that an ILEC is not required to construct a network of "superior quality" did not overturn the FCC's rules requiring an ILEC to condition loops regardless of whether it was providing advanced services to those customers. (TRO, fn 1947). The FCC notes that in the *UNE Remand Order* it found that line conditioning enabled the requesting carrier to use the basic loop. (TRO fn 1947, quoting UNE Remand Order, ¶ 173).

The FCC promulgated line conditioning rules provide, in part, as follows:

> The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop.

47 C.F.R. § 319(a)(1)(iii).

The FCC states in the *TRO* that it is re-adopting its line conditioning rules set forth in the UNE Remand Order. (¶ 642).

The language relied upon by BellSouth states that line conditioning does not constitute the creation of a superior network, but rather, should be "seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (*TRO*, ¶ 643). Read in the context of the remainder of the section on line conditioning and the pertinent FCC's rules, this paragraph cannot mean that ILECs are not required to provide line conditioning unless it provides advanced services to the end-user customers. Such a reading would flatly conflict with the remainder of the line conditioning section and 47 C.F.R. § 319(a)(1)(iii). The more consistent reading of the language at issue is that the FCC was explaining why the requirement expressly set forth in its rules does not conflict with the Eighth Circuit holding on the creation of a superior network. At the bottom of paragraph 643, the FCC notes that "Competitors cannot access the loop's inherent 'features,

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[13] *In the Matter of 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 (1999) (*UNE Remand Order"), reversed and remanded in part sub.nom. United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *cert denied sub nom. WorldCom v. United States Telecom Ass'n,* 123 S.Ct 1571 (2003 Mem.)

functions, and capabilities' unless it has been stripped of accretive devices." This explanation is properly viewed as an expansion on the policy behind the excerpt from the *UNE Remand Order* set forth in footnote 1947 of the *TRO* that line conditioning enables use of the basic loop. The FCC did not backtrack on the requirement set forth in its earlier orders. Instead, it rebutted once again the claim that the requirement runs afoul of the Eighth Circuit holding.

The FCC emphasizes that ILECs must provide line conditioning to CLECs on a nondiscriminatory basis. (*TRO,* ¶ 643). The FCC states that line conditioning is seen as a routine network modification that an ILEC regularly performs to provide advanced services to its own customers and does not constitute the creation of a superior network. *Id.* Given this direction, the Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

As to the second issue, the Commission directs BellSouth to permit inclusion of the CompSouth proposed language on RNMs that mirrors the FCC rule.

Issue 27 – 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?

Positions of the Parties

BellSouth

If BellSouth is not obligated to perform an RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC. The appropriate rate is a commercial or tariffed rate. (BellSouth Brief, p. 99).

CompSouth

BellSouth should not be allowed to impose individual case basis pricing for routine modifications. The rate should be cost-based. (CompSouth Brief, p. 111). Recovery should be allowed if BellSouth's RNM costs are not recovered in loop rates. BellSouth should not be able to double-recover its costs. *Id.* at 112.

Discussion

In its *Line Conditioning Order*, the FCC applied ILECs' line conditioning obligation to loops of any length. 14 FCC Rcd 20912, 20951-53, ¶¶ 81-87. BellSouth's position that a commercial rate is appropriate for removing load coils or bridged tap on loops that exceed 18,000 feet was premised on its argument that it is not obligated to perform these functions on such loops. Based on the FCC's *Line Conditioning Order*, and the reference to such order in the *TRO*, the Commission reaches a different conclusion. Because the Commission has found that

BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

The Commission also agrees with CompSouth that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

Issue 29 – Enhanced Extended Link ("EEL") Audits: -- What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

Position of the Parties

BellSouth

BellSouth proposed language that would enable it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria. BellSouth should not be required to show cause prior to the commencement of an audit. (BellSouth Brief, p. 85). It argues that the requirement is both unnecessary because it is paying for the audit and is used as a delay tactic. *Id.*

The next dispute within this issue relates to the selection of an independent auditor. BellSouth should not be required to incorporate a list of acceptable auditors in interconnection agreements or only use an auditor the other party agrees to use. *Id.* Finally, within this issue, the parties disagree on the cost accountability for the audit. BellSouth maintains that if the auditor determines that a CLEC's noncompliance is material in one area, then the CLEC should be responsible for the cost of the audit. *Id.*

CompSouth

BellSouth's audit rights are limited. The cause requirement is set forth in paragraph 622 of the *TRO*. (CompSouth Brief, p. 113). This requirement could make the process run smoother because if BellSouth identifies circuits, then the internal review conducted by the CLEC may obviate the need for an audit. *Id.* In addition, the identification of circuits would make relevant documentation available earlier in the process. *Id.*

On the selection of an auditor, CompSouth's proposal for a mutual agreement process would resolve problems on the front end and is consistent with the way PIU/PLU audits are performed. *Id.* at 115. The CLECs are not willing to agree to a "pre-approved" list of entities. (CompSouth Brief, p. 114). With respect to costs, CompSouth asserts that CLECs should only have to pay for the costs of the audit concerning those audits where material non-compliance is found. *Id.* at 116.

CompSouth also argues that a notice requirement makes practical sense. While the FCC did not require it, state commissions may because the FCC noted that the states were in a better position to provide for implementation. (*TRO*,¶ 625).

Discussion

The *TRO* provides as follows:

> Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order Clarification, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable.

(*Triennial Review Order*, ¶ 622).

In the above language, the "later verification" refers to the audits discussed in the context of this issue. The FCC specifies that this "later verification" is "based upon cause." There has not been any plausible explanation as to what the "based upon cause" language could be referencing if not that the ILEC have some reason, or concern, to initiate the audit. If the ILEC does not have any concern regarding the veracity of the CLEC's self-certification, then any audit that it would conduct through a third party auditor would not be "based upon cause." It is consistent with the *TRO* to include a requirement that BellSouth have some cause prior to initiating an audit.

The *TRO* requires that the audit be conducted by an independent auditor in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA"). (*TRO*, ¶ 626). It does not require that a CLEC agree to the specific auditor. An objection to an auditor that is unrelated to the standard of independence should not suffice to reject the auditor. If the CLEC has an objection that the auditor does not meet the legal standard, then it may raise that objection with the Commission. CompSouth's argument that it is more efficient to resolve any issues with regard to the auditor on the front end is not persuasive. CLECs would be able to delay the process if agreement was required.

The Commission also finds that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. The *TRO* states that "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." (*TRO*, ¶ 627). The *TRO* does not support CompSouth's position that CLECs should only have to compensate BellSouth related to those circuits for which material non-compliance was found. It states that ILECs are entitled to be reimbursed for the cost of the audit; it does not reference any sub-part of the audit. This conclusion is strengthened by the very next paragraph of the *TRO*, in which the FCC includes the reciprocal position regarding the ILECs compensating the CLECs for their costs in the event the auditor found compliance in "all" material respects. The question then in determining which party has to pay for the other's costs is whether the CLEC complied in "all material respects." And the reimbursement, regardless of who pays who, relates to the audit as a whole. That a CLEC may

have complied in numerous material respects does not answer the question of whether it complied in all material respects. If it did not do so, according to the *TRO*, it must compensate the ILEC for the costs of the audit.

Issue 31 – Core Forbearance Order: -- What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?

Positions of the Parties

BellSouth

The order should be incorporated on a case by case basis because BellSouth has entered into specific carrier settlements implementing the Core Order. (BellSouth Brief, p. 86). ITC^DeltaCom's proposed language would not address all scenarios encountered in the implementation of the Core Order. *Id.* at 86-87.

CompSouth

The *2004 ISP Remand Core Forbearance Order* removed certain restrictions on CLEC's right to receive reciprocal compensation. The Commission should order that interconnection agreements should be amended to remove "new markets" and "growth caps" restrictions in BellSouth ICA reciprocal compensation provisions. (CompSouth Brief, p. 117). CompSouth argues that such a result would not upset the contractual differences between CLECs. *Id.*

BellSouth's position is hypocritical because when a change is to its benefit, it always asserts that the implementation should be completed as promptly as possible. *Id.*

Discussion

The Commission concludes that agreements be amended to remove "new market" and "growth cap" restrictions in BellSouth's Interconnection agreement reciprocal compensation provisions. BellSouth has not explained how the distinctions between carrier contracts would render such direction problematic.

Issue 32 – Binding Nature of Commission Order: How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?

Positions of Parties

BellSouth

BellSouth argues that the Commission should make clear that the order in this case is binding upon all CLECs, including those who chose not to participate in this docket. (BellSouth Brief, p.80). It is important that the deadlines not be extended beyond March 10, 2006. *Id.* The

Commission should give the parties no more than 45 days from the date of the Commission order to execute complaint amendments. *Id.*

CompSouth

CompSouth did not take a position on whether the order should bind non-parties. As to the impact existing agreements, CompSouth argued that the order should not upend existing agreements that address how such changes of law should be incorporated into existing and new section 252 interconnection agreements. (CompSouth Brief, p. 118).

The Commission should not approve language on issues that were not within the scope of this proceeding. *Id.* at 119.

Cbeyond

Cbeyond's position on this issue is set forth within the context of Issue 3.

Discussion

The Commission provided notice of the proceeding and the issues to be addressed in this proceeding to all competitive local exchange carriers. A condition of the certificate of these local exchange carriers is that they comply with orders of the Commission. A carrier may not avoid its obligations by choosing not to participate in a proceeding. The Commission clarifies that its order applies to all certified competitive local exchange carriers.

The Commission concludes that in the event that parties entered into separate agreements with BellSouth that may impact the implementation of changes of law that the parties be bound by those agreements. CompSouth referenced an abeyance agreement between BellSouth and a couple of CLECs in which the parties agreed on a method of implementing *TRO* and *TRRO* changes. This issue was addressed in the context of Issue 3. The Commission also finds that it is appropriate to limit its consideration in this docket to those issues that are within the scope of the proceeding.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues that the parties presented to the Commission should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251, 252 and 271 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995 and O.C.G.A. §§ 46-2-20, 46-2-21 and 46-2-23.

WHEREFORE IT IS ORDERED, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that the Commission hereby remands Issue 15 to a Hearing Officer or to itself for the purpose of taking additional evidence on and determining an appropriate conversion rate. In the interim, the Commission adopts a rate of TELRIC plus fifteen percent based on the Commission's determination of TELRIC.

ORDERED FURTHER, that that the Commission hereby remands Issue 19 to a Hearing Officer or to itself for the purpose of taking additional evidence on and determining the extent of BellSouth's line splitting obligations.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 7th day of February, 2006.

Reece McAlister Executive Secretary	Stan Wise Chairman
Date	Date