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February 15, 2006
Via Hand Delivery

William McCool
Clerk of the Court
United States District Court
Northern District of Florida
111 N. Adams Street
Tallahassee, FL 32301-7730

041269-TP

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FLA PUBLIC SERVICE COMMISSION
OFFICE OF THE
GENERAL COUNSEL

Re: DIECA Communications, Inc. v. The Florida Public Service Commission et al.

Dear Mr. McCool:

CMP _____ Enclosed for filing please find a Civil Cover Sheet and accompanying Complaint. Also
COM _____ enclosed is a Motion for Preliminary Injunction and a Rule 7.1(E) Request for Expedited
CTR _____ Hearing on Plaintiff's Motion for a Preliminary Injunction. Also enclosed is one extra set of
_____ these documents for you to date stamp. Finally, enclosed is a check in the amount of \$250.00,
ECR _____ representing the filing fee for a civil case.

GCL _____ Since the nature of this filing is an emergency, please establish a file upon receipt.

OPC _____ Thank you for your attention to this matter. If there are any additional requirements to
RCA _____ initiate this proceeding, please let me know.

SCR _____

SGA _____

SEC 1

OTH Lockard

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman
Florida Bar No. 286672

VGK/pg
Enclosures

cc: Nancy B. White
David Smith

DOCUMENT NUMBER-DATE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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FLA PUBLIC SERVICE COMM.
OFFICE OF THE
GENERAL COUNSEL

DIECA Communications,
Inc. d/b/a Covad Communications
Company,

Plaintiff,

Civil Action No.: _____

v.

The Florida Public Service
Commission; Lisa Polak
Edgar, in her official capacity
As Chairman of the Florida
Public Service Commission;
and J. Terry Deason and Isilio
Arriaga in their official capacities
As Commissioners of the Florida
Public Service Commission

And

BellSouth Telecommunications, Inc.

Defendants.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, through undersigned counsel, respectfully moves this Court, pursuant to Rule 65, Federal Rules of Civil Procedure, for a Preliminary Injunction, enjoining Defendant, Florida Public Service Commission, from implementing its oral decision declaring that Defendant, BellSouth Telecommunications, Inc., is not required to provide line sharing and requiring Plaintiff to execute a new Interconnection Agreement to

conform to the Commission's decision by February 27, 2006 (within 20 days of the Commission's vote).

On February 7, 2006, Defendant Commission took action in a matter before it styled *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP. As demonstrated by the Complaint for Declaratory Relief, filed simultaneously with this Motion, the Commission orally adopted its Staff's recommendation finding that BellSouth is not required to provide line sharing to new customers. The Commission further adopted its Staff's recommendation that parties be required to execute new Interconnection Agreements within 20 days of the vote, before the final written order was even issued. In addition, it has recently come to light that a former BellSouth employee was employed at the Commission and was responsible for the substantive recommendation on the line sharing issues. The Commission has recognized that this employee, who was forced to resign on February 9, 2006, was engaged in misconduct in violation of Commission rules and policies. Immediate injunction relief is necessary because the Commission's vote is contrary to federal law and deprives Plaintiff of due process.

As demonstrated in the Complaint for Declaratory Judgment and the following Memorandum of Law, Plaintiff has met the criteria for entry of a Preliminary Injunction. Plaintiff has demonstrated irreparable harm because if the Commission decision is not enjoined, Plaintiff will suffer damage which can not be reversed and which cannot be compensated through money damages. Plaintiff has also demonstrated a likelihood of

success on the merits as the Commission's decision is contrary to federal law. Further, consideration of public interest concerns and the relative hardship that would be visited on Plaintiff if the Commission's decision is not enjoined demonstrate that entry of a Preliminary Injunction is appropriate. This Motion is based on the Complaint in this action and the accompanying memorandum of law.

Immediate service via hand delivery of this Motion will be made on Defendant Commission and Defendant BellSouth.

Plaintiff respectfully requests oral argument on this Motion.

WHEREFORE, Plaintiff requests that this Court immediately schedule a hearing and issue a Preliminary Injunction pursuant to rule 65(a), Federal Rules of Civil Procedure.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

Case law sets out the criteria that the Court must apply in evaluating Covad's Motion for a Preliminary Injunction. The movant must show that there is a substantial threat of irreparable injury unless injunctive relief is provided. The movant must demonstrate a likelihood of success on the merits. Additionally, courts considering requests for preliminary injunctions will evaluate if a greater injustice will result if the injunction is denied than harm that will occur if the injunction is granted. Finally, courts look to whether the public interest will be served by the granting of a preliminary injunction. *Zeller v. The Florida Bar and The Florida Judicial Qualification Commission*, 909 F.Supp. 1518, 1522 (N.D. Fla 1995); *see also, The Florida Democratic*

Party v. Hood, 342 F.Supp.2d 1073 (N.D. Fla 2004). The application of these criteria demonstrates that entry of a Preliminary Injunction is warranted in this case.

A. **Irreparable Harm.** Absent an order from this Court enjoining the implementation of the Commission's oral decision that no new line sharing orders by Covad will be processed by BellSouth, Covad will suffer irreparable harm that the possibility of money damages is insufficient to remedy. If the Commission's order is not enjoined, Covad will be unable to provision new DSL orders in Florida. In 2005, Covad processed an average of six hundred and eighty-seven (687) line sharing orders *every month* in the State of Florida. If Covad is precluded from accepting new orders for line sharing, each of those customers will likely move to BellSouth, a cable company, or other broadband provider for service, often under long term commitment – effectively causing Covad to lose that customer forever. Moreover, because the majority of Covad line sharing services are provided at wholesale through over forty (40) wholesale partners in the State of Florida, Covad's relationship with each of those partners will be effectively terminated by the Florida Public Service Commission's Order, thereby damaging Covad's on-going business relationships.

Both of these showings meet the irreparable harm standard. Courts have often found find that a plaintiff will suffer irreparable harm if there is an imminent threat of loss of customers, loss of goodwill, and loss to business reputation. *See, BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC*, 425 F.3d 964 (C.A. 11th Cir. 2005); *see also, Ferrellgas Partners, L.P. v. Barrow*, 143 Fed.Appx. 180 (C.A. 11th Cir 2005).

In the *BellSouth* case, the federal *TRRO* issued by the FCC found that incumbents were not obligated to provide CLECs with unbundled access to mass market local switching. As a result, BellSouth informed a number of CLECs that it was no longer accepting new orders for unbundled local switching or loop and transport orders. MCImetro filed an emergency motion with the Georgia Public Service Commission which concluded that, although the FCC had the power to alter rights under interconnection agreements, BellSouth was still required to negotiate with MCImetro and other CLECs regarding interconnection amendments.

BellSouth sued and moved for a preliminary injunction in federal court. The district court found that BellSouth would suffer irreparable harm due to the “loss of customers and those customers’ goodwill.” *BellSouth* at 968. On appeal of the district court’s grant of the preliminary injunction, the 11th Circuit concluded that BellSouth faced the loss of customers due to the Georgia Commission’s order, and “while economic losses alone do not justify a preliminary injunction, the loss of customers and goodwill is an irreparable injury. *Ferrero v. Associated Materials Inc*, 923 F.2d 1441, 1449 (11th Cir. (1991).” *BellSouth* at 970.

The matter at issue here is analogous to the *BellSouth* case, although now it is a CLEC seeking to enjoin a state Commission decision. If a preliminary injunction is not granted, Covad will suffer irreparable injury that cannot be satisfied through money damages. If BellSouth is no longer required to provide line sharing to new customers, Covad will lose a tremendous amount of business – on average over twenty (20) customers *per day*. All of these potential new customers that would have received DSL

service through Covad will no longer have that opportunity, and will most likely seek their DSL service from BellSouth.

Covad's business reputation in the retail and wholesale market will also suffer. Over the past eight years, Covad has developed wholesale business relationships with over 40 wholesale partners in the State of Florida. Each of these wholesale partners electronically interfaces with Covad and expects their line sharing orders to be processed smoothly. An interruption in Covad's ability to process new line sharing orders will harm not only Covad's relationship with its wholesale partners, but its relationship with prospective customers as well.

B. Probable Success On The Merits. The merits of this case strongly favor Covad. As discussed in Plaintiffs' Complaint for Declaratory Relief, which is incorporated herein by reference, the Commissioners' decision is contrary to clear federal law and the pronouncements of the FCC on the issue of line sharing. As is also discussed in the Complaint for Declaratory Relief, other state Commissions (including the Georgia Public Service Commission which considered this very issue on February 7th and the Louisiana Public Service Commission) who have reviewed this issue have declared that line sharing is a § 271 element.

C. Relative Hardships. If the Court were to deny Covad's request for a Preliminary Injunction, the impact on Covad would be severe: Covad would suffer dozens of daily lost customers, damaged wholesale relationships, and damage to wholesale partners' ability to process their orders with Covad

On the other hand, the granting of the Preliminary Injunction would not affect the Commission. It would simply preserve the status quo.

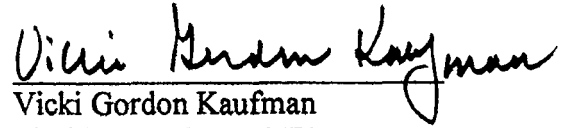
The same would be true as to BellSouth, who would continue to deal with Covad as it has in the past. Covad has been provisioning DSL via line sharing with BellSouth since 1998. A Preliminary Injunction would continue the current service arrangement. Neither the Commission nor BellSouth will be harmed by the issuance of a Preliminary Injunction.

D. **The Public Interest.** With respect to this criterion, the Court should look to the public policy supporting the enactment of the Act. That policy is to foster a competitive market in the telecommunications industry to promote better quality and lower prices.¹ Depriving consumers of the ability to choose Covad for the provision of competitive DSL service by eliminating line sharing would run contrary to the public interest in fostering competition. If a Preliminary Injunction is not issued, consumers will be denied access to Covad as a DSL carrier in the market place. Thus, the public interest strongly favors the granting of the Preliminary Injunction.

¹ See, *United States Telecom Assn v. FCC*, 359 F.3d 554 (DC Cir. 2004) (*USTA II*), cert. denied, 125 S.Ct. 313, 316, 345 (2004); *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC*, 425 F.3d 964, 966 (C.A. 11th Cir. 2005).

Dated: February 15, 2006

Respectfully submitted,



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Attorneys for Plaintiff, Covad
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² Pro hac vice admission will be applied for pursuant to Local Rule 11.1(C)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Preliminary Injunction was served via (*) hand delivery or U.S. mail this 15th day of February, 2006, to the following:

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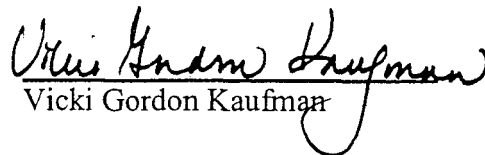
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Vicki Gordon Kaufman

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DIECA Communications,
Inc. d/b/a Covad Communications
Company,

Plaintiff,

Civil Action No.: _____

v.

The Florida Public Service
Commission; Lisa Polak
Edgar, in her official capacity
As Chairman of the Florida
Public Service Commission;
and J. Terry Deason and Isilio
Arriaga in their official capacities
As Commissioners of the Florida
Public Service Commission

And

BellSouth Telecommunications, Inc.

Defendants.

_____ /

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FLA PUBLIC SERVICE COMM.
OFFICE OF THE
GENERAL COUNSEL

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff, DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), through its undersigned counsel, files this Complaint seeking Declaratory Relief from a decision of the Florida Public Service Commission (Commission) interpreting federal law to find that BellSouth Telecommunications, Inc. (BellSouth) has no obligation to provide access to line sharing after October, 2004. The Commission's

decision is contrary to federal law and its implementation will result in irreparable harm to Covad. In support of this Complaint, Covad alleges:

NATURE OF THE ACTION

1. This action is brought to enforce federal law, including the U.S. Constitution and various provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 USC §§ 151 et seq (the Act).

2. On February 7, 2006, the Commission voted to allow BellSouth to cease accepting new orders for line sharing despite the fact that the Act requires BellSouth to provide line sharing.

3. The Commission took action on its Staff's written recommendation via voice vote.¹ It directed the parties to submit signed amendments or agreements conforming to its decision within 20 days of the Commission's *vote*. Under usual Commission practice, a written order is issued 21 days from the Commission's vote, affording parties the opportunity to exercise their due process rights under the Florida Administrative Procedures and the state and federal constitutions.²

4. The Commission's actions violate its authority and jurisdiction under state and federal law.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), 28 USC § 1337 and 47 USC § 252(e)(6). This

¹ See, Vote Sheet, attached hereto as Exhibit A.

² Even the transcript of the Commission's deliberations was not available from the Commission court reporters as of the time of filing.

Court has supplemental jurisdiction over the related state law claims pursuant to 28 USC § 1367.

6. Venue is proper in this district pursuant to 28 USC § 1391 (b)(1) because the Commission resides in this district. Defendant BellSouth is subject to personal jurisdiction, and is therefore deemed to reside in this district. Venue is also proper under 28 USC § 1391(b)(2) because the Commission conducted its proceedings in this district and thus the events giving rise to this action occurred in this district where the Commission sits.

PARTIES

7. Plaintiff, Covad, is a Virginia corporation with its principal place of business at 110 Rio Robles, San Jose, California 95134. Covad provides telecommunications services in the State of Florida and is a competitive local exchange carrier (CLEC) within the meaning of the Act.

8. Defendant, the Florida Public Service Commission, is an agency of the State of Florida. The Commissioners, in their official capacities, presided over the proceeding giving rise to this Complaint. Defendant Lisa Polak Edgar, Chairman of the Commission, and Defendants J. Terry Deason and Isilio Arriaga, Commissioners, are sued in their official capacity for injunctive and declaratory relief only.

9. Defendant BellSouth Telecommunications, Inc. (BellSouth) is a Georgia corporation with its principal place of business in Georgia. BellSouth provides telecommunications services within the state of Florida. BellSouth is an incumbent LEC and Regional Bell Operating Company (RBOC) within the meaning of the Act.

BACKGROUND

10. Covad is a Competitive Local Exchange Carrier (CLEC) and competes with incumbent telecommunications service providers, such as BellSouth, to provide telecommunications services to consumers. Covad's customers are business and residential consumers who use Covad's Digital Subscriber Line (DSL) services to connect to the Internet as well as to connect to internal computer networks. Covad provides service via "line sharing." Under a line sharing arrangement, as the term indicates, Covad provides its DSL service on the same "shared" telephone line over which the incumbent, such as BellSouth, provides voice service to an end user. Covad uses the high frequency portion of the loop, while BellSouth uses the low frequency portion. In Florida, over 10,000 Covad customers are served via line sharing pursuant to an Interconnection Agreement (ICA) between Covad and BellSouth. Covad provides the majority of its line shared services in Florida on a wholesale basis with over 40 partners, like EarthLink and America On Line (AOL).

11. On February 7, 2006, the Commission declared, in an oral decision, that BellSouth need not provide line sharing to new customers. The Commission further ordered that all ICAs³ be conformed to its vote within 20 days of its February 7th oral decision. As of the date of this filing, the Commission has not yet entered a written order. It has, nonetheless, attempted to require the parties to comply with its oral decision before the decision is reduced to writing and before Covad has had an opportunity to review that order.

³ ICAs are the contracts that govern the arrangements between incumbents and CLECs. See, 47 USC § 252.

12. The Commission's decision is contrary to well-established federal law. The Federal Communications Commission (FCC) has clearly held that line sharing is required by § 271 of the Act. Despite the FCC's clear pronouncements on this issue, the Commission has ruled to the contrary and found that BellSouth is not required to provide line sharing, causing irreparable harm to Covad.

13. **Section 271.** In 1996, Congress enacted the Telecommunications Act to provide for the development of competitive markets in the telecommunications industry. Among other things, Part III of the Act provides special provisions that apply to the Bell Operating Companies (BOCs), such as BellSouth, who seek permission to provide long distance service in the same service area where they provide local service.⁴ Principal among the prerequisites to the provision of long distance service is a demonstration to the FCC that the BOC has complied with the 14-point "Competitive Checklist."⁵ The FCC determined on December 19, 2002, that BellSouth had complied with the Competitive Checklist and was authorized to provide long distance service in its local service area in Florida.⁶ In the Order granting BellSouth § 271 authority to sell long distance service, the FCC specifically stated that "BellSouth's provisioning of the line shared loops satisfies checklist item 4."⁷

14. The Competitive Checklist contains 14 separate items which BellSouth was required to satisfy. The Checklist Item pertinent here, which BellSouth is required to

⁴ See, 47 USC § 271, attached hereto as Exhibit B.

⁵ See, 47 USC § 271(c)(2)(B), attached hereto as Exhibit B.

⁶ *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.

⁷ *Id.* at ¶ 144 (emphasis added).

provide, is Item #4 – a loop transmission facility, which the FCC has repeatedly stated encompasses line sharing. For instance, the FCC stated:

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 271.⁸

Thus, according to the grant of permission to provide long distance service pursuant to § 271, BellSouth must provide line sharing, and the Commission's decision – premised on the manifestly incorrect assertion that line sharing *never was* in Checklist Item 4 -- is error.

15. **Section 251.** The Act also required that incumbents provide certain “unbundled network elements” (UNEs)⁹ to competitors.¹⁰ There has been much controversy and litigation regarding the incumbents' unbundling obligations. The FCC has made several attempts to enact rules to implement the incumbents' unbundling obligations¹¹ which were challenged by various parties, resulting in several court

⁸ *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 ¶ 164 (emphasis added).

⁹ UNEs are the various component parts of the telecommunications network the incumbent owns.

¹⁰ See, 47 USC § 251(c)(3).

¹¹ See, *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, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order or TRO*), corrected by Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (DC Cir. 2004)(USTA II), cert. denied, 125 S.Ct. 313, 316, 345 (2004); *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (rel. Feb. 4, 2005) (*Triennial Review Remand Order or TRRO*).

decisions. On February 4, 2005, the FCC issued its *TRRO*, in which it adopted its final unbundling rules.

16. **The Commission's Decision.** On November 1, 2004, BellSouth filed a petition with the Commission for a generic docket¹² seeking to require CLECs to amend their ICAs consistent with the changes in law resulting from the federal activity described above. A hearing was held before a three (3) person panel, consisting of Chairman Edgar and Commissioners Deason and Arriaga.

17. On January 26, 2006, Staff filed its Staff recommendation in which it recommended to the Commission what action to take on the various issues identified in the docket. At issue here is Issue 16 relating to line sharing. On Issue 16, the Staff memorandum states:

Staff recommends that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004. The recommended language for this issue is addressed in Issue 17.¹³

Notably, the Commission staff person responsible for drafting that recommendation, Doris Moss, subsequently resigned from Commission staff during termination proceedings arising out of her efforts to sway the Commission to rule in BellSouth's favor on other issues. To date, the Commission has not acted to correct the obvious bias in the recommendation or the resulting oral order evidenced by Ms. Moss' misconduct.

18. On February 7, 2006, the Commission panel considered its Staff's recommendation at its Agenda Conference. It adopted the Staff recommendation on the

¹² *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP.

¹³ An excerpt of the Staff recommendation relating to the line sharing issues and contract language is attached as Exhibit C.

line sharing issue, Issue 16, *with no discussion*. The Commission further voted that conforming contracts must be executed within 20 days of February 7th.¹⁴ The Commission purported to require Covad, and other parties, to take this action (that is to execute agreements that will govern the parties' business relationships) before the issuance of the Commission's final written order and any opportunity for review of such order.

19. The Commission's decision on line sharing is clearly contrary to federal authority and incorrect as a matter of law. Line sharing is a loop transmission facility that BellSouth must provide pursuant to § 271 Competitive Checklist Item 4. BellSouth itself acknowledged this fact when it sought § 271 approval to offer long distance.

20. The BOCs' (and particularly at issue here, BellSouth's) obligation to provide access to line sharing pursuant to § 271 is required because: (1) line sharing is a § 271 Checklist Item 4 loop transmission facility; and (2) BOCs who, like BellSouth, offer long distance services pursuant to § 271 authority have an obligation to provide Checklist Item 4 loop transmission facilities irrespective of and without regard to unbundling determinations under § 251.

21. While much of the Commission's proceeding below focused on what elements were required to be unbundled pursuant to § 251, BellSouth has an independent obligation to provide line sharing pursuant to § 271 Checklist Item 4, regardless of whether § 251 is applicable or not. Determinations under § 251 as to what elements must be unbundled *do not* remove elements from the Competitive Checklist with which

¹⁴ See, Vote Sheet, attached as Exhibit A.

BellSouth must comply to be permitted to provide long distance service. Line sharing was included in Checklist Item 4 when BellSouth was granted relief from § 271 and permitted to offer long distance and it remains in Checklist Item 4 as an independent obligation today.¹⁵

22. In numerous FCC Orders, the FCC *has expressly stated* that line sharing is a Checklist Item 4 element. For example, in the *Massachusetts 271 Order*, the FCC found:

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 271.¹⁶

23. In the *Florida and Tennessee 271 Order*, the FCC held:

BellSouth's provisioning of the line shared loops satisfies checklist item 4.¹⁷

24. In the *Georgia 271 Order*, the FCC held:

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 4.¹⁸

25. The FCC's statements in these Orders are not anomalies. In every FCC 271 Order granting BellSouth long distance authority¹⁹ – indeed, in every FCC order

¹⁵ TRO ¶¶ 658-59. Exhibit D.

¹⁶ *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 ¶ 164 (emphasis added). Pertinent excerpts are attached as Exhibit E.

¹⁷ *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 ¶ 144 (emphasis added). Pertinent excerpts are attached as Exhibit F.

¹⁸ *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, ¶ 239. Pertinent excerpts are attached as Exhibit G.

granting any BOC such authority – the FCC placed line sharing in Checklist Item 4. Thus, line sharing is a § 271(c)(2)(B)(iv) (Checklist Item 4) network element.

26. Moreover, before it was in its interest to do otherwise, BellSouth itself placed line sharing in every one of its own § 271 briefs to the states and to the FCC under Checklist Item 4.²⁰ The FCC’s decisions above make no sense unless line sharing falls under § 271 Checklist Item 4.

27. There can be no legitimate dispute that BellSouth does indeed have an obligation to provide non-discriminatory access to all Checklist Item 4 elements, including line sharing “regardless of any unbundling analysis under section 251.”²¹ So long as BellSouth continues to sell long distance service under § 271 authority, it must continue to provide non-discriminatory access to all network elements under Checklist

¹⁹ *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 ¶ 144 (hereinafter “BellSouth FL/TN 271 Order”); 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, ¶ 248. Pertinent excerpts are attached as Exhibit H.; 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, ¶ 238.*

²⁰ *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 pp. 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 pp. 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 pp. 112-114. Pertinent excerpts are attached as Exhibit I.*

²¹ TRO at ¶ 653, Exhibit J; 47 U.S.C. § 271(c)(2)(B)(iv).

Items 4, 5, 6 and 10, irrespective of whether they are “de-listed under 251” – including line sharing under Checklist Item 4.²²

28. The statements of the FCC in its *Broadband Forbearance Order*²³ also make it clear that line sharing is a § 271 element. When the FCC released the *Broadband Forbearance Order*, two of the Commissioners released statements that leave different impressions of what action the FCC took regarding forbearance for line sharing under § 271. The dueling views of then-Commissioner Martin and then-Chairman Powell, however, make one thing clear: line sharing is a § 271 obligation. Chairman Powell’s statement says the FCC did not remove 271 obligations for line sharing.²⁴ Commissioner Martin’s statement on line sharing, although stating a different viewpoint that there was forbearance, is based upon the clear premise that line sharing is a § 271 obligation of on-going force unless and until the FCC grants a petition for forbearance. If line sharing never was a § 271 element, there would be no § 271 obligation to forbear from nor any need to clarify that the FCC was not “removing 271 unbundling obligations” for line sharing.

29. Further, in the *Broadband Forbearance Order*, the FCC did not grant – by implication or otherwise – forbearance from line sharing because forbearance from line sharing was never requested. The FCC Order repeatedly provides a list of the elements from which the FCC is forbearing and line sharing is not on the list:

²² This obligation can only be removed by the FCC in response to a petition for forbearance pursuant to 47 U.S.C. §160.

²³ *Petitions for Forbearance of Verizon, SBC, Qwest, and BellSouth*, WC Docket No. 01-338, *et seq.*, Memorandum Opinion and Order (rel. Oct. 27, 2004) (“Broadband Forbearance Order”). Exhibit K.

²⁴ *Broadband Forbearance Order*, Chairman Powell’s Statement.

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).²⁵

30. Moreover, the FCC repeatedly explains – as it is statutorily obliged²⁶ to do – that it is granting forbearance to encourage the BOCs to build next-generation fiber facilities.²⁷ Additionally, on November 5 – 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.”²⁸ Once again, line sharing is not on the list of “broadband elements” for which the FCC granted forbearance.

31. Finally, three state commissions who have addressed the question of whether line sharing is encompassed under § 271 Checklist Item 4 (Maine, Pennsylvania and Louisiana), have found that line sharing falls under Checklist Item 4, and that BOCs,

²⁵ *Broadband Forbearance Order*, ¶ 1. See also, ¶¶ 12, 19, and 37.

²⁶ 47 U.S.C. § 160 (c) (“The Commission . . . shall explain its decision in writing.”).

²⁷ *Broadband Forbearance Order*, ¶¶ 6, 12, 20, 21, 24, 25, 27, 31 and 34.

²⁸ *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, ¶ 2, Exhibit L.

like BellSouth, subject to § 271 must provide access to it.²⁹ And ironically, on the same day as the Florida Commission vote, the Georgia Public Service Commission, in the context of a proceeding just like the Florida Commission proceeding giving rise to this Complaint, found that line sharing is a § 271 element.³⁰

32. As noted above, the Commissioners did not discuss the line sharing issue, let alone discuss the analysis that demonstrates that line sharing is required under § 271 regardless of whether it is required under § 251. They simply approved the Staff position with no discussion. That Staff position has since been demonstrated to be drafted by a Florida Commission staffer, Doris Moss, who was manifestly biased in favor of BellSouth.

33. Presumably the Commission agrees with the analysis contained in the Staff recommendation.³¹ That analysis turns on Staff's unsupported statement that:

With HFPL [high frequency portion of the local loop] being "new" and only a portion of the loop, *staff does not believe* that the HFPL was included in the plain meaning of "local loop" in checklist item 4 of § 271 of the Act. Therefore, *staff believes* that the definition of a local loop does not obligate the ILEC to subdivide the loop and provide UNE access to the

²⁹ 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, pp. 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, December 5, 2005.

³⁰ The Georgia Commission's order has not been issued yet. Excerpts of the motion approved by the Georgia Commission are attached as Exhibit M.

³¹ This illustrates the problem with the Commission's attempt to force the parties to comply with a decision when it has not yet been reduced to writing.

HFPL. Further, *staff believes* that the inclusion of line sharing as an UNE in decisions granting § 271 authority is not sufficient to obligate ILECs to offer line sharing under § 271, especially considering that the FCC has found line sharing both anti-competitive and contrary to the goals of the Act. Therefore, *staff believes* that the FCC's finding that line sharing is anti-competitive and contrary to the goals of the Act removes all obligation for ILECs to offer line sharing subsequent to the transition period established by the FCC.³²

Staff's unsupported beliefs fly in the face of the clear FCC decisions (and other state commission decisions) discussed above and cannot support the elimination of line sharing. Specifically, Staff's statement that "*staff does not believe* that the HFPL was included in the plain meaning of 'local loop' in checklist item 4 of § 271 of the Act" is in direct conflict with numerous FCC Orders and statements identified herein. Among the many instances: If line sharing never was in Checklist Item 4, why does the FCC repeatedly find that the provision of line sharing satisfies a Checklist Item unrelated to linesharing?³³

34. Further, Covad's fundamental due process rights to fairness and impartiality were violated in the proceeding below. The Commission's process has been irreparably tainted through the involvement of a biased employee who had primary responsibility for the line sharing issues and who recently resigned her position under pressure.

³² Exhibit C.

³³ "BellSouth's provisioning of the line shared loops satisfies checklist item 4." *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 ¶ 144 (emphasis added). Pertinent excerpts are attached as Exhibit F. *See also, 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, ¶ 239.

35. On February 13, 2006, pursuant to a meeting conducted by the Commission's General Counsel, Covad learned for the first time, that a former BellSouth employee employed by Commission, Doris Moss, had been the subject of an investigation by the Commission Inspector General related to her inappropriate conduct in this case.³⁴ Ms. Moss was the Commission Staff member responsible for the analysis and staff recommendation on Issues 16 and 17, upon which the Commission based its substantive decision and the very issues which are the subject of this appeal. As noted earlier, the Commission did not discuss these issues at all during its deliberations, but simply "moved Staff" – that is, adopted the Staff's recommendation, which Plaintiff now knows Ms. Moss prepared.

36. In his report, the Commission Inspector General concluded that Ms. Moss sent unauthorized, anonymous e-mails to the Commissioners and attempted to influence other Staff to prepare a recommendation on certain issues that would favor BellSouth's position. The Inspector General found that Ms. Moss' conduct violated state and Commission rules and Commission policy.³⁵ Ms. Moss resigned her position under pressure on February 9, 2006.

37. It is the Commission's view, expressed through its General Counsel at the February 13th meeting, that there has been no impact on Covad (or the other parties) to this case because Ms. Moss' attempts to convince Commission Staff to her view³⁶ were

³⁴ The information that was provided to Covad for the first time on February 13, 2006 at the meeting with the Commission General Counsel is attached as Exhibit N. It appears from this information that BellSouth was aware of the inappropriate conduct before the other parties were informed.

³⁵ See Inspector General Report, Exhibit O.

³⁶ Ms. Moss' communications related to fiber to the home (FTTH) issues (Issues 22, 23, 27) and to commingling (Issue 13).

unsuccessful. This somewhat cavalier approach fails to recognize that Ms. Moss – who was unquestionably biased in favor of BellSouth as her emails demonstrate³⁷ -- had primary responsibility for Issues 16 and 17 – the issues that were decided adversely to Covad!

38. The day after Covad learned of the Ms. Moss' misconduct, Covad sent a letter to the Chairman of the Commission (with copies to all parties) and requested that the Commission *sua sponte* withdraw those parts of the staff recommendation for which Ms. Moss had responsibility, assign independent Staff to such issues, and direct such independent staff to provide the Commission with a *de novo* recommendation for its consideration.³⁸ To date, Covad has received no response from the Commission and the Commission has taken no action on Covad's request, thus allowing the biased recommendation and the Commission's reliance thereon to stand undisturbed.

39. Such inaction violates Plaintiffs' substantive and procedural due process rights under the federal and state constitutions. Due process requires, not only that certain procedures such as hearings be provided, but also that the procedures which are provided be fair. *Cruz v. Ferre*, 571 F.Supp. 125, 133 (SD Fla. 1983), *citing, In re Murchison*, 349 US 133, 136 (1955). In *Murchison*, the United States Supreme Court held:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.

³⁷ It is undisputed that Ms. Moss was employed by BellSouth prior to commencing employment at the Commission – this, in and of itself, clearly indicates that Ms. Moss should not have been assigned to a docket involving BellSouth. At this point, Plaintiff does not know if Ms. Moss is also receiving monetary compensation from BellSouth in the form of a pension or other separation benefits.

³⁸ See, Exhibit P, Covad letter of February 14, 2006 to Chairman Lisa Polak Edgar.

Further, the concept of due process protects against arbitrary and capricious governmental action. *See e.g., Ohio Bell Tel. Co. v. Comm'n*, 301 U.S. 292 (1937).

40. In this case, the bias of the employee responsible for the analysis of Issues 16 and 17 is uncontested. The Commission's reliance on that analysis has materially and fundamentally impaired the fairness of the proceeding below, depriving Covad of procedural and substantive due process.

41. Finally, the Commission is an administrative agency of the State of Florida. Its actions are governed by Chapter 120, Florida Statutes, the Florida Administrative Procedures Act (APA). Section 120.569, Florida Statutes, controls an administrative agency's actions when it makes a decision that affects a party's substantial interests. Section 120.569(2)(l) provides:

Unless the time period is waived or extended with the consent of the parties, the final order in a proceeding which affects substantial interests *must be in writing* and include findings of fact, if any, and conclusions of law. . . .³⁹

42. "Final order" is defined as:

a *written* final decision which results from a proceeding under s. . . . 120.569. . . which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive or declaratory in form.⁴⁰

43. Thus, the APA requires the entry of a *final written order* on a matter affecting a party's substantial interests. The entry of a written order triggers a party's right to seek reconsideration before the Commission⁴¹ as well a party's appellate rights.⁴²

³⁹ Emphasis supplied. There was no waiver of the requirement of a written order.

⁴⁰ Section 120.52(7), emphasis added.

⁴¹ *See*, rule 25-22.060, Florida Administrative Code.

⁴² *See*, section 120.68, Florida Statutes.

44. In *Powell v. Board of Public Instruction of Levy County*, 229 So.2d 308 (Fla. 1st DCA 1969), the court dealt with due process concerns related to the termination of a teacher's contract. Though addressing a prior version of the APA, the court noted the "necessity for the administrative body to enter a final order at the conclusion of its proceeding." *Powell* at 311. The court stated that:

Due process as well as the requirements of the Administrative Procedures Act dictates that the agency's final action be reduced to writing, contain findings of facts based upon the evidence adduced at the hearing, and specifically state the charges which the agency finds to have been sustained.

Id.

45. Quoting *Hickey v. Wells*, 91 So.2d 206, 210 (Fla. 1st DCA 1957), the court noted that:

The reasons [a decision must be reduced to writing] have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, Assuring [sic] more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction.

Powell at 311-12.

46. The Commission's oral direction that the parties execute signed ICAs within 20 days of its oral vote, *before* the final order has been issued and parties have had the opportunity to review it and assess any appropriate remedies is arbitrary and capricious. It is violative of state law and of the due process clauses of the federal and state constitutions.

47. As set forth below, the Commission's actions violate Article XIV, Section 1 of the U.S. Constitution; the requirements of 47 USC § 271(c)(2)(B); Article I, Section 9 of the Florida Constitution, and Chapter 120, Florida Statutes.

CLAIM FOR RELIEF

48. Plaintiff incorporates the foregoing paragraphs of this Complaint as if set forth completely herein.

49. For the reasons set forth above, Defendant Commission's decision declaring that BellSouth need no longer provision line sharing is contrary to and violates the Telecommunications Act of 1996 and the FCC orders interpreting that Act. Further, the Commission's failure to correct a fundamental flaw in the process when it discovered that a biased employee had responsibility for substantive issues in the case violates Plaintiff's substantive and due process rights. Finally, Defendant Commission's direction that parties execute new interconnection agreements within 20 days of its vote, before the issuance of a written order, is violate of federal law and state administrative and due process requirements.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Covad requests that the Court enter an order:

1. Declaring that the portion of the Commission's decision finding that BellSouth does not have a § 271 obligation to provide line sharing is unlawful and in violation of federal law;

2. Declaring that the Commission's reliance on substantive portions of the Staff memorandum prepared by a biased former BellSouth employee in reaching its decision in this matter violates Covad's substantive and procedural due process rights;

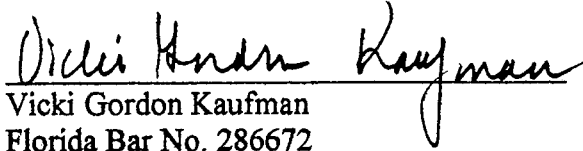
3. Declaring that the Commission's attempt to require Covad to comply with its oral vote, prior to the entry of a written order, is arbitrary and capricious and violates Covad's due process rights;

4. Enjoining the Commission, and all parties to the proceeding at the Commission, from seeking to enforce that unlawful decision against Covad; and

5. Granting such further relief as the Court finds just and reasonable.

Dated: February 15, 2006

Respectfully submitted,



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⁴³ Pro hac vice admission will be applied for pursuant to Local Rule 11.1(C)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint for Declaratory Relief was served via (*) hand delivery or U.S. mail this 15th day of February, 2006, to the following:

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RECEIVED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

06 FEB 15 PM 4:25

FLA PUBLIC SERVICE COMM.
OFFICE OF THE
GENERAL COUNSEL

DIECA Communications,
Inc. d/b/a Covad Communications
Company,

Plaintiff,

Civil Action No.: _____

v.

The Florida Public Service
Commission; Lisa Polak
Edgar, in her official capacity
As Chairman of the Florida
Public Service Commission;
and J. Terry Deason and Isilio
Arriaga in their official capacities
As Commissioners of the Florida
Public Service Commission

ORAL ARGUMENT REQUESTED

And

BellSouth Telecommunications, Inc.

Defendants.

_____ /

**RULE 7.1(E) REQUEST FOR EXPEDITED HEARING ON PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION**

Pursuant to Rule 7.1(E), N.D. Fla. Loc. R., Plaintiff, DIECA Communications,
Inc. d/b/a Covad Communications Company (Covad), seeks expedited consideration of
its Motion for Preliminary Injunction. This Motion is of an emergency nature as
Defendant, Florida Public Service Commission (Commission), seeks to require Plaintiff

to execute a new Interconnection Agreement (ICA) with Defendant, BellSouth Telecommunications, Inc. (BellSouth) no later than February 27, 2006. The terms the Commission purports to require in the new ICA are violative of federal law and will irrevocably alter the way in which Covad is able to provide service to its customers. If Covad is required to execute a new ICA, it will be irreparably harmed as more fully set out in its Motion for Preliminary Injunction filed simultaneously with this Motion.

In support of this request, Plaintiff states that it contacted Defendant Commission's General Counsel, Richard D. Melson, on February 15, 2006 and informed him that the motion would be filed on February 15, 2006. Copies of the Complaint for Declaratory Relief, Motion for Preliminary Injunction, and Request for Expedited Hearing were provided to Mr. Melson by hand delivery on February 15, 2006. David Smith, an attorney in the Commission's Appeals Division, has agreed to waive service of the summons in this matter pursuant to Rule 4, Federal Rules of Civil Procedure.

In further support of this request, Plaintiff states that it contacted Defendant BellSouth's General Counsel, Nancy B. White, on February 15, 2006 and informed her that the motion would be filed on February 15, 2006. Copies of the Complaint for Declaratory Relief, Motion for Preliminary Injunction, and Request for Expedited Hearing were provided to Ms. White via hand delivery on February 15, 2006. Ms. White has agreed to waive service of the summons in this matter pursuant to Rule 4, Federal Rules of Civil Procedure.

Expedited consideration is appropriate here because this matter is of an emergency nature as more fully set out in Plaintiff's Motion for Preliminary Injunction.

WHEREFORE, Plaintiff respectfully requests that its Motion for Preliminary Injunction be heard on an expedited basis.

Dated: February 15, 2006

Respectfully submitted,


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¹ Pro hac vice admission will be applied for pursuant to Local Rule 11.1(C)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Request for Expedited Hearing was served via (*) hand delivery or U.S. mail this 15th day of February, 2006, to the following:

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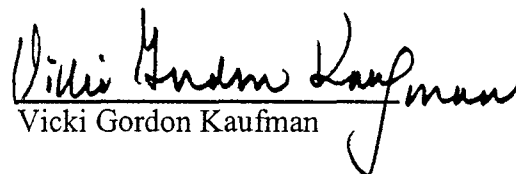

Vicki Gordon Kaufman

EXHIBIT A

FLORIDA PUBLIC SERVICE COMMISSION

VOTE SHEET

FEBRUARY 7, 2006

RE: Docket No. 041269-TP - Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

Issue 1: What is the appropriate language to implement the FCC's transition plan for

- (1) switching,
- (2) high capacity loops and
- (3) dedicated transport as detailed in the FCC's Triennial Review Remand Order ("TRRO"), issued February 4, 2005?

Recommendation: Staff recommends that the embedded base as used in the TRRO relates to de-listed UNE arrangements existing on March 11, 2005. Staff recommends that the TRRO transition rates be based on the higher of the rate the CLEC paid for that element or combination of elements on June 15, 2004, or the rate the Commission ordered for that element or combination of elements between June 16, 2004, and March 11, 2005, plus the applicable additive (one dollar for local circuit switching and 15 percent for high-capacity loops and transport and dark fiber). Accordingly, the transition rate for DS0 level capacity switching for customers subject to the four or more line carve-out is the rate in existing contracts. Additionally, staff recommends that the TRRO transitional rates for the de-listed UNEs are effective at the time of the ICA amendment and subject to true-up back to March 11, 2005; the TRO new unbundling obligations should be effective with the ICA amendment.

APPROVED

COMMISSIONERS ASSIGNED: Edgar, Deason, Arriaga

COMMISSIONERS' SIGNATURES

MAJORITY

DISSENTING

Jose Edgar

J. Jerry Deason

J/A (7a) / 13

REMARKS/DISSENTING COMMENTS:

Commissioner Arriaga dissented on Issues 7(a) and 13.

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Consistent with the Commission's finding in the Verizon Arbitration Order, staff recommends that regardless of when CLECs submit their conversion orders during the transition period, the TRRO rules entitle them to receive the transitional rates for the full 12 months, March 11, 2005 - March 10, 2006, for local circuit switching, high-capacity loops and transport, and 18 months, March 11, 2005 - September 10, 2006, for dark fiber loops and transport. However, transitional pricing ends March 10, 2006, and September 10, 2006, for the affected de-listed arrangements, whether or not the former UNEs have been converted.

With regard to the transition period process, staff recommends that (1) CLECs are required to submit conversion orders for the affected de-listed arrangements by the end of the transition period, but conversions do not have to be completed by the end of the applicable transition period (March 10, 2006, for local circuit switching and affected high-capacity loops and transport and September 10, 2006, for dark fiber loops and transport); and (2) there should not be a required date for CLECs to identify the respective embedded bases of the de-listed UNEs. However, if CLECs do not identify the applicable embedded bases by March 10, 2006, and by September 10, 2006, respectively, staff recommends that BellSouth should be permitted to (1) identify the arrangements itself, (2) charge CLECs the applicable disconnect charges and full installation charges, and (3) charge CLECs the resale or wholesale tariffed rate beginning March 11, 2006, for local circuit switching and affected high-capacity loops and transport (September 11, 2006, for dark fiber loops and transport), regardless of when the conversion is completed.

Staff also recommends that BellSouth's proposed "switch-as-is" conversion rates not be approved due to the lack of competent evidence. However, BellSouth is not precluded from initiating a cost proceeding later to address "switch-as-is" conversion rates.

Staff believes that neither the language proposed by BellSouth nor CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes that parts of the language proposed by BellSouth and CompSouth should be combined and adopted as discussed in the analysis portion of its memorandum. Staff's recommended language is found in Appendix A of staff's memorandum.

APPROVED

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Docket No. 041269-TP - Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

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- Issue 2:**
- 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 are no longer Section 251(c) (3) obligations?

Recommendation: a) The TRRO has changed BellSouth's obligation to provide unbundled network elements pursuant to its §251(c)(3) obligation. Therefore, staff recommends that existing ICAs should be amended to reflect those changes to BellSouth's obligations. b) Amendments to new ICAs pending arbitration should be based on the Commission's decisions in this proceeding, unless the parties have specifically agreed otherwise. Accordingly, staff believes that all Florida CLECs having ICAs with BellSouth should be bound by the decisions in this proceeding effective upon issuance of the final order.

APPROVED

Issue 3: 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

Recommendation: A business line should include all business UNE-P lines and all UNE-L lines, as well as HDSL-capable loops at full capacity. Fiber-based collocation should be based on the number of fiber-based collocators present in a wire-center at the time the count is made. The definition of a building should be based on a "reasonable telecom person" approach such that a multi-tenant building with multiple telecom entry points will be considered multiple buildings for purposes of DS1/DS3 caps. The FCC's definition of a route is appropriate. Staff believes that neither the language proposed by BellSouth nor CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes that parts of the language proposed by BellSouth and CompSouth should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

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Docket No. 041269-TP - Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

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- Issue 4:**
- 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)?

Recommendation: Staff believes this Commission has authority to resolve an ILEC's challenges to a CLEC self-certification, under an ICA's dispute resolution process. This Commission should also approve the initial wire center lists as requested by the parties. CLECs should exercise due diligence in making inquiries about the availability of UNEs and must self-certify that they are entitled to the UNE. BellSouth should provision such UNEs, but may bring disputes to this Commission for resolution in accordance with the TRRO. Staff believes that neither the language proposed by BellSouth nor CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes that parts of the language proposed by BellSouth and CompSouth should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

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

Recommendation: Staff recommends that:

- High Bit Rate Digital Subscriber (HDSL)-capable loops (i.e., BellSouth's 2-wire or 4-wire High Bit Rate Digital Subscriber Compatible Loop offering) are the equivalent of DS1 loops for the purpose of evaluating impairment and should be counted as 24 voice grade equivalents.
- BellSouth is obligated to provide CLECs with access to copper loops and to condition copper loops upon request; however, BellSouth is not obligated to offer pre-conditioned/pre-packaged loop offerings designed for a specific service type.
- An Unbundled Copper Loop Non-Designed (with or without conditioning) should be counted as one voice grade equivalent for each 2-wire (e.g., one voice grade equivalent for a 2-wire loop and two voice grade equivalents for a 4-wire loop).

Staff believes that neither the language proposed by BellSouth nor CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth in Exhibit 17, with the modifications discussed in the analysis portion of staff's January 26, 2006 memorandum, should be adopted. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

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

Recommendation: No. Staff believes that the Commission does not have authority to require BellSouth to include in §252 interconnection agreements §271 elements. The inclusion of §271 elements in a §252 agreement would be contrary to both the plain language of §§251 and 252 and the regulatory regime set forth by the FCC in the TRO and the TRRO.

APPROVED

Commissioner Arriaga dissented on the bases stated by the Commissioner at the conference.

Issue 7(b): If the answer to part (a) is affirmative in any respect, does the Commission have the authority to establish rates for such elements?

Recommendation: If the Commission approves staff's recommendation in Issue 7(a), this issue is moot.

MOOT

Issue 7(c): If the answer to part (a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements, and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?

Recommendation: If the Commission approves staff's recommendation in Issues 7(a) and/or (b), this issue is moot. If the Commission denies staff's recommendation in Issue(s) 7(a) and/or (b), staff recommends the Commission approve the Joint CLECs' proposed language pending a further proceeding to determine permanent rates which meet the standards set forth in §§201 and 202.

MOOT

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Issue 8: 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?

Recommendation: Staff recommends that moving or adding orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport are not allowed. However, changes to an existing service, such as adding or removing vertical features, are permitted during the applicable transition period. Staff recommends that no language is needed to effectuate this policy.

APPROVED

Issue 9: 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?

Recommendation:

(a) Transition of UNEs de-listed in the TRO

If a CLEC has any de-listed TRO elements or arrangements in place after the effective date of the change-of-law amendment, staff recommends that BellSouth should be authorized to disconnect or convert such services, after a 30-day written notice and absent a CLEC disconnection or conversion order. If CLECs submit the requisite orders during the 30-day period, staff recommends that conversions be subject to Commission-approved switch-as-is rates. If CLECs do not submit the requisite orders during the 30-day period, staff recommends that BellSouth should be allowed to transition such circuits to equivalent BellSouth tariffed services and impose full nonrecurring charges as set forth in BellSouth tariffs.

Staff believes that neither the language proposed by BellSouth nor CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth, with the modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A of its memorandum.

(b) Subsequent Transition Period

- Staff recommends that BellSouth should identify and post on its website subsequent wire centers meeting the non-impairment criteria set forth in the TRRO (Subsequent Wire Center List) in a Carrier Notification Letter (CNL).
- Staff recommends that CLECs have 30 calendar days following the CNL to dispute a non-impaired wire center claim. During the 30 days, rates for de-listed UNEs (DS1 and DS3 loops and transport and dark fiber transport) do not change.

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- 30 calendar days after the CNL, staff recommends that BellSouth no longer has an obligation to provide unbundling of new de-listed UNEs, as applicable, in the wire centers listed on the Subsequent Wire Center List. If a CLEC disputes a specific non-impaired wire center claim with a UNE order within 30 calendar days following the CNL, BellSouth will provision the CLEC's ordered UNE. BellSouth will review the CLEC claim and will seek dispute resolution if needed. During the dispute resolution period, the applicable UNE rates will not change unless ordered by the Commission. Upon the Commission's resolution of the dispute, the rates will be trued up, if necessary, to the time BellSouth provisioned the CLEC's order.
- Staff recommends that the Subsequent Transition Period for DS1 and DS3 loops and transport in a wire center identified on the Subsequent Wire Center List is 180 calendar days and begins on day 30 following issuance of the CNL; the Subsequent Transition Period for dark fiber transport is 270 calendar days beginning on day 30 following issuance of the CNL.
- Staff recommends that the Subsequent Transition Period applies to the Subsequent Embedded Base (all de-listed UNE arrangements in service in a wire center identified on the Subsequent Wire Center List on the thirtieth day following issuance of the CNL).
- Staff recommends that the transition rates to apply to the Subsequent Embedded Base throughout the Subsequent Transition Period should be the rate paid for that element at the time of the CNL posting, plus 15 percent.
- Staff recommends that CLECs be required to submit spreadsheets identifying the Subsequent Embedded Base of circuits to be disconnected or converted to other BellSouth services no later than the end of the Subsequent Transition Period (210 days following the CNL for DS1 and DS3 loops and transport and 300 days following the CNL for dark fiber transport). A project schedule for the conversion of these affected circuits will be negotiated between the parties.
- For the Subsequent Embedded Base circuits identified by the end of 210 days for DS1 and DS3 high-capacity loops and transport (300 days for dark fiber transport) following the CNL, BellSouth should convert the applicable circuits at Commission-approved switch-as-is rates and UNE disconnect charges do not apply. The applicable recurring tariff charges will apply beginning on the first day following the end of the Subsequent Transition Period.

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- If CLECs do not submit the spreadsheets for all of their Subsequent Embedded Base by the end of the Subsequent Transition Period, staff recommends that BellSouth be permitted to identify the remaining Subsequent Embedded Base and transition the circuits to the equivalent BellSouth tariffed services. Additionally, the circuits identified and transitioned by BellSouth should be subject to the applicable UNE disconnect charges and the full non-recurring charges for installation of the BellSouth equivalent tariffed service.
- For the Subsequent Embedded Base circuits, staff recommends that the applicable recurring tariff charges should apply beginning on the first day following the end of the Subsequent Transition Period, whether or not the circuits have been converted.

Staff believes that neither the language proposed by BellSouth nor CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth, with the modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

Issue 10: 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?

Recommendation: The staff recommendation addressing this issue is included in the recommendation for Issue 1. Therefore, if the staff recommendation in Issue 1 is approved, this issue is moot.

APPROVED

Issue 12: Should network elements de-listed under Section 251(c)(3) be removed from the SQM/PMAP/SEEM?

Recommendation: Yes. Performance data for services (de-listed elements) no longer under Section 251(c)(3) should be removed from BellSouth's SQM/PMAP/SEEM. Staff believes that the language proposed by BellSouth, with the modification discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

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Issue 13: 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)?

Recommendation: Staff recommends that: (1) BellSouth is required to 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 any method other than unbundling under §251(c)(3) of the Act, unless otherwise specifically prohibited; (2) BellSouth is not required to commingle UNEs or combinations of UNEs with another carrier; and (3) multiplexing in a commingled circuit should be billed from the same agreement or tariff as the higher bandwidth circuit. Staff believes that neither the language proposed by BellSouth nor the Joint CLECs is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth, with the modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A of its memorandum.

DENIED

Commissioner Arriaga dissented.

Issue 14: 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?

Recommendation: Staff recommends that BellSouth is obligated to provide conversions of special access to UNE pricing. Staff defers recommendation of the rates for conversions to Issue 1. Staff believes that the language proposed by BellSouth best implements this recommended decision and should be adopted. The recommended language is found in Appendix A of staff's memorandum.

APPROVED

Issue 15: 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?

Recommendation: Staff recommends that any conversions to stand-alone UNEs pending on the effective date of the TRO should be effective with the date of an amendment or interconnection agreement that incorporates conversions. Since neither party proposed or contested language as part of this issue, staff created its own language to cover this issue.

APPROVED

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Docket No. 041269-TP - Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

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Issue 16: 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?

Recommendation: Staff recommends that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004. The recommended language for this issue is addressed in Issue 17.

APPROVED

Issue 17: If the answer to foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Recommendation: Staff believes that neither the language proposed by CompSouth nor BellSouth is totally appropriate to implement the recommended decision in Issue 16. Instead the language proposed by BellSouth in Exhibit 12, with modifications discussed in the staff analysis, should be adopted. The recommended language is found in Appendix A of staff's memorandum.

APPROVED

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

Recommendation: Staff's recommended language is based on the following three points:

1. BellSouth's obligation with regard to line splitting is to provide nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.
2. The CLEC requesting a line splitting arrangement should purchase the whole loop and provide its own splitter to be collocated in the central office.
3. The CLEC requesting a line splitting arrangement should indemnify, defend and hold BellSouth harmless against any and all claims, loss or damage except where arising from or in connection with BellSouth's gross negligence or willful misconduct.

Staff believes that neither the language proposed by BellSouth nor CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth, with modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

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Issue 21: What is the appropriate ICA language, if any, to address access to call related databases?

Recommendation: BellSouth is obligated to offer all CLECs unbundled access to the 911 and E911 call-related databases. For CLECs with existing agreements with BellSouth as of March 11, 2005, BellSouth is obligated to offer unbundled access to all other call related databases through March 10, 2006.

Staff believes that neither the language proposed by BellSouth nor the Joint CLECs is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth, with the modification discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

Issue 22: 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?

Recommendation: a) Since no party has proposed language for a definition of MPOE within the contract, staff too concludes that no language is required.

b) BellSouth is required to unbundle FTTH/FTTC loops to predominantly commercial MDUs, but has no obligation to unbundle such fiber loops to residential MDUs. While the FCC's rules provide that FTTH/FTTC loops serving end user customer premises do not have to be unbundled, CLEC access to unbundled DS1 and DS3 loops was also preserved. Accordingly, in wire centers in which a non-impairment finding for DS1 or DS3 loops has not been made, BellSouth is obligated upon request to unbundle a FTTH/FTTC loop to provide a DS1 or DS3 loop. Staff believes that no party's language is completely appropriate. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

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

Recommendation: Staff recommends BellSouth be required to provide the CLEC with nondiscriminatory access to the time division multiplexing features, functions and capabilities of a 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. Staff believes that the language proposed by BellSouth best implements this recommended decision and should be adopted. The recommended language is found in Appendix A of staff's memorandum.

APPROVED

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

Recommendation: BellSouth should provide the same routine network modifications and line conditioning that it normally provides for its own customers. Staff believes that neither the language proposed by BellSouth, CompSouth nor Sprint is totally appropriate to implement this recommended decision. Instead, staff believes that parts of the language proposed by BellSouth, CompSouth, and Sprint should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A its memorandum.

APPROVED

Issue 26: What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or nonrecurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

Recommendation: BellSouth should use the rates approved by this Commission in the UNE Order. If any additional rates are needed, BellSouth should petition this Commission to establish those rates. Staff believes that neither the language proposed by BellSouth, CompSouth nor Sprint is totally appropriate to implement this recommended decision. Instead, staff believes that parts of the language proposed by BellSouth, CompSouth, and Sprint should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

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Issue 27: What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?

Recommendation: The unbundling requirements of an incumbent carrier with respect to overbuilt FTTH/FTTC loops are limited to either a 64 Kbps transmission path over the FTTH loop or unbundled access to a copper loop. Staff believes that the language proposed by BellSouth best implements this recommendation, with minor modifications as discussed in the staff analysis, and should be adopted. The recommended language is found in Appendix A of staff's memorandum.

APPROVED

Issue 28: What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

Recommendation: BellSouth need not identify the specific circuits that are to be audited or provide additional detailed documentation prior to an audit of a CLEC's EELs. The audit should be performed by an independent, third-party auditor selected by BellSouth. The audit should be performed according to the standards of the American Institute of Certified Public Accountants (AICPA). The CLEC may dispute any portion of the audit following the dispute resolution procedures contained in the interconnection agreement after the audit is complete. Staff believes that neither the language proposed by BellSouth nor CompSouth is totally appropriate to implement this recommended decision. Instead, staff believes that the language proposed by BellSouth, with the modifications discussed in the staff analysis, should be adopted. Staff's recommended language is found in Appendix A of its memorandum.

APPROVED

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

Recommendation: Staff recommends that while the Commission should make it clear that all affected CLECs are entitled to amend their agreements to implement the ISP Remand Core Forbearance Order, such amendments should be handled on a carrier-by-carrier basis. Accordingly, no language is necessary for this issue.

APPROVED

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Issue 31: How should the determinations made in this proceeding be incorporated into existing Section 252 interconnection agreements?

Recommendation: In accordance with the Commission's ruling in Order No. PSC-05-0639-PCO-TP, issued in this docket, staff believes that parties and non-parties should be bound to the amendments arising from the Commission's determinations in this proceeding. For non-parties, staff recommends that the resulting amendments be limited to the disputed issues in this proceeding and not affect language unrelated to the disputed issues in this proceeding. Staff recommends that it may be appropriate given the FCC's transitional deadlines to order the parties to file their respective amendments or agreements within 20 days of the decisions in this proceeding. Staff believes that this would allow the parties sufficient time to comply with the Commission's decisions in this proceeding and meet the March 11, 2006 deadline. In addition, staff requests that the Commission grant it administrative authority to approve any amendments and agreements filed in accordance with the Commission's decisions in this proceeding.

APPROVED

Issue 32: Should this docket be closed?

Recommendation: No. The parties should be required to submit signed amendments or agreements that comply with the Commission's decisions in this docket for approval within 20 days of the Commission's decisions in this proceeding. This docket should remain open pending Commission approval of the final arbitration agreements in accordance with §252 of the Telecommunications Act of 1996.

APPROVED

EXHIBIT B

47 U.S.C.A. § 271

Effective: February 08, 1996

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART III--SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

→ § 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

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 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the

47 U.S.C.A. § 271

network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought--

(i) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(ii) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(iii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

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(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to--

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to Commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

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(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that--

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and--

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing--

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to subchapter V of this chapter; or

(iii) suspend or revoke such approval.

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(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) "Incidental interLATA services" defined

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate--

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls,

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or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section--

(1) In-region State

The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms "video programming service" and "other programming services" have the same meanings as such terms have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that--

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(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

Current through P.L. 109-169 (excluding P.L. 109-163) approved 01-11-06

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END OF DOCUMENT

EXHIBIT C

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: January 26, 2006

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

FROM: Division of Competitive Markets & Enforcement (Barrett, Fogleman, Hallenstein, K. Kennedy, Lee, Marsh, Moss)
Office of the General Counsel (Teitzman, Scott)

RE: Docket No. 041269-TP – Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

AGENDA: 02/07/06 – Regular Agenda – Post-hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: Edgar, Deason, Arriaga

PREHEARING OFFICER: Edgar

CRITICAL DATES: 03/11/2006 – FCC Transitional Deadline

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\041269.RCM.DOC

Issue 16: 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?

Recommendation: Staff recommends that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004. The recommended language for this issue is addressed in Issue 17. (Moss)

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: Yes. Line sharing is a loop transmission facility that must be provided by BellSouth pursuant to the Section 271 competitive checklist (checklist item 4). BellSouth acknowledged this fact when it was seeking Section 271 approval, but has now changed course and seeks to eliminate line sharing from the competitive checklist.

SPRINT: Sprint has reached agreement with BellSouth on all Issues except Issue 5, discussed below.

Staff Analysis:

The term "line sharing" describes the situation "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."⁵¹ (TRO ¶255) The principal dispute between BellSouth and the Joint CLECs is whether the provision of line sharing is a § 271 obligation. The conclusion reached in this issue will affect the language proposed in Issue 17.

PARTIES' ARGUMENTS

Citing to several paragraphs in the TRO, BellSouth witness Fogle states that the FCC clearly removed the ILECs' obligations to provide new line sharing arrangements after October 1, 2004. (Fogle TR 298; TRO ¶¶199, 260-262, 264-265) BellSouth requests that the interconnection agreements eliminate line sharing entirely and include the FCC's transition rules. (BellSouth BR at 47) Additionally, BellSouth noted:

- "Even if line sharing were construed to be a section 271 network element, state commissions have no authority to require an ILEC to include section 271 elements in a 252 interconnection agreement." (BellSouth BR at 48)

⁵¹ HFPL is an acronym for the high-frequency portion of the local loop.

- “[I]n its *BellSouth Declaratory Ruling Order*, the FCC again stressed that, under its rules, ‘a competitive LEC officially leases the entire loop.’” (BellSouth BR at 50)
- “Line sharing is included in the relief granted in the *Broadband 271 Forbearance Order*.” (BellSouth BR at 50)
- Commission decisions in several states support BellSouth’s position. (BellSouth BR at 50)

The Joint CLECs argue that “[l]ine sharing is a Section 271 checklist item 4 transmission facility” and acknowledge that line sharing has been included in decisions granting § 271 authority. (Joint CLECs BR at 69-70) In addition, the Joint CLECs point out that two FCC commissioners issued statements on the Broadband 271 Forbearance Order, where one stated an opinion that the Order included line sharing while another was of the opinion that it did not. (Joint CLECs BR 73-75)

BellSouth counters that the language of § 271 does not require line sharing; furthermore, checklist item 4 requires BOCs to offer “local loop transmission . . . **unbundled** from local switching and other services.” (§ 271(d)(2)(B)(iv); BellSouth BR at 47; emphasis in brief)

ANALYSIS

The Commission’s authority regarding § 271 is addressed in Issue 7. More specifically, it addresses whether BellSouth is required to include § 271 elements in an ICA.

Section 271 checklist item 4 requires BOCs to offer “local loop transmission . . . unbundled from local switching and other services.” (§ 271(d)(2)(B)(iv)) Staff does not find a definition of local loop in the Act. In paragraph 380 of the Local Competition Order, the FCC defined the local loop network element “as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises.” This definition has not changed and appears in FCC rules defining the local loop. (47 CFR 51.319(a); BellSouth BR at 47) This network element also includes all features, functions and capabilities of such transmission facility. (TRO fn. 620) Where carriers connect customers directly to a central office via a loop dedicated solely to a particular customer, “the local loop consists of a single cable pair – for a copper loop.” (TRO ¶215) Staff believes that the definition of local loop includes the entire cable pair, with all of its features, functions and capabilities, which would include all frequencies that can be carried over the loop.

The high-frequency portion of the local loop (HFPL) is the “frequency range above the voiceband on a copper loop facility used to carry analog circuit-switched voiceband transmissions.” (Line Sharing Order ¶26; BellSouth BR at 48) BellSouth contends that the HFPL is only a “portion” of the loop as expressed in its name and definition, not the whole transmission facility as required by checklist item 4. (BellSouth BR at 48) Staff believes that the HFPL was not envisioned when § 271 of the Act was being drafted or at the time of defining the local loop network element in the Local Competition Order. BellSouth points out that the term “line sharing” was never mentioned in § 271. (BellSouth BR at 50) The HFPL was created by the FCC as a “new network element” in paragraph 4 of the Line Sharing Order. Staff believes that being “new,” the HFPL is different from any UNE in existence prior to its inception, including the local loop network element.

In the Line Sharing Order, the FCC directed ILECs to provide the HFPL to requesting telecommunications carriers as an UNE. (TRO ¶26) Staff believes that subsequent to this

ruling, any decisions granting § 271 authority would include line sharing, since checklist item 2 requires “[n]ondiscriminatory access to network elements in accordance with the requirements of §§ 251(c)(3) and 252(d)(1).” (§ 271(d)(2)(B)(ii)) Therefore, any additional requirements of § 251(c)(3) would have a mirrored § 271 obligation under checklist item 2. Checklist item 4, which refers to the local loop network element, is expressed as an independent obligation unrelated to § 251. Notably, the Joint CLECs provide examples of four state orders granting § 271 authority which included line sharing as a checklist item 4 requirement and they believe that if line sharing was ever referred to under checklist item 4, then it remains a checklist item 4 requirement. (Joint CLECs BR at 70 -71)

However, the FCC’s decision to require line sharing was unequivocally vacated by the D.C. Circuit. (TRO fn. 782) The court noted that the FCC had failed to consider the “opportunities afforded by the whole loop” in reaching its impairment conclusions. (TRO ¶252) In the TRO, the FCC recanted its earlier finding and ruled that the HFPL should no longer be separately unbundled. (TRO ¶260; BellSouth BR at 49) It noted that the HFPL created a pricing dilemma, since there is no reasonable way to apportion the costs of the loop between the divided spectra of the loop. (*Id.*) Further, the FCC found that the HFPL gave the CLECs an irrational cost advantage, and then declared unbundling of the HFPL to be anti-competitive and contrary to the goals of the Act. (*Id.*) The FCC found that ILECs do not have to unbundle the HFPL for requesting telecommunications carriers. (TRO ¶248)

With HFPL being “new” and only a portion of the loop, staff does not believe that the HFPL was included in the plain reading of “local loop” in checklist item 4 of § 271 of the Act. Therefore, staff believes that the definition of a local loop does not obligate the ILEC to subdivide the loop and provide UNE access to the HFPL. Further, staff believes that the inclusion of line sharing as an UNE in decisions granting § 271 authority is not sufficient to obligate the ILECs to offer line sharing under § 271, especially considering that the FCC has found line sharing both anti-competitive and contrary to the goals of the Act. Therefore, staff believes that the FCC’s finding that line sharing is anti-competitive and contrary to the goals of the Act removes all obligation for ILECs to offer line sharing subsequent to the transition period established by the FCC.

The transition period is summarized in ¶265 of the TRO and clearly stated in 47 CFR 51.319(a)(1)(i)(B). The ILEC is not obligated to provide new line sharing beyond the first year after the effective date of the TRO. (TRO ¶265; 47 CFR 51.319(a)(1)(i)(B)) The effective date of the TRO was October 1, 2003, which makes October 1, 2004 the end date for acquisition of new line sharing customers. The FCC provided for a transition of those new customers by the conclusion of the third year. (*Id.*) After the transition period, those new customers and any future customers would “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.” (TRO ¶265)

The FCC noted that the transition period was created “to permit requesting carriers to continue obtaining new customers during the first year of the transition to augment the carrier’s customer base enabling continued day-to-day operations while modifying their business plans and working to preserve access arrangements with incumbent LECs.” (TRO fn. 787) Staff finds no reference in the TRO stating that the FCC permits requesting carriers to continue obtaining

Docket No. 041269-TP
Date: January 26, 2006

new customers after October 1, 2004. In addition, no party has presented any cite to any other FCC order allowing such.

CONCLUSION

Staff recommends that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004. The recommended language for this issue is addressed in Issue 17.

Docket No. 041269-TP Appendix A
Date: January 26, 2006

Issue 16: 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?

Recommended Language: See proposed language in Issue 17.

Issue 17: If the answer to foregoing issue is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?

Recommended Language:

Line Sharing

General. Line Sharing is defined as the process by which <<customer-short-name>> provides digital subscriber line service ("xDSL") over the same copper Loop that BellSouth uses to provide retail voice service, with BellSouth using the low frequency portion of the Loop and <<customer-short-name>> using the high frequency spectrum (as defined below) of the Loop.

Line Sharing arrangements in service as of October 1, 2003 under a prior Interconnection Agreement between Bellsouth and <<customer-short-name>>, will remain in effect until the End User discontinues or moves xDSL service with <<customer-short-name>>. Arrangements pursuant to this Section will be billed at the rates set forth in Exhibit A.

For Line Sharing arrangements placed in service between October 2, 2003, and October 1, 2004 the rates will be as set forth in Exhibit A.

For Line Sharing arrangements placed on or after October 2, 2004 (whether under this Agreement only, or under this Agreement and a prior Agreement), the rates will be as set forth in Exhibit A.

Any Line Sharing arrangements placed in service on or after October 2, 2003; and not otherwise terminated, shall terminate on October 2, 2006.

No new line sharing arrangements may be ordered.

The High Frequency Spectrum is defined as the frequency range above the voiceband on a copper Loop facility carrying analog circuit-switched voiceband transmissions. Access to the High Frequency Spectrum is intended to allow <<customer-short-name>> the ability to provide xDSL data services to the End User for which BellSouth provides voice services.

The High Frequency Spectrum shall be available for any version of xDSL complying with Spectrum Management Class 5 of ANSI T1.417, American National Standard for Telecommunications, Spectrum Management for Loop Transmission Systems. BellSouth will continue to have access to the low frequency portion of the Loop spectrum (from 300 Hertz to at least 3000 Hertz, and potentially up to 3400 Hertz, depending on equipment and facilities) for the purposes of providing voice service. <<customer-short-name>> shall only use xDSL technology that is within the PSD mask for Spectrum Management Class 5 as found in the abovementioned document.

Access to the High Frequency Spectrum requires an unloaded, 2-wire copper Loop. An unloaded Loop is a copper Loop with no load coils, lowpass filters, range extenders, DAMLs, or similar devices and minimal bridged taps consistent with ANSI T1.413 and T1.601.

Date: January 26, 2006

BellSouth will provide Loop Modification to <<customer-short-name>> on an existing Loop for Line Sharing in accordance with procedures as specified in Section 2 of this Attachment. BellSouth is not required to modify a Loop for access to the High Frequency spectrum if modification of that Loop significantly degrades BellSouth's voice service. If <<customer-short-name>> requests that BellSouth modify a Loop and such modification significantly degrades the voice services on the Loop, <<customer-short-name>> shall pay for the Loop to be restored to its original state.

Line Sharing shall only be available on Loops on which BellSouth is also providing, and continues to provide, analog voice service directly to the End User. In the event the End User terminates its BellSouth provided voice service for any reason, or in the event BellSouth disconnects the End User's voice service pursuant to its tariffs or applicable law, and <<customer-short-name>> desires to continue providing xDSL service on such Loop, <<customer-short-name>> or the new voice provider, or both, shall be required to purchase a full stand-alone Loop. In those cases in which BellSouth no longer provides voice service to the End User and <<customer-short-name>> purchases the full stand-alone Loop, <<customer-short-name>> may elect the type of Loop it will purchase. <<customer-short-name>> will pay the appropriate recurring and nonrecurring rates for such Loop as set forth in Exhibit A to this Attachment. In the event <<customer-short-name>> purchases a voice grade Loop, <<customer-short-name>> acknowledges that such Loop may not remain xDSL compatible.

In the event the End User terminates its BellSouth provided voice service, and <<customer-short-name>> requests BellSouth to convert the Line Sharing arrangement to a Line Splitting arrangement (see below), BellSouth will discontinue billing <<customer-short-name>> for the High Frequency Spectrum and begin billing <<customer-short-name>> for the full stand-alone Loop. BellSouth will continue to bill <<customer-short-name>> for all associated splitter charges if <<customer-short-name>> continues to use a BellSouth splitter. Only one CLEC shall be permitted access to the High Frequency Spectrum of any particular Loop.

Once BellSouth has placed cross-connects on behalf of <<customer-short-name>> to provide <<customer-short-name>> access to the High Frequency Spectrum and chooses to rearrange its splitter or CLEC pairs, <<customer-short-name>> may order the rearrangement of its splitter or cable pairs via "Subsequent Activity". Subsequent Activity is any rearrangement of <<customer-short-name>>'s cable pairs or splitter ports after BellSouth has placed cross-connection to provide <<customer-short-name>> access to the High Frequency Spectrum. BellSouth shall bill and <<customer-short-name>> shall pay the Subsequent Activity charges as set forth in Exhibit A of this Attachment.

BellSouth's Local Ordering Handbook (LOH) will provide <<customer-short-name>> the LSR format to be used when ordering disconnections of the High Frequency Spectrum or Subsequent Activity.

Maintenance and Repair - Line Sharing. <<customer-short-name>> shall have access for repair and maintenance purposes to any Loop for which it has access to the High Frequency Spectrum. <<customer-short-name>> may test from the collocation space, the Termination Point, or the NID. BellSouth will be responsible for repairing voice services and the physical line between

Docket No. 041269-TP Appendix A

Date: January 26, 2006

the NID at the End User's premises and the Termination Point, <<customer-short-name>> will be responsible for repairing its data services. Each Party will be responsible for maintaining its own equipment.

<<customer-short-name>> shall inform its End Users to direct data problems to <<customer-short-name>>, unless both voice and data services are impaired, in which event <<customer-short-name>> should direct the End Users to contact BellSouth. Once a Party has isolated a trouble to the other Party's portion of the Loop, the Party isolating the trouble shall notify the End User that the trouble is on the other Party's portion of the Loop.

EXHIBIT D

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

In the Matter of)
Review of the Section 251 Unbundling)
Obligations of Incumbent Local Exchange) CC Docket No. 01-338
Carriers)
Implementation of the Local Competition)
Provisions of the Telecommunications Act of) CC Docket No. 96-98
1996)
Deployment of Wireline Services Offering) CC Docket No. 98-147
Advanced Telecommunications Capability)

REPORT AND ORDER AND ORDER ON REMAND
AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 20, 2003

Released: August 21, 2003

Comment Date: 30 days after Federal Register publication of this Notice

Comment Reply Date: 60 days after Federal Register publication of this Notice

By the Commission: Chairman Powell and Commissioner Abernathy approving in part,
dissenting in part and issuing separate statements; Commissioners Copps and Adelstein
approving in part, concurring in part, dissenting in part and issuing separate statements;
Commissioner Martin issuing a separate statement.

Para.

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reject Z-Tel's argument that the cross-references were omitted simply to conserve space or to avoid repetition.¹⁹⁹⁴ To the contrary, we find Congress' decision to omit cross-references particularly meaningful in this instance: half of the checklist items contain explicit cross-references to other statutory provisions, and it is reasonable to conclude that Congress would have inserted a cross-reference into items 4-6 and 10 had that been its intention.

658. We also decline to use section 271, as suggested by Z-Tel, to broaden the unbundling obligations of section 251. Z-Tel notes that section 251(d)(2) directs the Commission to consider "impair[ment]" "at a minimum" in determining which network elements must be unbundled, and thus argues that the Commission may require unbundling pursuant to section 251 and 252 even in the absence of an impairment finding.¹⁹⁹⁵ In analyzing section 252(d)(2) the D.C. Circuit in *USTA* determined that the "at a minimum" language potentially could justify the imposition of unbundling obligations under that provision even in the "absence" of impairment.¹⁹⁹⁶ However, the *USTA* decision contained key limitations to the exercise of such authority. In order to apply the "at a minimum" language in the absence of impairment, the *USTA* court required that the Commission "point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible."¹⁹⁹⁷ Were we to accept Z-Tel's argument, we would again impose a virtually unlimited standard to unbundling, based on little more than faith that more unbundling is better, regardless of context. Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2). Rather, the checklist independently imposes unbundling obligations, but simply does so with less rigid accompanying conditions.

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict.¹⁹⁹⁸ So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

¹⁹⁹⁴ Z-Tel Dec. 20, 2002 *Ex Parte* Letter at 11.

¹⁹⁹⁵ Z-Tel Comments at 17.

¹⁹⁹⁶ *USTA*, 290 F.3d at 425.

¹⁹⁹⁷ *Id.*

¹⁹⁹⁸ See *Washington Market Co. v. Hoffman*, 101 U.S. 112 (1879).

EXHIBIT E

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

In the Matter of)
)
 Application of Verizon New England Inc.,)
 Bell Atlantic Communications, Inc. (d/b/a)
 Verizon Long Distance), NYNEX Long) CC Docket No. 01-9
 Distance Company (d/b/a Verizon Enterprise)
 Solutions) And Verizon Global Networks Inc.,)
 For Authorization to Provide In-Region,)
 InterLATA Services in Massachusetts)

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 2001

Released: April 16, 2001

By the Commission: Chairman Powell and Commissioner Ness issuing separate statements;
 Commissioner Furchtgott-Roth concurring and issuing a statement; and Commissioner Tristani
 dissenting and issuing a statement.

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APPENDIX A – LIST OF COMMENTERS

APPENDIX B – STATUTORY REQUIREMENTS – CHECKLIST ITEMS 6-12

I. INTRODUCTION

1. On January 16, 2001, Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc. (Verizon) filed this application pursuant to section

This argument does not suggest that Verizon is not in compliance with current UNE requirements, and therefore is not relevant to our inquiry.

B. Checklist Item 4 – Unbundled Local Loops

1. Background

122. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”³⁹³ A BOC has an obligation to provision different types of loops, including “two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.”³⁹⁴

123. In evaluating Verizon’s overall performance in providing unbundled local loops in Massachusetts, we examine Verizon’s performance in the aggregate (*i.e.*, by all loop types) as well as its performance for specific loop types (*i.e.*, by voice grade, xDSL-capable, line-shared and DS-1 types).³⁹⁵ In doing so, we are looking for patterns of systemic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete.³⁹⁶ As the Commission has noted in previous section 271 orders, we
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Dkt. Nos. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4-P Order at 6 (Jan. 10, 2000)
<<http://www.state.ma.us/dpu/telecom/96-73/UneProvi.htm>> (emphasis omitted).

³⁹³ 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. See *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-167, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase “network interconnection device” with “demarcation point,” and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

³⁹⁴ *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67.

³⁹⁵ Competing carriers in Massachusetts rely principally on three types of unbundled stand-alone loops that support high-speed services: the xDSL loop, the Digital loop and the high-capacity or DS-1 loop. The Massachusetts Department has adopted the New York Commission’s separate loop-type performance measurement categories for xDSL loops (including, but not limited to, loops provisioned for ADSL, HDSL, and SDSL services); Digital loops, which are used by competing carriers to provide xDSL, IDSL or ISDN-like services and high-capacity or DS-1 loops. Commenters in this proceeding do not specifically criticize Verizon’s performance with regard to Digital loops which are a decreasing proportion of all xDSL-capable loops requested by competing LECs. For example, in November of 2000, the measure of missed installation appointments, PR 4-04, captured 1292 xDSL loops compared to 276 Digital loops. The carrier-to-carrier reports also suggest that Verizon’s performance for xDSL loops is similar to its performance for Digital loops. We analyze high-capacity or DS-1 loops separately at the end of this section.

³⁹⁶ See Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, *Public Notice*, DA 01-734, (rel. March 23, 2001) at 6 (encouraging BOC-applicants to explain why factual anomalies may have no meaningful adverse impact on a competing carrier’s ability to obtain and serve customers).

examine the data for all the various loop performance measurements, as well as the factors surrounding the development of these measures. Verizon demonstrates that for xDSL loops, it is performing at acceptable levels for all of the measures the Commission has considered in previous section 271 orders. Isolated cases of performance disparity, especially when the margin of disparity or the number of instances measured is small, will generally not result in findings of checklist noncompliance. Finally, we evaluate the information Verizon provided describing its processes for installing and maintaining loops, the capabilities of its workforce, and employee training to show that it provisions and maintains unbundled loops.

124. We focus our analysis in this section on the issues in controversy under this checklist item, beginning with the pre-ordering, ordering, provisioning and maintenance and repair of stand-alone xDSL-capable loops. We also address voice-grade loops provisioned as new loops and hot cut loops as well as Verizon's subloop unbundling offering. Finally, we address line sharing and line splitting at the end of this discussion.

2. Discussion

125. Based on the record before us, we conclude that Verizon has adequately demonstrated that it provides unbundled local loops as required by section 271 and our rules. First, as described above, we find that Verizon provides access to loop make-up information in compliance with the *UNE Remand Order*. Second, we find that Verizon provides nondiscriminatory access to stand alone xDSL-capable loops and high-capacity loops. Third, we find that Verizon provides voice grade loops, both as new loops and through hot-cut conversions, in a nondiscriminatory manner. Finally, we find that Verizon has demonstrated that it has a line-sharing and line-splitting provisioning process that affords competitors nondiscriminatory access to these facilities. In so doing, we acknowledge that the Massachusetts Department also concludes that Verizon complies with this checklist item.³⁹⁷

126. When all types of loops are considered, Verizon shows that it performs at an acceptable level, generally meeting the parity standards in the four month period leading up to its application. Verizon demonstrates that it has put in place a process to deliver xDSL-capable loops in a timely manner and at acceptable levels of quality to allow competitors to meet the significant demand for high-speed services in Massachusetts. Furthermore, Verizon demonstrates that it has adapted its provisioning methods and procedures to accommodate competitive carrier requests for line-shared loops – loops that are recognized as an important element in providing high-speed service to residential subscribers. One commenter, Rhythms, initially opposed Verizon's application on the basis of its xDSL loop performance, but now states that Verizon has taken steps to resolve its difficulties and has withdrawn its opposition.³⁹⁸ We find that Verizon's overall performance meets the checklist requirements, even though some performance measurements indicate isolated and marginal problems. As explained below, we

³⁹⁷ See Massachusetts Department Massachusetts II Comments at 24.

³⁹⁸ See Letter from Kimberly Scardino, Assistant General Counsel, Rhythms, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 14, 2001).

believe that the marginal disparities in some measurements are not competitively significant and do not show signs of systemic discrimination.

127. As described above, the New York Commission developed Verizon's performance measurements, business rules and standards in a collaborative state proceeding with input from competing carriers.³⁹⁹ The Massachusetts Department has adopted these performance measures, business rules and standards. When possible, the New York Commission elected to compare Verizon's service to competing carriers using unbundled loops directly to the level of service provided to Verizon's retail operations.⁴⁰⁰ Where, however, the New York Commission determined that no comparable retail function exists, the level of service Verizon provided to competing carriers in Massachusetts is tested against benchmarks developed in New York.⁴⁰¹ Because the New York Commission adopted the performance measures through an open and collaborative process, and no commenter specifically criticizes the New York Commission's process, we defer to the reasonable standards it set for these measurements as a basis for analyzing Verizon's Massachusetts application.⁴⁰²

a. Overview of Performance Data

128. In our analysis we rely primarily on Massachusetts performance data collected and submitted by Verizon under the state-adopted carrier-to-carrier standards. Where the data displays facial disparities in performance between the manner in which Verizon provisions loops for itself vis-à-vis its competitors, Verizon proposes explanations for statistical disparities and offers studies that recalculate measures according to various exclusions which are discussed below. In such instances, we look to the availability of data reconciled under the auspices of the Massachusetts Department and specific evidence presented by commenters to determine the appropriate weight to accord the challenged data. In evaluating the probity of Verizon's explanations and studies, we consider among other things, whether third parties had access to the underlying data and whether the challenged data were reconciled by the Massachusetts Department.

³⁹⁹ See Massachusetts Department Massachusetts I Comments at 7.

⁴⁰⁰ Where the New York Commission determined that a retail analogue is appropriate and the Massachusetts Department uses this analogue in its evaluation, we examine Verizon's Massachusetts performance by determining whether it provides unbundled local loops to competing carriers in substantially the same time and manner as it does to its retail customers. See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20655, para. 87; see also *Bell Atlantic New York Order*, 15 FCC Rcd at 4098, para. 279.

⁴⁰¹ In these instances, we examine Verizon's service to competing carriers in terms of whether its performance affords competitors a meaningful opportunity to compete. See generally *Bell Atlantic New York Order*, 15 FCC Rcd at 4098, para. 279.

⁴⁰² See *Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Order Amending Performance Assurance Plan, Case 97-C-0271 (NY PSC Mar. 9, 2000); see also *Bell Atlantic New York Order*, 15 FCC Rcd at 3974-76, paras. 54-60.

129. Although KPMG conducted a review of other Verizon performance metrics in Massachusetts, it did not separately evaluate the xDSL metrics because they were implemented by Verizon after the initial testing period.⁴⁰³ In its supplemental filing, however, Verizon describes its engagement of PwC to “validate its DSL and line sharing measures” and notes that PwC performed its work under the same standards as KPMG did during its third party OSS testing.⁴⁰⁴ PwC replicated a total of 159 measures and matched Verizon’s calculations for 136 of 159 measures. Verizon asserts that for the remaining 23, the number of observations were identical and the reported performance was within one percent of the results replicated by PwC.⁴⁰⁵ In addition to replicating the carrier-to-carrier data, PwC examined the additional special studies Verizon performed with respect to certain DSL measures.⁴⁰⁶

130. Several commenters challenge the validity of Verizon’s adjustment to official carrier-to-carrier performance data.⁴⁰⁷ Where commenters challenge the comprehensiveness of a third-party evaluation of underlying data or a BOC-applicant’s adjustment to carrier-to-carrier measures, carrier-specific carrier-to-carrier data become an important tool for the Commission to evaluate a BOC’s compliance with section 271. Carrier-specific data underlying the carrier-to-carrier reports are important to this Commission’s section 271 process because they allow competing carriers to compare carrier-to-carrier results or BOC-applicants’ explanations to their own experiences and thus provide us with as complete a record as possible on which to make our decision.⁴⁰⁸ Likewise, where there is no comprehensive third-party evaluation of particular metrics, we strongly suggest that state commissions and applicants enable all parties to have access to the data used to calculate special studies of the BOC’s performance. We find evidence that has been scrutinized in this manner is most persuasive. Accordingly, BOC-applicants may facilitate the development of a full record upon which they may rely to demonstrate compliance with section 271.⁴⁰⁹ In this case, Verizon has provided carrier-specific data underlying carrier-to-

⁴⁰³ See Department of Justice Massachusetts I Evaluation at 15; Rhythms Massachusetts I Comments at 29-30 (quoting KPMG Technical Session Tr. 5185-89). As part of its more general process evaluation, Covad suggests that KPMG observed the installation of 45 xDSL loops. See Covad Massachusetts I Comments at 35.

⁴⁰⁴ Verizon Massachusetts II Ruesterholz/Lacouture Decl. at para. 20; see also *supra* at para. 47.

⁴⁰⁵ See Verizon Massachusetts II Ruesterholz/Lacouture Decl. at para. 20.

⁴⁰⁶ PwC used the carrier-to-carrier guidelines and Verizon’s raw data to replicate Verizon’s DSL performance results in Massachusetts for October. PwC undertook a similar process with Verizon’s October line sharing performance results for New York and Massachusetts based on the January 16th corrected guidelines filed with the New York Commission in compliance with its December 15 order approving the new carrier-to-carrier working group consensus.

⁴⁰⁷ See Rhythms Massachusetts II Comments at 7; Covad Massachusetts II Comments at 7-8; Rhythms Massachusetts I Comments at 29; Covad Massachusetts I Comments at 13; ALTS Massachusetts I Comments at 32; NAS Massachusetts I Comments at 5.

⁴⁰⁸ During the Massachusetts I application, Verizon began the process of submitting carrier-specific data to the Commission.

⁴⁰⁹ In addition, we note that carrier-specific data aided the Massachusetts Department in concluding that Verizon provides nondiscriminatory access to hot cut loops. See Massachusetts Department Massachusetts I Comments at (continued....)

carrier measures and the underlying data used to generate reformulated measures of performance.⁴¹⁰ We discuss competitor challenges to Verizon's performance based on carrier-specific data where relevant below.

b. xDSL-Capable Loops

131. We find that Verizon demonstrates that it is providing xDSL-capable loops in accordance with the requirements of checklist item 4. In analyzing Verizon's showing, we rely primarily on the performance measures and performance data described in prior section 271 orders. We review Verizon's xDSL-capable loop order processing timeliness, the timeliness of Verizon's xDSL-capable loop installation and percentage of Verizon-caused missed installation appointments, the quality of the xDSL-capable loops Verizon installs, and the timeliness and quality of the maintenance and repair functions Verizon provides to competing carrier xDSL-capable loops. We note, however, that we do not rely on data reflecting Verizon's provision of xDSL loops to its separate affiliate to reach our conclusions because Verizon demonstrates checklist compliance with an evidentiary showing of performance to its wholesale xDSL customers.⁴¹¹

132. Verizon has a concrete and specific legal obligation to provide unbundled xDSL-capable loops to competing carriers.⁴¹² Verizon makes available unbundled xDSL-capable loops (including all technically feasible features, functions and capabilities) in Massachusetts through interconnection agreements and pursuant to tariffs approved by the Massachusetts Department.⁴¹³

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290. The availability of carrier-specific data was an important factor in the Commission's prior section 271 approvals. In New York, the Commission relied upon carrier-specific data to find that Bell Atlantic provided nondiscriminatory access to OSS. *See Bell Atlantic New York Order*, 15 FCC Rcd at paras. 166, 175, 181.

⁴¹⁰ Verizon states that it has provided carrier-specific reports beginning in May 2000 to competitors operating in Massachusetts that have requested them. *See Verizon Massachusetts II Lacouture/Ruesterholz Decl.* at para. 17. Verizon has included carrier-specific reports for September, October and November 2000 in its application. *See Verizon Massachusetts II Lacouture/Ruesterholz Decl. App. C.* Going forward Verizon has represented that it will provide carrier-specific reports to those competitors that have requested them by the 25th day of the following month. Further, Verizon is in the process of establishing a secure Website through which competitors will be able to obtain the aggregate performance results and their own individual reports and their Performance Plan reports, along with the underlying data in the first half of 2001. *See Verizon Massachusetts II Lacouture/Ruesterholz Decl.* at para. 17.

⁴¹¹ Verizon's separate affiliate has not been purchasing the same inputs to provide advanced services as unaffiliated competing carriers. Specifically, Verizon's separate affiliate purchases line sharing to provide ADSL service while competing carriers in Massachusetts continue to purchase stand alone, xDSL-capable loops and have only recently begun purchasing line sharing. As a result, Verizon's advanced services separate affiliate is not useful in making a presumption of nondiscriminatory performance.

⁴¹² *See Verizon Massachusetts I Lacouture/Ruesterholz Decl.* at paras. 63, 114.

⁴¹³ *See Verizon Massachusetts I Lacouture/Ruesterholz Decl.* at Exh. B (citing D.T.E. Tariff No. 17, Part B, Section 5).

(i) Order Processing Timeliness

133. To determine whether Verizon is processing orders in a timely fashion, we examine whether it provides competitors with nondiscriminatory access to loop information in a timely manner and whether it returns timely firm order confirmations (FOCs) to competitors.⁴¹⁴

134. *Timely Access to Loop Information.* As described above, we find that Verizon has demonstrated that its pre-ordering OSS provides competitors with access to the same underlying loop information available to Verizon's retail and back office personnel.⁴¹⁵ We also find that Verizon appears to be providing that information within the required time frames.

135. Verizon's performance data reflect that it provides responses to competing carrier requests for loop information in substantially the same time and manner as for itself.⁴¹⁶ The carrier-to-carrier reports contain four pre-ordering metrics that measure Verizon's performance in providing competitors with pre-order access to loop information.⁴¹⁷ Under two of these metrics, Verizon provides performance data for September through December 2000 showing that Verizon is providing timely responses to competitors' pre-order mechanized loop database queries submitted via Verizon's EDI and CORBA interfaces.⁴¹⁸ Verizon, however, has not reported carrier-to-carrier performance data measuring its average response times in conducting pre-order manual loop qualifications and engineering record requests.⁴¹⁹ Instead, Verizon provides data for manual loop qualifications conducted from September through November 2000 under Verizon's existing process through its ordering OSS, showing that between 97 percent and 99 percent of manual loop qualifications were completed within 48 hours.⁴²⁰ Although these data have not

⁴¹⁴ See *SWBT Texas Order*, 15 FCC Rcd at 18499-18501, paras. 286-90.

⁴¹⁵ See *supra* Part V.A.2.c(ii).

⁴¹⁶ See PO-1-06 (Facility Availability, Loop Qualification, EDI and CORBA).

⁴¹⁷ The first two metrics are "PO-1-06 Facility Availability (Loop Qualification) – EDI" and "PO-1-06 Facility Availability (Loop Qualification) – CORBA," both of which measure the timeliness of Verizon's responses to mechanized loop database queries. The second two metrics are "PO-8-01 Average Response Time – Manual Loop Qualification" and "PO-8-02 Average Response Time – Engineering Record Request," which measure the timeliness of Verizon's responses to manual loop qualification and engineering record requests. See *Verizon Massachusetts I Guerard/Canny Decl.* Tab B at 9, 18.

⁴¹⁸ See PO-1-06 for EDI. The performance data for these months show that Verizon consistently responds faster to queries for loop qualification information from the mechanized LiveWire database placed from competitors' application-to-application interfaces than to similar queries placed from VADI's retail pre-ordering interfaces. From October through December 2000, competitors received mechanized loop qualification responses on average within 3.11, 2.92, and 3.02 seconds respectively, as compared to 4.72, 17.26, 11.85 seconds for VADI's retail personnel.

⁴¹⁹ In its reply comments, Verizon explains that it has not reported data for the PO-8-01 and PO-8-02 metrics measuring the timeliness of its responses to pre-order manual loop qualification and engineering record requests, because there are currently no electronic pre-ordering OSS functions for manual loop qualification and engineering record requests. See *Verizon Massachusetts I Guerard/Canny Reply Decl.* at 13.

⁴²⁰ See *Verizon Massachusetts II Lacouture/Ruesterholz Decl.* Tab J. As discussed below, Verizon's performance data also show that it returns to competitors ordering xDSL loops timely firm order confirmations and rejects, which (continued....)

been submitted under the auspices of the Massachusetts carrier-to-carrier reports prepared in accordance with business rules developed collaboratively by Verizon and competitive carriers, we accept them here because they have not been challenged.⁴²¹ Finally, Verizon provides evidence that it is consistently meeting its target of returning loop make-up information to competitors within 24 hours under its interim LFACS process.⁴²² Verizon also states that competitors generally receive this information within 2 hours.⁴²³

136. *Timely Return of Firm Order Confirmations.* We conclude that Verizon's reported performance metrics indicate that it consistently provides timely confirmation notices to competing LECs in Massachusetts for xDSL unbundled loop orders.⁴²⁴ We encourage Verizon to work in the collaborative process to adopt disaggregated performance metrics for xDSL and digital loops, whether pre-qualified or manually qualified.⁴²⁵ As the Commission explained in the

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under Verizon's current manual loop qualification process contain the results of manual loop qualifications. *See id.* at Tab K and Tab L (summarizing Verizon's performance data for September through November 2000 for DSL order confirmation and reject timeliness); *see also infra* at para. 136.

⁴²¹ We note that Verizon has been ordered to begin reporting on these two pre-ordering metrics, in accordance with the guidelines adopted in the carrier-to-carrier working group. As stated above, the availability of carrier-to-carrier reports permits competitors to fully analyze Verizon's performance and evaluate it against the performance data they have collected themselves.

⁴²² *See* Verizon Massachusetts II Reply, App. A, Tab 1, Attach. C (showing 100 percent of LFACS queries receiving responses within 24 hours for February 2001).

⁴²³ *See* Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed April 3, 2001).

⁴²⁴ As the Massachusetts Department concluded, "although [Verizon] includes xDSL orders with other loop orders in the denominator of the relevant metric, based upon our review of [Verizon's] performance data, it appears that [Verizon] returns [xDSL confirmation notices] within the stated interval almost all of the time." Massachusetts Department Massachusetts I Comments at 298. For example, from September through December 2000, respectively, for "Loop/Pre-qualified Complex/LNP" orders, Verizon timely returned 99.68, 99.82, 99.48, and 99.79 percent of confirmation notices for flow-through orders within 2 hours; 97.35, 97.35, 97.27, and 97.88 percent of confirmation notices for orders of less than 10 lines within 24 hours; and 96.90, 99.73, 100.00, and 99.74 percent of confirmation notices for orders equal to or more than 10 lines within 72 hours. Verizon likewise exceeded the 95 percent benchmark for timely return of reject notices during this period. *See* OR-1-02, OR-1-04, OR-1-06, OR-2-02, OR-2-04, OR-2-06. "Pre-qualified Complex" orders encompass orders for pre-qualified xDSL-capable loops, and include specifically orders for pre-qualified 2-wire xDSL and 2-wire digital loops. *See* Verizon Massachusetts I Guerard/Canny Decl. Attach. B at 100. Verizon also appears to have exceeded the 95 percent benchmark for timely return of confirmation and reject notices with respect to manually qualified, 2-wire xDSL loop orders. For example, from September through December 2000, respectively, for "2 Wire xDSL Service" orders, Verizon timely returned 98.75, 98.67, 99.25, and 96.77 percent of confirmation notices, and 98.80, 98.92, 99.38, 97.75 percent of reject notices, for orders of less than 10 lines within 72 hours. *See* OR-1-04 and OR-2-04.

⁴²⁵ In Texas, for example, SBC disaggregated its order confirmation timeliness performance data into separate categories for stand-alone loops, loops ordered with a ported number, digital loops, and xDSL loops. *See id.* at paras. 172, 288. SBC's disaggregated data arose from a Texas Commission proceeding and involved joint efforts by SBC, interested competitive LECs, and the Texas Commission. *See id.* at paras. 286-90. In Massachusetts, beginning with its August 2000 carrier-to-carrier metrics, Verizon has disaggregated manually-qualified, 2-wire xDSL loop ordering performance measures from manually qualified, 2-wire digital loop ordering performance (continued....)

Bell Atlantic New York Order, the “need for unambiguous [xDSL] performance standards and measures has been reinforced by the disputes in [that] record regarding . . . what performance is being measured.”⁴²⁶

(ii) **Provisioning Timeliness**

137. We find that Verizon demonstrates that it provisions xDSL-capable loops for competing carriers in substantially the same time and manner that it installs xDSL-capable loops for its own retail operations. In analyzing Verizon’s provisioning performance for checklist compliance, we continue to rely primarily upon the performance measurements identified in the *Bell Atlantic New York Order* and *SWBT Texas Order*, i.e., missed installation appointments and average completion intervals.⁴²⁷

138. *Percent Missed Installation Appointments.* Recent performance data show that Verizon’s missed appointment measure demonstrates parity performance for competitive LECs.⁴²⁸ Although past performance indicates some statistically significant disparities, the trend
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measures. See Verizon Massachusetts I Guerard/Canny Reply Decl. Attach. D at 7, 22 (metrics OR-1-03-06 and OR-2-03-06). Furthermore, one of the “consensus items” from the New York carrier-to-carrier working group, whose results are likewise to be implemented in Massachusetts shortly, see, e.g., Verizon Guerard/Canny Decl. at para. 15, calls for Verizon to disaggregate further its 2-wire xDSL services ordering metrics into separate measures pertaining to 2-wire xDSL loops and DSL line sharing. See Verizon Guerard/Canny Decl. Attach. A at 2, 7-8 (discussing further disaggregation to line sharing order confirmation and reject timeliness metrics, specifically OR-1-03-06 and OR-2-03-06). Such disaggregation likewise should apply to performance data on reject notice timeliness, as captured in the OR-2 metrics.

⁴²⁶ *Bell Atlantic New York Order*, 15 FCC Rcd at 4123, para. 334.

⁴²⁷ The New York Commission and Massachusetts Department established Verizon’s provisioning of 2-Wire xDSL services as the appropriate retail analogue for competing carrier xDSL loops in the performance measurement for missed installation appointments. Verizon notes, however, that, for purposes of one xDSL measure, the Percent Completed in 6 Days measure, PR 3-10, the retail analogue has been changed to Verizon’s installation of POTS second lines. See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 94.

⁴²⁸ This performance metric is disaggregated to divide Verizon’s missed installation appointments between those requiring dispatch of a technician and those not requiring dispatch. A “dispatch” typically involves sending a Verizon technician “in” to a Verizon central office to provision a particular UNE or “out” into the field to work in the outside plant. To date, competing carriers generally request stand-alone xDSL-capable loops and thus request “dispatch” xDSL loops which require a Verizon technician to perform field work to provision an xDSL-capable loop. Verizon’s retail xDSL provisioning is overwhelmingly “no-dispatch” because its ADSL services are provided through line sharing arrangements. Since filing its original application, Verizon has amended its carrier-to-carrier performance reports to include both dispatch and no-dispatch information in the missed appointments measure. During the initial phase of this proceeding, Verizon was unable to resolve the discrepancy between the average completion interval and percent missed appointments measures for competing carrier no dispatch orders. On December 3, 2000, Verizon offered an explanation for this discrepancy. Verizon “discovered that performance for all unbundled xDSL loops was aggregated in the reported results for PR 4-04, whether or not the orders required a dispatch.” See Letter from Dee May, Executive Director Federal Regulatory, Verizon to Eric Einhorn, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 00-176 (filed Dec. 3, 2000). Since then, Verizon has reported both dispatch and no-dispatch volumes in the percent missed appointment measure for the months of September, October, November and December. Accordingly, the Commission can now rely upon competing carrier carrier-to-carrier data when examining the percent missed
(continued...)

in Massachusetts has improved significantly and, in the months of September, October, November and December, Verizon's performance moved to within approximately two percentage points of Verizon's retail missed appointment rate.⁴²⁹ Thus, the record shows that whatever performance disparities may have existed in the past, they have been narrowed to a small margin.⁴³⁰

139. We find no basis in the record to support NAS' contention that Verizon grants preferential installation appointments to its retail affiliate.⁴³¹ Verizon states that it offers nondiscriminatory access to shorter appointment windows for competitive LECs and Verizon alike.⁴³² Given Verizon's representation that it offers identical installation appointment windows to customers of both competitors and its retail affiliate that have "extenuating circumstances," we emphasize that Verizon is required to apply this policy consistently.⁴³³

140. *Average Completion Interval.* We find that Verizon's average completion interval data for the period September through December show nondiscriminatory treatment. During this period, the average completion interval for orders requiring a dispatch, which captures the vast majority of competing carrier orders, indicates a trend of improving performance and shows that retail performance is, on average, within approximately one-half a day of Verizon's retail affiliate
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appointments metrics to obtain a more accurate dispatch-to-dispatch comparison and therefore a more reliable picture of Verizon's performance.

⁴²⁹ The four month average (September – December) for competing carrier missed appointment rates, for dispatch services was 6.4 percent compared to 4.6 percent for Verizon. Indeed, in November, Verizon provided better service to competitors than its retail affiliate. In the months of October, November and December, the missed appointment rate for dispatch xDSL services for competitors was 3.67, 2.40 and 4.19 percent and the retail rate was 3.18, 4.21 and 2.13 percent, respectively. Verizon's performance in September showed some disparities, which Verizon attributes to the lingering effect of a strike it experienced in August. For September, Verizon missed 12.75 percent of its dispatch installation appointments for competitors compared to 7.13 percent for itself. See PR 4-04 (Provisioning , Two Wire xDSL Services, percent Missed Appointment, Verizon, Dispatch). Verizon responds that its September results were adversely affected by the work stoppage, because orders missed in August but completed in September were recorded as missed appointments in the September performance reports. Verizon performed a study which excludes orders not originally due during the strike, which shows that the adjusted missed appointment rate of 3.79 percent for September is comparable to its October and November results. See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 72 and Attach. V.

⁴³⁰ While the Department of Justice takes issue with isolated xDSL performance measures and the manner in which those measures report Verizon's wholesale performance, it does not specifically criticize the percent missed appointments measure for stand-alone xDSL loops. See generally Department of Justice Massachusetts I Evaluation at 8.

⁴³¹ See NAS Massachusetts II Comments at 5; but see Massachusetts Department Massachusetts I Reply at 86.

⁴³² Verizon states that if a retail customer has "extenuating circumstances and requests a shorter installation appointment window, Verizon will schedule either a morning or afternoon appointment window. Verizon will also schedule a morning or afternoon appointment for a competing LEC customer with extenuating circumstances." Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 38.

⁴³³ Failure to provide nondiscriminatory access to installation appointments at identical windows could subject Verizon to a targeted enforcement action or carrier-initiated complaint. See *infra* Part IX.

and approximately one and one-half days longer than the standard six-day interval established by the Massachusetts Department.⁴³⁴ The average completion interval for Verizon retail during the period September through December is also approximately one day longer than the standard interval.⁴³⁵ Verizon argues that these results show nondiscriminatory treatment and any average completion interval disparities that remain should be discounted because these results are skewed by competing carrier behavior. Specifically, Verizon asserts that orders which were not prequalified (which have a 9-day interval) and orders which request installation dates outside of the standard interval skew the carrier-to-carrier results.⁴³⁶

141. Although we recognize that the average completion interval as reported by the carrier-to-carrier measure slightly exceeds the standard interval adopted by the Massachusetts Department, we note that Verizon's performance has improved over the period September through December while the number of competitor orders has remained consistent.⁴³⁷ This

⁴³⁴ The 4 month (September – December) average for competing carrier dispatch orders was 7.3 days compared to 6.94 days for Verizon. In the months of September, October, November and December Verizon completed no-dispatch competing carrier orders in 9.7, 7.75, 7.3 and 6.7 days compared to 11.4, 7.63, 5.2 and 6.3 days for Verizon. See PR 2-02 (Provisioning, Two Wire xDSL Services, Average Interval Completed, Total Dispatch). While the September results for this measure appear to be affected by the strike, Verizon states that during the period September through November 2000, the average completion interval to provision DSL loops for competitors where a dispatch was required averaged 8.32 days, while Verizon's retail ADSL orders that likewise required a dispatch were provisioned within an average of 8.48 days. Verizon avers that consistent with the relevant business rules, this measure reports the time from Verizon's receipt of a valid service order to actual work completion, and uses the same measurement points for both retail and wholesale orders. See Verizon Massachusetts II Guerard/Canny Decl. Attach. B, at para. 42; Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 75.

⁴³⁵ See PR 2-02 (Provisioning, Two Wire xDSL Services, Average Interval Completed, Total Dispatch).

⁴³⁶ See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 75. In its original application, Verizon argued that its recalculated results - which exclude manually qualified loops - for average completion interval also show parity. See Verizon Massachusetts I Guerard/Canny Decl. at para. 79 and Attach. K. Approximately half of the orders, according to Verizon, were pre-qualified, while the remainder required manual loop qualification. The results of this study show that "[t]he average interval completed for pre-qualified xDSL loops was 6.46 days compared to 6.69 days for retail in June and 5.40 days compared to 5.93 days for retail in July." See Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 101. Covad responded to Verizon's study questioning its methodology and results. See Letter from Jason Oxman, Senior Governmental Affairs Counsel to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 (filed November 7, 2000) (Covad Nov. 7 *Ex Parte* Letter).

⁴³⁷ Competitor order volumes captured in the average completion interval, PR 2-01/2-02 peaked in October 2000 with 934 orders and have remained well-above 600 orders per month for the last four months. See PR 2-01/2-02 (Provisioning, 2-Wire xDSL Services, Average Interval Completed, Total Dispatch, Total No-Dispatch). Rhythms argues that Verizon's contention that VADI also receives service outside the standard interval is no response to Verizon's late wholesale performance for unaffiliated competitive LECs. Rhythms states that "it makes no difference to Rhythms that it received "parity" with Verizon's retail service when "parity" means that Rhythms received its loops two days later than the standard interval, an interval Rhythms notes is already an unnecessarily long period of time. See Rhythms Massachusetts II Comments at 11-12 and Williams Supplemental Declaration at para. 21. CIX argues that the Massachusetts Department's six-day interval was defined through a "long and thorough regulatory process" and Verizon should be accountable for failing to meet that interval for competitive LEC orders. CIX Massachusetts II Comments at 22.

improving trend and the competitively insignificant disparity between competitor and Verizon completion intervals persuades us that Verizon's technicians have gained sufficient expertise and operational readiness to adjust to the growth of competition in Massachusetts.⁴³⁸ To evaluate Verizon's provisioning timeliness, we look to the totality of the evidence presented to us. It is based on this totality and specifically, the measures the Commission has relied upon in the past, that we conclude that Verizon's provisioning timeliness performance offers competitors a meaningful opportunity to compete.

142. Although Verizon and some commenters urge us to rely on other measures, we need not do so in this case because Verizon has demonstrated compliance with this aspect of our loops analysis on the basis of the measures the Commission has relied upon in previous section 271 orders. We decline to rely upon the percent on-time measure supplied by Verizon⁴³⁹ or percent completed within 6 days measures supplied by competitors,⁴⁴⁰ because we do not have

⁴³⁸ The Department of Justice recognizes that Verizon's on-time performance is "improving" but notes that it falls short of the 95 percent on-time benchmark. Department of Justice Massachusetts II Evaluation at 9.

⁴³⁹ Verizon supplements its affirmative showing by arguing that it provides xDSL loops when competing carriers request them and asks us to consider, in addition to the average completion interval, Verizon's performance under a different metric which measures percent "on-time" installation. See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 66. Verizon claims that when facility misses are included in the results, Verizon's performance, when adjusted to remove the impact of the strike, is approximately 85 percent on-time in October and in November it is approximately 90 percent on-time. Verizon's removal of strike-affected orders from these measures for September and October 2000 improves Verizon's reported performance somewhat (from 75.7 to 86.6 percent). See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 69 and Attach. S. Verizon's final data presentation of the revised on-time measure, which excludes orders for which Verizon cannot provide a loop and adjusts for strike-affected orders, shows on-time performance that exceeds the 95 percent standard in November 2000. See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 66 and Attach. R.

⁴⁴⁰ Competing carriers contest Verizon's claim that it provides xDSL-capable loops on time and point to yet another measure of on-time performance, the percentage of xDSL loops completed within the standard interval of 6 days. See PR 3-10 (Provisioning, 2-Wire xDSL Services, percent Completed in 6 Days). In September, October, November and December Verizon completed 62.1, 64.6, 63.4 and 72.9 percent of competing carrier xDSL loops within 6 days. In the same months, Verizon completed 65.5, 82.3, 87.8, and 87.2 percent of xDSL loops within 6 days for itself. See Rhythms Massachusetts I Comments at 28; Department of Justice Massachusetts II Evaluation at 9 n.2; CIX Massachusetts II Comments at 22. USIAPA argues that the real provisioning interval is, on average, 25 days between the first FOC and actual installation because some 24 percent of orders in Massachusetts receive sliding FOCs. See USISPA Massachusetts II Reply at 8. During Verizon's original proceeding, Verizon and competing carriers reached consensus to eliminate the retail analogue and instead set a 95 percent benchmark standard for the percent completed within 6 days measure. Consensus was also reached to exclude orders that were not pre-qualified, orders requesting intervals outside of the standard interval and orders missed for lack of facilities. See Verizon Massachusetts II Lacouture/Ruesterholz Reply. Decl. at paras. 77-80. Verizon engaged a consultant, Lexecon, to recalculate the reported results for this measure consistent with the exclusions discussed above and to adjust this measure for orders affected by the strike. When Verizon's performance for this measure is calculated in accordance with the new business rules, Verizon argues it provides 84 percent of xDSL loops between September and November with six days. This study shows that during the September through November period, 95 percent of the competitor orders not completed within the standard six day installation interval are completed within 7 days. The Lexecon study shows that under the revised PR 3-10 measure, in September, 89.12 percent of competitive LEC orders were completed within 6 days; 80.00 percent were completed within 6 days in October and 82.24 percent were completed within 6 days in November. Reply Appendix, Tab 4, Joint Reply Declaration of Robert H. Gertner and Gustavo E. Bamberger. See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 82. Competitors (continued....)

enough data or experience with them for determining a BOC's compliance with section 271.⁴⁴¹ Moreover, commenters have offered no persuasive reason to depart from Commission practice of placing primary reliance upon the percent missed appointment or the average completion interval measures. Accordingly, we view the on-time measures cited by Verizon and the percent completed within 6 days measure cited by competitors as additional diagnostic data to evaluate Verizon's contention that it provides xDSL-capable loops in a timely manner.⁴⁴² We find that these measures support rather than refute the measures the Commission relied upon in the past and confirm our view that the missed appointment and average completion interval measures provide an accurate description of Verizon's performance for competitors.

(iii) Provisioning Quality

143. We conclude that Verizon provides xDSL loops to competing carriers at a level of loop installation quality that meets the requirements of checklist item 4. In analyzing installation quality we continue to rely primarily upon the measure identified in the *Bell Atlantic New York Order* and *SWBT Texas Order* – percent installation troubles within 30 days.⁴⁴³ Assessing the quality of loop installation is important because advanced services customers that experience substantial troubles in the period following installation of an xDSL-capable loop are unlikely to remain with a competing carrier.⁴⁴⁴

144. As an initial matter, we reject Verizon's request that we depart from relying upon certain metrics the Commission has relied upon in the past. We conclude that Verizon's use of the total DSL trouble report rate as a substitute for the percent trouble within 30 days does not measure the quality of Verizon's installation performance.⁴⁴⁵ In fact, it is not even classified in the carrier-to-carrier reports or the Commission's past orders as a provisioning metric, but rather, as a measure of maintenance and repair activities. Verizon has not persuaded us that the metric

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respond that even Verizon's recalculated results show that that a substantial number of orders are completed outside the standard interval. Rhythms Massachusetts II Comments at 11-12; CIX Massachusetts II Comments at 22.

⁴⁴¹ Furthermore, by some estimates, 83.77 percent of all DSL orders are excluded from the percent completed within 6 days measure. See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 84. We note that the Commission has not previously relied upon either the on-time measure cited by Verizon nor the percent completed within 6 days metric cited by competing carriers. Data supporting the 6-day measure became available for the first time in July 2000 and data supporting the on-time measure became available in June. The Massachusetts Department did not initially evaluate the percent completed on time measure relied upon by Verizon and also did not evaluate the percent completed with 6 day measure cited by competing carriers.

⁴⁴² For example, when the percent completed within 6 days results are examined in conjunction with the average completion interval, it is not surprising that approximately 80 percent of orders are completed within six days because the average completion interval is slightly more than 6 days.

⁴⁴³ The Commission stated in the *SWBT Texas Order*, that we consider trouble reports within 30 days as "indicative of the quality of network components supplied by the incumbent LEC." *SWBT Texas Order*, 15 FCC Rcd at 18504-05, para. 299.

⁴⁴⁴ *SWBT Texas Order*, 15 FCC Rcd at 18504-05, para. 299.

⁴⁴⁵ See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 86.

for trouble reports within 30 days of installation is any less probative of installation quality in the factual context of this application than it was in the previous applications wherein the Commission relied on this metric. Specifically, we find that the percent troubles within 30 days measure is more probative of installation quality than the total trouble report rate which measures all xDSL-lines in service throughout Verizon's network, not lines recently installed.⁴⁴⁶

145. During this proceeding, the New York Commission and the Massachusetts Department accepted a consensus revision to the trouble report within 30 days measure to control for certain carrier business practices.⁴⁴⁷ Under the new consensus measure, the metric will include only trouble reports that are submitted within 30 days of installation by competitors that participate in acceptance testing.⁴⁴⁸ The revised definition reflects the fact that properly conducted acceptance testing could identify some installation quality problems that could be resolved at the time the competitive LEC and Verizon conduct the acceptance test. When Verizon presents data that control for the exclusions adopted by the consensus revision, the performance dissimilarities are reduced or eliminated entirely.⁴⁴⁹ Competitive LECs question

⁴⁴⁶ See Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 (filed Nov. 14, 2000); see also Letter from Edward D. Young, III, Verizon, to William E. Kennard, Chairman, Federal Communications Commission, CC Docket No. 00-176 (filed Dec. 1, 2000).

⁴⁴⁷ The New York Commission adjusted the retail analogue to compare Verizon's performance for competitors with Verizon's own retail POTS service rather than its DSL service because Verizon's DSL service is almost always provided over a loop that is already working and delivering dial tone, whereas retail POTS will involve providing service over a loop that is not already working. Thus, because stand-alone loops better approximate the manner in which Verizon provisions stand alone xDSL-capable loops to competitors, it was selected as the appropriate retail analogue.

⁴⁴⁸ Acceptance testing is a joint project whereby after installation, Verizon contacts competitors so the loop can be tested for improper voltages, or other impediments to xDSL service, such as ringers and load coils. Under established acceptance testing procedures, Verizon "shorts" a loop enabling competitors to verify continuity length and to ensure that the loop meets a competitor's requirements. Competitors then provide to Verizon a confirmation indicating a loop is in working order, or, in the alternative, reject the loop as non-working.

⁴⁴⁹ Verizon engaged Lexecon to recompute the I-code rate (trouble reports within 30 days) presented in the official carrier-to-carrier data, for September through November 2000 using the new consensus method. Lexecon found that the performance disparity between competitive LEC and retail I-code rate was eliminated in September and substantially reduced – by 51 percent in October (from 8.2 to 4.34 percentage points); and by 74 percent in November (from 4.96 to 1.29 percentage points). Verizon contends that the "weighted average I-code rate under the new consensus rules for September through November 2000 was 4.78 for [competing carriers] and 3.3 for Verizon's retail customers." Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 94. Verizon goes on to adjust its performance results to include troubles that could have been discovered by a properly conducted acceptance test. Under this adjustment the competitive LEC I-code rate was 3.12 percent in September 2000; 6.08 percent for October 2000, and 4.19 percent for November 2000. See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 95 Attach. Z. The weighted average for this period is 4.28 percent for competitive LECs and 3.30 percent for Verizon retail. *Id.* Verizon performs a third level of analysis: after quantifying the I-code rate under the revised measure recently approved by the New York Commission, and then excluding those I-codes that could have been discovered by a properly conducted acceptance test, Verizon shows that the gap between competitive LECs and retail I-code rate in September and November 2000 is eliminated and reduced to less than one percent in October 2000. The adjusted rate is 1.43 percent for September 2000, 4.04 percent for October 2000 and 1.94 percent for (continued....)

whether Verizon may appropriately exclude some of these trouble reports and have used carrier-specific data supplied by Verizon to argue that Verizon does not provide loops at an acceptable level of quality.⁴⁵⁰

146. We agree with the Department of Justice that Verizon's adjustments to the data are justified if an inference could reliably be made when the type of trouble reported: (1) could not occur post-acceptance, but rather must have existed at acceptance; and (2) would consistently be detected by the joint testing methods employed.⁴⁵¹ The issue of whether competing carriers can consistently detect loop quality problems is disputed by Covad, Rhythms and NAS.⁴⁵² Covad argues that carrier-specific data show that it experiences installation quality troubles which are over four times higher for its orders compared to Verizon retail.⁴⁵³ Verizon responds that when

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November 2000 compared to the weighted average during this period of 2.36 percent for competitive LECs and 3.30 percent for Verizon. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 96 and Attach. AA.

⁴⁵⁰ *See* Rhythms Massachusetts II Williams Decl. para. 26; Covad Clancy Decl. para. 10-23; *see also* USISPA Massachusetts II Reply at 8. The Department of Justice questions the validity of the performance data and contends that Verizon's exclusion methodology infers improper acceptance testing from the nature of the trouble reported. *See* Department of Justice Massachusetts II Evaluation at 10 n.39. The Massachusetts Department discounts this measure entirely and questions whether the measure accurately captures Verizon's ability to provision quality loops. Massachusetts Department Massachusetts II Evaluation at 30. We agree with the Department of Justice that the calculation of the revised measure appears to be flawed. While trouble reports from carriers that do not conduct acceptance tests are excluded from the numerator of this measure, orders from such carriers are not excluded from the denominator. The result is to inappropriately skew the trouble report rate. When these orders are excluded from the denominator, the reported trouble rate is higher for October and November 2000 under the revised measure than as reported under the original carrier-to-carrier measure. The Department of Justice has recalculated PR 6-01 to control for this anomaly. Pursuant to this recalculation, for the period September to November, competitive LECs experienced 6.99 percent troubles within 30 days. *See* Department of Justice Evaluation at 10-11, Exh. 1.

⁴⁵¹ *See* Department of Justice Massachusetts II Evaluation at 11 n.39. Verizon responds that "while it is possible for a DSL loop to break after the loop is installed, that is a rare occurrence." Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 100.

⁴⁵² *See* Covad Massachusetts II Comments at 11; NAS Massachusetts II Comments at 11; Rhythms Massachusetts II Comments at 18.

⁴⁵³ In its comments, Covad reviewed 8 trouble tickets in the month of November to refute Verizon's argument that Covad knowingly accepted non-working loops. Covad contends that these loops were accepted because: (1) the Verizon technician was not at the NID when the test was performed; (2) Verizon failed to provision the loop to the appropriate NID; or (3) the loops became non-working after Covad accepted it. *See* Covad Massachusetts II Reply at 9. On reply Covad surveyed its acceptance testing logs for all of the I-codes reported in November. This survey showed that of the 25 I-codes which Verizon excluded from its adjusted performance measure, none of the installation quality troubles could have been discovered at the time of acceptance and all of these installation quality troubles were properly addressed as maintenance and repair issues. Covad argues that in many cases its records show that loops were much shorter at the time of acceptance testing than when repaired by Verizon, demonstrating that Verizon did not test the full loop length during acceptance testing. *See* Covad Massachusetts II Reply at 10. Verizon responds to Covad's initial survey of I-codes by showing that in two cases, Covad's test equipment was not available to perform an acceptance test and in two other instances, Covad's acceptance test failed to identify the presence of a load coil and half ringer. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 91. In three other instances, Verizon states that Covad tested and accepted a loop that Verizon identified as defective; (continued...)

an adjustment is made for Covad's failure to properly conduct acceptance testing its I-code rate falls to below retail.⁴⁵⁴ Verizon forwards similar carrier-specific responses to Rhythms and NAS.⁴⁵⁵

147. We find that Verizon is making loops available at substantially the same level of quality as Verizon provides to itself. In reaching this conclusion we rely upon data that are adjusted to comply with the recently-adopted consensus revision to the troubles with 30 days measure.⁴⁵⁶ During the period September through November 2000, competitive LECs experienced installation quality troubles at a rate of 7.0 percent compared to 2.3 percent for Verizon retail.⁴⁵⁷ Thus, the adjusted data narrow the facial disparity between Verizon's performance to its competitors compared to itself. Moreover, we also note that recent performance shows that Verizon has improved its ability to provide competitors with xDSL-capable loops at acceptable levels of quality.⁴⁵⁸ We find, therefore, that the adjusted data coupled

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Covad's technician went to the wrong demarcation point and finally, Covad could not locate the acceptance testing data on the loop in question in its database. *See id.*

⁴⁵⁴ When Verizon controls for installation quality issues that could have been discovered during acceptance testing Covad's rate is at parity for the period September through November. *Id.* at para. 83.

⁴⁵⁵ Rhythms claims that it reviewed the list of I-codes excluded by Verizon for acceptance testing reasons and states that "its records did not match Verizon's." Rhythms Massachusetts II Comments at 18. Verizon states that Rhythms did not provide any information for a number of the Rhythms I-codes excluded by Verizon. Verizon shows that some of the I-codes contested by Rhythms were not excluded by Verizon, therefore no downward adjustment to the competitive LEC I-code rate was taken. Finally, of the remaining I-codes submitted by Rhythms, Verizon's records show that these loops had ringers on the lines and should have been discovered during acceptance testing; these records contain inconclusive information or contained no relevant data or finally, the I-code was not related to Rhythms' failure to properly perform acceptance testing. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 94. Verizon performed a similar analysis for NAS adjusting its I-code rate to below retail in the period September through November. *See id.* at paras. 84-85.

⁴⁵⁶ We also agree with the Department of Justice that Verizon's practice of excluding trouble reports from carriers that do not conduct acceptance testing from the numerator but not the denominator is inappropriate and will result in inappropriately low trouble report rates. *See* Department of Justice Evaluation at 10. In this circumstance, where the carriers have agreed to revise a measure going forward, we believe it is reasonable to include the results of the revised measure to adjust Verizon's performance as officially reported.

⁴⁵⁷ *See* Department of Justice Massachusetts II Evaluation at 10, Attach. 1.

⁴⁵⁸ The individual results for competitive LECs performing acceptance testing for September, October and November were 4.13 percent, 11.18 and 8.22 percent compared to 1.93 percent, 2.09 percent and 2.81 percent for Verizon retail over the same period. *See id.* The unrevised carrier-to-carrier data confirm this positive trend. Even as volumes have remained substantial, the percent trouble within 30 days measure as originally reported moved from a high in October 2000 of 11.1 percent to 7.8 percent in November and 5.8 percent in December, reducing the disparity to approximately 3 percent in the most recent month we consider. In September, competitive LEC trouble reports within 30 days were 5.4 percent. The comparable numbers for Verizon retail were 1.93, 2.09, 2.81 and 2.79 percent in September, October, November and December respectively. *See* PR 6-01 (Provisioning, 2-Wire xDSL Services, percent Installation Troubles Reported Within 30 Days). The four month (September - December) average for competitive LEC trouble reports within 30 days, according to the unrevised carrier-to-carrier reports filed with the application, was 7.3 percent compared to 2.4 percent for Verizon.

with the improving trend in Verizon's performance are sufficient for us to conclude that Verizon is installing loops in a nondiscriminatory manner.

148. We are unable to quantify exactly the effect of Verizon and competitor adjustments to the data because of limited factual disputes.⁴⁵⁹ We note however, that the Massachusetts Department has conducted a comprehensive and detailed factual reconciliation of I-codes for the month of November 2000 with the participation of Covad and Verizon.⁴⁶⁰ This inquiry has yielded several process improvements that are designed to improve Verizon's installation quality results.⁴⁶¹ We welcome the Massachusetts Department's participation in addressing Verizon's acceptance testing process and are encouraged by the improvements to this process.⁴⁶² We encourage carriers to bring issues such as these to the attention of state commissions so that factual disputes can be resolved before a BOC applicant files a section 271 application with this Commission.

149. We find that recent carrier-to-carrier installation quality measures show that Verizon has improved significantly its ability to provide competitors with xDSL-capable loops at

⁴⁵⁹ We note that Verizon's adjustment to the data lower the I-code rate to less than 7 percent and competitive LEC challenges to Verizon's adjustment raise the I-code rate; but in no case do competitor challenges to Verizon's adjustment raise the I-code rate above the 7 percent level presented by the revised carrier-to-carrier measure as calculated by the Department of Justice. See Letter from Paul Afonso, General Counsel, Massachusetts Department of Telecommunications and Energy to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 21, 2001) (*Massachusetts Department Reconciliation Letter*).

⁴⁶⁰ On March 15 2001, at the request of the Commission's staff, the Massachusetts Department, together with Covad and Verizon, undertook a review of the disputed Covad orders. After conducting its review, the Massachusetts Department submitted a list of process improvements developed by Verizon and Covad during this review.

⁴⁶¹ Under the auspices of the Massachusetts Department, Covad and Verizon have agreed to several modifications or additions to the existing acceptance testing process. Verizon has agreed to implement a process requirement that its technicians will "cut down" xDSL loops at the NID before the final cooperative test is performed. Additionally, Covad has agreed to insert into its acceptance testing script a question to determine whether the Verizon technician is testing through the network interface device. Second, to reduce technician confusion about where in Verizon's outside plant the cooperative test was performed, the carriers have agreed to enhance the demarcation point information procedures by establishing a three-fold process whereby the Covad technician can: (1) verify before dispatch, that the loop was located and tagged by the Verizon technician during cooperative testing; (2) access Verizon's demarcation information electronically before dispatching to the field; and (3) call Verizon from the field if the technician cannot locate the demarcation point. Third, Verizon has committed to make it clear to its technicians that they should remove all half ringers on stand-alone xDSL loops. Fourth, Covad and Verizon have agreed to implement a process for obtaining a final acceptance test when an earlier acceptance test has failed and to educate their technicians about interim loop testing versus final acceptance testing. See Massachusetts Department Reconciliation Letter at 8.

⁴⁶² We note that the Department of Justice did not have the benefit of the Massachusetts Department's reconciliation of Verizon's I-codes. See Department of Justice Massachusetts II Evaluation at 15 n.61 (noting that the Department of Justice's evaluation is "necessarily based solely on the evidence in Verizon's application" and stating that "[r]eply comments and *ex parte* submissions undoubtedly will provide additional evidence concerning the questions that have been raised about Verizon's pre-application DSL performance.").

acceptable levels of quality.⁴⁶³ Moreover, we find that Verizon's remedial efforts to improve the stand-alone xDSL loop provisioning and acceptance testing process, in addition to those agreed to in the context of the Massachusetts Department's reconciliation proceeding, are likely to reduce competitive LEC installation quality impairments in the future. Starting in January 2001, Verizon will tag DSL loops at both the NID and the cross-connection box with special services markers to indicate to Verizon technicians that the loop is in use for data services and should not be used to serve another customer.⁴⁶⁴ Verizon is also engaged in on-site visits to competitive LEC testing centers to discover ways to improve the acceptance testing process.⁴⁶⁵ Verizon has committed to providing competitive LECs with detailed information on their I-codes to diagnose acceptance testing issues and reconcile data.⁴⁶⁶ Verizon has also agreed to a trial of "sync" testing to enable Verizon technicians, at the time of testing, to determine whether the competitive LEC can synchronize its DSLAM with customer premises modems.⁴⁶⁷ Finally, Verizon is working with a competitive LEC to make access to its testing equipment available to Verizon through a voice response unit.⁴⁶⁸ We emphasize that Verizon's installation quality performance is minimally acceptable -- even under our flexible approach of reviewing Verizon's performance in light of the totality of the circumstances.⁴⁶⁹

(iv) Maintenance and Repair

150. We agree with the Massachusetts Department that Verizon demonstrates that it provides maintenance and repair functions for competing carrier xDSL-capable loops in a manner sufficient to meet the requirements of checklist item 4.⁴⁷⁰ In analyzing Verizon's maintenance and repair functions we continue to rely primarily upon the mean time to repair and repeat trouble rate measures identified in the *Bell Atlantic New York* and *SWBT Texas Orders*.

151. *Mean Time to Repair.* Like the Massachusetts Department, we find that Verizon offers nondiscriminatory access to maintenance and repair functions. During the period from

⁴⁶³ We therefore rely upon the Massachusetts Department's conclusion that "the information contained in VZ-MA's supplemental application only affirms our earlier conclusion that VZ-MA provides [competing carriers] an installation quality sufficient to afford them a meaningful opportunity to compete." Massachusetts Department Massachusetts II Comments at 29-30; *see also SWBT Kansas/Oklahoma Order* at para. 191 (finding that SWBT generally met 6 percent installation quality benchmark and noting improved performance trend).

⁴⁶⁴ *See Verizon Massachusetts II Lacouture/Ruesterholz Decl* at para. 110.

⁴⁶⁵ *See id.* at para. 110.

⁴⁶⁶ *See id.* at para. 109.

⁴⁶⁷ *See id.* at para. 118.

⁴⁶⁸ *See id.* at para. 109.

⁴⁶⁹ Any future evidence of significant and sustained deterioration may result in a targeted enforcement action or carrier-initiated complaint under the Act. *See also infra* Part IX.

⁴⁷⁰ *See Massachusetts Department Massachusetts II Comments* at 31.

September through December, the mean time to repair competing carrier troubles on xDSL loops was 29.4 hours while the comparable number for Verizon was 21.59 hours, an approximately 8 hour difference. Although this disparity is statistically significant, we note that, in December, Verizon repaired competitive LEC lines in 19.1 hours compared to 17.8 hours for its retail affiliate, bringing Verizon into near facial parity with its retail operation.⁴⁷¹ Accordingly, the most recent month we consider indicates that Verizon has virtually eliminated this performance disparity.⁴⁷² We do not find, therefore, any systematic discrimination in Verizon's maintenance and repair functions offered to competitors.⁴⁷³

152. Verizon contends that the data reflecting the measurement of mean time to repair for xDSL loops provide a misleading indication of its performance and thus the Commission should look behind the measures for additional evidence of nondiscrimination. Verizon claims that it is much more likely to be unable to access competing carriers customers' premises to repair xDSL loops than access to the premises of its own retail customers⁴⁷⁴ and that competing carriers are less willing to schedule weekend appointments than are Verizon's retail customers.⁴⁷⁵ Both of these factors, Verizon claims, lengthens the time needed to repair competing carrier

⁴⁷¹ Verizon's missed repair appointment performance is likewise at parity. During September through November 2000, Verizon met approximately 85 percent of repair appointments for competitive LECs compared to approximately 86 percent for retail. MR 3-01 (Maintenance and Repair, 2-wire xDSL Services, percent Missed Repair Appointment – Loop); *see also* Verizon Massachusetts II Lacouture/Ruesterholz Decl. Attach. EE. Verizon concludes that during September through November 2000, nearly 58 percent of troubles reported within 30 days of the installation of a DSL loop were closed with no trouble found. *See id.* at para. 105 and Attach. BB. This number is consistent with Verizon's analysis for the period May through July. *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 78, 104 & Attach. I (discussing the effect of failure to isolate troubles on UNE POTS repair metrics).

⁴⁷² Indeed, we take additional comfort in Verizon's January performance which indicates that this trend has continued. In fact, Verizon performs better for competitive LECs than for itself in January. The January mean time to repair competitive LEC xDSL loops was 20.82 hrs compared to 23.80 hrs. for Verizon. *See* MR 4-02 (Maintenance, 2-Wire xDSL Services, Mean Time to Repair – Loop Trouble).

⁴⁷³ Should Verizon's future performance reverse this positive trend, Verizon risks a targeted enforcement action or carrier-initiated complaint under the Act. *See infra* Part IX.

⁴⁷⁴ Verizon Massachusetts II Application at 25; Verizon Massachusetts II Lacouture/Ruesterholz Decl at para. 106. During April, May, June and July 2000, Verizon claims that competing carriers provided only "limited access" to end users for 58.9 percent of competing carrier Complex loop repair requests, compared to 3.4 percent on Verizon's Complex loop retail repair requests. *Id.* at para. 106 & Attach. N.

⁴⁷⁵ Verizon contends that a relatively small disparity in the mean time to repair measure exists during September, October and November and that there is some variation among competitive LECs regarding the rate at which they accept weekend repair appointments. *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 119 Attach. GG. Verizon performed an analysis of the weekend repair appointment exclusion and concluded that the rejection of weekend repair appointments added approximately 4.35 hours to the average repair interval for competitive LEC loops, reducing the 9 hour difference to approximately 4-5 hours of disparity, an amount Verizon contends, that is not competitively significant; *see also* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para 119 Attach. GG. *See also* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at 73-74 & Attach. G (discussing the effect of not accepting weekend repair appointments on the UNE POTS repair metrics.)

xDSL loops. Covad and Rhythms specifically deny that they avoid weekend repair appointments and otherwise criticize Verizon's maintenance and repair functions.⁴⁷⁶

153. We exercise our discretion to afford Verizon's adjusted mean time to repair data little weight.⁴⁷⁷ Because the official carrier-to-carrier data provide sufficient evidence for the Commission to conclude that Verizon provides nondiscriminatory access to maintenance and repair functions, we need not resolve the factual dispute presented by commenters regarding refused weekend repair appointments. We recognize and encourage BOCs to conduct root cause analysis of their performance and will appropriately credit explanations of disparities in the performance measures. We believe, however, that such explanations are best used to improve processes and carrier-to-carrier reporting and that they are most useful when surfaced in state proceedings. We note that the development of performance measures is an iterative process and we encourage competitive LECs and Verizon to continue to specifically improve the mean time to repair measure to provide a more accurate indicator of performance.⁴⁷⁸

154. *Repeat Trouble Rate.* We conclude that Verizon provides competitors with maintenance and repair services at an acceptable level of quality. Verizon's repeat trouble report data show that competing carriers infrequently experience problems after a repair visit for a trouble on DSL loops. This measure shows that competing carriers experience fewer repeat troubles than Verizon's retail affiliate.⁴⁷⁹ For the period September through December, competing carriers experienced 16.3 percent repeat trouble report rates compared to 21.5 percent

⁴⁷⁶ See Rhythms Massachusetts I Comments at 31-32; See Letter from Dhruv Khana, Executive Vice President and General Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176, at 8 (filed Dec. 5, 2000); see also Covad Massachusetts I Comments at 20-22 (stating that Verizon adds to the "no access" problem by assigning "all day" appointment windows); Network Access Solutions Massachusetts I Comments at 3-4 (same). Rhythms Massachusetts I Comments at 32. Covad specifically notes that an apparent increase in competing carrier "no access" situations is explained by the fact that Verizon's schedules retail repair appointments in smaller windows than for competing carriers. The Massachusetts Department was unable to comment on Covad's alleged unsuccessful attempt to shorten repair windows offered by Verizon to competing carriers. See Massachusetts Department Massachusetts I Reply at 86. On reply, Verizon states that it will grant morning or afternoon appointments for retail customers if they have extenuating circumstances and it will do the same for competing carriers. Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl. at 33 (emphasis added).

⁴⁷⁷ See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para 119 Attach. GG.

⁴⁷⁸ The Department of Justice notes that the mean time to repair measure is likely to be disputed in the future and, if the measure is left unrevised, it may create an analysis that is biased toward finding parity. "Excluding observations involving competitive LEC refusals of weekend appointments makes Verizon's performance for competitive LECs look stronger, moving the apparent balance toward parity. Excluding observations involving refused weekday appointments – an adjustment Verizon did not make – could make Verizon's performance as to its retail unit or separate affiliate look better, moving the apparent balance away from parity." Department of Justice Massachusetts II Evaluation at 12.

⁴⁷⁹ The Percent Repeat Trouble Reports metric, MR 5-01 shows that the 4-month (September – December) average for competing carriers is 16.3 percent and 21.5 percent for Verizon. For the months of September, October, November and December, competing carrier repeat trouble rates were 19.3, 15.4, 16.1 and 13.4 percent. For the same months, Verizon repeat trouble rate was 22.7, 20.3, 22.6 and 16.5 percent. See MR 5-01 (Maintenance, 2-Wire DSL Services, percent Repeat Trouble Reports within 30 Days).

for Verizon.⁴⁸⁰ Thus, during the four recent months we consider, Verizon provides better service to competitors in this area than it does for its retail affiliate.⁴⁸¹

c. Subloops

155. We find that Verizon provides nondiscriminatory access to subloops consistent with the requirements of section 271 and the *UNE Remand Order*.⁴⁸² The Commission's *UNE Remand Order* requires incumbent LECs to provide competitors access to subloop elements at any technically feasible point to ensure that "requesting carriers [have] maximum flexibility to interconnect their own facilities" with those of the incumbent LEC.⁴⁸³ Competitors take issue with Verizon's subloop offering claiming that Verizon limits subloops to "metallic distribution pairs/facilities;" restricts competitor subloop access to interconnection at the feeder distribution interface (FDI); and refuses to allow competitors to collocate equipment inside remote terminals for purposes of accessing subloops.⁴⁸⁴

156. We find that, consistent with our rules, Verizon allows collocation inside remote terminals on a space-available basis.⁴⁸⁵ Where space is unavailable, competitive LECs may deploy an adjacent cabinet to access subloops through an interconnecting cable.⁴⁸⁶ Furthermore, Verizon does not limit competitive LEC access to subloops to only metallic distribution facilities. Rather, Verizon allows requesting carrier to obtain access to subloop facilities regardless of the transmission medium.⁴⁸⁷ Finally, Verizon has demonstrated that competitive

⁴⁸⁰ See *id.*

⁴⁸¹ The average repeat trouble report rate for the period September through December is 16.3 for competing LECs compared to 21.5 for Verizon retail. See MR 5-01 (Maintenance, 2-Wire DSL Services, percent Repeat Trouble Reports within 30 Days). We take additional comfort in Verizon's network trouble report rates for DSL loops in Massachusetts. These results further support our conclusion that Verizon provides competing carriers with maintenance and repair service in substantially the same time and manner as Verizon's own retail operations. Competing carriers experienced a trouble report rate of 1.9 percent for the months of September through December 2000 while Verizon experienced trouble report rates at a comparable 1.3 percent rate. See MR 2-02/2-03 (Maintenance, 2-Wire xDSL Services, Network Trouble Report Rate, Loop; Network Trouble Report Rate, Central Office).

⁴⁸² Although nondiscriminatory access to subloops technically falls under checklist item 2, we treat subloops in this section because it is logically related to the provision of unbundled loops.

⁴⁸³ *UNE Remand Order* at para. 206. The Commission held that technically feasible points of interconnection near a customer premises could include poles or pedestals, the NID or the minimum point of entry (MPOE), the feeder distribution interface (FDI) or a remote terminal or environmentally controlled vault. *Id.*

⁴⁸⁴ Rhythms Massachusetts I Comments at 12; ALTS Massachusetts I Comments at 16-17; Covad Massachusetts I Comments at 25-28.

⁴⁸⁵ See Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl. at para. 44.

⁴⁸⁶ *Id.*

⁴⁸⁷ Verizon offers "feeder subloops over DS1 or DS3 transmission paths which may be either fiber or copper depending upon facilities availability." See Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl. at para. (continued....)

LECs may gain access to subloops at technically feasible points of interconnection other than the FDI.⁴⁸⁸ For these reasons, we cannot agree with the commenters' claims that Verizon limits access to subloop unbundled network elements in violation of the requirements of section 271.

d. High Capacity Loop Performance

157. We find that Verizon's performance for high capacity loops does not result in a finding of noncompliance with checklist item four. We look to the totality of the circumstances in evaluating Verizon's performance in providing loops in accordance with the checklist requirements.⁴⁸⁹ During the period September through November, although volumes are low, carrier-to-carrier data show that Verizon misses a comparable number of installation appointments for competitors and retail alike.⁴⁹⁰ Verizon's performance data for its maintenance and repair functions for high capacity loops show parity.⁴⁹¹ Like other types of loops we consider, Verizon states that competing carrier behavior skews its high capacity loop performance.⁴⁹² We recognize that Verizon's performance on other measures with respect to

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137. *Id.* at Attach. P (stating that a 'Feeder Sub-Loop' means a DS1-DS3 transmission path over a feeder facility in Verizon's network).

⁴⁸⁸ Verizon specifically identifies the NID and the MPOE as possible alternative points for competing LECs to obtain access to subloops. See Verizon Massachusetts I Lacouture/Ruesterholz Reply Decl. at para. 138.

⁴⁸⁹ In so doing, we do not consider Verizon's special access services performance. OnSite Access specifically criticizes Verizon's performance in provisioning high capacity "loops" in New York and Massachusetts. See also On Site Access Massachusetts I Comments at 20-21 (citing Leonard Kriss Decl. at 2-6). CompTel lodges a related complaint alleging that Verizon has not demonstrated that it can comply with the competitive checklist at the same time it meets its obligation to provision access services and operate its long distance affiliate consistent with section 272's nondiscrimination requirements. See CompTel Massachusetts II Comments at 1-3. Criticisms of Verizon's provisioning of special access service are not relevant to compliance with checklist item four. As we held in the *SWBT Texas* and *Bell Atlantic New York Orders*, we do not consider the provision of special access services pursuant to tariffs for purposes of determining checklist compliance. *SWBT Texas Order*, 15 FCC Rcd at 18504, para. 335; *Bell Atlantic New York Order*, 15 FCC Rcd at 4126-27, para. 340. Checklist item 4 does not address itself to retail services Verizon provides to competitors such as special access services.

⁴⁹⁰ See PR 4-01 (UNE POTS/Special Services, percent Missed Appointments – Verizon – Total). In September and October, Verizon did not miss any installation appointments for high-capacity loops and missed 18.39 percent of its installation appointments in November. In November, the number of observations in this metric is 310 competitive LEC installations. However, this measure aggregates EEL and interoffice facilities installations. The comparable numbers over the same period for Verizon retail were 2.78, 1.90 and 1.43 percent. See *id.*

⁴⁹¹ For the period September through January, the Mean Time to Repair measure shows that Verizon troubles are resolved in 8.38 hours compared to 8.40 hours for competitive LECs during the same period. See MR 4-01 (Maintenance, UNE POTS, Special Services, Mean Time to Repair, Total).

⁴⁹² Verizon examined a sample of the January orders that were included in the Average Interval Offered measure (PR 1-07) and discovered that the vast majority of the orders should have been "X" coded because the competitive LEC asked for an interval longer than the standard interval. Because the orders were incorrectly "W" coded, Verizon states that they were included in the results and skewed the reported results. See Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-09 (filed February 28, 2001) (*Verizon Feb. 28 Ex Parte Letter*).

provisioning high capacity loops has been poor in Massachusetts.⁴⁹³ High capacity loops in Massachusetts represent only approximately 0.8 percent of all unbundled loops provisioned to competitors.⁴⁹⁴ Verizon performs at an acceptable level for most types of unbundled local loops. Given the low volumes of orders for high capacity loops in Massachusetts we cannot find that Verizon's performance for high capacity loops results in a finding of noncompliance for all loop types.⁴⁹⁵

e. Voice Grade Loops

158. We agree with the Massachusetts Department that Verizon demonstrates that it provides voice grade unbundled loops in a nondiscriminatory manner.⁴⁹⁶ This category includes hot cut loops and new stand-alone loops. We discuss each of these categories separately below.

(i) Hot Cut Loop Provisioning

159. *Hot Cut Process.* Verizon's hot cut process is designed to move a loop that is in service from Verizon's switch to a competitor's switch. Competitors can request that Verizon complete the hot cut within a specific appointment window and Verizon has committed to ensuring that the customer will not be out of service for more than five minutes during the hot cut.⁴⁹⁷ Verizon's hot cut process includes a number of steps that Verizon and competitors must take during the days preceding the hot cut. These steps include pre-wiring a cross-connection from the competitor's collocation arrangement to Verizon's main distribution frame prior to the committed date and time of the hot cut, setting the appropriate Local Number Portability triggers and confirming with the competitor that the loop is to be cut over to a competitor's switch.⁴⁹⁸

⁴⁹³ See e.g., PR 2-07 (Special Services – Provisioning, Av. Interval Completed – DS-1); PR 6-01 (Special Services – Provisioning, percent Installation Troubles reported within 30 Days).

⁴⁹⁴ Verizon states that during the period September through January, observations for PR 2-07 totaled 176 loops. Verizon notes that the high-capacity loop volumes the Commission considered in the *SWBT Kansas/Oklahoma Order* was even higher over the four month period the Commission considered in that proceeding. See *Verizon Feb. 28 Ex Parte Letter*. Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-09 (filed February 28, 2001). In the period July through October, SWBT received 210 orders for DS-1 loops in Oklahoma. *SWBT Kansas/Oklahoma Order* at para. 213 n.616.

⁴⁹⁵ Although we recognize specific performance problems for high capacity loops, we do not find that these disparities in and of themselves are enough to render a finding of checklist noncompliance because of the small numbers of DS-1 loops requested by competing-carriers. We stress, however, that we will be actively monitoring Verizon's performance in this area and we will take swift and appropriate enforcement action in the event that Verizon's provisioning performance for high capacity loops deteriorates. See *infra* Part IX.

⁴⁹⁶ See Massachusetts Department Massachusetts I Comments at 279.

⁴⁹⁷ See *Verizon Massachusetts I Lacouture/Ruesterholz Decl.* at para. 81.

⁴⁹⁸ *Id.* at Attach. J.

160. *Hot Cut Timeliness and Quality.* We find that Verizon demonstrates that it provides hot cuts in Massachusetts in accordance with checklist item 4 because it provides hot cuts in a timely manner, at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.⁴⁹⁹ Verizon reports data on the percentage of hot cut orders completed within the cut-over window specified by the requesting competing carriers on an LSR.

161. In the instant application, Verizon demonstrates that its hot cut performance has returned to acceptable pre-strike levels which afford a competitor a meaningful opportunity to compete.⁵⁰⁰ During October and November 2000, Verizon completed on average 96 percent of hot cut orders on time. During the same time period, less than 0.8 of the hot cut lines experienced installation troubles within 7 days.⁵⁰¹ The Massachusetts Department engaged in a reconciliation of various Verizon self-reported hot cut performance measurement data in the context of the state section 271 proceeding.⁵⁰² Relying upon the results of its carrier-specific data reconciliation, the Massachusetts Department concluded that “there is no need for further data reconciliation” and concluded that Verizon provides sufficient on-time hot cut performance to meet the requirements of checklist item 4.⁵⁰³ Because the Massachusetts Department performed a searching and specific data reconciliation of Verizon’s hot cut performance, we accord its resolution of this issue substantial weight. We note that no commenter challenges Verizon’s hot-cut conversion performance in this phase of the proceeding. We thus conclude that the record demonstrates that the hot cut performance Verizon makes available to competing carriers in Massachusetts minimizes service disruptions and affords a competitor a meaningful opportunity to compete.

⁴⁹⁹ We evaluate the PR 9-01 (Provisioning, POTS, percent On-Time Performance – Hot Cut); PR 6-02 (Provisioning, POTS, percent Installation Troubles reported within 7 Days – Hot Cut Loop) measures in Massachusetts.

⁵⁰⁰ See Verizon Massachusetts I Guerard/Canny Decl. at Attach. E; PR 9-01 (Provisioning POTS, percent On Time Performance – Hot Cuts). For May, PR 9-01 showed 98.45 percent on time performance, for June, PR 9-01 showed 99.63 percent on time performance and for July, PR 9-01 showed 99.19 percent on time performance. KPMG reviewed Verizon’s hot cut performance between October 1999 and January 2000 and found that 98 percent of hot cuts were completed on-time. See Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 83 (citing KPMG Report at 198-99 (POP-6-2-6). The Massachusetts Department characterizes Verizon’s hot cut timeliness performance as “excellent” and notes that unlike Verizon’s performance in New York prior to filing its application with this Commission, Verizon bettered the 95 percent “on time” benchmark in Massachusetts every month from January through July 2000. See Massachusetts Department Comments at 284-85.

⁵⁰¹ See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 5.

⁵⁰² In response to criticism from one carrier, AT&T, regarding the accuracy of Verizon’s hot cut data, the Massachusetts Department engaged in a reconciliation of various Verizon self-reported hot cut performance measurement data in the context of the state section 271 proceeding. Massachusetts Department Massachusetts I Comments at 288. AT&T does not criticize Verizon’s hot cut performance in this proceeding.

⁵⁰³ Massachusetts Department Massachusetts I Comments at 288.

(ii) New Stand-Alone Loop Provisioning

162. We agree with the Massachusetts Department that Verizon demonstrates that it provisions new unbundled stand-alone voice grade loops in accordance with the requirements of checklist item 4.⁵⁰⁴ When Verizon does not presently service the customer on the line in question, a hot cut loop is not required. In such instances, a competing carrier obtains a new stand-alone loop from Verizon which dispatches a technician to the customer's premises to complete the installation. We find that Verizon demonstrates that it provisions and maintains new stand-alone voice grade loops for competing carriers in substantially the same time and manner that it installs new voice grade loops for its own retail operations.

163. *Provisioning Timeliness and Quality, Maintenance and Repair.* Verizon demonstrates that it delivers new voice grade loops in a timely manner and at acceptable levels of quality. Verizon also demonstrates that it provides maintenance and repair functions for such loops in a nondiscriminatory manner. No party specifically criticizes Verizon's new, stand-alone loop provisioning performance. As in previous section 271 orders, in reviewing Verizon's performance we examine the average completion interval, missed installation appointments, trouble reports within 7 days and mean time to repair measures. Specifically, Verizon's performance results for the months of September, October, November and December 2000 also demonstrate parity for the average completion interval for new loop orders of 1-5 lines measure.⁵⁰⁵ During the same period, Verizon's missed installation appointment rate for new voice loops also demonstrated parity.⁵⁰⁶ Furthermore, Verizon appears to be providing new voice grade loops to competitors at an acceptable level of quality. Based on the trouble report within 7 days measure, Verizon provided installation at the same level of quality for competitive LECs compared to retail during the months of September, October, November and December 2000.⁵⁰⁷ Verizon's mean time to repair measures show that it is providing maintenance and repair functions for new loops to competitors in a nondiscriminatory manner.⁵⁰⁸

⁵⁰⁴ See *id.* at 256.

⁵⁰⁵ In September, Verizon completed POTS loop orders of 1-5 lines in 8.82 for Verizon retail and 8.53 for competitors. The comparable numbers for October were 5.81 for Verizon retail affiliate and 9.22 and 5.45 for Verizon retail and 4.86 for competitors in December. See PR 2-03 (Provisioning, Average Completed Interval, Dispatch 1-5 lines – Loop).

⁵⁰⁶ See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at Attach. A. The September to November missed appointment rate, PR 4-04, is 8.13 percent for Verizon and 7.09 percent for [competing carriers]. The December rate was 6.96 for Verizon and 10.31 for competing LECs. See PR 4-04 (Provisioning, POTS, percent Missed Appointments, Verizon, Dispatch, Loop – New).

⁵⁰⁷ The percentage of installation troubles reported on voice grade loops for competitors were 1.13 percent in September, .98 percent in October, .80 percent in November and .74 in December. The comparable numbers for Verizon were 2.39 in September, 1.87 in October, 1.77 in November and 1.60 in December. See PR 6-02 (Provisioning, POTS, percent Installation Troubles reported within 7 Days – Loop).

⁵⁰⁸ Results for the mean time to repair measure, Mean Time to Repair – Total, in the months of September, October, November and December show parity. Competitor troubles were repaired in 19.77 hours in September, 18.52 hours in October, 19.00 hours in November and 15.38 hrs in December. Verizon's troubles were repaired in (continued....)

f. Line Sharing

(i) Background

164. 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 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.⁵⁰⁹ In the *Line Sharing Order* the Commission acknowledged that it could take as long as 180 days from the release date for incumbent LECs to develop and deploy the modifications necessary to implement this new requirement. This 180 day period concluded on June 6, 2000, approximately six months before Verizon filed its Massachusetts II application. In the *SWBT Kansas/Oklahoma Order*, the Commission provided BOC-applicants guidance concerning the required section 271 line sharing showing necessary to meet a BOC's burden of proof. Specifically, the Commission stated that "a successful BOC-applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases."⁵¹⁰ The Commission also held that "to the extent that a BOC applicant relies upon commercial data from another state to establish that it is providing nondiscriminatory access to line shared loops in a state where it requests section 271 authority, it should provide evidence that the OSS and provisioning processes are identical."⁵¹¹ Verizon must demonstrate, therefore, that it provides nondiscriminatory access to the unbundled high-frequency portion of the loop to gain section 271 approval in Massachusetts.

165. Verizon proposes to demonstrate compliance with its line sharing obligation with evidence that it has signed nine interconnection agreements in Massachusetts with line sharing provisions. Verizon also notes that the Massachusetts Department recently approved its line sharing tariffs, with only minor amendments.⁵¹² It further states that it is able to handle

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21.63 hours in September, 17.68 hours in October, 17.95 hours in November and 16.98 hrs in December. See MR 4-01 (Maintenance, POTS Loop, Mean Time to Repair – Total).

⁵⁰⁹ See *Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 98-147, Fourth Report and Order, CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*) (*pet. for rehearing pending sub nom. USTA v. FCC*, DC Cir. No. 00-102 (filed Jan 18, 2000)).

⁵¹⁰ *SWBT Kansas/Oklahoma Order* at para. 215.

⁵¹¹ *SWBT Kansas/Oklahoma Order* at para. 215. The Commission further stated that to "the extent its OSS provisioning processes are not identical, a BOC applicant bears the burden of showing that whatever differences are present are not material." *Id.*

⁵¹² Verizon offers competing carriers two arrangements for line sharing pursuant to its interconnection agreements and line sharing tariff. The first arrangement provides a competing carrier with the ability to install, own and maintain the splitter in the competing carrier's own collocation arrangement. In the second arrangement, a competitive LEC-owned splitter is located in Verizon's central office space and is maintained by Verizon. See Verizon Massachusetts I Ruesterholz/Lacouture Decl. at para. 118. As part of its *Phase III* proceeding, the (continued....)

“considerable volumes of line sharing orders” by utilizing its successful New York provisioning methods and procedures in Massachusetts.⁵¹³ Finally, through the New York DSL collaborative, it has worked with competing carriers to identify and resolve various technical and operational issues associated with line sharing in Massachusetts.⁵¹⁴ Competing carriers contest Verizon’s operational readiness to offer line sharing and Verizon’s ability to offer line sharing on a nondiscriminatory basis.⁵¹⁵

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Massachusetts Department has directed Verizon to implement OSS enhancements to support line sharing by April 1, 2001. The Massachusetts Department, however, found that the fact that line sharing orders currently require manual processing does not prevent it from finding that Verizon satisfies its nondiscrimination obligation. See Massachusetts Department Massachusetts I Comments at 328. Covad contests Verizon’s showing that it offers line sharing capability over fiber-fed loops. Covad Massachusetts II Comments at 35. Verizon responds that it satisfies the Commission’s requirements through remote terminal collocation and unbundled subloop offerings. See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at paras. 160-65. We note that the issue of line sharing over fiber-fed loops is the subject of a *Further Notice of Proposed Rulemaking* at the Commission. See Line Sharing Reconsideration Order at para. 12; see also accompanying, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98.

⁵¹³ Verizon Massachusetts I Ruesterholz/Lacouture Decl. at para. 114. In its initial application Verizon stated that it has provisioned over 7,000 line sharing orders in New York, the majority of which were for its own data affiliate. See *id.* Verizon’s Massachusetts II application shows that Verizon has processed roughly 10 times the number of line sharing orders for its retail affiliate compared to line sharing orders processed for unaffiliated competing LECs.

⁵¹⁴ Verizon Massachusetts I Ruesterholz/Lacouture Decl. at para. 115. For example, Verizon asked competing carriers to identify their priority wire centers throughout Massachusetts by March 13, 2000 so that Verizon could prioritize the central office wiring work necessary to accommodate line sharing requests. *Id.* at 127.

⁵¹⁵ See Covad Massachusetts II Comments at 7-8; Rhythms Massachusetts II Comments at 6; CIX Massachusetts II Comments at 7; USISPA Massachusetts II Reply at 9; AT&T Massachusetts II Reply at 25; Covad Massachusetts I Comments at 28; WorldCom Massachusetts I Comments at 62; Rhythms Massachusetts I Reply at 18; ALTS Massachusetts I Reply at 36. On March 14, 2001, Verizon filed an *ex parte* letter in this proceeding stating that Verizon has “taken steps to address the outstanding issues” between Rhythms and Verizon and accordingly, Rhythms “no longer opposes Verizon’s Application for section 271 authority in Massachusetts.” Letter from Kimberly A. Scardino, Assistant General Counsel, Rhythms to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 14, 2001). Rhythms had argued that where Verizon completed pre-wiring collocation work, in some instances it was wired incorrectly or the cable and pair assignment were not entered into Verizon’s inventory system. See Rhythms Massachusetts II Comments, Williams Decl. at para. 39. Covad claims that Verizon cannot “provision a single line shared order in a central office while at the same time Verizon was shutting off line-sharing ready central offices for its own retail service because orders are flowing through beyond capacity.” Letter from Jason D. Oxman, Senior Government Affairs Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 at 1 (filed Feb. 21, 2000); see also Letter from Jason D. Oxman, Senior Government Affairs Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176 at 1 (filed Nov. 28, 2000) (arguing that walkthroughs of Verizon central offices showed incomplete splitter installations as of the week of November 20, 2000). Verizon responds that Covad and Rhythms are the only competing carriers that submitted their line sharing plans to Verizon’s project management plan and that installation of splitters was performed on a timely basis. Verizon Massachusetts I Lacouture/Ruesterholz Decl. at paras. 112-13. The Massachusetts Department found that whatever delays resulted from splitter installation were attributable to competing carriers, specifically Covad. Massachusetts Department Massachusetts I Comments at 327.

(ii) Discussion

166. We find that Verizon demonstrates that it provides nondiscriminatory access to the high-frequency portion of the loop. Specifically, the most probative evidence that Verizon submits to support this point is actual commercial usage.⁵¹⁶ The Commission stated in the *SWBT Kansas/Oklahoma Order* that “a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates.”⁵¹⁷ Our approach in this case is to rely primarily on the limited commercial data Verizon has submitted from its Massachusetts operations. Because line sharing volumes in Massachusetts have escalated only recently, however, we look to Verizon’s line sharing performance in New York as well, where line sharing volumes are larger for additional evidence that Verizon is providing nondiscriminatory access to line sharing.⁵¹⁸ As discussed above, we conclude that Verizon’s line sharing OSS in New York and Massachusetts uses the same systems and offers the same functionality.⁵¹⁹ Accordingly, we shall consider Verizon’s commercial line sharing performance in New York as a supplement to Verizon’s limited commercial line sharing performance in Massachusetts.

⁵¹⁶ See *supra* Part II.A.

⁵¹⁷ See *SWBT Kansas/Oklahoma Order* at para. 215.

⁵¹⁸ From September 2000 through January 2001, Verizon has provided a total of approximately 51,000 line shared loops in Massachusetts including those for VADI. During December and January, Verizon completed nearly 500 line shared loops for competitors in Massachusetts. See *Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl.* at para. 103. In New York, Verizon has processed 110,000 line shared orders including those provided to VADI. See *id.* at para. 28.

⁵¹⁹ See *supra* Part IV.A.2.b. The Massachusetts Department concluded that the “systems and processes in Massachusetts are comparable to, indeed the very same as, those found in New York.” Massachusetts Department Massachusetts II Comments at 35; see also *Verizon Massachusetts II Sapienza/Mulcahy Decl.* App. A, Attach. B. PwC also investigated whether VADI has the same interface options as unaffiliated competitive LECs and whether Verizon treats transactions it receives from VADI the same as transactions it receives from unaffiliated competitive LECs. PwC confirmed that VADI offers DSL service using line sharing purchased from Verizon using the same interfaces that are available to other unaffiliated competitive LECs. VADI generally uses CORBA for pre-ordering, EDI for ordering and the Web GUI for maintenance and repair. In addition, PwC confirmed that once Verizon receives the orders over the interface, it provisions a VADI order using the same systems and processes as it uses to provision an order for any other competitive LEC. Likewise, PwC reports that VADI’s maintenance and repair requests are handled by Verizon in the same manner as a request from an unaffiliated competitive LEC. See *Verizon Massachusetts II Lacouture/Ruesterholz Decl.* at para. 143. Verizon does, however, reveal that a “small percentage” of VADI’s New York line sharing orders are distributed by a team leader in the Boston xDSL/Line Sharing Center to a group of approximately 35 temporary service order representatives located in New York. Verizon contends that it retained these temporary representatives to clear a backlog of retail DSL orders in New York that existed before VADI was operational. *Verizon Massachusetts II Lacouture/Ruesterholz Supp. Decl.* at para. 154. This slight difference in OSS functionality does not alter our conclusion that the OSS in New York and Massachusetts are identical for purposes of the Commission’s consideration of New York line sharing commercial data.

167. *Operational Readiness.* Competitive LECs take issue with Verizon's ability to wire adequately central offices to offer line sharing.⁵²⁰ Covad specifically contests Verizon's representation that it was operationally ready to provision line sharing for all splitter collocation arrangements in place as of December 1, 2000.⁵²¹ In response, Verizon states that it recognized central office wiring problems that delayed the readiness of certain offices and committed to reinspections of all line-sharing related central office work beginning in December 2000.⁵²² The Department of Justice recognizes that "Verizon is making efforts to resolve its line sharing implementation difficulties" and the Massachusetts Department urges us to find that Verizon provides nondiscriminatory access to the high frequency portion of the loop.⁵²³

168. Verizon has now completed all the quality inspections and has "taken the necessary corrective action for all of the line sharing-related collocation arrangements that were in place as of December 1, 2000 . . . in both Massachusetts and New York."⁵²⁴ Verizon has also agreed to implement the elements of its quality inspection process into the normal collocation inspection process and thus, new line sharing-related collocation arrangements will be subject to

⁵²⁰ See Covad Massachusetts II Comments at 6; Rhythms Massachusetts II Comments at 8. Rhythms contends that Verizon's explanation of defective splitter installation could not apply to it because Rhythms has elected to place splitter in Rhythms collocation spaces and the only remaining central office wiring work to be done is the re-termination of existing 200 cable and pair, a process that Rhythms claims is simple and accomplished quickly. Rhythms Massachusetts II Comments at 8.

⁵²¹ Covad argues that it requested that 55 central offices in Massachusetts offer line sharing capability. As of February 21, 2000, Covad has successfully provisioned line sharing in 44 of those 55 offices and it has provided the CLLI codes for those offices where Covad has pending orders. See Covad Massachusetts II Reply at 19; see also Rhythms Massachusetts II Comments at 8. Verizon responds that only two of the offices Covad initially complained of are in Massachusetts and of these two, it has provisioned Covad orders in a number of the central offices which are relevant to this application. See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 131. As to the status of contested offices in New York, Verizon responds that Covad's claim that its "Failed Dispatch Report" shows discrimination is misplaced because joint investigations at these central offices show that the orders have failed due to operational and other problems on Covad's part. *Id.* at 133-35. Covad concedes that for some of its collocation arrangements, it is possible that "Covad has not yet installed DSLAM cards in a particular office to support line sharing capability" to conserve scarce resources but nonetheless argues that regardless of whether such equipment is installed, Verizon has an obligation to ensure that the office is line-sharing ready. Covad Massachusetts II Reply at 20 n.35. Verizon offers a similar response to Rhythm's allegations that several Massachusetts central offices are not line sharing ready. Verizon contends that the central offices in question have been re-examined and it has not found any wiring problems. Verizon further responds that its records show that of the LSRs submitted by Rhythms only a small proportion of the central offices in Massachusetts are at issue. Of these offices, Verizon claims that it has completed line sharing orders for Rhythms in nearly all of the central offices at issue in Massachusetts. See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at paras. 143-145.

⁵²² Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 138.

⁵²³ Massachusetts-Department Massachusetts II Comments at 36-38; Department of Justice Massachusetts II Evaluation at 14.

⁵²⁴ See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para 126; see also Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed February 23, 2001). Covad represents that it submitted "every single one of its linesharing collocation applications in Massachusetts in April 2000." Covad Massachusetts II Reply at 22.

this inspection process as well.⁵²⁵ It therefore appears that Verizon instituted its quality inspection process and completed any necessary corrective action as it became aware of central office wiring issues described by competitive LECs.⁵²⁶

169. *Line Sharing Performance Data.* Verizon has supplied a limited amount of Massachusetts commercial data for the period September through November 2000 in support of its line sharing showing.⁵²⁷ To show that the data are reliable, Verizon engaged PwC to replicate its carrier-to-carrier results and 34 line sharing measures for the period September through November, the results of which, according to PwC, largely confirm the results presented by Verizon.⁵²⁸ We recognize the Department of Justice's concerns that some of the line sharing completion interval data may be inaccurate.⁵²⁹ Like the Massachusetts Department, however, we conclude that the data adequately show that Verizon has met its line sharing obligation.⁵³⁰ The

⁵²⁵ See Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed February 22, 2001). Rhythms argues that Verizon did not institute its quality inspection audit process soon enough. See Rhythms Massachusetts II Comments at 8. Verizon responds that its "implemented the inspection process as soon as it became aware of the start-up issues." Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 37.

⁵²⁶ See Verizon Massachusetts II Lacouture/Ruesterholz. Reply Decl. at para. 137. Verizon has continued to address these issues, particularly with Covad. Recent reports suggest that Verizon has largely, if not completely, resolved central office wiring issues that have affected the deployment of line-shared services by competing carriers. See Letter from Jason Oxman, Senior Counsel, Covad to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9, (filed April 6, 2001) (stating that "Covad verified, in Massachusetts, that Verizon honored its commitment to clear all infrastructure related troubles, throughout the former Bell Atlantic footprint, by February 15, 2001").

⁵²⁷ See Verizon Massachusetts II Sapienza/Mulcahy Decl. at para. 13.

⁵²⁸ See *id.* (finding that for the majority of the line sharing measurements, PwC's numbers matched Verizon's and that for the remaining measurements, the number of observations was consistent and Verizon's reported performance was within one percent).

⁵²⁹ While PwC confirmed that Verizon accurately calculated the missed appointment rates under the terms of the new consensus measurements, the reported results may overstate Verizon's performance. Verizon's technicians may have marked some competitive LEC orders as completed after they had tested the line and received a working dialtone, even though the splitter to enable DSL serve on that line may not initially have been installed correctly. Verizon however has committed to adopt additional testing procedures to ensure that line sharing orders are not marked completed unless working splitters are in place. See Verizon Massachusetts II Application at 30 n.25. The Department of Justice states that this problem "affected those performance measures calculated using the provisioning completion date: PR-2 (average interval completed); PR 3-10 (percent completed within x days); and PR-4 (missed appointments)." Department of Justice Massachusetts II Evaluation at 13 n.54. Competing carriers also contest Verizon's line sharing showing and argue that the current record is insufficient to support a finding of nondiscrimination. See Covad Massachusetts II Comments at 8; Rhythms Massachusetts II Comments at 6; CIX Massachusetts II Comments at 24.

⁵³⁰ The Massachusetts Department notes that Verizon states that for the percent missed appointments – dispatch measure, PR 4-05, "Verizon may not have included those instances where Verizon's technician performed the central office work typically required for xDSL loops but failed to confirm that a splitter . . . was functioning on the line." Massachusetts Department Massachusetts II Comments at 37. The Massachusetts Department found that Verizon's manual processing of line sharing orders "will be short-lived and, even absent complete line sharing order flow- (continued....)

New York Commission only recently directed Verizon to capture its xDSL performance in disaggregated line sharing measures. In this case, we decline to hold isolated inaccuracies against Verizon where the method of reporting and collecting data is new and the underlying cause of the distortion has been addressed by Verizon.⁵³¹ In this context, we believe it is appropriate to credit Verizon's submission of Massachusetts commercial line sharing data, supplemented by data from New York, when making our determination that Verizon provides nondiscriminatory access to the high-frequency portion of the loop. Specifically, we are convinced that the flawed timeliness measures provide evidence of the time it takes Verizon to provision line shared loops.

170. *Provisioning Timeliness.* Overall, Verizon adequately demonstrates that it provisions line sharing to competitors in substantially the same time as it does for itself. We note at the outset that we give no decisional weight to Verizon's missed appointment data for line sharing in New York and Massachusetts. Although the data on their face show that Verizon meets the parity standard⁵³² we agree with the Department of Justice, the Massachusetts Department and even Verizon itself, that the measure may be flawed.⁵³³ Specifically, Verizon states that this measure may not have captured those instances where a Verizon technician performed the central office work typically required for xDSL loops but failed to confirm that a splitter was functioning on the line.⁵³⁴ Parties criticizing the completion measures appear to argue that because a Verizon technician did not test for a functioning splitter, the quality – rather than the timeliness – of Verizon's installation work is unacceptable.⁵³⁵ While we recognize that performing the additional work required to test whether a splitter was functioning on the line could have an impact on the completion measures, we find that the data provided by Verizon are probative of the time it takes Verizon's technicians to install line-shared service.⁵³⁶ We are
(Continued from previous page)

through" Verizon can meet foreseeable demand for line sharing. Massachusetts Department Massachusetts I Comments at 327.

⁵³¹ Verizon now performs a "splitter signature test" which is used "to determine whether the splitter, which is necessary for line sharing, is functioning on the line." Verizon Massachusetts II Reply at 23.

⁵³² In September, October, and November in Massachusetts, Verizon did not miss any competitive LEC line sharing appointments. In December, Verizon missed approximately one percent of competitive LEC appointments. Verizon has supplied provisioning information for its separate data affiliate, VADI, only for the month of November. In November, these results demonstrate parity. See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at Attach. JJ.

⁵³³ Verizon Massachusetts II Application at 30 n.25. The Massachusetts Department believes that the measure is sufficiently flawed to merit exclusion of this information as evidence that Verizon is providing nondiscriminatory access to line sharing. Massachusetts Department Massachusetts II Comments at 37. The Department of Justice agrees and characterizes the measure as "substantially undermined" by the inaccuracies captured in the measure. *Id.* at 13.

⁵³⁴ Verizon Massachusetts II Brief at 30 n.25. Without such testing, even though technicians have confirmed dial-tone to and from the splitter, Verizon is unable to confirm that a splitter is properly functioning on a line.

⁵³⁵ See Covad Massachusetts II Comments at 8; see also Department of Justice Massachusetts II Evaluation at 13.

⁵³⁶ Even with the miscoding, the measures describe accurately the amount of time Verizon technicians required to install line-shared service without the added task of performing a splitter signature test. Because failure to install a
(continued....)

therefore not prepared to dismiss all of the evidence of commercial usage as USISPA suggests because the inaccuracies appear to be limited to the completion measures and are not so pervasive as to render Verizon's line sharing data completely untrustworthy.⁵³⁷ Furthermore, as Verizon became aware of this problem, it addressed this data integrity issue by properly instructing its installation personnel to code orders as complete after properly functioning splitters are working on a given line, implementing its quality inspections for line sharing-related collocation work and performing a splitter signature test to ensure that the quality of its installation work was acceptable. Indeed, the record shows that during the period of time not affected by the distortion, Verizon's timeliness performance demonstrates parity.⁵³⁸

171. The average completion interval data for line sharing show parity.⁵³⁹ While Verizon has supplied no retail information as a basis for comparison during the months of September and October for Massachusetts data, the average completion interval measure in November shows that Verizon required slightly more than six days to provision line-shared loops to competitors compared to over seven days for itself.⁵⁴⁰ In New York, for the months of September and November, performance for competitive LECs is superior to that provided to VADI.⁵⁴¹ Although these data show that Verizon is performing at parity we note that Verizon's (Continued from previous page)

functioning splitter on a line could prevent line-shared service, the lack of a splitter test suggests that the quality of the work, rather than its timeliness, was affected.

⁵³⁷ We disagree with USISPA that the line sharing "measurements simply do not exist." USISPA Massachusetts II Reply at 6.

⁵³⁸ Verizon remedied this miscoding problem by December 15, 2000. In Massachusetts, the missed appointment measure in January shows that Verizon missed only one percent of competitive LEC line sharing installation appointments. Verizon argues that the January results show that "the impact on the performance measures caused by the lack of the splitter signature test was minimal." Letter from Dee May, Executive Director Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 19, 2001). The December results also show that Verizon misses less than one percent of installation appointments for competing carrier line sharing orders. *See id.*

⁵³⁹ We acknowledge that the failure of Verizon's technicians to test whether a splitter was functioning on the line may also have affected the average completion interval. As discussed above, Verizon has addressed this data integrity issue going forward and has instituted a quality inspection program to ensure that competitive LECs receive acceptable installation quality performance.

⁵⁴⁰ The Massachusetts average completion interval in November was 6.37 days for competitive LECs compared to 7.53 days for VADI. In September, Verizon completed competitive LEC line sharing orders in 6.47 days and 6.29 days in October. *See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 159 & Attach. NN.* Verizon has also presented data for another interval measure, the percent completed within 6 days measure. In New York, from September through November, Verizon completed 74.87 percent of competitive LEC orders and 71.60 percent of VADI orders within six days, where a six day interval was requested. *See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 159 & Attach. OO.* Verizon contends that a majority of the competitive LEC orders not completed within six days are completed within seven days. In Massachusetts, over 93 percent of the competitive LEC line sharing orders in the period September through November were completed within seven days. *See id.*

⁵⁴¹ For the months of September, October and November, the average completion interval for competitive LECs in New York was 5.59, 6.4, and 6.42 days compared to 9.15, 6.2, 6.02 days for VADI. *See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at 159, Attach. MM.*

performance is generally above the 5-day interval established by the Massachusetts Department even as the current interval is scheduled to be reduced to four days in the near future.⁵⁴² It is encouraging that Verizon is moving toward meeting this state-approved provisioning interval while it gains additional experience provisioning commercial volumes of line shared orders.

172. *Installation Quality & Maintenance and Repair.* Based on the commercial data presented in Massachusetts, Verizon appears to be providing line shared loops at acceptable levels of quality. Although VADI did not submit any trouble reports within thirty days of installation in the month of November, the competitive LEC rate was 1 percent and in September and October 2000, competitive LECs did not report any troubles on line-shared loops captured by the measures.⁵⁴³ In New York, from September through November, the weighted average of installation troubles for competitive LECs was 1.70 percent compared to less than one percent for VADI.⁵⁴⁴

173. With respect to maintenance and repair, Verizon repairs loops for competitors in less time than it takes to repair retail line-shared loops. In November, the only month for which Verizon provided such data in Massachusetts, Verizon repaired competing carrier line-shared loops in just over three hours.⁵⁴⁵ Verizon represents that it took significantly longer to repair loops for VADI – over 25 hours.⁵⁴⁶ In New York, Verizon shows that the mean time to repair is

⁵⁴² Verizon has introduced flow through capability for line-shared ADSL orders and will accomplish line sharing provisioning for most orders without the time necessary to dispatch a technician to install service. Given the fact that line sharing provisioning is largely accomplished without manual intervention, the Massachusetts Department ordered Verizon to reduce its line sharing interval from 6 days to five days effective November 27, 2000. Massachusetts Department Massachusetts I Comments at 36 n.110; *see also* CIX Massachusetts I Comments at 25. Verizon states that its 5-day interval tariff for line sharing orders of 1-9 lines went into effect on November 27, 2000 and Verizon “is now complying with the new interval.” *See* D.T.E. Tariff No. 17, Part A, Section 3.2.10. Additionally, Verizon has committed to file, as required by the Massachusetts Department, a tariff reducing the provisioning interval by an additional business day after the April 1st deadline for fully implementing certain OSS upgrades. *See* Verizon Massachusetts I Lacouture/Ruesterholz Decl. at para. 164.

⁵⁴³ Massachusetts Department Massachusetts II Comments at 36. We are mindful that, because Verizon has committed to resolving line sharing troubles through a coordinated process, it addresses some number of line sharing troubles “without the receipt of a trouble ticket” and concedes that the “small number of maintenance and repair requests reported is likely attributable to that interim process.” *See* Verizon Massachusetts II Lacouture/Ruesterholz Supp. Decl. at para. 156.

⁵⁴⁴ Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 166 & Attach. SS. Covad argues that Verizon’s line sharing I-code data are skewed because Verizon classifies troubles associated with splitter wiring as “CPE troubles” which show up in the performance measure as competitive LEC-caused troubles. Covad Massachusetts II Reply at 15. Verizon responds that Covad mistakenly assumes that Verizon’s trouble designation codes are designed to assign blame for a trouble ticket to Verizon or a competitive LEC. *See* Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 119. The codes at issue are designed to indicate whether the trouble is caused by an item in the Verizon or competitive LEC network. Because splitters are not part of Verizon’s network Verizon codes splitter troubles accordingly.

⁵⁴⁵ *See* Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 71.

⁵⁴⁶ *Id.*

comparable to stand-alone xDSL loop repair times and offers competitors nondiscriminatory access to maintenance and repair functions.⁵⁴⁷ Verizon also shows that its repair services are performed at acceptable levels of quality.⁵⁴⁸ Thus we find that the data suggest that Verizon is providing line-shared loops at an acceptable level of quality and repairing these facilities in a nondiscriminatory manner.

174. Although we have some concerns with the accuracy of Verizon's performance results and the limited volume of competitive LEC orders captured by the measures, we base our decision on measures not affected by such inaccuracies, the replication of other measures by PwC and Verizon's efforts in addressing the central office wiring issues that have impaired the ability of competitive LECs to submit commercial volumes of line sharing orders. Recent efforts by Verizon have substantially, if not completely, addressed the initial central office wiring implementation issues experienced by competitive LECs in Massachusetts.⁵⁴⁹ Furthermore, we also note that Verizon has designed a process to address line sharing implementation difficulties going forward.⁵⁵⁰

g. Line Splitting

(i) Background

175. In the *Line Sharing Order on Reconsideration*, the Commission made clear that line splitting is an existing legal obligation and that incumbent LECs must allow competitors to order line splitting immediately, whether or not a fully electronic interface is in place.⁵⁵¹ The Commission further stated that "we expect Bell Operating Companies to demonstrate, in the

⁵⁴⁷ During September through November, the mean time to repair for competitive LECs was 16 hours compared to slightly longer than 10 hours for VADI. Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 172. In New York, from September through November, Verizon met more than 92 percent of the repair appointments that did not require a dispatch for both VADI and competitors. Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 170 & Attach. TT.

⁵⁴⁸ Verizon also provided the percentage of repeat trouble reports for both competitors and VADI. These data demonstrate that Verizon provides superior service to competitors compared to itself. See MR 5-01 (Line Sharing, percent Repeat Troubles w/30 Days).

⁵⁴⁹ See Letter from Kimberly A. Scardino, Rhythms to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-09 (filed March 2, 2001).

⁵⁵⁰ Verizon has designated a single point of contact for each competitive LEC to address line sharing ordering or provisioning processes regardless of whether they arise in Verizon's TISOC, CLPC or RCMC. Verizon is participating in the Commission's "Line Sharing Summit" and is engaged in a dialogue with competitive LECs to further improve the line sharing process. Verizon has also introduced flow through capability on line sharing orders for connections requiring less than three lines. Verizon has also accompanied Covad on site visits of several Massachusetts central offices to address what it terms are several "minor collocation-related issues." See Verizon Massachusetts II Lacouture/Ruesterholz Decl. at para. 139.

⁵⁵¹ Third Report and Order and Order on Reconsideration, CC Docket No. 98-147; Fourth Report and Order on Reconsideration, CC Docket No. 96-98; Third Further Notice of Proposed Rulemaking; CC Docket No. 98-147; Sixth Further Notice of Proposed Rulemaking; CC Docket No. 96-98 (rel. Jan. 19, 2001) at para. 20 n.36.

context of section 271 applications, that they permit line splitting, by providing access to network elements necessary for competing carriers to provide line-split services.⁵⁵² We discuss below the steps Verizon has taken to offer line splitting capabilities consistent with the *Line Sharing Order on Reconsideration*.⁵⁵³

176. Verizon states that it currently offers the unbundled network elements that would allow line-split services.⁵⁵⁴ On February 14, 2001, Verizon issued a statement of policy to accommodate line splitting.⁵⁵⁵ Additionally, Verizon has incorporated line splitting contract language reflecting this policy into its Model Interconnection Agreement which it will make immediately available to any carrier who wishes to offer line-split services.⁵⁵⁶ Verizon has also demonstrated that it offers competitors nondiscriminatory access to the individual network elements necessary to provide line-split services and that nothing prevent competitors from offering voice and data services over a single unbundled loop.⁵⁵⁷ Several competitors contest the adequacy of this language and argue that Verizon is currently not in compliance with the Commission's line sharing and line splitting requirements.⁵⁵⁸ These carriers further contend that Verizon has engaged in a pattern of recalcitrant behavior with regard to implementing line sharing and line splitting requirements and the Commission should not credit its promises of future compliance.⁵⁵⁹

⁵⁵² *Id.*

⁵⁵³ The Massachusetts Department recognizes that Verizon is required to offer line splitting but requests that the Commission "take into account the recent nature of both its and the Department's clarifying Orders on line splitting when reviewing" Verizon's section 271 application. Massachusetts Department Massachusetts II Comments at 41.

⁵⁵⁴ See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at 149.

⁵⁵⁵ Verizon issued its statement of policy on February 14, 2001, approximately three weeks after this Commission issued the *Line Sharing Reconsideration Order*. See Verizon Massachusetts II Lacouture/Ruesterholz Reply. Decl. at 154. AT&T argues that Verizon must at least demonstrate it has a nondiscriminatory process in place to support line-split services. AT&T Massachusetts II Reply at 24; see also USISPA Massachusetts II Reply at 5; CompTel Massachusetts II Comments at 3-5.

⁵⁵⁶ In its line splitting amendment, Verizon commits to offer line splitting consistent with the Commission's *Line Sharing Reconsideration Order* by utilizing Verizon's OSS to order the unbundled network elements necessary to provide line-split services. With regard to migrations of UNE-P customers to line splitting, Verizon commits to follow the implementation schedules, terms, conditions and guidelines established in the ongoing DSL collaborative at the New York Public Service Commission. Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at 154, Attach. Q.

⁵⁵⁷ See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 149-58. Verizon further argues that the Commission has already held that Verizon can provide unbundled network elements in combination, and line splitting can be achieved through the combination of unbundled network elements. See *id.* at para. 158.

⁵⁵⁸ See AT&T Massachusetts II Reply 24; WorldCom Massachusetts II Reply at 12-13; Covad Massachusetts II Reply at 5-6.

⁵⁵⁹ AT&T Massachusetts II Reply 24; WorldCom Massachusetts II Reply at 12-13; Covad Massachusetts II Reply at 5-6.

(ii) Discussion

177. Verizon demonstrates that it makes it possible for competing carriers to provide voice and data service over a single loop – *i.e.*, to engage in “line splitting.”⁵⁶⁰ Specifically, Verizon demonstrates that it has concrete and specific legal obligation to provide line splitting through rates, terms and conditions in interconnection agreements. As a result, a competing carrier may, for instance, provide voice service using UNE-P and, either alone or in conjunction with another carrier, provide xDSL service on that same line.

178. Our recent *Line Sharing Reconsideration Order* is clear: Verizon must permit competing LECs to offer both voice and data services over a single unbundled loop in a line splitting configuration.⁵⁶¹ The Commission also stated that incumbents must make necessary network modifications including access to OSS necessary for the “pre-ordering, ordering, provisioning, maintenance and repair and billing for loops used in line splitting arrangements.”⁵⁶² As carriers identify operational issues associated with line splitting, the Commission recognized that state collaboratives and change management processes could be used by “incumbent LECs and competing carriers to work together to develop processes and systems to support competing carrier ordering and provisioning of unbundled loops and switching necessary for line splitting.”⁵⁶³

179. We disagree with WorldCom’s contention that Verizon’s line-splitting interconnection agreement language limits line splitting to carriers who are collocated in Verizon central offices or that Verizon is taking the position that the UNE-P providers may not line split unless they are collocated.⁵⁶⁴ Verizon’s contract language, which includes a reference to “collocator to collocator” connections, does not require UNE-P providers to be collocated in Verizon central offices to offer line split services.⁵⁶⁵ Rather, UNE-P providers need not obtain collocation in Verizon central offices to offer the voice component of line-split services.

⁵⁶⁰ *Line Sharing Reconsideration Order* at para. 14-25; *SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. § 51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers “to provide any telecommunications service that can be offered by means of that network element”).

⁵⁶¹ *Line Sharing Reconsideration Order* at para. 18.

⁵⁶² *Id.* at paras. 18-20.

⁵⁶³ *Id.* at para. 21.

⁵⁶⁴ See WorldCom Massachusetts II Reply at 13.

⁵⁶⁵ See Letter from Dee May, Executive Director Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-9 (filed March 23, 2001) (clarifying that voice providers in line splitting arrangements are not required to be collocated). We note that where a competitive LEC purchases an unbundled xDSL-capable loop terminated to its collocation arrangement to provide data service, it may partner with another competitive LEC to provide voice service. In this situation, the data provider may require a connection to the voice provider’s collocation arrangement.

180. Verizon's interconnection agreement amendment is also consistent with our *Line Sharing Reconsideration Order*, which requires that incumbent LECs minimize service disruptions to existing voice customers undergoing a transition to line-splitting.⁵⁶⁶ For example, where competitive LECs provide data service to existing end user customers and Verizon provides voice service to that customer there is no need to "rearrange" network facilities to provide line-split services.⁵⁶⁷ Because no central office wiring changes are necessary in such a conversion from line sharing to line splitting, Verizon is required under our *Line Sharing Reconsideration Order* to develop a streamlined ordering processes for formerly line sharing competitive LECs to enable migrations between line sharing and line splitting that avoid voice and data service disruption and make use of the existing xDSL-capable loop.⁵⁶⁸ Such a transition from line sharing to line splitting should occur subject only to charges consistent with the Commission's cost methodology as articulated in the *Local Competition First Report and Order*.⁵⁶⁹

181. We disagree with WorldCom's claim that Verizon's OSS does not comply with our *Line Sharing Reconsideration Order* in other respects.⁵⁷⁰ The *Line Sharing Reconsideration Order* does not require Verizon to have implemented an electronic OSS functionality to permit line splitting. Rather, the Commission's *Line Sharing Reconsideration Order* recognizes that a state-sponsored xDSL collaboratives is the appropriate place for Verizon to evaluate how best to

⁵⁶⁶ Verizon's line splitting amendment refers to "existing supporting OSS to order and combine" unbundled network elements necessary for line-split services. *Line Sharing Reconsideration Order* at para. 22. WorldCom likewise asserts that Verizon's contract language suggests that it intends to charge a series of non-recurring charges associated with each unbundled network element to its line-splitting customers that it does not charge to its UNE-P customers. See WorldCom Massachusetts II Reply at 13.

⁵⁶⁷ In the *Line Sharing Reconsideration Order*, the Commission held that "no central office wiring changes are necessary in a conversion from line sharing to line splitting." *Line Sharing Reconsideration Order* at para. 22. Verizon suggests that when competitive LEC serve customers with existing voice service, they may order new unbundled xDSL-capable loops and UNE-P arrangements and then issue a disconnect of the existing voice service to provide line split services. See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 157. Disconnecting a customer's currently-established voice service to enable the transition from line sharing to line splitting would require some disruption of dial tone and may require a change in the voice customers telephone number, a result that is inconsistent with our *Line Sharing Reconsideration Order*. See *Line Sharing Reconsideration Order* at para. 22.

⁵⁶⁸ *Line Sharing Reconsideration Order* at para. 22.

⁵⁶⁹ See *Local Competition First Report and Order*, 11 FCC Rcd at 15814-84, paras. 625-771. For example, we would expect Verizon to demonstrate why non-recurring charges in addition to those assessed when a competitive LEC orders a UNE-P arrangement are necessary. We cannot agree with Verizon when it states that "if Covad wants to engage in a line splitting arrangement with a voice [competing carrier], it may do so by working with the voice [competing carrier] to order the individual network elements" if such a process would impose unnecessary charges that are not cost-based or would otherwise require disruption of an end user's voice service in the context of a migration from line sharing to line splitting. Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 159.

⁵⁷⁰ WorldCom Massachusetts II Comments at 27.

develop this functionality.⁵⁷¹ For example, Verizon has represented that it is actively working on developing the OSS upgrades necessary to provide for electronic ordering of line-split services in the context of the New York Commission's xDSL collaborative.⁵⁷² We recognize that Verizon has not, to date, implemented the OSS upgrades necessary to electronically process line-splitting orders in a manner that is minimally disruptive to existing voice customers; but that such functionality may require significant software upgrades and testing. It is undisputed that the parties in the New York DSL collaborative commenced discussion of line splitting over a year ago; that in April 2000 Verizon formally posed numerous questions to competitors concerning their business rules for line splitting; and that in August 2000, competitive LECs submitted their initial detailed business rules to Verizon.⁵⁷³ Thus it appears that Verizon has the necessary information to implement the necessary OSS upgrades. Verizon has been able to provide its customers line-shared DSL service for approximately two years. Our *Line Sharing Reconsideration Order* is fulfilled by Verizon's adoption of an implementation schedule for line splitting as directed by the New York Commission that will afford competitors the same opportunities.

182. We note that in response to WorldCom's concerns, Verizon has agreed upon an implementation schedule to offer line splitting-specific OSS capabilities under the supervision of the New York Commission.⁵⁷⁴ In June of this year we expect that Verizon will conduct a preliminary OSS implementation in New York using new OSS functionality to add data service to an existing UNE-P customer. In October, Verizon has committed to implement, in the Verizon East territory including Massachusetts, the new OSS capability necessary to support migrations from line sharing to line splitting arrangements consistent with the business processes defined in the New York DSL collaborative.⁵⁷⁵ Consistent with their plans and with the guidance of the New York DSL collaborative, Verizon plans to offer OSS capability necessary to support UNE-P migrations to line splitting by October 2001.

V. OTHER CHECKLIST ITEMS

A. Checklist Item 1 – Interconnection

183. We conclude, as described below, that Verizon demonstrates that it provides equal-in-quality interconnection on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of sections 251(c)(2) and as specified in

⁵⁷¹ *Line Sharing Reconsideration Order* at para. 22 n.41 (“We also encourage participants in state collaboratives and change management processes to develop specific ordering procedures associated with a variety” of line splitting scenarios.)

⁵⁷² Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at para. 157.

⁵⁷³ See New York PSC, Order Granting Clarification, Granting Reconsideration in Part and Denying Reconsideration in Part and Adopting Schedule, Case 00-C-0127 (Issued and Effective January 29, 2001).

⁵⁷⁴ See Verizon Massachusetts II Reply at 30.

⁵⁷⁵ See Verizon Massachusetts II Lacouture/Ruesterholz Reply Decl. at paras. 157.

EXHIBIT F

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

In the Matter of)
)
Application by BellSouth Corporation,)
BellSouth Telecommunications, Inc., and) WC Docket No. 02 – 307
BellSouth Long Distance, Inc., for)
Authorization To Provide In-Region,)
InterLATA Services in Florida and Tennessee)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 2002

Released: December 19, 2002

By the Commission: Chairman Powell and Commissioner Copps issuing separate statements;
Commissioner Adelstein not participating.

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APPENDIX A – LIST OF COMMENTERS

APPENDIX B – FLORIDA PERFORMANCE DATA

APPENDIX C – TENNESSEE PERFORMANCE DATA

APPENDIX D – STATUTORY REQUIREMENTS

I. INTRODUCTION

1. On September 20, 2002, BellSouth Corporation and its subsidiaries, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, BellSouth) filed an application pursuant to section 271 of the Communications Act of 1934, as amended,¹ for authority to provide in-region, interLATA service originating in the states of Florida and Tennessee.² We grant BellSouth's application in this Order based on our conclusion that BellSouth has taken the statutorily required steps to open its local exchange markets in these states to competition. BellSouth therefore becomes the first Bell Operating Company (BOC) to obtain section 271 authority for interLATA service throughout its region.³

2. In ruling on BellSouth's application, we wish to acknowledge the effort and dedication of the Florida Public Service Commission (Florida Commission) and the Tennessee

¹ We refer to the Communications Act of 1934, as amended, as the Communications Act or the Act. See 47 U.S.C. §§ 151 *et seq.*

² See *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02-307 (filed Sept. 20, 2002) (BellSouth Application); see also *Comments Requested on the Joint Application by BellSouth Corporation for Authorization under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the States of Florida and Tennessee*, WC Docket No. 02-307, Public Notice, 17 FCC Rcd 17435 (Wireline Comp. Bur. 2002).

³ See *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*, WC Docket No. 02-150, Memorandum Opinion and Order, 17 FCC Rcd 17595 (2002) (*BellSouth Multistate Order*); *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018 (2002) (*BellSouth Georgia/Louisiana Order*).

BellSouth has committed itself to making capacity information available to competitive LECs in a form similar to that provided to the Commission.⁴⁵¹

h. Training, Technical Assistance, and Help Desk Support

131. As we did in the *BellSouth Georgia/Louisiana* and the *BellSouth Multistate Orders*, we find that BellSouth adequately assists competing carriers in their use of available OSS functions.⁴⁵² We reject Network Telephone's assertion that BellSouth's "Care Team" service is inadequate because Network Telephone provides no evidence that BellSouth has failed to enable Network Telephone to understand, implement, and use all of the OSS functions available to them.⁴⁵³ In fact, the record shows that from April 17-19, 2002, seventeen BellSouth employees traveled to Florida to meet with Network Telephone to discuss operational assistance issues.⁴⁵⁴ An outcome of this meeting was the discussion of a single point of contact ("SPOC") for Network Telephone on operational issues. If Network Telephone believes that BellSouth has failed to uphold its responsibilities in these areas, it may either avail itself of the change management plan's dispute resolution process or initiate an enforcement proceeding. However, given the lack of substantiating evidence in this proceeding, we find that BellSouth's showing in this area is the same as, if not better than, that which we found sufficient to meet the requirements of section 271 in the *BellSouth Georgia/Louisiana* and the *BellSouth Multistate Orders*.

V. OTHER CHECKLIST ITEMS

A. Checklist Item 4 - Unbundled Local Loops

132. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."⁴⁵⁵ Based on the evidence in the record, we conclude, as did the state commissions,⁴⁵⁶ that BellSouth demonstrates that it provides unbundled local loops in accordance with the requirements of section 271 and our rules. As in past section 271 orders, our conclusion

⁴⁵¹ BellSouth Nov. 20 *Ex Parte* Letter - #1 at 5-6.

⁴⁵² See *BellSouth Multistate Order* 17 FCC at 17712-13, para. 208; *BellSouth Georgia/Louisiana Order*, 17 FCC at 9132, para. 198.

⁴⁵³ Network Telephone Comments at 11-12. Network Telephone states that the Care Team cannot quickly provide answers to complicated questions, that deadlines are missed, that team members do not have the appropriate level of expertise, and that the Care Team does not have access to the appropriate personnel at BellSouth. *Id.* at 11.

⁴⁵⁴ See *BellSouth Ruscilli/Cox Reply Aff.* at paras. 54-58.

⁴⁵⁵ 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. Dark fiber and loop conditioning equipment are among the features, functions, and capabilities of the loop. *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67 n.301. See Appendix D at paras. 48-52.

⁴⁵⁶ See Florida Commission Comments - Hearing at 123-24; Tennessee Authority Comments at 33-34.

is based on our review of BellSouth's performance for all loop types, including voice grade loops, xDSL-capable loops, high capacity loops, and digital loops, as well as our review of BellSouth's hot cut, line-sharing, and line splitting processes. We note that, as of July 31, 2002, BellSouth states that it had provisioned 166,168 loops in Florida and 50,886 loops in Tennessee.⁴⁵⁷

133. Consistent with our prior section 271 orders, we do not address in detail aspects of BellSouth's loop performance where there is little, if any, dispute in the record that BellSouth's performance complies with the parity and benchmark measures established in the relevant states.⁴⁵⁸ As in past section 271 proceedings, in the course of our review we look for patterns of systemic performance disparities that have resulted in competitive harm or that otherwise have denied new entrants a meaningful opportunity to compete.⁴⁵⁹ Although several parties have raised issues with respect to BellSouth's loop performance,⁴⁶⁰ our own review of the record shows that BellSouth's performance overall has been satisfactory. Thus, we do not engage in detailed discussion of BellSouth's loop performance. Instead we focus on concerns raised by commenters, where the record indicates significant discrepancies between BellSouth's performance for its competitors and BellSouth's performance for its own retail operations.

134. *Voice Grade Loops.* We find, as did the state commissions,⁴⁶¹ that BellSouth provisions voice grade loops to competitors in a nondiscriminatory manner. BellSouth generally meets the benchmark and parity standards for order processing timeliness, installation timeliness, installation quality, and maintenance and repair timeliness and quality of voice grade loops in Florida and Tennessee, with few exceptions.⁴⁶² We find that the exceptions to BellSouth's

⁴⁵⁷ See BellSouth Application at 84.

⁴⁵⁸ See, e.g., *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219; *Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9.

⁴⁵⁹ See, e.g., *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122. We note that in its comments, AT&T lists various performance metrics missed by BellSouth. Although AT&T relates some of these missed metrics to alleged competitive impact, much of what AT&T lists demonstrates nothing more than isolated instances, or instances of near-compliance that, as we have found in previous orders, have no competitive impact. Accordingly, we decline to make a finding of noncompliance based upon AT&T's unsubstantiated allegations. See generally *AT&T Norris Decl.* However, the draft order fully treats those portions of the Norris Declaration that correlate BellSouth performance data to any competitive impact alleged by AT&T in its comments. See also *supra* n.201.

⁴⁶⁰ See, e.g., Covad Comments at 25-29; KMC Comments at 15-17.

⁴⁶¹ See Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

⁴⁶² See, e.g., Florida/Tennessee B.1.12.8 – B.1.12.9 (FOC Timeliness – Partially Mechanized – 10 Hours, 2 Wire Analog Loops); Florida/Tennessee B.2.18.8 – B.2.18.9 (% Missed Installation Appointments, 2 Wire Analog Loops); Tennessee B.2.19.8 – B.2.19.9 (% Provisioning Troubles Within 30 Days, 2 Wire Analog Loops); Tennessee B.3.1.8 – B.3.1.9 (Missed Repair Appointments, 2 Wire Analog Loops); Florida/Tennessee B.3.4.8 – B.3.4.9 (% Repeat Troubles Within 30 Days, 2 Wire Analog Loops).

generally nondiscriminatory performance are not competitively significant.⁴⁶³ We therefore find that a finding of checklist compliance is warranted despite these exceptions. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

135. *Hot Cut Activity.* We find, as did the state commissions,⁴⁶⁴ that BellSouth is providing voice grade loops through hot cuts in accordance with the requirements of checklist item 4.⁴⁶⁵ As in the Georgia/Louisiana proceeding, Mpower alleges that BellSouth's failure to provide an adequate frame due time (FDT) process violates BellSouth's obligation to provide nondiscriminatory access to OSS and to unbundled loops.⁴⁶⁶ The Commission did not find

⁴⁶³ BellSouth missed several months under an order processing timeliness benchmark (95% within 3 hours). See Florida B.1.9.8 (FOC Timeliness – Mechanized, 2 Wire Analog Loops)(indicating misses in June, July and August). However, competitive LECs experienced an average of 95.08% within 3 hours for the relevant period. Although BellSouth also missed parity from May-Sept. in Florida under a provisioning timeliness metric (the order completion interval metric), we note that its performance under another measure of installation timeliness, the percent missed installation appointments metric, indicates parity performance throughout the relevant period. See Florida B.2.1.9.1.4 (Order Completion Interval, 2 Wire Analog Loops Non-Design/Dispatch) (indicating a disparity from May-Sept.); see also Florida B.2.18 (% Missed Installation Appointments, 2 Wire Analog Loops). In previous orders, we have found the percent missed installation appointments metric more persuasive under comparable circumstances. See, e.g., *Bell Atlantic New York Order*, 15 FCC Rcd at 4063-66, paras. 205-10. BellSouth also suggests that some disparity under the order completion interval metric may be attributable to the fact that competitive LEC orders are scheduled based on the standard ordering guide which carries a minimum four-day interval, while the retail analogue for the majority of these orders is residence and business type plain old telephone service (POTS) orders that are scheduled on the due date calculator, and may be completed in less than a day. BellSouth Varner Aff., Ex. PM-2 at para.139. BellSouth missed parity in Florida for three months under a provisioning quality measure. See Florida B.2.19.9.1.4 (% Provisioning Troubles Within 30 Days, 2 Wire Analog Loops). We give little weight to this reported performance failure, however, in light of BellSouth's explanation that the misses correspond to a small number of trouble reports that do not provide a valid comparison to the retail analogue. The low competitive LEC volume of 9 in September makes it difficult to draw further conclusions regarding the data. BellSouth Varner Aff., Ex. PM-2 at para.143. BellSouth also missed several months under a maintenance and repair measure. See Florida B.3.2.9.1 (Customer Trouble Report Rate, 2 Wire Analog Loops, Non-Design/Dispatch). However, BellSouth still provided over 97% trouble-free services under this measurement, and the difference in the trouble report rate for competitive LEC lines was less than 1% higher than the BellSouth retail analogue. BellSouth Varner Aff., Ex. PM-2 at para. 148. Therefore, we find that that reported performance failure has little, if any, competitive impact. Finally, we note that BellSouth missed three months in Florida under the missed appointments metric for non-dispatch orders. See Florida B.3.1.9.2 (Missed Repair Appointments, 2 Wire Analog Loops, Non-Design/Non-Dispatch). BellSouth states that two of the six missed appointments in May were missed by less than thirty minutes each, and the other four were due to improper order close-out procedures associated with a multi-trouble order for the same customer. BellSouth further states that two of the eighteen total missed appointments in July were closed as Tested OK/ Found OK, and fifteen of the remaining 16 missed appointments were the result of 2 multiple troubles. BellSouth Varner Aff., Ex. PM-2 at para.147. We are persuaded by BellSouth's explanations for these performance disparities and find that they have little, if any, competitive impact.

⁴⁶⁴ See Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

⁴⁶⁵ See generally Appendices B and C.

⁴⁶⁶ See Mpower Comments at 12-13.

Mpower's arguments persuasive in the *BellSouth Georgia/Louisiana Order*,⁴⁶⁷ and Mpower provides no new evidence to support its claim in the instant proceeding. Accordingly, we dismiss Mpower's allegations.

136. *Digital Loops.* We find, as did the state commissions,⁴⁶⁸ that BellSouth's performance with respect to digital loops complies with checklist item 4.⁴⁶⁹ We recognize, however, that BellSouth's performance in Florida with respect to one installation timeliness measure – the order completion interval metric (dispatch) – was out of parity from May through September.⁴⁷⁰ BellSouth explains, however, that within the mix of competitive LEC orders under this measurement, more than half were for unbundled digital channel (UDC) circuits, which are designed circuits requiring approximately 10 days for completion as compared to the retail analogue which is heavily weighted toward ADSL circuits requiring approximately 4 days to complete.⁴⁷¹ Due to BellSouth's explanation, we do not find that the disparity in BellSouth's performance under this metric raises an issue of checklist noncompliance. In addition, the data under another installation timeliness metric – percent missed installation appointments – shows that BellSouth provisioned digital loops in a timely fashion during the relevant period.⁴⁷² In these circumstances, as in previous orders, we conclude that BellSouth's performance under the order completion interval metric has not denied competitive LECs a meaningful opportunity to compete in Florida.⁴⁷³

137. Contrary to the argument propounded by KMC, we conclude that BellSouth's provisioning and maintenance and repair performance for digital loops warrants a finding of checklist compliance.⁴⁷⁴ Although BellSouth's installation quality measure for digital loops – the percentage of provisioning troubles within 30 days – was out of parity in Florida from May to

⁴⁶⁷ See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9146, para. 222.

⁴⁶⁸ See Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

⁴⁶⁹ BellSouth missed several months under an order processing timeliness benchmark (85% within 10 hours). See Florida B.1.12.14 (FOC Timeliness – Partially Mechanized – 10 Hours) (Other Design). This category comprises several loop types, including digital and high capacity loops. However, competitive LECs experienced an average of 87.03% within 10 hours for the relevant period. Thus, we do not find these misses to be competitively significant. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

⁴⁷⁰ The order completion interval metric measures the amount of time it takes BellSouth to actually provide service on the orders it receives from competitive LECs and its own customers. See Florida B.2.1.18.1.1 (Order Completion Interval, Digital Loops <DS1/<10 Circuits/Dispatch) (indicating intervals of 8.89, 7.64, 7.77, 8.24, and 7.99 days for competitive LECs and 4.77, 3.69, 3.58, 3.27, and 3.17 days for BellSouth's retail operations).

⁴⁷¹ See *BellSouth Varner Aff.*, Ex. PM-2 at para. 151. BellSouth also states that UDC circuits are not offered as retail products. *Id.*

⁴⁷² See Florida B.2.18.18.1.1 (% Missed Installation Appointments, Digital Loops <DS1/<10 Circuits/Dispatch).

⁴⁷³ See, e.g., *BellSouth Multistate Order*, 17 FCC Rcd at 17729-30, para. 240.

⁴⁷⁴ KMC Comments at 15-17.

September,⁴⁷⁵ BellSouth demonstrates that the majority of these misses were caused by defective plant facilities, central office wiring problems, or incidents where trouble reports were resolved as “tested OK/found OK”.⁴⁷⁶ Specifically, BellSouth provides the number of total trouble reports for each month that would be classified under the above categories of troubles, and explains how troubles under these categories often do not reflect the quality of the installation performed by BellSouth.⁴⁷⁷ BellSouth further states that it is retraining plant technicians on proper testing and order turn-up procedures.⁴⁷⁸ We agree that several troubles reported under this measure appear to be attributed to causes other than BellSouth’s provisioning process, and accordingly find that BellSouth’s performance in this area satisfies checklist item 4.

138. Similarly, BellSouth’s maintenance and repair performance for digital loops was generally in parity during the applicable period.⁴⁷⁹ This performance constitutes checklist compliance notwithstanding that one measure of that performance – the customer trouble report rate – was out of parity in Florida and Tennessee throughout much of the relevant period.⁴⁸⁰

⁴⁷⁵ See Florida B.2.19.18.1.1 (% Provisioning Troubles within 30 Days, Digital Loops<DS1/<10 Circuits/Dispatch) (indicating trouble rates from May to September of 7.22%, 6.61%, 6.99%, 8.28%, and 6.96% for competitive LECs, and rates of 4.63%, 4.63%, 5.18%, 4.81%, and 4.03% for BellSouth retail).

⁴⁷⁶ See BellSouth Varner Aff., Ex. PM-2 at para. 154.

⁴⁷⁷ For example, BellSouth explains that incidents of defective plant facilities may occur after BellSouth has installed and tested the facility when a cable gets wet or foreign voltage finds its way onto the facility. Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 4 (filed Nov. 13, 2002)(BellSouth Nov. 13 *Ex Parte* Letter – #2). Furthermore, troubles that fall under the tested OK/found OK category would also not appear to indicate that there was an actual problem with the quality of the installation performed by BellSouth. As BellSouth describes, the tested OK/found OK category includes competitive LEC reported troubles where a technician conducts tests in either the repair center, the central office or outside, and finds that the loop is operating without a problem. See Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 3 (filed Nov. 18, 2002)(BellSouth Nov. 18 *Ex Parte* Letter – #1). BellSouth shows that when tested OK/found OK reports are removed from the percent provisioning troubles in 30 days metric, the competitive LEC results from May-Sept. are reduced to 6.4%, 5.8%, 6.2%, 7.4% and 5.8% respectively. *Id.* at 2.

⁴⁷⁸ See BellSouth Varner Aff., Ex. PM-2 at para. 154.

⁴⁷⁹ See BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 (filed Nov. 21, 2002) (BellSouth Nov. 21 *Ex Parte* Letter – #1) (listing BellSouth’s disaggregated performance under the % Missed Repair Appointments, Maintenance Average Duration, and % Repeat Troubles within 30 Days metrics for digital and high capacity loops). We note that while BellSouth has provided disaggregated maintenance and repair data for digital loops, the Florida interim and Tennessee measurements do not have established metrics for this data. Disaggregated metrics are included under the Florida permanent measurements.

⁴⁸⁰ See *Id.* (listing BellSouth’s disaggregated performance under the Customer Trouble Report Rate, Digital Loops<DS1/Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through September); *id.* (listing BellSouth’s disaggregated performance under the Customer Trouble Report Rate, Digital (continued....)

BellSouth states that in spite of this disparity, 95 percent of the competitive LEC circuits for dispatch and non-dispatch digital loop orders were trouble-free during the relevant period.⁴⁸¹ Because the overall trouble report rate for digital loops that BellSouth provided competitive LECs was low during the relevant period, we find that these disparities lack competitive significance.⁴⁸² Moreover, contrary to KMC's assertions, BellSouth was consistently in parity, with very few repeat troubles, with regard to its measure for repeat troubles within 30 days of maintenance or repair of digital loops.⁴⁸³

139. *High Capacity Loops.* We find, as did the state commissions,⁴⁸⁴ that BellSouth's performance with respect to high capacity loops complies with checklist item 4.⁴⁸⁵ We reach this conclusion despite the fact that BellSouth's performance with respect to some provisioning metrics – including the percentage of missed installation appointments and the percentage of troubles found within 30 days of installation – is out of parity for several months during the applicable period.⁴⁸⁶ As we discuss below, however, this performance does not warrant a finding of checklist noncompliance. Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.⁴⁸⁷

(Continued from previous page)

Loops<DS1/Non-Dispatch in Florida/Tennessee) (out of parity in Florida from May through September, and out of parity in Tennessee in May); *see also* KMC Comments at 16.

⁴⁸¹ BellSouth Reply at 42; BellSouth Varner Reply Aff. at para. 150.

⁴⁸² BellSouth missed parity with regard to digital loops requiring dispatch in Florida from May through September with customer trouble rates of 1.34%, 1.49%, 1.74%, 1.57%, and 1.40% for competitive LECs, and rates of 0.26%, 0.28%, 0.34%, 0.36%, and 0.28% for BellSouth retail; BellSouth also missed parity in Tennessee from May through September with customer trouble rates of 1.11%, 1.14%, 1.10%, 1.49%, and 0.95% for competitive LECs, and rates of 0.34%, 0.37%, 0.44%, 0.44%, and 0.40% for BellSouth retail. *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1. BellSouth missed parity with respect to non-dispatch digital loops in Florida from May through September with customer trouble rates of 0.66%, 0.55%, 0.47%, 0.57%, and 0.49% for competitive LECs, and rates of 0.35%, 0.28%, 0.32%, 0.33%, and 0.31% for BellSouth retail; BellSouth only missed parity in Tennessee in May with a customer trouble rate of 0.71% for competitive LECs, and a rate of 0.32% for BellSouth retail. *See* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1; *see also* BellSouth Georgia/Louisiana Order, 17 FCC Rcd at 9150, para. 230. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

⁴⁸³ *See* KMC Comments at 16-17; *but see* BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the % Repeat Troubles within 30 Days metrics for digital and high capacity loops); BellSouth Varner Reply Aff. at para. 151.

⁴⁸⁴ *See* Florida Commission Comments – Hearing at 123-124; Tennessee Authority Comments at 33-34.

⁴⁸⁵ *See generally* Appendices B and C; *see also supra* n.469.

⁴⁸⁶ *See* Florida/Tennessee B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops \geq DS1/<10 Circuits/Dispatch); Florida/Tennessee B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops \geq DS1/<10 Circuits/Dispatch).

⁴⁸⁷ *See* BellSouth Georgia/Louisiana Order, 17 FCC Rcd at 9144, para. 219; Verizon Massachusetts Order, 16 FCC Rcd at 9055-56, para. 122; Verizon Pennsylvania Order, 16 FCC Rcd at 17468-69, para. 90 (finding that even (continued....))

140. First, we recognize that BellSouth's performance with respect to the missed installation appointments metric was out of parity in Florida and Tennessee for several months during the relevant period.⁴⁸⁸ BellSouth states that there were only 29 missed appointments in Florida under the missed installation appointment metric from May through July for over 1,200 orders, and that the majority of these missed due dates were caused by facility issues where installation of the loop required the construction of additional facilities.⁴⁸⁹ Given that the majority of installation appointments were met, and that BellSouth's overall loop performance is satisfactory, we do not find that lack of parity under the missed installation appointments metric for high capacity loops warrants a finding of noncompliance in Florida and Tennessee for checklist item 4.

(Continued from previous page)

"poor" performance with regard to high capacity loops did not warrant a finding of checklist noncompliance for all loop types where high capacity loops represented only a small percentage of all loops ordered by competitors in a state). High capacity loops appear to represent approximately 3.5% and 7.6% of the unbundled loops provisioned to competitive LECs in Florida and Tennessee, respectively. See BellSouth Application App. A, Vol. 3a, Tab F, Affidavit of W. Keith Milner (BellSouth Milner Aff.) at paras. 96, 98.

⁴⁸⁸ See Florida B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops \geq DS1/<10 Circuits/Dispatch) (indicating missed installation appointment rates from May to September of 2.16%, 1.81%, 3.15%, 4.01%, and 4.37% for competitive LECs, and rates of 0.60%, 0.00%, 1.30%, 0.69%, and 1.33% for BellSouth retail); Tennessee B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops \geq DS1/<10 Circuits/Dispatch) (indicating missed installation appointment rates in May, June, August and September of 6.77%, 9.17%, 7.25%, and 6.38% for competitive LECs, and rates of 2.93%, 4.22%, 3.14%, and 1.98% for BellSouth retail). KMC argues that BellSouth's loop assignment practices are discriminatory, and result in a greater percentage of competitive LEC high capacity loop orders being "held, pending facility" and placed in jeopardy status. KMC Comments at 11; see also Letter from Andrew M. Klein, Counsel to KMC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307, Attach. at 6 (filed Dec. 5, 2002) (KMC Dec. 5 *Ex Parte* Letter). According to KMC, BellSouth's jeopardy performance in Georgia and Louisiana has also declined in recent months. See KMC Dec. 5 *Ex Parte* Letter, Attach. at 7-8. KMC states that this high percentage of jeopardies under BellSouth's facility assignment approach leads to more missed appointments for competitive LECs. KMC Comments at 14; KMC Reply at 8. BellSouth, however, explains that the difference in the percentage of competitive LEC and BellSouth orders placed in jeopardy status is primarily a reflection of the fact that competitive LECs are targeting business customers in customer locations that are typically heavily congested and capacity constrained, whereas BellSouth's retail orders are more widely distributed across a statewide area. See Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1-2 (filed Dec. 11, 2002)(BellSouth Dec. 11 *Ex Parte* Letter – #1). According to BellSouth, the percentage of jeopardies issued for competitive LEC orders in Georgia and Louisiana has increased, but BellSouth notes that jeopardies for BellSouth retail have also increased to an even greater degree than for competitive LEC orders. BellSouth Dec. 11 *Ex Parte* Letter – #1 at 3. BellSouth states that despite the issuance of jeopardies in Florida and Tennessee, many orders were still completed as scheduled. BellSouth Varner Reply Aff. at paras. 127, 129. But see Letter from Andrew M. Klein, Counsel to KMC, Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1 (filed Dec. 17, 2002) (KMC Dec. 17 *Ex Parte* Letter). In addition, BellSouth states that the majority of missed appointments that did occur were not caused by discriminatory practices, but instead were due to the fact that the competitive LEC orders were placed to end-users where facility projects were required to meet the demand. BellSouth Varner Reply Aff. at para. 129. We note that BellSouth's performance reflected by another measure of installation timeliness – the order completion interval metric – indicates parity in both states for all relevant months. See Florida/Tennessee B.2.1.19.1.1 (Order Completion Interval, Digital Loops \geq DS1/<10 Circuits/Dispatch).

⁴⁸⁹ See BellSouth Varner Aff., Ex. PM-2 at para. 153.

141. Next, KMC argues that BellSouth fails to achieve parity under the provisioning quality metric measuring the percentage of troubles found within 30 days of high capacity loop installation.⁴⁹⁰ BellSouth states that in Florida the majority of the misses were caused by defective plant facilities, central office wiring problems or incidents where trouble reports were resolved as tested OK/found OK.⁴⁹¹ BellSouth also specifically states that in Tennessee, forty percent of the reports were closed as no trouble found, while the remainder were equally spread between outside facilities and equipment within the central office.⁴⁹² As discussed above, we agree that several troubles reported under this measure appear to be attributed to causes other than BellSouth's own provisioning process. Data provided by BellSouth show for example that 13 of the 39 total trouble reports reported in September for high capacity loops in Florida fell under the category of loops that actually were tested OK or found OK.⁴⁹³ Given this evidence, and recognizing BellSouth's generally acceptable performance for other categories of loops, we find that BellSouth's performance is in compliance with checklist item 4.⁴⁹⁴

142. KMC also contends that BellSouth's maintenance and repair performance for high capacity loops precludes a finding of checklist compliance.⁴⁹⁵ In particular, KMC points to BellSouth's performance under the percentage of repeat troubles within 30 days and the customer trouble report rate.⁴⁹⁶ With respect to BellSouth's performance under the repeat troubles metric in Florida and Tennessee, we find that contrary to KMC's claim, results during the relevant period indicate nondiscriminatory performance for BellSouth's maintenance and

⁴⁹⁰ KMC Comments at 15-16. As with missed appointments, KMC suggests that the high percentage of jeopardies under BellSouth's facility assignment approach contributes to the greater number of provisioning troubles. *See supra* n.488; KMC Reply at 8-9. *See also* Florida/Tennessee B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops \geq DS1/ $<$ 10 Circuits/Dispatch) (BellSouth missed parity in Florida in May, July, August and September with trouble rates of 11.17%, 10.57%, 9.93%, and 12.04% for competitive LECs, and rates of 6.89%, 5.41%, 6.36%, and 2.07% for BellSouth retail; BellSouth missed parity in Tennessee in May, July, August, and September with trouble rates of 19.23%, 14.41%, 18.92%, and 16.58% for competitive LECs, and rates of 5.51%, 6.63%, 3.52%, and 3.92% for BellSouth retail). Performance under these measures is within the range accepted in previous BellSouth applications.

⁴⁹¹ *See* BellSouth Varner Aff., Ex. PM-2 at para. 154; *see also* BellSouth Dec. 11 *Ex Parte* Letter – #1 at 5-6. *But see* KMC Dec. 17 *Ex Parte* Letter at 3.

⁴⁹² *See* BellSouth Varner Aff., Ex. PM-3 at para. 149.

⁴⁹³ *See* BellSouth November 13 *Ex Parte* Letter – #2 at 4. BellSouth shows that when tested OK/found OK reports are removed from the percent provisioning troubles in 30 days metric, the competitive LEC results in May, July, August and September are reduced to 8.6%, 7.3%, 6.5%, and 8.0% respectively. BellSouth Nov. 18 *Ex Parte* Letter – #1.

⁴⁹⁴ Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

⁴⁹⁵ KMC Comments at 17.

⁴⁹⁶ KMC Comments at 16-17. As with missed appointments, KMC suggests that the high percentage of jeopardies under BellSouth's facility assignment approach contributes to the greater number of customer trouble reports. *See supra* n.488; KMC Reply at 8-9.

repair of high capacity loops.⁴⁹⁷ The customer trouble report rate, however, was out of parity in Florida and Tennessee throughout the relevant period.⁴⁹⁸ BellSouth states that one explanation for this disparity is that the retail analogue for these circuits includes many interoffice circuits that use fiber facilities running between central offices at the DS-3 level, and which are less complex, and thus less prone to the technical problems that give rise to customer trouble reports, than the DS-1 competitive LEC circuits that have additional circuit equipment.⁴⁹⁹ BellSouth also states that, in spite of the performance disparity, 95 percent of the competitive LEC circuits for dispatch and non-dispatch high capacity loop orders were trouble free during the relevant period.⁵⁰⁰ Because the overall trouble report rate for high capacity loops that BellSouth provided competitive LECs was low during the relevant period, we find that these disparities lack competitive significance, and that BellSouth's maintenance and repair performance for high capacity loops warrants a finding of checklist compliance.⁵⁰¹

⁴⁹⁷ See BellSouth Varner Aff., Ex. PM-33; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the % Repeat Troubles Within 30 Days metric for digital and high capacity loops) (indicating parity performance from May-Sept. for dispatch/non-dispatch high capacity loop orders in Tennessee, and parity performance for every month during the relevant period except August for dispatch/non-dispatch high capacity loop orders in Florida). See also BellSouth Dec. 11 *Ex Parte* Letter – #1 at 7.

⁴⁹⁸ See BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops>=DS1/Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through September); *id.* (discussing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops>=DS1/Non-Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through September); see also KMC Comments at 9, 16 (stating that despite the fact that in most cases high capacity loops constitute a small percentage of overall loops provided, the out of parity trouble rate for high capacity loops affects a competitive LEC customer base equivalent to between 156,240 and 4,374,720 voice grade lines depending on whether all of the 6,510 circuits are on DS-1 or DS-3 high capacity loops).

⁴⁹⁹ See BellSouth Varner Reply Aff. at para. 150. BellSouth also notes that KMC's argument regarding the voice grade line equivalent for these high capacity loops assumes that each DS-1 and DS-3 is completely full, which is not the case. See BellSouth Varner Reply Aff. at para. 150.

⁵⁰⁰ BellSouth Reply at 42; BellSouth Varner Reply Aff. at para. 150; see also BellSouth Dec. 11 *Ex Parte* Letter – #1 at 6.

⁵⁰¹ BellSouth missed parity with regard to high capacity loops requiring dispatch in Florida from May through September with customer trouble rates of 3.55%, 3.34%, 3.59%, 3.10%, and 3.03% for competitive LECs, and rates of 0.26%, 0.28%, 0.34%, 0.36%, and 0.28% for BellSouth retail; BellSouth also missed parity in Tennessee from May through September with customer trouble rates of 3.30%, 3.03%, 4.40%, 3.91%, and 3.25% for competitive LECs, and rates of 0.34%, 0.37%, 0.44%, 0.44%, and 0.40% for BellSouth retail. See BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1. BellSouth missed parity with respect to non-dispatch high capacity loops in Florida from May through September with customer trouble rates of 1.44%, 1.32%, 1.44%, 1.26%, and 1.31% for competitive LECs, and rates of 0.35%, 0.28%, 0.32%, 0.33%, and 0.31% for BellSouth retail; BellSouth missed parity in Tennessee from May through September with customer trouble rates of 1.38%, 1.48%, 1.43%, 1.60%, and 1.46% for competitive LECs, and rates of 0.32%, 0.32%, 0.35%, 0.38%, and 0.28% for BellSouth retail. See BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1; see also *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9150, para. 230.

143. AT&T asserts that BellSouth fails to satisfy checklist item 4 because it fails to provide a reasonable and cost-based method of converting special access DS-1 circuits to TELRIC-priced unbundled loops.⁵⁰² Specifically, AT&T states that BellSouth's conversion process requires the issuance of a disconnect order for the special access DS-1 in addition to a new connect order for the UNE loop, risking disruption of service.⁵⁰³ AT&T further states that BellSouth does not dispute AT&T's right to convert the special access circuit to an unbundled loop, only the process of conversion.⁵⁰⁴ In response, BellSouth argues that its interconnection agreement provides only for the conversion of special access to UNE combinations and does not provide for, or require, conversions of access or tariffed services to stand-alone UNEs.⁵⁰⁵ Based on the limited factual record, and the time constraints associated with section 271 proceedings, we find that this competitive LEC-specific dispute is more appropriately addressed in an adjudicatory proceeding in the appropriate forum. Thus we find that a finding of checklist compliance is warranted despite AT&T's allegations.

144. *Line Sharing.* We find, as did the state commissions,⁵⁰⁶ that BellSouth offers nondiscriminatory access to the high frequency portion of the loop in Florida and Tennessee.⁵⁰⁷ BellSouth has provisioned 2,850 line sharing arrangements in Florida and 931 line sharing arrangements in Tennessee, as of July 2002.⁵⁰⁸ We recognize that BellSouth's performance in Florida and Tennessee, with respect to one installation timeliness measure – the order completion interval metric (dispatch) – was out of parity for several months.⁵⁰⁹ We note, however, that the data under another installation timeliness metric – percent missed installation appointments – shows that BellSouth generally provisioned line shared loops in a timely fashion

⁵⁰² AT&T Comments at 19-20.

⁵⁰³ AT&T Comments at 19-20. AT&T also suggests that current single order alternatives are cost prohibitive. *Id.* at 20.

⁵⁰⁴ AT&T Comments at 19 n.13.

⁵⁰⁵ BellSouth Ruscilli/Cox Reply Aff. at para. 25. BellSouth submits that its project management offer to facilitate the conversion of special access to stand-alone UNEs goes beyond its obligations. BellSouth Ruscilli/Cox Reply Aff. at paras. 26-27.

⁵⁰⁶ See Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

⁵⁰⁷ The D.C. Circuit recently stated that “the *Line Sharing Order* must be vacated and remanded.” *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002). The court also stated that it “grant[ed] the petitions for review[] and remand[ed] the *Line Sharing Order* . . . to the Commission for further consideration in accordance with the principles outlined.” *Id.* at 430. We are addressing the line sharing rules as part of our *Triennial Review Proceeding*. See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781, 22805, paras. 53-54 (2001). -

⁵⁰⁸ See BellSouth Application at 97.

⁵⁰⁹ See Florida B.2.1.7.3.1 (Order Completion Interval, <6 Circuits/Dispatch); Florida B.2.1.7.3.2 (Order Completion Interval, <6 Circuits/Non-Dispatch); Tennessee B.2.1.7.3.2 (Order Completion Interval, <6 Circuits/Non-Dispatch).

during the relevant period.⁵¹⁰ Accordingly, we find that BellSouth's provisioning of line-shared loops satisfies checklist item 4. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

145. Covad raises issues regarding BellSouth's performance under the percent provisioning troubles within 30 days of installation, the maintenance average duration, and the percent repeat troubles within 30 days metrics.⁵¹¹ BellSouth states that despite the disparity under the provisioning troubles within 30 days of installation metric, the results indicate a very high incidence of trouble reports that were resolved as tested OK/found OK in Florida for both dispatch and non-dispatch orders.⁵¹² BellSouth further states that misses in Tennessee under the maintenance average duration metric are again largely due to delays caused by a very high incidence of trouble reports closed as tested OK/found OK.⁵¹³ Given the totality of circumstances, we conclude that BellSouth's performance under these metrics is consistent with satisfactory performance of this checklist item. We also note that despite Covad's claims of discriminatory performance under the percent repeat troubles within 30 days metric, BellSouth achieved parity under this metric for all relevant months in Tennessee, and all but one month in Florida.⁵¹⁴

146. *UNE ISDN Loops.* We find, as did the state commissions,⁵¹⁵ that BellSouth provides ISDN loops to competitors in a nondiscriminatory manner. BellSouth's performance

⁵¹⁰ See Florida B.2.18.7.1.1 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Dispatch); Florida B.2.18.7.1.2 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Non-Dispatch); Tennessee B.2.18.7.1.2 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Dispatch).

⁵¹¹ Covad Comments at 25-29. As in prior section 271 orders, performance data relative to competitive LECs on an aggregate basis is the most persuasive evidence of whether a BOC meets the checklist requirements. See, e.g., *BellSouth MultiState Order*, 17 FCC Rcd at 17727, para. 237; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9148, para. 226. Thus, although Covad claims that its data show discriminatory performance, allegedly anomalous results for a single carrier in this instance are insufficient to rebut BellSouth's evidence demonstrating checklist compliance. If evidence becomes available to the Commission in the future sufficient to show systemic performance disparities, we will pursue appropriate enforcement action.

⁵¹² BellSouth Reply at 40; BellSouth Varner Reply Aff. at para. 143 (indicating that 39% of the troubles for dispatch line sharing orders were closed as tested OK/found OK in May, 23% in June, 50% in July, and 31% in August). BellSouth states that when tested OK/found OK reports are removed from this metric for non-dispatch line sharing orders in Florida, the results in May, June, July, and August are 4.6%, 9.6%, 5.4% and 4.5% respectively. BellSouth Varner Reply Aff. at para. 144. BellSouth also states that when tested OK/found OK reports are removed from Tennessee results, the percentage of troubles within 30 days are quite small. BellSouth Reply at 41; BellSouth Varner Reply Aff. at para. 144 (indicating that results under this metric would have been 2.8% and 4.2% respectively if the tested OK/found OK reports are removed for July and August).

⁵¹³ BellSouth Reply at 41; BellSouth Varner Reply Aff. at para. 146. As noted above, troubles that fall under the tested OK/found OK category would not appear to indicate that there was an actual problem with the quality of the installation performed by BellSouth. See *supra* n.477.

⁵¹⁴ See BellSouth Reply at 41.

⁵¹⁵ See Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

data demonstrate that, for the most part, it met the relevant benchmarks and parity standards,⁵¹⁶ notwithstanding that the data reveal some performance issues with respect to ordering and a maintenance and repair measure. First, with respect to the order processing timeliness metric, Firm Order Confirmation (FOC) timeliness, we recognize that BellSouth's performance misses the relevant benchmarks for partially mechanized orders for several months.⁵¹⁷ BellSouth explains that the volumes decreased to such low levels in recent months that to meet the 85 percent in 10-hours benchmark in any given month, BellSouth could not miss more than four LSRs in Florida and could not miss any LSRs in Tennessee.⁵¹⁸ BellSouth adds that steps have been taken to improve performance, such as the implementation of new computer tools and periodic operational reviews.⁵¹⁹ Given this, and the fact that the order volumes were low for this submetric, we find that that these performance discrepancies are not competitively significant. We also reject AT&T's claim that BellSouth's performance for the percentage of jeopardy notices for mechanized ISDN loops, which is out of parity throughout the relevant period in Florida and Tennessee, demonstrates BellSouth's noncompliance with this checklist item.⁵²⁰ We believe that BellSouth's failing to meet the parity standard for such jeopardy notices has little competitive impact because BellSouth ultimately provisioned the ISDN loop in a timely manner.⁵²¹ Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

⁵¹⁶ See, e.g., Florida/Tennessee B.2.1.6.3.1 (Order Completion Interval, UNE ISDN/<6 Circuits/Dispatch); Florida/Tennessee B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN/<10 Circuits/Dispatch).

⁵¹⁷ See Florida B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)) (in Florida, BellSouth missed the 85% within 10 hours benchmark from June-Sept., the results are 82.05%, 70.83%, 80.95%, 83.33%, respectively); Tennessee B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)) (in Tennessee, BellSouth missed the 85% within 10 hours benchmark in June and July, the results are 81.82% and 80.00%, respectively). We note that AT&T generally comments about BellSouth's performance in Florida and Tennessee with respect to the FOC timeliness partially mechanized submetric. AT&T Norris Decl. at paras. 18, 51; see also *supra* n.201.

⁵¹⁸ BellSouth Varner Reply Aff. at paras. 160-61. Volumes dropped off substantially after May 2002 in Florida and Tennessee. In Florida, on average, from June-Sept., there were approximately 25 orders a month. In Tennessee, for these same months, there were approximately 7 orders a month, on average. See Florida/Tennessee B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)).

⁵¹⁹ BellSouth Varner Reply Aff. at para. 161.

⁵²⁰ See AT&T Norris Decl. at paras. 20, 56; Florida B.2.5.6 (% Jeopardies - Mechanized, UNE ISDN) (out of parity in May-Sept.); Tennessee B.2.5.6 (% Jeopardies - Mechanized, UNE ISDN) (out of parity in May, July-Sept.).

⁵²¹ Jeopardy notices warn competitive LECs that BellSouth may miss an installation appointment. BellSouth Varner Aff., Ex. PM-2 at para. 141. In its reply, BellSouth points out that AT&T failed to mention that BellSouth met almost all of the % Missed Installation Appointment metrics and added that "the jeopardy percentage was not indicative of whether the appointment was actually made." BellSouth Varner Reply Aff. at para. 129. BellSouth met or exceeded the missed installation appointment submetric with one minor exception in Florida. See Florida B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN/<10 Circuits/Dispatch).

147. Finally, even though BellSouth's data reveal some performance disparities with respect to the maintenance and repair of ISDN loops, BellSouth's overall performance in this area complies with checklist item 4. Specifically, BellSouth was out of parity with respect to the customer trouble report rate for several months in Florida.⁵²² BellSouth states that a large proportion of the reported troubles were due to defective cable pairs or circuit cards that had to be "reseated."⁵²³ BellSouth adds that with respect to the circuit cards, the problem may be attributable to a customer's defective modem or computer⁵²⁴ and claims that its performance is excellent when viewing the metric from the converse perspective – trouble-free lines – which is 97 percent for both wholesale and retail customers.⁵²⁵ The record shows that BellSouth has not identified any persistent problems and seeks ways to improve performance by holding monthly Outside Plant Improvement committees aimed at addressing these types of problems.⁵²⁶ Moreover, the disparity between BellSouth retail and competitive LEC performance is small for this submetric.⁵²⁷ Accordingly, we find that BellSouth's performance overall for ISDN loops warrants a finding of checklist compliance.

B. Checklist Item 11 – Number Portability

148. Section 271(c)(2)(B)(xi) of the Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.⁵²⁸ Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."⁵²⁹ Based on the evidence in the

⁵²² See Florida B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch) (out of parity May-Sept.). However, we note that BellSouth met or exceeded the parity standard for metrics measuring the percentage of missed repairs, maintenance average duration, and the percentage of repeat troubles with two minor exceptions. See Florida B.3.3.6.2 (Maintenance Average Duration, UNE ISDN/Non-Dispatch) (out of parity in June and September); Florida B.3.4.6.1 (% Repeat Troubles within 30 days, UNE ISDN/Dispatch) (out of parity in June).

⁵²³ BellSouth Application at 95; BellSouth Varner Reply Aff. at para. 164; Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 2 (filed Nov. 12, 2002) (BellSouth Nov. 12 *Ex Parte* Letter). BellSouth explains that when a circuit card has to be "reseated" this means that a technician removes a plug-in card associated with an ISDN line and then reinserts that card into the same slot. BellSouth Nov. 12 *Ex Parte* Letter at 2.

⁵²⁴ *Id.* According to BellSouth, a defective modem or computer may seize the line but does not release when the transmission is complete. *Id.* As a result, the line is unavailable. *Id.*

⁵²⁵ BellSouth Varner Reply Aff. at para. 162.

⁵²⁶ *Id.* at para. 164.

⁵²⁷ Florida B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch) (generally equal to or less than 1.5% difference between BellSouth retail and wholesale performance).

⁵²⁸ 47 U.S.C. § 271(c)(2)(B)(xi).

⁵²⁹ 47 U.S.C. § 251(b)(2).

attachments in any case where such matters are regulated by a State.”¹⁵⁹ As of 1992, nineteen states, including Connecticut, had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.¹⁶⁰

D. Checklist Item 4 – Unbundled Local Loops

48. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”¹⁶¹ The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types of loops, including two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.¹⁶²

49. 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.¹⁶³ Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible

¹⁵⁹ *Id.* § 224(c)(1). The 1996 Act extended the Commission’s authority to include not just rates, terms, and conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(f). Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(c)(1); see also *Bell Atlantic New York Order*, 15 FCC Rcd at 4093, para. 264.

¹⁶⁰ See *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992); 47 U.S.C. § 224(f).

¹⁶¹ 47 U.S.C. § 271(c)(2)(B)(iv).

¹⁶² *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase “network interconnection device” with “demarcation point,” and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

¹⁶³ *SWBT Texas Order*, 15 FCC Rcd at 18481-81, para. 248; *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637, para. 185.

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.

50. On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL).¹⁶⁴ HFPL is defined as “the frequency above the voiceband on a copper loop facility that is being used to carry traditional POTS analog circuit-switched voiceband transmissions.” This definition applies whether a BOC’s voice customers are served by copper or by digital loop carrier equipment. Competing carriers should have access to the HFPL at either a central office or at a remote terminal. However, the HFPL network element is *only* available on a copper loop facility.¹⁶⁵

51. To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*. Specifically, a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates, and repeat trouble report rates. In addition, a successful BOC applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases.

52. Section 271(c)(2)(B)(iv) also requires that a BOC demonstrate that it makes line splitting available to competing carriers so that competing carriers may provide voice and data service over a single loop.¹⁶⁶ In addition, a BOC must demonstrate that a competing carrier, either alone or in conjunction with another carrier, is able to replace an existing UNE-P

¹⁶⁴ See *Line Sharing Order*, 14 FCC Rcd at 20924-27, paras. 20-27; see also n.63 at C-12 *supra*.

¹⁶⁵ See *Deployment of Wireline Services offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101, 2106-07, para. 10 (2001).

¹⁶⁶ See generally *SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. § 51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers “to provide any telecommunications service that can be offered by means of that network element”).

configuration used to provide voice service with an arrangement that enables it to provide voice and data service to a customer. To make such a showing, a BOC must show that it has a legal obligation to provide line splitting through rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment, and combine it with unbundled switching and shared transport.¹⁶⁷

E. Checklist Item 5 – Unbundled Local Transport

53. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.”¹⁶⁸ The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.¹⁶⁹ Dedicated transport consists of BOC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by BOCs or requesting telecommunications carriers, or between switches owned by BOCs or requesting telecommunications carriers.¹⁷⁰ Shared transport consists of transmission facilities shared by more than one carrier, including the BOC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the BOC’s network.¹⁷¹

¹⁶⁷ See *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6348, para. 220.

¹⁶⁸ 47 U.S.C. § 271(c)(2)(B)(v).

¹⁶⁹ *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20719, para. 201.

¹⁷⁰ *Id.* A BOC has the following obligations with respect to dedicated transport: (a) provide unbundled access to dedicated transmission facilities between BOC central offices or between such offices and serving wire centers (SWCs); between SWCs and interexchange carriers points of presence (POPs); between tandem switches and SWCs, end offices or tandems of the BOC, and the wire centers of BOCs and requesting carriers; (b) provide all technically feasible transmission capabilities such as DS1, DS3, and Optical Carrier levels that the competing carrier could use to provide telecommunications; (c) not limit the facilities to which dedicated interoffice transport facilities are connected, provided such interconnections are technically feasible, or restrict the use of unbundled transport facilities; and (d) to the extent technically feasible, provide requesting carriers with access to digital cross-connect system functionality in the same manner that the BOC offers such capabilities to interexchange carriers that purchase transport services. *Id.* at 20719.

¹⁷¹ *Id.* at 20719, n.650. The Commission also found that a BOC has the following obligations with respect to shared transport: (a) provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same transport facilities that a BOC uses for its own traffic; (b) provide shared transport transmission facilities between end office switches, between its end office and tandem switches, and between tandem switches in its network; (c) permit (continued...)

EXHIBIT G

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

In the Matter of)
)
 Joint Application by BellSouth Corporation,)
 BellSouth Telecommunications, Inc.,) CC Docket No. 02-35
 And BellSouth Long Distance, Inc for)
 Provision of In-Region, InterLATA Services)
 In Georgia and Louisiana)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2002

Released: May 15, 2002

By the Commission: Commissioner Copps issuing a statement.

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APPENDIX A–LIST OF COMMENTERS

APPENDIX B–GEORGIA PERFORMANCE METRICS

APPENDIX C–LOUISIANA PERFORMANCE METRICS

APPENDIX D–STATUTORY FRAMEWORK

I. INTRODUCTION

1. On February 14, 2002, BellSouth Corporation and its subsidiaries, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, BellSouth) filed this application pursuant to section 271 of the Communications Act of 1934, as amended,¹ for authority to provide in-region, interLATA service originating in the states of Georgia and Louisiana. Although BellSouth initially filed for in-region, interLATA authority for the states of Georgia and Louisiana on October 2, 2001,² that application was subsequently withdrawn by

¹ We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act or the Act. *See* 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. *See* Telecommunications Act of 1006, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² *See Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Georgia and Louisiana*, CC Docket No. 01-277 (filed October 2, 2001) (BellSouth GALA I (continued....))

B. Checklist Item 4 – Unbundled Local Loops

218. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide, “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”⁸⁵² Based on the evidence in the record, we conclude, as did the Georgia and Louisiana Commissions,⁸⁵³ that BellSouth demonstrates that it provides unbundled local loops in accordance with the requirements of section 271 and our rules. Our conclusion is based on our review of BellSouth’s performance for all loop types, which include, as in past section 271 orders, voice grade loops, hot cut provisioning, xDSL-capable loops, high capacity loops, and digital loops, and our review of BellSouth’s processes for line sharing and line splitting. As of October 2001, competitors have acquired and placed into use more than 80,000 loops in Georgia, and 19,000 loops in Louisiana.⁸⁵⁴

219. Consistent with our prior section 271 orders, we do not address every aspect of BellSouth’s loop performance where our review of the record satisfies us that BellSouth’s performance is in compliance with the parity and benchmark measures established in Georgia and Louisiana.⁸⁵⁵ Instead, we focus our discussion on those areas where the record indicates minor discrepancies in performance between BellSouth and its competitors in Georgia and Louisiana. As in past section 271 proceedings, in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete.⁸⁵⁶ Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.⁸⁵⁷

220. *Hot Cut Activity.* Like the Georgia and Louisiana Commissions,⁸⁵⁸ we find that BellSouth is providing voice grade loops through hot cuts in Georgia and Louisiana in

⁸⁵² 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. Dark fiber and loop conditioning equipment are among the features, functions, and capabilities of the loop. *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67 n.301. For a discussion of the requirements of checklist item 4, see Appendix D at paras. 48-52, *infra*.

⁸⁵³ Georgia Commission GALA I Comments at 166; Louisiana Commission GALA II Comments at 1-2.

⁸⁵⁴ BellSouth GALA II Stockdale Aff., Exh. ES-5 and ES-6 (*citing confidential information*). As of February 2002, BellSouth had provisioned over 70,000 stand-alone loops (including DSL loops), 8,934 digital loops, and 3,145 high capacity loops. See Milner GALA I Aff. at para. 115; Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth, to Marlene R. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed April 17, 2002) (BellSouth Apr. 17 *Ex Parte* Letter). In Louisiana, BellSouth had provisioned over 15,000 stand-alone loops (including DSL Loops), 3,500 digital loops, and 3,154 high capacity loops. *Id.*

⁸⁵⁵ See, e.g., *Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9.

⁸⁵⁶ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

⁸⁵⁷ See *id.*

⁸⁵⁸ Georgia Commission GALA I Comments at 161; Louisiana Commission GALA I Comments at 57.

accordance with the requirements of checklist item 4. BellSouth provides hot cuts in Georgia and Louisiana within a reasonable time interval,⁸⁵⁹ at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.⁸⁶⁰

221. We reject the argument made by AT&T that BellSouth fails to meet the “standards” the Commission developed in the *Bell Atlantic New York Order*.⁸⁶¹ AT&T claims that when using the loop cutover calculation measures analyzed by the Commission in the *Bell Atlantic New York Order*, BellSouth’s on-time performance for completing hot cuts is deficient.⁸⁶² In the Texas proceedings, AT&T similarly argued that SWBT could not establish checklist compliance because the Texas performance metrics differed from those employed in New York.⁸⁶³ As the Commission noted in the *SWBT Texas Order*, “[w]ith each application we are presented with a different set of circumstances: new and differently designed performance measurements, state proceedings with different histories, new processes by which BOCs perform necessary functions for competing carriers, and new competing carrier concerns.”⁸⁶⁴ In fact, this Commission has recognized that “individual states and BOCs may define performance measures in different ways.”⁸⁶⁵ As a result, although our hot cut inquiry examines the same criteria as our inquiry in prior section 271 applications, we necessarily base our conclusion on the evidence presented in this application.⁸⁶⁶ In particular, as noted above, we evaluate BellSouth’s hot cut process, and the timeliness and quality of the hot cuts it provides to competing carriers, and find that BellSouth’s hot cut performance for the five-month period, October through February, met or exceeded the checklist requirements.

⁸⁵⁹ See Georgia/Louisiana B.2.12.1 (Coordinated Customer Conversions, Loops with INP); Georgia/Louisiana B.2.12.2 (Coordinated Customers Conversions, Loops with LNP); Georgia/Louisiana B.2.14.1-B.2.14.4 (Hot Cut Timeliness); Georgia/Louisiana B.2.15.1-B.2.15.4 (% Hot Cuts>15 Minutes Late); Georgia/Louisiana B.2.16.1-B.2.16.2 (Average Recovery Time – CCC); Georgia/Louisiana B.2.13 (% Hot Cuts>15 minutes early); Georgia/Louisiana B.2.15 (% Hot Cuts>15 minutes late). *But see* Xspedius GALA I Comments at 5-6 (asserting that BellSouth does not perform coordinate customer conversions as scheduled).

⁸⁶⁰ See Georgia/Louisiana B.2.17.1.1-B.2.17.2.2 (% Provisioning Troubles Within Seven Days – Hot Cuts). KMC claims that, when BellSouth completes the physical hot cut, BellSouth fails to perform timely switch translations and loop cutovers in a manner that prevent end users from losing service. KMC Comments at 7. We address KMC’s claim in checklist item 11, below.

⁸⁶¹ See AT&T GALA I Comments at 40-41.

⁸⁶² *Id.*

⁸⁶³ *SWBT Texas Order*, 15 FCC Rcd at 18485, para. 257.

⁸⁶⁴ *Id.*

⁸⁶⁵ *Verizon Pennsylvania Order*, 16 FCC Rcd at 17462-63, para. 79 n.275. In many cases, such differences are the product of state proceedings where provisioning processes and performance measurements were developed and refined with input from both the BOC and competing carriers.

⁸⁶⁶ *SWBT Texas Order*, 15 FCC Rcd at 18485, para. 257.

222. We also reject Mpower's claim that BellSouth's failure to provide an adequate automated frame due time (FDT) violates BellSouth's obligation to provide reasonable and nondiscriminatory access to OSS and to unbundled loops.⁸⁶⁷ Mpower asserts that BellSouth should be required to provide an adequate automated FDT process or, at least, not separately charge for coordination of hot cuts.⁸⁶⁸ Competing carriers can now choose freely between the CHC and FDT hot cut processes in Georgia and Louisiana. In the *SWBT Texas and Kansas/Oklahoma Orders*, however, the Commission expressly chose not to rely upon SWBT's FDT showing in demonstrating compliance with checklist item 4 and relied instead on SWBT's coordinated method (for which there was no charge).⁸⁶⁹ Absent further substantiation, we cannot find that BellSouth does not provide an adequate automated FDT process. The evidence in this record demonstrates that BellSouth provisions FDT hot cuts in a timely manner and with a minimum number of troubles following installation. Concerning BellSouth's separate charge for coordinated hot cuts (CHCs), the Commission has never required BOCs to provide CHCs at no charge.⁸⁷⁰ By contrast, the Commission has found that competitive carriers have a meaningful opportunity to compete if a BOC makes available a non-automated CHC process with a charge.⁸⁷¹ We therefore believe that Mpower's challenge to the cost basis of these charges is in reality a challenge to the pricing determinations of the Georgia Commission and, to the extent that Mpower is requesting a hot cut process that BellSouth does not currently offer, we note that a section 271 application is not an appropriate forum for the resolution of such inter-carrier disputes. Given that BellSouth demonstrates that it provisions CHCs in a timely manner and at an acceptable level of quality, with a minimal service disruption and a minimum number of troubles following installation, we find that Mpower's concerns do not warrant a finding of checklist noncompliance. Thus, we do not believe that we have a sufficient basis for finding that these claims warrant checklist noncompliance.

223. *Voice Grade Loops*. Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,⁸⁷² that BellSouth provisions voice grade loops to competitors in Georgia and Louisiana in a nondiscriminatory manner. In order to determine that

⁸⁶⁷ Mpower GALA I Comments at 6; Mpower GALA II Comments at 15.

⁸⁶⁸ Mpower GALA II Comments at 16. Mpower states that BellSouth's automated FDT is very unsatisfactory and compares unfavorably with the process of the other BOCs because BellSouth will only specify a business day on which the automated transfer will occur, which could result in customers being without service for several hours or more if the transfer fails. *Id.* at 15. According to Mpower, SBC and Verizon make a commitment to perform a transfer of service within a time frame of 60 or 90 minutes. *Id.*

⁸⁶⁹ *SWBT Texas Order*, 15 FCC Rcd at 18487, paras. 260-61; see also *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6337, para. 201.

⁸⁷⁰ See *SWBT Texas Order*, 15 FCC Rcd at 18494-95, para. 276.

⁸⁷¹ See *id.* at 18494-95, paras. 275-77. In the *SWBT Texas Order*, the Commission found that time and material charges imposed during the CHC process were valid because of the Texas Commission's demonstrated commitment to the Commission's pricing rules. *Id.* at paras. 276-77.

⁸⁷² Georgia Commission GALA I Comments at 154; Louisiana Commission GALA I Comments at 57.

BellSouth's performance reflects parity, we review performance measures comparable to those we have relied upon in prior section 271 orders.⁸⁷³

224. In both Georgia and Louisiana, BellSouth has generally met the benchmark and parity standards for installation timeliness, installation quality, and the quality of the maintenance and repair functions.⁸⁷⁴ We recognize that BellSouth's performance with respect to a provisioning timeliness metric – the order completion interval metric – appears to be slightly out of parity in Georgia and Louisiana for several recent months.⁸⁷⁵ However, recognizing that BellSouth performed at parity with respect to the majority of the voice grade loop “order completion interval” metrics, we find that BellSouth's performance does not warrant a finding of checklist noncompliance. Should BellSouth's performance in this area deteriorate, we may pursue appropriate enforcement action. In addition, we note that BellSouth's performance under the missed installation appointment metric suggests that BellSouth has generally been timely in the provisioning of voice grade loops.⁸⁷⁶

225. We also recognize that BellSouth does not achieve parity under the missed repair appointments metric for three months during the relevant October through February period in Georgia.⁸⁷⁷ BellSouth explains that the primary reason for the disparity is the small volume of competitive LEC reports.⁸⁷⁸ BellSouth's performance data demonstrate that it did not miss any competitive LEC repair appointments in January and February.⁸⁷⁹ Given this improving trend in

⁸⁷³ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9078-79, para. 162.

⁸⁷⁴ See Georgia/Louisiana B.2.19.8.1.1-B.2.19.13.2.4 (% Provisioning Troubles within 30 Days, 2W Analog Loop); Georgia/Louisiana B.2.18.8.1.1-B.2.18.3.2.4 (% Missed Installation Appointments, 2W Analog Loop); Georgia/Louisiana B.3.2.8.1-B.3.2.9.2 (Customer Trouble Report Rate, 2W Analog Loop); Georgia/Louisiana B.3.3.8.1-B.3.3.9.2 (Maintenance Average Duration, 2W Analog Loop); Georgia/Louisiana B.3.4.8.1-B.3.4.9.2 (% Repeat Troubles within 30 Days, 2W Analog Loop).

⁸⁷⁵ See Louisiana B.2.1.8.1.1 (Order Completion Interval, 2W Analog Loop-Design/<10 circuits/Dispatch); Louisiana B.2.1.12.1.1 (Order Completion Interval, 2W Analog Loop with LNP-Design/<10 circuits/Dispatch). For B.2.1.8.1.1, BellSouth performed better for its own retail affiliate in November and December in Louisiana. For B.2.1.12.1.1, the competitive LEC average measure was 5.47 for October-February and 3.47 for BellSouth retail in Louisiana.

⁸⁷⁶ See generally Georgia/Louisiana B.2.18.8.1.1-B.2.18.13.2.4 (% Missed Installation Appointments, 2W Analog Loop); Georgia/Louisiana B.3.3.8.1-B.3.3.9.2 (Maintenance Average Duration, 2W Analog Loop).

⁸⁷⁷ For October-February, BellSouth missed an average of 6.66% of competitive LEC repair appointments, compared to an average of 1.52% for BellSouth retail in Georgia. See Georgia B.3.1.9.2 (Missed Repair Appointments, 2W Analog Loop, Non-Design/Non-Dispatch).

⁸⁷⁸ See Letter from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed March 14, 2002) (BellSouth Mar. 14 *Ex Parte* Letter). For the months of October, November, and December 2001, the competitive LEC volumes for this measure were 21, 13, and 20, respectively, with only two appointments missed each month. *Id.*

⁸⁷⁹ *Id.* In January, the reported results show zero missed appointments for the 26 competitive LEC appointments scheduled in Georgia, exceeding the retail analogue with 0.00% for competitive LECs compared to 1.06% for the (continued....)

January and February, and the fact that competitive LEC volumes are low compared to other relevant missed repair appointment metrics, we do not find that this disparity rises to the level of checklist noncompliance.

226. KMC provides its own data to demonstrate that BellSouth's Georgia and Louisiana performance for missed installation appointments and provisioning troubles within 30 days for voice grade loops show discriminatory performance for competitive LECs.⁸⁸⁰ Xspedius also claims that BellSouth's missed installation appointment performance for voice grade loops with LNP for October through January does not achieve parity.⁸⁸¹ We do not find that KMC and Xspedius's claims warrant a finding of checklist noncompliance. In making this finding, we rely on aggregate competitive carrier performance data, which we have found above to be accurate and reliable, to show that BellSouth's performance meets the requirements of checklist item four in this case.⁸⁸² According to the carrier-to-carrier reports for both Georgia and Louisiana, with the exception of November 2001 in Louisiana,⁸⁸³ BellSouth's performance data for the relevant four month period show that it is provisioning voice grade loops in a timely manner in Georgia and Louisiana. Moreover, despite relatively low competitive carrier volumes, BellSouth's Georgia and Louisiana performance data for installation quality of voice grade loops show nondiscriminatory treatment.⁸⁸⁴ Given this evidence, and recognizing that BellSouth is meeting the service installation dates for competitive LECs at higher rates than for its own retail customers,⁸⁸⁵ and provisions voice grade loops of a quality sufficient to afford competitors a meaningful opportunity to compete, we do not find that KMC and Xspedius's claims warrant a finding of checklist noncompliance. Thus, although KMC and Xspedius claim that its data show discriminatory performance, anomalous results for a single carrier in this instance does not qualify as a pattern of systemic performance disparities that result in competitive harm.⁸⁸⁶

(Continued from previous page)

retail analogue. BellSouth's data show zero missed appointments for the ten competitive LEC appointments scheduled in February. *Id.*

⁸⁸⁰ KMC GALA I Comments at 3-4. In Georgia, KMC claims that BellSouth missed over 10% of the basic 2 Wire Analog Loop installs for KMC over an 8 month period ending January 2002; 26% of KMC's analog loop orders with LNP in December 2001; and 13% of KMC's analog installs failed within 30 days of installation. *See* KMC GALA II Comments at 6. In Louisiana, KMC asserts that 16% of the analog loop installs failed within 30 days of being installed in December 2001. *Id.*

⁸⁸¹ Xspedius GALA II Comments at 8-9.

⁸⁸² For a discussion of the evidentiary case, *see* section IIIB, *supra*.

⁸⁸³ *See* Georgia/Louisiana B.2.18.8.1.1-B.2.18.3.2.4 (% Missed Installation Appointments, 2W Analog Loop). BellSouth missed 4.06% of its appointments for its own customers, and 20.00% of the five appointments of those for its competitors in November in Louisiana. *See* Louisiana B.2.1810.1.1 (% Missed Installation Appointments, 2W Analog Loop with INP Design<10 circuits/Dispatch).

⁸⁸⁴ *See* Georgia/Louisiana B.2.19.8.1.1-B.2.19.13.2.4 (% Provisioning Troubles within 30 Days, 2W Analog Loop).

⁸⁸⁵ *See* Georgia/Louisiana B.2.18.8.1.1-B.2.18.3.2.4 (% Missed Installation Appointments, 2W Analog Loop).

⁸⁸⁶ *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

227. We also reject Mpower's claim that BellSouth will not provide access to SL1 voice grade loops for end users that BellSouth serves through remote terminals.⁸⁸⁷ In particular, Mpower asserts that when a requested loop is served by a DLC system, BellSouth insists on providing a more expensive SL2 loop to the competitive carrier.⁸⁸⁸ The record reflects, however, that BellSouth will fill an SL1 loop order whenever the facilities are available, and it imposes no requirement that competitive LECs order a more expensive loop simply because DLC equipment is present.⁸⁸⁹ Because we are not persuaded by Mpower's contention that BellSouth will not provide access to SL1 voice grade loops for end users that BellSouth serves through remote terminals, we do not believe that we have a sufficient basis for finding that these concerns warrant a finding of noncompliance with checklist item 4. We also note that no other carrier raises similar claims in this proceeding.

228. *xDSL-Capable Loops.* Based upon the evidence in the record, we find, as did the Georgia and Louisiana Commissions,⁸⁹⁰ that BellSouth demonstrates that it provides xDSL-capable loops in accordance with the requirements of checklist item 4.⁸⁹¹ BellSouth makes available xDSL-capable loops in Georgia and Louisiana through interconnection agreements and pursuant to tariffs approved by the Georgia and Louisiana Commissions.⁸⁹² In analyzing BellSouth's showing, we review performance measures comparable to those we have relied upon in prior section 271 orders: order processing timeliness, installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of the maintenance and repair functions.⁸⁹³ Based on our analysis of BellSouth's performance under these measures, we conclude that BellSouth's performance for competitive LECs has generally met the benchmark and parity standards established in Georgia and Louisiana.

229. While BellSouth's performance with respect to a maintenance and repair measure – the customer trouble report rate – appears to be out of parity in October and December in Georgia, we find that these disparities are slight and thus not competitively significant. Indeed, in Georgia, BellSouth's performance data show that BellSouth performed slightly better for its

⁸⁸⁷ Mpower GALA I Comments at 30-31.

⁸⁸⁸ *Id.* at 32.

⁸⁸⁹ BellSouth GALA I Reply App., Tab H, Reply Affidavit of Wiley G. Latham, Jr. at para. 7 (BellSouth GALA I Latham Reply Aff.).

⁸⁹⁰ Georgia Commission GALA I Comments at 157; Louisiana Commission GALA I Comments at 61-62.

⁸⁹¹ We note that competing carriers in Georgia and Louisiana rely principally on two types of unbundled xDSL-capable loops: the xDSL loop and the ISDN loop. The Georgia and Louisiana Commissions developed separate loop-type performance measurement categories for xDSL loops (including, but not limited to, loops provisioned for ADSL, HDSL, and UCL) and ISDN loops, which can be used by some competing carriers to provide IDSL services.

⁸⁹² See BellSouth GALA I Latham Aff. at para. 3.

⁸⁹³ See *Verizon Pennsylvania Order*, 16 FCC Rcd at 17462-63, para. 79; *Verizon Connecticut Order*, 16 FCC Rcd at 15153-56, paras. 15-20; *Verizon Massachusetts Order*, 16 FCC Rcd at 9056, 9059, paras. 123, 130; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6326-27, paras. 181-82.

retail affiliate from October through February.⁸⁹⁴ Moreover, no commenter has indicated that the maintenance and repair performance of xDSL loops is a problem in Georgia. We therefore find that these issues are not fatal to BellSouth's showing, and do not warrant a finding of checklist noncompliance. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action. Moreover, contrary to DIRECTV Broadband's assertion,⁸⁹⁵ we are not persuaded that BellSouth is making fundamental changes to its DSL architecture that would severely limit the existing capability of DSL circuits to support advanced services.⁸⁹⁶

230. *ISDN Loops.* Based on the evidence in the record, we also find, as did the Georgia and Louisiana Commission,⁸⁹⁷ that BellSouth provides ISDN loops to competitors in Georgia and Louisiana in accordance with the requirements of checklist item 4. Although BellSouth's data reveal some performance issues with ISDN loops, we conclude that these issues are not fatal to BellSouth's showing.⁸⁹⁸ We find that the performance issues are relatively slight and do not appear to be competitively significant to competing LECs. Accordingly, in light of BellSouth's competitive carrier xDSL-capable loop record overall, we do not find that BellSouth's performance demonstrates that it fails to meet the requirements of checklist item 4.

⁸⁹⁴ The October-February average for this measure is 0.82% for competitive LECs and 0.81% for BellSouth retail. See Georgia B.3.2.5.1 (Customer Trouble Report Rate, xDSL (ADSL, HDSL, and UCL)/Dispatch).

⁸⁹⁵ DIRECTV Broadband GALA I Comments at 5.

⁸⁹⁶ See BellSouth GALA I Milner Reply Aff. at para. 44 (explaining that BellSouth has not changed the way DSL is provisioned, nor does it have plans currently do so).

⁸⁹⁷ Georgia Commission GALA I Comments at 157; Louisiana Commission GALA I Comments at 61-62.

⁸⁹⁸ Specifically, in Louisiana, BellSouth's customer trouble report rate (dispatch) was out of parity for all months reported. See Louisiana B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch). However, the customer trouble report rate has remained low in Louisiana, with competitive carriers experiencing an average of 1.40% dispatch trouble reports compared to an average of 0.58% for BellSouth retail operations from October through February. *Id.* In addition, the UNE ISDN customer trouble report rate (non-dispatch) was in parity for all months reported, with competitive LECs experiencing an average of 0.79% non-dispatch customer trouble reports compared to an average of 1.03% for BellSouth retail operations from October-February. See Louisiana B.3.2.6.2 (Customer Trouble Report Rate, UNE ISDN/Non-Dispatch). BellSouth has also generally met the benchmark for installation timeliness and missed installation appointments for each month from October-February in Georgia and Louisiana. See Georgia/Louisiana B.2.1.6.3.1 (Order Completion Interval, UNE ISDN<6 circuits/Dispatch); Georgia/Louisiana B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN<10 circuits/Dispatch). BellSouth's Georgia performance data show that it provides an installation quality sufficient to afford competitors a meaningful opportunity to compete. See Georgia B.2.19.6.1.1 (% Provisioning Troubles within 30 Days, UNE ISDN<10 circuits/Dispatch). Competitive LECs experience an average of 4.90% trouble reports within 30 days after installation of an ISDN loop, compared to an average of 5.70% for BellSouth retail operations from October-February in Georgia. See *id.* In addition, BellSouth's maintenance and repair performance, which measure the timeliness and quality of the maintenance and repair functions, has shown parity or very low repeat trouble rates during the same period. See Georgia/Louisiana B.3.1.6.1-B.3.16.2 (Missed Repair Appointments, UNE ISDN); Georgia/Louisiana B.3.4.6.1-B.3.4.6.2 (% Repeat Troubles within 30 Days, UNE ISDN).

231. *Digital Loops.* Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,⁸⁹⁹ that BellSouth's performance with respect to digital loops complies with checklist item 4. We recognize that BellSouth's performance with respect to the order completion interval metric in Georgia has been out of parity for competitive LECs for almost all months reported.⁹⁰⁰ We find, however, that this performance does not warrant a finding of checklist noncompliance. BellSouth's parity performance for all relevant months under the missed appointment metric in Georgia and Louisiana indicates that BellSouth provisions digital loops in a timely manner. We also note that, for every month during the relevant period, BellSouth maintained parity under the installation quality measure in Georgia and Louisiana.⁹⁰¹ Disaggregated maintenance and repair performance is not available for digital loops. Rather, digital loop maintenance and repair performance is subsumed under a broader category ("UNE Other Design"), which include unbundled port and transport data. BellSouth generally maintained parity during the relevant months for measures of repair and maintenance timeliness and quality.⁹⁰² Given this evidence, we do not find that BellSouth's digital loop performance warrants a finding of checklist noncompliance.

232. *High Capacity Loops.* Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,⁹⁰³ that BellSouth's performance with respect to high capacity loops complies with checklist item 4. We reach this conclusion despite the fact that BellSouth's performance with respect to two specific performance metrics – the percentage of troubles found within 30 days following installation of a high capacity loop and the percentage of missed installation appointments – appear to be out of parity for several recent months.⁹⁰⁴ As we discuss below, however, this performance does not warrant a finding of checklist noncompliance. As the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.⁹⁰⁵ Moreover, given BellSouth's generally acceptable performance for all other categories of loops, and recognizing that high capacity loops make up a small percentage of

⁸⁹⁹ Georgia Commission GALA I Comments at 166; Louisiana Commission GALA I Comments at 56.

⁹⁰⁰ See Georgia B.2.1.18.1.1 (Order Competition Interval, Digital Loop<DS1/<10 circuits/Dispatch).

⁹⁰¹ See Georgia/Louisiana B.2.19.18.1.1 (% Provisioning Troubles within 30 Days, Digital Loop<DS1/<10 circuits/Dispatch).

⁹⁰² Georgia/Louisiana B.3.1.10.1-B.3.1.10.2 (Missed Repair Appointments, Other Design); Georgia/Louisiana B.3.2.10.1-B.3.1.10.2 (Customer Trouble Report Rate, Other Design); Georgia/Louisiana B.3.3.10.1-B.3.3.10.2 (Maintenance Average Duration, Other Design); Georgia/Louisiana B.3.4.10.1-B.3.4.10.2 (% Repeat Troubles within 30 Days, Other Design).

⁹⁰³ Georgia Commission GALA I Comments at 166; Louisiana Commission GALA I Comments at 56.

⁹⁰⁴ See Georgia/Louisiana B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loop >= DS1/< 10 circuits/Dispatch); Louisiana B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loop >= DS1/<10 circuits/Dispatch).

⁹⁰⁵ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 22.

overall loop orders in Georgia and Louisiana, we find that BellSouth's performance is in compliance with checklist item 4.⁹⁰⁶

233. In Georgia and Louisiana, BellSouth's performance for a high capacity loop installation quality measure, the percentage of troubles found within 30 days following installation, has been statistically out of parity for the five-month period.⁹⁰⁷ According to BellSouth, however, when its performance under this metric is recalculated to not reflect troubles "found O.K.," "no trouble" found, and competitive LEC caused reports its performance improves.⁹⁰⁸ In Georgia, BellSouth explains that the competitive LEC troubles are approximately half central office problems and half facility problems.⁹⁰⁹ BellSouth states that its review of the competitive LEC trouble reports in Louisiana indicates the majority of the reports are attributable to facility issues.⁹¹⁰ More significant, BellSouth claims that competitive LECs received approximately 95 percent actual trouble free installations from December through February when troubles found O.K., no troubles found, and competitive LEC caused reports are removed from the calculations. In light of these facts, we give credence to statements made by BellSouth in this proceeding and are encouraged that BellSouth has instituted new procedures in Georgia and Louisiana to reduce the trouble reports for this metric.⁹¹¹ Moreover, prior to the completion of any high capacity loop, BellSouth states that its technicians in the customer wholesale

⁹⁰⁶ Through February 2002, BellSouth had provisioned 3,145 and 3,154 high capacity loops in Georgia and Louisiana, respectively. See BellSouth Apr. 17 *Ex Parte* Letter.

⁹⁰⁷ Competing carriers experienced an average of 7.87% trouble reports within 30 days after installation of an high capacity digital loop, compared to an average of 1.76% for BellSouth retail operations from October through February in Georgia. See Georgia B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loop>= DS1/<10 circuits/Dispatch). Louisiana performance data show that competitive carriers experienced an average of 6.93% trouble reports, compared to an average of 1.00% for BellSouth resale operations for the same period. See Louisiana B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loop>=DS1/<10 circuits/Dispatch).

⁹⁰⁸ See BellSouth Mar. 14 *Ex Parte* Letter at Att. 7; BellSouth Apr. 17 *Ex Parte* Letter.

⁹⁰⁹ See BellSouth Apr. 17 *Ex Parte* Letter.

⁹¹⁰ *Id.*

⁹¹¹ BellSouth GALA I Varner Aff. at para. 236. BellSouth states that it has implemented specific action plans in Georgia to bring the high capacity loop measure into parity with their retail analogue. See BellSouth Apr. 17 *Ex Parte* Letter. First, BellSouth states that the Louisiana Service Advocacy Centers (SACs) have increased their readiness to resolve any and all service order jeopardies. See *id.* Second, BellSouth claims that it is providing a "maintenance spare" DS1 circuit (where possible) in service areas with known defective pairs. In Georgia, BellSouth states that it has instituted an action plan requiring the appropriate Network supervisor to review all provisioning trouble reports to determine the report's cause and the necessary action to keep it from recurring. *Id.* But see Letter from Patrick J. Donovan, Counsel to Cbeyond, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed April 26, 2002) (Mar. 14 *Ex Parte* Letter); Letter from Tricia Breckenridge, Executive Vice President, Industry Affairs, KMC Telecom, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed May 2, 2002) (Mar. 14 *Ex Parte* Letter).

interconnection network service (CWINS) center, central office, and field will do a simultaneous test to make sure that the loop meets the appropriate specifications.⁹¹²

234. We also note that BellSouth's performance with respect to a provisioning timeliness metric – the missed installation appointments metric for dispatch orders – has been out of parity for October through February in Louisiana.⁹¹³ However, BellSouth's performance reflected by another provisioning timeliness metric – the order completion interval metric – satisfies the benchmark for most months.⁹¹⁴ In addition, BellSouth's satisfies the benchmark for all relevant months with respect to the non-dispatch missed installation appointment metric.⁹¹⁵ We are encouraged that BellSouth has initiated specific action plans to address missed installations, and BellSouth states that, for December 2001, the majority of the missed installations were a result of facility issues.⁹¹⁶ Because we look to the totality of circumstances in evaluating BellSouth's performance in providing loops in accordance with the checklist requirements, we do not find that lack of parity on these high capacity loop measurements warrant a finding that BellSouth fails to meet checklist item 4.⁹¹⁷

235. KMC provides its own data to demonstrate that BellSouth misses firm loop installation appointments for high capacity loops, and that a large percentage of its high capacity loop installs fail within 30 days of installation.⁹¹⁸ We find, however, that this KMC-specific data does not warrant a finding of checklist noncompliance for checklist item 4. We discuss above BellSouth's aggregate performance under the installation quality and missed installation appointment metrics, and do not find that lack of parity on these high capacity loop measurements warrant a finding of checklist noncompliance.

236. We also note that KMC has expressed concern about BellSouth's high capacity loop maintenance and repair performance for the percentage of repeat troubles within 30 days.⁹¹⁹

⁹¹² *Id.* We note that we will monitor BellSouth's compliance with its commitment to improve its high capacity loop performance. Deterioration of BellSouth's performance could result in enforcement action.

⁹¹³ See Louisiana B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loop \geq DS1/ $<$ 10 circuits/Dispatch). The October-February average for this measure is 7.13% for competitive LECs and 2.23% for BellSouth retail.

⁹¹⁴ See generally Louisiana B.2.1.18.1.1-B.2.1.19.2.2 (Order Completion Interval, Digital Loop).

⁹¹⁵ See Louisiana B.2.18.18.1.1 (% Missed Installation Appointments, Digital Loop $<$ DS1/ $<$ 10 circuits/Non Dispatch).

⁹¹⁶ BellSouth GALA II Varner Reply Aff. at para. 97.

⁹¹⁷ See *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6344, para. 213.

⁹¹⁸ See generally KMC GALA I Comments at 8.

⁹¹⁹ KMC GALA I Comments at 3; KMC GALA II Comments at 10. KMC claims that BellSouth's own reported performance indicates that over one-third of KMC's DS1 and higher loop troubles in both Georgia and Louisiana from August 2001 to March 2002 experienced a trouble report within 30 days of installation. See KMC GALA II Comments at 10.

As discussed above, disaggregated maintenance and repair performance is not available for high capacity loops. Rather, high capacity loop maintenance and repair performance is subsumed under a broader category ("UNE Other Design"), which include unbundled port and transport data. BellSouth has maintained parity performance with respect to the maintenance and repair timeliness under the mean time to repair measure. Moreover, BellSouth's disaggregated maintenance and repair performance for high capacity loops shows repair timeliness under the mean time to repair measure. Georgia and Louisiana UNE Other Design maintenance and repair performance, which measure the timeliness and quality of the maintenance and repair functions, has shown parity or very low trouble rates in recent months.⁹²⁰ Given this evidence, we do not find that BellSouth's maintenance and repair performance warrants a finding of checklist noncompliance.

237. We also reject Cbeyond's allegations that BellSouth provides competitive carriers inferior quality DS1 loops and does not charge competitors correctly.⁹²¹ The record reflects that BellSouth delivers DS1 loops with a four-wire interface, regardless of the particular technology developed.⁹²² Significantly, the Georgia Commission has investigated and dismissed Cbeyond's claim, finding no basis to conclude that BellSouth has violated its interconnection agreement with Cbeyond in this respect.⁹²³ Given this, we do not find that we have a sufficient basis for finding that Cbeyond's claims warrant a finding of checklist noncompliance.

238. *Line Sharing.* Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,⁹²⁴ that BellSouth demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop.⁹²⁵ BellSouth offers line sharing in Georgia and

⁹²⁰ Georgia/Louisiana B.3.1.10.1-B.3.1.10.2 (Missed Repair Appointments, Other Design); Georgia/Louisiana B.3.2.10.1-B.3.1.10.2 (Customer Trouble Report Rate, Other Design); Georgia/Louisiana B.3.3.10.1-B.3.3.10.2 (Maintenance Average Duration, Other Design); Georgia/Louisiana B.3.4.10.1-B.3.4.10.2 (% Repeat Troubles within 30 Days, Other Design).

⁹²¹ Cbeyond GALA I Comments at 22-26. Cbeyond claims that BellSouth is violating the parties' interconnection agreement because BellSouth does not provide the four-wire DS1 loops ordered by Cbeyond; instead, BellSouth frequently provides inferior quality 2-wire DS1 loops, which result in service degradation and inferior quality. *Id.* at 25. Cbeyond further claims that it is unfairly compensating BellSouth for its inappropriate provisioning of 2-wire DS1 loops. *Id.*

⁹²² See BellSouth Milner GALA I Reply Aff. at paras. 25, 27-29.

⁹²³ Georgia Commission GALA I Comments at 107.

⁹²⁴ Georgia Commission GALA I Comments at 164; Louisiana Commission GALA I Comments at 64.

⁹²⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 98-147, Fourth Report and Order, CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*) (*pet. for rehearing pending sub nom. USTA v. FCC*, DC Cir. No. 00-102 (filed Jan. 18, 2000)); *Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration, CC Docket No. 98-147, Fourth Report and Order on Reconsideration, CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking; CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking; CC Docket No. 96- (continued....)

Louisiana under its interconnection agreements and the terms of its tariff, in accordance with the requirements of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*.⁹²⁶

239. BellSouth's performance with regard to the customer trouble report rate is out of parity for several recent months in Louisiana.⁹²⁷ According to BellSouth, however, several of the customer trouble reports in November and December 2001, and January 2002, were actually information reports from competitive LECs and were not an indication of actual trouble.⁹²⁸ Moreover, BellSouth's performance data show that customer trouble reports for competitive LECs decreased from 9.60 percent in January to 2.11 percent in February in Louisiana. 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 4.⁹²⁹ As the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.⁹³⁰ No commenter has raised concerns with BellSouth's line sharing customer trouble report rate in Louisiana.

240. While not addressing specific instances of line-shared performance disparities, AT&T raises broader policy and legal issues regarding BellSouth's line-sharing obligations.⁹³¹ AT&T contends that BellSouth does not permit competitive LECs to obtain access to the entire capabilities of the unbundled next generation digital loop carrier loop at the central office and at

(Continued from previous page)

98, 16 FCC Rcd 2101 (2001) (*Line Sharing Reconsideration Order*); see also *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6345-46, para. 215.

⁹²⁶ See BellSouth GALA I App., Tab W, Affidavit of Thomas G. Williams at para. 17 (Williams GALA I Aff.).

⁹²⁷ In Louisiana, the October-February average for this measure is 5.10% for competitive LECs and 1.47% for BellSouth retail. See Louisiana B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch).

⁹²⁸ See Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed April 9, 2002) (BellSouth Apr. 9 *Ex Parte* Letter). BellSouth explains that a breakdown of the trouble report rate show that, during November and December 2001, and January 2002, the number of reports for which there were "no trouble found" ranged from 50% in November 2001 to 72% in February 2002. See *id.*

⁹²⁹ Georgia and Louisiana performance for installation timeliness and installation quality show nondiscriminatory treatment between competitors and BellSouth retail customers for line-shared loops. See Georgia/Louisiana B.2.18.7.1.1-B.2.18.7.2.2 (% Missed Installation Appointments, Line Sharing); Georgia/Louisiana B.2.19.7.1.2-B.2.19.7.2.1 (% Provisioning Troubles within 30 Days, Line Sharing). In addition, BellSouth's performance demonstrates that competing carriers experience comparable repair times for line shared loops as BellSouth retail operations, and in both states, the percentage of competitive LEC missed repair appointments and repeat troubles were out of parity for only one of the five months reported. See Georgia/Louisiana B.3.4.7.1 (% Repeat Troubles within 30 Days, Line Sharing/Dispatch); Georgia/Louisiana B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Non-Dispatch); Georgia/Louisiana B.3.3.7.1 (Maintenance Average Duration, Line Sharing/Dispatch); Georgia/Louisiana B.3.3.7.2 (Maintenance Average Duration, Line Sharing/Non-Dispatch).

⁹³⁰ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 22.

⁹³¹ AT&T GALA I Comments at 42-45.

the remote terminal through the installation of integrated splitter/DSLAM cards.⁹³² We reject AT&T's allegation because although incumbent LECs are required to provide unbundled access to the entire loop, we have found that "the high frequency portion of the loop network element is limited by technology, *i.e.*, is only available on a copper facility."⁹³³ Furthermore, competitive LECs may provide data services to BellSouth voice customers served by digital loop carriers by either collocation in the remote terminal or, in the event that the Commission's four-part test for packet switching is met, access to unbundled packet switching. In fact, BellSouth states that competitive LECs can choose whether to access the high frequency portion of the loop at a BellSouth central office or remote terminal, and competitive LECs can engage in line sharing or line splitting whether the customer is served by an all-copper loop, or by a combination of copper and digital loop carrier equipment.⁹³⁴ Therefore, we disagree with AT&T that BellSouth's policies and practices concerning the provisioning of line sharing, as explained to us in the instant proceeding, violate the Commission's unbundling rules.⁹³⁵ Accordingly, we decline to find that these allegations warrant a finding of checklist non-compliance.

241. *Line Splitting.* Based on the evidence in the record, we find, as did the Georgia and Louisiana Commissions,⁹³⁶ that BellSouth complies with its line-splitting obligations and provides access to network elements necessary for competing carriers to provide line splitting.⁹³⁷

242. We disagree with AT&T's claim that BellSouth must provide splitters for "voice" competitive LECs that seek to engage in line splitting.⁹³⁸ The Commission rejected this precise argument in the *SWBT Texas Order*, explaining that "[t]he Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter, and incumbent LECs, therefore have no current obligation to make the

⁹³² *Id.*

⁹³³ See *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2107, para. 10.

⁹³⁴ BellSouth GALA I Reply at 78.

⁹³⁵ As we have stated in other section 271 orders, new interpretative disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding. See *Verizon Massachusetts Order*, 16 FCC Rcd at 8993, para. 10; *SWBT Texas Order*, 15 FCC Rcd at 18366, para. 23. We note that many of these allegations with respect to competitive access to fiber-fed loops are being addressed in pending proceedings before the Commission. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297, 15 FCC Rcd 17806, 17856-62, paras. 118-33 (Aug. 10, 2000); *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2127-30, paras. 55-64.

⁹³⁶ Georgia Commission GALA I Comments at 165; Louisiana Commission GALA I Comments at 65.

⁹³⁷ See *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2111, para. 20 n.36.

⁹³⁸ AT&T GALA I Comments at 44.

splitter available.⁹³⁹ BellSouth, however, explains that it will allow a competitive carrier to provide its own splitter, or lease a BellSouth owned splitter for both line sharing and line splitting for central office based deployments and for both existing and new customers.⁹⁴⁰ Thus, we do not find that AT&T's claims warrant a finding of checklist noncompliance.

243. We also disagree with AT&T's claim that BellSouth's OSS does not comply with our *Line Sharing Reconsideration Order*.⁹⁴¹ Specifically, AT&T asserts that BellSouth does not provide electronic OSS for ordering, provisioning and maintaining line splitting.⁹⁴² Pursuant to the Georgia Commission's mandate to make such OSS available for line splitting, BellSouth implemented permanent OSS for line splitting on January 5, 2002, and competitive LECs have raised no complaints about this new process. We find, therefore, that given the record before us, BellSouth's process for line splitting orders is in compliance with the requirements of the checklist at this time.

244. *Other Issues.* KMC contends that BellSouth takes weeks to accomplish the actual loop disconnect when requested by KMC.⁹⁴³ KMC estimates that, in Georgia, between 20 percent and 30 percent of the facilities underlying loop disconnect orders remain unavailable 30 days after the loop disconnect, and in Louisiana, BellSouth's failure to disconnect loops properly has led to customer outages and delay in the release of the facility for use by KMC and other competitive carriers.⁹⁴⁴ We conclude, however, that there is no evidence that the difficulties KMC may have encountered with BellSouth's loop disconnect processes reflect systemic defects with BellSouth's provisioning of unbundled local loops, and thus cannot find checklist noncompliance.

C. Checklist Item 5 – Unbundled Transport

245. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.”⁹⁴⁵ Based on our review of the record, we conclude, as did both the

⁹³⁹ See *SWBT Texas Order*, 15 FCC Rcd at 18516, para. 327.

⁹⁴⁰ BellSouth GALA I App., Tab T, Reply Affidavit of Thomas G. Williams at para. 8 (Williams GALA I Reply Aff.).

⁹⁴¹ AT&T GALA I Comments at 45-46; AT&T GALA I Turner Decl. at para. 24.

⁹⁴² AT&T GALA I Comments at 45; AT&T GALA I Turner Decl. at 24.

⁹⁴³ KMC GALA I Comments at 10.

⁹⁴⁴ *Id.*

⁹⁴⁵ 47 U.S.C. § 271(c)(2)(B)(v).

EXHIBIT H

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

In the Matter of)
)
 Joint Application by BellSouth Corporation,)
 BellSouth Telecommunications, Inc., And) WC Docket No. 02 - 150
 BellSouth Long Distance, Inc. for Provision)
 of In-Region, InterLATA Services in)
 Alabama, Kentucky, Mississippi, North)
 Carolina, and South Carolina)

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 2002

Released: September 18, 2002

By the Commission: Commissioner Copps issuing a statement.

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APPENDIX H – STATUTORY APPENDIX

I. INTRODUCTION

1. On June 20, 2002, BellSouth Corporation and its subsidiaries, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, BellSouth) filed an application pursuant to section 271 of the Communications Act of 1934, as amended,¹ for authority to provide in-region, interLATA service originating in the states of Alabama, Kentucky, Mississippi, North Carolina, and South Carolina.² We grant BellSouth's application

¹ We refer to the Communications Act of 1934, as amended, as the Communications Act or the Act. See 47 U.S.C. §§ 151 *et seq.*

² See *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*, WC Docket No. 02-150 (filed June 20, 2002) (BellSouth Application); see also *Comments Requested on the Joint Application by BellSouth Corporation for Authorization under Section 271 of the Communications Act to Provide In-region InterLata Service in the States of Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, Public Notice, 17 FCC Rcd 11303 (2002).

commission's distinction between those calls subject to access charges and those subject to reciprocal compensation.⁸⁷⁹

230. In any event, as AT&T itself recognizes, the interconnection agreement between AT&T and BellSouth expressly covers the LATA-wide calling issue.⁸⁸⁰ Indeed, AT&T's principal complaint is that "BellSouth refuses to perform *according to the terms in its interconnection agreements*."⁸⁸¹ Interpretive disputes concerning interconnection agreements are for the state commissions to decide in the first instance, and this Commission will not normally preempt a state commission's decisionmaking process.⁸⁸²

231. For the foregoing reasons, we reject commenters' allegations of error and find that BellSouth complies with checklist item 1.

B. Checklist Item 4 - Unbundled Local Loops

232. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."⁸⁸³ Based on the evidence in the record, we conclude, as did the state commissions,⁸⁸⁴ that BellSouth demonstrates that it provides unbundled local loops in accordance

⁸⁷⁹ AT&T Comments at 28. AT&T also asserts that "nothing in the *Virginia Arbitration Order* established that ILECs may deny CLECs equal flexibility to define their local calling areas." AT&T August 23 Pricing and Growth Tariff *Ex Parte* Letter at 9 (citing *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, 00-249, and 00-251, Memorandum Opinion and Order, DA 02-1731 (rel. July 15, 2002) (*Virginia Arbitration Order*). Consistent with the *Local Competition Order*, however, the definition of a local calling area is the prerogative of a state commission. *Local Competition Order*, 12 FCC Rcd at 16013, para. 1035.

⁸⁸⁰ AT&T Comments App., Ex. A, Declaration of Denise Berger (AT&T Berger Decl.) at paras. 9-11.

⁸⁸¹ *Id.* at para. 15 (emphasis added). AT&T states that this is not an interconnection agreement dispute because of BellSouth's belief that "CLEC[s] do not have a right to LATA-wide calling." AT&T August 23 Pricing and Growth Tariff *Ex Parte* Letter at 10 (citation omitted). We believe that a more accurate characterization of the issue is whether state commissions have the authority to define the local calling area as they see fit. See *Local Competition Order*, 12 FCC Rcd at 16013, para. 1035.

⁸⁸² *Verizon Pennsylvania Order*, 16 FCC Rcd at 17484, para. 118; *Verizon New Jersey Order*, 17 FCC Rcd at 12354, para. 159.

⁸⁸³ 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. Dark fiber and loop conditioning equipment are among the features, functions, and capabilities of the loop. *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67 n.301. For a discussion of the requirements of checklist item 4, see Appendix H at paras. 48-52, *infra*.

⁸⁸⁴ See Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 206; South Carolina Commission Comments at 1.

with the requirements of section 271 and our rules. As in past section 271 orders, our conclusion is based on our review of BellSouth's performance for all loop types, including voice grade loops, xDSL-capable loops, high capacity loops, and digital loops, as well as our review of BellSouth's hot cut, line-sharing, and line splitting processes. We note that, as of June 30, 2002, BellSouth states that it had provisioned 15,913 loops in Alabama, 3,841 loops in Kentucky, 6,258 loops in Mississippi, 51,229 loops in North Carolina, and 14,901 loops in South Carolina.⁸⁸⁵

233. Consistent with our prior section 271 orders, we do not address aspects of BellSouth's loop performance where our review of the record satisfies us that BellSouth's performance complies with the parity and benchmark measures established in the relevant states.⁸⁸⁶ Instead, we focus our discussion on those areas where the record indicates discrepancies between BellSouth's performance for its competitors and BellSouth's performance for its own retail operations. As in past section 271 proceedings in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that otherwise have denied new entrants a meaningful opportunity to compete.⁸⁸⁷ Where BellSouth's competitive LEC volumes in a particular state are too small to provide a meaningful assessment of BellSouth's loop-provisioning capabilities, we look to BellSouth's recent performance in Georgia to help us determine whether BellSouth meets this checklist item.⁸⁸⁸

234. *Hot Cut Activity.* Like the state commissions,⁸⁸⁹ we find that BellSouth is providing voice grade loops through hot cuts in each state in accordance with the requirements of checklist item 4.⁸⁹⁰ BellSouth provides hot cuts in each of the states within reasonable time intervals,⁸⁹¹ at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.⁸⁹²

⁸⁸⁵ See BellSouth August 14 OSS and Loops *Ex Parte* Letter at 3.

⁸⁸⁶ See, e.g., *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219; *Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9.

⁸⁸⁷ See, e.g., *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

⁸⁸⁸ See *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6254, paras. 36-37 (determining that recent data regarding SWBT's performance in Texas provides a reliable indicator of SWBT's performance in Kansas and Oklahoma).

⁸⁸⁹⁸⁸⁹ See Alabama Commission Comments at 204; Kentucky Commission Comments at 32; Mississippi Commission Comments at 3; North Carolina Commission Comments at 197; South Carolina Commission Comments at 1.

⁸⁹⁰ A hot cut is the process of converting a customer from one network, usually a UNE-platform served by an incumbent LEC's switch, to a UNE-loop served by another carrier's switch. The "cut" is said to be "hot" because telephone service on the specific customer's loop is interrupted for a brief period of time during the conversion process. *Bell Atlantic New York Order*, 15 FCC Rcd 3953, 4104, para. 291 n.925.

⁸⁹¹ See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.12.1-B.2.12.2 (Coordinated Customer Conversions); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.13.1-B.2.13.4 (% Hot Cuts > 15 (continued...))

235. *Voice Grade Loops.* We find, as did the state commissions,⁸⁹³ that BellSouth provisions voice grade loops to competitors in a nondiscriminatory manner. BellSouth met the benchmark and parity standards for installation timeliness,⁸⁹⁴ installation quality,⁸⁹⁵ and maintenance and repair timeliness and quality with regard to voice grade loops in each of the states in each relevant month, with minor exceptions.⁸⁹⁶ These exceptions are relatively slight and are not competitively significant to competitive LECs.⁸⁹⁷ We therefore find that these exceptions do not warrant a finding of checklist noncompliance.

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Minutes Early); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.14.1-B.2.14.4 (Hot Cut Timeliness); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.15.1-B.2.15.4 (% Hot Cuts>15 Minutes Late); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.16.1-B.2.16.2 (Average Recovery Time – CCC). *But see* KMC Comments at 10 (alleging that BellSouth's hot cut coordination is substandard).

⁸⁹² See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.17.1.1-B.2.17.2.2 (% Provisioning Troubles within 7 Days – Hot Cuts). We note that, while BellSouth failed to meet one of these benchmarks during June in South Carolina, it exceeded that benchmark on average during March through June in South Carolina. See South Carolina B.2.17.1.1 (% Provisioning Troubles within 7 Days, Hot Cuts, UNE Loop Design/Dispatch). We therefore find that the disparity in June does not rise to the level of checklist noncompliance. We also note that although BellSouth's volumes were low for certain hot cut measures in the applicable states, BellSouth's hot cut performance in Georgia raises no issues regarding checklist compliance. See Georgia B.2.12.1-B.2.17.2.2 (Hot Cut Provisioning).

⁸⁹³ See Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 190; South Carolina Commission Comments at 1.

⁸⁹⁴ See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.1.9.8.-B.1.9.13, B.1.12.8-B.1.1.12.13, B.1.13.8-B.1.13.13 (FOC Timeliness, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.1.8.1.1-B.2.1.13.2.4 (Order Completion Interval, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.18.8.1.1-B.2.18.13.2.4 (% Missed Installation Appointments, 2 Wire Analog Loops).

⁸⁹⁵ See Kentucky/Mississippi/North Carolina/South Carolina B.2.19.8.1.1-B.2.19.13.2.4 (% Provisioning Troubles within 30 Days, 2 Wire Analog Loops); Alabama B.2.19.8.1.2-B.2.19.13.2.4 (% Provisioning Troubles within 30 Days, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi B.3.2.8.1-B.3.2.9.2 (Customer Trouble Report Rate, 2 Wire Analog Loops).

⁸⁹⁶ See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.1.8.1-B.3.1.9.2 (% Missed Repair Appointments, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.3.8.1-B.3.3.9.2 (Maintenance Average Duration, 2 Wire Analog Loops); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.3.8.1-B.3.3.9.2 (% Repeat Troubles within 30 Days, 2 Wire Analog Loops).

⁸⁹⁷ See Alabama B.3.1.8.1 (Missed Repair Appointments, 2 Wire Analog Loops, Design/Dispatch) (out of parity in June with a 11.54% trouble report rate for competitive LECs and a 6.79% trouble report rate for BellSouth's retail operations, but a 4.50% overall trouble report rate for competitive LECs and a 6.30% overall trouble report rate for BellSouth's retail operations during March through June); South Carolina B.3.2.9.1 (Customer Trouble Report Rate, 2 Wire Analog Loops, Non-Design/Dispatch) (out of parity in two months with a 4.38% trouble report rate during March and a 7.05% trouble report rate during April for competitive LECs and a 1.60% trouble report rate during March and a 1.82% trouble report rate during April for BellSouth's retail operations, but a 4.13% overall trouble report rate for competitive LECs and a 1.83% overall trouble report rate for BellSouth's retail operations (continued....))

236. *xDSL-Capable Loops*. We find, as did the state commissions,⁸⁹⁸ that BellSouth demonstrates that it provides stand-alone xDSL-capable loops in accordance with checklist item 4. BellSouth's performance with respect to the percentage of provisioning troubles within 30 days, a metric that measures installation quality, appears to be out of parity in Kentucky, Mississippi, North Carolina, and South Carolina for recent months.⁸⁹⁹ We find, however, that this performance does not warrant a finding of checklist noncompliance in view of the low number of installation troubles reported in each of the five states. We recognize, as we have in prior section 271 orders, that a small handful of observations can cause seemingly large variations in the performance measures.⁹⁰⁰ Moreover, given BellSouth's parity of performance with respect to this metric in Georgia for the relevant period, we find that BellSouth provisions xDSL loops in a nondiscriminatory manner in all five states.⁹⁰¹ Next, we note that BellSouth's

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 from March through June); Georgia B.1.12.12 (FOC Timeliness, Partially Mechanized, 2 Wire Analog Loops with LNP, Design) (under benchmark requiring that BellSouth provide firm order confirmations within 10 hours at least 85% of the time, out of parity in May with an 83.41% score and June with a 78.71% score, but 86.13% overall average during March through June); Georgia B.2.1.13.1.4 (Order Completion Interval, 2 Wire Analog Loops with LNP/Non-Design/<10 Circuits/Dispatch) (out of parity from March through June with average intervals of 4.90 days for competitive LECs and 1.56 days for BellSouth's retail operations; competitive LEC volume of 54 orders represents only about 5.15% of total voice grade loops that competitive LECs ordered for Georgia during the same period). We consider these data for Georgia because BellSouth volumes under these metrics were low in certain of the applicable states. See, e.g., Kentucky B.1.12.12 (FOC Timeliness, Partially Mechanized, 2 Wire Analog Loops with LNP, Design); Kentucky B.2.1.13.1.4 (Order Completion Interval, 2 Wire Analog Loops with LNP/Non-Design/<10 Circuits/Dispatch).

⁸⁹⁸ See Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 192; South Carolina Commission Comments at 1.

⁸⁹⁹ Specifically, BellSouth's performance data show that it was out of parity in Kentucky, Mississippi, North Carolina, and South Carolina in April, and missed parity in North Carolina in May and South Carolina in March. In Mississippi, BellSouth's performance data show that competitive LECs experience an average of 7.01% trouble reports within 30 days after installation of an xDSL loop, compared to an average of 3.14% for BellSouth retail operations from March through June. In North Carolina, competitive LECs experience an average of 8.15%, compared to an average of 3.09% for BellSouth retail. See Mississippi/North Carolina B.2.19.5.1.1 (% Provisioning Troubles within 30 Days, ADSL, HDSL and UCL<10 Circuits/Dispatch). We note that BellSouth's performance data is based on low volumes in Kentucky and South Carolina. Further, there are no volumes reported for BellSouth retail operations in Kentucky in March, May, and June. In Kentucky, competitive LECs experience an average of 5.26% provisioning trouble reports within 30 days, compared to an average of 0.00%, while in South Carolina competitors experience an average of 13.04% trouble reports within 30 days, compared to an average of 3.05% for BellSouth retail operations. See Kentucky/South Carolina B.2.19.5.1.1 (% Provisioning Troubles within 30 Days, ADSL, HDSL and UCL<10 Circuits/Dispatch).

⁹⁰⁰ See *Verizon Massachusetts Order*, 16 FCC Rcd at 8988, para. 93 n.296. BellSouth's installation quality performance data show that competitive LECs volumes were, on average, 44 in Alabama, 10 in Kentucky, 39 in Mississippi, 58 in North Carolina, and 6 in South Carolina during the relevant period. See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.19.5.1.1 (% Provisioning Troubles within 30 Days, ADSL, HDSL and UCL<10 Circuits/Dispatch).

⁹⁰¹ In Georgia, BellSouth's performance data show that it achieved parity for this metric for all months during the relevant period. See Georgia B.2.19.5.1.1 (% Provisioning Troubles within 30 Days, ADSL, HDSL and UCL<10 Circuits/Dispatch).

order processing timeliness performance was slightly out of parity in Kentucky, Mississippi, and North Carolina on a few occasions.⁹⁰² We find that these performance discrepancies are slight, episodic, and do not appear to be competitively significant.

237. Covad alleges that its own data show that BellSouth's UCL-ND order completion interval,⁹⁰³ installation quality,⁹⁰⁴ and maintenance average duration⁹⁰⁵ performance demonstrates discriminatory treatment.⁹⁰⁶ BellSouth, however, contends that its performance with respect to this type of loop has been excellent and that it installs UCL-ND loops in a timely manner.⁹⁰⁷ We find that Covad-specific data is outweighed by evidence of BellSouth's overall performance. As in prior section 271 orders, performance data relative to competitive LECs on an aggregate basis is the most persuasive evidence of whether a BOC meets the checklist requirements.⁹⁰⁸ BellSouth's performance data demonstrate that BellSouth met or exceeded the parity standard for the order completion interval.⁹⁰⁹ In addition, BellSouth's maintenance and repair performance, which measures the timeliness and quality of the maintenance and repair functions,

⁹⁰² BellSouth met the vast majority of its order processing timeliness benchmarks. In Kentucky, BellSouth missed the benchmark (95% within 3 hours) for mechanized orders in March. However, competitive LECs experience an average of 97.20% within 3 hours for the relevant period. See Kentucky B.1.9.5 (FOC Timeliness, Mechanized, ADSL, HDSL and UCL). For partially mechanized orders in Mississippi and North Carolina, BellSouth missed the benchmark (85% within 10 hours) in March and May, respectively. In Mississippi, competitive LECs experience an average of 90.60% within 10 hours, and in North Carolina competitive LECs experience an average of 88.57% within 10 hours. See Mississippi/North Carolina B.1.12.5 (FOC Timeliness, Partially Mechanized, ADSL, HDSL and UCL).

⁹⁰³ Covad contends that for orders of this loop requiring dispatch, BellSouth completed orders for its own customers one day faster than Covad's orders in North Carolina, two days faster in Alabama, and five days faster in Kentucky. Covad Comments at 27.

⁹⁰⁴ Covad maintains that BellSouth failed to properly provision 38 of 50 UCL-ND orders in Florida in January 2002. Covad Comments at 24.

⁹⁰⁵ Specifically, Covad states that in Alabama for UCL-ND loops not requiring dispatch, BellSouth fixed problems for its own customers in 8.10 hours, while taking 24 hours to get Covad's customers back to service. Covad Comments at 29-30.

⁹⁰⁶ See generally Covad Comments at 22-31. In fact, Covad contends that BellSouth's provisioning problems with the UCL-ND loop have been so bad that Covad was forced to stop ordering the loop entirely in every state in the BellSouth region except Florida. *Id.* at 23.

⁹⁰⁷ BellSouth Reply Comments at 55; BellSouth Varner Reply Aff. at paras. 117, 120. Concerning Covad's claim that BellSouth provides retail customers faster repair services on average than it provides for Covad's UCL-ND orders, BellSouth states that Covad fails to note the differences in sample size and the effect even a single "miss" can have on the reported performance for the competitive LEC product. *Id.*

⁹⁰⁸ See, e.g., *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9148, para. 226.

⁹⁰⁹ See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.2.2 (Order Completion Interval within 7 Days, ADSL, HDSL and UCL/Loop without Conditioning < 6 Circuits/Dispatch).

has shown parity during the relevant period.⁹¹⁰ Moreover, as discussed above, we find that BellSouth provisions xDSL-capable loops of a quality sufficient to afford competitors a meaningful opportunity to compete. Thus, although Covad claims that its data show discriminatory performance, allegedly anomalous results for a single carrier in this instance do not qualify as a pattern of systemic performance disparities that result in competitive harm.⁹¹¹

238. *UNE ISDN Loops.* Like the state commissions,⁹¹² we find that BellSouth provides ISDN loops to competitors in a nondiscriminatory manner. BellSouth's performance under the order completion interval and the percentage missed installation appointment submetrics shows that BellSouth has been timely in the provisioning of ISDN loops.⁹¹³ Further, BellSouth's performance data demonstrate that it generally met the parity standard for the percentage of provisioning troubles within 30 days (dispatch) of installation metric.⁹¹⁴

239. BellSouth's data, however, reveal some performance issues with respect to the maintenance and repair of ISDN loops. Specifically, while BellSouth met or exceeded the parity standard for metrics measuring the percentage of missed repairs, maintenance average duration,

⁹¹⁰ BellSouth met or exceeded parity with respect to the percentage of missed repair appointments, customer trouble report rate, and maintenance average duration metrics in each of the states during the relevant period. See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.1.5.1-B.3.1.5.2 (% Missed Repair Appointments, ADSL, HDSL and UCL/Dispatch and Non-Dispatch); B.3.2.5.1-B.3.2.5.2 (Customer Trouble Report Rate, ADSL, HDSL and UCL/Dispatch and Non-Dispatch); B.3.3.5.1-B.3.3.5.2 (Maintenance Average Duration, ADSL, HDSL and UCL/Dispatch and Non-Dispatch). BellSouth met the standard for repeat troubles within 30 days, with two minor exceptions. See South Carolina B.3.4.5.2 (% Repeat Troubles within 30 Days, ADSL, HDSL and UCL/Non-Dispatch). BellSouth missed this metric in April and June.

⁹¹¹ If evidence becomes available to the Commission in the future sufficient to show systemic performance disparities, we will pursue appropriate enforcement action.

⁹¹² See Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 192; South Carolina Commission Comments at 1.

⁹¹³ BellSouth met the benchmark for installation timeliness and missed installation appointments for each month in all five states during the relevant period. See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.1.6.3.1 (Order Completion Interval, UNE ISDN<6 Circuits/Dispatch); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN<10 Circuits/Dispatch).

⁹¹⁴ BellSouth's performance data show that it provides an installation quality sufficient to afford competitors a meaningful opportunity to compete. See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.19.6.1.1 (% Provisioning Troubles within 30 Days, UNE ISDN<10 Circuits/Dispatch). However, BellSouth missed one month in Kentucky and two months in North Carolina. In Kentucky, competitive LECs experienced an average of 8.00% provisioning troubles within 30 days of installation, compared to 6.79% for BellSouth retail operations. See Kentucky B.2.19.6.1.1 (% Provisioning Troubles within 30 Days, UNE ISDN<10 Circuits/Dispatch). In North Carolina, competitors experienced an average of 8.22% compared to 5.82% for BellSouth retail for the same period. See North Carolina B.2.19.6.1.1 (% Provisioning Troubles within 30 Days, UNE ISDN<10 Circuits/Dispatch). We find, however, that BellSouth's overall performance for this metric show that BellSouth provides competitors with sufficient installation quality.

and the percentage of repeat troubles with few minor exceptions,⁹¹⁵ BellSouth was out of parity with the customer trouble report rate for several months in each of the five states.⁹¹⁶ We do not find, however, that these performance discrepancies are competitively significant. Further, we note that no commenter has commented on BellSouth's ISDN loop performance with respect to this metric. Accordingly, in light of BellSouth's competitive carrier ISDN loop record overall, we do not find that BellSouth's performance demonstrates that it fails to meet the requirements of checklist item 4.

240. *Digital Loops.* We find, as did the state commissions,⁹¹⁷ that BellSouth's performance with respect to digital loops complies with checklist item 4. BellSouth's performance in this area generally met the parity standards established by the state commissions for installation timeliness.⁹¹⁸ We recognize, however, that BellSouth's performance in North

⁹¹⁵ Specifically, BellSouth's missed repair appointment performance (dispatch) was out of parity for two months in North Carolina and one month in South Carolina during the relevant period. See North Carolina/South Carolina B.3.1.6.1 (% Missed Repair Appointments, UNE ISDN/Dispatch). In North Carolina, competitive carriers experienced an average of 1.19% missed repair appointments compared to 1.03% for BellSouth retail operations from March through June. In South Carolina, competitors experienced an average of 7.14% compared to 3.09% for BellSouth retail for the same period. *Id.* In Alabama, BellSouth was only out of parity in May for non-dispatch loops. See Alabama B.3.1.6.2 (% Missed Repair Appointments, UNE ISDN/Non-Dispatch). BellSouth's maintenance average duration (dispatch) was only out of parity for one month in South Carolina. See South Carolina B.3.3.6.1 (Maintenance Average Duration, UNE ISDN/Dispatch). BellSouth performance data show that it was out of parity for one month in Alabama and South Carolina for maintenance average duration (non-dispatch). In North Carolina, BellSouth missed parity for two months, and competitive carriers experience an average of 2.75% misses compared to an average of 1.73% for BellSouth's retail operations for the relevant period. See Alabama/North Carolina/South Carolina B.3.3.6.2 (Maintenance Average Duration, UNE ISDN/Non-Dispatch). BellSouth was also slightly out of parity for the percentage of repeat troubles within 30 days metric. However, BellSouth's performance data for this metric show that BellSouth was out of parity for one month in Alabama (dispatch), and one month in Mississippi and North Carolina (non-dispatch). See Alabama B.3.4.6.1 (% Repeat Troubles within 30 Days, UNE ISDN/Dispatch); Mississippi/North Carolina B.3.4.6.2 (% Repeat Troubles within 30 Days, UNE ISDN/Non-Dispatch). Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

⁹¹⁶ Specifically, BellSouth's customer trouble report rate (dispatch) was out of parity for one month in South Carolina, two months in Alabama and Kentucky, three months in Mississippi, and four months in North Carolina. See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch). In Mississippi, competitive carriers experienced an average of 1.33% dispatch trouble reports compared to an average of 0.61% for BellSouth retail operations for the relevant period. In North Carolina, competitors experienced an average of 1.18% dispatch trouble reports compared to an average of 0.64% for BellSouth retail. See Mississippi/North Carolina B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch). BellSouth's customer trouble report rate (non-dispatch) performance data show that BellSouth was in parity for all months reported. See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.3.2.6.2 (Customer Trouble Report Rate, UNE ISDN/Non-Dispatch).

⁹¹⁷ See Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 192; South Carolina Commission Comments at 1.

⁹¹⁸ See Kentucky/Mississippi/South Carolina B.2.1.18.1.1 (Order Competition Interval, Digital Loops<DS1/<10 Circuits/Dispatch); Kentucky/Mississippi/North Carolina/South Carolina B.2.1.18.1.2-B.2.1.18.2.2 (Order (continued....))

Carolina with respect to an installation timeliness measure – the order completion interval metric (dispatch) – was out of parity for March through June.⁹¹⁹ The record shows, however, that no facilities were available for a disproportionate percentage of the competitive LEC orders reflected in this metric and that completing these orders required BellSouth to dispatch technicians to provision new loops.⁹²⁰ We find that BellSouth reasonably assigned these orders longer intervals than it assigned to orders that did not involve the dispatch of technicians. Because the retail orders reflected in this metric typically did not involve the dispatch of technicians, we also find that the disparity in BellSouth's performance under this metric does not raise an issue of checklist noncompliance.⁹²¹ In addition, the data for the other installation timeliness metric – percent missed installation appointments – show that BellSouth missed no installation appointments for competitive LECs during the relevant period in North Carolina.⁹²² In these circumstances, we conclude that BellSouth's performance under this order completion interval metric has not denied competitive LECs a meaningful opportunity to compete in North Carolina.

241. We reject KMC's argument that BellSouth's provisioning and maintenance and repair performance for digital loops preclude a finding of checklist compliance.⁹²³ BellSouth's installation quality measure for digital loops – the percentage of provisioning troubles within 30 days – was out of parity for certain months in Kentucky, Mississippi, North Carolina, and South Carolina.⁹²⁴ The record shows, however, that BellSouth has implemented several initiatives to

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Competition Interval, Other Digital Loops<DS1>; Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.18.18.1-B.2.18.18.2 (% Missed Installation Appointments, Digital Loops<DS1/<10 Circuits).

⁹¹⁹ See North Carolina B.2.1.18.1.1 (Order Competition Interval, Digital Loops<DS1/<10 Circuits/Dispatch) (monthly averages ranging from 8.72 days to 9.69 days for competitive LECs and from 3.74 days to 5.51 days for BellSouth's retail operations).

⁹²⁰ BellSouth August 14 *Ex Parte* Letter at 3; BellSouth Varner Reply Aff. at para. 224.

⁹²¹ BellSouth August 14 *Ex Parte* Letter at 3.

⁹²² See BellSouth Varner Reply Aff. at para. 224; North Carolina B.2.18.18.1.1 (% Missed Installation Appointments, Digital Loops<DS1/<10 Circuits/Dispatch) (no missed installation appointments for competitive LECs from March through June, versus an overall 3.70 % missed installation appointment rate for BellSouth's retail operations during the same period).

⁹²³ KMC Comments at 15-16.

⁹²⁴ See Kentucky/Mississippi/North Carolina/South Carolina B.2.19.18.1.1 (% Provisioning Troubles within 30 Days, Digital Loops<DS1/<10 Circuits/Dispatch). Specifically, BellSouth was below parity for this metric for May in Kentucky (11.76% of installations for competitive LECs having troubles within 30 days, versus 1.25% for BellSouth's retail operations); for April in Mississippi (8.97% of installations for competitive LECs having troubles within 30 days, versus 3.29% for BellSouth's retail operations); for March through May in North Carolina (6.25%, 10.12%, and 10.14% of installations for competitive LECs having troubles within 30 days, versus 3.58%, 2.21%, and 3.52% for BellSouth's retail operations); and for March and April in South Carolina (15.63% and 9.43% of installations for competitive LECs having troubles within 30 days, versus 3.24% and 3.71% for BellSouth's retail operations). *Id.*

reduce provisioning troubles.⁹²⁵ These initiatives include working with competitive LECs to rectify any issues and concerns prior to completing a service order.⁹²⁶ In addition, at the competitive LEC's request, BellSouth will engage in cooperative testing to ensure that the loop being provisioned meets the relevant technical criteria.⁹²⁷ Given this evidence, and recognizing BellSouth's generally acceptable performance for other categories of loops, we find that BellSouth's performance under this installation quality metric does not warrant a finding of checklist noncompliance.

242. Similarly, although BellSouth's maintenance and repair performance for digital loops was generally in parity during the applicable period,⁹²⁸ one measure of that performance – the customer trouble report rate – was out of parity for the applicable states throughout much of the relevant period.⁹²⁹ Because the overall trouble report rate for digital loops that BellSouth provided competitive LECs was low during the relevant period,⁹³⁰ we find that these disparities lack competitive significance.⁹³¹ BellSouth also was out of parity with regard to another measure of maintenance and repair quality – maintenance average duration – during certain months in Alabama, Mississippi, North Carolina, and South Carolina.⁹³² However, BellSouth's overall

⁹²⁵ See BellSouth August 14 OSS and Loops *Ex Parte* Letter at 4.

⁹²⁶ BellSouth Ainsworth Aff. at para. 139.

⁹²⁷ *Id.*

⁹²⁸ See BellSouth August 14 OSS and Loops *Ex Parte* Letter at 9, 11-14, 21, 23-27, 29-32 (discussing % Missed Repair Appointments, Maintenance Average Duration, and % Repeat Troubles within 30 Days, Digital Loops). We note that while BellSouth has provided disaggregated maintenance and repair data for digital loops, no metrics have been established for these data.

⁹²⁹ See BellSouth August 14 OSS and Loops *Ex Parte* Letter at 15, 17-20 (discussing Customer Trouble Report Rate, Digital Loops<DS1/Dispatch) (out of parity in applicable states throughout relevant period); *id.* (discussing Customer Trouble Report Rate, Digital Loops<DS1/Non-Dispatch) (out of parity in Alabama during April and May, in Mississippi during June, in North Carolina during March through May, and in South Carolina during March).

⁹³⁰ During that period, the average trouble report rate for digital loops provided competitive LECs was 1.12% in Alabama, 1.27% in Kentucky, 1.54% in Mississippi, 1.64% in North Carolina, and 1.63% in South Carolina. See BellSouth August 14 *Ex Parte* Letter at 15, 17-20 (discussing Customer Trouble Report Rate, Digital Loops<DS1).

⁹³¹ See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9150, para. 230.

⁹³² See BellSouth August 14 OSS and Loops *Ex Parte* Letter at 27, 29-32 (discussing Maintenance Average Duration, Digital Loops<DS1/Non-Dispatch). Specifically, in Alabama, BellSouth's performance for this measure was out of parity in April with an average duration of 5.01 hours for competitive LECs and 2.28 hours for BellSouth's retail operations, and in May with an average duration of 7.03 hours for competitive LECs and 2.55 hours for BellSouth's retail operations. In Mississippi, BellSouth's performance was out of parity in June with an average duration of 5.63 hours for competitive LECs and 2.50 hours for BellSouth's retail operations. In North Carolina, BellSouth's performance was out of parity in June with an average duration of 4.29 hours for competitive LECs and 2.29 hours for BellSouth's retail operations. In South Carolina, BellSouth's performance was out of parity in March with an average duration of 4.87 hours for competitive LECs and 1.99 hours for BellSouth's retail operations, and in June with an average duration of 3.92 hours for competitive LECs and 1.88 hours for BellSouth's retail operations. *Id.*

performance for this measure during the applicable period for competitive LECs was comparable to its performance for its own retail operations.⁹³³ We therefore find that the disparities in maintenance average duration also lack competitive significance. Moreover, contrary to KMC's assertion, BellSouth was consistently in parity, with very few repeat troubles, with regard to its measure for repeat troubles within 30 days of maintenance or repair of digital loops.⁹³⁴

243. *High Capacity Loops.* We find, as did the state commissions,⁹³⁵ that BellSouth's performance with respect to high capacity loops complies with checklist item 4. We reach this conclusion despite the fact that BellSouth's performance with respect to certain performance metrics – including the percentage of missed installation appointments for high capacity loops and the percentage of troubles found within 30 days following installation of a high capacity loop – is out of parity for several recent months.⁹³⁶ As we discuss below, however, this performance does not warrant a finding of checklist noncompliance. As the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.⁹³⁷

244. First, we recognize that BellSouth's performance with respect to an installation timeliness measure – the missed installation appointments metric – was out of parity for most of the months in Alabama.⁹³⁸ The record shows, however, that BellSouth missed few installation

⁹³³ During the relevant period, BellSouth's maintenance intervals for digital loops averaged 4.76 hours for competitive LECs and 4.25 hours for BellSouth's retail operations in Alabama, 4.52 hours for competitive LECs and 3.78 hours for BellSouth's retail operations in Kentucky, 4.83 hours for competitive LECs and 4.09 hours for BellSouth's retail operations in Mississippi, 3.71 hours for competitive LECs and 3.83 hours for BellSouth's retail operations in North Carolina, and 5.14 hours for competitive LECs and 3.39 hours for BellSouth's retail operations in South Carolina. See BellSouth August 14 OSS and Loops *Ex Parte* Letter at 27, 29-32 (discussing Maintenance Average Duration, Digital Loops<DS1).

⁹³⁴ See KMC Comments at 16. Specifically, the record shows that during the relevant period, competitive LECs reported only 77 repeat troubles for digital loops in the applicable states. BellSouth August 14 OSS and Loops *Ex Parte* Letter at 21, 23-26 (discussing % Repeat Troubles within 30 Days, Digital Loops<DS1).

⁹³⁵ See Alabama Commission Comments at 211; Kentucky Commission Comments at 31, 41; Mississippi Commission Comments at 3; North Carolina Commission Comments at 206; South Carolina Commission Comments at 1.

⁹³⁶ See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops \geq DS1/<10 Circuits/Dispatch); Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops \geq DS1/<10 Circuits/Dispatch). Notes 941 and 944, *infra*, provide the relevant data regarding BellSouth's performance under these metrics.

⁹³⁷ See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 619; *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 22; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17468-69, para. 90 (finding that even "poor" performance with regard to high capacity loops did not warrant a finding of checklist noncompliance for all loop types where high capacity loops represented only a small percentage of all loops ordered by competitors in a state). Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

⁹³⁸ See Alabama B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops \geq DS1/<10 Circuits/Dispatch). BellSouth's data for Alabama show that, from March through June, BellSouth missed 4.62% of its installation appointments for its retail high capacity loop operations and 9.51% of its installation appointments for competitive (continued....)

appointments for either wholesale or retail high capacity loops in Alabama during the applicable period.⁹³⁹ Therefore, a very small increase in the number of missed installation appointments for competitive LEC customers can cause BellSouth to fail to achieve parity for this metric in a given month.⁹⁴⁰ BellSouth's data show that it missed a total of 29 high capacity loop appointments for competitive LECs during the relevant period and that 14 fewer missed installation appointments would have allowed BellSouth to achieve parity with respect to this metric throughout that period.⁹⁴¹ Moreover, we note that BellSouth's performance reflected by an installation timeliness metric – the order completion interval metric for high capacity loops – satisfies the benchmark for all months.⁹⁴² Given this evidence, we do not find that lack of parity on this missed installation appointments metric warrants a finding that BellSouth fails to meet checklist item 4 in Alabama.⁹⁴³

245. Next, in each applicable state, the percentage of troubles reported within 30 days following installation was statistically out of parity during much of the relevant period.⁹⁴⁴ The

(Continued from previous page)

LECs' high capacity loop operations. *Id.* We note that BellSouth was out of parity for this metric for May in Kentucky and North Carolina. Kentucky/North Carolina B.2.1.19.1.1 (Order Completion Interval, Digital Loops \geq DS1/<10 Circuits/Dispatch). BellSouth, however, failed to keep only three high capacity loop appointments for May in Kentucky and only one high capacity loop appointment for May in North Carolina. These isolated disparities in performance do not undercut BellSouth's otherwise acceptable level of performance and, thus, do not require a finding of checklist noncompliance. *See, e.g., Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

⁹³⁹ BellSouth Varner Reply Aff. at para. 226; Alabama B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops \geq DS1/<10 Circuits/Dispatch).

⁹⁴⁰ BellSouth Varner Reply Aff. at para. 226.

⁹⁴¹ BellSouth's data show that of its high capacity loop appointments for competitive LECs in Alabama, it missed a total of eight in March, nine in April, six in May, and six in June. While BellSouth achieved parity for this metric in Alabama during March, four fewer missed appointments during April, five fewer missed appointments during May, and five fewer missed appointments during June would have enabled BellSouth to achieve parity for this metric in Alabama during each relevant month. *See* Alabama B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops \geq DS1/<10 Circuits/Dispatch).

⁹⁴² *See* Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.1.19.1.1 (Order Completion Interval, Digital Loops \geq DS1/<10 Circuits/Dispatch); *see also* BellSouth August 15 Non-pricing *Ex Parte* Letter at 9-10 (arguing that the need to construct or rearrange facilities serving particular end users caused many of the missed installation appointments for high capacity loops); BellSouth Varner Reply Aff. at para. 226 (stating that BellSouth missed six high capacity loop appointments in March and seven high capacity loop appointments in April because it failed to add needed facilities at a single location prior to the scheduled installation dates).

⁹⁴³ *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6344, para. 213.

⁹⁴⁴ Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops \geq DS1/<10 Circuits/Dispatch). In Alabama, competing carriers experienced an average of 12.26% trouble reports within 30 days after installation of a high capacity digital loop, compared to an average of 2.98% for BellSouth retail operations from March through June. *See* Alabama B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops \geq DS1/<10 Circuits/Dispatch). Kentucky performance data show that competitive carriers experienced an average of 7.38% trouble reports, compared to an average of 2.28% for BellSouth retail operations for the same period. *See* Kentucky B.2.19.19.1.1 (% Provisioning Troubles within 30 (continued....))

record makes clear, however, that many of the troubles competitive LECs reported during that period were closed without any trouble being found.⁹⁴⁵ Adjusting BellSouth's reported performance data to eliminate these trouble reports would improve the reported results significantly.⁹⁴⁶ In addition, BellSouth has implemented an ongoing program to ensure installation quality for high capacity loops throughout its region.⁹⁴⁷ This program has allowed BellSouth to identify and, in some instances, eliminate the problems that cause installation problems with high capacity loops.⁹⁴⁸ As with digital loops, this program includes an opportunity for the competitive LEC to engage in cooperative testing with BellSouth to ensure that a high capacity loop meets relevant technical criteria prior to its being handed off to the competitive LEC.⁹⁴⁹ BellSouth indicates, however, that, even with cooperative testing, some problems arise cannot be detected until the customer premises equipment is connected to the loop, which typically does not happen until several days after BellSouth hands it off to the competitive LEC.⁹⁵⁰ Given this evidence, and recognizing BellSouth's generally acceptable performance for other categories of loops, we find that BellSouth's performance is in compliance with checklist item 4.

246. We reject KMC's contentions that BellSouth's provisioning and maintenance and repair performance for high capacity loops precludes a finding of checklist compliance.⁹⁵¹ Given (Continued from previous page)

Days, Digital Loops \geq DS1/<10 Circuits/Dispatch). In Mississippi, the comparable figures were 16.44% for competitive LECs and 5.92% for BellSouth. See Mississippi B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops \geq DS1/<10 Circuits/Dispatch). In North Carolina, they were 12.79% for competitive LECs and 5.00% for BellSouth. See North Carolina B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops \geq DS1/<10 Circuits/Dispatch). In South Carolina, they were 12.18% for competitive LECs and 4.15% for BellSouth. South Carolina B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops \geq DS1/<10 Circuits/Dispatch). We note that in the *BellSouth Georgia/Louisiana Order*, the Commission considered performance data showing averages for trouble reports within 30 days of 7.87% for competitive LECs and 1.76% for BellSouth's retail operations in Georgia, and 6.93% for competitive LECs and 1.00% for BellSouth retail operations in Louisiana. See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9152 n.907.

⁹⁴⁵ See BellSouth Varner Reply Aff. at para. 219.

⁹⁴⁶ See *id.*

⁹⁴⁷ BellSouth August 14 OSS and Loops *Ex Parte* Letter at 4; BellSouth Ainsworth Aff. at para. 139; BellSouth Varner Reply Aff. at paras. 217; see also *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9152-53, para. 233. This program also addressed digital loops. See para. 241, *supra*.

⁹⁴⁸ BellSouth August 14 OSS and Loops *Ex Parte* Letter at 4; BellSouth Varner Reply Aff. at paras. 216-18. For instance, to help assure that its technicians test high capacity loops before reporting that installations are complete, BellSouth now requires that the technicians post the test results. BellSouth Varner Reply Aff. at para. 216.

⁹⁴⁹ BellSouth Ainsworth Aff. at para. 139; BellSouth August 14 OSS and Loops *Ex Parte* Letter at 4.

⁹⁵⁰ See BellSouth Varner Reply Aff. at para. 215 (stating that the customer premises equipment adds loop length and resistance to the circuit that may push it beyond viable limits).

⁹⁵¹ KMC Comments at 15-16. KMC also asserts that facilities-based carriers like KMC will have no meaningful opportunity to compete unless the Commission forces BellSouth to improve its high capacity loop performance by denying this application. KMC Comments at 8-9.

BellSouth's generally acceptable performance with regard to other types of loops, and BellSouth's continuing efforts to ensure installation quality for high capacity loops, we cannot conclude that BellSouth's performance with regard to high capacity loops denies competitive LECs a reasonable opportunity to compete.⁹⁵² Contrary to KMC's assertion,⁹⁵³ repeat troubles are not a major problem with respect to high capacity loops. During the relevant four-month period, competitive LECs reported only 283 repeat troubles for high capacity loops, a reporting rate generally in parity with the retail analogue.⁹⁵⁴ Moreover, BellSouth generally maintained parity performance under the missed repair appointment and the mean time to repair measures during the relevant period.⁹⁵⁵ Although one measure of BellSouth's maintenance and repair performance for high capacity loops – the customer trouble report rate – was out of parity for the applicable states throughout much of the relevant period,⁹⁵⁶ the overall trouble report rate for high capacity loops that BellSouth provided competitive LECs was low during the relevant period.⁹⁵⁷ We therefore find that these disparities lack competitive significance,⁹⁵⁸ and that BellSouth's maintenance and repair performance for high capacity loops warrants a finding of checklist compliance.

247. We also reject KMC's argument that BellSouth's performance for the percentage of jeopardy notices for mechanized high capacity loops, which is significantly out of parity throughout the four-month period,⁹⁵⁹ demonstrates that BellSouth assigns high capacity loops in a

⁹⁵² See *Verizon Pennsylvania Order*, 16 FCC Rcd at 17468-69, para. 90.

⁹⁵³ See KMC Comments at 16.

⁹⁵⁴ BellSouth August 14 OSS and Loops *Ex Parte* Letter at 21, 23-26 (discussing % Repeat Troubles within 30 Days, Digital Loops \geq DS1) (parity during the applicable months except with regard to high capacity loop troubles requiring dispatch in Mississippi in April, and high capacity loop troubles not requiring dispatch in South Carolina in April and Mississippi in May).

⁹⁵⁵ See BellSouth August 14 OSS and Loops *Ex Parte* Letter at 9, 11-14 (discussing Missed Repair Appointments, Digital Loops \geq DS1) (parity throughout the applicable states for the relevant period except with regard to high capacity loop maintenance requiring dispatch in North Carolina in May); *id.* at 27-33 (discussing Maintenance Average Duration, Digital Loops \geq DS1) (parity throughout the applicable states for the relevant period except with regard to high capacity loop maintenance requiring dispatch in North Carolina in May).

⁹⁵⁶ See BellSouth August 14 OSS and Loops *Ex Parte* Letter at 15, 17-20 (discussing Customer Trouble Report Rate, Digital Loops \geq DS1/Dispatch) (out of parity in applicable states throughout relevant period); *id.* (discussing Customer Trouble Report Rate, Digital Loops \geq DS1/Non-Dispatch) (out of parity in Alabama, Mississippi, North Carolina, and South Carolina throughout relevant period and in Kentucky from April through June).

⁹⁵⁷ During that period, the average trouble report rate for high capacity loops was 3.19% in Alabama, 4.04% in Kentucky, 7.82% in Mississippi, 3.84% in North Carolina, and 4.22% in South Carolina. See *id.* (Customer Trouble Report Rate, Digital Loops \geq DS1).

⁹⁵⁸ See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9150, para. 230.

⁹⁵⁹ Alabama/Kentucky/Mississippi/North Carolina/South Carolina Metric B.2.5.19 (% Jeopardies, Digital Loops \geq DS1, Mechanized). BellSouth's monthly performance data for this metric range from 3.93% to 35.87% during the four-month period; for competitive LECs, the percentages range from 60.87% to 93.22%.

discriminatory manner.⁹⁶⁰ This difference in the jeopardy rates simply reflects differences between the types and locations of facilities reflected in this metric. Because virtually all of the high capacity loops ordered by competitive LECs terminate at an end user's premises, it is likely that a temporary facilities shortage would place a competitive LEC's order in jeopardy.⁹⁶¹ In contrast, a significant percentage of the high capacity circuits included in the retail analogue for this metric carry traffic between BellSouth central offices, where temporary facility shortages are significantly less likely.⁹⁶² We therefore give this performance data minimal weight with respect to whether BellSouth's loop assignment practices are nondiscriminatory.⁹⁶³

248. *Line Sharing.* We find, as did the state commissions,⁹⁶⁴ that BellSouth offers nondiscriminatory access to the high frequency portion of the loop in each applicable state.⁹⁶⁵ We note that competitive LECs in Mississippi and South Carolina have not yet ordered any line-sharing arrangements from BellSouth.⁹⁶⁶ Because order volumes for line-shared loops are low in each of the states, we look to BellSouth's line-sharing performance in Georgia to inform our analysis.⁹⁶⁷ We further note that no party has alleged that BellSouth's line-sharing offerings in

⁹⁶⁰ KMC Comments at 11. We note that KMC makes no claim that BellSouth provides jeopardy notices for high capacity loops in a discriminatory manner. *See id.*

⁹⁶¹ BellSouth Varner Reply Aff. at para. 127.

⁹⁶² *Id.*

⁹⁶³ We note that BellSouth's systems and procedures are designed to ensure that high capacity loops are assigned on a nondiscriminatory basis. BellSouth Milner Reply Aff. at para. 10. Specifically, BellSouth shows that it uses a mechanized system, LFACS, to assign high capacity loops, among other facilities, on a "first come, first served" basis to its wholesale and retail customers. If LFACS cannot find a suitable facility, the service order is referred to BellSouth's Address and Facilities Inventory Group (AFIG) or its Service Advocate Center (SAC). These groups assign high capacity loops and other facilities in the order in which BellSouth originally received the service orders. *Id.* We also note that BellSouth's data make clear that it provides jeopardy notices to competitive LECs significantly in advance of scheduled installation dates. *See Alabama/Kentucky/Mississippi/North Carolina/South Carolina B.2.8.19 (Average Jeopardy Notice Interval, Digital Loops ≥ DS1, Mechanized)* (showing compliance with benchmark requiring that jeopardy notices be provided at least 48 hours prior to scheduled installation). We therefore reject KMC's argument that competitive LECs do not receive adequate notice that the change in service providers will not take place as scheduled. KMC Comments at 14.

⁹⁶⁴ *See Alabama Commission Comments at 211; Kentucky Commission Comments at 32-33; Mississippi Commission Comments at 3; North Carolina Commission Comments at 200; South Carolina Commission Comments at 1.*

⁹⁶⁵ As discussed in note 61, *supra*, the D.C. Circuit recently stated that "the *Line Sharing Order* must be vacated and remanded." *USTA v. FCC*, 290 F.3d 415, 429. The court also stated that it "grant[ed] the petitions for review[] and remand[ed] the *Line Sharing Order* . . . to the Commission for further consideration in accordance with the principles outlined." *Id.* at 430. We are addressing the line sharing rules as part of our *Triennial Review Proceeding*. *See Triennial Review Notice*, 16 FCC Rcd at 22805, paras. 53-54.

⁹⁶⁶ BellSouth Milner Aff. at para. 114.

⁹⁶⁷ *See* para. 233, *supra*.

Mississippi and South Carolina fail to provide nondiscriminatory access to the high frequency portion of the loop.

249. BellSouth has generally met the benchmark and parity standards for installation timeliness,⁹⁶⁸ installation quality,⁹⁶⁹ and maintenance and repair quality for line sharing in the other relevant states.⁹⁷⁰ Because BellSouth's performance data show that it installs line-sharing arrangements in accordance with the standards approved by the state commissions,⁹⁷¹ we reject Covad's reliance on BellSouth's alleged failure to provision line-sharing arrangements within the time frame specified in its interconnection agreement with Covad.⁹⁷² Given that BellSouth's

⁹⁶⁸ See Alabama/Kentucky/North Carolina B.1.9.7-B.1.13.7 (Firm Order Confirmation, Line Sharing); Alabama/Kentucky/North Carolina B.2.1.7.3.1-B.2.7.5.2 (Order Completion Interval, Line Sharing); *see also* Georgia B.2.1.7.3.1-B.2.1.7.5.2 (Order Completion Interval, Line Sharing); Georgia B.2.1.7.3.1-B.2.1.7.5.2 (Order Completion Interval, Line Sharing); Alabama/Kentucky/North Carolina/Georgia B.2.18.7.1.1-B.2.18.7.2.2 (% Missed Installation Appointments, Line Sharing).

⁹⁶⁹ See Alabama/Kentucky/North Carolina/Georgia B.2.19.7.1.2-B.2.19.7.2.1 (% Provisioning Troubles within 30 Days, Line Sharing); Alabama/Kentucky/North Carolina/Georgia B.3.2.7.1-B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing).

⁹⁷⁰ See Alabama/Kentucky/North Carolina/Georgia B.3.1.7.1-B.3.1.7.2 (% Missed Repair Appointments, Line Sharing); Alabama/Kentucky/North Carolina/Georgia B.3.3.7.1-B.3.3.7.2 (Maintenance Average Duration, Line Sharing); Alabama/Kentucky/North Carolina/Georgia B.3.4.7.1-B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing). While Covad complains that BellSouth took longer to perform line-sharing maintenance for competitive LECs than for its own retail operations, BellSouth's performance under the metrics for maintenance average duration is generally in parity, with very low volumes, in Alabama, Kentucky, and North Carolina from March through June. Covad Comments at 29-30; *see* Alabama B.3.3.7.1-B.3.3.7.2 (Maintenance Average Duration, Line Sharing) (parity in all four months for both dispatch and non-dispatch); Kentucky B.3.3.7.1-B.3.3.7.2 (Maintenance Average Duration, Line Sharing) (parity in all four months for both dispatch and in three months for non-dispatch); North Carolina B.3.3.7.1-B.3.3.7.2 (Maintenance Average Duration, Line Sharing) (parity in all four months for both dispatch and non-dispatch).

⁹⁷¹ See Alabama/Kentucky/North Carolina B.2.1.7.3.1-B.2.1.7.3.2 (Order Completion Interval, Line Sharing/<6 Circuits). We note that BellSouth's order completion interval performance was out of parity during June in Alabama, Kentucky, and North Carolina, and during much of the relevant period in Georgia. *See* Alabama/Kentucky/North Carolina B.2.1.7.3.2 (Order Completion Interval, Line Sharing/<6 Circuits/Non-Dispatch) (average June intervals of 4.00 for competitive LECs and 2.43 days for BellSouth's retail operations in Alabama, 3.85 days for competitive LECs and 2.46 days for BellSouth's retail operations in Kentucky, and 3.63 days for competitive LECs and 2.39 days for BellSouth's retail operations in North Carolina); Georgia B.2.1.7.3.1-B.2.1.7.5.2 (Order Completion Interval, Line Sharing) (average monthly intervals ranging from 3.88 days to 5.96 days for competitive LECs and 2.39 days to 4.07 days for BellSouth's retail operations). The data indicate, however, that, on average during the applicable period, BellSouth's order completion intervals were 0.49 days shorter in Alabama, 0.46 days longer in Kentucky, 0.15 days shorter in North Carolina, and 0.66 days longer in Georgia for competitive LECs than for BellSouth's retail operations. Alabama/Kentucky/North Carolina/Georgia B.2.1.7.3.1-B.2.1.7.3.2 (Order Completion Interval, Line Sharing/<6 Circuits). We find these differences to be competitively insignificant.

⁹⁷² See Covad Comments at 22-23, 27 (asserting that BellSouth's failure to provision line-sharing arrangements within the three-day time frame specified in the interconnection agreement adversely affects Covad's ability to serve its customers with the speed and efficiency they expect).

line-sharing provisioning intervals for its retail customers and competitive LECs are comparable, and recognizing BellSouth's timeliness performance during the relevant period in Georgia, we find that BellSouth's installation performance does not warrant a finding of checklist noncompliance.⁹⁷³ We do not, however, exclude the possibility that Covad might prevail in the event it chose to pursue this as a dispute under its agreement with BellSouth.

250. We also reject Covad's claim that BellSouth's line-sharing provisioning and maintenance and repair performance precludes a grant of long distance authority.⁹⁷⁴ Although BellSouth's performance with regard to certain measures – customer trouble reports within 30 days of installation and repeat trouble reports within 30 days of maintenance or repair – is out of parity in certain months,⁹⁷⁵ we find these disparities in reported performance do not warrant a finding of checklist noncompliance. First, as BellSouth argues, certain disparities reflect only a few trouble reports.⁹⁷⁶ Second, because only a small percentage of the line-sharing arrangements provided by BellSouth resulted in initial trouble reports, the total volume of repeat troubles is too

⁹⁷³ We note that Covad provides no data regarding the provisioning intervals for the line-shared loops it obtains from BellSouth. See Covad Comments at 27 (alleging line-sharing provisioning intervals of 3.88 days in Alabama, 4.07 days in Kentucky, and 3.78 days in North Carolina). In any event, this proceeding is not the proper forum for redressing any interconnection agreement violations by BellSouth. Covad may seek enforcement of its interconnection agreement by the state commissions.

⁹⁷⁴ Covad Comments at 27-29.

⁹⁷⁵ Alabama B.2.19.7.1.2 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Non-Dispatch) (out of parity during three months with an average trouble rate of 8.43% for competitive LECs and 1.95% for BellSouth's retail operations); North Carolina B.2.19.7.1.2 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Non-Dispatch) (out of parity throughout relevant period with an average trouble rate of 20.62% for competitive LECs and 2.38% for BellSouth's retail operations); Georgia B.2.19.7.1.1-B.2.19.7.1.2 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits) (out of parity throughout relevant period with trouble rates ranging from 11.30% to 39.42% for competitive LECs and from 2.06% to 5.27% for BellSouth); North Carolina B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Non-Dispatch) (out of parity in April and June with overall repeat trouble rates of 36.00% for competitive LECs and 22.19% for BellSouth's retail operations during March through June); Georgia B.3.4.7.1 (% Repeat Troubles within 30 Days, Line Sharing/Dispatch) (out of parity in March, May, and June with overall repeat trouble rates of 47.22% for competitive LECs and 26.94% for BellSouth's retail operations during March through June); Georgia B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Non-Dispatch) (out of parity in June with overall repeat trouble rates of 29.91% for competitive LECs and 26.04% for BellSouth's retail operations during March through June).

⁹⁷⁶ BellSouth Varner Reply Aff. at para. 121 (citing confidential data); *id.* at para. 227; Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-150 (filed Sept. 6, 2002) (BellSouth September 6 *Ex Parte* Letter); Alabama B.2.19.7.1.1 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Dispatch) (out of parity during March and April with monthly volumes of seven for competitive LECs); North Carolina B.2.19.7.1.1 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Dispatch) (out of parity during March with volume of five for competitive LECs); Kentucky B.2.19.7.1.2 (% Provisioning Troubles within 30 days, Line Sharing/<10 Circuits/Non-Dispatch) (out of parity during April, May, and June with respective monthly volumes of three, four, and three for competitive LECs).

small to yield statistically significant results.⁹⁷⁷ BellSouth generally performed at or above parity with regard to line-sharing maintenance, as measured by its trouble report rate for line-sharing arrangements, during the relevant period.⁹⁷⁸ In these circumstances, we conclude that BellSouth's customer trouble report and repeat trouble report rates for line sharing do not support a finding of checklist noncompliance.

251. *Line Splitting.* We find that BellSouth also provides nondiscriminatory access to line splitting in accordance with our rules.⁹⁷⁹ BellSouth states that it facilitates line splitting by cross connecting an unbundled loop to a competitive LEC's collocation space. Moreover, BellSouth implemented permanent OSS for line splitting on January 5, 2002, and competitive LECs have raised no complaints about this process.⁹⁸⁰

⁹⁷⁷ Kentucky B.3.2.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Dispatch) (out of parity in May with two repeat troubles); North Carolina B.3.4.7.2 (% Repeat Troubles within 30 Days, Line Sharing/Non-Dispatch) (out of parity in April with four repeat troubles and in June with three repeat troubles); Georgia B.3.4.7.1 (% Repeat Troubles within 30 Days, Line Sharing/Dispatch) (out of parity in four months with repeat trouble counts ranging from three to 16).

⁹⁷⁸ See, e.g., Alabama B.3.2.7.1 (Customer Trouble Report Rate, Line Sharing/Dispatch) (overall trouble report rates of 20.00% for competitive LECs and 50.57% for BellSouth for dispatch orders); Alabama B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch) (overall trouble report rates of 3.70% for competitive LECs and 3.49% for BellSouth for non-dispatch orders); Kentucky B.3.2.7.1 (Customer Trouble Report Rate, Line Sharing/Dispatch) (overall trouble report rates of 0.32% for competitive LECs and 1.24% for BellSouth for dispatch orders); Kentucky B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch) (overall trouble report rates of 1.41% for competitive LECs and 2.03% for BellSouth for non-dispatch orders); North Carolina B.3.2.7.1 (Customer Trouble Report Rate, Line Sharing/Dispatch) (overall trouble report rates of 0.18% for competitive LECs and 0.81% for BellSouth for dispatch orders); North Carolina B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch) (overall trouble report rates of 1.32% for competitive LECs and 1.61% for BellSouth for non-dispatch orders); Georgia B.3.2.7.1 (Customer Trouble Report Rate, Line Sharing/Dispatch) (overall trouble report rates of 0.78% for competitive LECs and 1.17% for BellSouth for dispatch orders); Georgia B.3.2.7.2 (Customer Trouble Report Rate, Line Sharing/Non-Dispatch) (overall trouble report rates of 2.58% for competitive LECs and 2.85% for BellSouth for non-dispatch orders).

⁹⁷⁹ See *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2111, para. 20 n.36.

⁹⁸⁰ See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9157, para. 243.

C. Checklist Item 5 – Unbundled Transport

252. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.”⁹⁸¹ Based on the evidence in the record, we conclude, as did the state commissions,⁹⁸² that BellSouth complies with the requirements of checklist item 5.⁹⁸³

253. The Commission has previously relied on the missed installation appointment rate to determine whether a BOC is provisioning transport to its competitors in a nondiscriminatory manner.⁹⁸⁴ Despite the low transport order volume for competitive LECs in each of the five states, BellSouth’s performance data show that it missed installation appointments for provisioning transport at a lower rate for its competitors than for its own retail customers during the relevant period.⁹⁸⁵ Given this evidence, and recognizing BellSouth’s parity performance in Georgia, we conclude that BellSouth’s provisioning of transport to competitive LECs is nondiscriminatory.⁹⁸⁶

254. We note that US LEC alleges that the current rules regarding loop-transport combinations, EELs, have impeded US LEC’s ability to compete with BellSouth in violation of checklist item 5.⁹⁸⁷ New South also claims that BellSouth does not comply with the Commission’s orders regarding EELs audits and contends that it has experienced delays in the conversion of special access circuits to EELs.⁹⁸⁸ We address these claims in our discussion of checklist item 2, above.⁹⁸⁹

⁹⁸¹ 47 U.S.C. § 271(c)(2)(B)(v).

⁹⁸² Alabama Commission Comments at 213-15; Mississippi Commission Comments at 3; Kentucky Commission Comments at 33; North Carolina Commission Comments at 209; South Carolina Commission Comments at 1.

⁹⁸³ BellSouth Application at 117-18; BellSouth Milner Aff. at paras. 137-45.

⁹⁸⁴ See, e.g., *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9158, para. 246; *Verizon Massachusetts Order*, 16 FCC Rcd at 9106-07, para. 210.

⁹⁸⁵ See B.2.18.2.1.1 (% Missed Installation Appointments, Local Interoffice Transport/<10 Circuits/Dispatch). We note that, during the months with reported competitive LEC data, BellSouth achieved parity in Alabama (June), Kentucky (April, May, and June), Mississippi (April, May, and June), and North Carolina (March, April, May, and June). See Alabama/Kentucky/Mississippi/North Carolina B.2.18.2.1.1 (% Missed Installation Appointments, Local Interoffice Transport/<10 Circuits/Dispatch).

⁹⁸⁶ Because order volumes for transport were nonexistent or low in the five states during the relevant period, we look to Georgia data to inform our analysis. See Georgia B.2.18.2.1.1 (% Missed Installation Appointments, Local Interoffice Transport/<10 Circuits/Dispatch).

⁹⁸⁷ US LEC Comments at 7-19; US LEC Reply at 4-5.

⁹⁸⁸ New South August 5 *Ex Parte* Letter at 6.

⁹⁸⁹ See section IV.B.3, *supra*.

apply to, or to give the Commission jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in [section 224(f)], for pole attachments in any case where such matters are regulated by a State.”¹⁵⁹ As of 1992, nineteen states, including Connecticut, had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.¹⁶⁰

D. Checklist Item 4 – Unbundled Local Loops

48. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”¹⁶¹ The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types of loops, including two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.¹⁶²

49. 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.¹⁶³ 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

¹⁵⁹ *Id.* § 224(c)(1). The 1996 Act extended the Commission’s authority to include not just rates, terms, and conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(f). Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(c)(1); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4093, para. 264.

¹⁶⁰ *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992); 47 U.S.C. § 224(f).

¹⁶¹ 47 U.S.C. § 271(c)(2)(B)(iv).

¹⁶² *Local Competition First Report and Order*; 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase “network interconnection device” with “demarcation point,” and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

¹⁶³ *SWBT Texas Order*, 15 FCC Rcd at 18481-81, para. 248; *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637, para. 185.

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.

50. On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL).¹⁶⁴ HFPL is defined as “the frequency above the voiceband on a copper loop facility that is being used to carry traditional POTS analog circuit-switched voiceband transmissions.” This definition applies whether a BOC’s voice customers are served by copper or by digital loop carrier equipment. Competing carriers should have access to the HFPL at either a central office or at a remote terminal. However, the HFPL network element is *only* available on a copper loop facility.¹⁶⁵

51. To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the *Bell Atlantic New York* and *SWBT Texas Orders*. Specifically, a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates, and repeat trouble report rates. In addition, a successful BOC applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases.

52. Section 271(c)(2)(B)(iv) also requires that a BOC demonstrate that it makes line splitting available to competing carriers so that competing carriers may provide voice and data service over a single loop.¹⁶⁶ In addition, a BOC must demonstrate that a competing carrier, either alone or in conjunction with another carrier, is able to replace an existing UNE-P configuration used to provide voice service with an arrangement that enables it to provide voice and data service to a customer. To make such a showing, a BOC must show that it has a legal obligation to provide line splitting through rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable

¹⁶⁴ See *Line Sharing Order*, 14 FCC Rcd at 20924-27, paras. 20-27; see also n.63 at C-12 *supra*.

¹⁶⁵ See *Deployment of Wireline Services offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101, 2106-07, para. 10 (2001).

¹⁶⁶ See generally *SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. § 51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers “to provide any telecommunications service that can be offered by means of that network element”).

loop terminated to a collocated splitter and DSLAM equipment, and combine it with unbundled switching and shared transport.¹⁶⁷

E. Checklist Item 5 – Unbundled Local Transport

53. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.”¹⁶⁸ The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.¹⁶⁹ Dedicated transport consists of BOC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by BOCs or requesting telecommunications carriers, or between switches owned by BOCs or requesting telecommunications carriers.¹⁷⁰ Shared transport consists of transmission facilities shared by more than one carrier, including the BOC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the BOC’s network.¹⁷¹

F. Checklist Item 6 – Unbundled Local Switching

54. Section 271(c)(2)(B)(vi) of the 1996 Act requires a BOC to provide “[l]ocal switching unbundled from transport, local loop transmission, or other services.”¹⁷² In the *Second*

¹⁶⁷ See *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6348, para. 220.

¹⁶⁸ 47 U.S.C. § 271(c)(2)(B)(v).

¹⁶⁹ *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20719, para. 201.

¹⁷⁰ *Id.* A BOC has the following obligations with respect to dedicated transport: (a) provide unbundled access to dedicated transmission facilities between BOC central offices or between such offices and serving wire centers (SWCs); between SWCs and interexchange carriers points of presence (POPs); between tandem switches and SWCs, end offices or tandems of the BOC, and the wire centers of BOCs and requesting carriers; (b) provide all technically feasible transmission capabilities such as DS1, DS3, and Optical Carrier levels that the competing carrier could use to provide telecommunications; (c) not limit the facilities to which dedicated interoffice transport facilities are connected, provided such interconnections are technically feasible, or restrict the use of unbundled transport facilities; and (d) to the extent technically feasible, provide requesting carriers with access to digital cross-connect system functionality in the same manner that the BOC offers such capabilities to interexchange carriers that purchase transport services. *Id.* at 20719.

¹⁷¹ *Id.* at 20719, n.650. The Commission also found that a BOC has the following obligations with respect to shared transport: (a) provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same transport facilities that a BOC uses for its own traffic; (b) provide shared transport transmission facilities between end office switches, between its end office and tandem switches, and between tandem switches in its network; (c) permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table that is resident in the BOC’s switch; and (d) permit requesting carriers to use shared (or dedicated) transport as an unbundled element to carry originating access traffic from, and terminating traffic to, customers to whom the requesting carrier is also providing local exchange service. *Id.* at 20720, n.652.

¹⁷² 47 U.S.C. § 271(c)(2)(B)(vi); see also *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722. A switch connects end user lines to other end user lines, and connects end user lines to trunks used for transporting a call to (continued....)

EXHIBIT I

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

WC Docket No. _____

**BRIEF IN SUPPORT OF APPLICATION BY BELL SOUTH FOR PROVISION
OF IN-REGION, INTERLATA SERVICES IN FLORIDA AND TENNESSEE**

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September 20, 2002

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in various negotiated and arbitrated interconnection agreements, BellSouth continues to offer nondiscriminatory access to poles, ducts, conduits, and rights-of-way within reasonable time frames in both Florida and Tennessee. *See Milner Aff.* ¶ 89 & Exh. WKM-4. BellSouth's provision of this checklist item to CLECs in Florida and Tennessee is no different than in Georgia and Louisiana or any of the five states covered by BellSouth's recently approved application. *See id.* *See also FPSC Staff Checklist Rec.* at 114, 118; *TRA Trans.* at 21-22.

BellSouth's satisfaction of Checklist Item 3 is borne out by the fact that CLECs are executing license agreements and requesting access to BellSouth's poles, ducts, conduits, and rights-of-way in Florida and Tennessee in numbers proportional to Georgia and Louisiana. As of August 15, 2002, 61 CLECs have executed license agreements for access to BellSouth's poles, ducts, conduits, and rights-of-way in Florida, and 55 have executed such agreements in Tennessee. *Milner Aff.* ¶ 90. As of the same date, 23 of the Florida CLECs with license agreements had made 380 applications for access to BellSouth's poles, ducts, conduits, and rights-of-way; 16 Tennessee CLECs had made 728 applications for access. *Id.*

In sum, BellSouth plainly satisfies the requirements of Checklist Item 3. Indeed, BellSouth's compliance is so clear that no party challenged that conclusion during the Florida or Tennessee state proceedings. *See Ruscilli/Cox Joint Aff.* ¶ 3 n.3. Nor did any party dispute BellSouth's compliance with this checklist item in the recent Georgia/Louisiana and Five State proceedings before this Commission. *GA/LA Order* ¶ 278; *Five State Order* ¶ 270.

D. Checklist Item 4: Unbundled Local Loops

As the Commission found in the *GA/LA Order*, BellSouth "provides unbundled local loops in accordance with the requirements of section 271 and [Commission] rules." *GA/LA Order* ¶ 218. *See also Five State Order* ¶ 232. Because BellSouth provides nondiscriminatory

access to unbundled local loops in Florida and Tennessee in substantively the same manner as in the other seven states in BellSouth's region that have already received section 271 approval, that finding is similarly true of this Application. See *Milner Aff.* ¶ 91. BellSouth fully complies with all of its obligations under this checklist item. See *FPSC Staff Checklist Rec.* at 119, 132-40; *TRA Trans.* at 23-24.

BellSouth has a concrete and specific legal obligation in both Florida and Tennessee to provide local loop facilities on an unbundled basis, the terms of which are set forth in BellSouth's SGATs and in interconnection agreements with multiple CLECs. See *Ruscilli/Cox Joint Aff.* ¶¶ 8-9. As in the seven states for which BellSouth has already received section 271 approval, BellSouth provisions high-quality loops in a timely manner in both Florida and Tennessee, and has demonstrated its ability to satisfy all levels of reasonable customer demand. Moreover, BellSouth utilizes the same processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services throughout its region that the Commission examined and found nondiscriminatory in BellSouth's previous 271 applications. BellSouth has also complied fully with its obligations under the *Line Sharing Order*,⁵⁸ the *Line Sharing Reconsideration Order*,⁵⁹ and the *UNE Remand Order*.

BellSouth offers CLECs local loop transmission from the central office to the customer's premises, unbundled from local switching and other services. As of July 31, 2002, BellSouth

⁵⁸ Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), vacated and remanded, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

⁵⁹ Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101 (2001) ("*Line Sharing Reconsideration Order*").

had provisioned 166,168 loops in Florida and 50,886 in Tennessee. *See Milner Aff.* ¶ 98.

Overall, throughout BellSouth's region, BellSouth has provisioned more than 400,000 loops.

See id.

1. Stand-Alone Loops

In both Florida and Tennessee, BellSouth offers a variety of loop types to CLECs, including SL1 voice grade loops, SL2 voice grade loops, 2-wire ISDN digital grade loops, 56 or 64 kbps digital grade loops, 4-wire DS1 loops, and various high-capacity and xDSL-capable loops. *See Milner Aff.* ¶ 96.⁶⁰ In addition, BellSouth provides CLECs with unbundled loops in those instances where the customer was previously served by IDLC. *See id.* ¶ 99. CLECs can access unbundled loops at any technically feasible point, and BellSouth provides access to all the features, functions, and capabilities of the loop. *See id.* ¶ 92; *New York Order* ¶¶ 273, 275. CLECs seeking additional loop types can take advantage of BellSouth's BFR process. *See Milner Aff.* ¶ 97; *Ruscilli/Cox Joint Aff.* ¶¶ 12-13.

As demonstrated below, comprehensive performance data demonstrate that BellSouth's processes and procedures for the ordering, provisioning, and maintenance of unbundled loop facilities offer CLECs in both Florida and Tennessee a meaningful opportunity to compete in the local service market. *See GA/LA Order* ¶¶ 224, 228 (analyzing BellSouth's compliance with Checklist Item 4 through performance measurements covering order processing timeliness, installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of maintenance and repair functions).

⁶⁰ Both SL1 and SL2 are voice grade loops, but SL2 loops are designed. SL2 loops come with test points for mechanized trouble isolation (SMAS points), and the CLEC gets a Detailed Layout Record ("DLR") depicting the composition of the loop (what cable and pair, gauge, length to crossbox, etc.).

BellSouth's SQM plans in Florida and Tennessee are disaggregated by loop type. As demonstrated in the affidavit of Alphonso Varner and its exhibits, and as further demonstrated below, those plans provide highly disaggregated data for different loop types – including data for analog loops (designed and nondesigned, and with and without LNP), various kinds of digital loops, xDSL loops, and line-shared loops. BellSouth's performance in the pre-ordering, ordering, and provisioning of unbundled loops, as captured by these comprehensive measures, demonstrates that CLECs have nondiscriminatory access to local loop transmission. See generally *Varner Aff.* Exhs. PM-2 ¶¶ 106-161 (Florida), PM-3 ¶¶ 104-159 (Tennessee).

a. Hot Cuts

BellSouth provides nondiscriminatory access to hot-cut loops in Florida and Tennessee in accordance with the Commission's standards, utilizing the exact same hot-cut processes and procedures that the Commission approved in its *Five State* and *GA/LA Orders*. See *GA/LA Order* ¶ 220; *Five State Order* ¶ 234. Specifically, BellSouth performs coordinated conversions in a timely manner, with minimal service disruption, and with few troubles following installation. See *GA/LA Order* ¶ 220; *Five State Order* ¶ 234.

BellSouth has developed three different hot-cut processes, allowing CLECs to select the particular method that best fits their business plan and their customers' needs. Two of these processes (the time-specific cutover and the non-time-specific cutover) involve order coordination between BellSouth and the requesting CLEC, while the third process (the date-specific cutover) does not involve any such coordination. See *Milner Aff.* ¶¶ 124-125. In the third method, the CLEC simply specifies a date for the desired conversion to occur. See *id.* ¶ 126.

The time-specific and non-time-specific processes are largely analogous: the difference is the time for determining the cutover. When a CLEC places an order for a time-specific conversion, the CLEC simultaneously selects the date and time for the desired conversion. *See id.* ¶ 124. For a non-time-specific conversion, the CLEC selects only the cutover *date* at the time it places the original order. *See id.* ¶ 125. Then, within 24 to 48 hours of that cutover date, BellSouth and the CLEC jointly select a mutually acceptable time for the coordinated conversion to occur. *Id.*

The Commission has noted that “[t]he ability of a BOC to provision working, trouble-free loops through hot cuts is critically important in light of the substantial risk that a defective hot cut will result in competing carrier customers experiencing service outages for more than a brief period.” *Texas Order* ¶ 256. As in the seven states for which BellSouth has already received 271 approval, BellSouth’s performance data for Florida and Tennessee demonstrate that it is doing exceptionally well in performing this “critically important” task.

In Florida, between May and July 2002, BellSouth met or exceeded every benchmark for each of the hot-cut submetrics. *See Varner Aff. Exh. PM-2* ¶ 156. BellSouth provisioned 99.9% of scheduled conversions on time, and in fewer than 15 minutes, during this three-month time period. *See id. Exh. PM-2* ¶¶ 5, 157 (B.2.12). BellSouth also performed these cutovers with less than 1% of service outages each month. *See id. Exh. PM-2 Attachs. 1-3* (B.2.12.2, B.2.16.2). This is far superior to the applicable standard. *See KS/OK Order* ¶ 204; *New York Order* ¶ 302. In addition, CLECs reported trouble on only 1.2% of converted circuits (B.2.17), which is well within the benchmark established by BellSouth’s SQM and in line with this Commission’s standards. *See Varner Aff. Exh. PM-2* ¶ 161.

BellSouth's Tennessee performance is also excellent, meeting or exceeding every benchmark for each of the hot-cut submetrics. *See id.* Exh. PM-3 ¶ 151. From May through July 2002, BellSouth completed 809 of the 809 scheduled conversions on time between May and July 2002. *See id.* Exh. PM-3 ¶ 152 (B.2.12). BellSouth performed these cutovers with less than 1% of service outages each month, again exceeding the applicable standard. *See id.* Exh. PM-3 Attachs. 1-3 (B.2.12.2, B.2.16.2). During that time period, CLECs reported trouble on only 31 of 509 provisioned circuits, meeting the benchmarks in two out of three months. *See Varner Aff.* Exhs. PM-3 ¶ 156.⁶¹

There can be no serious dispute that BellSouth satisfies this Commission's standards for hot cuts in Florida and Tennessee. *See GA/LA Order* ¶¶ 220-221 (BellSouth demonstrates compliance by providing hot cuts in a timely manner, at an acceptable level of quality, with minimal service disruptions, and with a minimum number of troubles following installation); *Five State Order* ¶ 234.

b. Stand-Alone Loop Performance

In reviewing a BOC's performance for stand-alone loop provisioning, the Commission focuses upon the following categories: (i) installation timeliness; (ii) installation quality; and (iii) the quality of maintenance and repair functions. *See GA/LA Order* ¶ 224. In both Florida and Tennessee, across all loop types, BellSouth's performance has been excellent.

BellSouth provisions high-quality, unbundled voice-grade loops in a timely manner, affording CLECs serving end users in Florida and Tennessee a meaningful opportunity to compete. In Tennessee, between May and July 2002, reported performance data for analog loops

⁶¹ In July 2002, an inadvertent central office error disconnected 9 lines after they had been accepted by the CLEC. Once identified, these lines were immediately put back in service. *See Varner Aff.* Exh. PM-3 ¶ 156.

demonstrate that BellSouth has consistently met or exceeded the parity standard for both order completion intervals (or "OCIs") (B.2.1.8, B.2.1.9) and the percentage of missed installation appointments (B.2.18.8, B.2.18.9). *See Varner Aff.* Exh. PM-3 ¶¶ 134, 137. In Florida, during that same time period, BellSouth met or exceeded the retail analogues for 11 of the 16 OCI submetrics with CLEC activity,⁶² and all 16 submetrics with CLEC activity for percentage of missed installation appointments. *See id.* Exh. PM-2 ¶¶ 139, 142.

The quality of BellSouth's loop provisioning, as well as the timeliness and quality of its maintenance and repair services, has been solid in both Florida and Tennessee. *See id.* Exhs. PM-2 ¶¶ 143-148, PM-3 ¶¶ 138-143. In the few instances in which BellSouth missed an installation quality submetric, the small volume of trouble reports precluded a meaningful comparison to the retail analogue. *See id.* Exh. PM-2 ¶ 143. For those I-30 (troubles within 30 days of installation) submetrics for which there are sufficient volumes to offer a statistically significant portrait of BellSouth's performance, BellSouth has consistently met the parity standard. *See id.* Exhs. PM-2 ¶ 143, PM-3 ¶ 138 (B.2.19.8.1.1) (2-wire analog loop design/<10 circuits/dispatch).

For designed two-wire analog loops, between May and July 2002, in both Florida and Tennessee, BellSouth met a greater percentage of maintenance and repair appointments for CLEC customers than it did for its own retail customers (B.3.1.8). *See id.* Exhs. PM-2 ¶ 146 (6 of the 6 submetrics in Florida), PM-3 ¶ 142 (5 of the 6 submetrics in Tennessee). For non-

⁶² CLEC orders in these submetrics are scheduled based on the standard ordering guide, which carries a minimum four-day interval for these orders. *See Varner Aff.* Exh. PM-2 ¶ 139. The retail analogue for the majority of CLEC orders in these measurements, however, is residence and business (POTS) type orders, which are scheduled based on the due date calculator, and thus may be scheduled and completed in less than one day. *See id.* Thus, these misses do not raise any systemic issues.

designed two-wire analog loops, BellSouth met all 6 submetrics in Tennessee. *See id.* Exh. PM-3 ¶ 143 (B.3.1.9).⁶³ And, in both states, BellSouth completed maintenance and repair work for both design and non-design analog loops in substantially less time for CLEC loops than for BellSouth's own retail customers (B.3.3.8, B.3.3.9). *See id.* Exhs. PM-2 ¶ 149, PM-3 ¶ 144. Finally, with respect to both design and non-design analog loops, BellSouth provides high-quality maintenance and repair services, such that CLEC customers generally suffered a lower percentage of repeat troubles than did BellSouth retail customers. *See id.* (B.3.4.8, B.3.4.9).

c. High-Speed Digital Loops

BellSouth has provisioned high-quality DS1 loops in a timely manner to CLECs in both Florida and Tennessee, and, though rarely ordered, BellSouth continues to offer unbundled loops of greater transmission capacity. In Florida, BellSouth met 7 of the 10 submetrics with CLEC activity between May and July 2002, missing only 29 of the more than 1,200 scheduled appointments for provisioning digital loops. *See Varner Aff.* Exh. PM-2 ¶ 153 (B.2.18). In Tennessee, BellSouth met or exceeded the retail analogues for 4 of the 6 submetrics with CLEC activity in May through July 2002, missing only 46 of the 603 scheduled appointments for provisioning digital loops within that same time period. *See id.* ¶ 148. Moreover, as was the

⁶³ In Florida, BellSouth met the retail analogue requirement for 3 of the 6 submetrics that had CLEC activity in May through July 2002. *See Varner Aff.* Exh. PM-2 ¶ 147. For the May "Dispatched" measurement, 60 of the 104 total missed appointments were due to wet or damaged feeder cable, while another 16 were missed by less than one hour. For the May "Non-Dispatched" measurement, two of the six missed appointments were missed by less than 30 minutes each, while the other four missed appointments were due to improper order close-out procedures associated with a multi-trouble order for the same customer. Maintenance technicians have been retrained on appropriate order close-out procedures. There were 18 total missed appointments for the Non-Dispatched measurement in July. Two of the 18 were closed as Test OK/Found OK, and 15 of the remaining 16 were the result of two multiple troubles – one involving five circuits and the other involving 10 circuits. *See id.*

case in both states, the majority of these missed appointments were caused by facility issues that required construction to add facilities. *See id.* Exhs. PM-2 ¶ 153, PM-6 ¶ 148.

The average OCI for DS1 loops has also been substantially shorter for CLECs than it has been for BellSouth retail customers. *See id.* Exhs. PM-2 ¶ 151, PM-3 ¶ 146 (B.2.1.18, B.2.1.19). In Tennessee, BellSouth met or exceeded the retail analogues for 6 of the 6 submetrics with CLEC activity in the months of May through July 2002 for both the digital loops < & => DS1. *See id.* Exh. PM-3 ¶ 144. In Florida, BellSouth met or exceeded the retail analogues for 5 of the 9 submetrics with CLEC activity in the months of May through July 2002 for both the digital loops < & => DS1. *See id.* Exh. PM-2 ¶ 151. The misses, however, were the result mainly of differences between the product mix of CLEC orders and the retail analogue. Specifically, more than one-half of CLEC orders in this measurement were Unbundled Digital Channel (“UDC”) circuits, which are designed circuits that require approximately 10 days completion, compared to the retail analogue, which is heavily weighted toward ADSL circuits requiring approximately 4 days completion. *See id.*⁶⁴

⁶⁴ With respect to the number of provisioning troubles within 30 days, BellSouth in Florida met or exceeded the retail analogues for 3 of the 9 submetrics with CLEC activity in May through July 2002. *See Varner Aff.* Exh. PM-2 ¶ 154. Three of the six misses were in the “< DS1 / < 10 Circuits / Dispatch” measurement. Two misses were associated with “>= DS1 / < 10 Circuits / Dispatch” orders. *See id.* The majority of the missed submetrics for these measures were caused by defective plant facilities, CO wiring problems, or Test OK/Found OK reports. *See id.* Similarly, BellSouth in Tennessee met or exceeded the retail analogues for 2 of the 6 submetrics with CLEC activity in May through July 2002. *See id.* Exh. PM-3 ¶ 149. There were 2 missed submetrics in May and June for digital loops <DS1 and 2 missed submetrics in June and July for digital loops =>DS1. *See id.* The <DS1 loops showed greater than 20% of the reports being closed as “no trouble found” with the =>DS1 having approximately 40% of the reports closed as “no trouble found.” *See id.* The remainder of the reports were spread equally between the outside facilities and the equipment within the central office. *See id.* In both states, however, no trends or systemic installation issues were identified for these items. *See id.* Exh. PM-2 ¶ 154, PM-3 ¶ 149.

2. Access to Subloop Elements

In addition to the unbundled loops themselves, BellSouth offers CLECs the same nondiscriminatory access to subloop elements in Florida and Tennessee that it offers in its other states. *See Milner Aff.* ¶ 107. The subloop UNE has been defined as a portion of the local loop that can be accessed at accessible points on the loop. *See id.* This includes any technically feasible point near the customer's premises (such as the pole or pedestal, the network interface device, or minimum point of entry to the customer's premises), the feeder distribution interface, the Main Distributing Frame, remote terminals, and various other terminals. *See id.* BellSouth offers the following subloop elements: loop concentration/multiplexing; loop feeder; loop distribution; intrabuilding network cable; and network terminating wire. *See id.* Moreover, CLECs can request additional subloop elements via the BFR process. *See id.* As of July 31, 2002, BellSouth has provided CLECs 587 unbundled loop distribution subloop elements region-wide, of which 566 are in Florida. *See id.* ¶ 108. CLECs in Tennessee have not purchased the unbundled loop distribution subloop elements. *See id.*

3. Access to xDSL-Capable Loops

As the Commission previously found, "BellSouth demonstrates that it provides xDSL-capable loops in accordance with the requirements of checklist item 4." *GA/LA Order* ¶ 228. *See also Five State Order* ¶ 236. BellSouth utilizes the same nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services in Florida and Tennessee as it does in the other states in BellSouth's region, offering CLECs a meaningful opportunity to compete in the advanced services market. As BellSouth explained in its previous section 271 applications, because the various flavors of xDSL have different technical prerequisites and disparate tolerance for disturbing devices, CLECs requested that BellSouth create xDSL loop offerings with distinct parameters. In response to these

requests, BellSouth developed a variety of unbundled loop types for CLECs to choose from. Because BellSouth signed interconnection agreements obligating it to continue provisioning these different loop types, however, multiple product offerings have been and remain available over time. The historical evolution of BellSouth's specific xDSL loop offerings – which currently include the ADSL-capable loop; HDSL-capable loop; ISDN loop; Unbundled Digital Channel (“UDC”); Unbundled Copper Loop (“UCL”), Short and Long; and UCL-Nondesign (“UCL-ND”) – is recounted in Exhibit WKM-5 to the affidavit of W. Keith Milner.⁶⁵

BellSouth also performs loop conditioning as requested, regardless of whether BellSouth offers advanced services to the end-user customer on that loop. CLECs may select the precise conditioning (*i.e.*, loop modification) that they desire on their loop and will pay only for the level of conditioning selected. *See Milner Aff.* ¶ 104 & Exh. WKM-5 ¶ 24. Through BellSouth's Unbundled Loop Modification (“ULM”) process, a CLEC can request that BellSouth modify any existing loop to be compatible with the CLEC's particular hardware requirements. *See id.* Exh. WKM-5 ¶ 24.

Under the direction of its in-region state commissions, BellSouth has also developed comprehensive, disaggregated performance metrics that capture its performance in the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services. In both Florida and Tennessee, BellSouth's performance has been nondiscriminatory across each of the categories upon which this Commission has focused its attention: (i) order processing timeliness; (ii) installation timeliness; (iii) missed installation appointments; (iv) installation

⁶⁵ As of July 31, 2002, BellSouth has provisioned the following volumes of xDSL-capable loops in Florida: 5,170 2-wire ADSL loops; 141 2-wire HDSL loops; 263 UCL (Long and Short) loops; and 5,301 UDC loops. In Tennessee, BellSouth had provisioned the following volumes of xDSL-capable loops: 1,698 2-wire ADSL loops; 46 2-wire HDSL loops; 425 UCL (Long and Short) loops; and 1,099 UDC loops. *See Milner Aff.* ¶ 96.

quality; and (v) quality and timeliness of maintenance and repair. *See GA/LA Order* ¶ 228. BellSouth's comprehensive performance data clearly support the conclusion that BellSouth provides nondiscriminatory access to xDSL-capable loops and related services in compliance with Checklist Item 4.

In both Florida and Tennessee, across all five of the relevant categories and across each of its xDSL-related metrics, BellSouth's performance has been excellent. BellSouth returns LMU to CLECs in substantially the same time and manner as it is available to BellSouth's personnel. *See Stacy Aff.* ¶ 365. In Florida, BellSouth returned timely responses for 91% of the 12,087 CLEC requests for electronic loop make-up information during the period May through July 2002. *See Varner Aff.* Exh. PM-2 ¶ 82 (F.2.2). In Tennessee, BellSouth returned timely responses for 94% of the 2,392 CLEC requests. *See id.* Exh. PM-3 ¶ 79. A root-cause analysis identified a DOM system queuing problem that resulted in longer responses for both CLECs and BellSouth alike. After BellSouth corrected the problem on June 27, it met the relevant benchmark – 95% in 1 minute – in July 2002 in both Florida and Tennessee. *See id.* Exhs. PM-2 ¶ 82 & Attachs. 1-3 (99.1% in Florida), PM-3 ¶ 79 & Attachs. 1-3 (99.6% in Tennessee).

BellSouth additionally installs high-quality xDSL-capable loops in a timely manner in Florida and Tennessee. BellSouth provisions xDSL-capable loops well within the seven-day benchmark established in its state-approved performance plans, *see id.* Exhs. PM-2 ¶ 111, PM-3 ¶ 108 (B.2.2), and BellSouth has met or exceeded the applicable parity standard for missed installation appointments in May through July 2002, *id.* Exhs. PM-2 ¶ 115, PM-3 ¶ 112 (B.2.18.5). Once provisioned, CLEC-ordered xDSL-capable loops experience few technical problems. Between May and July 2002, BellSouth met or exceeded the parity standard for

trouble reports within 30 days of installation for all submetrics in Tennessee and Florida. *Id.* Exhs. PM-2 ¶ 117, PM-3 ¶ 113 (B.2.19.5).

When CLECs did experience trouble on xDSL-capable loops, BellSouth handled the troubles in substantially less time than it handled the troubles for its retail units (B.3.3.5). *See id.* Exhs. PM-2 ¶ 124, PM-3 ¶ 120. BellSouth consistently made a greater percentage of repair appointments for CLECs than for its own retail customers, *see id.* Exhs. PM-2 ¶ 120, PM-3 ¶ 116 (B.3.1.5), and provided superior quality repair service, as CLECs suffered fewer repeat troubles, *see id.* Exhs. PM-2 ¶ 125, PM-3 ¶ 121 (B.3.4.5).

4. ISDN-BRI Loop Provisioning

BellSouth's performance in provisioning ISDN-BRI loops has also been excellent across each of the categories to which this Commission has directed its attention. *See G/LA Order* ¶ 230 ("BellSouth provides ISDN loops to competitors in Georgia and Louisiana in accordance with the requirements of checklist item 4."); *Five State Order* ¶ 238. In both Florida and Tennessee, BellSouth has met or exceeded the parity standard for ISDN-BRI loops for average OCI, *see Varner Aff.* Exhs. PM-2 ¶ 129, PM-3 ¶ 124 (B.2.1.6.3), and for meeting installation appointments during each month from May through July 2002, *see id.* Exhs. PM-2 ¶ 131, PM-3 ¶ 126.

With respect to the customer trouble report rate, in Tennessee, BellSouth met the retail analogue comparison for 6 of the 6 submetrics during the May through July 2002 time period. *See id.* Exh. PM-3 ¶ 129. Although BellSouth in Florida missed the retail analogue comparison for 3 of the 6 submetrics during the May through July 2002 time period, a large proportion of the reported troubles were due to defective cable pairs or circuit cards that had to be reseated. *See id.* Exh. PM-2 ¶ 134. Moreover, CLECs in Florida reported 157 troubles for the 6,643 lines in service for this submetric in May 2002, 168 troubles for the 6,570 lines in service in June 2002,

and 193 troubles for the 6,557 lines in service in July 2002. *See id.* Thus, because both CLECs and BellSouth retail averaged over 97% trouble free service (including both dispatched and non-dispatched orders) in May through July 2002, CLECs were not denied a meaningful opportunity to compete. *See id.*

When CLECs do experience troubles, BellSouth has provided timely and high-quality maintenance and repair services. In both Florida and Tennessee, BellSouth routinely meets or exceeds the parity standard for missed repair appointments, *see id.* Exhs. PM-2 ¶ 133, PM-3 ¶ 128 (B.3.1.6), average maintenance duration, *see id.* Exhs. PM-2 ¶ 135, PM-3 ¶ 130 (B.3.3.6), and percent repeat reports within 30 days, *see id.* Exhs. PM-2 ¶ 136, PM-3 ¶ 131 (B.3.4.6).

5. Line Sharing

BellSouth has implemented line sharing in both Florida and Tennessee in full compliance with the terms of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*, allowing CLECs to offer high-speed data service to BellSouth voice customers. *See Milner Aff.* ¶¶ 111, 120 & Exh. WKM-6. Specifically, line sharing is available to a single requesting carrier on loops that carry BellSouth's POTS so long as the xDSL technology deployed by the requesting carrier does not interfere with the analog voice-band transmissions. *See id.* Exh. WKM-6 ¶ 5. BellSouth allows line-sharing CLECs to deploy any version of xDSL that is presumed acceptable for shared-line deployment in accordance with Commission rules and that will not significantly degrade analog voice service. *See id.* At the request of the data CLECs, BellSouth voluntarily provides line splitters in 96-line unit, 24-line unit, and 8-line unit complements in Florida, and in 96-line unit, 24-line unit, and 1-line unit complements in Tennessee. *See id.* ¶ 17. BellSouth utilizes the exact same processes and procedures for the pre-ordering, ordering, and provisioning of line-shared loops in Florida and Tennessee as it follows in each of the seven states for which BellSouth has received interLATA authority. *See id.* ¶ 19. Accordingly, the Commission's

conclusion that “BellSouth offers line sharing in Georgia and Louisiana . . . in accordance with the requirements of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*,” *GA/LA Order* ¶ 238; *Five State Order* ¶ 248, applies with equal force here.

BellSouth developed its line-sharing product in a collaborative effort with CLECs and is continuing to work cooperatively with CLECs on an ongoing basis to resolve issues as they arise. See *Milner Aff.* ¶ 115 & Exh. WKM-6 ¶¶ 6-15. BellSouth invited all interested CLECs to collaborative meetings beginning in January 2000, and 12 CLECs participated in these meetings. See *id.* Exh. WKM-6 ¶ 6. The participants agreed to form several working collaborative teams to develop processes and procedures for central-office-based line sharing, which were then implemented, tested, and improved. See *id.* As a result of these efforts, BellSouth was able to implement commercial line sharing by this Commission's June 6, 2000 deadline. See *id.* ¶¶ 6-13. As of July 2002, BellSouth had provisioned 2,850 line-sharing arrangements in Florida, 931 line-sharing arrangements in Tennessee, and 9,770 such arrangements region-wide. See *Milner Aff.* ¶ 112.

The pre-ordering, ordering, provisioning, and maintenance and repair processes for the line-sharing product are very similar to the processes for xDSL-capable loops. *Id.* Exh. WKM-6 ¶¶ 20-27. CLECs obtain access to LMU in the exact same manner whether they are seeking to obtain an xDSL-capable loop or the high-frequency portion of the loop. *Id.* ¶¶ 20-21. As BellSouth has demonstrated, it offers access to the exact same LMU available to and used by its retail personnel, and in the same time and manner. See *Stacy Aff.* ¶¶ 363-372. See also *Five State Order* ¶ 141; *GA/LA Order* ¶ 112.

BellSouth provisions line sharing in a timely, accurate, and nondiscriminatory manner. See *Massachusetts Order* ¶ 165 (“[A] successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates.”) (internal quotation marks omitted).

BellSouth routinely meets substantially the same percentage of CLEC and retail installation appointments for line shared loops. *See Varner Aff.* Exhs. PM-2 ¶ 116, PM-3 ¶ 112 (B.2.18.7). In Tennessee, BellSouth met the parity benchmark of every month between May and July 2002. *See id.* Exh. PM-3 ¶ 112. In Florida, BellSouth met the benchmark for 5 of the 6 submetrics, meeting 97.4% of installation appointments. *See id.* Exh. PM-2 ¶ 116.

Although BellSouth missed the parity benchmark in both Florida and Tennessee for many of the OCI submetrics with CLEC activity for this measure during May through July 2002, a detailed analysis has indicated that the major difference is in how BellSouth was handling the scheduling of the CLEC orders. *See id.* Exhs. PM-2 ¶ 113, PM-3 ¶ 110. To address this issue, BellSouth changed how it schedules the ADSL portion of the line sharing order. *See id.* Initial indications show that for the first two weeks after this change was implemented, the CLEC results for dispatched orders were reduced by more than three days and for non-dispatched orders by approximately 1.5 days from the actual July results. *See id.* This would have reduced the dispatched result to approximately 3.5 days and to less than 2.5 days for the non-dispatched results if applied to the full July data month. *See id.* Exhs. PM-2 ¶ 113, PM-3 ¶ 110.

With respect to provisioning troubles within 30 days, although BellSouth has not met the benchmarks in Florida, analysis of the trouble reports revealed a large number that were closed as Test OK/Found OK. *See id.* Exh. PM-2 ¶ 118. In Tennessee, although BellSouth met or exceeded the retail analogue for 3 of the 6 submetrics with CLEC activity during the months of May through July 2002, there were only 14 troubles out of 149 orders completed for the entire three-month period. There were no systemic issues identified for any of the 14 troubles during the period. *See id.* Exh. PM-3 ¶ 114.

BellSouth has met substantially the same percentage of repair appointments for CLECs as for its retail customers. *See id.* Exhs. PM-2 ¶ 121, PM-3 ¶ 117 (B.3.1.7). BellSouth additionally met or exceeded the parity standard for repeat troubles for all six relevant submetrics in both Florida and Tennessee. *See id.* Exhs. PM-2 ¶ 126, PM-3 ¶ 121 (B.3.4.7).

6. Line Splitting

As in its other states, BellSouth facilitates CLEC efforts to engage in line splitting in Florida and Tennessee in full compliance with the Commission's instructions. *Milner Aff.* Exh. WKM-6 ¶¶ 34-46; *see also GA/LA Order* ¶ 241 ("BellSouth complies with its line-splitting obligations and provides access to network elements necessary for competing carriers to provide line splitting."); *Five State Order* ¶ 241. Specifically, BellSouth facilitates line splitting by cross-connecting an unbundled loop to a CLEC's collocation space. *Milner Aff.* ¶ 120 & Exh. WKM-6 ¶ 34. Once the CLEC has separated the voice from the data service, and sent the latter onto its packet-switched network, BellSouth will cross-connect the voice signal back to the BellSouth circuit switch. *Id.* Exh. WKM-6 ¶ 42. In other words, BellSouth offers the same arrangement to CLECs as the Commission described in the *Texas Order* and the *Line Sharing Reconsideration Order*, and approved in its *GA/LA Order*. *See GA/LA Order* ¶ 241.

E. Checklist Item 5: Unbundled Local Transport

In compliance with the Act, BellSouth provides "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C. § 271(c)(2)(B)(v). Interoffice transmission facilities include both dedicated transport and shared transport. *Second Louisiana Order* ¶ 201. Dedicated transport is defined as "incumbent LEC transmission facilities . . . dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

WC Docket No. _____

**BRIEF IN SUPPORT OF APPLICATION BY BELLSOUTH FOR PROVISION
OF IN-REGION, INTERLATA SERVICES IN ALABAMA, KENTUCKY, MISSISSIPPI,
NORTH CAROLINA, AND SOUTH CAROLINA**

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interconnection agreements, BellSouth continues to offer nondiscriminatory access to poles, ducts, conduits, and rights-of-way within reasonable time frames in each of the five states. See *Milner Aff.* ¶ 94 & Exh. WKM-4. BellSouth's provision of this checklist item to CLECs in each of the five states is no different than in Georgia and Louisiana. See *id.*

BellSouth's satisfaction of Checklist Item 3 is borne out by the fact that CLECs are executing license agreements and requesting access to BellSouth's poles, ducts, conduits, and rights-of-way in the five states in numbers proportional to Georgia and Louisiana. As of April 12, 2002, 54 CLECs have executed license agreements for access to BellSouth's poles, ducts, conduits, and rights-of-way in Alabama; 53 in Kentucky; 54 in Mississippi; 53 in North Carolina; and 52 in South Carolina. *Id.* ¶ 95 & Exh. WKM-4 ¶ 27. As of the same date, 15 of the 54 Alabama CLECs with license agreements had made 121 applications for access to BellSouth's poles, ducts, conduits, and rights-of-way; 7 CLECs had made 55 applications for access in Kentucky; 7 CLECs had made 29 applications in Mississippi; 18 CLECs had made 604 applications in North Carolina; and 11 CLECs had made 968 applications in South Carolina. *Id.* ¶ 95 & Exh. WKM-4 ¶ 28.

In sum, BellSouth plainly satisfies the requirements of Checklist Item 3. Indeed, BellSouth's compliance is so clear that no party in any of the five states' checklist-compliance proceedings challenged that conclusion. See *Ruscilli/Cox Joint Aff.* ¶ 3 n.2. Nor did any party dispute BellSouth's compliance with this checklist item in the recent Georgia/Louisiana proceeding. *GA/LA Order* ¶ 278.

D. Checklist Item 4: Unbundled Local Loops

BellSouth offers CLECs local loop transmission from the central office to the customer's premises, unbundled from local switching or other services. As of March 31, 2002, BellSouth

had provisioned more than 16,000 loops in Alabama, more than 4,100 in Kentucky, more than 5,900 in Mississippi, more than 51,000 in North Carolina, and more than 15,000 in South Carolina. *See Milner Aff.* ¶ 100.

BellSouth fully complies with all of its obligations under this checklist item. BellSouth has a concrete and specific legal obligation in each of the five states to provide local loop facilities on an unbundled basis, the terms of which are set forth in BellSouth's Alabama, Kentucky, Mississippi, North Carolina, and South Carolina SGATs, and in interconnection agreements with multiple CLECs. *See Ruscilli/Cox Joint Aff.* ¶¶ 6-7. As in Georgia and Louisiana, BellSouth provisions high-quality loops in a timely manner throughout each of the five states, and has demonstrated its ability to satisfy all levels of reasonable customer demand. Moreover, BellSouth utilizes the same nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services throughout its region that the Commission examined in its Georgia/Louisiana proceeding. BellSouth has complied fully with its obligations under the *Line Sharing Order*,⁶⁰ the *Line Sharing Reconsideration Order*,⁶¹ and the *UNE Remand Order*.

1. Stand-Alone Loops

In each of the five states, BellSouth offers a variety of loop types to CLECs, including SL1 voice grade loops, SL2 voice grade loops, 2-wire ISDN digital grade loops, 56 or 64 kbps

⁶⁰ Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”), *vacated and remanded*, *United States Telecom Ass’n v. FCC*, No. 00-1012, *et al.* (D.C. Cir. May 24, 2002).

⁶¹ Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101 (2001) (“*Line Sharing Reconsideration Order*”).

digital grade loops, 4-wire DS1 loops, and various high-capacity and xDSL-capable loops. *See Milner Aff.* ¶ 98. In addition, BellSouth provides CLECs with unbundled loops in those instances where the customer was previously served by IDLC. *See id.* ¶ 101. CLECs can access unbundled loops at any technically feasible point, and BellSouth provides access to all the features, functions, and capabilities of the loop. *See id.* ¶ 97; *New York Order* ¶¶ 273, 275. CLECs seeking additional loop types can take advantage of BellSouth's BFR process. *See Milner Aff.* ¶ 99; *Ruscilli/Cox Joint Aff.* ¶¶ 10-11.

Comprehensive performance data demonstrate that BellSouth's processes and procedures for the ordering, provisioning, and maintenance of unbundled loop facilities offer CLECs in each of the five states a meaningful opportunity to compete in the local service market. *See GA/LA Order* ¶¶ 224, 228 (analyzing BellSouth's compliance with Checklist Item 4 through performance measurements covering order processing timeliness, installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of maintenance and repair functions).

As in Georgia and Louisiana, BellSouth's SQM plans in each of the five states are disaggregated by loop type. The SQM plans were developed through a collaborative process with significant CLEC participation, and they have been approved by the regulatory commission in each of the five states. As demonstrated in the affidavit of Alphonso Varner and its exhibits, and as further demonstrated below, those plans provide highly disaggregated data for different loop types – including data for analog loops (designed and nondesigned, and with and without LNP), various kinds of digital loops, xDSL loops, and line-shared loops. BellSouth's performance in the pre-ordering, ordering, and provisioning of unbundled loops, as captured by these comprehensive measures, demonstrates that CLECs have nondiscriminatory access to local

loop transmission. *See generally Varner Aff.* Exhs. PM-2 ¶¶ 104-159 (Alabama), PM-3 ¶¶ 104-159 (Kentucky), PM-4 ¶¶ 103-153 (Mississippi), PM-5 ¶¶ 103-157 (North Carolina), PM-6 ¶¶ 103-153 (South Carolina).

a. Hot Cuts

BellSouth provides nondiscriminatory access to hot-cut loops in each of the five states in accordance with the Commission's standards, utilizing the exact same hot-cut processes and procedures that the Commission approved in its *GALA Order*. Specifically, BellSouth performs coordinated conversions in a timely manner, with minimal service disruption, and with few troubles following installation. *See MPSC 271 Order* at 78 ("BellSouth has met, and in some cases gone beyond, the explicit [hot-cut] requirements delineated by the FCC"); *KPSC 271 Order* at 32; *SCPSC 271 Order* at 83.

BellSouth has developed three different hot-cut processes, allowing CLECs to select the particular method that best fits their business plan and their customers' needs. Two of these processes (the time-specific cutover and the non-time-specific cutover) involve order coordination between BellSouth and the requesting CLEC, while the third process (the date-specific cutover) does not involve any such coordination. *See Milner Aff.* ¶¶ 122-123. In the third method, the CLEC simply specifies a date for the desired conversion to occur. *Id.* ¶ 124.

The time-specific and non-time-specific processes are largely analogous: the difference is when the time for the cutover is determined. When a CLEC places an order for a time-specific conversion, the CLEC selects up-front the date and time for the desired conversion. *Id.* ¶ 122. For a non-time-specific conversion, the CLEC selects only the cutover *date* at the time it places the original order. *Id.* ¶ 123. Then, within 24 to 48 hours of that cutover date, BellSouth and the CLEC jointly select a mutually acceptable time for the coordinated conversion to occur. *Id.*

The Commission has noted that “[t]he ability of a BOC to provision working, trouble-free loops through hot cuts is critically important in light of the substantial risk that a defective hot cut will result in competing carrier customers experiencing service outages for more than a brief period.” *Texas Order* ¶ 256. As in Georgia and Louisiana, BellSouth’s performance data for the five states demonstrate that it is doing exceptionally well in performing this “critically important” task.

Alabama. Between January and March 2002, BellSouth met or exceeded every benchmark in Alabama for each of the hot-cut submetrics. *See Varner Aff.* Exh. PM-2 ¶ 152. BellSouth provisioned 100% of scheduled conversions on time, and in fewer than 15 minutes, during the three-month period of January, February, and March 2002. *Id.* Exh. PM-2 ¶ 153. BellSouth also performed these cutovers without causing a single outage. *Id.* Exh. PM-2 ¶ 157. In addition, CLECs reported trouble on only one of 236 (0.4%) converted circuits (B.2.17), well within the benchmark established by BellSouth’s SQM and in line with this Commission’s standards. *See id.* Exh. PM-2 ¶ 158.

North Carolina. BellSouth’s North Carolina performance is also excellent. From January through March 2002, BellSouth completed 2,744 of the 2,754 (99.6%) scheduled conversions within the 15-minute benchmark. *See id.* Exh. PM-5 ¶ 151. BellSouth performed more than 99.4% of coordinated conversions without causing an outage, again far superior to the applicable standard. *See id.* Exh. PM-5 ¶ 155. During that time period, CLECs reported trouble on only 19 of 2,752 (0.69%) provisioned circuits, again well within the Commission’s standard. *See id.* Exh. PM-5 ¶ 156.

South Carolina. BellSouth’s South Carolina performance has been almost perfect. Between January and March 2002, BellSouth completed all 454 scheduled conversions on time,

and without a single outage on conversion. *See id.* Exh. PM-6 ¶¶ 147, 151. During that time period, CLECs reported trouble on only eight of 554 (1.44%) provisioned circuits, easily satisfying the Commission's standard. *See id.* Exh. PM-6 ¶ 152.

Kentucky and Mississippi. Hot-cut volumes have been comparatively small in both Kentucky and Mississippi, as BellSouth performed hot cuts on only four circuits in Kentucky and 21 circuits in Mississippi between January and March 2002. BellSouth's performance was perfect: BellSouth completed all hot-cut conversions on a timely basis in both Kentucky and Mississippi; BellSouth did not cause a single outage on conversion; and there were no reported troubles on any of the provisioned facilities within seven days of conversion. *See id.* Exhs. PM-3 ¶¶ 152-158, PM-4 ¶¶ 147-153. Because BellSouth utilizes the exact same hot-cut processes and procedures throughout its region, the Commission can look to other BellSouth states with larger hot-cut volumes (such as Georgia and North Carolina) for evidence that BellSouth's performance continues to be excellent when faced with substantially greater volumes of orders. *See KS/OK Order* ¶ 180 ("We also look to SWBT's performance in Texas (where SWBT has been handling commercial volumes to a greater degree and for a longer period of time) as evidence relevant to this checklist item because volumes in Kansas and Oklahoma are low."). In Georgia, BellSouth continues to meet all applicable Commission hot-cut standards. *See Varner Aff.* Exhs. PM-11 to -13.

In light of this evidence, there can be no serious dispute that BellSouth satisfies this Commission's standards for hot cuts throughout the five states. *See GA/LA Order* ¶¶ 220-221 (BellSouth demonstrates compliance by providing hot cuts in a timely manner, at an acceptable level of quality, with minimal service disruptions, and with a minimum number of troubles following installation).

b. Stand-Alone Loop Performance

In reviewing a BOC's performance for stand-alone loop provisioning, the Commission focuses upon the following categories: (i) installation timeliness; (ii) installation quality; and (iii) the quality of maintenance and repair functions. *GALA Order* ¶ 224. Throughout the five states, and across loop types, BellSouth's performance has been excellent.

In each of the five states, BellSouth provisions high-quality, unbundled voice-grade loops in a timely manner, affording CLECs a meaningful opportunity to compete. Reported performance data for analog loops demonstrate that BellSouth has consistently met or exceeded the parity standard for both OCIs (B.2.1.8, B.2.1.9) and the percentage of kept installation appointments (B.2.18.8, B.2.18.9) throughout the five states. *Varner Aff. Exhs. PM-2* ¶¶ 135, 138 (Alabama), *PM-3* ¶¶ 135, 138 (Kentucky), *PM-4* ¶¶ 129, 132 (Mississippi), *PM-5* ¶¶ 134, 137 (North Carolina), *PM-6* ¶¶ 129, 132 (South Carolina).

The quality of BellSouth's loop provisioning, as well as the timeliness and quality of its maintenance and repair services, have also been solid in each of the five states. In the few instances in which BellSouth missed an installation quality submetric (B.2.19.8, B.2.19.9), the small volume of CLEC orders is predominantly responsible for the disparity. In North Carolina, for example, BellSouth missed the parity standard for three submetrics in February 2002 (B.2.19.8.2.1, B.2.19.9.1.4, B.2.19.9.2.1) because CLECs reported trouble on a total of five analog loops. *See id.* *Exh. PM-5* ¶ 138 & Attach. 1. For those I-30 (troubles within 30 days of installation) submetrics where there are sufficient volumes to offer a statistically significant portrait of BellSouth's performance, by contrast, BellSouth has consistently met the parity standard. *See* B.2.19.8.1.1 (2-wire analog loop design/<10 circuits/dispatch). Between January and March 2002, BellSouth additionally met a greater percentage of maintenance and repair

appointments for CLEC customers than it did for its own retail customers in each of the five states (B.3.1.8, B.3.1.9), and completed maintenance and repair work in substantially less time for CLEC loops than for BellSouth's own retail customers (B.3.3.8, B.3.3.9). *See id.* Exhs. PM-2 ¶¶ 142-145 (Alabama), PM-3 ¶¶ 142-145 (Kentucky), PM-4 ¶¶ 136-139 (Mississippi), PM-5 ¶¶ 141-143 (North Carolina), PM-6 ¶¶ 136-139 (South Carolina).

Finally, BellSouth provides high-quality maintenance and repair services, such that CLEC customers generally suffered a lower percentage of repeat troubles than did BellSouth retail customers (B.3.4.8, B.3.4.9). *See id.* Exhs. PM-2 ¶ 145 (Alabama), PM-3 ¶ 145 (Kentucky), PM-4 ¶ 139 (Mississippi), PM-5 ¶ 143 (North Carolina), PM-6 ¶ 139 (South Carolina).

c. High-Speed Digital Loops

BellSouth has additionally provisioned high-quality DS1 loops to CLECs throughout the five states, and BellSouth continues to offer, although CLECs have yet to order, unbundled loops of greater transmission capacity. Between January and March 2002, BellSouth missed a smaller percentage of installation appointments for CLECs in provisioning DS1 loops than it did for its own retail customers (B.2.18.19). In North Carolina, where BellSouth had the largest volume of DS1 loop orders among the five states, BellSouth missed only two out of 403 installation appointments for DS1 loops. *See id.* Exh. PM-5 Attach. 1. In South Carolina, BellSouth missed only one out of 349 installation appointments during that same time period. *See id.* Exh. PM-6 Attach. 1. The average OCI for DS1 loops has also been substantially shorter for CLECs than it has been for BellSouth retail customers (B.2.1.19). While CLECs have, at times, reported trouble within 30 days of provisioning for a greater percentage of DS1 loops than have BellSouth retail customers, the CLECs themselves are responsible for a large percentage of the disparity.

As was true in Georgia, nearly half of all CLEC trouble reports for DS1 loops result in a finding of "no trouble." See *GA/LA Order* ¶ 233; *Varner Aff.* Exh. PM-6 ¶ 144 (South Carolina), PM-4 ¶ 144 (Mississippi), PM-2 ¶ 150 (Alabama). BellSouth's performance substantially improves when these improperly filed reports are factored out. See *GA/LA Order* ¶ 233.

2. Access to Subloop Elements

In addition to the unbundled loops themselves, BellSouth offers CLECs the same nondiscriminatory access to subloop elements throughout the five states that it offers in Georgia and Louisiana. See *Milner Aff.* ¶ 109. The subloop UNE has been defined as a portion of the local loop that can be accessed at accessible points on the loop. *Id.* This includes any technically feasible point near the customer's premises, such as the pole or pedestal, the network interface device, or minimum point of entry to the customer's premises, the feeder distribution interface, the Main Distributing Frame, remote terminals, and various other terminals. See *id.* BellSouth offers the following subloop elements: loop concentration/multiplexing; loop feeder; loop distribution; intrabuilding network cable; and network terminating wire. See *id.* Moreover, CLECs can request additional subloop elements via the BFR process. See *id.* As of March 31, 2002, BellSouth has provided CLECs 568 unbundled loop distribution subloop elements region-wide. See *id.* ¶ 110.

3. Access to xDSL-capable Loops

BellSouth utilizes the same nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services in the five states as it does in Georgia and Louisiana, offering CLECs a meaningful opportunity to compete in the advanced services market. As BellSouth explained in its Georgia/Louisiana Application, because the various flavors of xDSL have different technical prerequisites and disparate tolerance for disturbing devices, CLECs requested that BellSouth create xDSL loop offerings

with distinct parameters. In response to these requests, BellSouth developed a variety of unbundled loop types for CLECs to choose from. Because BellSouth signed interconnection agreements obligating it to continue provisioning these different loop types, however, multiple product offerings have been and remain available over time. The historical evolution of BellSouth's specific xDSL loop offerings – which currently include the ADSL-capable loop; HDSL-capable loop; ISDN loop; Universal Digital Channel (“UDC”); Unbundled Copper Loop (“UCL”), Short and Long; and UCL-Nondesign (“UCL-ND”) – is recounted in Exhibit WKM-5 to the affidavit of W. Keith Milner.⁶²

As in Georgia and Louisiana, for the pre-ordering of xDSL-capable loops, BellSouth offers CLECs in the five states nondiscriminatory access to the actual loop makeup information (“LMU”) contained in its records and databases. *See generally Stacy Aff.* ¶¶ 241-250. In full compliance with the obligations set forth in the *UNE Remand Order*, BellSouth provides CLECs access to the exact same LMU available to and used by its retail personnel, and in the same manner. *See id.*; *GA/LA Order* ¶ 112 (“Based on the evidence in the record, we find . . . that

⁶² As of March 31, 2002, BellSouth had provisioned the following volumes of xDSL-capable loops in each of the five states:

Alabama: 1,200 2-wire ADSL loops; 63 2-wire HDSL loops; 316 UCL (Long and Short) loops; and 666 UDC loops.

Kentucky: 387 2-wire ADSL loops; 1 2-wire HDSL loop; 10 UCL-ND loops; and 404 UDC loops.

Mississippi: 807 2-wire ADSL loops; 42 2-wire HDSL loops; 53 UCL (Long and Short) loops; 108 UCL-ND loops; and 480 UDC loops.

North Carolina: 1,827 2-wire ADSL loops; 22 2-wire and 7 4-wire HDSL loops; 121 UCL (Long and Short) loops; 49 UCL-ND loops; and 2,454 UDC loops.

South Carolina: 419 2-wire ADSL loops; 6 2-wire HDSL loops; 121 UCL (Long and Short) loops; 24 UCL-ND loops; and 778 UDC loops.

See Milner Aff. ¶ 98.

BellSouth provides competitive LECs with access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*.⁶³

LMU consists of the detailed information about the loop facilities serving a particular end-user address needed to determine the feasibility of providing a desired xDSL service over a loop. BellSouth's LENS and TAG interfaces allow CLECs to obtain real-time electronic access to the LMU contained in BellSouth's Loop Facilities Assignment & Control System ("LFACS"). *Stacy Aff.* ¶¶ 242-244. BellSouth also has implemented an enhancement such that when LFACS does not contain the requested LMU, LFACS automatically will send an electronic query to BellSouth's Corporate Facilities Database – a digitized version of the plats available in Georgia, North Carolina, South Carolina, Florida, and 13 Alabama wire centers. *Id.* ¶ 245. In the remaining in-region states, where outside plant information is stored on paper records, CLECs can request that BellSouth's outside plant engineers perform a manual lookup should LFACS lack the desired LMU. *Id.* ¶¶ 246-247; *Milner Aff.* Exh. WKM-5 ¶¶ 23-24. With LMU in hand, CLECs can make their own determination as to the suitability of particular loops for the desired xDSL service.⁶³

BellSouth also performs loop conditioning as requested, irrespective of whether BellSouth offers advanced services to the end-user customer on that loop. CLECs may select the precise conditioning (*i.e.*, loop modification) they desire on their loop and will only pay for the level of conditioning selected. *See Milner Aff.* ¶ 106 & Exh. WKM-5 ¶ 24. Through BellSouth's Unbundled Loop Modification ("ULM") process, a CLEC can request that BellSouth modify any

⁶³ BellSouth additionally offers CLECs access to its Loop Qualification System ("LQS"), a database designed for Network Service Providers ("NSPs") to enable them to inquire as to whether plain old telephone service ("POTS") lines will support BellSouth's wholesale ADSL service. CLECs have electronic access to the exact same LQS database, and in the same time and manner, as NSPs. *See Stacy Aff.* ¶¶ 249-250.

existing loop to be compatible with the CLEC's particular hardware requirements. *See id.* Exh. WKM-5 ¶ 24.

Under the direction of its in-region state commissions, BellSouth has also developed comprehensive, disaggregated performance metrics that capture its performance in the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services. In each of the five states, BellSouth's performance has been nondiscriminatory across each of the categories upon which this Commission has focused its attention: (i) order processing timeliness; (ii) installation timeliness; (iii) missed installation appointments; (iv) installation quality; and (v) quality and timeliness of maintenance and repair. *See GA/LA Order* ¶ 228. BellSouth's comprehensive performance data clearly support the conclusion that BellSouth provides nondiscriminatory access to xDSL-capable loops and related services in compliance with Checklist Item 4.

Across the five states, across all five of the relevant categories, and across each of its xDSL-related metrics, BellSouth's performance has been excellent. BellSouth returns LMU to CLECs in substantially the same time and manner as it is available to BellSouth's personnel. *See Stacy Aff.* ¶ 241. Between January and March 2002, BellSouth returned electronic LMU within five minutes for more than 99% of such requests in each of Alabama, Kentucky, Mississippi, and South Carolina. *See Varner Aff.* Exhs. PM-2 ¶ 77 (Alabama), PM-3 ¶ 77 (Kentucky), PM-4 ¶ 76 (Mississippi), PM-6 ¶ 76 (South Carolina). In North Carolina, BellSouth returned electronic LMU within five minutes for more than 97.5% of such requests, well above the applicable 95% benchmark. *See id.* Exh. PM-5 ¶ 76.

BellSouth additionally installs high-quality xDSL-capable loops in a timely manner in each of the five states. BellSouth provisions xDSL-capable loops well within the seven-day

benchmark established in its state-approved performance plans, *see id.* Exhs. PM-2 ¶ 108 (Alabama), PM-3 ¶ 108 (Kentucky), PM-4 ¶ 107 (Mississippi), PM-5 ¶ 107 (North Carolina), PM-6 ¶ 107 (South Carolina) (B.2.2), and BellSouth has met or exceeded the applicable parity standard for missed installation appointments in January through March 2002, *id.* Exhs. PM-2 ¶ 112, PM-3 ¶ 112, PM-4 ¶ 110, PM-5 ¶ 111, PM-6 ¶ 110 (B.2.18.5).

Once provisioned, CLEC-ordered xDSL-capable loops experience few technical problems. Between January and March 2002, BellSouth met or exceeded the parity standard for trouble reports within 30 days of installation in each of the five states. *Id.* Exhs. PM-2 ¶ 113, PM-3 ¶ 113, PM-4 ¶ 111, PM-5 ¶ 112, PM-6 ¶ 111.

When CLECs did experience trouble on xDSL-capable loops, BellSouth handled the troubles in substantially less time than it handled the troubles for its retail units (B.3.3.5). BellSouth consistently made a greater percentage of repair appointments for CLECs than for its own retail customers (B.3.1.5), and provided superior quality repair service, as CLECs suffered fewer repeat troubles (B.3.4.5). *See id.* Exhs. PM-2 ¶ 121, PM-3 ¶ 121, PM-4 ¶ 116, PM-5 ¶ 120, PM-6 ¶ 116.

4. ISDN-BRI Loop Provisioning

BellSouth's performance in provisioning ISDN-BRI loops has also been excellent across each of the categories to which this Commission has directed its attention. In each of the five states, BellSouth has met or exceeded the parity standard for ISDN-BRI loops for average OCI (B.2.1.6.3) and for meeting installation appointments during each month from January through March. *See Varner Aff.* Exhs. PM-2 ¶¶ 125, 127 (Alabama), PM-3 ¶¶ 125, 127 (Kentucky), PM-4 ¶¶ 119, 121 (Mississippi), PM-5 ¶¶ 124, 126 (North Carolina), PM-6 ¶¶ 119, 121 (South Carolina). CLEC ISDN loops experience few technical problems within 30 days of installation, and more than 95% of CLEC ISDN-BRI loops are consistently trouble free throughout the five

states (B.3.2.6). And when CLECs do experience troubles, BellSouth has provided timely and high-quality maintenance and repair services. In each of the five states, BellSouth routinely meets or exceeds the parity standard for missed repair appointments (B.3.1.6), average maintenance duration (B.3.3.6), and percent repeat reports within 30 days (B.3.4.6). In the rare instances where BellSouth has fallen just short of parity, the small number of CLEC ISDN-BRI loops experiencing trouble skews the picture of BellSouth's performance. *See id.* Exh. PM-4 ¶ 126. None of these minor deviations is competitively significant to CLECs. *See GA/LA Order* ¶ 230.

5. Line Sharing

BellSouth has implemented line sharing in each of the five states in full compliance with the terms of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*, allowing CLECs to offer high-speed data service to BellSouth voice customers. Specifically, line sharing is available to a single requesting carrier, on loops that carry BellSouth's POTS, so long as the xDSL technology deployed by the requesting carrier does not interfere with the analog voice-band transmissions. *See Milner Aff.* Exh. WKM-6. BellSouth allows line-sharing CLECs to deploy any version of xDSL that is presumed acceptable for shared-line deployment in accordance with Commission rules, and will not significantly degrade analog voice service. At the request of the data CLECs, BellSouth voluntarily provides line splitters in 96-line unit, 24-line unit, and 8-line unit compliments. *Id.* ¶ 17. BellSouth utilizes the exact same processes and procedures for the pre-ordering, ordering, and provisioning of line-shared loops in the five states as it does in Georgia and Louisiana. *Id.* ¶ 19. Accordingly, the Commission's conclusion that "BellSouth offers line sharing in Georgia and Louisiana . . . in accordance with the requirements of the *Line Sharing Order* and the *Line Sharing Reconsideration Order*," *GA/LA Order* ¶ 238, applies with equal force here.

BellSouth developed its line-sharing product in a collaborative effort with CLECs and is continuing to work cooperatively with CLECs on an ongoing basis to resolve issues as they arise. *See Milner Aff.* Exh. WKM-6 ¶¶ 6-15. BellSouth invited all interested CLECs to collaborative meetings beginning in January 2000, and at least 11 CLECs participated in these meetings. The participants agreed to form several working collaborative teams to develop processes and procedures for central-office-based line sharing, which were then implemented, tested, and improved. As a result of these efforts, BellSouth was able to implement commercial line sharing by this Commission's June 6, 2000 deadline. As of April 2002, BellSouth had provisioned 702 line-sharing arrangements in Alabama, 518 line-sharing arrangements in Kentucky, 585 line-sharing arrangements in North Carolina, and 7,900 such arrangements region-wide. *See Milner Aff.* ¶ 114.

The pre-ordering, ordering, provisioning, and maintenance and repair processes for the line-sharing product are very similar to the processes for xDSL-capable loops. *Id.* Exh. WKM-6 ¶¶ 20-27. CLECs obtain access to LMU in the exact same manner whether they are seeking to obtain an xDSL-capable loop or the high-frequency portion of the loop. *Id.* ¶¶ 20-21. As BellSouth has demonstrated, it offers access to the exact same LMU available to and used by its retail personnel, and in the same time and manner.

BellSouth provisions line sharing in a timely, accurate, and nondiscriminatory manner. *See Massachusetts Order* ¶ 165 (“[A] successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates.”) (internal quotation marks omitted). BellSouth has met or exceeded the parity standard for order

completion throughout the five states (B.2.1.7), and BellSouth routinely meets substantially the same percentage of CLEC and retail installation appointments (B.2.18.7).

BellSouth's performance data additionally demonstrate that it offers high-quality line-shared facilities, as well as timely and quality maintenance and repair service. In North Carolina, for example, more than 97% of CLEC line-sharing arrangements were trouble-free between January and March 2002. Moreover, a full two-thirds of reported troubles in January were closed with "no trouble found," indicating that the percentage of trouble-free line-shared loops is actually higher than reported. *Varner Aff.* Exh. PM-5 ¶ 118. *See also id.* Exh. PM-2 ¶ 119 (over 70% of reported troubles in Alabama were closed as "no trouble found"). BellSouth has met substantially the same percentage of repair appointments for CLECs as for its retail customers. *See id.* Exhs. PM-2 ¶ 117 (Alabama), PM-3 ¶ 117 (Kentucky), PM-5 ¶ 116 (North Carolina). BellSouth additionally met or exceeded the parity standard for repeat troubles for all six relevant submetrics in Kentucky, and for five of six relevant submetrics in Alabama and North Carolina. *See id.* Exhs. PM-2 ¶ 122, PM-3 ¶ 122, PM-5 ¶ 121.

Moreover, although BellSouth has discovered a PMAP 2.6 problem that caused it to miss some line-sharing provisioning activity, the April results generated by PMAP 4.0 (which has corrected this problem) confirm that BellSouth's performance is compliant. In areas with activity, BellSouth met all OCI submetrics except one, and met every submetric on held orders, percent jeopardies, percent missed installation appointments, and average completion notice interval. *See Varner Aff.* ¶¶ 292-294.

6. Line Splitting

As in Georgia and Louisiana, BellSouth facilitates CLEC efforts to engage in line splitting throughout the five states in full compliance with the Commission's instructions. *Milner Aff.* Exh. WKM-6 ¶¶ 36-43; *see also GA/LA Order* ¶ 241 ("BellSouth complies with its

line-splitting obligations and provides access to network elements necessary for competing carriers to provide line splitting”). Specifically, BellSouth facilitates line splitting by cross-connecting an unbundled loop to a CLEC’s collocation space. *Milner Aff.* ¶ 118 & Exh. WKM-6 ¶ 36. Once the CLEC has separated the voice from the data service, and sent the latter onto the packet-switched network, BellSouth will cross-connect the voice signal back to the BellSouth circuit switch. *Id.* Exh. WKM-6 ¶ 43. In other words, BellSouth offers the same arrangement to CLECs as the Commission described in the *Texas Order* and the *Line Sharing Reconsideration Order*, and approved in its *GA/LA Order*. See *GA/LA Order* ¶ 241.

E. Checklist Item 5: Unbundled Local Transport

In compliance with the Act, BellSouth provides “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.” 47 U.S.C. § 271(c)(2)(B)(v). Interoffice transmission facilities include both dedicated transport and shared transport. *Second Louisiana Order* ¶ 201. Dedicated transport is defined as “incumbent LEC transmission facilities . . . dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.” 47 C.F.R. § 51.319(d)(1)(i). Shared transport is defined as “transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network.” *Id.* § 51.319(d)(1)(iii).

In the *GA/LA Order*, this Commission concluded that BellSouth complies “with the requirements of this checklist item.” *GA/LA Order* ¶ 245. Because BellSouth’s terms and conditions for local transport in the five states at issue here are substantively the same as those in

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Joint Application by BellSouth Corporation,
BellSouth Telecommunications, Inc.,
and BellSouth Long Distance, Inc. for
Provision of In-Region, InterLATA Services
in Georgia and Louisiana

CC Docket No. _____

To: The Commission

**BRIEF IN SUPPORT OF APPLICATION BY BELL SOUTH FOR PROVISION
OF IN-REGION, INTERLATA SERVICES IN GEORGIA AND LOUISIANA**

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GPSC or LPSC during those agencies' checklist-compliance proceedings challenged that conclusion.

D. Checklist Item 4: Unbundled Local Loops

BellSouth offers CLECs local loop transmission from the central office to the customer's premises, unbundled from local switching or other services, thereby enabling CLECs to provide local service without replicating BellSouth's sunk investment in an infrastructure connecting each end user to the public switched telephone network. As of July 31, 2001, BellSouth had provisioned more than 84,000 loops in Georgia and more than 17,000 loops in Louisiana. *See id.* ¶ 117.

BellSouth fully complies with all of its obligations under this checklist item. BellSouth has a concrete and specific legal obligation in both Georgia and Louisiana to provide local loop facilities on an unbundled basis, the terms of which are set forth in BellSouth's Georgia and Louisiana SGATs and in interconnection agreements with multiple CLECs. BellSouth provisions high-quality loops in a timely manner, and has demonstrated its ability to satisfy all levels of reasonable customer demand. Moreover, working largely through collaborative meetings with CLECs, BellSouth has developed nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services. BellSouth has complied fully with its obligations under the *Line Sharing Order*,⁸⁰ the *Line Sharing Reconsideration Order*,⁸¹ and the *UNE Remand Order*.

⁸⁰ Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999).

⁸¹ Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC

1. Stand-Alone Loops

In both Georgia and Louisiana, BellSouth offers a variety of loop types to CLECs, including SL1 voice grade loops, SL2 voice grade loops, 2-wire ISDN digital grade loops, 56 or 64 kbps digital grade loops, and various high-capacity and xDSL-capable loops. *See Milner Aff.* ¶ 115. In addition, BellSouth provides CLECs with unbundled loops in those instances where the customer was previously served by Integrated Digital Loop Carrier (“IDLC”). *See id.* ¶ 118; *Kansas/Oklahoma Order* ¶ 178. CLECs can access unbundled loops at any technically feasible point, and BellSouth provides access to all the features, functions, and capabilities of the loop. *See Milner Aff.* ¶ 114; *New York Order* ¶ 275. CLECs seeking additional loop types can take advantage of BellSouth’s BFR process. *See Milner Aff.* ¶ 110; *Ruscilli/Cox Joint Aff.* ¶¶ 12-13.

Comprehensive performance data unequivocally demonstrate that BellSouth’s processes and procedures for the ordering, provisioning, and maintenance of unbundled loop facilities offer CLECs a meaningful opportunity to compete in the local service market. *See New York Order* ¶¶ 270, 283 (performance measurements showing provisioning intervals and success in meeting due dates are instructive in proving nondiscriminatory access); *Texas Order* ¶ 249; *Kansas/Oklahoma Order* ¶ 208 (the Commission continues to rely primarily upon missed installation appointments and average installation intervals).

In its *Second Louisiana Order*, the Commission suggested that it was unable to find that BellSouth complied with Checklist Item 4 because BellSouth’s performance metrics were not disaggregated by loop type, and lacked sufficient underlying documentation. *See Second Louisiana Order* ¶¶ 192-198. BellSouth’s SQM plans in Georgia and Louisiana fully address

Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101 (2001).

those issues. As BellSouth has explained, the SQM plans were developed through a collaborative process with significant CLEC participation, and they have been modified and approved by both the GPSC and the LPSC. As explained in the affidavits of Alphonso Varner, and further demonstrated below, those plans provide highly disaggregated data for different loop types – including data for analog loops (designed and non-designed, and with and without LNP), various kinds of digital loops, xDSL loops, and line-shared loops. BellSouth’s performance in the pre-ordering, ordering, and provisioning of unbundled loops, as captured by these comprehensive measures, demonstrates that CLECs have nondiscriminatory access to local loop transmission. *See generally Varner Ga. Aff.* ¶¶ 189-244; *Varner La. Aff.* ¶¶ 203-257. The Varner affidavits and their attachments additionally contain a detailed explanation of how these PSC-approved measurements are derived, and provide sufficient documentation so that their results can be (and have been) subject to audit by independent parties. *See Second Louisiana Order* ¶ 198 (“in future applications, we expect BellSouth to explain how it derives and calculates its data and why its performance data demonstrates that competitive LECs have nondiscriminatory access to unbundled loops”).

a. Hot Cuts

BellSouth provides nondiscriminatory access to hot cut loops in accordance with the Commission’s standards. Specifically, BellSouth performs coordinated conversions in a timely manner, with minimal service disruption, and with few troubles following installation. *See LPSC Staff Final Recommendation* at 77.

BellSouth has developed three different hot cut processes, allowing CLECs to select the particular method that best fits their business plan and their customers’ needs. Two of these processes – the time-specific cutover and the non-time-specific cutover – involve order

coordination between BellSouth and the requesting CLEC, while the third process – the date-specific cutover – does not involve any such coordination. *See Milner Aff.* ¶ 142. In the third method, the CLEC simply specifies a date for the desired conversion to occur. *Id.* ¶ 144.

The time-specific and non-time-specific processes are largely analogous: the difference is when the specific time for the cutover is determined. When a CLEC places an order for a time-specific conversion, the CLEC selects up-front the date and time for the desired conversion. *Id.* ¶ 142. For a non-time specific conversion, the CLEC selects only the cutover *date* at the time it places the original order. Then, within 24 to 48 hours of that cutover date, BellSouth and the CLEC will jointly select a mutually acceptable time for the coordinated conversion to occur. *Id.* ¶ 143.

As the Commission has noted, “[t]he ability of a BOC to provision working, trouble-free loops through hot cuts is critically important in light of the substantial risk that a defective hot cut will result in competing carrier customers experiencing service outages for more than a brief period.” *Texas Order* ¶ 256. BellSouth’s performance data for both Georgia and Louisiana demonstrate that it is doing exceptionally well in performing this “critically important” task.

Georgia. Between May and July 2001, BellSouth met every benchmark in Georgia for each of the hot cut sub-metrics. *See Varner Ga. Aff.* ¶ 238. BellSouth provisioned 6,615 of the 6,673 scheduled conversions (or greater than 99%) on time during the three-month period of May, June, and July 2001. *Id.* ¶ 239. The average interval for each cutover was a mere 2.53 minutes. *Id.* In July, BellSouth completed 97.92% of time-specific and 99.39% of non-time-specific SL1 loop conversions in fewer than 15 minutes; during that same month, it completed 98.94% of time-specific and 100% of non-time-specific SL2 loop conversions in fewer than 15 minutes. *See BellSouth Monthly State Summary – Georgia, July 2001 (B.2.14) (Varner Affs.*

Exh. PM-4). BellSouth also performed these cutovers with a minimum of service disruption, causing only 15 outages while performing 6,673 conversions. *Varner Ga. Aff.* ¶ 243. See also *Pennsylvania Order* ¶ 79 n.275 (“We note that individual states and BOCs may define performance measures in different ways. We look to those measurements however, that provide data most similar to data we have relied on in past orders.”). This outage rate of only 0.22% easily satisfies the Commission’s 5% standard. In addition, CLECs reported trouble on only 108 of 4,956 (2.17%) converted circuits (B.2.17), well within the benchmark established by the Georgia PSC and in line with this Commission’s standards. See *Varner Ga. Aff.* ¶ 244.

Louisiana. BellSouth’s Louisiana performance is, if anything, even better than its Georgia performance. From May through July, BellSouth completed all 1,391 scheduled conversions within the 15-minute benchmark. See *Varner La. Aff.* ¶ 252. The average completion interval was 2.76 minutes. See *id.* BellSouth performed more than 99.7% of coordinated conversions without causing an outage, again far superior to the applicable 95% standard. See *id.* ¶ 256. During that time period, CLECs reported trouble on only 17 of 1,310 (1.3%) provisioned circuits, well within the Commission’s 2% standard. See ¶ 257.

In light of this evidence, there can be no serious dispute that BellSouth satisfies this Commission’s standards for hot cuts in both Georgia and Louisiana. See *Kansas/Oklahoma Order* ¶ 201; *Massachusetts Order* ¶ 110 (BOC demonstrates compliance by providing hot cuts in a timely manner; at an acceptable level of quality; with minimal service disruptions; and with a minimum of troubles following installation).

b. Stand-Alone Loop Performance

In reviewing a BOC’s performance for stand-alone loop provisioning, the Commission focuses upon the following categories: (i) average completion interval (for BellSouth, this is tracked through an analogous metric known as order completion interval or “OCI”); (ii) missed

installation appointments; (iii) trouble reports after provisioning; and (iv) the timeliness and quality of maintenance and repair measures. *Kansas/Oklahoma Order* ¶¶ 208-212. Across loop types, and in both Georgia and Louisiana, BellSouth's performance has been excellent.

Georgia. BellSouth provisions quality unbundled voice grade loops in a timely manner, guaranteeing Georgia CLECs a meaningful opportunity to compete. BellSouth consistently meets a greater percentage of installation appointments for Georgia CLECs than for its own retail customers, and provisions voice grade loops for CLECs in substantially the same time as it does for its own retail customers. Between May and July, for example, BellSouth met or exceeded the applicable benchmark for 12 of the 13 installation appointment sub-metrics for analog loops. *Varner Ga. Aff.* ¶ 223.⁸² Likewise, BellSouth's reported OCI performance data for analog loops indicate that it met or exceeded the applicable benchmark for each of the relevant sub-metrics during that same time period. *See Varner Ga. Aff.* ¶ 220.

The quality of BellSouth's loop provisioning in Georgia, as well as the timeliness and quality of its maintenance and repair services, has also been exemplary. Between May and July, BellSouth met or exceeded the parity standard for all sub-metrics that capture provisioning troubles for analog loops. *See Varner Ga. Aff.* ¶ 225. During that same time period, BellSouth also met a greater percentage of maintenance and repair appointments for CLEC customers than it did for its own retail customers (B.3.1.8, B.3.1.9), and completed maintenance and repair work in substantially less time for CLEC loops than for BellSouth's own retail customers (B.3.3.8, B.3.3.9). *See id.* ¶¶ 228-230. Finally, BellSouth provides high-quality maintenance and repair

⁸² The only sub-metric that BellSouth missed – B.2.18.9.2.1 (June 2001) (2-wire analog loop non-design/>=10 circuits/dispatch) – involved only two orders.

services, such that CLEC customers suffered a lower percentage of repeat troubles than did BellSouth retail customers (B.3.4.8, B.3.4.9). *See id.* ¶ 230.

Louisiana. BellSouth also provisions unbundled voice grade loops in Louisiana in a manner that provides Louisiana CLECs a meaningful opportunity to compete. BellSouth consistently meets more installation appointments for Louisiana CLECs than for its own retail customers, exceeding parity for all seven sub-metrics with reported data (B.2.18.8, B.2.18.9) between May and July. *See Varner La. Aff.* ¶ 237. While the order completion intervals have been substantially the same for CLEC and BellSouth retail customers (B.2.1.8), the limited CLEC order volume has accentuated any minor deviations that have occurred. *See* BellSouth Monthly State Summaries – Louisiana, May-July 2001 (*Varner Affs.* Exhs. PM-14 to PM-16). This minimal deviation has not affected CLECs' opportunity to compete in the Louisiana local service market.

As in Georgia, the quality of BellSouth's provisioning in Louisiana has also been superb. Between May and July, BellSouth missed none of the nine sub-metrics that capture provisioning troubles for analog loops. *See Varner La. Aff.* ¶ 238 (B.2.19.8, B.2.19.9). Likewise, as captured by the "customer trouble report rate" metric, Louisiana CLEC customers consistently experienced a smaller percentage of troubles than did BellSouth's retail customers. *See id.* ¶ 243 (B.3.2.8, B.3.2.9). BellSouth has also provided Louisiana CLECs maintenance and repair services that are on par with, if not superior to, that provided to BellSouth's retail customers. Between May and July, BellSouth missed a smaller percentage of installation appointments for CLECs than for its retail customers (B.3.1.8, B.3.1.9), and BellSouth completed maintenance and repair work in substantially less time for CLECs than for its own retail customers (B.3.3.8). *See id.* ¶¶ 241, 243. In July alone, BellSouth completed maintenance work for CLEC more than

three times faster than for its retail customers. See BellSouth Monthly State Summary – Louisiana, July 2001 (B.3.3.8) (*Varner Affs.* Exh. PM-16). CLECs have also received superior quality maintenance and repair services, as BellSouth met or exceeded parity for all six of the repeat trouble report sub-metrics (B.3.4.8). *Varner La. Aff.* ¶ 243.

c. High-Speed Digital Loops

Georgia. BellSouth has additionally provisioned high-quality digital loops to Georgia CLECs at speeds of DS1 and greater. From May through July, BellSouth has missed a smaller percentage of installation appointments for CLECs in provisioning such high-speed digital loops than it has for its own retail customers (B.2.18.19). See *Varner Ga. Aff.* ¶ 234. Likewise, the average order completion interval for digital loops of DS1 capacity or greater has consistently been shorter for CLECs than it has been for BellSouth retail customers (B.2.1.19). See *id.* ¶ 232. BellSouth has also instituted a new turn-up process to address concerns with some provisioning troubles. See *id.* ¶ 236.

Louisiana. BellSouth additionally provides nondiscriminatory access to digital loops of DS1 capacity or greater in Louisiana. BellSouth's provisioning performance has been excellent. During each of the past three months, BellSouth has missed a smaller percentage of installation appointments when provisioning high-speed digital loops for CLECs than it has when provisioning such loops to its retail customers. See *Varner La. Aff.* ¶ 247 (B.2.18.19). Likewise, the average order completion interval for digital loops of DS1 capacity or greater has consistently been shorter for Louisiana CLECs than it has been for BellSouth retail customers. See *id.* ¶ 245 (B.2.1.19).

2. Access to Subloop Elements

In addition to the unbundled loops themselves, BellSouth offers CLECs nondiscriminatory access to subloop elements. *See Milner Aff.* ¶ 124. The subloop UNE has been defined as a portion of the local loop that can be accessed at accessible points on the loop. This includes any technically feasible point near the customer premises, such as the pole or pedestal, the network interface device (“NID”), or minimum point of entry to the customer’s premises, the feeder distribution interface, the Main Distributing Frame, remote terminals and various other terminals. *See id.* BellSouth offers the following subloop elements: loop concentration/multiplexing; loop feeder; loop distribution; intrabuilding network cable; and network terminating wire. *See id.* Moreover, CLECs can request additional subloop elements via the bona fide request process. *See id.* As of July 31, 2001, BellSouth has provided CLECs over 600 unbundled subloop loop distribution elements region-wide. *See id.* ¶ 125.

3. Access to xDSL-capable Loops

BellSouth has developed and implemented nondiscriminatory processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services, providing Georgia CLECs a meaningful opportunity to compete in the advanced services market. Because the various flavors of xDSL have different technical prerequisites and disparate tolerance for disturbing devices, CLECs requested that BellSouth create xDSL loop offerings with distinct parameters. In response to these requests, BellSouth developed a variety of unbundled loop-types for CLECs to choose among. Because BellSouth signed interconnection agreements obligating it to continue provisioning these different loop types, multiple product offerings have been and remain available over time. The historical evolution of BellSouth’s specific xDSL loop offerings – which currently include the ADSL-capable loop; HDSL-capable

loop; ISDN loop; Universal Digital Channel (“UDC”); Unbundled Copper Loop (“UCL”), Short and Long; and UCL-Nondesign (“UCL-ND”) – is recounted in the affidavit of Jerry Latham. *See generally Latham Aff.* ¶¶ 3-19 (App. A, Tab M). By July 31, 2001, BellSouth had provisioned 3,391 2-wire ADSL loops, 80 2-wire HDSL loops, 737 UCL (Long and Short) loops, and 3,091 UDC loops in Georgia, as well as 1,781 2-wire ADSL loops, 71 2-wire HDSL loops, 934 UCL (Long and Short) loops, and 752 UDC loops in Louisiana. *See Milner Aff.* ¶¶ 115, 138.

For pre-ordering of xDSL-capable loops, BellSouth offers CLECs nondiscriminatory access to the actual loop make-up information (“LMU”) contained in its records and databases. *See generally Stacy Aff.* ¶¶ 227-249. In compliance with the *UNE Remand Order*, BellSouth provides CLECs access to the exact same LMU available to and used by its retail personnel and in the same manner. *See id.* ¶¶ 227-278 231-32.

LMU consists of the detailed information about the loop facilities serving a particular end-user address needed to determine the feasibility of providing a desired xDSL service over a loop. BellSouth’s LENS, TAG, and RoboTAG interfaces allow CLECs to obtain real-time electronic access to the LMU contained in BellSouth’s Loop Facilities Assignment & Control System (“LFACS”). *Id.* ¶ 228. Should LFACS lack the desired LMU, CLECs can request that BellSouth’s outside plant engineers perform a manual lookup in BellSouth’s Corporate Facilities Database. *Id.* ¶ 231-32; *Latham Aff.* ¶ 25; *see also Massachusetts Order* ¶ 68 (approving mix of manual and electronic processes); *Kansas/Oklahoma Order* ¶ 122; *Texas Order* ¶ 165. With

LMU in hand, CLECs can make their own determination as to the suitability of particular loops for the desired xDSL service. *See Latham Aff.* ¶ 23.⁸³

BellSouth also performs loop conditioning as requested, irrespective of whether BellSouth offers advanced services to the end-user customer on that loop. CLECs may select the precise conditioning (*i.e.*, loop modification) they desire on their loop and will only pay for the level of conditioning selected. *See Latham Aff.* ¶ 25; *Milner Aff.* ¶ 122.⁸⁴ Through BellSouth's Unbundled Loop Modification ("ULM") process, CLECs can request that BellSouth modify any existing loop to be compatible with the CLEC's particular hardware requirements. *See Latham Aff.* ¶ 25.

Under the direction of the Georgia and Louisiana PSCs, BellSouth has also developed comprehensive, disaggregated performance metrics that capture its performance in the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services. BellSouth's performance has been excellent across each of the five categories upon which this Commission has focused its attention: (i) order processing timeliness; (ii) average installation intervals; (iii) missed installation appointments; (iv) quality; and (v) quality and timeliness of maintenance and repair. *See Massachusetts Order* ¶ 130. Based on these performance data, the Commission should conclude that BellSouth "provisions xDSL-capable loops for competing carriers in substantially the same time and manner that it installs xDSL-capable loops for its own retail operations." *Kansas/Oklahoma Order* ¶ 185.

⁸³ BellSouth additionally offers CLECs access to its Loop Qualification System ("LQS"), a database designed for Network Service Providers ("NSPs") to enable them to inquire as to whether POTS lines will support BellSouth's wholesale ADSL service. CLECs have electronic access to the exact same LQS database, and in the same time and manner as NSPs. *See Stacy Aff.* ¶¶ 234-236.

⁸⁴ By order dated June 11, 2001, the GPSC set rates for loop conditioning at zero for a

Georgia. BellSouth provides nondiscriminatory access to xDSL-capable loops in Georgia, as demonstrated by its performance across all five of the relevant categories. BellSouth returns loop makeup information to CLECs in substantially the same time and manner as it is available to BellSouth's personnel. *See Stacy Aff.* ¶¶ 227-28, 231-32. Between May and July, BellSouth returned electronic loop makeup information within five minutes for 100% of such requests. *See Varner Ga. Aff.* ¶ 165 (F.2.2.1). BellSouth additionally returned 98% (160 of 164) of manual requests within the established three-day benchmark during that same time frame. *See id.* ¶ 164 (F.2.1.1).

BellSouth also provisions CLEC xDSL-capable loop orders well within the seven-day benchmark established by the GPSC. *See id.* ¶ 193 (B.2.1.5, B.2.2). In absolute terms, the average order completion interval fell during each month from May through July. *See BellSouth Monthly State Summaries – Georgia, May-July 2001 (Varner Affs. Exhs. PM-2 to PM-4)*. Likewise, BellSouth met or exceeded the applicable parity standard for missed installation appointments in each of the past three months. *Varner Ga. Aff.* ¶ 197 (B.2.1.8.5).

BellSouth not only delivers xDSL-capable loops and related services in a timely manner but also provisions high-quality loops that present few technical problems. During the months of May to July 2001, only 5.1% of provisioned xDSL-capable loops experienced trouble within 30 days of their installation. *See BellSouth Monthly State Summaries – Georgia, May-July 2001 (B.2.19.5) (Varner Affs. Exhs. PM-2 to PM-4)*. During that same time period, more than 99% of CLEC xDSL-capable loops were trouble free. *See Varner Ga. Aff.* ¶ 203. And while BellSouth just missed the parity measure for Customer Trouble Report Rate for xDSL (B.3.2.5), the

period of 18 months. *See Latham Aff.* ¶ 25.

absolute percentage of troubles was so small as to be competitively insignificant. *See id.*; *Pennsylvania Order* ¶ 77; *Massachusetts Order* ¶ 122.

When CLECs did experience trouble on xDSL-capable loops, BellSouth handled the troubles in substantially less time than it handled the troubles for its retail units. In July, for example, BellSouth completed maintenance work for CLEC xDSL-capable loops in an average of 5.38 hours for dispatch (B.3.3.5.1) and 3.08 hours for non-dispatch (B.3.3.5.2) repair service. By way of comparison, BellSouth completed the analog retail maintenance work in an average of 62.47 hours for dispatch and 18.49 hours for non-dispatch repair service. *See BellSouth Monthly State Summaries – Georgia, July (Varner Affs. Exh. PM-4)*. BellSouth consistently made a greater percentage of repair appointments for CLECs than for its own retail customers (B.3.1.5), and provided superior quality repair service as CLECs suffered substantially fewer repeat troubles (B.3.4.5). *See Varner Ga. Aff.* ¶¶ 201, 206.

Louisiana. BellSouth also provides nondiscriminatory access to xDSL-capable loops in Louisiana. As in Georgia, BellSouth returns loop makeup information to Louisiana CLECs in substantially the same time and manner as that information is available to BellSouth's own personnel. Between May and July 2001, BellSouth returned electronic loop makeup information within five minutes for 100% of such requests. *See Varner La. Aff.* ¶ 179 (F.2.2.1). There was only one manual request for loop makeup information submitted between May and July. *See id.* ¶ 178.

BellSouth also provisions high-quality xDSL-capable loops to Louisiana CLECs in a timely manner. During each of the past three months, BellSouth satisfied CLEC xDSL-capable loop orders well within the seven-day benchmark established by the LPSC. *See Varner La. Aff.* ¶ 207 (B.2.1.5, B.2.2). Likewise, BellSouth met or exceeded the applicable parity standard for

missed installation appointments in each of the three months. *Id.* ¶ 211 (B.2.18.5). BellSouth xDSL-capable loops faced few technical problems once provisioned, as BellSouth met or exceeded the retail analog for troubles within 30 days of installation during each of the past three months. *Id.* ¶ 212 (B.2.19.5). During that same time period, more than 99% of CLEC xDSL-capable loops were trouble free. *See id.* ¶ 217. When CLECs did experience trouble on xDSL-capable loops, BellSouth provided timely and high-quality repair service. BellSouth missed fewer CLEC repair appointments (B.3.1.5), and it handled CLEC reported troubles in substantially less time than it handled the troubles for its retail analog units (B.3.3.5). *See id.* ¶¶ 215, 219. In light of this comprehensive evidence, there can be no doubt but that Louisiana CLECs have been provided a meaningful opportunity to compete in the advanced services market.

4. ISDN-BRI Loop Provisioning

BellSouth's performance in provisioning ISDN-BRI loops has also been excellent across each of the categories upon which this Commission has directed its attention. In both Georgia and Louisiana, BellSouth has met or exceeded the parity standard for ISDN-BRI loops for average order completion interval (B.2.1.6.3) during each of the past three months. *See Varner Ga. Aff.* ¶ 210; *Varner La. Aff.* ¶ 224. Likewise, BellSouth has consistently met a greater percentage of ISDN-BRI installation appointments for CLECs than it has for its own customers (B.2.18.6.1). *See Varner Ga. Aff.* ¶ 212; *Varner La. Aff.* ¶ 226. The customer trouble report rate has been significantly lower for Georgia CLECs than for BellSouth during each of the past three months (B.3.2.6), *see Varner Ga. Aff.* ¶ 215, and BellSouth has just missed the parity standard for two sub-metrics in Louisiana, *see Varner La. Aff.* ¶ 229. In each instance, however, more than 98% of CLEC ISDN-BRI loops were trouble free. *See id.* Moreover, when CLECs have

experienced troubles, BellSouth has provided timely and high-quality maintenance and repair services. In both Georgia and Louisiana, BellSouth has met or exceeded the parity standard for missed repair appointments (B.3.1.6), average maintenance duration (B.3.3.6), and percent repeat reports within thirty days (B.3.4.6) for every available sub-metric. See *Varner Ga. Aff.* ¶¶ 214, 216, 217; *Varner La. Aff.* ¶¶ 228, 230, 231.

5. Line Sharing

BellSouth has implemented line sharing in full compliance with the Commission's requirements, allowing CLECs to offer high-speed data service to BellSouth voice customers. Like SWBT, BellSouth developed its line-sharing product in a collaborative effort with CLECs and is continuing to work cooperatively with the CLECs on an ongoing basis to resolve issues as they arise. See *Williams Aff.* ¶ 7 (App. A, Tab W); see also *LPSC Staff Final Recommendation* at 84. BellSouth invited all interested CLECs to collaborative meetings beginning in January 2000, and at least 11 CLECs participated in these meetings. The participants agreed to form several working collaborative teams to develop processes and procedures for central-office-based line sharing, which were then implemented, tested, and improved. As a result of these efforts, BellSouth was able to implement commercial line sharing by this Commission's June 6, 2000 deadline. As of August 31, 2001, BellSouth had provisioned 824 line-sharing arrangements in Georgia, 418 line-sharing arrangements in Louisiana, and 3,856 such arrangements region-wide. See *Milner Aff.* ¶ 134.

BellSouth provides line sharing in accordance with the obligations set forth in the Commission's *Line Sharing Order* and *Line Sharing Reconsideration Order*. Specifically, line sharing is available to a single requesting carrier, on loops that carry BellSouth's plain old telephone service ("POTS"), so long as the xDSL technology deployed by the requesting carrier

does not interfere with the analog voice-band transmissions. *See Williams Aff.* ¶¶ 5-6. BellSouth allows line-sharing CLECs to deploy any version of xDSL that is presumed acceptable for shared-line deployment in accordance with Commission rules and will not significantly degrade analog voice service. *Id.* At the request of the data CLECs, BellSouth provides line splitters in both Georgia and Louisiana. *Id.* ¶ 18.

The pre-ordering, ordering, provisioning, and maintenance and repair processes for the line-sharing product are very similar to the processes for xDSL-capable loops. *Id.* ¶¶ 21-28. For loop makeup information, the process is the same whether the CLEC wishes to obtain an xDSL-capable loop, or the high-frequency portion of the loop. *Id.* ¶ 21.

BellSouth provisions line sharing in a timely, accurate, and nondiscriminatory manner. *See Massachusetts Order* ¶ 165 (“a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates and repeat trouble report rates”).

Georgia. In Georgia, BellSouth has completed orders for line sharing arrangements in substantially the same time as for the retail analog. BellSouth has met or exceeded the parity standard for five of six relevant OCI sub-metrics over the past three months (B.2.1.7). *Varner Ga. Aff.* ¶ 195. BellSouth just missed the sixth sub-metric, and the minimal disparity is largely explained by the limited sample size. *See id.* BellSouth also has consistently met or exceeded the parity standard for missed installation appointments during each of the past three months, *see id.* ¶ 197, and CLECs have suffered a smaller percentage of provisioning troubles within 30 days, *see id.* ¶ 199. BellSouth has met substantially the same percentage of repair appointments for CLECs as for its retail customers. *See id.* ¶ 202. Because so few CLECs’ line-sharing

arrangements have required repair work, the limited sample size results in figures that understate BellSouth's record of high-quality maintenance service. *See id.* ¶ 207.

Louisiana. BellSouth also provides nondiscriminatory access to line-shared loops in Louisiana. BellSouth provisions line sharing arrangements in substantially the same time as it does for the retail analog, and BellSouth misses a smaller percentage of CLEC installation appointments. *See Varner La. Aff.* ¶¶ 209, 211. Likewise, BellSouth provisions high-quality loops, meeting the parity standard for three of four sub-metrics for provisioning troubles. *See id.* ¶ 213. In those instances where BellSouth has missed the parity standard, the limited sample size is largely responsible for skewing the record of high quality provisioning and maintenance services that BellSouth has demonstrated across loop types.

6. Line Splitting

BellSouth facilitates CLEC efforts to engage in line splitting in full compliance with the Commission's instructions. *Williams Aff.* ¶ 35. Specifically, BellSouth facilitates line splitting by cross-connecting an unbundled loop to a CLEC's collocation space. *Id.* ¶ 39. Once the CLEC has separated the voice from the data service, and sent the latter onto the packet switched network, BellSouth will cross-connect the voice signal back to the BellSouth circuit switch. In other words, BellSouth offers the same arrangement to CLECs as that described by the Commission in the *Texas Order* and the *Line Sharing Reconsideration Order*. *See Ga. SGAT* § II.B.9.b; *La. SGAT* § II.A.9.b. BellSouth's current offerings meet all Commission requirements for line splitting. *Texas Order* ¶¶ 323-329.

E. Checklist Item 5: Unbundled Local Transport

In compliance with the Act, BellSouth provides "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C.

EXHIBIT J

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

In the Matter of)
Review of the Section 251 Unbundling)
Obligations of Incumbent Local Exchange) CC Docket No. 01-338
Carriers)
Implementation of the Local Competition)
Provisions of the Telecommunications Act of) CC Docket No. 96-98
1996)
Deployment of Wireline Services Offering) CC Docket No. 98-147
Advanced Telecommunications Capability)

REPORT AND ORDER AND ORDER ON REMAND
AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 20, 2003

Released: August 21, 2003

Comment Date: 30 days after Federal Register publication of this Notice

Comment Reply Date: 60 days after Federal Register publication of this Notice

By the Commission: Chairman Powell and Commissioner Abernathy approving in part,
dissenting in part and issuing separate statements; Commissioners Copps and Adelstein
approving in part, concurring in part, dissenting in part and issuing separate statements;
Commissioner Martin issuing a separate statement.

Para.

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requires BOCs to provide access to loops, switching, transport, and signaling regardless of impairment under section 251.¹⁹⁷⁸ Z-Tel further argues that competitors are entitled to access to loops, switching, transport, and signaling at TELRIC rates, even if the Commission were to remove these items from the list of UNEs under section 251.¹⁹⁷⁹ For the reasons outlined below, we reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates.

2. Discussion

653. *Independent Access Obligation.* For reasons set forth below, we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

654. First, the plain language and the structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271. Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3).¹⁹⁸⁰ Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling,¹⁹⁸¹ without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2.¹⁹⁸² Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and word of a statute.¹⁹⁸³ Verizon asserts that an interpretation of the Act that recognizes the independence of sections 271

(Continued from previous page) _____

related argument that BOCs that offer access to delisted checklist items pursuant to section 271 alone are under no obligation to combine the elements for requesting carriers. Verizon Reply at 59.

¹⁹⁷⁸ ALTS *et al.* Comments at 117-18; NuVox *et al.* Comments at 115-16; CompTel Comments at 20; UNE-P Coalition Comments at 17; Z-Tel Comments at 4-15.

¹⁹⁷⁹ Z-Tel Comments at 7; *see also* UNE-P Coalition Reply at 37 (noting that the "Coalition agrees with Z-Tel . . .").

¹⁹⁸⁰ *See* 47 U.S.C. § 271(c)(2)(B)(ii).

¹⁹⁸¹ *See* 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x).

¹⁹⁸² *Bates v. U.S.*, 522 U.S. 23, 29-30 (1997) (stating that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). As such, our decision is entitled to deference because the interpretation involves matters about which the Act is silent. *Chevron*, 467 U.S. at 843.

¹⁹⁸³ *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

EXHIBIT K

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

In the Matters of)	
)	
Petition for Forbearance of the Verizon Telephone)	
Companies Pursuant to)	WC Docket No. 01-338
47 U.S.C. § 160(c))	
)	
SBC Communications Inc.'s Petition for)	WC Docket No. 03-235
Forbearance Under 47 U.S.C. § 160(c))	
)	
Qwest Communications International Inc. Petition)	WC Docket No. 03-260
for Forbearance Under)	
47 U.S.C. § 160(c))	
)	
BellSouth Telecommunications, Inc.)	WC Docket No. 04-48
Petition for Forbearance Under)	
47 U.S.C. § 160(c))	

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 2004

Released: October 27, 2004

By the Commission: Chairman Powell, Commissioners Abernathy, and Martin issuing separate statements; Commission Adelstein concurring in part, dissenting in part and issuing a statement; Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. 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).¹ We therefore grant the Verizon Petition² and BellSouth Petition,³ and grant in part the SBC Petition⁴ and Qwest Petition.⁵

¹These elements are defined in our *Triennial Review Order*, *Triennial Review MDU Reconsideration Order*, and *Triennial Review FTTC Reconsideration Order*. See *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, 98-147, Report and Order and Order on Remand and Further Notice of (continued....)

2. In its petition, Verizon requests that the Commission forbear from applying the independent section 271 unbundling obligations enumerated in the *Triennial Review* proceeding to the broadband elements the Commission removed from unbundling under section 251.⁶ BellSouth seeks “the same relief requested by Verizon in its Petition for Forbearance.”⁷ The SBC and Qwest petitions request broader relief, essentially asking the Commission to forbear from applying the independent access obligations of section 271 to all network elements that the Commission determined need not be unbundled under section 251.

II. BACKGROUND

3. *Statutory Requirements.* The Telecommunications Act of 1996⁸ requires that incumbent local exchange carriers (incumbent LECs) provide unbundled network elements (UNEs) to other

(Continued from previous page)

Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), 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*); Order on Reconsideration, FCC 04-191 (rel. Aug. 9, 2004) (*Triennial Review MDU Reconsideration Order*); Order on Reconsideration, FCC 04-248 (rel. Oct. 18, 2004) (*Triennial Review FTTC Reconsideration Order*). In response to the D.C. Circuit’s vacatur of certain *Triennial Review Order* unbundling rules, the Commission issued an *Interim Order and NPRM*, setting forth a six-month interim unbundling framework with respect to those network elements, and seeking comment on permanent unbundling rules that would respond to the *USTA II* decision. *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) (*Interim Order and NPRM*).

²See Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Michael Powell, Chairman, and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, FCC, CC Docket No. 01-338 (filed Oct. 24, 2003) (Verizon Oct. 24 *Ex Parte* Letter or Verizon Revised Petition); *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, Public Notice, 18 FCC Rcd 22795 (2003) (subsequent history omitted) (Verizon Revised Petition Public Notice).

³*BellSouth Telecommunications, Inc. Petition for Forbearance*, WC Docket No. 04-48 (filed Mar. 1, 2004) (BellSouth Petition).

⁴*SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (filed Nov. 6, 2003) (SBC Petition).

⁵*Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260 (filed Dec. 18, 2003) (Qwest Petition).

⁶Although Verizon’s Petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under section 251(c). See Verizon Revised Petition; Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-337, 01-338, 02-33, 02-52, Attach. at 1-8 (filed Mar. 26, 2004) (Verizon Mar. 26 *Ex Parte* Letter).

⁷BellSouth Petition at 1.

⁸Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these Acts collectively as the “1996 Act” or the “Act.”

telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide to requesting telecommunications carriers “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with ... the requirements of this section and section 252.”⁹ Section 251(d)(2) of the Act describes two standards that the Commission should use in determining which network elements must be made available to requesting telecommunications carriers.¹⁰ For network elements that are not proprietary in nature, section 251(d)(2)(B) requires the Commission to determine “at a minimum, whether ... the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”¹¹ The Commission has determined that most network elements (including the elements at issue) are nonproprietary in nature, and are thus governed by the section 251(d)(2)(B) “impair” standard.

4. Section 271 establishes both the procedures by which a BOC may apply to provide interLATA services in its in-region states and the substantive standards by which that application must be judged. In particular, section 271(c)(2)(B) of the Act requires the BOCs to satisfy a fourteen point “competitive checklist” of access and interconnection requirements demonstrating that the local market is open to competition before they are permitted to provide in-region, interLATA services.¹² The section 251(c) obligations are referenced and incorporated as obligations of the BOCs under checklist item number two.¹³ Four of the other checklist items require BOCs to provide competitors with “unbundled” access to specific network elements.¹⁴ Specifically, item four of the competitive checklist requires the BOCs to provide competitive providers with access to local loop transmission from the central office to the customer’s premises.¹⁵ Item five requires the BOCs to provide access to local transport from the trunk side of a wireline local exchange carrier switch.¹⁶ Item six requires the BOCs to provide access to local switching¹⁷ and item ten requires the BOCs to provide nondiscriminatory access to databases and associated signaling.¹⁸

5. *Triennial Review Proceeding.* The Commission last year released the *Triennial Review Order*,¹⁹ which reexamined the issues presented in implementing the unbundling requirements of section 251 of the Act. The Commission redefined the “impair” standard governing which nonproprietary network

⁹47 U.S.C. § 251(c)(3).

¹⁰47 U.S.C. § 251(d)(2).

¹¹47 U.S.C. § 251(d)(2)(B).

¹²47 U.S.C. § 271(c)(2)(B).

¹³47 U.S.C. § 271(c)(2)(B)(ii).

¹⁴47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x).

¹⁵47 U.S.C. § 271(c)(2)(B)(iv).

¹⁶47 U.S.C. § 271(c)(2)(B)(v).

¹⁷47 U.S.C. § 271(c)(2)(B)(vi).

¹⁸47 U.S.C. § 271(c)(2)(B)(x).

¹⁹See generally *Triennial Review Order*, 18 FCC Rcd 16978.

elements the incumbent LECs should be required to unbundle under section 251(c)(3).²⁰ The Commission concluded that a requesting telecommunications carrier is impaired when lack of access to an incumbent LEC network element poses barriers to entry, including operational and economic barriers that are likely to make entry into a market uneconomic.²¹ In considering whether the sum of the barriers to entry was likely to make entry uneconomic, the Commission made clear that it is necessary to take into account any countervailing advantages that a requesting carrier may have.²² With regard to loops, transport, switching and signaling/databases, the Commission, while limiting access to certain aspects of the elements, did find varying degrees of impairment and continued to require some unbundling of all of the elements at issue.²³

6. The Commission distinguished new fiber networks used to provide broadband services for the purposes of its unbundling analysis. Specifically, the Commission determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including FTTH loops in greenfield situations, broadband services over FTTH loops in overbuild situations, the packetized portion of hybrid loops, and packet switching.²⁴ The Commission based its determinations with regard to these

²⁰*Triennial Review Order*, 18 FCC Rcd at 17021-85, paras. 61-169, corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19020, paras. 5-6.

²¹*Triennial Review Order*, 18 FCC Rcd at 17035, para. 84.

²²*Id.*

²³Regarding loops for mass market customers, the Commission held that incumbent LECs are required to offer unbundled access to stand-alone copper loops, line splitting and subloops for the provision of narrowband and broadband services. *Triennial Review Order*, 18 FCC Rcd at 17128-32, paras. 248-54, corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19020-21, paras. 9-10. The Commission also required incumbent LECs to offer unbundled access to hybrid/copper loops for narrowband services. *Id.* at 17153-54, paras. 296-97. For enterprise customer loops, the Commission required incumbent LECs to offer unbundled access to dark fiber loops, DS3 loops and DS1 loops subject to more granular reviews by the state commissions. *Id.* at 17155-83, paras. 298-342, corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19021, paras. 12-13. The Commission further ruled that incumbent LECs must provide unbundled access to dark fiber, DS3 and DS1 dedicated transport subject to more granular reviews by state commissions. *Id.* at 17199-237, paras. 359-418, corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19021, para. 15. With regard to switching for mass market customers, the Commission found that competing carriers are impaired without unbundled incumbent LEC local circuit switching because of barriers associated with the incumbent LEC hot cut process. *Id.* at 17265-85, paras. 464-85, corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19021, paras. 17-18. The Commission therefore asked the state commissions to approve loop cut-over processes that accommodate high volume cut-overs, or make detailed findings demonstrating that such a process is not necessary. *Id.* at 17286-90, paras. 487-92. The state commissions were also asked to determine whether there is any other impairment in a particular market and whether such impairment can be cured by requiring unbundled switching on a rolling basis, rather than making unbundled switching available for an indefinite period of time. *Id.* at 17310-12, paras. 521-24. The Commission determined that both unbundled signaling and call-related databases must be unbundled for competitive carriers that are purchasing the incumbent LEC's local circuit switching. *Id.* at 17323-34, paras. 542-60.

²⁴For FTTH loops, the Commission relieved incumbent LECs from unbundling FTTH loops in greenfield situations. In overbuild circumstances, the Commission required incumbent LECs to either keep the existing copper loop for competitive use, or provide unbundled access to a 64 kbps transmission path. However, incumbent LECs are relieved from any requirement to unbundle broadband services over overbuild FTTH loops. *Id.* at 17142-45, paras. 273-77. As discussed below, the Commission extended the FTTH unbundling relief initially to FTTH loops serving predominantly residential MDUs, and then to FTTC loop facilities, as well. See *infra* nn. 27-28 and accompanying text. The Commission also relieved incumbent LECs from the requirement to unbundle the next generation, (continued....)

elements on the impairment standard and the requirement of section 706 of the 1996 Act to provide incentives for all carriers, including the incumbent LECs, to invest in broadband facilities.²⁵ The Commission concluded that although it was relying on its impairment standard in determining whether these elements should be subject to unbundling, it had discretion under its section 251(d)(2) “at a minimum” authority to consider other factors.²⁶ Accordingly, the Commission considered the statutory goals outlined in section 706 in concluding that those broadband elements would not be subject to unbundling nationwide. In the *Triennial Review MDU Reconsideration Order*, the Commission determined that these same section 706 considerations justified extending the *Triennial Review Order*’s FTTH unbundling relief to encompass FTTH loops serving predominantly residential multiple dwelling units (MDUs).²⁷ 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.²⁸

7. The Commission also considered the relationship between sections 251 and 271 of the Act. Specifically, the Commission considered the relationship between checklist item two (which references section 251) and checklist items four through six and ten (which do not). The Commission concluded that checklist items four through six and ten constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements that does not necessarily hinge on whether those elements are included among those subject to section 251(c)(3)’s unbundling requirements.²⁹ Accordingly, the Commission stated that even if it concluded that requesting telecommunications carriers are not “impaired” without access to one of those elements under section 251, section 271 would still require the BOC to provide access.³⁰ However, under that circumstance, the pricing standard would not be determined under section 252(d)(1), but would be governed by the “just and reasonable” standard established under sections 201 and 202.³¹

8. The United States Court of the Appeals for the District of Columbia Circuit recently reviewed the Commission’s conclusions in the *Triennial Review Order*.³² Although the court vacated and remanded many of the Commission’s impairment findings, including those relating to mass market

(Continued from previous page) _____
packetized capabilities of their hybrid loops for the provision of broadband services to the mass market. *Id.* at 17149-53, paras. 288-95. Finally, the Commission found that competitive LECs were not impaired without unbundled access to packet switching, and declined to require the incumbent LECs to unbundle such facilities. *Id.* at 17321-23, paras. 537-41, corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19022, para. 26.

²⁵*Triennial Review Order*, 18 FCC Rcd at 17125-27; paras. 242-44.

²⁶*Id.* at 17121, para. 234.

²⁷*Triennial Review MDU Reconsideration Order*, paras. 7-9.

²⁸*Triennial Review FTTC Reconsideration Order*, paras. 9-19.

²⁹*Triennial Review Order*, 18 FCC Rcd at 17382-91, paras. 649-67, corrected by *Triennial Review Errata*, 19 FCC Rcd at 19022, paras. 30-33.

³⁰*Id.* at 17384, para. 653.

³¹*Id.* at 17386-89, paras 656-64, corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19022, paras. 32-33.

³²See generally *USTA II*, 359 F.3d 554.

switching and local transport, the court affirmed the Commission's decisions to relieve incumbent LECs from broadband unbundling obligations.³³ The court also affirmed the Commission's conclusions related to the section 271 obligations.³⁴

9. *Petitions for Forbearance.* During the pendency of the *Triennial Review* proceeding described above, Verizon filed a petition requesting that the Commission forbear from applying items four through six and ten of the section 271 checklist once the corresponding elements no longer need to be unbundled under section 251(d)(2).³⁵ Immediately prior to the Commission's statutory deadline to rule on its petition, Verizon submitted a letter requesting that the Commission limit the pending forbearance petition to the broadband elements that the Commission found on a national basis in the *Triennial Review* proceeding do not have to be unbundled under section 251.³⁶ The Commission denied that petition,³⁷ and Verizon sought judicial review of the Commission's order. In an opinion released in July 2004, the Court of Appeals for the D.C. Circuit found that the Commission had failed adequately to explain its decision not to grant Verizon's original petition, and remanded the matter to the Commission.³⁸

10. BellSouth, SBC and Qwest then filed petitions seeking similar relief to that sought by Verizon. While BellSouth seeks forbearance from the same broadband elements as sought by Verizon,³⁹ SBC and Qwest request forbearance from the section 271 independent access obligation for all elements—both narrowband and broadband—that are not required to be unbundled under section 251(d)(2).⁴⁰ SBC and Qwest argue that once an element no longer meets the section 251(d)(2) standard for unbundling, forbearance with respect to the parallel checklist item is required by section 10.⁴¹ SBC and Qwest further maintain that the rationale for forbearance is especially persuasive with regard to the broadband elements the Commission relieved from unbundling in the *Triennial Review* proceeding.⁴²

11. *Forbearance Standard.* The goal of the Telecommunications Act of 1996 is to establish "a pro-competitive, de-regulatory national policy framework."⁴³ An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any

³³*Id.* at 578-85.

³⁴*Id.* at 588-90.

³⁵*Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 (filed July 29, 2002).

³⁶Verizon Revised Petition.

³⁷Verizon Revised Petition Public Notice.

³⁸*Verizon Telephone Companies v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004).

³⁹BellSouth Petition at 1.

⁴⁰SBC Petition at 4-8; Qwest Petition at 3-14.

⁴¹SBC Petition at 5-6; Qwest Petition at 11-13.

⁴²SBC Petition at 8-14; Qwest Petition at 14-15.

⁴³Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations.⁴⁴ Specifically, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁴⁵ In making such determinations, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."⁴⁶

III. DISCUSSION

12. 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. As required by section 10, we forbear from applying the section 271 access obligations to those broadband elements to the same extent that the Commission relieved those elements from unbundling under section 251(c)(3) in the *Triennial Review* proceeding.⁴⁷ In arriving at this determination, we find that the checklist portion of section 271 has been "fully implemented" in all states, and that the three-pronged forbearance test has been met with respect to these broadband elements. With regard to SBC's and Qwest's broader forbearance requests, we decline to address those issues in this Order.⁴⁸

A. "Fully Implemented"

13. As a threshold matter, we must consider whether section 10(d) prohibits the forbearance sought by the BOCs in this proceeding. As stated above, section 10(d) prohibits the Commission from forbearing from the requirements of section 271 until it determines that those requirements have been "fully implemented."⁴⁹ In our recent order denying Verizon's forbearance petition from the separate operating, installation, and maintenance functions of section 272 (*OI&M Order*),⁵⁰ the Commission

⁴⁴47 U.S.C. § 160(a).

⁴⁵47 U.S.C. § 160.

⁴⁶47 U.S.C. § 160(d).

⁴⁷The forbearance relief granted in this Order in no way modifies the obligations of the BOCs under section 251(c) to continue to provide access to UNEs as specified in the *Triennial Review Order*. For example, in the *Interim Order and NPRM*, the Commission established six-month, interim unbundling rules. *Interim Order and NPRM*, paras. 18-29.

⁴⁸We note that the one-year statutory period for considering these requests runs to November 5, 2004 with respect to SBC, and December 17, 2004 with respect to Qwest.

⁴⁹47 U.S.C. § 160(d).

⁵⁰See *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, Memorandum Opinion (continued....)

concluded that the section 272 separate affiliate requirements, which are referenced in section 271(d), are not “fully implemented” until three years after a BOC has obtained section 271 authority to provide interLATA services in a particular state.⁵¹ In arriving at that conclusion, the Commission noted that section 272 specifically requires that the BOCs maintain the separate affiliate structure for at least three years after grant of a section 271 application in a particular state.⁵²

14. AT&T argues that the *OI&M Order* prohibits the Commission from finding that section 271 is fully implemented until a minimum of three years after long distance authority has been granted in a particular state.⁵³ Other commenters have argued that the Commission should adopt a market-based test and only find section 271 “fully implemented” when markets are deemed competitive.⁵⁴ The BOCs counter that the checklist of section 271 has already been determined to be “fully implemented” because the BOCs have received section 271 authority in all of their states.⁵⁵

15. We find that the checklist portion of section 271(c) is “fully implemented” once section 271 authority is obtained in a particular state. Accordingly, because the BOCs have obtained section 271 authority in all of their states, we find that the checklist requirements of section 271(c) are “fully implemented” for purposes of section 10(d) throughout the United States.

16. This interpretation is the most reasonable reading of the statute. Once the checklist requirements have been met and the BOC is granted authority to provide interLATA services under section 271(d), there is nothing further the Commission or the BOC needs to do in order to implement the checklist. Certainly, the Commission continues to have enforcement authority under section 271(d)(6), but this assumes that the checklist has been implemented and that the BOC has received section 271 authority in a given state. This determination is consistent with the language in section 271(d)(3)(A)(i) stating that a BOC has met the requirements of section 271(c)(1) if among other obligations it has “fully implemented” the competitive checklist.⁵⁶ It is the most logical interpretation that the words “fully implemented” would have the same meaning when used in section 271, as when referring to section 10(d)’s requirement that section 271 be “fully implemented” prior to forbearance.

17. Accordingly, we reject suggestions by commenters that section 271(c)(1)(B) is only “fully implemented” once a certain competitive threshold in the market has been met. By interpreting the “fully implemented” language to include competitive thresholds, we would be creating inquiries redundant with those forbearance requirements, since section 10(b) of the Act already requires the Commission to

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and Order, 18 FCC Rcd 23525 (2003) (*OI&M Order*).

⁵¹*OI&M Order*, 18 FCC Rcd at 23530, para. 7. The Commission also initiated a rulemaking regarding the “operate independently” requirement of section 272. See Section 272(b)(1)’s “Operate Independently” Requirement for Section 272 Affiliates, WC Docket No. 03-228, Notice of Proposed Rulemaking, 18 FCC Rcd 23538 (2003).

⁵²*OI&M Order*, 18 FCC Rcd at 23529-30, para. 6.

⁵³See, e.g., AT&T Comments at 11 (Verizon Petition).

⁵⁴See, e.g., MCI Comments at 18 (Verizon Petition); PACE Coalition Comments at 5 (Verizon Petition); Sprint Comments at 8-9 (Verizon Petition); Covad Comments at 6 (Verizon Petition).

⁵⁵Verizon Reply at 26-29; SBC Petition at 8; Qwest Petition at 17-18.

⁵⁶See 47 U.S.C. § 271(d)(3)(A)(i).

consider the competitive market conditions, including whether a grant of forbearance will enhance competition in making its determination.⁵⁷ Instead, we believe section 10(d) is reasonably interpreted as a threshold standard, limiting the Commission from granting forbearance until it has determined that the BOC satisfies the section 271(c) competitive checklist.

18. Our finding in the *OI&M Order* regarding application of section 10(d) to section 272 in no way prevents us from reaching this conclusion. Indeed, the Commission specifically stated in the *OI&M Order* that its determination with regard to section 272 does not address whether any other part of section 271, such as the section 271(c) competitive checklist, is “fully implemented.”⁵⁸ The “fully implemented” language of section 10(d) must be read in light of the particular requirements at issue, and section 272 requirements are distinct from the other requirements of section 271: the separate affiliate obligations of section 272 continue for at least a three-year period after the BOC is authorized to provide interLATA telecommunications services under section 271(d), while the section 271(c) competitive checklist lacks any such statutorily mandated timeframe. Accordingly, we conclude that the “fully implemented” standard that we have applied to section 272 should not be applied to the checklist obligation of section 271(c).

B. Forbearance from Section 271 Independent Access Obligations for Broadband Elements

19. 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. Therefore, as required by section 10, we forbear from applying the section 271 access obligations to those broadband elements to the same extent that the Commission relieved those elements from unbundling under section 251(c)(3).

20. We apply our section 10 analysis in light of the Act’s overall goals of promoting local competition and encouraging broadband deployment.⁵⁹ Indeed, the Commission previously has considered “the statutory language, the framework of the 1996 Act, its legislative history, and Congress’ policy objectives,” and concluded that the Act “directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services.”⁶⁰ The analysis below is informed by that congressional direction, and we believe that our conclusions are faithful to Congress’s intent.

⁵⁷47 U.S.C. § 160(b).

⁵⁸*OI&M Order*, 18 FCC Rcd at 23529-30, para. 6.

⁵⁹Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996) (1996 Act Preamble); Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (Section 706).

⁶⁰*Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24047, para. 77 (1998) (*Advanced Services Order and NPRM*) (subsequent history omitted) (discussing the relationship between section 10 and section 706).

1. Just and Reasonable Charges and Practices

21. Section 10(a)(1) requires that we determine whether applying the independent section 271 unbundling obligation to the broadband elements of the BOCs is necessary to ensure that the “charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory.”⁶¹ Although in other forbearance orders, the Commission placed emphasis on the wholesale aspect of the 10(a)(1) prong,⁶² we find that, under the particular circumstances relevant to the instant analysis, it is appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market. Specifically, the developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities, leads us to conclude that the contribution of section 271 unbundling requirements to ensuring just and reasonable charges and practices is relatively modest—particularly at the retail level—and outweighed by the greater competitive pressure that would be brought to bear on all providers if the section 271 unbundling requirements were lifted.⁶³ We are mindful of the disincentive effects of unbundling on BOC investment, and believe that the beneficial effect of unbundling is small given the particular characteristics of this retail market. Accordingly, our section 10(a)(1) analysis considers the effects of forbearance from section 271’s broadband unbundling requirements on the BOCs’ rates and practices, considering the overall state of competition in the developing broadband market and the investment disincentives associated with unbundling obligations. For the following reasons, we agree with the BOCs’ petitions that their relative position in the emerging broadband market would not lead to unreasonable or discriminatory practices in the absence of a section 271 obligation to unbundle their broadband facilities.⁶⁴

22. The broadband market is still an emerging and changing market, where, as the Commission previously has concluded, the preconditions for monopoly are not present.⁶⁵ In particular, actual and

⁶¹47 U.S.C. § 160(a)(1).

⁶²See, e.g., *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27009-13, paras. 17-22 (2002).

⁶³Cf. *Application of WorldCom, Inc., and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18065-68, paras. 67-71 (*WorldCom/MCI Order*) (finding loss of wholesale market of concern only to the extent that it had negative effects in the retail market).

⁶⁴See Verizon Reply at 7-9; BellSouth Petition at 7; SBC Petition at 13-14; Qwest Petition at 15-16.

⁶⁵See, e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2423-24, para. 48 (1999) (“The preconditions for monopoly appear absent . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio.”); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Third Report, 17 FCC Rcd 2844, paras. 79-88 (2002) (*Section 706 Third Report*) (describing development of intermodal competition in broadband market); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22747-48, para. 5 (2001) (“[T]he one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services.”); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Third Report and Order (continued....)

potential intermodal competition informs rational competitors' decisions concerning next-generation broadband technologies.⁶⁶ From the BOCs' perspective, cable providers play an especially significant role in the emerging broadband market. The Commission's most recent High Speed Services Report, as well as other data in the record of this proceeding, indicates that cable modem providers control a majority of all residential and small-business high-speed lines.⁶⁷ The record demonstrates that cable operators have had success in acquiring not only residential and small-business broadband customers, but increasingly large business customers as well.⁶⁸ Further, in the *Triennial Review Order*, the Commission observed that "[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for . . . wireline broadband service."⁶⁹ The Commission recognized in the *Triennial Review Order* the "important broadband potential of other

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and Memorandum Opinion and Order, 15 FCC Rcd 11857, 11864, 11865, paras. 17, 19 (2000) (noting with approval "a continuing increase in consumer broadband choices within and among the various delivery technologies," which indicates that "no group of firms or technology will likely be able to dominate the provision of broadband services"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9867, para. 116 (2000) (finding that cable operators, despite having a commanding share of the broadband market, face "significant actual and potential competition from . . . alternative broadband providers").

⁶⁶See generally *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (market share is imperfect measure of competitive constraints and must be examined in light of access to alternative supplies); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (stating, in discussing competition to cable systems, that "normally a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the availability of competition"); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3308, para. 68 (1995) ("market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities") (quoting *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Order, 6 FCC Rcd 5880, 5890, para. 51 (1991)).

⁶⁷Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2003* at Tables 3 & 4 (Dec. 2003) (*High-Speed Services Report Dec. 2003*); Verizon Mar. 26 *Ex Parte* Letter, Attach. at 1-8 (citing broadband market data through "the second half of 2003"); Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-337, 01-338, 02-33, 02-52 at 9 (filed May 3, 2004) (Verizon May 3 *Ex Parte* Letter) (same).

⁶⁸See Verizon Mar. 26 *Ex Parte* Letter at 24-25 & Attach. We note that AT&T argues that forbearance should not be granted because cable providers tend not to serve business customers, allowing the BOCs to retain monopoly power for those services. See Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 1-5 (filed May 12, 2004) (AT&T May 12 *Ex Parte* Letter). In response, Verizon cites evidence that cable providers are currently serving some small business customers and are increasingly offering services to such customers. Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed May 17, 2004) (Verizon May 17 *Ex Parte* Letter). However, the availability of intermodal competition specifically from cable operators is only part of our analysis. Because competitive LECs can still obtain access to network elements under section 251 to serve business customers, and because of actual and potential intermodal competition from other services, we find that forbearance from section 271 is warranted, notwithstanding that the evidence regarding cable competition for business customers is not as powerful as residential customers. See *infra* para. 26. We therefore reject AT&T's argument.

⁶⁹*Triennial Review Order*, 18 FCC Rcd at 17127, para. 246.

platforms and technologies, such as third generation wireless, satellite, and power lines.”⁷⁰ Ku-band satellite service and fixed wireless service are available to provide high-speed Internet access across large parts of the country, and the Commission has a pending proceeding addressing broadband over power lines and has also created a task force on wireless broadband.⁷¹ The record here likewise demonstrates the existence of numerous emerging broadband competitors.⁷²

23. We also note that, in the *USTA II* decision, the D.C. Circuit upheld the Commission’s findings in the *Triennial Review Order* that it was appropriate to relieve the BOCs from unbundling obligations on a national basis for the broadband elements at issue.⁷³ In affirming these findings, the court noted the presence of robust intermodal competition from cable operators and concluded that the Commission was correct to take into account the BOCs’ lesser penetration of the broadband market when compared with cable broadband providers.⁷⁴ The D.C. Circuit further agreed with the Commission that the emerging nature of the broadband market, along with the availability of alternative loop facilities,⁷⁵ mitigated any potential harm from removing access to these facilities.⁷⁶

24. Given the importance of competition in ensuring just, reasonable, and nondiscriminatory charges and practices for broadband services, we also weigh the value of the BOCs’ own competitive role in the emerging broadband market as part of our overall section 10(a)(1) analysis.⁷⁷ As the Commission previously has found in the context of its section 10(a)(1) analysis, “competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory.”⁷⁸ The section 271 unbundled access obligations for broadband have the effect of discouraging BOC investment in this emerging market, diminishing their potential effectiveness as competitors today and in the future, to the detriment of the goals of section 10(a)(1). We

⁷⁰*Id.* at 17136, para. 263.

⁷¹*Section 706 Third Report*, 17 FCC Rcd at 2875, 2877, paras. 72, 78; *Carrier Current Systems, including Broadband Over Power Line Systems*, ET Docket Nos. 03-104, 04-37, Notice of Proposed Rulemaking, 19 FCC Rcd 3335 (2004); *FCC Chairman Michael K. Powell Announces Formation of Wireless Broadband Access Task Force* (rel. May 5, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246852A1.pdf.

⁷²*See, e.g.*, Verizon Mar. 26 *Ex Parte* Letter, Attach. (describing existing and potential competition from cable modem providers, power lines, fixed wireless, 3G mobile wireless, and satellite).

⁷³*See USTA II*, 359 F.3d at 578-85.

⁷⁴*Id.* at 582.

⁷⁵In the *Triennial Review Order*, the Commission found that competitive LECs could deploy FTTH loops, had widely deployed their own packet switches, and continued to have access to other elements of the incumbent LECs’ network. *Triennial Review Order*, 18 FCC Rcd at 17143, 17151, 17321-22, paras. 275, 291, 538.

⁷⁶*USTA II*, 359 F.3d at 581-82.

⁷⁷In addition, the investment disincentives associated with broadband unbundling obligations also are a factor in our more general analysis of consumer protection, as discussed below. *See infra* para. 32.

⁷⁸*Petition of US WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, *Petition of US WEST Communications, Inc., for Forbearance*, CC Docket No. 97-172, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999).

recognized when we relieved the incumbent LECs from unbundling obligations under section 251(c) that the elements used to provide access to next-generation networks are more recently developed technologies, and generally represent upgrades to incumbent LECs' loop plant.⁷⁹ Indeed, by granting relief from the similar broadband unbundling obligations of section 251, the Commission's intention was to encourage the deployment of new fiber technologies by incumbent LECs and their competitors alike, and increase the broadband services being offered to consumers in the near future.⁸⁰

25. We conclude that investment disincentives also arise from section 271 unbundled access requirements. Those disincentives are attributable to not only the prospect that regulated unbundling will diminish the compensation BOCs receive from users of their broadband facilities, but also the costs of constructing BOC broadband facilities in a fashion that will allow the BOC to satisfy whatever access requirements might foreseeably be imposed under section 271, as well as the significant costs that can be associated with regulatory proceedings themselves.⁸¹ In light of the competitive benefit of the BOCs' continued investment in fiber-based broadband facilities, the disincentives associated with regulated broadband unbundling under section 271 support our decision to grant forbearance from those requirements. We conclude that removing those disincentives will promote just and reasonable charges and practices through the operation of market forces.

26. With regard to the potential impact of forbearance specifically on the wholesale broadband market, as raised by certain competitive LEC commenters,⁸² the evidence currently before us, taken as a whole, leads us to conclude that competition from multiple sources and technologies in the retail broadband market, most notably from cable modem broadband providers, will pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business. Verizon plausibly claims that because the BOCs face intense intermodal competition, even in the absence of section 271 unbundling they will need to find ways to keep traffic "on-net," which we conclude would likely include the provision of wholesale offerings.⁸³ Although we acknowledge that the question is not entirely susceptible to resolution with evidentiary proof, and a degree of informed prediction is required, we conclude in light of the evidence before us that even if the BOCs were not required to provide competitors unbundled access to the broadband elements at issue under section 271, competitive LECs would still be able to access other network elements to compete in the broadband market or take

⁷⁹*Triennial Review Order*, 18 FCC Rcd at 17126, para. 243.

⁸⁰*Id.* at 17141, para. 272.

⁸¹*See Id.* at 17127, 17145, 17153, paras. 244, 278, 295. We note that, even if we were not correct about the disincentive effects of unbundling requirements under section 271, that would not necessarily suggest that forbearance is inappropriate under section 10(a). If section 271 did not discourage investment, the most obvious reason would be that competitive forces impose equivalent (or more severe) constraints on BOC pricing and offerings. In that situation, application of the section 10(a) criteria likely would lead to the same conclusion that forbearance is required.

⁸²*See, e.g.*, Sprint Comments at 14 (Verizon Petition); AT&T Comments at 21 (Verizon Petition); Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 9 (filed Mar. 3, 2004) (AT&T Mar. 3 *Ex Parte* Letter).

⁸³Verizon March 26 *Ex Parte* Letter at 15.

advantage of the opportunities presented by the developing market situation to build their own facilities or obtain access to facilities from other suppliers.⁸⁴

27. We also note that, where section 271 unbundling obligations discourage the BOCs from building next generation networks in the first place, competitive LECs derive no access benefit from those obligations. Competitive LECs cannot provide broadband services using a BOC network that is unable to support broadband services. Moreover, as discussed above, we take into account the effect that terminating wholesale access under section 271 would have on retail customers.⁸⁵ Given our analysis of the characteristics of the retail broadband market, coupled with the potential for section 271 unbundling obligations to deter the BOCs from becoming more vibrant broadband competitors (and thereby spurring other providers as well), we find that the requirements of section 10(a)(1) are satisfied here.⁸⁶

28. We reject the arguments of competitive LECs that a fully competitive wholesale market is a mandatory precursor to a finding that section 10(a)(1) is satisfied, regardless of the state of intermodal competition in the retail market and the effects on incumbent LEC investments.⁸⁷ Forbearance need not await the development of a fully competitive market when the section 10 criteria are otherwise satisfied.⁸⁸ Furthermore, the competitive LECs' reading of section 10 conflicts with the D.C. Circuit's

⁸⁴We note that our judgment here is based on our determination that because the broadband market is a developing market, we should not presume, nor do we have any evidence, that the BOCs will act in an unreasonable or unreasonably discriminatory manner without evidence of such actions. To the extent our predictions about the broadband market and the BOCs' actions are incorrect, carriers can file appropriate petitions with the Commission and, of course, the Commission has the option of reconsidering this forbearance ruling. *See CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998); *see also Petition of SBC Communications Inc. For Forbearance From Structural Separation Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request For Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19 n.66 (2004) (*International Directory Assistance Order*). For these reasons and the reasons given in the text, we reject the premise of AT&T's argument that granting the forbearance authority at issue here involves an impermissible "trade off" between short-term consumer harms and longer-term policy benefits." AT&T May 12, 2004 *Ex Parte* at 2. We conclude, instead, that market forces and regulatory safeguards will adequately protect against the short-term consumer harms AT&T hypothesizes in the absence of section 271 unbundling requirements for certain broadband elements.

⁸⁵*See WorldCom/MCI Order*, 13 FCC Rcd at 18065, para. 68.

⁸⁶This situation has parallels to the one the Commission recently addressed in the *International Directory Assistance Order*, in which the Commission concluded that because the BOCs would be new entrants into the international directory assistance market, and would face competition from interexchange carriers, they would be unable to impose unjust, unreasonable, or unjustly or unreasonably discriminatory charges or practices on other carriers. *See International Directory Assistance Order*, 19 FCC Rcd at 5221-23, paras. 15-19.

⁸⁷For instance AT&T argues that because the BOCs allegedly have monopolistic power in the broadband markets, forbearance from the access obligations of section 271 would permit them to either charge supracompetitive prices for wholesale access to their broadband facilities, or deny access altogether. *See, e.g., AT&T Mar. 3 Ex Parte Letter*; Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 1-5 (filed Apr. 15, 2004) (AT&T Apr. 15 *Ex Parte Letter*).

⁸⁸*See Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1467-68, 1470-72, paras. 138, 146-54 (1994) (concluding that market need not be "fully competitive" to permit forbearance under section 332(c)(1)(A) and describing constraints on anti-competitive practices by duopoly providers).

USTA II decision which held, in the section 251 context, that “the Commission cannot ignore intermodal alternatives” when evaluating wholesale unbundling obligations.⁸⁹ The D.C. Circuit likewise required a “confrontation of the issue [of investment disincentives] and some effort to make reasonable trade-offs” when considering unbundling pursuant to section 251.⁹⁰ We disagree with commenters who argue that the Commission is precluded under our forbearance authority from considering factors relating to unbundling policy pursuant to section 271 that we are required to consider pursuant to section 251. If section 10(a)(1) were read as the competitive LECs propose, no amount of intermodal retail competition or investment disincentives could ever warrant forbearance if there was not also a fully competitive wholesale market that would continue in the absence of unbundling.

29. Finally, and consistent with the foregoing analysis, we specifically reject the assertions of competitive carriers that forbearance should be denied because the BOCs either are not subject to competition with respect to their broadband offerings, or are constrained only by a duopolistic relationship with cable operators.⁹¹ Again, we refuse to take the static view suggested by some competitors of this dynamic broadband market, thus leveling the terms of competition, providing real competitive choice, and furthering the goal of ensuring just, reasonable and nondiscriminatory rates, terms and conditions for these services. As explained above, broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.

2. Protection of Consumers

30. Section 10(a)(2) of the forbearance analysis requires us to determine whether the independent section 271 access obligation for broadband elements is necessary to protect consumers.⁹² For reasons similar to those that persuade us that the independent section 271 unbundling obligation for the broadband elements is not necessary within the meaning of section 10(a)(1), we also determine that the obligation is not necessary for the protection of consumers. As we concluded above, the BOCs have limited competitive advantages with regard to the broadband elements, given their position with respect to cable modem providers and others in the emerging broadband market. BOCs are not even the largest

⁸⁹*USTA II*, 359 F.3d at 572-73.

⁹⁰*USTA v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (*USTA I*).

⁹¹See AT&T Mar. 3 *Ex Parte* Letter at 11-12; see also CLEC Coalition Comments at 6-7 (Verizon Petition). AT&T also incorrectly focuses on the existence of competition with respect to particular facilities, such as hybrid loops. AT&T Mar. 3 *Ex Parte* Letter at 9. We need not evaluate competition separately with respect to each type of facility in the BOCs' networks that can be used to offer broadband services when, as discussed above, there is both existing and potential competition in the emerging broadband market from a wide range of facilities and platforms (including incumbent LEC facilities that must be unbundled under section 251).

⁹²47 U.S.C. § 160(a)(2).

provider of broadband services to consumers—many more consumers receive broadband through cable modem services.⁹³

31. Therefore, as discussed above, we believe that forbearance from these requirements will provide an increased incentive for the BOCs to deploy broadband services and compete with cable providers, which will in turn increase competition and benefit consumers.⁹⁴ As the Commission stated in the *Triennial Review Order*, relieving the incumbent LECs from the section 251 unbundling requirements for broadband elements will benefit consumers “from this race to build next generation networks and the increased competition in the delivery of broadband services.”⁹⁵ The *USTA II* decision recently upheld the Commission’s approach, finding that the Commission lawfully may focus on future consumer benefits anticipated by its current policy decisions.⁹⁶ We believe that forbearance from the section 271 independent unbundling obligations for the broadband elements is consistent with these findings and will further this result.

32. Accordingly, we reject the arguments of competitive LECs that the section 271 independent access obligation is necessary under section 10(a)(2) to ensure that competitive LECs will also have the ability to provide broadband services, thereby offering consumers additional choices.⁹⁷ We believe this argument is faulty because in this context forbearance provides competitive carriers as well as BOCs with increased incentives to invest in the broadband market. As we concluded in the *Triennial Review Order*, removing unbundling obligations for broadband services will result in increased choices for consumers in two ways. First, once incumbent LECs are certain that their broadband networks will be free from unbundling requirements, we expect that they will expand their deployment of these networks, and provide increased choices to consumers.⁹⁸ Second, we expect that competitive LECs will seek “innovative network access options” to continue to provide broadband services to consumers and to compete with the incumbent LECs.⁹⁹

3. Public Interest

33. With respect to the third criterion for forbearance, we conclude that relieving the BOCs from the section 271(c) access obligation for the broadband elements is in the public interest. Section 10(b) directs the Commission to consider whether forbearance “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services,” and states that such a determination may be the basis for finding that forbearance is in the public interest and thus meets section 10(c).¹⁰⁰ As we concluded above, given that

⁹³*High Speed Services Report Dec. 2003* at Table 2.

⁹⁴See Verizon Petition at 7-10; SBC Petition at 8-10; Qwest Petition at 10-11.

⁹⁵*Triennial Review Order*, 18 FCC Rcd at 17141-42, para. 272.

⁹⁶*USTA II*, 359 F.3d at 581.

⁹⁷See, e.g., AT&T Comments at 23-25 (Verizon Petition); Sprint Comments at 15-17 (Verizon Petition).

⁹⁸*Triennial Review Order*, 18 FCC Rcd at 17141-42, para. 272.

⁹⁹*Id.*

¹⁰⁰47 U.S.C. § 160(b).

these broadband elements generally involve new network investment on the BOCs' part, and that the BOCs are subject to significant intermodal competition in providing broadband services, relieving the BOCs of unbundling obligations will encourage BOCs to further invest in, and deploy broadband technologies. In turn, we believe these investments will promote increased competition in the market for broadband services.

34. Our analysis of the public interest is informed by section 706 of the 1996 Act, which – as noted above – directs us to promote the timely and comprehensive deployment of broadband facilities. Moreover, we take note of the BOCs' arguments that the unbundling obligation of section 271 imposes a costly requirement of designing the broadband network to create access points for the various components.¹⁰¹ The Commission 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.¹⁰²

35. In making these determinations, we reject the arguments of certain competitive carriers that section 271(d)(4), which provides that “[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section,” precludes the relief the BOCs seek here.¹⁰³ Such a reading is inconsistent with the plain terms of the statute. As an initial matter, as we have found above, the competitive checklist of section 271 is “fully implemented” when a BOC receives authorization to provide interLATA service under section 271. Subsequent forbearance from the checklist cannot thus be considered to “limit or extend” its terms: the Commission applied the checklist when it completed its section 271 inquiry and may then exercise forbearance, consistent with its obligations under section 10. Indeed, the opposite reading would place entirely too much weight on section 271(d)(4), to the detriment of the clear statutory directive in section 10. Forbearance neither limits nor extends the terms of any statutory provision. Rather, the decision to forbear represents the conclusion that under the statute, we are prohibited from applying a particular provision at all to specific telecommunications carriers or services. Granting forbearance in this circumstance, therefore, would not alter the terms used in the checklist, but instead suspend their ongoing enforcement in a discrete set of circumstances. Had Congress intended the prohibition on “limit[ing] or extend[ing]” the checklist to bar forbearance as well, it would have addressed that specific statutory procedure in section 271(d)(4).¹⁰⁴

¹⁰¹ See, e.g., Verizon Petition at 9-10.

¹⁰² We disagree with MCI's argument that Verizon's offering competitive carriers access to transmission services as part of its Packet at the Remote Terminal Services (PARTS) proves that the unbundling difficulties that Verizon and the other BOCs present do not exist. MCI Comments at 13-14 (Verizon Petition). As Verizon explained in its reply comments, the PARTS service was designed to provide competitive LECs access to xDSL service over hybrid facilities and does not contemplate unbundling of full fiber networks. Verizon Reply at 13.

¹⁰³ See, e.g., AT&T Comments at 8 (Verizon Petition); Sprint Comments at 6-7 (Verizon Petition).

¹⁰⁴ See, e.g., *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (“[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotations and citations omitted).

36. The BOCs have therefore satisfied section 10(a)'s three-pronged test with regard to section 271(c)(2)(B)'s independent access obligations for the particular broadband elements at issue in this decision. Accordingly, we forbear from enforcing those requirements.

IV. CONCLUSION

37. Based on the foregoing discussion, we conclude that section 271(c)(1)(B) has been fully implemented for all of the BOCs in all of the states in which they are providing service. 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). Accordingly, we grant Verizon's and BellSouth's petitions for forbearance, and we grant in part the SBC and Qwest petitions.

V. EFFECTIVE DATE

38. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, October 22, 2004.¹⁰⁵ The time for appeal shall run from the release date of this order.¹⁰⁶

¹⁰⁵ See 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute), and 47 C.F.R. § 1.103(a).

¹⁰⁶ See 47 C.F.R. §§ 1.4 and 1.13.

VI. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), Verizon Telephone Companies' Revised Petition for Forbearance IS GRANTED.

40. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), SBC Communications Inc.'s Petition for Forbearance IS GRANTED to the extent described herein.

41. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), Qwest Communications International Inc.'s Petition for Forbearance IS GRANTED to the extent described herein.

42. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), BellSouth's Petition for Forbearance IS GRANTED.

43. IT IS FURTHER ORDERED that, pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. 160, and section 1.103(a), that the Commission's forbearance decision SHALL BE EFFECTIVE on October 22, 2004. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48

In my separate statement to the *Triennial Review Order* and in countless other statements during my seven years at the Commission, I have emphasized that “[b]roadband deployment is the most central communications policy objective of our day.” Today, we take another important step forward to realize this objective.

By removing 271 unbundling obligations for fiber-based technologies - and not copper based technologies such as line sharing - today’s decision holds great promise for consumers, the telecommunications sector and the American economy. The item eliminates barriers to companies that provide customers with an assortment of new services and applications including interactive educational content, improved telecommuting, life saving telemedicine applications, real-time two-way sign language conversations with people with disabilities, and enhanced video-on-demand services in competition with cable operators.

This Commission has a comprehensive approach to bringing faster broadband connections to consumers. Many have complained that the United States ranks 11th in the world. Today’s action represents an effort to close that gap. The networks we are considering in this item offer speeds of up to 100 Mbs and exist largely where no provider has undertaken the expense and risk of pulling fiber all the way to a home. And companies are responding to the Commission’s efforts to create a stable regulatory environment for new investment. For example, just this week Verizon announced its plans to double its fiber-to-the-premises (FTTP) deployment rate next year, bringing FTTP to 2 million additional locations. This represents a 566 percent increase over the number of existing FTTP subscribers. SBC has committed to serve 300,000 households with a FTTH network while BellSouth has deployed a deep fiber network to approximately 1 million homes. Other carriers are taking similar actions. And there are important ancillary benefits to this activity. It is estimated that Verizon’s efforts will generate between 3,000 and 5,000 new jobs. These are positive developments for consumers and our nation’s economy. All of these facts demonstrate that the Commission has a clear plan that has generated clear results.

My mission is to continue to stimulate investment in next generation architectures, apply a light hand and let entrepreneurs bring the future to the people. This item demonstrates that we are one step further along.

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48

In the Triennial Review Order and subsequent reconsideration orders, the Commission took the bold step of fencing off next-generation broadband facilities from unbundling obligations. This forbearance decision is an important component of that deregulatory policy, and it will help deliver the promise of broadband networks and IP-enabled services to Americans throughout all parts of the country.

The Commission declined to subject broadband facilities to unbundling obligations under section 251 to encourage greater investment in deep-fiber networks — investment that is massive in scope and carries no assurance of profit. While curtailing unbundling requirements undeniably creates challenges for wireline competitors, the Commission was rightly concerned that new broadband investment would be severely chilled if incumbents were required to share the fruits of their labors on terms and conditions set by regulators. Moreover, in a broadband marketplace where cable operators enjoy a significant lead over wireline incumbents, it is difficult to justify saddling the less-dominant platform — but not the market leader — with unbundling obligations.

Forbearance from unbundling obligations imposed under section 271 is necessary to ensure that the Commission's broadband relief has its intended effect. The Commission has determined that the costs of unbundling outweigh its benefits in the broadband context, and that determination warrants relief from unbundling irrespective of which statutory provision it arises under. While access obligations under section 271 have been argued to be less burdensome than those imposed under section 251 (because the TELRIC standard is inapplicable under section 271), unbundling in all events "spread[s] the disincentive to invest in innovation and create[s] complex issues of managing shared facilities." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

Notably, the Commission retains regulatory authority to ensure that consumers will be protected if robust broadband competition fails to live up to its potential. I do not expect such an outcome, but the Commission stands ready to act if a market failure occurs. In addition, this grant of forbearance is without prejudice to our ongoing proceeding regarding the *Computer Inquiry* nondiscrimination provisions, so the Commission will have a full opportunity to determine the extent to which those separate requirements remain necessary.

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order (WC Docket Nos. 01-338, 03-235, 03-260 & 04-48)

The mismatch between the Commission's broadband rhetoric and reality reaches new heights with today's decision. The reality is that the International Telecommunications Union reports that the United States is now *thirteenth* in the world in broadband penetration. This is a fall even from our sobering perch at eleven that the Commission reported just a few months ago. It's an ominous trend when we recall that just two-and-a-half years ago the Commission reported that the United States ranked number four in the world in broadband penetration.

While the country experiences broadband freefall, the Commission has embarked on a policy of closing off competitive access to last mile bottleneck facilities. In the *Triennial Review*, the majority restricted access to fiber-to-the-home loops. Last summer, the majority extended this exemption from competition to facilities serving "primarily residential" buildings, an action that clouded the line between mass market and small business customers. The result: millions of small businesses located in buildings where there are also residential units are shut off from the benefits of having competitive broadband options. Last week brought another onslaught when the majority insulated fiber-to-the-curb architectures from competition. This action further restricted broadband choice for residential consumers and further tightened the noose on small businesses seeking competitive broadband services.

Today, the majority pounds another nail into the coffin it is building for competition. In all prior decisions, the majority used Section 251 to restrict access to last mile facilities. But to ensure at least the possibility of access and the possibility of competition—even though it might be at higher prices—the Commission unanimously required continued access to these facilities under the less stringent requirements of Section 271. In *USTA II*, the D.C. Circuit upheld this approach. But in today's decision, the majority casts aside the court's holding and moves on to slash even the residual bare requirements of Section 271 access. As a result, there is now absolutely no obligation to provide competitive access to any broadband facilities—from fiber-to-the-home to fiber-to-the-curb to packetized functions of hybrid loops to packetized switching capabilities—at just and reasonable rates. The majority accomplishes this final feat using the Commission's Section 10 forbearance authority to shut off any obligation to provide fair access to last mile bottleneck facilities. In doing so, they replace their will for that of Congress, finding that competition is not required for just and reasonable charges or for the protection of consumers. They conclude that the public interest is served by retreating to a policy of non-competition and last mile monopoly control. I cannot support such conclusions nor the underlying analysis.

The majority attempts to assure us that today's action is part of an effort to promote local competition. They contend that in the broadband market preconditions for dominance are not present because promising technologies are flooding the marketplace. But broad rhetoric about the power of competition does not make it happen. And choosing to ignore the Commission's own data does not help the weak analytical structure on which this decision is built.

The facts are clear. This Commission's most recent report on high-speed services shows that the residential and small business market is a duopoly. Our data show that new satellite and wireless technologies—exciting though they are—together serve only 1.3 percent of this market. Broadband over powerline does not yet even register. Yet the majority chooses to ignore the Commission's statistics, preferring instead sweeping rhetoric about regulatory relief and broadband competition.

One problem here is that the majority gets so carried away with its vision of the country's telecom future that they act like it is already here, that competition is everywhere flourishing, and that intermodal competition is already ubiquitous reality. But their cheerful blindness to stubborn market reality actually pushes farther into the future the kind of competitive telecom world they say they want.

The lack of analysis in this proceeding—and in the Commission's approach to broadband generally—amounts to a regulatory policy of crossing our fingers and hoping competition will somehow magically burst forth. With the international economy increasingly dependent on broadband facilities, faith-based approaches to advanced telecommunications are insufficient. We cannot afford to wait. As *Business Week* recently made clear: "If the U.S. is not to lose out in the global race of the next-generation Internet and the new businesses it can spawn, change is needed. The country must create vigorous competition to drive the low prices and high speeds that can usher in a prosperous broadband economy." I agree. There may not be a "one-sized-fits-all" competition policy out there, but if we want to enter the brave new world of broadband, we need to move away from our current course. The facts show we are headed in the wrong direction at warp speed. I dissent.

**STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. Sec. 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. Sec. 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. Sec. 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. Sec. 160(c)

For the past year, I have called on the Commission to take quick action to clarify that the section 271 rules do not trump the regulatory relief we provided in our recent broadband decisions. I am pleased that today's action continues the commitment not to saddle next-generation broadband networks and facilities with unbundling obligations established for legacy networks. This decision should encourage the rapid deployment of new investment in the high-speed broadband networks and facilities that will provide American consumers with more 21st century advanced services.

I join my colleagues in support of today's decision to forbear from enforcing the requirements of section 271, with regard to all the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent broadband decisions. The elements are fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, packet switching, and line-sharing.

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.¹ 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.

¹ See, e.g., *Verizon Petition for Forbearance*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dkt No. 01-338.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN PART, DISSENTING IN PART**

Re Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, 04-48

I concur in part and dissent in part to this decision to relieve the Bell Operating Companies from the unbundling requirements of Section 271 for high-speed fiber loops capable of delivering advanced data, video and voice service to the mass market. I am disappointed, however, that this expert agency fails to back up many of the assertions in this item with hard data and in-depth analysis. With the U.S. ranked 13th in the world in broadband penetration, this Order should be based on a careful, comprehensive and independent analysis of the broadband marketplace. Unfortunately, this Order makes bold predictions about broadband competition but fails to apply the careful and thorough analysis requisite to our delicate forbearance authority.

Particularly with respect to the capital-intensive investments required to deploy new fiber networks to customers' premises, I have taken the view that we should carefully balance the costs and benefits of unbundling, a view affirmed recently by the D.C. Circuit Court of Appeals.¹ In past Orders, that approach has led me to support measured unbundling relief for broadband investment in so-called "greenfield areas," where there is no existing loop plant and competitors and incumbents stand on equal footing.

For similar reasons, I again support the lifting of unbundling requirements for greenfield deployments of fiber-to-the-home facilities used to serve mass market customers.² In reaching this decision, I acknowledge the extraordinary investment required to bring high-speed fiber to mass market customers' premises and the consumer benefits that will result, including the potential for new competition in the video marketplace. Given these benefits, granting providers additional incentives to build these next generation networks through targeted unbundling relief is warranted.

I can only concur in my support, however, because I believe that this Order falls far short in providing the careful market analysis required under the statute and Commission precedent.³ Under current case law, we must presume that the petitioners exercise market power in their provision of

¹ See *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

² In past Orders, I have supported relief for the deployment of functionally equivalent facilities, such as fiber to the curb and fiber to multi-dwelling units, to serve mass market customers in greenfield areas. My support for the unbundling relief in this Order extends similarly to these investments.

³ See 47 U.S.C. § 160 (enumerating forbearance criteria and directing the Commission to consider "competitive market conditions"); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, FCC 01-360 (2001) (describing the Commission's approach to market definition and market power analysis).

advanced services, in the absence of a finding of non-dominance.⁴ In previous Orders, the Commission has carefully considered the ability of such carriers to use market power to affect the reasonableness of rates for consumers. Yet, the Commission makes little serious attempt in this Order to evaluate specific product or geographic markets, the competitive market conditions in all areas of the country, or the petitioners' abilities to exercise market power for broadband services. In my view, the Commission should have conducted the requisite market analysis first.⁵ The Commission could have then lifted unbundling requirements in markets in which we determined the carrier does not exercise market power. This sort of careful review would help allay concern about the impact of Section 10 forbearance on the ability of State commissions to ensure just and reasonable wholesale rates where competitive alternatives are lacking.

A decision based on the statutory forbearance criteria requires us to make reasoned judgments to ensure the protection of consumers and competition consistent with the public interest. This undertaking requires a comprehensive and rigorous review to ensure that we do not inadvertently harm the very communities and burgeoning competition that we are trying to protect. Despite the Order's lack of in-depth market analysis, I must nonetheless make a determination on the petitioners' forbearance requests based on the best information available. My support for measured unbundling relief here recognizes that the petitioners currently have less market share than the leading provider in the rapidly developing, but still emerging, market for mass market broadband services, albeit on a national basis. Should we find in the future that circumstances are changed, the Commission's approach here may well need to change.

My support for targeted relief here does not signal that the Commission need not remain vigilant about the evolution of this marketplace to ensure that consumers continue to gain the benefits of lower prices and increased bandwidth offerings. Similarly, the Commission should move to address distinctions between the mass market and the enterprise market, given the importance of competitive choice to small businesses throughout the nation.

I note that my support for this Order does not speak to the different context of access to networks provided to information service providers under our rules. Any reconsideration of those rules, which have served to ensure the open character of the Internet, may involve a very different set of considerations than those faced here.

For these reasons, I concur in part and dissent in part.

⁴ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, FCC 02-340, CC Docket 01-337 (2002) (*Advanced Services Forbearance Order*).

⁵ I note that the Commission opened an as-yet-uncompleted proceeding to conduct precisely this sort of market analysis almost three years ago. *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, FCC 01-360 (2001).

EXHIBIT L

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

In the Matter of)	
)	
SBC Communications Inc.'s Petition for)	
Forbearance Under 47 U.S.C. § 160(c) from)	WC Docket No. 03-235
Application of Section 271)	
)	

ORDER

Adopted: November 5, 2004

Released: November 5, 2004

By the Chief, Wireline Competition Bureau:

1. In this Order, pursuant to section 10(c) of the Communications Act of 1934, as amended (the Act),¹ we extend by 90 days the date by which the petition requesting forbearance filed by SBC Communications Inc. (SBC) shall be deemed granted in the absence of a Commission decision that the petition fails to meet the standards for forbearance under section 10(a) of the Act.²

2. On November 6, 2003, SBC filed a petition requesting that the Commission forbear from applying the requirements of section 271(c)(2)(B)³ to the extent, if any, that those provisions impose unbundling obligations on SBC that this Commission has determined should not be imposed on incumbent local exchange carriers pursuant to section 251(c)(3).⁴ On 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.⁵ 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. Section 10(c) of the Act states that a petition for forbearance shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by

¹ 47 U.S.C. § 160(c).

² 47 U.S.C. § 160(a).

³ 47 U.S.C. § 271(c)(2)(B).

⁴ *SBC Communications, Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (filed Nov. 6, 2003).

⁵ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235, *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260, *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 04-48, Memorandum Opinion and Order, FCC 04-254 (rel. Oct. 27, 2004).

the Commission.⁶ The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection 10(a).⁷

3. The portion of the petition still under review raises significant questions regarding whether forbearance from applying section 271 to network elements that need not be unbundled under section 251(c)(3) meets the statutory requirements set forth in section 10(a). The Bureau thus finds that a 90-day extension is warranted under section 10(c).

4. Accordingly, IT IS ORDERED, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the date on which the petition seeking forbearance filed by SBC shall be deemed granted, in the absence of a Commission denial of the petition for failure to meet the statutory standards for forbearance, is extended to February 3, 2005.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey J. Carlisle
Chief, Wireline Competition Bureau

⁶ 47 U.S.C. § 160(c).

⁷ See, e.g., *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, As Amended*, CC Docket No. 98-65, Order, 14 FCC Rcd 6415 (Com. Car. Bur. 1999).

EXHIBIT M

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

SUMMARY

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

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

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

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

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

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

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

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

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

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 a Commission finding that line sharing is a checklist item 4 obligation would require 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 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

A.

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).

B.

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

C.

CompSouth did not provide testimony in support of its proposed contract language on this issue. *Id.* at 47.

D.

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.

E.

BellSouth again asserts that states have no authority to require ILECs to include 271 elements in an interconnection agreement. *Id.* at 47.

F.

BellSouth next discusses the FCC's order in response to its forbearance petition.³ 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.

G.

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 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

A.

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).

B.

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 is included in the checklist item. *Id.* at 85.

C.

CompSouth 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

³ *Memorandum Opinion and Order*, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order*").

switching as the broadband elements for which it is granting forbearance. *Id.* at 88. An FCC order issued subsequent to the 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.⁴

Discussion

The Commission asserted jurisdiction to set just and reasonable rates under Section 271. This issue is not asking about the state commission's authority, but rather whether BellSouth has an obligation under the Federal Act to provide line sharing. The Commission finds that its role in construing Section 271 is consultative and that the FCC possesses ultimate adjudicative authority. Given that condition, the Commission concludes that BellSouth is obligated under Section 271 to provide line sharing.

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 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?

⁴ 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").

Positions of the Parties

BellSouth

A.

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*.

CompSouth

CompSouth agrees with the transitional language should the Commission determine that BellSouth does not have a line sharing obligation.

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

A.

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. No CLEC provided testimony on line splitting so CompSouth’s proposal should not be adopted.

B.

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.

C.

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.

D.

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).

EXHIBIT N

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: February 6, 2006
TO: Blanca S. Bayó, Commission Clerk and Administrative Services Director
FROM: Adam J. Teitzman, Senior Attorney, Office of the General Counsel *AT*
RE: Docket No. 041269-TP - Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

Please be advised that the attached e-mail from Ms. Anita Megna regarding the above referenced docket was received by all Commissioners on January 27, 2006. It appears this e-mail is not from a party to the docket or, to the best of staff's knowledge, from a representative to any party.

Staff has confirmed that the document attached to the e-mail has not been viewed by any Commissioner. Further, it should be noted that Commissioners Carter and Tew are not assigned to this docket.

Nevertheless, in the abundance of caution, please place this memo and a copy of the attached e-mail in the docket file in accordance with the provisions of Section 350.042, Florida Statutes.

Adam Teitzman

Subject: FW: 041269 Issue 22

Attachments: 4071887923-041269.doc

From: anita megna [mailto:amegna1222@yahoo.com]

Sent: Friday, January 27, 2006 6:17 PM

To: Commissioners & Staffs

Subject: 041269 Issue 22

There appear to be a lot of unanswered questions, a lot of points not addressed.

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041269-TP Issue 22.

1. Does this recommendation agree with prior FPSC rulings, as in Docket 040156? No.
2. Pg 148 paragraph 1, you state the FCC distinguishes between mass market and enterprise market,
 - a. has the FCC defined those terms? No. See FTTC Recon Order fn 2
 - b. Does the TRO distinguish mass market from enterprise by categories other than service type? Yes, geographic and building type. TRO 326 distinguishes enterprise market as urban and multi-unit, mid to large business. Mass market would be primarily residential, predominately single unit, except for predominately residential MDUs.
3. pg 148 paragraph 2, you state that "FTTH is not included in the enterprise market section of the TRO."
 - a. What does the acronym FTTH mean? Fiber to the home.
 - b. Would a "home" be expected to be included in a enterprise market?
 - c. Is FTTH fiber-based? Yes
 - d. How are fiber-based technologies referred to in the enterprise market section? "Fiber"
 - e. Is "fiber" discussed as a loop type for the mass market? No. See TRO para 247.
 - f. What is the difference between "fiber" and "FTTH"? There is an architectural difference.
 - g. Is unbundling granted for FTTH architecturally based? Yes. See FTTC Recon ORDER para 18.
 - h. Does the ILEC make a distinguishment between "fiber" and "FTTH"? Yes FTTC Recon Order para 18.
 - i. Is the architecture used to deploy FTTH different from that used to deploy "fiber" to the enterprise market? yes
4. pg 148 paragraph 4, you state that the FTTH rule applies to customers who, in the absense of fiber, would be served by low capacity loop.
 - a. In a greenfield area, or a new development is the technology placed prior to the customer requesting service? Yes.
 - b. So is a decision of how the potential customer "would be" served made prior to the customer requesting a DS1 or DS3? Yes.
5. pg 148 last sentence, you state that unbundling of DS1 and DS3 loops is required where impairment exists.
 - a. Does impairment exist on FTTH loops? No. See TRO para 273
 - b. For these new developments, are entry barriers the same for CLECs and ILECs? Yes. See TRO para 275.
 - c. Are the FTTH restrictions based on impairment? No it is based on Section 706 goals. See TRO para 236.
 - d. Do you discuss Section 706 goals in your analysis? No.
6. On page 150 you state that DS1 and DS3 loops in impaired wire centers was an exception to FTTH unbundling exemption.
 - a. Does unbundling for DS1 and DS3 impairment takes precedent over FTTH unbundling exemption?
 - b. Does impairment take precedent over Section 706? No. Section 706 takes precedence over impairment. See TRO paras 236, 274, 278, 279.

- c. Would this recommendation permit unbundling of FTTH? Yes.
- d. Does the FCC permit unbundling of FTTH? No. see TRO fn 803. paras 273-284. TRRO para 12.
- e. There is a 10-1-05 edition of the FCC rules. Do the FCC's current rules provide this exception that you are recommending? No.
- f. Is the provision of DS1 and DS3 discussed under the fiber-to-the home section of the rules? No.
 - i. Is it discussed under the hybrid loop section of the rules? Yes.
 - ii. Is there a DS1 loop section in the rule? Yes
 - iii. Does the DS1 loop section discuss FTTH? No.
 - iv. Can it be concluded that the elimination of discussion of DS1 and DS3 in the fiber-to-the-home section was intentional? Yes.
 - v. Would provision for unbundling of DS1 and DS3 in fiber-to-the-home loops, where the FCC intentionally deleted this provision in its rules, be contrary to the reading of the rule? Yes.

White, Nancy

From: White, Nancy
Sent: Tuesday, December 06, 2005 1:15 PM
To: 'Anna Christie'
Cc: Mays, Meredith; Hendrix, Jerry D
Subject: RE: BellSouth Generic Arbitration- FTTH

While I appreciate your interest in and knowledge of this case, I am uncomfortable receiving such detailed emails from someone who I do not know. With all due respect, I would appreciate it if you would end your correspondence.

-----Original Message-----

From: Anna Christie [mailto:annachristies@yahoo.com]
Sent: Friday, December 02, 2005 10:42 AM
To: White, Nancy
Subject: BellSouth Generic Arbitration- FTTH

FTTH

Gillan makes the supposition that FTTH rules are limited only to the mass market. This is a new theory that wasn't mentioned in prior cases. This would produce a new record and give the Commission leeway to rule contrary to their own prior ruling. Although Gillan's supposition is not founded in the FCC's rules, perhaps there is enough reference to the mass market in the TRO, TRRO and in subsequent rulings that this supposition could be found to be true. Pointedly, the FCC did state in paragraph 210 that their rules were based on loop types and not customer class, but what if it was believed that this single sentence in the TRO was not sufficient to disregard the multitude of references to the mass market? If we were to set that sentence aside for a moment, then the question arises, what is the mass market?

FCC has yet to define where the mass-market ends and the enterprise market begins. In the TRO the FCC was delegating the definition to some extent to the states. The court ruled that the FCC could not delegate impairment findings to the states, so perhaps this leaves the states open to at least define the mass market.

Gillan presents that the definition of enterprise market is a consumer of DS1, or high-capacity services. Certainly, this is one of many descriptions the FCC used in defining the enterprise market. The FCC also stated in the TRO that mass market customers also use DS1s and enterprise customers also use DS0s. Perhaps such a definition alone is not firm enough ground to stand on. Would the use of this definition even be appropriate in a discussion of FTTH?

Gillan stated that an enterprise customer is one in which the CLEC desires to serve with a DS1. Now that is stepping way out there, defining a customer by what the CLEC desires! The FCC views dark fiber as the equivalent of an OCn, so using Gillan's definition (a customer to be served with DS1 or greater), that would make every consumer of FTTH an enterprise customer, wouldn't it?

Gillan also states that when a customer requests a DS1 that customer becomes or is becoming an enterprise customer. With FTTH there is such a thing as a greenfield application, so just how does his definition apply? When a company makes the decision to deploy FTTH in greenfield applications, they are looking at vacant property, perhaps a subdivision plat indicating that residences and perhaps small parcels for businesses will be built. For all intent and purposes this appears to be "mass market," so the choice is made to invest in a fiber infrastructure. Section 706 goals were to protect that investment in order to encourage more investment. But what if after expending great sums of money, and after the subdivision is built and customers move in, one of those

12/6/2005

"mass market" customers decides to order a DS1, have they now become an "enterprise customer" and is that infrastructure now required to be unbundled? Is the protection the FCC afforded variable according to the whims of the consumer as Gillan would suggest?

The FCC stated, "Accordingly, we do not require incumbent LECs to provide unbundled access to new mass market FTTC loops for either narrowband or broadband services. In overbuild situations, because incumbent LECs have an entry barrier within their sole control, we conclude, as with FTTH loops, that competitive LECs should have continued access to either a copper loop or a 64 kbps transmission path in those situations. Finally, we note that, consistent with our recent *MDU Reconsideration Order*, FTTC loops serving predominantly residential MDUs will be subject to the same unbundling relief as FTTH loops." (FCC 04-248 para 14) The term "new mass market", isn't this is when no customer has moved in and ordered any service, before it is known whether they will request a DS1 or not? The ILEC is not then and not ever required to unbundle that loop. There is no variability here!

If the protection of a fiber infrastructure were variable, then it would be useless in making a sound financial business decision of whether to invest or not; there would simply be too much risk! So ultimately, it would be a disincentive for the ILEC to invest and it would be a disincentive for the CLEC to construct their own infrastructure; both are contrary to the FCC's 706 goals. So defining a customer using a FTTH architecture as a consumer of DS1 is contrary to the FCC's 706 goals, correct?

The FCC created FTTH rules to encourage the provision of broadband services to the mass market. Broadband is other than narrowband, anything over 64 kbps (DS0). A consumer of broadband is not a consumer of DS0, and according to Gillan is not a mass market customer, but not according to the FCC. What if the broadband customer requests HDSL? The FCC views HDSL as equivalent to DS1. Does that broadband customer become an enterprise customer? According to Gillan, he does, but not according to the FCC. According to the FCC, xDSL is associated with the mass market. So now we have two equivalent services associated with two presumably distinct markets yet services are being used to define and distinguish the markets; something fails in the logic!

The FCC stated that "FTTC [and FTTH] architecture offers considerable capability for providing advanced services, including the ability to offer voice, multi-channel video, and high speed data services. We thus expect FTTC deployments to lead to the offering of this "triple play" of services to end-users, furthering the goals of section 706." (FCC 04-248 para 13) The FCC was fully aware that in these FTTH networks the opportunity to provide high speed data services (ie, DS1) would arise, yet this did not deter their ruling. The FCC further stated that "treating FTTC loops the same as FTTH loops will encourage carriers to further deploy fiber architectures necessary to deploy broadband services to the mass market, and the benefits of such deployment outweigh the limited impairment that competitive carriers face" (Id.) Obviously, according to the FCC, Section 706 goals take precedent over, outweigh and overrule the impairment goals Gillan wishes to stress.

Moreover, the FCC concluded that denying unbundled access to FTTC loops will provide CLECs incentives to "seek innovative access options, including the deployment of their own facilities necessary for providing broadband services to the mass market." As with FTTH loops, both incumbent LECs and competitive LECs have comparable abilities to undertake the investment risk associated with deploying FTTC facilities. The *USTA II* court recognized that "[a]n unbundling requirement under these circumstances seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy FTTH and ILECs fearful that CLEC access would undermine the investments' potential return. Absence of unbundling, by contrast, will give all parties an incentive to take a shot at this potentially lucrative market." (FCC 04-248 para 16)

". . . if unbundling relief is tailored on an architectural basis, [and it is in the case of FTTH, it is not based on service type or market class as Gillan proposes] they might have difficulty identifying which loops are FTTC

loops. BellSouth responds that both FTTC loops and FTTH loops bear an information code in their systems distinguishing those loops from other types of loop facilities, allowing competitive LECs to know in advance whether a particular loop is a FTTC loop or FTTH loop. We agree that it is important for requesting carriers to have the necessary information about whether particular loops would qualify as FTTC loops or FTTH loops, and we thus reiterate the requirement, stated in the *UNE Remand Order*, that incumbent LECs' OSS must provide competitive LECs with nondiscriminatory access to the same detailed information about the loop that is available to itself and such information must be provided to competitive LECs in the same time frame as provided to its own personnel. (FCC 04-248 para 18)

If FTTH is based on an architectural basis, and it is, then if it is to be deployed to the mass market and then identified by the ILEC, did the FCC presume that the ILEC, or in this case the FCC referred to, BellSouth, knows what a mass market is? So did anyone ask BellSouth for their definition of mass market?

If the mass market can't be defined in terms of service in an architecturally based decision, then what can it be defined in terms of? In the original writing of the Appendix to the TRO, FTTH was resigned to residential applications. I believe it is a given that residences are mass market. This would include home offices. The Appendix was corrected with an errata to extend FTTH to the end-user customer premises. So what is an "end-user customer premise"?

It appears that unbundling relief for fiber was extended to the premises rather than just to residences, seemingly making the opportunity to deploy to small businesses more real. So what is a "small business"? Could it be the premises of a single end-user customer?

In USTA II, the court also referred to the mass market. It was their understanding that it was residences and small to medium business within close proximity to the residential network. Now what is "close proximity"? Is it defined by the technical parameters of the architecture?

The FCC in its MDU reconsideration Order referred to "predominately residential." Could the term "predominately residential" be used to define the geographical area in which FTTH may be deployed? When looking at a green field are there indications of whether it will be predominately residential? Perhaps the available county subdivision plats or zoning codes and even the surrounding developments would give a clue. Sounds reasonable, but is there any indication in the record of this case that would give even a reasonable definition for mass market?

Could the Commission restrict FTTH to the "mass market" without providing a definition for the mass market? If so, would it be wise to produce language in agreements with undefined terminology? Should the Commission defer to the FCC, since it was the FCC who issued multiple Orders referring to a "mass market" without defining the term and no one has been able to get a mental grasp upon exactly what it is?

Perhaps the mass market isn't exactly anything! It may be something in flux. With the mass market getting fiber infrastructure and ordering broadband and high-capacity services, perhaps what was once viewed as a dual mass or enterprise market is merging into a single undefined entity with no distinction.

Perhaps the Commission should simply include language in the agreement devoid of any market terminology as the FCC chose to do in formulating their rules? Hmmm.

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Fatool, Vicki

From: Anna Christie [annachristies@yahoo.com]
Sent: Thursday, December 01, 2005 9:21 PM
To: White, Nancy
Subject: RE: BellSouth Generic Arbitration Florida Briefs

Florida citizen full of questions. The case is open to the public. PSC commissioner ruled in opposition to its staff recommendation in prior case. Would a recommendation in this case be different? Is the record different? More commissioners to review this case than the prior one. A prior ruling in an arbitration case does not set a precedent and the opinion of one commissioner could be overruled. Questions were only food for thought. Pardon my interruption.
Anna Christie

"White, Nancy" <Nancy.White@BellSouth.COM> wrote:

Pardon me, but who are you? Nancy White

-----Original Message-----

From: Anna Christie [mailto:annachristies@yahoo.com]
Sent: Wednesday, November 23, 2005 6:17 PM
To: White, Nancy; Mays, Meredith
Subject: BellSouth Generic Arbitration Florida Briefs

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12/2/2005

Message -

White, Nancy

From: White, Nancy
Sent: Monday, November 28, 2005 10:32 AM
To: 'Anna Christie'; Mays, Meredith
Subject: RE: BellSouth Generic Arbitration Florida Briefs

Pardon me, but who are you? Nancy White

-----Original Message-----

From: Anna Christie [mailto:annachristie@yahoo.com]
Sent: Wednesday, November 23, 2005 6:17 PM
To: White, Nancy; Mays, Meredith
Subject: BellSouth Generic Arbitration Florida Briefs

Need to make the commingling case. Do not presume the the commission will follow suit as it did in Docket 040130.

Does the USTA II 271 combination ruling address commingling?
What are the commingling rules? Where are the found?
Were the commingling rules appealed?
Were the FCC commingling rules repealed?
Is the definition of commingling different from combining?
Does "unbundled from...other services" in section 271 checklist items 4-6,10 include a requirement not to combine or commingle?
The Act was written before the terms "combine" or "co-mingle" were defined. How should the plain language of the Act regarding those independent items be read?
The District Court in USTA II held tht "no 251 ruling applies to 271", is that valid? Would this include commingling?
If the Commission ruled that 252 should be commingled with independent 271 checklist itemsw, would there be merit that such a decision would be overturned in court?
If it is required to commingle 251 UNEs with "any wholesale services," what are wholesale services? Do they include 271 independent 271 items?
USTA II p. 52 stated "the independent section 271 unbundling obligations didn't include a duty to combine network elements." Did it include a duty to commingle?

251(c)(3) applies to all incumbent LECs. Do commingling rules apply to all incumbent LECs? Would it be discriminatory for 251 commingling rules to be applied to BOCs whose only obligation is 271 , such as, with local switching?

TRO p. 13 "commingle...with other wholesale services, such as tariffed interstate special access service." "such as" is only an example and is not all inclusive, correct? What else would be included?

Does TRO para 579 define commingling as "connect, combine, or otherwise attach"?
TRO para 581 states "Act does not prohibit commingling of UNEs and wholesale services." Does it prohibit commingling of indenpendent 271 checklist items?
It states permit commingling of UNEs with "wholesale servicesw including interstate access service." What is meant by "including"? Is this only an example?

Would exempting checklist items 4-6,10 from commingling provide CLECs "a meaningful opportunity to

Message ~

Page 2 of 2

compete" (TRO fn 1787)? If so, how?

Did the FCC include anywhere in the final versions of the TRO or TRRO a description of 271 items as "Wholesale services" subject to commingling?

Rule 51.309(e) "commingle... with wholesale services obtained from an incumbent LEC." Are BOCs excluded?

In 040130 witness Blake stated that it is clear that both the FCC and D.C. Circuit have determined there is no requirement to commingle UNEs with section 271 independent checklist items. Was such a statement a part of the record in this proceeding?

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Message

Fatool, Vicki

From: Mays, Meredith
Sent: Friday, December 02, 2005 11:29 AM
To: Fatool, Vicki
Cc: White, Nancy
Subject: For the Anna Christie file

-----Original Message-----

From: Harper, Mike
Sent: Friday, December 02, 2005 10:47 AM
To: Mays, Meredith
Subject: FW: Anna Christie--BellSouth Generic Arbitration

Meredith,

I understand that you forwarded the original message from Anna Christie to Security. Thought you might want to have this response I received from her to my email inquiry I sent on Tuesday.

Mike Harper
404 330-0495
lpage: mikeharper

-----Original Message-----

From: Harper, Mike
Sent: Friday, December 02, 2005 10:13 AM
To: Hobbs, Linda
Subject: FW: Anna Christie--BellSouth Generic Arbitration

Linda,

I sent an email to the mysterious Anna Christie on Tuesday and this is the response I received late last evening.

Mike

-----Original Message-----

From: Anna Christie [mailto:annachristies@yahoo.com]
Sent: Thursday, December 01, 2005 9:26 PM
To: Harper, Mike
Subject: Re: BellSouth Generic Arbitration

Sorry, I don't represent anyone.

"Harper, Mike" <Mike.Harper2@BellSouth.com> wrote:

Anna,
Several folks here at BellSouth saw your comments in the above proceeding but aren't sure what group or organization you represent. Can you enlighten me and I'll pass the word along?
Thanks,
Mike Harper

12/2/2005

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers. 162

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Single? There's someone we'd like you to meet.

Lots of someones, actually. Yahoo! Personals

Rick Melson

From: Nancy White
Sent: Friday, February 10, 2006 3:00 PM
To: Rick Melson
Subject: FW: BellSouth Generic Docket 041269

This woman is at it again. Nancy White

-----Original Message-----

From: famnet@bellsouth.net [mailto:famnet@bellsouth.net]
Sent: Friday, February 10, 2006 2:28 PM
To: White, Nancy
Subject: BellSouth Generic Docket 041269

I was a employed with the State of Florida Public Service Commission and assigned to the BellSouth Generic Docket 041269. I had met with Fogleman and his supervisor, David Dowds, to discuss Issue 22 in this case. It is similar to Docket 040156, the Verizon Arbitration, where I addressed the same issue. In that case, I recommended and it was approved that in NO EVENT is FTTH to be unbundled. The body of the order for the related issue addressed DS1 and DS3 and Section 706 goals (which supercede impairment goals) and that the TRO clearly states that there is NO impairment in FTTH. The rules for hybrid address DS1 and DS3 unbundling; however, the FCC intentionally deleted any provisions for DS1 and DS3 in the FTTH rules.

In prior rulings by the FPSC, it established a precedent to abide by the rules, this was not done in this case. Fogleman would like to present that the unbundling rules for impairment of DS1 and DS3 in 'fiber' includes FTTH, or he would like to presume that there is non-clarity, giving him room to make an exception to the rules. However, the FCC made a clear distinction between "fiber" and "FTTH" in the TRO and in the rules.

In addition to our meeting to discuss this issue, several interoffice emails were sent from me to Fogleman addressing this issue. At the conclusion of our last meeting prior to his writing the recommendation, Fogleman said that he knew how he would handle his recommendation. After reading his recommendation, it was evident to me that his way of handling it was to present an incomplete recommendation, not revealing to the commission any discussion of 706 goals, the FPSC's prior ruling in 040156 or the 10-2005 edition of the rules.

Just prior to the commission staff's meeting with the writers of the recommendation, I submitted the attached document to the commission suite so that they could ask Fogleman about the key points that were missing from his analysis leading to his recommendation. However this document was intercepted and I was removed from the case and put on indefinite administrative leave on the afternoon of 2/3/06.

On the following Monday, 02/06/06, Management immediately released an errata to the recommendation so it would not appear that any reference to the FPSC order in the Verizon case was 'inadvertently' omitted, even though reference to the Verizon Arbitration was brought up by BellSouth as a part of the record. The letter to the commission by management implies that there was no dispute between the recommendation made in this case and the one in the prior Verizon Arbitration case; however that is clearly untrue.

There certainly would be grounds for reconsideration.

Subsequent to the voting on this case, on 02/09/06, I have resigned from employment with the commission.

Doris Moss
(850) 597-2742

041269-TP Issue 22.

1. Does this recommendation agree with prior FPSC rulings, as in Docket 040156? No.
2. Pg 148 paragraph 1, you state the FCC distinguishes between mass market and enterprise market,
 - a. Has the FCC defined those terms? No. See FTTC Recon Order fn 2
 - b. Does the TRO distinguish mass market from enterprise by categories other than service type? Yes, geographic and building type. TRO 326 distinguishes enterprise market as urban and multi-unit, mid to large business. Mass market would be primarily residential, predominately single unit, except for predominately residential MDUs.
3. pg 148 paragraph 2, you state that "FTTH is not included in the enterprise market section of the TRO."
 - a. What does the acronym FTTH mean? Fiber to the home.
 - b. Would a "home" be expected to be included in an enterprise market?
 - c. Is FTTH fiber-based? Yes
 - d. How are fiber-based technologies referred to in the enterprise market section? "Fiber"
 - e. Is "fiber" discussed as a loop type for the mass market? No. See TRO Para 247.
 - f. What is the difference between "fiber" and "FTTH"? There is an architectural difference.
 - g. Is unbundling granted for FTTH architecturally based? Yes. See FTTC Recon ORDER Para 18.
 - h. Does the ILEC distinguish between "fiber" and "FTTH"? Yes FTTC Recon Order Para 18.
 - i. Is the architecture used to deploy FTTH different from that used to deploy "fiber" to the enterprise market? yes
4. On pg 148, paragraph 4; you state that the FTTH rule applies to customers who, in the absence of fiber, would be served by low capacity loop.
 - a. In a "greenfield" area or a new development is the technology placed prior to the customer requesting service? Yes.
 - b. So is a decision of how the potential customer "would be" served made prior to the customer requesting a DS1 or DS3? Yes.
5. On pg 148 in the last sentence, you state that unbundling of DS1 and DS3 loops is required where impairment exists.
 - a. Does impairment exist on FTTH loops? No. See TRO Para 273
 - b. For these new developments, are entry barriers the same for CLECs and ILECs?
Yes. See TRO Para 275.
 - c. Are the FTTH restrictions based on impairment? No it is based on Section 706 goals. See TRO Para 236.
 - d. Do you discuss Section 706 goals in your analysis? No.
6. On page 150 you state that DS1 and DS3 loops in impaired wire centers were an exception to FTTH unbundling exemption.
 - a. Does unbundling for DS1 and DS3 impairment takes precedent over FTTH unbundling exemption?
 - b. Does impairment take precedent over Section 706? No. Section 706 takes precedence over impairment. See TRO Paragraphs 236, 274, 278, 279.
 - c. Would this recommendation permit unbundling of FTTH? Yes.
 - d. Does the FCC permit unbundling of FTTH? No. See TRO fn. 803. Paragraphs 273-284. TRRO Para 12.
 - e. There is a 10-1-05 edition of the FCC rules. Do the FCC's current rules provide this exception that you are recommending? No.

f. Is the provision of DS1 and DS3 discussed under the fiber-to-the home section of the rules? No.

i. Is it discussed under the hybrid loop section of the rules?

Yes.

ii. Is there a DS1 loop section in the rule? Yes

iii. Does the DS1 loop section discuss FTTH? No.

iv. Can it be concluded that the elimination of discussion of DS1 and DS3 in the fiber-to-the-home section was intentional? Yes.

v. Would provision for unbundling of DS1 and DS3 in fiber-to-the-home loops, where the FCC intentionally deleted this provision in its rules, be contrary to the reading of the rule? Yes.

"The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers." 118


EXHIBIT O



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: February 9, 2006
TO: Lisa Polak Edgar, Chairman
FROM:  Steven J. Stolting, Inspector General
RE: Alleged misconduct by staff – inappropriate communication with Commission suite and parties (OIG #05/06-37)

The Office of Inspector General has completed its investigation of allegedly improper communications to the Commission or others pertaining to a currently open docket. This memorandum summarizes the results of that investigation, and provides conclusions and recommendations to Commission management.

Background

On Monday, January 30, 2006, the Office of Inspector General was provided by the Office of General Counsel (GCL) with a copy of an e-mail communication that had been received in the Commission suite. The e-mail grouping listed on the "To" line of the communication indicated that it had been sent to each Commissioner and each assistant and executive secretary assigned to the Commissioners. The sender's e-mail address appeared as amegna1222@yahoo.com. The subject line read "041269 Issue 22" and, according to staff, the message and attached document contained information pertaining to a currently open docket. This information raised various questions regarding the docket and provided answers or information arguing for a specific view of the referenced docket issue.

GCL management stated that they had reviewed this e-mail with the intent of determining whether it was an ex parte communication to the Commission from a party to an open docket, which under law and rules would require placement in the docket file and notification to the parties in the docket. As part of this review, a telephone call had been placed to BellSouth Telecommunications, Inc. (BellSouth), a party to the docket, to inquire as to whether they had knowledge of the source of the communication. This was done because, according to GCL management, the document appeared to take positions generally favorable to that party. According to GCL management, BellSouth staff denied any knowledge of the listed e-mail sender or of the communication. They also stated that, approximately two months earlier, e-mail communications had been received by BellSouth containing information or arguments pertaining to this docket from an unknown party.

Given that the source of the communication to the Commissioners remained unclear, GCL prepared a memorandum to transmit the document to the docket file. GCL management stated that this action would ensure that, in the event the e-mail was determined to be an ex parte

communication, it would have been appropriately handled by the Commission. GCL also determined that the matter should be submitted to the Office of Inspector General for further investigation.

Investigation

The Office of Inspector General (OIG) initiated an investigation in an attempt to identify the source of the communication in order to determine if any misconduct had occurred or if further action by Commission management was required. Based on the results of this review, OIG would determine if further inquiry was necessary into the messages previously received by BellSouth as noted above.

Initially, Commission information technology staff were requested to analyze the message contents and the Commission's computer system to assess whether this communication could have originated with or passed through the Commission's network. The communication had been sent using a Yahoo mail account which can be created on the internet, complicating any efforts to trace the communication or sender. This review determined that the message used what appeared to be an established Commission mailing list as noted above, and found evidence that the text document attached to the e-mail in question had been created on the Commission's network under a specific Commission employee sign-in. This employee was determined to be Ms. Doris Moss, an Engineer Specialist II in the Commission's Division of Competitive Markets and Enforcement (CMP). It was also determined that Ms. Moss was assigned to the docket that was the subject of the e-mail communication, although not to the issue that was the subject of the e-mail. A review of personnel records indicated that Ms. Moss has been employed with the Commission since July 2003. Previous to her employment with the Commission, Ms. Moss had been employed by BellSouth.

Based on this information, the Inspector General and the CMP Division Director interviewed Ms. Moss on February 1, 2006. Ms. Moss stated that she did send the communication to the Commission suite concerning this docket. She stated that she did so on her own initiative, after disagreeing with the staff recommendation that had been written regarding this issue. She stated that she felt the Commissioners needed this additional information to ensure that they understood that the staff recommendation could be inconsistent with prior Commission action, and she said that her objections had been voiced to staff assigned to write that recommendation, but that they had not agreed with or incorporated her position. She stated that she understood that this was not the approved process for addressing such a difference of opinion, and she apologized for her action. She said that no other staff had been aware of or participated in her action.

Given these facts, Ms. Moss was questioned regarding the e-mail messages reportedly received by BellSouth regarding this docket. She denied sending such messages or having any knowledge of them. OIG then contacted BellSouth representatives, who provided specific information regarding the messages received. They stated that they attempted to identify the person(s)

sending such messages at the time, but had been unable to do so. At that time, they specifically requested by e-mail that these person(s) stop contacting them.

Based on the information provided, additional analysis of Ms. Moss' computer by Commission information technology staff was conducted. This review demonstrated that the e-mail account created on Yahoo and shown on the messages received by BellSouth had been accessed through Ms. Moss' Commission computer ID and password during the period the messages were sent. In addition, this e-mail account was listed on documents maintained on Ms. Moss' computer.

Conclusions and recommendations

Based on the facts above, the Office of Inspector General concluded that Ms. Moss did send the anonymous communications to the Commission and to BellSouth as alleged. We also concluded that her actions in sending unauthorized, anonymous e-mail to the Commission and to a party in an open docket constituted violations of Commission policy and State and Commission rules including conduct unbecoming a state employee under Rule 60L-36.005(3)(f), FAC and improper communication between a Commission employee and a party under Rule 25-22.033, FAC.

Given these conclusions, we make the following recommendations:

1. We **recommend** that Commission management, in consultation with the Office of General Counsel, review this report and supporting documentation and determine appropriate disciplinary action based on documented conduct unbecoming a state employee and potential violations of other state or Commission rules and policies.
2. We **recommend** that Commission management and the Office of General Counsel assess whether the information provided to BellSouth or directly to the Commission had any legal effect on consideration of the docket in question and determine if any response on the part of the Commission is warranted.

I am providing this report to Commission management and will monitor corrective action. Please advise if you require additional information.

cc: Mary A. Bane, Executive Director
Chuck Hill, Deputy Executive Director
Rick Melson, General Counsel ✓
Beth Salak, Director, Division of Competitive Markets and Enforcement

EXHIBIT P

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February 14, 2006
Via Hand Delivery

COMMISSION
CLERK

06 FEB 14 PM 3:44

RECEIVED-PPSC

Lisa Polak Edgar, Chairman
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket No. 041269-TP


Dear Chairman Edgar:

I represent Covad Communications Company (Covad). Covad requests that the Commission, *sua sponte*, withdraw all portions of the staff recommendation in the above docket that were the responsibility of Doris Moss, as well as those she discussed in her emails, assign new staff to those issues, and direct such staff to prepare an independent recommendation for the Commission's de novo consideration. Only by taking this action can Covad, and the other parties to this case, receive the fair and impartial consideration to which they are entitled under state and federal law.

Pursuant to a meeting yesterday with the Commission's General Counsel, Rick Melson, Covad learned for the first time, that a former Commission employee, Doris Moss, was the subject of an investigation by the Commission Inspector General related to her inappropriate conduct in the above docket. The Inspector General concluded that Ms. Moss, a former BellSouth employee, sent unauthorized, anonymous e-mails to the Commissioners and to BellSouth, and attempted to influence other Commission Staff to prepare a recommendation on certain issues that would favor BellSouth's position. The Inspector General found that Ms. Moss' conduct violated state and Commission rules and Commission policy. It is my understanding that Ms. Moss resigned her position with the Commission last Thursday, but has continued her inappropriate behavior in support of BellSouth's position by continuing to send emails about this docket.

It is clear from the emails Ms. Moss sent, as well as Mr. Melson's explanation of the situation at yesterday's meeting, that Ms. Moss was biased in favor of BellSouth. Mr. Melson

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FPSC-BUREAU OF RECORDS

stated that, in his view, there had been no impact on the parties to this docket because Ms. Moss' communications to other Commission Staff were not followed. However, Mr. Melson failed to recognize or acknowledge that Ms. Moss had primary responsibility for Issues 5, 16, 17, and 18. In addition, Ms. Moss communicated about Issue 12 (commingling), an issue as to which the Staff recommendation was *not* adopted.

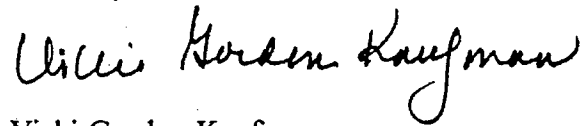
Of particular importance to Covad are Issues 16 and 17 relating to line sharing. The Staff recommendation on those issues (for which Ms. Moss was responsible) was adverse to Covad and in favor of BellSouth. Covad is justifiably concerned that the adverse recommendation on Issues 16 and 17 was fueled by Ms. Moss' bias in favor of BellSouth (Ms. Moss had no need to persuade others to her view on these issues, as she had responsibility for them). The Florida Commission is the only commission in the nation to rule in the manner it did with the information it had. The only two commissions to rule in a similar manner have both granted reconsideration based on the evidence presented to the Florida Commission. Ms. Moss' bias renders her opinion, as embodied in the staff recommendation, invalid and her views should not be considered by the Commission.

Covad was shocked to learn that apparently there is no Commission rule or policy that prohibits a former BellSouth employee from being assigned to and providing substantive, critical recommendations, upon which the Commission relies, about a matter in which BellSouth is involved. In addition, there is no rule or policy which would require the Commission to inquire as to whether such an employee is receiving retirement or other compensation from BellSouth. In this case, we know that Ms. Moss was a former BellSouth employee. It appears that the Commission does not know nor did it inquire as to whether Ms. Moss was receiving compensation from BellSouth related to her prior employment with them. In Covad's view, to ensure the impartiality and fairness of Commission proceedings, such inquiries must be performed as a routine matter. The fact that the Commission did not exercise such management oversight has resulted in a tainted recommendation that the Commission cannot rely upon and illustrates why such a policy is absolutely necessary.

It is Covad's position that to correct this clear unfairness to Covad, and the other parties, the Commission should follow the course of action described above. The burden should not be on Covad, or the parties, to attempt via reconsideration or some other means, to correct the bias of a Commission employee with responsibility for this docket.

All parties are entitled to fairness and impartiality before the Commission. This can be achieved in this case only by disregarding Ms. Moss' biased recommendation on those issues for which she had responsibility, as well as those in which she provided her unsolicited opinion, and assigning new and independent Staff to evaluate those issues and bring forth a truly independent recommendation for your consideration. We request that you immediately take such action.

Sincerely,



Vicki Gordon Kaufman

Cc: Governor Jeb Bush
Senator Lee Constantine
Commissioner Isilio Arriaga
Commissioner J. Terry Deason
Commissioner Matthew M. Carter II
Commissioner Katrina J. Tew
Richard D. Melson
Blanca Bayo
Patrick Wiggins
Adam Teitzman
Kira Scott
Beth Salak
Nancy B. White
Charles E. (Gene) Watkins
Parties of Record

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DIECA Communications,
Inc. d/b/a Covad Communications
Company,

Plaintiff,

Civil Action No.: 4:06 CV 72 RH-WCS

v.

The Florida Public Service
Commission; Lisa Polak
Edgar, in her official capacity
As Chairman of the Florida
Public Service Commission;
and J. Terry Deason and Isilio
Arriaga in their official capacities
As Commissioners of the Florida
Public Service Commission

And

BellSouth Telecommunications, Inc.

Defendants.

WAIVER OF SERVICE OF SUMMONS

I acknowledge receipt of your request that I waive service of a summons in the action of DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), 1230 Peachtree Street, NE, Suite 1900, Atlanta, GA 30309, Plaintiff, v. Florida Public Service Commission, Lisa Polak Edgar, in her official capacity as Chairman of the Florida Public Service Commission; and J. Terry Deason and Isilio Arriaga, in their official capacities as Commissioners of the Florida Public Service Commission, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850 and BellSouth Telecommunications, Inc., 150 S. Monroe Street, Suite 400, Tallahassee, FL 32301, Defendants, case number 4:06 CV 72 RH-WCS in the United States District Court for the Northern District of Florida. I have also received a copy of the complaint in the action, two copies of this instrument, and means by which I can return the signed waiver to you without cost to me.

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

DIECA Communications,
Inc.,

Plaintiff,

CASE NO. 4:06 cv72-RH/WCS

v.

The Florida Public Service
Commission, et al.

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF

Plaintiff, DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), through its undersigned counsel, pursuant to Rule 15(a), Federal Rules of Civil Procedure, files this Amended Complaint seeking Declaratory Relief from a decision of the Florida Public Service Commission (Commission) which interprets federal law to find that BellSouth Telecommunications, Inc. (BellSouth) has no obligation to provide access to line sharing after October, 2004. The Commission's decision is contrary to federal law and its implementation will result in irreparable harm to Covad. In support of this Amended Complaint, Covad alleges:

NATURE OF THE ACTION

1. This action is brought to enforce federal law, including the U.S. Constitution and various provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 USC §§ 151 et seq (the Act).

2. A staff recommendation finding that BellSouth is not obligated to provide line sharing after October 1, 2004 was filed on March 23, 2006. Exhibit A. On April 4, 2006, the Commission voted to adopt the staff recommendation in its entirety. Exhibit B. A written order is expected to be issued on or about April 17, 2006.¹

3. The Commission's April 4th action violates its authority and jurisdiction under federal law.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), 28 USC § 1337 and 47 USC § 252(e)(6).

5. Venue is proper in this district pursuant to 28 USC § 1391 (b)(1) because the Commission resides in this district. Defendant BellSouth is subject to personal jurisdiction, and is therefore deemed to reside in this district. Venue is also proper under 28 USC § 1391(b)(2) because the Commission conducted its proceedings in this district and thus the events giving rise to this action occurred in this district where the Commission sits.

PARTIES

6. Plaintiff, Covad, is a Virginia corporation with its principal place of business at 110 Rio Robles, San Jose, California 95134. Covad provides telecommunications services in the State of Florida and is a competitive local exchange carrier (CLEC) within the meaning of the Act.

7. Defendant, the Florida Public Service Commission, is an agency of the State of Florida. The Commissioners, in their official capacities, presided over the proceeding giving rise

¹ Covad will file the Commission's written order with the Court immediately upon its issuance. Due to the time sensitive nature of the issues Covad has raised and the Court's schedule, Covad filed its Amended Complaint as soon as practical after the Commission's decision.

to this Amended Complaint. Defendant Lisa Polak Edgar, Chairman of the Commission, and Defendants J. Terry Deason and Isilio Arriaga, Commissioners, are sued in their official capacity for injunctive and declaratory relief only.

8. Defendant BellSouth Telecommunications, Inc. (BellSouth) is a Georgia corporation with its principal place of business in Georgia. BellSouth provides telecommunications services within the state of Florida. BellSouth is an incumbent LEC and Regional Bell Operating Company (RBOC) within the meaning of the Act.

BACKGROUND

9. Covad is a Competitive Local Exchange Carrier (CLEC) and competes with incumbent telecommunications service providers, such as BellSouth, to provide telecommunications services to consumers. Covad's customers are business and residential consumers who use Covad's Digital Subscriber Line (DSL) services to connect to the Internet as well as to connect to internal computer networks. Covad provides service via "line sharing." Under a line sharing arrangement, as the term indicates, Covad provides its DSL service on the same "shared" telephone line over which the incumbent, such as BellSouth, provides voice service to an end user. Covad uses the high frequency portion of the loop, while BellSouth uses the low frequency portion. In Florida, over 10,000 Covad customers are served via line sharing pursuant to an Interconnection Agreement (ICA) between Covad and BellSouth. Covad provides the majority of its line shared services in Florida on a wholesale basis with over 40 partners, like EarthLink and America On Line (AOL).

10. On April 4, 2006, the Commission declared that BellSouth need not provide line sharing to new customers. The Commission further ordered that all ICAs² be conformed to its vote within 10 days of the issuance of its order.

11. The Commission's decision is contrary to well-established federal law. The Federal Communications Commission (FCC) has clearly held that line sharing is required by § 271 of the Act. Despite the FCC's clear pronouncements on this issue, the Commission has ruled to the contrary and found that BellSouth is not required to provide line sharing, causing irreparable harm to Covad.

12. **Section 271.** In 1996, Congress enacted the Telecommunications Act to provide for the development of competitive markets in the telecommunications industry. Among other things, Part III of the Act provides special provisions that apply to the Bell Operating Companies (BOCs), such as BellSouth, who seek permission to provide long distance service in the same service area where they provide local service.³ Principal among the prerequisites to the provision of long distance service is a demonstration to the FCC that the BOC has complied with the 14-point "Competitive Checklist."⁴ The FCC determined on December 19, 2002, that BellSouth had complied with the Competitive Checklist and was authorized to provide long distance service in its local service area in Florida.⁵ In the Order granting BellSouth § 271 authority to sell long distance service, the FCC specifically stated that "BellSouth's provisioning of the line shared loops satisfies checklist item 4."⁶

² ICAs are the contracts that govern the arrangements between incumbents and CLECs. *See*, 47 USC § 252.

³ *See*, 47 USC § 271, attached hereto as Exhibit C.

⁴ *See*, 47 USC § 271(c)(2)(B), attached hereto as Exhibit C.

⁵ *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.

⁶ *Id.* at ¶ 144 (emphasis added).

13. The Competitive Checklist contains 14 separate items which BellSouth was required to satisfy before it would be permitted to offer long distance service. The Checklist Item pertinent here, which BellSouth is required to provide, is Item #4 – a loop transmission facility, which the FCC has repeatedly stated encompasses line sharing. For instance, the FCC stated:

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 271.⁷

Thus, according to the grant of permission to provide long distance service pursuant to § 271, BellSouth must provide line sharing, and the Commission's decision – premised on the manifestly incorrect assertion that while line sharing *was* a Checklist Item 4 requirement at the time BellSouth was given permission to provide long distance service, it has somehow now *ceased* to be a Checklist Item 4 requirement -- is error.

14. **Section 251.** The Act also required that incumbents provide certain “unbundled network elements” (UNEs)⁸ to competitors.⁹ There has been much controversy and litigation regarding the incumbents' unbundling obligations pursuant to this requirement. The FCC made several attempts to enact rules to implement the incumbents' unbundling obligations¹⁰ which

⁷ *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 ¶ 164 (emphasis added).

⁸ UNEs are the various component parts of the telecommunications network the incumbent owns.

⁹ *See*, 47 USC § 251(c)(3).

¹⁰ *See*, *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, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order* or *TRO*), corrected by Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (DC Cir. 2004)(*USTA II*), cert. denied, 125 S.Ct. 313, 316, 345 (2004); *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (rel. Feb. 4, 2005) (*Triennial Review Remand Order* or *TRRO*).

were challenged by various parties, resulting in several court decisions. On February 4, 2005, the FCC issued its *TRRO*, in which it adopted its final unbundling rules.

15. **The Commission's Decision.** On November 1, 2004, BellSouth filed a petition with the Commission for a generic docket¹¹ seeking to require CLECs to amend their ICAs consistent with the changes in law resulting from the federal activity described above. Numerous issue identification meetings were held and the parties agreed as to the issues to be presented, including Issue 16 regarding line sharing. A hearing was held before a three (3) person panel, consisting of Chairman Edgar and Commissioners Deason and Arriaga.

16. On February 7, 2006, the Commission voted to allow BellSouth to cease accepting new orders for line sharing despite the fact that the Act requires BellSouth to provide line sharing.

17. The Commission acted on its Staff's written recommendation via voice vote. It directed the parties to submit signed amendments or agreements conforming to its decision within twenty (20) days of the Commission's vote. On February 15, 2006, Covad filed a Complaint for Declaratory Relief and Motion for Preliminary Injunction with this Court.

18. On February 28, 2006, prior to the entry of a written order setting out its February 7th decision, the Commission voted to vacate its decision on the line sharing issues (as well as other issues). The Commission took this action because a Commission employee, with responsibility for substantive portions of the recommendation, had engaged in prohibited ex parte communications.¹²

¹¹ *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP.

¹² The Court had scheduled a hearing on Covad's original Motion for Preliminary Injunction on February 23, 2006, which was subsequently cancelled. On March 2, 2006, Covad withdrew its Motion for Preliminary Injunction which was filed simultaneously with its Complaint in light of the Commission's action vacating its first decision on line sharing.

19. On March 23, 2006, Staff filed a new recommendation in which it recommended to the Commission what action to take on the line sharing issue, Issue 16. On Issue 16, the new Staff stated:

In light of (1) the action of the D.C. Circuit in USTA I to vacate and remand the FCC's decision on line sharing, (2) the FCC's subsequent decision, upon reconsideration, not to reinstate line sharing as an unbundled network, and (3) the FCC's own words regarding ongoing enforcement of § 271 approvals contained in the TRO, staff concludes that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004.¹³

20. At its April 4, 2006 Agenda Conference, the Commission panel considered and approved Staff's recommendation.

COUNT I

21. The Commission's decision on line sharing is contrary to federal authority and incorrect as a matter of law. Line sharing is a loop transmission facility that BellSouth must provide pursuant to § 271 Competitive Checklist Item 4. BellSouth itself acknowledged this fact when it sought § 271 approval to offer long distance.

22. The BOCs' (and particularly at issue here, BellSouth's) obligation to provide access to line sharing pursuant to § 271 is required because: (1) line sharing is a § 271 Checklist Item 4 loop transmission facility; and (2) BOCs who, like BellSouth, offer long distance services pursuant to § 271 authority have an obligation to provide Checklist Item 4 loop transmission facilities irrespective of and without regard to unbundling determinations under § 251.

23. While much of the Commission's proceeding below focused on what elements were required to be unbundled pursuant to § 251, BellSouth has an *independent* obligation to provide line sharing pursuant to § 271 Checklist Item 4, regardless of the applicability of § 251. Determinations under § 251 as to what elements must be unbundled *do not* remove elements

¹³ Exhibit B at pp. 33-34.

from the Competitive Checklist with which BellSouth must comply to be permitted to provide long distance service. Line sharing was included in Checklist Item 4 when BellSouth was granted relief from § 271 and permitted to offer long distance and it remains in Checklist Item 4 as an independent obligation today¹⁴, notwithstanding the Commission's view that it has somehow disappeared from the Competitive Checklist.

24. In numerous FCC Orders, the FCC *has expressly stated* that line sharing is a Checklist Item 4 element. For example, in the *Massachusetts 271 Order*, the FCC found:

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 271.¹⁵

25. In the *Florida and Tennessee 271 Order*, the FCC held:

BellSouth's provisioning of the line shared loops satisfies checklist item 4.¹⁶

26. In the *Georgia 271 Order*, the FCC held:

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 4.¹⁷

27. The FCC's statements in these Orders are not anomalies. In every FCC 271 Order granting BellSouth long distance authority¹⁸ – indeed, in every FCC order granting any

¹⁴ TRO ¶¶ 658-59. Exhibit D.

¹⁵ *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 ¶ 164 (emphasis added). Pertinent excerpts are attached as Exhibit E.

¹⁶ *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization to Provide 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 ¶ 144 (emphasis added). Pertinent excerpts are attached as Exhibit F.

¹⁷ *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, ¶ 239. Pertinent excerpts are attached as Exhibit G.

¹⁸ *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 ¶ 144

BOC such authority – the FCC placed line sharing in Checklist Item 4. Thus, line sharing is a § 271(c)(2)(B)(iv) (Checklist Item 4) network element.¹⁹

28. Moreover, before it was in its interest to do otherwise, BellSouth itself placed line sharing in every one of its own § 271 briefs to the states and to the FCC under Checklist Item 4.²⁰ The FCC’s decisions above make no sense unless line sharing falls under § 271 Checklist Item 4.

29. There can be no legitimate dispute that BellSouth does indeed have an obligation to provide non-discriminatory access to all Checklist Item 4 elements, including line sharing “regardless of any unbundling analysis under section 251.”²¹ So long as BellSouth continues to sell long distance service under § 271 authority, it must continue to provide non-discriminatory

(hereinafter “BellSouth FL/TN 271 Order”); *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, ¶ 248. Pertinent excerpts are attached as Exhibit H.; *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, ¶ 238.

¹⁹ “BellSouth’s provisioning of the line shared loops satisfies checklist item 4.” *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization to Provide 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 ¶ 144 (emphasis added). Pertinent excerpts are attached as Exhibit F. See also, *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, ¶ 239. Exhibit G.

²⁰ *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 pp. 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 pp. 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 pp. 112-114. Pertinent excerpts are attached as Exhibit I.

²¹ TRO at ¶ 653, Exhibit J; 47 U.S.C. § 271(c)(2)(B)(iv).

access to all network elements under Checklist Items 4, 5, 6 and 10, irrespective of whether they are “de-listed under 251” – including line sharing under Checklist Item 4.²²

30. The statements of the FCC in its *Broadband Forbearance Order*²³ also make it clear that line sharing is a § 271 element. When the FCC released the *Broadband Forbearance Order*, two of the Commissioners released statements that leave different impressions of what action the FCC took regarding forbearance for line sharing under § 271. The dueling views of then-Commissioner Martin and then-Chairman Powell, however, make one thing clear: line sharing is a § 271 obligation. Chairman Powell’s statement says the FCC did not remove 271 obligations for line sharing.²⁴ Commissioner Martin’s statement on line sharing, although stating a different viewpoint that there was forbearance, is based upon the clear premise that line sharing is a § 271 obligation of on-going force unless and until the FCC grants a petition for forbearance. If line sharing never was a § 271 element, there would be no § 271 obligation to forbear from nor any need to clarify that the FCC was not “removing 271 unbundling obligations” for line sharing.

31. Further, in the *Broadband Forbearance Order*, the FCC did not grant – by implication or otherwise – forbearance from line sharing because forbearance from line sharing was never requested. The FCC 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-

²² This obligation can only be removed by the FCC in response to a petition for forbearance pursuant to 47 U.S.C. §160.

²³ *Petitions for Forbearance of Verizon, SBC, Qwest, and BellSouth*, WC Docket No. 01-338, *et seq.*, Memorandum Opinion and Order (rel. Oct. 27, 2004) (“Broadband Forbearance Order”). Exhibit K.

²⁴ *Broadband Forbearance Order*, Chairman Powell’s Statement.

the home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops), the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements).²⁵

32. Moreover, the FCC repeatedly explains – as it is statutorily obliged²⁶ to do – that it is granting forbearance to encourage the BOCs to build next-generation fiber facilities.²⁷ Additionally, on November 5 – 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.”²⁸ Once again, line sharing is not on the list of “broadband elements” for which the FCC granted forbearance.

33. The Louisiana Public Service Commission has addressed and rejected BellSouth’s forbearance argument. The Louisiana Commission found:

The Forbearance Order released by the Federal Communications Commission does not specifically address line-sharing. In accordance with the analysis provided above, absent a further clarification from the FCC that it is the FCC’s intention to include line-sharing in its forbearance grant, the Commission must conclude that currently no relief from 271 line-sharing obligations has been granted. . . . In accordance with Louisiana Public Service Commission Order U-28027 issued on January 13, 2005, BellSouth Telecommunications, Inc. has a continuing obligation to provide . . . Covad with line-sharing under Section 271 of the Telecommunications Act of 1996 which has not thus far been forborne.²⁹

34. Four state commissions (Georgia, Maine, Pennsylvania and Louisiana), have found that line sharing falls under § 271 Checklist Item 4, and that BOCs, like BellSouth, subject

²⁵ *Broadband Forbearance Order*, ¶ 1. See also, ¶¶ 12, 19, and 37.

²⁶ 47 U.S.C. § 160 (c) (“The Commission . . . shall explain its decision in writing.”).

²⁷ *Broadband Forbearance Order*, ¶¶ 6, 12, 20, 21, 24, 25, 27, 31 and 34.

²⁸ 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, ¶ 2, Exhibit L.

²⁹ DIECA Communications, Inc. d/b/a Covad Communications Company, Ex Parte, Docket No. U-28027, *Ruling* at pp. 37-38, December 5, 2005. Exhibit M.

to § 271 must provide access to it.³⁰ No state public service commission has found, as the Florida Commission did, that line sharing was once a § 271 Checklist Item 4, but has now ceased to be one.

35. The Commission's failure to require BellSouth to provide line sharing is error. In the recommendation the Commission adopted, it acknowledges that the FCC considered line sharing to be a Checklist Item 4 element in the order that granted BellSouth long distance authority in Florida.³¹ The Commission further acknowledges that the FCC included line sharing as a Checklist Item 4 element in orders approving long distance entry for Verizon in Massachusetts and BellSouth in Georgia.³² The recommendation which the Commission adopted then explains that the order granting BellSouth long distance authority includes Appendix D which sets forth the statutory requirements with which BellSouth must comply to receive long distance authority. Appendix D is an annotated history of the statutory requirements necessary for approval of long distance authority. Appendix D includes under the compliance requirements for Checklist Item 4 the provision of nondiscriminatory access to unbundled loops." Thus, the recommendation the Commission adopted concludes:

. . . [T]he FCC's inclusion of the line sharing discussion under the Section D. Checklist Item 4 – Unbundled Loops heading, as well as, the use of the term

³⁰ 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, pp. 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, December 5, 2005. Defendants may cite decisions holding otherwise, but such decisions are distinguishable from the case at bar.

³¹ Exhibit A at 32.

³² *Id.*

'BOCs' in reference to line sharing obligations, offers further support that line sharing was considered a § 271 checklist item 4 element by the FCC at the time it issued the BellSouth Long Distance Order. BellSouth has not provided evidence that refutes this conclusion.³³

36. But the Commission goes on to find that because line sharing is no longer a § 251 element, it has been removed from BellSouth's independent § 271 obligations – obligations BellSouth is required to adhere to as the *quid pro quo* for its authority to provide long distance service in Florida. This conclusion is at odds with the FCC's *TRO* order, the *USTA I*³⁴ decision, and the *USTA II*³⁵ decision.

37. In the *TRO* order, the FCC made it clear that BellSouth's § 251 and § 271 obligations are *independent* of each other:

Independent Access Obligation. . . . [W]e continue to believe that the requirements of section 271(c)(2)(B) [the Competitive Checklist] establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

First, the plain language and the structure of section 271(c)(2)(b) establish that BOCs have an independent and ongoing access obligation under section 271. . . . Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so in checklist item 2. Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2, and thus violate one of the enduring tenets of statutory construction: to give effect if possible to every clause and word of a statute.³⁶

The FCC went on to find:

. . . [I]t is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs. In fact, section 271 places

³³ *Id.*

³⁴ *United States Telecom Assn v. FCC*, 290 F.3d 415 (DC Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) (*USTA I*) (Exhibit N).

³⁵ *United States Telecom Assn v. FCC*, 359 F.3d 554 (D.C.Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) (*USTA II*) (Exhibit O).

³⁶ *TRO* at ¶¶ 653-654, footnotes omitted. Exhibit J.

specific requirements on BOCs that were not listed in section 251. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission [FCC] and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market. . . . As explained above, recognizing an independent obligation on BOCs under section 271 would by no means be inconsistent with the structure of the statute.³⁷

These FCC findings have not been vacated or overruled by any court. And ironically, the language unequivocally finding the above § 271 obligations to be independent from § 251 obligations appears in the very *TRO* upon which the Commission attempts to rely to support its decision.

38. The Commission's reliance on the *TRO* at ¶ 665, which provides that conditions for § 271 approval may change, is entirely misplaced. The condition that has changed is that BellSouth, after *USTA I*³⁸, is no longer required to provide line sharing as a *UNE* at *TELRIC*³⁹ prices. However, because line sharing remains a § 271 Checklist Item 4 element, BellSouth is still obligated to provide line sharing at just and reasonable prices. The *USTA I* decision does not change BellSouth's § 271 obligations.

39. And in fact, the United States Court of Appeals for the D.C. Circuit affirmed this finding of the FCC in *USTA II*:

The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements *independent* of the unbundling requirements imposed by § § 251-52.⁴⁰

Thus, it is clear that the unbundling requirements of the FCC in the *TRO* and of the Court in *USTA I* do not change BellSouth's independent obligation to provide line sharing pursuant to §

³⁷ *Id.* at ¶ 655, emphasis in original.

³⁸ It is important to recognize that *USTA I* vacated and remanded the *Line Sharing Order* so that the FCC could consider other forms of competition. *USTA I* at 428-429. It had nothing to do with § 271 obligations.

³⁹ *TELRIC* is a cost-based pricing methodology which required costs for *UNEs* to be forward looking.

⁴⁰ *USTA II* at 588, emphasis added.

271. Line sharing remains a § 271 obligation pursuant to Checklist Item 4 and nothing in *USTA I* or the FCC's determinations under § 251 changes that obligation.

40. If the Commission were correct that line sharing is no longer required under § 271, the very same thing would be true for the switching agreements which BellSouth admits are § 271 agreements. Under the Commission's theory, these switching agreements would be unnecessary because the *USTA II* court and the FCC in the *TRRO* removed switching (like line sharing) as a § 251 UNE. Line sharing, like switching and loops and transport, while no longer § 251 UNEs remain independent § 271 obligations.

41. The Commission's view that line sharing has been removed from § 271 because the *TRO* did not reinstate the FCC's *Line Sharing Order*⁴¹ is belied by the fact that the FCC has continued to require the provision of line sharing as a Checklist Item 4 element pursuant to § 271 even *after* the issuance of the *TRO*. See, *FCC Michigan 271 order*.⁴²

42. Finally, the Commission has the authority to require the requisite § 271 obligations to be contained in § 252 agreements. In *Coserv LLC v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003), the 5th Circuit found that if parties voluntarily negotiate, fail to come to agreement, and then raise the issue in an arbitration, the state commission should decide the issue. This is exactly what has occurred in this case; BellSouth and Covad attempted to negotiate the line sharing issue, could not reach agreement, and it was included in the issues presented to the state commission in the docket *initiated by BellSouth*. As the *Coserv* court held:

There is nothing in § 252(b)(1) limiting open issues only to those listed in § 251(b) and (c). By including an open-ended voluntary negotiations provision in §

⁴¹ Third Report and Order, CC Docket No. 98-147, Fourth Report and Order, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability* (1999), *vacated and remanded*, *United States Telecom Assn. v. FCC*, 290 F.3d 415 (DC Cir. 2002), *cert. denied*, 538 US 940 (2003).

⁴²In *the Matter of: Application by SBC Communications, Inc., Michigan Bell Telephone Company and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Michigan*, WC Docket No. 03-138, (Michigan 271 order) ¶133, released September 17, 2003. Exhibit P.

252(a)(1), Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework. In combining these voluntary negotiations with a compulsory arbitration provision in § 252(b)(1), Congress knew that these non-§ 251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the PUC.

We hold, therefore, that where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). *The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations.* It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations. This interpretation comports with the views of the other courts that have reviewed this provision in similar contexts. It also comports with the structure of the Act and our recognition of the flexibility accorded state PUCs by the Act.⁴³

To accept the premise that the Commission can rule only one way on an issue presented to it (that is, it can accept BellSouth's position, but not Covad's) would lead to outcome determinative jurisdiction, a concept heretofore unknown in the law.

43. The Commission's decision is contrary to the clear FCC decisions discussed above and cannot support the elimination of line sharing. The decision is in direct conflict with numerous FCC Orders and statements identified herein. The Commission's actions violate the requirements of 47 USC § 271(c)(2)(B).

44. WHEREFORE, Plaintiff has been aggrieved and prays for relief as set forth herein.

⁴³ *Coserv* at 486-487, footnotes omitted, second emphasis provided.

CLAIM FOR RELIEF

45. Plaintiff incorporates the foregoing paragraphs of this Amended Complaint as if set forth completely herein.

46. For the reasons set forth above, Defendant Commission's decision declaring that BellSouth need no longer provision line sharing is contrary to and violates the Telecommunications Act of 1996 and the FCC orders interpreting that Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Covad requests that the Court enter an order:

1. Declaring that the portion of the Commission's decision finding that BellSouth does not have a § 271 obligation to provide line sharing is unlawful and in violation of federal law;
2. Enjoining the Commission, and all parties to the proceeding at the Commission, from seeking to enforce that unlawful decision against Covad; and
3. Granting such further relief as the Court finds just and reasonable.

Dated: April 10, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the Amended Complaint will be furnished by the Court via the CM/ECF system on this 10th day of April, 2006, to:

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