State of Florida

Public Service Commission

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

DATE: September 22, 2005

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

FROM: Office of the General Counsel (Teitzman, Scott)
Division of Competitive Markets & Enforcement (Barrett)

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: 10/04/05 – Regular Agenda – Motion for Summary Final Order/Declaratory Statement – Parties May Participate

COMMISSIONERS ASSIGNED: Bradley, Edgar

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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

Case Background

On August 21, 2003, the Federal Communications Commission (FCC) released its *Triennial Review Order*[1] *(TRO)*, which contained revised unbundling rules and responded to the D.C. Circuit Court of Appeals' remand decision in *USTA I*.[2]

[1] In the Matter of 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, rel. August 21, 2003 (*Triennial Review Order or TRO*).

On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in *United States Telecom Ass'n v. FCC*[3] *(USTA II)*, which vacated and remanded certain provisions of the *TRO*. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and further found that the national findings of impairment for mass market switching and high-capacity transport were improper.

The FCC released an *Order and Notice*[4] *(Interim Order)* on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after publication of the *Interim Order* in the Federal Register. On February 4, 2005, the FCC released an *Order on Remand (TRRO)*, wherein the FCC's final unbundling rules were adopted with an effective date of March 11, 2005.

In response to the decisions handed down in *USTA II* and the FCC's *Interim Order*, BellSouth Telecommunications, Inc. (BellSouth) filed, on November 1, 2004, its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth asked that we determine what changes are required in existing approved interconnection agreements between BellSouth and competitive local exchange carriers (CLECs) in Florida as a result of *USTA II* and the *Interim Order*.

On July 15, 2005, BellSouth filed its Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling. BellSouth requests the Commission resolve, without hearing, a number of the issues raised by the parties in this proceeding and to declare the current state of the law with respect to other issues raised by parties to the proceeding. On July 22, 2005, Competitive Carriers of the South (CompSouth), Sprint Communications Company Limited Partnership (Sprint) and Florida Digital Network, Inc., d/b/a FDN Communications (FDN) each filed their Response to BellSouth's Motion. Additionally, CompSouth filed its Cross-Motion for Summary Final Order or Declaratory Ruling. On July 29, 2005, BellSouth filed its Response in Opposition to CompSouth's Cross-Motion.

Staff's recommendation addresses BellSouth's Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling and CompSouth's Cross-Motion for Summary Final Order or Declaratory Ruling. Essentially, the parties dispute involves a disagreement as to what is the most efficient and appropriate manner in which this docket should proceed. In its Motion, BellSouth argues that a majority of the issues in this proceeding involve legal questions the Commission should decide up front before a hearing takes place. CompSouth disagrees, and argues in its Response that although the issues involve legal questions, there are policy and fact components to each issue that would assist the Commission in reaching its ultimate decision.

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[2] United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (USTA I).

[3] 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*), cert. denied, 160 L. Ed. 2d 223, 2004 U.S. LEXIS 671042 (October 12, 2004).

[4] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, rel. August 20, 2004 *(Interim Order)*.

The Commission has jurisdiction over this matter pursuant to Sections 364.01 and 364.162, Florida Statutes, and under §252 of the Act.

Discussion of Issues

Issue 1: Should BellSouth's Motion for Summary Final Order or, in the alternative, Declaratory Ruling be granted?

Recommendation: No, the Motion for Summary Final Order or, in the alternative, Declaratory Ruling filed by BellSouth should be denied. **(TEITZMAN, SCOTT)**

Position of the Parties

BellSouth's Motion: In its Motion, BellSouth argues that by resolving certain issues that are matters of law and by declaring the law where the parties have disputed interpretations, the Commission will make the most efficient use of its own resources and the limited resources of the parties. BellSouth asserts that it is not requesting that the Commission adopt specific contractual language. BellSouth contends, to the contrary, that it is requesting the Commission address the legal questions underlying the issue and either resolve the issue completely, or provide a clear statement of the applicable law, after which the parties can implement the Commission's decision.

BellSouth argues further that even if the parties are unable to reach mutually agreed-upon language for a particular issue after the Commission addresses the legal questions, a preliminary ruling is vital to efficient proceedings. BellSouth argues that this is because the hearing can then focus on the precise area of disagreement, which should revolve around the language needed to implement the law, rather than a dispute about what the law requires. BellSouth asserts that if its Motion is granted, witnesses can explain the basis for their proposed contractual language based on what the law is, rather than based on their opinion of what the law should be, and the Commission will not be subjected to resolving different contractual language based on competing legal theories.

BellSouth contends that CompSouth's assertions that the parties are "well aware of the law" is a fallacy because if such were true, presumably, the fundamental legal disagreements between the parties would not exist. BellSouth asserts that the parties have diametrically opposed views of the state of the law. BellSouth argues that failure to resolve what it considers to be the legal issues would mean a longer hearing with lay witnesses opining on a number of legal issues and attempting to support contractual language based on that party's interpretation of the law, which may be completely wrong. BellSouth asserts further there is no need to subject the Commission to protracted hearings on disputed topics that can and should be addressed now as a matter of law.

BellSouth argues that many of the differences between BellSouth and the CLECs result from divergent positions concerning the subjects that must be included within interconnection agreements. BellSouth asserts further that these differences affect many of the issues presented in this proceeding and are purely questions of law. BellSouth asserts that in contrast to the aforementioned disputes, there are other issues where the parties agree that they need to arrive at language to include in their interconnection agreement, but they have differing views of what the law requires and, therefore, have completely different views of what the language should be. BellSouth asserts this second type of dispute requires the Commission to make a determination

of what the applicable law requires and then a determination of what language should be drafted to implement the law.

BellSouth contends there are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law. BellSouth argues it satisfies both requirements and is entitled to a judgment in its favor.

The specific issues and corresponding arguments BellSouth requests the Commission address in its Motion are set forth in the table attached to this recommendation as Attachment A, and are divided into: (1) issues that should be resolved, in their entirety, as a matter of law;[5] and (2) partial summary judgment issues, or alternatively, issues that the Commission can address by issuing a declaration setting forth the applicable law, so that the parties may efficiently present the factual disputes such issues present.[6]

CompSouth's Response: In its Response, CompSouth argues that the interconnection agreement language is ultimately at issue in this proceeding. CompSouth contends that the resolution of specific disputes between the parties on that contract language that will drive this proceeding much more than broad policy decisions. CompSouth argues further that BellSouth seeks to have the Commission rule on complex legal and policy issues raised by the TRO/TRRO in a vacuum, without consideration of the actual contractual disputes that give those issues substance in the real world.

CompSouth asserts that the "clear statement of the law" BellSouth claims it seeks by filing its Motion will not necessarily resolve the particular contract language disputes that are keeping the parties from resolving TRO/TRRO issues on a negotiated basis. CompSouth argues further that if the Commission were to grant BellSouth's Motion, the Commission would likely have to resolve interlocutory appeals of such a decision and would still be required to resolve disputes over the specific contract language implementing the Commission's decision on the overarching legal or policy issue. CompSouth asserts that consequently, BellSouth's Motion is an invitation to the Commission to do its work twice.

In its Response, CompSouth contends that the Commission's decisions will be best informed if the Commission and staff have the opportunity to review the testimony of witnesses, consider responses to cross-examination, and ask questions of witnesses and counsel at hearing. CompSouth asserts further that meaningful decisions on exactly what contract language should be accepted must await development of such contract language through negotiations.

CompSouth argues that the issues before the Commission in this proceeding will, as is inevitable in the telecommunications world, involve mixed questions of policy, law, and fact. CompSouth asserts that at a minimum the Commission will face the prospect of addressing most issues at a "high level" in the context of the BellSouth Motion, then again reviewing the issue on

[5] Issue Nos. 5 (HDSL Capable Copper Loops), 6 (High Capacity Loops and Transport), 7(a) (Section 271), 7(b) (section 271), 16 (Line Sharing), 19 Sub-Loop Concentration), 20 (Packet Switching), 22 (Greenfield Areas), 23 (Hybrid Loops), 24 (End User Premises), 29 (Entire Agreement Rule), and 31 (Binding Nature of Commission Orders).
[6] Issue Nos. 1 (*TRRO* Transition Plan), 10 (UNEs That Are Not Converted), 13 (Commingling), 18 (Line Splitting), 21 (Call Related Databases), 25 (Routine Network Modification), 27(Fiber to the Home), and 28 (EEL Audits).

a more detailed level in the contract language implementation phase of the proceeding if BellSouth's Motion is granted.

CompSouth suggests that the most efficient way to proceed is for the Commission to refrain from ruling on BellSouth's Motion until after a full legal and factual record has been developed. CompSouth asserts that this approach will result in a final resolution of all disputed issues that is both fully informed, and is associated with actual working contract language the parties can implement in their interconnection agreements.

Sprint's Response: In its Response, Sprint requests the Commission deny BellSouth's Motion with respect to Issues No. 1, 5, 10, and 19(a). Sprint's arguments addressing each issue are set forth in Attachment A of this recommendation.

FDN's Response: In its Response, FDN asserts that it generally supports the response of CompSouth. FDN contends that BellSouth's Motion would actually require the Commission to do its work twice or, minimally, not as efficiently as desired. FDN asserts that the issue list in this docket may evolve as discovery and negotiations proceed and that the Commission may be able to resolve some narrow legal issues up front. FDN argues further that most issues BellSouth has characterized in its Moition as legal questions are really disputes over implementation language in interconnection agreements and as such, are inappropriate for summary final judgment.

Staff Analysis:

Rule 28-106.204(4), Florida Administrative Code, provides:

> Any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the light most favorable toward the party against whom the summary judgment is to be entered. When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing. If the opponent does not do so, summary judgment is proper and should be affirmed. The question for determination on a motion for summary judgment is the existence or nonexistence of an issue of material fact. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts. See Trawick's Florida Practice and Procedure, §25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (1999).

The question is whether the record shows an absence of disputed material facts under the substantive law applicable to the action. To decide the question, the applicable substantive law must be determined and then compared with the facts in the record. If the comparison shows a genuinely disputed material factual issue, summary judgment must be denied and the court cannot decide the issue. Even though the facts are not disputed, a summary judgment is improper if differing conclusions or inferences can be drawn from the facts. Id.

In summary, under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) (citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000).

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
>
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, Florida Administrative Code, sets forth the general purpose and use of a declaratory statement as follows:

> A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

Staff believes it is quite clear from the testimony previously filed in this docket, as well as the arguments set forth in Attachment A, that the parties have divergent views as to the appropriate legal, factual, and policy considerations the Commission should examine in reaching the ultimate resolution of the issues to be addressed in this proceeding. Since the Motion must be viewed in the light most favorable to the party against whom the Motion is directed, staff

believes BellSouth's Motion for Summary Final Order should be denied in this case. In addition, the alternative request for Declaratory Statement should be rejected because the issues address matters pertaining to the conduct of a number of parties, as well as general policy statements, all of which are incompatible with a Declaratory Statement.

Furthermore, staff believes that any possible gains in efficiency that may be realized by addressing the issues at this time would be greatly offset by the significant likelihood of a party filing a Motion for Reconsideration or an Interlocutory Appeal. Such filings would require additional Commission resources and time for consideration by the Commission. Additionally, they may result in postponement of the hearing[7] and consequently the ultimate resolution of this matter. A delay in the hearing is problematic because the FCC's TRRO will become effective March 11, 2006. With efficiency in mind, it is also important to note that by the time the Commission addresses this recommendation, the parties will have filed both direct and rebuttal testimonies.

Consequently, staff believes it is not appropriate at this time to make a determination on the legal or factual issues to be addressed at the evidentiary hearing. Rather, staff recommends that the Commission find that the high standard for granting a summary final order has not been met, nor is it appropriate to issue a declaratory statement at this time.

Issue 2: Should CompSouth's Cross-Motion for Summary Final Order or, in the alternative, Declaratory Ruling be granted?

Recommendation: No, the Cross-Motion for Summary Final Order filed by CompSouth should be denied. Staff also recommends that Issues 6, 13, and 20 be removed from further consideration in this proceeding as there is no live dispute that requires a resolution on these issues. **(TEITZMAN, SCOTT)**

Position of the Parties

CompSouth's Motion: In its Cross-Motion, CompSouth asserts that it does not agree with the categorization of issues BellSouth has set forth in its Motion. CompSouth argues that BellSouth's version of the governing law and rules, as described in BellSouth's Motion, is misleading. CompSouth contends it possesses a much different view of the policy, law, and facts inherent in the parties' efforts to implement new rules in interconnection agreements.

[7] The hearing in this proceeding is currently set for November 2-4, 2005.

CompSouth requests that if, and only if, the Commission finds that disposition of any issues prior to hearing is the appropriate course, that the Commission grant its Cross-Motion for Summary Final Order or Declaratory Ruling. The specific issues and corresponding arguments CompSouth requests the Commission address in its Cross-Motion are set forth in the chart attached to this recommendation. CompSouth notes that it has not requested the Commission address Issue Nos. 6, 13, and 20. CompSouth asserts that there is no "live" dispute between the parties that requires resolution by the Commission and agrees to the removal of these issues from further consideration in this proceeding.

BellSouth's Response: In its Response, BellSouth argues that the Commission should summarily deny CompSouth's Cross-Motion because CompSouth maintains the Commission should not resolve any issues until after the hearing. BellSouth asserts that CompSouth's filing of a Cross-Motion for Summary Judgment while at the same time claiming no issues should be resolved now is prohibitively inconsistent. BellSouth argues further that CompSouth has only really moved for two issues to be decided in summary fashion (Issue Nos. 16 and 21).

BellSouth asserts that the majority of the issues raised in CompSouth's Cross-Motion[8] were fully addressed in BellSouth's Motion[9] and, therefore, has chosen not to repeat its dispositive arguments in its Response. BellSouth contends that the two exceptions are Issue Nos. 7 and 16 given the philosophical and legal importance of these two issues. BellSouth's arguments on these issues are set forth in Attachment A.

BellSouth did not contest CompSouth's contention that there is no "live" dispute invloving Issue Nos. 6, 13, and 20.

Staff Analysis

CompSouth makes it quite clear in its Cross-Motion that the purpose of the filing was to rebut the arguments set forth in BellSouth's Motion and to provide the Commission with an alternative, if the Commission were inclined to resolve the issues listed in Attachment A prior to hearing. Consequently, if the Commission approves staff's recommendation in Issue 1, staff recommends the Commission should deny CompSouth's Cross-Motion. As set forth in Issue 1, staff believes the disputed issues raise mixed questions of fact, law, and policy, and therefore, the high standard for granting a summary final order has not been met nor is it appropriate to issue a declaratory statement at this time.

Staff also recommends that Issues 6, 13, and 20 be removed from further consideration in this proceeding as there is no live dispute between the parties that requires resolution on these issues.

[8] See Attachment A.
[9] See Attachment A.

Issue 3: Should this docket be closed?

Recommendation: No, this docket should remain open for an evidentiary hearing on this matter. **(TEITZMAN, SCOTT)**

Staff Analysis: This docket should remain open for an evidentiary hearing on this matter.

ISSUE NO	BELLSOUTH POSITION	COMPSOUTH POSITION	SPRINT POSITION	FDN POSITION	STAFF ANALYSIS
ISSUES THAT BELLSOUTH REQUESTS BE RESOLVED, IN THEIR ENTIRETY, AS A MATTER OF LAW.					
5. HDSL Capable-Copper Loops	Because the FCC has declared that DS1 loop and a T1 are equivalent in speed and capacity, and because the FCC declared that HDSL loops are used to deliver T1 services, HDSL loops must be counted, for the purpose of determining business lines in an office, on a 64kbps equivalent basis, or as 24 business lines.	The Commission should refrain from ruling on this issue until it can hear from witnesses who are qualified to describe the characteristics of HDSL-capable copper loops, DS1 lines, and how those terms relate to the technical definitions adopted by the FCC in the *TRRO*.	Sprint strongly objects to any suggestion that because the non-impairment threshold has been reached in a given wire center with regard to DS1 loops, HDSL-capable copper loops would also be unavailable to CLECs in that wire center.	FDN did not address this issue in its response.	This issue will require the Commission to undertake a technical, legal and policy analysis before reaching a decision and therefore, is not appropriate to be addressed in a Summary Final Order. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000).

ISSUE NO	BELLSOUTH POSITION	COMPSOUTH POSITION	SPRINT POSITION	FDN POSITION	STAFF ANALYSIS
6. High Capacity Loops and Transport – Changed Circumstances	The *TRRO* and the applicable federal rules expressly state that changed circumstances cannot reverse the classification of unimpaired wire centers.	CompSouth did not address this issue in its response.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	There is no live dispute that requires a resolution on these issues.
7(a). Section 271 and State Laws	Once the FCC has concluded that such elements need not be provided as UNEs, state commissions have no authority to require BOCs to provide unbundled access to those elements.	The statutory interplay between § 252 and § 271 of the Act dictates that BellSouth incorporate the items in the § 271 checklist.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision.

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7(b). Section 271 and State Laws	Even if state commissions had authority to require ILECs to include § 271 elements in a § 252 interconnection agreement, the state commissions, as a matter of law, have no authority to set rates for those elements.	Nothing in the *TRO* eliminates the state commission's role as arbiter of the rates that must be set using the "just and reasonable" rate standard that replaces TELRIC for § 271 checklist items.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision.
16. Line Sharing	The FCC's transition plan as stated in the *TRO*, constitutes the only obligation BellSouth has regarding line sharing	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 items 4, 5, 6, and 10, irrespective of whether they are "de-listed under § 251" including line sharing under checklist item 4.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision.

ISSUE NO	BELLSOUTH POSITION	COMPSOUTH POSITION	SPRINT POSITION	FDN POSITION	STAFF ANALYSIS
19. Sub- Loop Concentration	There is no need for any interconnection agreement to contain language with respect to sub-loop feeder or sub-loop concentration, and this Commission should so rule as a matter of law.	The FCC's *TRO* rules on subloops provide important avenues for facilities-based competition that should not be unduly limited until all the evidence is heard at hearing.	Sprint wishes to clarify that BellSouth's Motions do not address in any way subparts (b) and (c) of Issue 19. Should Bellsouth attempt to amend its original Motion to include 19(b) and (c), Sprint would ask that the Commission deny BellSouth's request.	FDN did not address this issue in its response.	This issue will require the Commission to undertake a technical, legal and policy analysis before reaching a decision and therefore, is not appropriate to be addressed in a Summary Final Order. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000).

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22. Greenfield Areas	There are no genuine issues of material fact for these fundamental principles and, pursuant to the *TRO*, FTTC Order on Reconsideration, MDU Order on Reconsideration, and FCC Rules, BellSouth is entitled to judgment as a matter of law.	The Commission would be better served by permitting the parties to narrow disputes through negotiation, addressing only the disputes on this issue that remain for arbitration, and relying on witnesses' testimony rather than lawyers' pleadings to explain the technical aspects of the FCC's broadband rulings.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	This issue will require the Commission to undertake a technical, legal and policy analysis before reaching a decision and therefore, is not appropriate to be addressed in a Summary Final Order. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000).

ISSUE NO	BELLSOUTH POSITION	COMPSOUTH POSITION	SPRINT POSITION	FDN POSITION	STAFF ANALYSIS
23. Hybrid Loops	The Commission should rule that BellSouth is not obligated to unbundle the next generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the market.	The Commission would be better served by permitting the parties to narrow disputes through negotiation, addressing only the disputes on this issue that remain for arbitration, and relying on witnesses' testimony rather than lawyers' pleadings to explain the technical aspects of the FCC's broadband rulings.	Sprint did not address this issue in its response.	If the Commission was to find that 47 CFR 51.319(a)(2) governed the unbundling for hybrid loops, this finding would make little net progress on the question of what interconnection agreement language is required to implement the FCC rule.	This issue will require the Commission to undertake a technical, legal and policy analysis before reaching a decision and therefore, is not appropriate to be addressed in a Summary Final Order. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000)

ISSUE NO	BELLSOUTH POSITION	COMPSOUTH POSITION	SPRINT POSITION	FDN POSITION	STAFF ANALYSIS
24. End User Premises	This Commission should rule on this legal issue and make clear that a mobile switching center or cell site cannot constitute an "end user customer premises."	Despite BellSouth's contention that this issue is strictly a legal issue upon which the FCC has already ruled, there is more to this issue than BellSouth would have the Commission believe. For example, BellSouth's categorical exclusion of the availability of loops to cell sites would deny CLECs the right to use UNE loops to serve personnel who work at those sites.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	This issue will require the Commission to undertake a technical, legal and policy analysis before reaching a decision and therefore, is not appropriate to be addressed in a Summary Final Order. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000).

ISSUE NO	BELLSOUTH POSITION	COMPSOUTH POSITION	SPRINT POSITION	FDN POSITION	STAFF ANALYSIS
29 Entire Agreement Rule	The modified rule, codified in the federal rules at 47 C.F.R. §51.089, requires a requesting carrier seeking to avail itself of terms in an interconnection agreement to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement.	BellSouth's proposed contract language seeks to extend the "all-or-nothing" rule beyond its intended scope to preclude a carrier from requesting services not contained in its interconnection agreement which are offered generally to the public by BellSouth in statements of Generally Available Terms or standard interconnection offerings. This issues is one directly tied to the competing contract language offered by the parties and does not lend itself to resolution in the legal vacuum of a Motion for Summary Final Order.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision.

ISSUE NO	BELLSOUTH POSITION	COMPSOUTH POSITION	SPRINT POSITION	FDN POSITION	STAFF ANALYSIS
PARTIAL SUMMARY JUDGMENT ISSUES, OR ALTERNATIVELY, ISSUES THAT BELLSOUTH REQUESTS THE COMMISSION ADDRESS BY ISSUING A DECLARATION SETTING FORTH THE APPLICABLE LAW, SO THAT THE PARTIES MAY EFFICIENTLY PRESENT THE FACTUAL DISPUTES SUCH ISSUES PRESENT.					
1. *TRRO* Transition Plan	BellSouth asks the Commission to enter an order that finds that the transition periods for former UNEs will end at a date certain. Answering the legal question is straightforward because the FCC detailed transition plan for switching, high capacity loops, and dedicated transport in the *TRRO* and its rules.	Issues concerning appropriate transition intervals and appropriate transition pricing are the kinds of factual matters that require development in the context of a hearing.	Sprint objects to BellSouth's proposed abbreviated time period for CLECs to transition affected UNEs to alternate services in those wire centers where BellSouth subsequently demonstrates, wire center by wire center, that the non-impairment threshold has been reached. Sprint believes the parties should apply the transitional language included in the *TRRO* for the embedded base of affected UNEs.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision. Furthermore, asks Commission to decide issue that has implications beyond the specific facts and circumstances of the petitioner; thus, it is not appropriate for a declaratory ruling.

ISSUE NO	BELLSOUTH POSITION	COMPSOUTH POSITION	SPRINT POSITION	FDN POSITION	STAFF ANALYSIS
10. UNEs that are not Converted.	The Commission should confirm that CLECs are not entitled to rates lower than the transition rates contained in the federal rules.	If the Commission determines based on record evidence, that there is a need for language addressing specific action or inaction as the March 2006 *TRRO* Transition Plan date approaches, the Commission can implement such contract language. There is no basis, however, for a ruling on this dispute absent a factual basis for implementing such contract language.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision. Furthermore, asks Commission to decide issue that has implications beyond the specific facts and circumstances of the petitioner; thus, it is not appropriate for a declaratory ruling

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13. Commingling	The FCC has narrowly interpreted "wholesale services" as limited to tariffed services, and it does not expect or require BellSouth to combine § 271 network elements with § 251 network elements. Additionally, the Commission should find as a matter of law that DSL over UNE-P is not an acceptable form of Commingling. Even if CLECs claim there is a factual dispute as to whether BellSouth offers § 271 services as wholesale services, such a claim presupposes that the Commission can then regulate or enforce § 271 services, which it clearly cannot.	This is an issue that has far-reaching ramifications that should be addressed based on a full record at hearing. The plain language of the *TRO* applies the commingling rules to wholesale services obtained pursuant to any method other than unbundling under § 251, and the language that would have exempted § 271 offerings from commingling obligations was removed from the *TRO* by the Errata.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision. Furthermore, asks Commission to decide issue that has implications beyond the specific facts and circumstances of the petitioner; thus, it is not appropriate for a declaratory ruling

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18. Line Splitting	The Commission should find as a matter of law that BellSouth's line splitting obligations are limited to when a CLEC purchases a stand-alone loop and provides its own splitter and that BellSouth has no obligation to provide line splitting under any other service arrangement.	This issue is best addressed in the context of the competing language of the parties, not in a "partial" Motion for Summary Judgment. BellSouth's legal obligations include the provision of line splitting to the UNE-P "embedded base"; compatible splitter functionality; and an obligation to make OSS modifications to facilitate line splitting.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision. Furthermore, asks Commission to decide issue that has implications beyond the specific facts and circumstances of the petitioner; thus, it is not appropriate for a declaratory ruling

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21. Call-Related Databases	The Commission should find that as a matter of law, BellSouth's obligation to provide call-related databases on an unbundled basis is limited to the situations where CLECs have access to unbundled switching pursuant to the FCC's transition plan.	Both unbundled switching and call-related databases must continue to be provided to CLECs at just and reasonable rates, terms, and conditions as part of BellSouth's compliance with the § 271 competitive checklist. If the Commission is inclined to rule, it should affirm CLECs' rights to obtain access to call-related databases pursuant to § 271 of the Act.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision. Furthermore, asks Commission to decide issue that has implications beyond the specific facts and circumstances of the petitioner; thus, it is not appropriate for a declaratory ruling

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25. Routine Network Modification	The Commission should find that interconnection agreements should not include any language around unbundling of Fiber to the Home/ Fiber to the Curb loops in new or Greenfield situations.	BellSouth's erroneous attempt to conflate its separate routine network modification obligations with its line conditioning obligations must be rejected. There are separate rules, and while in certain respects, the obligations may be overlapping, in others they are not.	Sprint did not address this issue in its response.	FDN did not address this issue in its response.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision. Furthermore, asks Commission to decide issue that has implications beyond the specific facts and circumstances of the petitioner; thus, it is not appropriate for a declaratory ruling

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28. Enhanced Extended Link (EELS) audits	The Commission should find as a matter of law that BellSouth has the right to conduct an annual audit of each CLEC it chooses to determine whether the CLEC has complied with the EELs eligibility requirements.	This dispute should be narrowed by negotiation, and discussed in testimony by subject matter experts who are familiar with auditing processes and the impact they have on companies' operations. The issue does not at all present a pure legal issue appropriate for resolution by summary judgment.	Sprint did not address this issue in its response.	The appropriate exercise of BellSouth's audit rights is not proper for summary adjudication.	Although primarily a legal issue, staff believes the Commission will benefit from taking testimony on the policy implications before reaching a decision. Furthermore, asks Commission to decide issue that has implications beyond the specific facts and circumstances of the petitioner; thus, it is not appropriate for a declaratory ruling